

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



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ERRATA

Title: Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, Volume 6 GPO Stock Number (029-000-00278-9)

This Supplement to Volume 6 contains Administrative Law Judge's Recommended Decisions and Orders and/or decisions of the Federal Labor Relations Council which were inadvertently omitted from Volume 6. The following is a numerical table of the A/SLMR cases involved and the page number where the Administrative Law Judge's Recommended Decisions and Orders and/or decisions of the Federal Labor Relations Council are located in this Supplement.

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REPORT AND RECOMMENDATIONS

Statement of the Case

In the Matter of

Naval Air Rework Facility
Pensacola, Florida (Activity)

and

Secretary of the Navy
Department of the Navy,
Washington, D.C. (Agency)

Respondents

and

American Federation of Government
Employees,
AFL-CIO, Local 1960

Complainant

CASE NO.
42-2529 (CA)

APPEARANCES:

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BEFORE: RHEA M. BURROW
Administrative Law Judge

This case arises under Executive Order 11491, as amended. The complaint filed May 30, 1974 on behalf of American Federation of Government Employees, AFL-CIO, Local No. 1960 (hereafter called the Complainant), against the Commanding Officer, Naval Air Rework Facility, Pensacola, Florida and the Secretary of the Navy, U.S. Department of the Navy, Washington, D.C., (hereinafter called the Respondents), alleged violations of Subsections 19(a)(1) and (6) of the Order. 1/ The violations were alleged to consist of the Respondent Agency's Office of Civilian Manpower Management (hereinafter called OCMM and/or the Agency) directing D.J. Woodard, Commanding Officer of Naval Air Rework Facility, Pensacola, Florida, (hereinafter referred to as the Activity and/or NARF), on October 26, 1973, to discontinue as soon as possible the environmental differential pay (herein called EDP) for the Activity's aircraft surface treatment workers and employees working with oxygen systems and components and poisons and/or toxic chemicals. By ordering NARF to unilaterally terminate environmental differential pay, OCMM acting for and on behalf of the Secretary of the Navy interfered with, restrained and coerced employees in the exercise of their right to union representation in violation of Section 19(a)(1) of the Order and such action had the further effect of evidencing to unit employees the ability of the Department of the Navy to act unilaterally with respect to negotiated terms and conditions of employment without regard to the employees' exclusive representative. It was further alleged that the November 21 announcement and later effectuation of the decision to terminate EDP by NARF unilaterally changed the terms and conditions of employment specifically covered by the contract

1/ Prior to the hearing the Assistant Secretary for Labor Management Relations sustained the Assistant Regional Director's dismissal of the 19(a)(6) alleged violation against the Respondent Agency, the Secretary of the Navy. In this proceeding the issues are confined to the alleged 19(a)(1) violation against the Secretary of the Navy and the alleged 19(a)(1) and (6) violations against NARF.

between the parties, past practice and two arbitration awards made in October 1972 and rendered the union's right to negotiate meaningless and in violation of Section 19(a) (6) of the Order since it was tantamount to a refusal to negotiate as required; NARF's course of conduct in the matter had the effect of evidencing to unit employees its ability to act unilaterally with respect to negotiated terms and conditions of employment without regard to the employees' exclusive representative and, such unilateral termination of EDP interfered with, restrained or coerced employees in the exercise of their rights to union representation in violation of Section 19(a) (1) of the Order.

A hearing was held in the above-entitled matter on January 22 and 23, 1975, at Pensacola, Florida. The parties through counsel were afforded the opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and to present oral arguments and file briefs in support of their positions. At the conclusion of the hearing the time for filing briefs was extended to March 15, 1975. Both parties filed timely briefs.

Upon the entire record herein, including stipulations between the parties made at the hearing, my observation of the witnesses and their demeanor, the relevant evidence adduced at the hearing, and the briefs filed herein, I make the following findings, conclusions and recommendation.

I

The material facts in this proceeding are not in essential dispute and are found to be as follows:

The Respondent Activity is one of six subordinate field activities of the Naval Air Systems Command, which in turn is an organizational component of the Respondent Agency. Basically, the Respondent Activity is responsible for the rework (maintenance) and repair of aircraft, their engines, electrical equipment, and other flight components, as part of its assigned mission to support fleet readiness. The Respondent Activity's workforce consists of approximately 3,600 civilian employees, in various job and trade positions. The Complainant represents an exclusive unit of all non-supervisory graded and ungraded employees of the Respondent Activity, with certain exceptions not relevant here.

The record reflects that since the Order has been in effect, the Respondent Activity and the Complainant have been parties to two collective bargaining agreements, which provided in pertinent part, as follows:

"It is agreed and understood by the Employer and the Union that in the administration of all matters covered by this Agreement, the Employer and the Union are governed by existing or future laws or regulations of the Federal Government, including but not restricted to those rules and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published Department of Defense and Department of the Navy and the Naval Air Systems Command policies and regulations in existence at the time this Agreement is approved and by subsequently published Defense and Navy and Naval Air Systems Command policies regulations required by law or by regulations of appropriate authorities."

The earlier agreement was not as explicit as the second but both contained provisions authorizing additional pay for employees who are engaged in hazardous or "dirty" work at the rework facility. Such payments are authorized by statute (5 U.S.C. §5343(c) 1970), and implementing regulations of the Civil Service Commission, establishing wage schedules, rates in administering the prevailing rate system and for proper differentials, as determined by the Commission for a duty involving unusually severe working conditions or unusually severe hazards. These are found in Federal Personnel Manual Supplement 532-1. The relevant directives appear in Subchapter 8-7 of that supplement and Appendix J to it, which is a schedule of specific differential rates and categories where pay is authorized for employees working under adverse conditions. These regulations provide, however, that the situations listed in Appendix J are illustrative only, and that:

"Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is

considered to warrant referral to the Commission for prior approval...."

A. The Two Arbitration Awards

Under a collective bargaining agreement that became effective in September 1970 between the Complainant and the Department of the Navy - Naval Air Rework Facility (NARF) there were two grievances filed in 1972 by Complainant in connection with certain employees being entitled to Environmental Differential Pay. The collective bargaining agreement provided, in pertinent part that:

"...Lacking proper mechanical equipment or protective devices, the following are typical examples of work situations for which additional pay may be justified and authorized:

"...b. Any employee repairing or servicing facilities under Electroplating and process tanks and cleaning process equipment located in Building 709, 604, 755, 71, 62 and 649.

"...e. Any employee, except Aircraft Surface Treatment Workers, performing duties of an Aircraft Surface Treatment Worker."

The parties were unable to resolve their grievances and they were referred for arbitration. In the arbitration action by the Complainant on behalf of A.C. Perira against Respondent NARF which was heard by Arbitrator, Edmund W. Schedler, in August 1972, the Arbitrator in a decision on October 4, 1972 recommended:

"that the employees in the Oxygen Shop at the Naval Air Force Facility be considered working in close proximity to explosive and incendiary materials which involves potential injury to employees."

Likewise, Arbitrator, Herbert A. Lynch in a similar proceeding concerning the grievance of John Melton et al., and the Respondent Activity issued an opinion on October 25, 1972 to the effect that the grievant and others were working with or in close proximity to poisons (toxic chemicals) and were

entitled to environmental differential pay.

Pursuant to the decision by Arbitrator, Schedler concerning entitlement to Environmental Pay for Aircraft Oxygen Equipment Repairmen, under the provisions of FPM Supplement 532-1 Respondent NARF's then Commanding Officer notified the Complainant by letter dated November 2, 1972 that:

"This Facility accepts the opinion of the Arbitrator, reference (b), that Environmental Pay is applicable. The differential has been established at 4% while working with or in close proximity to explosives and incendiary materials which involves potential injury. This differential pay is effective 15 October 1972 and will be paid to all Aircraft Oxygen Equipment Repairmen while performing oxygen work under these conditions."

Respondent NARF likewise notified Complainant on November 2, 1972 the following with reference to Arbitrator Lynch's decision concerning the grievance for Environmental Pay for Aircraft Surface Treatment Workers under the provisions of FPM Supplement 532-1:

"This Facility accepts the opinion of the Arbitrator, reference (b) that Environmental Pay is applicable. The differential has been established at 4% while working with or in close proximity to poisons (toxic chemicals). This differential pay is effective 29 October 1972 and will be paid to all Aircraft Surface Treatment Workers while performing surface treatment work."

B. Events After the Two Arbitration Awards

FPM Supplement 532-1 and Appendix J are part of the Coordinated Federal Wage System (hereinafter CFWS) applicable to all executive department employees. The responsibility for administration of all regulations and procedures pertaining to CFWS, including the environmental pay plan, has been assigned by the Secretary of the Navy to OCMM. As an integral part of the Respondent Agency's secretariat, OCMM supervises all facets of the Navy's personnel programs and systems established

for civilian employees. It is functionally subdivided into several divisions and branches, two of which are the Compensation Branch of the Manpower Planning Division, and the Labor Relations Branch of the Labor and Employee Relations Division. The Labor Relations Branch is responsible, generally, for administering the Navy's labor relations program established under the Order. The Compensation Branch ensures that all regulations and procedures pertaining to the CFWS, including environmental pay, job classification programs, and pay systems, are administered uniformly throughout the Respondent Agency by the issuance of appropriate guidance and policy interpretations.

In a letter dated May 22, 1973 ^{2/} the Compensation Branch of the Department of Navy's Office of Civilian Manpower Management expressed concern to the U.S. Civil Service Commission about the different interpretations by various activities, unions and arbitrators regarding two areas of the Environmental Differential Pay Plan; it questioned the propriety of paying such awards and sought Civil Service confirmation of OCMM's view of Appendix J of the FPM ^{3/} Supplement 532-1, the category for Explosives and Incendiary Materials, that: "Since oxygen is neither an explosive or incendiary, we do not consider that it is covered by the category definitions; nor do we believe that the conditions associated with the overhaul and repair of oxygen components constitute hazards sufficiently unusual to warrant consideration of a new category for such work." The letter noted that the matter had been complicated by an arbitration award which recommended that employees in the Oxygen Shop at one of the Naval Air Rework Facilities "be considered working in close proximity to explosives and incendiary materials which involves potential injury to the employees." The second area of concern related to the category for Poisons (toxic chemicals) wherein many Department of the Navy employees accomplish work which necessitates exposure to a variety of chemical substances such as poisons, caustics, corrosive liquids, oxidizing materials, and flammable or non-flammable compressed gases. The Department's view was expressed that: "While some activities and employee organizations believe exposure to practically any of these substances warrants payment under the Poisons (toxic chemicals) category,

^{2/} Complainant's Exhibit No. 9.

^{3/} Federal Personnel Manual

we have maintained that environmental pay under that category is proper only when the hazards have not been practically eliminated by protective devices and/or safety measures."

In a letter dated August 20, 1973 ^{4/}, OCMM was advised by the Chief, Pay Policy Division, United States Civil Service Commission, Bureau of Policies and Standards, in reply to its letter of May 22, 1973 that:

"We agree with your position regarding the application of the categories covering explosives and incendiary material, and poisons (toxic chemicals), to the Navy situations described in your letter. Your interpretations of subchapter S8-7 of FPM Supplement 532-1, and of Appendix J of the Supplement, with respect to the propriety of differential payments by your department are, in our opinion, fully in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials."

C. OCMM's Letter To NARF To Terminate Environmental Differential Pay Awards

In a letter dated October 26, 1973, Subject, Termination of Environmental pay with reference to (a) Arbitration Award by Edmund W. Schedler, Jr., of 4 October 1972 (working with oxygen systems and components); and (b) Arbitration award by Herbert H. Lynch of 25 October 1972 (aircraft surface treatment operations); and (c) FPM Supplement 532-1, S8-7 and Appendix J; the proper interpretations for (a) and (b) were set forth ^{5/} and NARF was requested by OCMM to discontinue

^{4/} Complainant's Exhibit No. 11.

^{5/} Complainant's Exhibit No. 8, describes them as follows:

"a. The category for Explosives and Incendiary Material provides for payment of an environmental differential when working with, or in close proximity to, sensitive explosive [continued on next page]

payment of an environmental differential under the category for Explosives and Incendiary Material for working with oxygen systems and components; also, NARF was requested to discontinue payment of an environmental differential under the Poisons (toxic chemicals) category to employees performing surface treatment operations, unless payment is warranted by exposure to poisonous substances and the hazards have not been practically eliminated by protective devices and/or safety measures.

D. NARF's Action

Upon receipt of OCMM's October 26, 1973 letter, NARF's Commanding Officer notified the President of Complainant's Local No. 1960 by letter dated November 6, 1973 that it had

5/ - continued

and incendiary ordinance material, nitroglycerine, primary or initiating explosives, propellant charges, primers, high-energy output flare pellets, etc., when protective devices and/or safety measures have not practically eliminated the potential for serious injury or loss of life. Since oxygen is neither explosive nor incendiary, it is not covered by the category definition for Explosives and Incendiary Material; therefore, environmental pay for employees working with liquid and gaseous oxygen systems and components is not proper under that category. Further, the conditions associated with the overhaul and repair of oxygen systems and components do not constitute hazards sufficiently unusual to warrant establishment of a new category to cover such work.

"b. Provisions of the category for Poisons (toxic chemicals) apply only to those work operations involving exposure to poisonous substances when the hazards have not been practically eliminated by protective devices and/or safety measures. In that light, exposure to poisonous substances, such as phenol, warrants payment of the appropriate differential, provided the hazards have not been practically eliminated. Exposure to acids, caustics, corrosive liquids, and paint removers, which are not poisons, however, does not qualify an employee for environmental pay under that category. Examples of specific chemicals used in surface treatment operations which do not satisfy CSC criteria for the Poisons [continued on next page]

been requested to: (a) discontinue payment of an environmental differential under the category of Explosives and Incendiary Material for working with oxygen systems and components; and (b) to discontinue payment of an environmental differential under the Poisons (toxic chemicals) category to employees performing surface treatment operations, unless payment is warranted by exposure to poisonous substances and the hazards have not been practically eliminated by protective devices and/or safety measures. Copy of the October 26 letter that NARF had received from OCMM was enclosed. The grievants to the arbitration proceedings were also notified. The Complainant was requested to study the content of the letter and the impact that compliance would have on the employees in the unit. The Commanding Officer concluded by stating: "I am available to discuss this matter at a mutually agreeable time. However, in order to effect the action required by enclosure (1), any discussion deemed necessary should take place prior to 21 November 1973."

There was no written reply by the Complainant to the November 6, 1973 letter and on November 21, 1973, the Complainant was advised by letter that NARF would comply with OCMM's request and would terminate the environmental differential pay on December 8, 1973 that had previously been awarded and paid to Aircraft Surface Treatment Workers. 6/ It was stipulated at the hearing that the agency terminated payment on the two aforesaid arbitration awards on December 8, 1973.

II

Complainant's Position

At the outset of its presentation counsel for the Complainant stated "...the issue is one of whether management can change terms and conditions of employment on what

5/ - continued

(toxic chemicals) category include nitric acid, sodium hydroxide (caustic soda), sulfuric acid, chronic acid, hydrofluoric acid, and laquer or paint removing compounds."

6/ Within a few days after the November 6, 1973 letter, the President of Local No. 1960, and Captain Woodard had a conversation in which Captain Woodard stated in substance [continued on next page]

we believe to be a negotiable topic without prior negotiations with an exclusive bargaining representative. In the alternative, if for some reason the Court does not feel that the environmental pay was a truly negotiable topic, we would argue that nevertheless management may not change terms and conditions of employment even on nonnegotiable topics which affect employees' terms and conditions of employment without proper and full prior consultation, which we feel was not had in this case. We feel there was neither proper negotiations, which we think was required since this was a negotiable matter, or in fact there was not even proper consultation...."

III

Findings

In the proceeding before Arbitrator Schedler decided October 4, 1972, NARF contended that the employees in the Oxygen Shop were not entitled to environmental differential pay because there were not unusual hazards as interpreted from the Federal Personnel Manual 532-1 subchapter 8 and Appendix J.

In the proceeding before Arbitrator Lynch, decided October 25, 1972, grievant Melton on behalf of himself and others stated: "I hereby grieve the non-payment of environmental differential as provided by FPM Supplement 532-1, S8-7 and Appendix J, Part II-5. As an Aircraft Surface Treatment Worker, I am continually exposed to numerous types of toxic and corrosive materials used daily in my work of paint stripping and cleaning of aircraft related parts."

Appendix J of the FPM is a Schedule of Environmental Differentials Paid For Exposure to Various Degrees of hazards, physical hardships and working conditions of an unusual nature. The objective standard outlined in Instruction 5, FPM Supplement 532-1 dated May 20, 1971, for each agency is to eliminate or reduce to the lowest level possible all hazards, physical hardships and working conditions of an unusual nature. When agency action does not overcome the unusual nature of the hazard, physical hardship, or working condition, an environmental differential is warranted.

6/ - continued

that NARF was complying with the directive of OCMM and there was nothing that NARF could do other than had been stated in its letter.

The arbitration awards were referenced to Explosive and Incendiary Material - low degree hazard and Poisons (toxic chemicals) low degree hazard. Each of the standards 7/ are shown to have an effective date of November 1, 1970 and contain descriptive classification terms and examples illustrating specific examples of conditions considered of an unusual nature.

Under the FPM requirements 8/ each installation or activity must evaluate its situations against the guidelines in Appendix J to determine whether the local situation is covered by one or more of the defined categories. When the local situation is determined to be covered the authorized environmental differential is paid for the appropriate category. When the local situation is not covered by one of the defined categories but is considered to be unusual in nature so as to warrant payment of an environmental, a differential may not be paid but action is to be initiated to request the Commission to consider authorizing the payment of an environmental differential. It was also provided:

"Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above." 9/

In accordance with established agency procedure, the Respondent Agency contends among other things that the Labor Relations Branch routinely referred awards to the Compensation Branch for review since they concerned matters covered by CFWS and since the work situations did not satisfy the criteria for payment under the categories in Appendix J, the matter presented a question of the legality of payment of appropriated funds. (underscoring supplied).

7/ Now contained in FPM Supplement 532-1, Instruction 10, dated September 5, 1974.

8/ FPM Supplement 532-1; Instruction 5, dated May 20, 1971.

9/ 2 above is the same as preceding paragraph.

From the foregoing, I find that (1) the requirements for qualification for entitlement to environmental differential pay were the same from the time respondent NARF employees were awarded EDP pursuant to the arbitration awards as they were at the time such awards were terminated; that NARF and the Complainant had bargained in good faith concerning their differences regarding environmental differential pay and the matter was referred for arbitration; OCMM was not a party to the collective bargaining agreement; the awards were terminated by direction of OCMM to NARF following the Civil Service Commission review or response to a request by OCMM without any pertinent intervening circumstances or applicable regulatory changes.

2. The Complainant was the exclusive representative at the NARF installation at Pensacola, Florida at all times material to this proceeding. After Respondent NARF accepted the aforementioned Environmental differential arbitration awards in November 1972, I find that it neither initiated or participated in any action to cause such awards to be reduced or terminated prior to OCMM's letter of October 26, 1973, directing it to take action to terminate the Environmental Differential Pay which had previously been authorized. 10/

3. There was no timely exception or appeal from the aforementioned arbitration awards of Environmental differential Pay which were accepted by Respondent NARF in November 1972 and they were paid until terminated on December 8, 1973.

4. The October 26, 1973 letter by the Respondent Agency to the Activity was a directive made pursuant to an expression of policy felt to be in Federal Personnel Manual which the Agency had requested and received from the U. S. Civil Service Commission.

5. In carrying out the directive of terminating environmental pay the Respondent Activity fulfilled any obligation which it may have had to meet and confer with the Complainant regarding the procedures to be utilized in terminating the

10/ Although the subject of the letter was stated in terms of a request, the content of the letter as well as evidence at the hearing establish that it was in fact a directive and not a request.

environmental differential pay to the Aircraft Surface Treatment Workers concerned and the impact on the employees involved herein.

6. The Agency action directing termination of the arbitration awards was unilateral and not predicated on Civil Service Commission requirements of the August 20, 1973 letter of policy expression. Neither the Activity or the Union had an opportunity to question, confer, consult, or negotiate as to the basic issue of termination of the awards.

IV

Discussion and Conclusions

One of the issues for determination is whether the unilateral local implementation of OCMM's October 26, 1973 directive by the Respondent Activity terminating environmental differential pay to certain of its Aircraft Surface Treatment employees was in violation of section 19(a)(6) of the Order. Under this Section it is an unfair labor practice for Agency management to "refuse, to consult, confer, or negotiate with a labor organization as required by this Order."

Section 12(a) of the Order set forth certain standards governing the administration of negotiated agreements between agencies and labor organizations. Article II, Section 1 of the parties negotiated agreement is substantially the same as set forth in Section 12 of the Order which reads:

"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 level.

Article III, Section 2 of the negotiated agreement states that:

"The provisions of Section 12(a)(b) and (c) of Executive Order 11491 included elsewhere in this Agreement apply to all supplemental, implementing, subsidiary, or informal agreements between the Employer and the Union."

In Department of the Navy, Supervisor of Shipbuilding Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390, the Assistant Secretary noted that the Study Committee in its Report and Recommendations, (1969), made clear that only if a regulation met one of the standards set forth in Section 12(a) of the Order could it supersede or modify the terms of an existing agreement; that the Report and Recommendation and the Council's decision in IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9, indicate that the term "appropriate authorities" as used in the Order mean an authority outside the agency involved, and not a higher echelon within the same agency. He differentiated those cases involving higher level regulations controlling the scope of negotiations 11/ from the one under consideration involving regulations modifying the terms of an existing agreement. 12/

Counsel for Complainant ably argues in his brief that whether or not the respondents could have continued payment pursuant to the arbitration awards involved in this case, had these awards, in fact, violated the law is not in issue in this case--first, because the only proper issue in this case is management's unilateral action; secondly, because, there has never been an appropriate determination that the arbitration awards were, in fact, illegal. Only the Federal Labor Relations Council (FLRC), and not the Assistant Secretary, has the authority to review arbitration awards. 13/ Even, then, arbitration awards may only be appealed pursuant to Section 2411.31 of the Council's Rules and not in the context of an unfair labor practice proceeding. For the Assistant Secretary to rule on the legal propriety of the two arbitration awards involved in this proceeding

11/ United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71-15, and Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60, decisions of the Federal Labor Relations Council (Council) and the Air Force Defense Language Institute, Lackland Air Force Base, A/SLMR No. 322.

12/ A/SLMR No. 390, supra.

13/ Citing Section 4(c)(3) of the Order providing that The Council may consider subject to its regulations exceptions to arbitration awards.

would put the Assistant Secretary in the position of accepting appeals from arbitration awards. It is pointless to discuss management's responsibilities when faced with illegal arbitration awards because management never appealed the legality of those awards and certainly, the respondents' legal analysis is not determinative.

The May 22, 1973 Agency request of the Civil Service Commission was not an appeal from the two arbitration awards as contended but a request for clarifying information regarding agency wide policy of interpretation of Civil Service provisions relating to payment of environmental differentials contained in FPM Supplement 532-1 and Appendix J. Since the request applied to all agency installations it was not an appeal; there was no ruling by the Civil Service Commission as to the legality of the aforementioned arbitration awards nor is the Assistant Secretary placed in the position of accepting appeals from arbitration awards as contended.

What is important is the Agency's action on the Civil Service response relating to environmental differential pay 14/ contained in the aforementioned FPM Supplement and Appendix.

Thus, there is for consideration the issue as to the extent the arbitration decisions herein are binding on the Agency head regarding matters covered by the negotiated agreement that are subject to Section 12(a) of the Order. It was stated in Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator), FLRC No. 74A-1 that "in the private sector courts have consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. See e.g., United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960). This principle regarding the interpretation of negotiated provisions is likewise applicable in

14/ Respondent's Exhibit No. 2. Article XX, Sections 2 and 3 of the negotiated agreement approved December 18, 1972 provide:

"Environmental pay differentials are paid for exposure to various degrees of hazards, physical hardships, and working conditions of an unusual nature. Appendix J of FPM 532-1
[continued on next page]

the Federal sector under 2411.32 of the Council's rules of procedure. American Federation of Government Employees Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Case Report No. 44. This does not mean, of course, that an arbitrator's interpretation of an agreement provision need not be consistent with applicable law, appropriate regulations, or the Order. For where it appears based upon the facts and circumstances described in a petition that there is support for a contention that an arbitrator has interpreted an agreement provision in a manner which results in the award violating applicable law, appropriate regulation, or the Order, the Council, under its rules, will grant review of the award. Here, as previously discussed, it does not appear that the arbitrator's interpretation of Article 55 has resulted in an award which violates the Order." The Council in its decisions has consistently emphasized that rights reserved to management officials under 12(b) of the Order are mandatory

14/ - continued

describes all of the current environmental pay situations authorized by the Civil Service Commission. The Union will recognize Enclosure (1) to NARF INST 12531.1 and any additions or deletions thereto as the specific work situations for which environmental pay differentials are authorized for employees of the ungraded unit.

"Hazards differential pay for graded employees shall be paid only for a duty included in the Civil Service Commission schedule of irregular or intermittent hazardous duty or duties involving physical hardships as authorized in Appendix A of FPM 550, subchapter 9. However, a differential may not be paid to an employee for a duty listed in Appendix A when the duty has been taken into account in the classification of the employee's position."

and cannot be bargained away. 15/

It is well settled that an agency's action in unilaterally instituting a change in a negotiable condition or employment without prior consultation with the bargaining representative is violative of Section 19(a)(1) and (6) of the Order. 16/ Similarly, it is also well settled that an agency is under no obligation to consult and confer prior to instituting a change in a non-negotiable condition of employment which, among other things, owes its existence to "higher level published policies and regulations that are applicable uniformly to more than one Activity...."17/

NARF and three other Naval Air Rework Facilities (Jacksonville, Norfolk and Cherry Point), fall under the command system of Naval Air System Command Representative Atlantic (NARF's immediate supervisor); NAVAIRSCOM, an Acronym for the Naval Air System Command in Washington, and ROCMM the Regional Office of Civilian Manpower Management located in Jacksonville, Florida, are the other higher levels

15/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31, at p. 3; accord, Veterans Administration Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), FLRC 72A-42 (July 31, 1974), Report No. 55, at pp. 8-9; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 12, 1973), Report No. 46, at pp. 5-7; Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41, at pp. 4-7.

16/ Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87

17/ United Federation of College Teachers, Local 1460 and the U.S. Merchant Marine Academy, FLRC No. 71A-15.

of command, the latter being a field office of OCMM headquarters in Washington. OCMM's Compensation Branch letter of May 22, 1973 concerned differing interpretations of the activities, unions and arbitrators at the various installations within the command system regarding the two areas of Environmental Differential Pay and was not confined to the NARF situation.

From the foregoing, I conclude that an arbitrator's decision interpreting the provisions of a contract is binding on the parties unless such interpretation results in an award violating applicable law, appropriate regulations including policies set forth in the Federal Personnel Manual, or the Order. In this case, the Civil Service Commission has interpreted the Agency views regarding the application of the categories covering explosives and incendiary materials, and categories covering poisons (toxic chemicals) to the Navy situations described as being in accord with the intent and the requirements delineated in the FPM Supplement concerning the payment of environmental differential. While the requested interpretation was intended to provide a basis for establishment or reconciliation of policies uniformly applicable to more than one activity, the interpretation was not intended as a vehicle to terminate arbitration awards that had become final.

Arbitrator's decisions like those of a court command respect. The fact that a different agency or tribunal reaches another conclusion on the issue presented at a later date does not invalidate or render illegal decisions formerly made and effected. No legal opinion from the Department of Defense or Navy was submitted supporting Respondents position that the arbitration awards were illegal nor did the Civil Service letter of interpretation purport to do so. I find that the evidence does not support the respondents position that the aforementioned arbitration awards were illegal. The Civil Service interpretation may have alerted the Agency as to policy at its installations on differential pay that it should assess and follow; it was not a mandate to terminate, bona-fide arbitration awards that had previously been made and accepted.

The fact that the Respondent Agency is not now charged with a Section 19(a)(6) violations does not necessarily preclude a finding of an independent 19(a)(1) violation, which is not premised on the existence of an exclusive bargaining

relationship between the Respondent Agency and the Complainant. In National Aeronautics and Space Administration (NASA), Washington, D.C., and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457 the obligations of an agency were described and the following was stated: "As stated in previous decisions, once an exclusive bargaining representative has been designated by a majority of the employees in an appropriate unit, the obligation of the agency or activity which has accorded recognition is to deal with such representative concerning grievances, personnel policies and practices, or other matters affecting working conditions of all unit employees. Such obligation is exclusive and carries with it the correlative duty not to treat with others. 18/ Further, Section 1(a) of the Order states, in part, 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, and that no interference, restraint, coercion, or discrimination is practiced with his agency to encourage or discourage membership in a labor organization.' It is clear from the parties' stipulation that the Respondent Activity had accorded exclusive recognition to the Complainant and that the Respondent Agency was aware of this bargaining relationship at the time of the denial of the request that the Complainant's representative be permitted to participate in the Respondent Agency's EEO discussion with unit employees. Nevertheless, the Respondent Agency, through its representative, Dr. McConnell, although conducting meetings or interviews with unit employees in which certain of their terms and conditions of employment were discussed, refused the request of the exclusive representative of these employees to participate in such discussions. In my view, by these actions, the Respondent Agency implicitly suggested to unit employees that Agency management could deal directly with them concerning their terms and conditions of employment and, in effect, interfered with the exclusive bargaining relationship."

It is my opinion that the Agency action directing the Activity to terminate the arbitration awards herein, implicitly suggested to unit employees that Agency management

18/ See, e.g., Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301, and United States Army School/Training Center, For McClellan, Alabama, A/SLMR No. 42.

would not abide by collective bargaining agreements regarding arbitration as to terms and conditions of employment and in effect interfered with the exclusive bargaining relationship.

In Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12, the Agency in its first exception contended "that the arbitrator exceeded the scope of his authority by directing that electroplaters received 'low degree' environmental differential payments, because the specific issue submitted to him was whether electroplaters are entitled to receive 'high degree' payments. Hence, the agency asserts that the arbitrator exceeded the scope of his authority by deciding an issue not submitted to him, and that his award directing payment of 'low degree' environmental differentials should therefore be stricken. In support of this exception the agency relies on alleged precedent in the private sector; and cites the Councils' decision in American Federation of Government Employees, Local No. 12 (AFGE) and U.S. Department of Labor (Jaffe, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42, as establishing the principle in the federal sector that an arbitrator's award should be vacated where the arbitrator has exceeded the scope of his authority."

The Council after expressing the opinion that the Agency's petition did not present facts and circumstances to support its assertion that the arbitrator did not exceed the scope of his authority stated: "Further, the agency's reliance on the Council's decision in AFGE, Local 12, and U.S. Department of Labor, supra, as support for its first exception is misplaced. In that case, the Council held in essence that the arbitrator had exceeded his authority by granting contractual relief to non-grievants, as well as the grievant. That holding is inapposite to the present question of whether an arbitrator may properly award to a grievant relief which is of lesser degree than that specified in the submission agreement."

In its second exception in FLRC 74A-12, supra, the agency alleged "that the arbitrator was required by the broad guidelines in FPM Supplement 532-1, Section 58-7 and Appendix J to FPM Supplement 532-1 to make specific findings of fact and failed to do so. Obviously, in the determination of local situations for which environmental differential is

authorized the FPM must be complied with; however, with regard to the instant case, the agency does not advert to any specific FPM requirement to support its contention that the arbitrator must make specific findings of fact, nor does our research reveal the presence of any such requirement in the FPM.

"We therefore find that the agency has not supported its contention that implementation of the award will violate the FPM, or derivatively, Section 12(a) of the Order...."

From the foregoing, it is evident (1) that the Complainant had no opportunity to submit its position to the Civil Service Commission Agency in connection with the May 22, 1973 inquiry or letter expressing concern and questioning the propriety of awards regarding application of the categories covering explosives and incendiary materials, and poisons, (toxic chemicals); (2) the Civil Service response on August 20, 1973 did not purport to be a review of the NARF arbitration awards that had previously been accepted; (3) there had been no timely appeal from the arbitration awards in issue in this proceeding and they had, in fact, been approved, accepted and paid until December 8, 1973; there is no factual showing establishing that the arbitration awards made and accepted in this case violates the Order; and the Complainant was first advised that the awards were to be terminated about November 6, 1973 after the agency had already made the decision.

In Governmental Employees Relations Report (GERR) No. 589, January 20, 1975 at pages 18 and 19, the following is stated:

"The arbitrator's authority to interpret the agency's regulation stems from the fact that it was incorporated by reference into the collective bargaining agreement. Article 2, section 2 requires the parties to abide by 'all Federal laws, applicable state laws, regulations of the employer, and this agreement in matters relating to the employment of employees covered by this agreement.'...

"This does not mean that the arbitrator's interpretation of such directives necessarily takes precedence over the agency's own interpretation. We believe there is

considerable merit in OEO's contention that the arbitrator erred in concluding that the promotion actions in question were 'routine' within the meaning of OEO Staff Manual 250-2, supra, and had to be completed within an 8 day period. An administrative agency's interpretation and application of its own regulations will generally be accorded great deference and will be deemed controlling as long as it is one of several interpretations, though it may not appear quite as reasonable as some others. Roy Bryant Cattle Co. v. United States, 463 F.2d 418 (5th Cir. 1972); United States v. Whelan 463 F.2d 1093 (9th Cir. 1972). However, OEO did not appeal a contrary interpretation by the arbitrator in a timely fashion. Section 4(c) (3) of Executive Order 11491, supra, places review of arbitration awards within the jurisdiction of the Federal Labor Relations Council (FLRC) and section 13(b) provides that either party may file exceptions to an arbitrator's award under regulations prescribed by the council. These procedures were duly promulgated in 5 C.F.R. subpart D of Part 2411 (1974), prescribing a 20 day time limit from the date of award to appeal, but the OEO did not avail itself of the opportunity to challenge the arbitrator's findings and interpretation. The purpose of statutes and regulations limiting the period for appeal is to set a definite point of time when litigation or arbitration shall be at an end unless within that time the prescribed application has been made, and, if it has not, to advise all interested parties that the action is final. Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943). Since OEO did not file an exception to the award within the period of limitations, we must now presume its acquiescence with the facts and the interpretation of the applicable regulation"...

It was concluded that failure to file a timely appeal constituted fatal agency error.

I conclude that the October 26, 1973 agency action directing the Activity to terminate the arbitration awards herein, implicitly suggested to unit employees that Agency management would not abide by the collective bargaining agreement regarding arbitration as to terms and conditions

of employment and in effect interfered with the exclusive bargaining relationship between the Activity and the Union in violation of Section 19(a) (1) of the Order. 19/

The evidence shows that the Union was notified on November 6, 1973 that the EDP awards were to be terminated and were shown a copy of the Agency directive. The Activity argues that between November 6 and December 8, 1973 the Union had the opportunity to request consultation on negotiable impact issues. No such overtures having been received from the Union, the Activity contends it cannot be found in violation of the duty to bargain in good faith. I cannot so conclude.

On November 6, 1973 the Union was presented with the accomplished fact of a determination to terminate certain environmental differential pay awards. Its views had not been previously sought and it was unaware of the arbitration awards being challenged. As far as the Union was concerned there was no opportunity to question the propriety of the determination and an Activity witness, D.J. Woodard, testified in effect that he had no alternative but to carry out the agency directive; that the termination date was delayed until December 8, 1973 is of no moment. To hold as the Activity urges would be to impose on the Union an obligation to request consultation regarding an Activity action which it reasonably believed was already instituted. This, in effect, would require the Union to perform what, under the circumstances, would be essentially a futile Act.

I therefore conclude that NARF's unilateral termination of the Environmental Differential pay awards made to its employees pursuant to the aforementioned arbitration awards constituted a change in established conditions of employment settled by arbitration and a violation by the Activity of Section 19(a) (6) of the Order. 20/ Section (1) (a) of the Order

19/ Section 19(a) (1) of the Order provides that Agency management shall not - (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order.

20/ Section 19(a) (6) provides that Agency management shall not - refuse to consult, confer, or negotiate with a labor organization as required by this Order.

grants to each employee the right to form, join and assist a labor organization and Section 19(a)(1) prohibits an agency from interfering with that right. Where as here, the Activity takes an action in carrying out a management directive terminating employees environmental differential without meeting its obligation to confer and consult regarding the basic right of termination as well as the impact and potentially adverse effects of such action, the exclusive representative is undercut and disparaged so as to affect Section 1 rights of employees in violation of Section 19(a)(1). 21/ I do not find the action privileged because the arbitration awards are not shown to have been illegal or contra to the Order.

It is undisputed that OCMM directed termination of the arbitration awards. I agree with Counsel for Complainant that the Secretary of the Navy (OCMM) committed an independent violation of Section 19(a)(1) because his office interfered with, restrained, and coerced employees in the exercise of rights assured by the Order, in that his agent (OCMM) was the central and essential moving force behind the termination of environmental differential pay at NARF Pensacola, a termination which reflected badly upon AFGE Local 1960 and could not help but have a chilling effect upon unionism in that bargaining unit.

Remedy

The Respondent Agency directed and its Activity terminated the environmental differential pay awarded to certain employees at the NARF installation pursuant to the two aforementioned arbitration awards. I therefore find

21/ The duty to bargain regarding impact has long been recognized by the Assistant Secretary and the Federal Labor Relations Council. For example, Immigration and Naturalization Service, FLRC No. 70A-10 (April 15, 1971); Plum Island Arrival Disease Laboratory, FLRC No. 71A-11 (July 9, 1971); Griffiss Air Force Base, FLRC No. 71A-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. 341 (January 9, 1974); New Mexico Air National Guard, A/SLMR No. 362 (February 28, 1974).

that the Respondents must remit to the employees all accumulated sums due and owing as environmental differential pay since the awards were terminated on December 8, 1973. The environmental differential pay wrongfully withheld by Respondent to its Aircraft Oxygen Equipment Repairmen and Aircraft Surface Treatment Workers will be remitted to each of the employees involved and computed in the same manner as was in effect when the awards were terminated plus accruals, if any, that have inured since December 8, 1973. 22/

Recommendations

Having found that the Respondent Agency engaged in conduct violative of Section 19(a)(1) of the Order and that the Respondent Activity engaged in conduct violative of 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 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the Secretary of Navy, Department of the Navy, Naval Air Rework Facility, Pensacola, Florida shall:

(1) Cease and desist from:

(a) Interfering with, restraining or coercing unit employees at the Naval Air Rework Facility, Pensacola, Florida, by refusing to give effect to the environmental differential pay awarded to Aircraft Oxygen and Equipment Repairmen and Aircraft Surface Treatment Workers pursuant to the Schedler-Lynch arbitration awards during 1972 and/or

22/ Complainant also requested interest for employees but in view of a recent Comptroller General's Decision, the payment interest does not appear to be warranted. See, File B-180010 [continued on next page]

terminating such awards or refusing to comply with the terms therewith on or after December 8, 1973.

(b) Refusing to consult, confer and negotiate on the part of the Activity as to changes in conditions of employment affected by its unwarranted termination of environmental differential pay made pursuant to arbitration under the terms of the collective bargaining agreement and the Order.

(c) In any like or related manner interfering with, restraining, or coercing its employees represented by American Federation Government Employees, AFL-CIO, Local 1960, 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) The respondents will remit, to each of the employees involved in or affected by the Schedler-Lynch arbitration awards all monies deducted or withheld from them by reason of termination of environmental differential pay since December 8, 1973, and the Activity will continue such awards during the term of the collective bargaining agreement.

(b) The respondents will honor and enforce all terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 1960.

(c) The respondent will post at its OCMM headquarters in Washington, D.C. and at NARF Facility, Pensacola, Florida 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 at the respective locations, and shall be posted and maintained by each of them for 60 consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. The respective Commanding Officers shall take reasonable steps to

22/ - continued

dated March 19, 1975 in the Matter of Unfair Labor Practice
Make Whole Remedies.

to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 203.26 of the Regulations, each Commanding Officer at the respective locations will 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.


RHEA M. BURROW
Administrative Law Judge

DATED: April 17, 1975
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 interfere with, restrain or coerce unit employees at the Naval Air Rework Facility, Pensacola, Florida by refusing to recognize and abide by unappealed arbitration decisions involving environmental differential pay made pursuant to the collective bargaining agreement between the Naval Air Rework Facility Pensacola, Florida, and American Federation of Government Employees, AFL-CIO, Local 1960. We will not refuse to honor the existing negotiated agreement with that labor organization by withholding from unit employees concerned, the environmental differential pay to which they were found entitled by reason of the Schedler-Lynch arbitration awards in 1972.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees represented by American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL honor and enforce all terms of the existing negotiated agreement between the Naval Air Rework Facility, Pensacola, Florida, and American Federation of Government Employees, AFL-CIO, Local 1960.

WE WILL immediately remit to all unit employees and former employees entitled to environmental differential pay by reason of the Schedler-Lynch arbitration awards, the monies withheld from them since December 8, 1973 by reason of the erroneous termination of their awards.

WE WILL henceforth add and include environmental differential pay to the regular pay of employees in the above unit in accordance with the provisions of the aforesaid arbitration awards and the existing collective bargaining agreement.

(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 Assistant Regional Director of the Labor-Management Services Administration, United States Department of Labor, whose address is 1371 Peachtree Place Northeast, Room 300, Atlanta, Georgia, 30309.

Defense Supply Agency,
Defense Property Disposal Office,
Aberdeen Proving Ground,
Aberdeen, Maryland

and

A/SLMR No. 360
FLRC No. 74A-22

Local Lodge 2424, International
Association of Machinists and
Aerospace Workers, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary, upon a complaint filed by Local Lodge 2424 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as IAM). The Assistant Secretary found that the Defense Supply Agency (hereinafter referred to as DSA), Defense Property Disposal Office at Aberdeen Proving Ground, Aberdeen, Maryland, violated section 19(a)(5) of the Order by failing to accord appropriate recognition to a labor organization qualified for such recognition and failing to honor an existing negotiated agreement; and by such conduct, and by threatening to revoke dues withholding authorizations, also violated section 19(a)(1) of the Order.^{1/} The pertinent facts as found by the Assistant Secretary are set forth below.

On July 29, 1970, IAM was certified as the exclusive representative for a unit of approximately 1620 employees of the Department of the Army's

1/ Section 19(a)(1) and (5) of the Order provides 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;

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition. . . .

Aberdeen Proving Ground Command (APGC), at Aberdeen Proving Ground, Aberdeen, Maryland. On August 9, 1972, the union entered into a negotiated agreement with APGC covering the employees in the unit. Shortly thereafter, under the authority granted by the Department of Defense (DOD), a Defense Property Disposal Service (DPDS) was established under DSA, composed basically of Defense Property Disposal Offices (DPDO's). To staff these offices, DOD decided that employees performing surplus personal property disposal functions in the Departments of the Army, Navy and Air Force, and in DSA, were all to be transferred to the new DPDS within DSA. Under this "transfer-in-place," the transferred employees would be under the command of DSA but continue at the same duty stations performing essentially the same duties as before the transfer, with no changes in job descriptions, classifications and grades. One of these offices was established at Aberdeen Proving Ground, consisting of 27 employees, 15 of whom were members of IAM's collective bargaining unit at APGC.

Upon learning of the proposed transfer, IAM took the position with DSA that its agreement with APGC continued to cover the 15 employees to be transferred to DSA from Army. DSA, however, notified IAM, as well as other labor organizations with agreements covering other property disposal employees transferred to DSA, that "the dues withholding privileges of those employees would be extended for a six month period . . . to allow for the resolution of such representation and successorship issues as may arise incident to this reorganization." On April 22, 1973, the 15 unit employees performing property disposal functions at APGC were administratively transferred to DSA, and thereafter DSA rejected further IAM requests that DSA continue dues withholding for the 15 transferred employees beyond the 6-month period. DSA took the position that the Aberdeen agreement was between IAM and Army, and that the transferred employees were no longer part of the APGC unit, but were DPDS employees. DSA offered, alternatively, to recognize any union which was certified by the Department of Labor "as the duly elected representative of the employees of DPDS or of any appropriate bargaining unit made up of DPDS employees."

IAM thereupon filed a complaint, alleging that DSA had violated section 19(a)(1), (2), (5) and (6) of the Order by refusing to recognize IAM as the representative of the 15 transferred employees, by refusing to apply the terms of the IAM-APGC agreement and by improperly threatening to revoke the dues withholding authorizations of its employees. In response, DSA took the position that IAM should not be permitted to gain certification and recognition as the exclusive bargaining representative of any bargaining unit in DPDS without filing a representation petition and winning an election. Additionally, in its response to the IAM complaint, DSA relied on the Council's decision in the AVSCOM case,^{2/} as protecting it from any unfair labor practice finding.

2/ Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30 (July 25, 1973), Report No. 42.

The Assistant Secretary concluded that DSA had violated section 19(a)(1) and (5) of the Order. He found, among other things, that, as the 15 unit employees performed the same duties under the same immediate supervision after the reorganization and their administrative transfer-in-place into the DPDO under the command of DSA as before, they retained a community of interest with the Army's employees in the APGC bargaining unit.^{3/} He further stated that while DSA and Army were separate employing agencies with different specific missions and functions, they were both DOD components and, under the circumstances, must be viewed as "co-employers" of all the employees in the unit "with common responsibilities for maintaining the present terms and conditions of employment . . . including any negotiated agreement that is in existence." Accordingly, the Assistant Secretary found that DSA had improperly withdrawn recognition from the union which was "qualified for such recognition" in violation of section 19(a)(5), and by such conduct had also violated section 19(a)(1). He further found that the threat to terminate dues withholding 6 months after the employees' administrative transfer to DPDS, if no representation petition was filed, constituted an additional violation of section 19(a)(1).

In so finding, the Assistant Secretary rejected DSA's reliance on AVSCOM, since he viewed that decision as requiring the agency to initiate appropriate representation proceedings to resolve the legitimate questions raised as a result of the reorganization, rather than unilaterally terminating the union's recognition and setting its own rules as to how new recognition would be obtained.

As a remedy, in view of "the broad scope of the reorganization . . . affecting the major components of the Department of Defense and its implementation on a nationwide basis by DSA," the Assistant Secretary determined that a "broad cease and desist order" was warranted. He therefore issued an order requiring DSA, among other things, to cease and desist from refusing to accord appropriate recognition to IAM "and similarly situated labor organizations," and from refusing to honor the existing negotiated agreement as it pertains to DPDO employees at Aberdeen as well as "existing negotiated agreements of similarly situated labor organizations as they pertain to other [DPDO] employees." IAM's allegations of section 19(a)(2) and (6) violations by DSA were dismissed and are not at issue here.

DSA appealed to the Council alleging that the Assistant Secretary's decision presented major policy issues and was arbitrary and capricious. The Council accepted the petition for review, having determined that major policy issues were presented by the subject decision of the Assistant Secretary, including: (1) The applicability of the Council's decision in the AVSCOM case; (2) the

^{3/} The Assistant Secretary also found that "[t]o upset these existing units based solely on such an administrative reorganization clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations."

propriety of the doctrine of "co-employers" as established by the Assistant Secretary; (3) the conformity of the decision to the requirements of section 10(b) of the Order; (4) the impact of "successorship" criteria in this case; (5) the effect of Civil Service Commission regulations concerning dues withholding in the circumstances here involved; and (6) the propriety of extending the decision and order to labor organizations "similarly situated" to IAM, which organizations were not "parties" to the proceeding before the Assistant Secretary.

DSA also requested a stay of the decision pending Council resolution of the appeal. The Council determined that issuance of a stay was warranted in this case and granted the agency request.^{4/}

Briefs were filed by DSA and IAM. Additionally, the Council granted a number of requests from interested agencies and labor organizations, filed pursuant to section 2411.49 of the Council's rules, for permission to file amicus curiae briefs. General Services Administration, Department of Health, Education, and Welfare, and Department of the Treasury filed briefs with the Council as amici curiae urging, in effect, that the subject decision of the Assistant Secretary be set aside; and American Federation of Government Employees (AFGE) and Metal Trades Department of the AFL-CIO, and National Association of Government Employees, filed briefs as amici curiae urging, in effect, that the decision be sustained. AFGE also requested oral argument.^{5/}

Subsequent to acceptance of the instant case, the Council commenced its general review of E.O. 11491, as amended. Among the areas focused upon during the review was the status of negotiated agreements during reorganization. The Council determined that this area of the general review was directly applicable to the issues raised in this case; and, therefore, that the final disposition of the appeal should be deferred pending completion of the general review. On February 6, 1975, the President signed E.O. 11838, amending E.O. 11491, effective on or after May 7, 1975.

OPINION

As detailed above, the Assistant Secretary found, in essence, that DSA violated section 19(a)(5) and (1) of the Order by its conduct following the transfer to DSA of 15 employees from a unit of about 1620 employees

^{4/} The Council, in granting the stay, added that: "This is not to be interpreted as permitting the agency to cease giving effect to valid dues withholding agreements as they apply to affected employees prior to the issuance of a final decision on the request for review."

^{5/} Pursuant to section 2411.49 of the Council's rules, the request by AFGE is denied, because the positions of the participants in this case are adequately reflected in the entire record now before the Council.

represented by IAM at Army's Aberdeen Proving Ground Command, in the course of a bona fide reorganization of DOD's property disposal functions. More particularly, the Assistant Secretary held that DSA violated 19(a)(5) by failing to accord appropriate recognition to IAM and failing to honor an existing negotiated agreement previously entered into between IAM and the Army Command; that by such action, and by threatening to revoke dues withholding authorizations of the transferred employees, DSA further violated 19(a)(1); and that a broad remedial order should issue extending benefits not only to IAM but also to "similarly situated labor organizations" affected by the entire reorganization.

The Council accepted DSA's petition for review on the ground that major policy issues were presented by the subject decision of the Assistant Secretary. We turn now to the consideration of these major policy issues and the principles which properly control the determination of a reorganization case such as here involved under the Order.

ISSUE 1. Applicability of Council's Decision in AVSCOM Case.

In the AVSCOM case, note 2, supra, the situation was essentially as follows: On July 1, 1971, a reorganization was effected within the Army Aviation Systems Command (AVSCOM), whereby 49 of 53 Headquarters employees represented in a separate unit by AFGE were combined with 35 employees from a nearby inactivated Depot unit represented by the Operating Engineers, into a newly formed subordinate element of AVSCOM Headquarters. This reorganization occurred while negotiations between AVSCOM and AFGE were in progress; and its anticipation prompted Army to file a petition with the Assistant Secretary in which Army contended that a single overall unit was now appropriate and requested an election to determine which of the two unions represented that unit.^{6/} During the pendency of that petition, AFGE and AVSCOM continued to negotiate and in October 1971 reached full accord. However, AVSCOM refused to sign the agreement until the Assistant Secretary resolved the representation issue. AFGE thereupon filed a 19(a)(6) complaint by reason of AVSCOM's refusal to sign the agreement.

In May 1972, the Assistant Secretary issued his decision in the representation case, dismissing the petition on the ground that there was insufficient basis for the activity's claim that separate units were no longer appropriate. (No appeal was taken to the Council from that decision.) Thereafter, in June 1972, the Assistant Secretary issued his decision in the unfair labor practice case, finding that, because the existing units remained viable, Army's refusal to sign the October 1971 agreement violated 19(a)(6). As a remedy, the Assistant Secretary ordered Army to sign the agreement upon request and to post the customary notice. Army appealed to the Council, objecting not to the 19(a)(6) finding or the required signing of the agreement, but to the posting requirement.

^{6/} The petition filed by Army was a "clarification of unit" petition which the Assistant Secretary later found improper, but which he treated for purposes of decision as a "representation (agency)" petition.

In its AVSCOM decision, issued in July 1973, the Council upheld the posting requirement in the circumstances of that appeal. However, the Council also addressed the underlying dilemma faced by agency management in the course of such a reorganization, and the derivative responsibilities of the Assistant Secretary under the Order. In more detail, the Council stated at pp. 5-6 of its decision:

. . . [W]e recognize the serious dilemma which agency management is in when faced with circumstances such as those present in this case. That is, as a result of the reorganization of AVSCOM, the Army had a doubt as to the continued appropriateness of the existing units, and sought to resolve that doubt by the filing of a petition with the Assistant Secretary. As stated above, if the existing units had been found to be inappropriate due to the reorganization of AVSCOM, the Army would not have been obligated to sign the contract. In fact, to have signed it could, at least potentially, have subjected it to a charge that it had violated section 19(a)(3) of the Order. Yet, because the existing units were subsequently found to be appropriate, the Assistant Secretary held that the Army was obligated to sign the negotiated agreement. Since there were no other allegations of misconduct involved in this case, the disposition of the representation issue was determinative of the disposition of the 19(a)(6) complaint.

In our view, this type of a dilemma or risk places an undue burden on an agency. That is, where an agency has acted in apparent good faith and availed itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit, and where no other evidence of misconduct is involved, an agency should not be forced to assume the risk of violating either section 19(a)(3) or section 19(a)(6) during the period in which the underlying representation issue is still pending before the Assistant Secretary.

Rather, we believe that procedures can and must be devised which will permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from the representation decision, before that agency incurs the risk of an unfair labor practice finding. Since it does not violate the Order to raise a question concerning representation in good faith, the procedures employed to effectuate the purposes of the Order must permit an agency to do so without risking an unfair labor practice finding.

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary the determination as to the precise procedures which will best accomplish this result, we direct that his procedures be reviewed and revised so that, in the future, agencies will be permitted to await his decision on a representation petition without incurring the risk of an unfair labor practice finding. [Underscoring in part supplied.]

As previously mentioned, DSA here relied on the Council's AVSCOM decision in defense of its conduct after the April 1973 reorganization in refusing in good faith to recognize IAM until that union was certified as the duly elected representative of the DPDS employees or of any appropriate unit made up of DPDS employees, and in stating that it would terminate dues withholding provided for under the IAM-APGC agreement after 6 months if no representation petition covering the employees was filed. However, the Assistant Secretary ruled that AVSCOM was not dispositive because:

. . . In the instant case, it is clear that [DSA] did not "avail itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit" but, rather, it unilaterally terminated recognition and set its own rules for how a new recognition would be obtained.

In our opinion, the Assistant Secretary has misconceived, and thereby failed properly to apply, the meaning and import of the Council's AVSCOM decision.

As indicated in AVSCOM, the Council was of the view that where an agency, as a result of a reorganization, has good faith doubts concerning the status of a union as the exclusive representative of its employees in an appropriate unit, the Order requires (1) that the agency be enabled to initiate a representation proceeding which would resolve these doubts; and (2) that the procedures of the Assistant Secretary must precisely implement this right of an agency to initiate such a representation proceeding and thereby to avert the risk of an unfair labor practice finding.

While the Assistant Secretary sought to distinguish the instant case from AVSCOM because DSA did not invoke a representation proceeding, he failed specifically to address the first question, namely: Whether the "representation proceedings offered" by the Assistant Secretary would have led to the Assistant Secretary's resolution of IAM's representative status, upon a representation petition filed by DSA.^{7/} For IAM was not the currently recognized or certified representative of a separate unit of these DSA employees; DSA was not questioning IAM's representative status in the APGC unit; and IAM, at the time the reorganization was effected, apparently was not claiming to represent the 15 transferred employees in a separate appropriate unit of DSA employees, but was claiming instead that the agreement with Army covering that unit continued to apply to the transferred employees, and that DSA was bound by that agreement. Moreover, the Assistant Secretary did not either advert to or consider the second question, that

^{7/} Section 202.2(b)(1) of the Assistant Secretary's regulations, at the time here involved, reads as follows:

(b) Petition for an election to determine if a labor organization should cease to be the exclusive representative.

(1) A petition by an agency shall contain . . . a statement that the agency or activity has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in an appropriate unit. . . .

is, whether his procedures at the critical times in this case, which antedated AVSCOM, clearly provided DSA with access to representation proceedings which would resolve the legitimate doubts of DSA arising from the subject reorganization.^{8/}

Therefore, upon the remand to be ordered by the Council, the Assistant Secretary should reconsider and pass upon the applicability of AVSCOM as properly interpreted and applied in the instant case.^{9/}

Further, if upon remand, the Assistant Secretary concludes that his procedures failed to satisfy the requirements of AVSCOM at times relevant to this case and if these procedures remain substantially unchanged, the Assistant Secretary is directed to take action consistent with AVSCOM. That is, the Assistant Secretary shall develop new procedures, or clarify existing procedures, to enable an agency to raise questions such as here presented subsequent to a reorganization concerning the appropriateness of units of employees involved in the reorganization and the qualification of labor organizations to be accorded exclusive recognition as the representatives of the employees in those units, without incurring the risk of an unfair labor practice finding.

ISSUE 2. Propriety of Co-Employer Doctrine Established by Assistant Secretary.

The Assistant Secretary also predicated his decision that DSA violated section 19(a)(5) and (1) of the Order in part on his conclusion that:

. . . [DSA] and the Department of the Army are co-employers vis-a-vis the existing unit at Aberdeen represented by the [IAM] and, as such, [DSA] and the Department of the Army are responsible for maintaining the present terms and conditions of employment of all employees in the unit including those contained in the existing negotiated agreement. [Footnote omitted.]

While the Assistant Secretary tacitly acknowledged that the employing entity bears the obligation of recognition imposed under section 10 of the Order, he relied in reaching the above-quoted conclusion principally on his finding that DSA and Army are both components of DOD which was

^{8/} The Council's direction in AVSCOM as to future corrective action to be taken by the Assistant Secretary did not mean that the requirements concerning the availability of procedures to avert an unfair labor practice finding, which derived from the Order itself, were only prospective in nature.

^{9/} Assuming the requirements detailed in AVSCOM were satisfied, DSA would, of course, be deemed to have accepted the risk of an unfair labor practice finding by failing to file a representation petition, and the legality of its conduct must then be assessed under the principles discussed hereinafter.

the moving force behind the reorganization, and his belief that the co-employer doctrine would avert the "chaotic labor-management relations situation" which assertedly obtained from the "administrative reorganization" of property disposal functions within DOD.

In our opinion, the co-employer doctrine as thus fashioned and applied by the Assistant Secretary in the present case is wholly inconsistent with the language and purposes of the Order and must be rejected.

Under section 10 of the Order, it is the employing entity which is intended and required to accord exclusive recognition to the labor organization duly selected by its employees as their representative. Although in this case both DSA and Army are components of DOD, and DOD may have been the progenitor of the reorganization, DSA and Army have separate missions, functions, regulations, administrations, and commands; and there is no indication in the record that DSA and Army either before or after the reorganization shared any common control or direction whatsoever over either the 15 employees transferred to DSA or the remaining approximately 1600 employees in the Army unit. In other words, DSA and Army retained their separate employing identities over their respective employees before and after the reorganization and each component thus remained a separate employing "agency" for the purposes of according exclusive recognition to the labor organization representing its employees in an appropriate unit under section 10 of the Order. Contrary to the position of the Assistant Secretary, the overall responsibilities and initiative of DOD with respect to the various components of DOD neither destroyed nor diminished in any manner the separate identity of the respective components from each other as employing entities and therefore each component continued to constitute a separate employing "agency" for the purposes of exclusive recognition under section 10 of the Order.^{10/}

As to the "chaotic" situation sought to be averted by the Assistant Secretary, we share the concern of the Assistant Secretary over the numerous problems, especially the multiplicity of representation petitions, which may result from a comprehensive reorganization such as here involved. However, the resolution of these problems obviously must be consistent with the provisions and intent of the Order. In our view, the co-employer doctrine which would artificially impose a single employment relationship on diverse employing entities with different missions, regulations and organizational frameworks, and sharing no common control or direction over the subject employees would seriously disrupt the operating capabilities of those agencies and, as already mentioned, would conflict with the meaning and purposes of the Order. Moreover, the administrative difficulties of particular concern to the Assistant Secretary may be readily resolved by established adjudicative techniques, such as consolidated proceedings,

^{10/} Cf. IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Md., FLRC No. 70A-9 (March 9, 1971), Report No. 5.

multi-party stipulations, expedited hearings and the like, and by prompt resort to procedures already provided for or available under the Order. Therefore, no overriding exigency is presented to justify the co-employer doctrine here conceived and applied by the Assistant Secretary.

Accordingly, we hold that the co-employer doctrine, as fashioned and applied by the Assistant Secretary in the circumstances of this case, was improper and may not be relied upon by him in his reconsideration upon remand of the instant case.

ISSUE 3. Conformity of Assistant Secretary's Decision to Requirements of Section 10(b) of the Order.

Section 10(b) of the Order provides in relevant part as follows:

Sec. 10. Exclusive recognition.

(b) 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.

In his conclusion that DSA violated section 19(a)(5) and (1) of the Order in the present case, the Assistant Secretary ruled, in substance, that the combined unit of the 15 employees transferred to DSA and the remaining approximately 1600 APGC employees continued to be appropriate under section 10(b).

The Assistant Secretary reasoned in the above regard that, after the reorganization and administrative "transfer-in-place," the DSA employees retained their same job descriptions and classifications, continued to work in the same locations, performed the same duties and functions, and, while Commands differed, worked under the same immediate supervision, as before the reorganization. Based thereon, the Assistant Secretary found that the DSA employees "continue[d] to share a community of interest" with the APGC unit employees and in effect remained in that unit. Further, after advertent to the substantial number of representation petitions which were filed seeking to separate employees from their historical units, the Assistant Secretary found:

To upset these units, based solely on such an administrative reorganization clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations.

This finding by the Assistant Secretary as to effective dealings and efficiency of agency operations plainly falls far short of the requirements

of section 10(b) as recently explicated by the Council in the Tulsa AFS case.^{11/}

Tulsa AFS involved an agency reorganization, in which the activity, Tulsa Airway Facilities Sector (Tulsa AFS), was enlarged by the transfer of various field offices to the activity's jurisdiction. The activity thereafter sought an election in a sectorwide unit including the employees in Tulsa AFS already represented by IAM and those newly placed under the activity's jurisdiction as a result of the reorganization. The Assistant Secretary dismissed the activity's representation petition because, based on a detailed consideration of employment conditions before and after the reorganization, the Assistant Secretary found that the employees in the existing unit represented by IAM continued to share a separate clear and identifiable community of interest. The Assistant Secretary also stated:

Noting the established bargaining history with respect to the unit represented by the IAM, the fact, standing alone, that an additional unit or units subsequently may be established to cover those employees added to the activity's jurisdiction as a result of the reorganization was not considered to require a finding that the unit represented by the IAM necessarily will fail to promote effective dealings and efficiency of agency operations.

The Council, upon appeal by the agency, held that the Assistant Secretary's decision failed to meet the requirements of section 10(b) of the Order.

As to the meaning of section 10(b), the Council stated (at p. 5 of its decision):

It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . , especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

The Council also noted the Report accompanying E.O. 11838, which reads in part as follows:^{12/}

^{11/} Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

^{12/} Labor-Management Relations in the Federal Service (1975), at p. 51.

X. Status of Negotiated Agreements during Reorganization.

Moreover, the resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of the Order that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations. This policy requirement, in the Council's view, is sufficiently comprehensive and flexible to achieve the desirable equitable balance between the sometimes divergent and conflicting interests of agencies, labor organizations, and employees involved in any reorganization. This policy must be applied so that controlling weight is not given to any one of the criteria; equal weight must be given to each criterion in any representation case arising out of a reorganization just as it is in any other case involving a question as to the appropriateness of a unit. For example, to give controlling weight to a desire, however otherwise commendable, of maintaining the stability of an existing unit would not meet the policy requirements in section 10(b). . . .

The Council concluded as to the required findings under section 10(b) of the Order (at pp. 6-7 of decision):

Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate. In this case . . . the Assistant Secretary found that the employees in the existing unit represented by the union continued to share a clear and identifiable community of interest separate and distinct from those assigned to the activity as a result of the reorganization and, thus, concluded that the existing unit continued to be an appropriate one under the Order. Further, the Assistant Secretary attributed little, if any, weight to the criteria of effective dealings and efficiency of agency operations. . . . It is therefore apparent that the Assistant Secretary did not give equal weight to the criteria of effective dealings and efficiency of agency operations, but, rather, gave predominant weight to the criterion of community of interest of the employees concerned.

Obviously, the required affirmative determinations and according of equal weight to each criterion under section 10(b), as discussed in the Tulsa AFS case, are apposite whether the appropriate unit question is raised, as in that case, in a representation proceeding or, as here, in an unfair labor practice proceeding.

As already indicated, the Assistant Secretary, in our opinion, failed to meet those requirements in the present case. Here, the Assistant Secretary found affirmatively, with detailed supporting reasons, that the employees transferred to DSA and the remaining Army employees in the APGC unit continued to share a community of interest. However, as to the remaining criteria in section 10(b), the Assistant Secretary limited his determination essentially to a statement that upsetting the various historical bargaining units in DOD by reason of the subject reorganization would not have the effect of promoting effective dealings and efficiency of agency operations. Thus, the Assistant Secretary failed to make the required determinations that the APGC unit, including the employees transferred to DSA, would promote effective dealings and efficiency of agency operations. Moreover, the Assistant Secretary, insofar as this particular unit is concerned, manifestly did not give equal weight to the criteria of effective dealings and efficiency of agency operations. Instead, he gave predominant and almost exclusive weight to the criterion of the community of interest of the employees involved.^{13/}

Accordingly, if upon remand the question of appropriate unit is reached by the Assistant Secretary, he is directed to make the required determinations and to accord the necessary equal weight to each criterion, as compelled by section 10(b) of the Order.^{14/}

ISSUE 4. Impact of "Successorship" Criteria.

As we observed in our rejection of the Assistant Secretary's "co-employer" doctrine under Issue 2, supra, the administrative difficulties of particular concern to the Assistant Secretary may be readily resolved in part by prompt resort to procedures already provided for or available under the Order. Among others, these procedures obtain following a reorganization, when an agency or employing entity becomes the "successor" to another

^{13/} For example, the Assistant Secretary did not even consider the impact on "efficiency of agency operations," of a combined unit of employees of different components having different missions, regulations, and organizations. Nor did he consider such impact on "effective dealings," except in a later footnote when he in effect simply characterized this problem as "the responsibility of management" to resolve.

^{14/} The instant case is clearly distinguishable from National Weather Service, A/SLMR No. 331, FLRC No. 74A-16 (July 21, 1975), Report No. 77, in which the Council upheld the unit findings of the Assistant Secretary although such findings were not couched in the precise language of the Order. In that case, unlike here, there was no countervailing evidence that the units would not promote effective dealings and efficiency of agency operations. Moreover, the substance of the Assistant Secretary's decision in that case reflected affirmative determinations and the according of equal weight required under 10(b).

agency or employing entity which had granted exclusive recognition to a labor organization in an appropriate unit under section 10(a) of the Order.^{15/} We now consider the criteria for determining "successorship," the consequences of such relationship, and the relevant procedures provided for or available under the Order.^{16/}

In our view, an agency or employing entity is a "successor," i.e., stands in the stead, of another agency or employing entity for purposes of accord- ing exclusive recognition under 10(a) 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.

Stated otherwise, the gaining employer (whether by inter or intra agency transfer) takes the place of the losing agency or employing entity as a "successor" under 10(a) when the substantive elements of recognition continue without material change after the subject reorganization. In these circumstances, there is no requirement that a new secret ballot election be conducted, since the election requirement in 10(a) was already satisfied at the time the previous recognition was accorded.^{17/} If these criteria of "successorship" are fully met, the gaining employer bears the same obligation to grant recognition to the incumbent union as that borne by the losing entity, under section 10(a) of the Order.

The existence of a "successor" relationship may, under rules which may be established by the Assistant Secretary,^{18/} be: (1) voluntarily acknowledged

^{15/} Section 10(a) provides:

Sec. 10. Exclusive recognition. (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative. . . .

^{16/} Of course, the principles here discussed do not apply if the reorganization does not involve different gaining and losing employing entities.

^{17/} If after a reorganization a question concerning representation is duly raised by the employees or a rival labor organization, then, as provided in the Order, a new secret ballot election would be required.

^{18/} 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.

by the agency; or (2) properly determined and so certified by the Assistant Secretary, either in a representation proceeding or, if such proceeding is not initiated, in the context of an unfair labor practice complaint. However, as discussed under Issue 1, supra, the Assistant Secretary's rules must enable the gaining employer to initiate a representation proceeding in order to resolve its good faith doubts as to the representative status of the incumbent, without incurring the risk of an unfair labor practice finding. Moreover, in deciding "successorship," the Assistant Secretary must continue to apply the pertinent provisions of the Order, such as the criteria in 10(b) for determining the appropriate unit, in the manner considered at length under Issue 3, supra.

To repeat, the gaining employer as a "successor" assumes the same duty as the losing employer to grant recognition to the incumbent labor organization under section 10(a) of the Order. This does not mean that the "successor" is required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union. To hold otherwise would, as in instances such as here involved, impose upon the gaining employer an agreement entered into with a different employing entity having different objectives and different organizational and regulatory policies and would frequently, as here, disrupt the operating capabilities of the gaining employer and the accomplishment of its assigned mission. Moreover, to require maintenance of the agreement entered into with the predecessor would subject the labor organization and employees to terms and conditions of employment negotiated under a different work situation with, for example, a different and possibly more restrictive regulatory framework. Consequently, a required adoption of the earlier agreement would plainly conflict with the interests of the agency, the labor organization and the employees, and with the paramount need to protect the public interest and would be contrary to the underlying purposes of the Order.

While the gaining employer which is established as a "successor" is thus not required to adopt and be bound by the agreement of its predecessor, it is nevertheless enjoined under the Order to adhere so far as practicable to the personnel policies and practices and matters affecting working conditions, including dues withholding, provided in the earlier agreement, until the "successor" has fulfilled its bargaining obligation under the Order with the incumbent union. Moreover, until the question of "successorship" is resolved or until any other issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the like), the gaining employer is likewise enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible.^{19/} As stated in this

^{19/} If as a result of a reorganization a determination is made that the gaining employer is not a "successor," then of course such employer owes

(Continued)

regard in the Report accompanying E.O. 11838 concerning the status of negotiated agreements pending proceedings on issues raised by reorganizations:^{20/}

. . . [E]xisting recognitions, agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final decisions on issues raised by reorganizations. . . .

Accordingly, in his disposition of the instant case upon remand, the Assistant Secretary is directed to apply the foregoing principles to relevant issues which may be reached with respect to the subject reorganization.

ISSUE 5. Effect of Civil Service Commission Regulations Concerning Dues Withholding.

Section 21 of the Order provides with respect to dues withholding as follows:

Sec. 21. Allotment of dues. (a) When a labor organization holds exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when--

- (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or
- (2) the employee has been suspended or expelled from the labor organization. [Underscoring supplied.]

(Continued)

no duty to bargain with the labor organization which previously represented the affected employees. While we appreciate that there is an impact on employees in such a situation, exclusive recognition is dependent on meeting the requirements of sections 10(a) and 10(b) of the Order and these requirements have been carefully designed to foster the development of a sound Federal labor-management relations program. Moreover, employees and labor organizations are not precluded thereafter from exercising their rights under the Order to organize and seek to establish appropriate units under section 10.

^{20/} Labor-Management Relations in the Federal Service (1975), at p. 51.

On February 15, 1972, the Civil Service Commission (CSC) issued implementing regulations (5 CFR 550.301, et seq.), which read in pertinent part as follows:

§ 550.322. Limitation and discontinuance of allotment.

(c) Except as provided in paragraph (d) of this section, an agency shall discontinue paying an allotment when the allottee . . . transfers between agencies, moves or is reassigned . . . within the agency outside the unit for which the labor organization has been accorded exclusive recognition; . . . or when the dues withholding agreement between the agency and the labor organization is terminated, suspended, or ceases to be applicable to the allottee.

(d) An agency may permit an employee, transferring in from another agency, or transferring within the same agency, to continue on a temporary basis to make an allotment for dues to a labor organization under the following conditions:

(1) The transfer of the employee is in connection with a transfer of function or reorganization; and

(2) The employee was in a unit of recognition, which unit was transferred in whole or part to another agency, or different organizational group within the same agency.

(3) A substantial question of successorship exists, that is, a question as to whether the union which held exclusive recognition for the unit is eligible to retain the recognition previously granted to it by the losing agency; and

(4) The continuation of dues allotment is on a temporary basis until such time as the recognition status of the unit is clarified.

The agreement between IAM and APGC in the present case provided for dues withholding when authorized by employees in the APGC unit. The Assistant Secretary, as already mentioned, found that DSA violated section 19(a)(5) and (1) of the Order by refusing to maintain this agreement, and that DSA additionally violated 19(a)(1) by threatening to terminate the dues withholding authorized under this agreement 6 months after the 15 unit employees were transferred to DSA, if no representation petition was filed. Since these findings as to the illegality of DSA's conduct relating to the termination of dues withholding were predicated on the conclusion that DSA was bound by the IAM-APGC agreement, he did not reach the question as to whether DSA's conduct was consistent with the above-quoted CSC regulations, as required under section 21 of the Order.

We have previously rejected the co-employer doctrine upon which the Assistant Secretary based DSA's liability under the agreement; and, for reasons indicated under Issue 4, supra, even if DSA were a "successor" to APGC with respect to the transferred employees, DSA would not be bound by the APGC

agreement. Accordingly, we turn to the question of whether DSA's conduct conformed with the applicable CSC regulations.

The regulations issued by CSC, sanctioning the temporary extension of dues withholding arrangements following an agency reorganization, are plainly consistent with and implementive of the language and purposes of the Order.^{21/}

Further, without passing upon whether section 550.322(d) of the CSC regulations is mandatory in nature, we find that DSA completely satisfied the policies set forth therein. More fully in this regard, the stipulated record shows that DSA, by letter of March 21, 1973, requested an interpretation by CSC of section 550.322(d), questioning particularly whether it would be consistent with that regulation to extend dues allotments of employees transferred during this reorganization "for six months plus whatever additional time is required to process any petition filed during that period through the Labor Department." On March 23, 1973, CSC provided such interpretation, which among other things, set forth the underlying intent of the regulations^{22/} and answered in the affirmative the question as to the consistency of the continued dues withholding with the subject regulations.

In accordance with established Council practice, we hold that the interpretation by CSC of its own regulations is binding upon the Council.^{23/} And as it is clear that DSA, in its conduct with respect to terminating dues withholding in the instant case, strictly adhered to CSC's interpretation of section 550.322(d), we find that such conduct complied with CSC regulations as required under section 21 of the Order and was not thereby violative of section 19(a)(5) or section 19(a)(1) of the Order.

21/ Ibid.

22/ According to CSC:

The intent of Section 550.322(d) of the Commission's regulations is to reduce, to the extent possible, any adverse impact relating to dues withholding as a result of agency reorganizations and transfers of functions. To this end, the provisions of this regulation should be given a liberal interpretation in their application. Such interpretation allows the continued administration of existing dues withholding agreements pending the resolution of representation and successorship issues incident to agency reorganization.

23/ For application of this policy in an unfair labor practice case, see National Labor Relations Board, Region 17, and National Labor Relations Board, Assistant Secretary Case No. 60-3035 (CA), FLRC No. 73A-53 (October 31, 1974), Report No. 59.

ISSUE 6. Propriety of Extending Decision and Order to "Similarly Situated" Labor Organizations.

As previously stated, the Assistant Secretary found that, in view of the scope of the subject reorganization, a broad cease and desist order was warranted in the instant case. Thus, in addition to ordering DSA to cease and desist from refusing to recognize IAM and refusing to honor the IAM-APGC agreement, the Assistant Secretary also directed DSA to cease and desist from refusing to recognize "similarly situated labor organizations," and refusing to honor existing negotiated agreements of such organizations at other DPDO's.

Section 6(b) of the Order empowers the Assistant Secretary to require an agency or a labor organization to cease and desist from violations of the Order and to require such affirmative action to be taken as he deems appropriate to effectuate the policies of the Order. While we reaffirm the Assistant Secretary's authority to fashion appropriate remedies, we also reaffirm the Council's authority to review such remedial orders under section 4(c) of the Order.^{24/} Based upon such review herein, while we do not rule that broad cease and desist orders may not be appropriate in any instance, we find that such broad remedial action would not effectuate the purposes of the Order in circumstances such as here presented.

Few problem areas in Federal labor-management relations may involve a greater variety of facts and circumstances or greater potential for different results than issues arising out of agency reorganizations. As pointed out in the Report accompanying E.O. 11838 concerning the status of negotiated agreements during reorganizations:^{25/}

Each reorganization presents distinct labor-management relations problems when it affects employees in units of exclusive recognition and the problems are compounded when the affected units are covered

^{24/} As the Council stated in the AVSCOM case, note 2, supra, at p. 5 of Council decision in AVSCOM:

While the Assistant Secretary possesses this authority, it is equally clear that the Council may review his remedial requirements in the same manner and pursuant to the same standards as other issues reviewed by the Council. Section 4(c) of the Order provides that the Council may, at its discretion, consider appeals from Assistant Secretary decisions, and we view the remedial portion of a decision as an integral part of a decision. Accordingly, where questions arise with respect to remedy, the Council may accept such a question for review, consistent with its requirements for review as set forth in section 2411.12 of the Council's rules of procedure.

^{25/} Labor-Management Relations in the Federal Service (1975), at p. 50.

by negotiated agreements or dues withholding arrangements. Reorganization situations can give rise to a number of appropriate unit, recognition and agreement status questions. Additionally, those questions can involve myriad combinations of variable factors.

The Council has concluded that in view of the wide variety of representation questions that can emerge from the diverse factual configurations of the agency reorganization situations that have been experienced, or that can be envisioned, a contextual approach to resolution of those problems is required. The need to ensure an equitable balancing of the legitimate interests of the agencies, labor organizations and employees involved in reorganizations, as well as the paramount need to ensure the protection of the public interest in all instances, counseled this course of action.

Accordingly, the Report recommended (and the President adopted this recommendation) that:

Each reorganization-related problem should be dealt with on a case-by-case basis within the particular factual context in which it has arisen. Any policies, principles or standards deemed necessary in this area of the program should be formulated and declared in the context of a case decision on the basis of the policies contained in the existing provisions of the Order rather than through amendment of the Order.

In the instant case, the Assistant Secretary was called upon to determine the respective rights and obligations of IAM and DSA with respect to DPDO employees at Aberdeen Proving Ground who were transferred to DSA from the APGC unit. The resolution of these matters, as discussed hereinbefore, requires determinations as to unit appropriateness, substantiality of transfers, existence of questions concerning representation, bona fides of the agency, and the like. No other labor organization was a party to the proceeding and the critical circumstances necessary to the disposition of these questions in the context of other units and other components were not stipulated or developed in the record.

Thus, a broad cease and desist order not only conflicts with the case-by-case requirement in the Order for resolving reorganization-related problems, but also the essential facts upon which to predicate the necessary findings and determinations by the Assistant Secretary, for purposes of deciding compliance with his broad order, are not even presently available. As a consequence, substantial expenditures of time and funds would be required by the labor organizations, DSA and the Assistant Secretary to conduct extensive proceedings relating to compliance. Moreover, additional expenditures would be required in those instances where the labor organizations were found not to be "similarly situated" and where separate representation or unfair labor proceedings were thereafter initiated.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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In summary, while we commend the apparent objective of the Assistant Secretary to reduce the multiplicity of proceedings deriving from the subject reorganization, we repeat, as stated in our discussion of Issue 2, supra, that the resolution of such problems must be consistent with the purposes of the Order and such problems may be averted by established adjudicative techniques. Here, the broad cease and desist order of the Assistant Secretary would be contrary to the contextual approach to reorganization situations required by the Order. Moreover, such a broad order would be counter-productive and inappropriate, since it would potentially enhance the multiplicity of proceedings and would impose unnecessary expenditures of time and money upon labor organizations and agencies, contrary to the public interest.

Accordingly, we find that the Assistant Secretary improperly extended his decision and order to "similarly situated labor organizations" and we set aside his decision and order in that respect.

CONCLUSION

For the foregoing reasons and pursuant to section 2411.18(b) of the Council's Rules and Regulations, we set aside the Assistant Secretary's decision and order and remand the case to him for appropriate action in a manner consistent with our decision herein.

By the Council.

Henry B. Frazier III
Henry B. Frazier III
Executive Director

Issued: December 9, 1975

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In the Matter of
SOCIAL SECURITY ADMINISTRATION
MID-AMERICAN PROGRAM CENTER, BRSI
Kansas City, Missouri
Respondent
Case No. 60-3837 (CA)
and
SOCIAL SECURITY LOCAL 1336
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES AFL-CIO
Complainant
.....

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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 24, 1974 and filed September 25, 1974 alleging violations of Sections 19(a) (1) and (2) of the Executive Order. An amended complaint, dated

December 12, 1974 and filed December 13, 1974, alleged the same facts to constitute violations of Sections 19(a)(1) and (6) of the Executive Order. At the hearing the complaint was again amended to reinstate the contention that the alleged conduct was also a violation of Section 19(a)(2).^{1/} The Respondent filed a response to the complaint dated October 9, 1974, a further response and Motion to Dismiss dated October 31, 1974, and a response dated December 23, 1974 to the amended complaint. The response to the amended complaint also included a Motion to Dismiss.

The complaint alleged that during the course of processing a grievance over a performance appraisal of Mrs. Normal Dennis Gough^{2/} in which she was represented by the complainant by T. Jerry Cook, a head steward, Elmer Harris, Mrs. Gough's Section Chief (and second level supervisor) frequently referred to a chart he maintained and refused to make it available to Mrs. Gough or Mr. Cook, thereby depriving her of adequate presentation of her grievance. It alleged also that on November 27, 1973 and on March 21, 1974 Mr. Harris stated that if Mrs. Gough had spent less time on union activities and more time on her official duties she would have been promoted.

On December 23, 1974 the Assistant Regional Director issued a Notice of Hearing and in an accompanying letter referred the Motion to Dismiss to the Administrative Law Judge pursuant to Section 203.18(b)(1) of the Regulations. On March 7 and 9, 1975 the Assistant Regional Director issued Orders Rescheduling Hearing.

A hearing was held before me on July 16, 1975 at which the Complainant was represented by counsel and the Respondent was represented by a Management Representative. Both sides filed posthearing briefs and the Respondent was permitted to file a reply brief which was filed on October 10, 1975.

Facts

In February 1974 Mrs. Gough, a benefit authorizer, received a performance appraisal of her work for the eighteen months ending January 31, 1974. She was dissatisfied with

^{1/} This was done over the mild, expressly not a strong, objection of the Respondent. Tr. 23-24.

^{2/} During the time of the events covered by the complaint the grievant's name was Mrs. Norma Dennis and became Mrs. Norma Dennis Gough before the hearing.

the appraisal given her and filed a grievance. Mrs. Gough was the head steward at that time of the post-entitlement branch of the Respondent, where she was employed, and was elected Chief Steward of the Complainant in December 1974.

The A.F.G.E. was certified as the exclusive representative under Executive Order 10988 of a national unit of employees of the Social Security Administration's Program Centers of the Bureau of Retirement and Survivors Insurance. Mrs. Gough was employed by the Respondent in that unit. Social Security Local 1336, the Complainant, acts for A.F.G.E. in representing the members of that unit employed in the Mid-America Program Center in Kansas City, Missouri. Mrs. Gough requested the Complainant to represent her in processing her grievance over her performance appraisal and T. Jerry Cook, another head steward, acted for the union.

The first step in processing the grievance was a written submission to Mrs. Gough's immediate supervisor, Laurence N. Hughes, the head of Gough's unit. That step was unavailing. The next step was an oral presentation to Elmer Harris, the Section Chief. There were seven units in the Section with each unit having about fifteen benefit authorizers. In the course of a three-hour discussion among Harris, Cook and Gough, on March 21, 1974, Harris at times referred to a "chart" he kept on his desk. The chart was a tabulation of the performance appraisals of all the employees in Harris' section broken down by units and class of employee. It showed the rating given each employee in each aspect of the employee's work that was appraised. It had been prepared by Harris for his own use; it was not an official document.

The evidence is in conflict on whether Harris was asked to show the "chart" to the union during the March 21 conference so that it could adequately present Gough in her grievance. Gough testified that she and Cook asked for it and that Harris refused to furnish it. Cook, her union representative, testified that he did not ask for it at that meeting^{3/} and was uncertain whether Gough asked for it,^{4/} and Harris flatly denied that either Gough or Cook asked him to see the chart to which he was referring from time to time. I credit the testimony of Harris; in any event there is no evidence, none at all, that a representative of the Complainant, in that capacity, asked for the chart and was denied access. Further, the complaint does not allege that the chart was

^{3/} Tr. 96-97, 102, 104-5.

^{4/} Tr. 110-12.

asked for at any time prior to the "Notice of Order to Produce", dated June 10, 1974, described below. Although the pre-complaint unfair-labor-practice charge does so state, the omission of such assertion in the complaint must be taken as an abandonment of such contention. United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, A/SLMR No. 557 (September 16, 1975).

The result of the second step of the grievance procedure, the conference with Harris, was a slight improvement in Gough's appraisal. Gough and the union were still dissatisfied, resort was had to the third step, and no satisfaction obtained.

The fourth step was reference of the grievance to a Hearing Examiner for advisory arbitration. He advised some significant improvements in Gough's appraisal, and his advice was followed.

The hearing before the Hearing Examiner who rendered the advisory arbitration award was held and concluded on May 15, 1974. He rendered his advisory award on July 31, 1974.^{5/} On June 10, 1974, after the hearing before the Hearing Examiner had been concluded and while it was under consideration, the President of the Complainant Local, Arthur B. Johnson, sent by registered mail to Mr. Harris a "Notice of Order to Produce"^{6/} requesting him "to produce the chart you are maintaining listing all appraisals given to every employee in Section III for the rating period ending January 31, 1974." The "Notice of Order to Produce" stated that copies of the chart were to be furnished to Cook as representatives of Local 1336 and to Gough as the grievant.

Harris referred the "Notice" to HEW's Director of Management. He wrote a memorandum to Johnson on June 13 asking for the authority for the request, why the union believed it needed the information, what was the issue in the grievance, and why Johnson thought the requested information was relevant. Johnson did not respond to the Director of Management but instead on June 18 sent Harris another "Notice of Order to Produce" denominating it "Second Notice".^{7/} In it he stated that the chart was necessary to show the inequities in the rating system in Harris' Section and that

^{5/} Exhibit R-1.

^{6/} Exhibit C-4.

^{7/} Exhibit C-3.

the ratings were made on a curve instead of the actual work performance and that it would be used as additional evidence in Gough's appraisal grievance.

Gough testified also that at the March 21 conference Harris said that Gough was rated on the work she did in the 75% of the time she spent on the job since she spent 25% of her time (as permitted by the agreement between the parties) attending to her duties as a head steward. She testified also that Harris said that if she had not acted so much like a "mother hen" or "mother superior" she would have done better and possibly have been promoted. Cook testified that Harris made some reference to Gough being a "mother hen" which was detrimental to her rating, and thought Harris' reference to Gough's activities as a "mother hen" was probably a reference to her union activities. Cook had no recollection of Harris having said that Gough was rated on only 75% of her time; he testified however that Harris "gave the impression" that Gough's union activities were holding her back although he could recall nothing that Harris said that gave him that impression.

Harris denied that he said that Gough was rated lower because she spent only 75% of her time working on the job or said anything to indicate that Gough's union activities affected her rating or held her back. He could not understand how the phrases "mother hen" or "mother superior" could be thought to have been used in the conference. Hughes, although he discussed Gough's appraisal with Harris, did not hear him say that if Gough would cut down on her union activities and increase her work production she would more likely get promoted. I found Hughes and Harris both to be completely credible witnesses. I believe it more likely than not that Gough and Cook, especially the former, read into statements by Harris matters that were not there and certainly were not intended. Accordingly I find that Harris neither told Gough that she was rated as a 75% producer nor did he say or intend to imply that if she had spent less time on her union activities she would have received a better rating or been promoted.

There was much evidence, all of it irrelevant to any issue in this case, concerning the manner in which supervisors determined the appropriate performance appraisal and its conformance with prescribed guidelines.

Discussion and Conclusion

The Respondent vigorously contended, both at the hearing and in its brief, that Section 19(d) of the Executive Order precludes us from entertaining the complaint.

Section 19(d) provides in 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....

The Respondent argues that since the grievance procedure was followed over Gough's performance appraisal, the complaint in this case, involving Gough's appraisal, may not be pursued. Such argument misconceives the issues in this case or in the grievance that was pursued or both. The grievance was over the performance appraisal of Mrs. Gough. The complaint in this case is not that Gough's performance appraisal was unjust or in violation of the Executive Order on other provisions of law; the complaint arises from the Complainant's contention that in processing Mrs. Gough's appraisal the Respondent improperly denied certain information to the Complainant which the Complainant allegedly needed properly to represent Mrs. Gough in presenting her grievance and that this was allegedly a violation of Section 19(a)(6) of the Executive Order. The denial of the information to the Complainant never was the subject of a grievance and therefore Section 19(d) does not preclude entertainment of the complaint.

The failure of the Respondent to furnish to the Complainant Harris' "chart" was not a violation of the Executive Order (Section 19(a)(b)) for several reasons.

It is a violation of Section 19(a)(6) for an agency to refuse information (with certain exceptions) to an exclusive representative necessary for it to perform its functions effectively as the representative of the employees in the unit. See, e.g., Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289 (1973). Assuming the chart would have enabled the Complainant to have presented the grievance more effectively, the

Complainant did not ask for it at such time. It did not ask for it at any time prior to presenting the grievance at any of the four stages of grievance processing. The first, second, and third steps of the grievance procedure had been fully completed. The fourth step, advisory arbitration, had been partially completed, i.e., the presentation of evidence to the arbitrator had been completed, and the hearing closed and there remained only the issuance by the arbitrator of his advisory award which was issued on July 31, 1974. The first time the Complainant requested the chart was on June 10, 1974, four weeks after the hearing had been closed. There is nothing in the record that shows that receiving the chart at that date would have been of any utility to the Complainant and would have satisfied anything more than its academic interest.

The Complainant argues that had it been given a copy of the chart when requested it could have forwarded it to the Secretary of HEW for further consideration.^{8/} But there is nothing in the record that shows that the submission to advisory arbitration was not, as is usually the case, the final step of the grievance procedure. And it is hardly to be believed that even if the Secretary "considered" the matter he would consider reversing the decision below on the basis of evidence not submitted or attempted to be submitted at any of the four previous steps. Assuming the chart should have been furnished if timely requested, it was not timely requested.

Furthermore, the "chart" contained confidential information. It was a tabulation of the appraisals given to each of the more than 100 employees in Harris' Section showing the appraisal in each category for each employee, identifying the employee.

While an employee is entitled to see his own appraisal, he is not entitled to see the appraisal of another employee except under circumstances not here applicable. National Labor Relations Board, Region 17 and David A. Nixon, FLRC No. 73A-53 (October 31, 1974). Cook, the grievant's representative, assumed correctly that the chart showed the appraisals for the entire section.^{9/} Yet when the request for the chart was belatedly made it was a request for the chart, not for a "sanitized" version of it with the names deleted.

^{8/} Tr. 188

^{9/} Tr. 97

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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See National Labor Relations Board, FLRC No. 73A-53, supra. The Complainant knew or should have known that if the chart contained, as it did and as the Complainant assumed it did, the names and appraisals of all the employees in the Section, that Harris could not properly have furnished it. The Federal Personnel Manual prohibited such disclosure. Chapter 335; F:RC No. 73A-53. Accordingly, not complying with the request that it be furnished, even if the request had been timely, was not a violation of Section 19(a)(6) of the Executive Order. But the request was not timely.

The remaining issues, - revolving around whether Gough was given a lower performance appraisal and was denied advancement because of her union activities and the time she spent on behalf of the union, - turn on credibility issues. I have resolved these under the caption "Facts" in favor of the Respondent. According, the complaint should be dismissed.

Recommendation

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: December 9, 1975
Washington, D. C.

.....	:	
In the Matter of	:	
	:	
U. S. Department of Commerce,	:	
U.S. Merchant Marine Academy	:	
Kings Point, New York	:	
	:	Case Nos. 30-5454 (CA)
	:	30-5455 (CA)
Respondent.	:	
and	:	
	:	
United Federation of College Teachers,	:	
U.S. Merchant Marine Academy Chapter,	:	
Local 1460 of NYSUT, NEA/AFT, AFL-CIO	:	
Complainant	:	
.....	:	

Michael J. McMorrow, Esq.,
and Edna Bee
Washington, D.C.
For the Respondent

Donald R. Paquette, Vice Chairman
Local 1460
Kingspoint, New York

and

William Carpenter, Field Representative
New York, New York
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

Decision

Statement of the Case

Pursuant to a complaint filed on February 19, 1974, in case No. 30-5454 alleging that the U.S. Department of Commerce violated Sections 19(a)(1) and (6) of Executive

Order 11491, as amended, and an additional complaint filed on the same date in Case No. 30-5455 alleging the U.S. Merchant Marine Academy violated Sections 19(a)(1), (5), and (6) of the Order, the Assistant Regional Director for the New York Region issued a Notice of Hearing on Complaint and an Order Consolidating Cases on September 6, 1974. The gravamen of the complaint in Case No. 30-5454 was that the U.S. Department of Commerce (hereinafter called the Respondent Agency) engaged in dilatory actions and refused to negotiate in good faith with the United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460 of NYSUT, NEA/AFT, AFL-CIO (hereinafter called the Complainant Union) as the exclusive representative of the faculty members regarding two specific salary items. These particular items were found to be negotiable in a decision issued by the Federal Labor Relations Council on November 20, 1972 (FLRC No. 71A-15). The complaint in Case No. 30-5455 alleged that the U.S. Merchant Marine Academy (hereinafter called Respondent Academy), a subordinate activity of Respondent Agency failed to negotiate in good faith by engaging in a unilateral interpretation of a provision in the collective bargaining agreement in order to terminate the agreement, and further, by unilaterally terminating the collective bargaining agreement in an effort "to effect the agency's purpose in a salary dispute."

Hearings were held on the issues presented in these cases on October 8, 10, 11 and 17, 1974 in Kingspoint, New York. All parties were represented and afforded full opportunity to present a relevant evidence and testimony and to cross examine witnesses. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, 1/ including my observations of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make

1/ Both the Complainant and the Respondent filed requests for correction of the official record in this matter. The Complainant noted that the index pages of the transcript did not indicate the page numbers where certain of Complainant's exhibits were received in evidence. Accordingly, the transcript is hereby corrected to show (Cont'd on next page)

the following:

Findings of Fact

A. Background Facts

The controversy involved in this matter has a lengthy history. The Complainant Union has been the exclusive bargaining representative of the teaching faculty at the Respondent Academy since 1965. 2/

(Footnote 1 cont'd)

the following:

<u>Complainant Ex. No.</u>	<u>Page Rec'd</u>	<u>Complainant Ex. No.</u>	<u>Page Rec'd</u>
1	66	8	125
2	72	18	242
5	121	21	241
6	121	22	241
7	121	23	241

On October 29, 1974, Respondent Agency submitted two copies of the Assistant Regional Director's letter rejecting Respondent's Offer of Settlement. It was agreed at the hearing that said letter would be in evidence as a joint exhibit. It is therefore received as Joint Exhibit No. 3 and made a part of this record as Appendix A, attached hereto.

On November 5 and 13, 1974, Respondent Agency submitted voluminous line corrections to portions of the transcript. Upon review of my notes and the record I find the Respondent's corrections to be substantially accurate. The record is therefore corrected in the manner set forth in Respondent's requests attached hereto as Appendix B and C respectively.

2/ The Merchant Marine Academy is an operating unit within the Maritime Administration, which in turn is a primary operating unit within the U.S. Department of Commerce.

On February 13, 1968, the Complainant Union and Respondent Academy entered into a collective bargaining agreement. This agreement was in conformity with the then existing Executive Order and Agency Regulations. Because the Respondent Agency took the position that Section 216(e) of the Merchant Marine Act of 1936, as amended, authorized the Secretary of Commerce to establish faculty compensation scales and this authority was not delegated to the Respondent Academy, the agreement specifically excluded provisions for faculty salary. 3/

The faculty salary scales were set by Maritime Administrator's Order 181 (AO-181) which was based on the salary grades and classifications established at the U.S. Naval Academy. 4/ However, the salary scales were 120 percent higher at the Respondent Academy because the duty status for its faculty was 12 months as contrasted to 10 months for the Naval Academy faculty.

Although the negotiated agreement excluded salary items, Complainant Union continued to insist that faculty compensation was a negotiable matter, and sought to negotiate a change in the faculty salary provisions

3/ The specific provision in the collective bargaining agreement relating to faculty compensation provided as follows:

Article XIII

Faculty Salary

Section 216(e) of the Merchant Marine Act of 1936, as amended, authorizes the Secretary of Commerce to establish faculty compensation scales. This authority is not delegated to the Academy, consequently this Agreement does not include a negotiated Article on salary. Faculty compensation scales are appended to this Agreement.

4/ The legislative history of the amendments to the Merchant Marine Act indicates that Congress intended for the Merchant Marine Academy salaries to be "comparable" or "similar" to those of the faculty of the U.S. Naval Academy. H.R. Rep. No. 542, 87th Cong., 1st Sess. 3, 9 (1961); S. Rep. Ep. No. 177, 87th Cong., 1st Sess. 3 (1961).

contained in AO-181. The Complainant Union proposed to reduce the number of steps from entry to the top of the grade in the current schedule, and further sought to increase the salary differential from 120 percent to 133 1/3 percent of the Naval Academy scale. The Respondents resisted these proposals on the ground that faculty salary was non-negotiable. 5/

The dispute between the parties was first submitted to the Federal Services Impasses Panel, but that forum subsequently declined jurisdiction because of the Respondent Agency's position that the matter was not negotiable. Finally, the issue was presented to the Federal Labor Relations Council on an appeal from the non-negotiability determination.

On November 20, 1972, the Council issued a decision in which it found that the Complainant Union's proposals regarding faculty compensation were negotiable under Section 11(a) of the Executive Order. In so doing, the Council held, among other things, that Section 216(e) of the Merchant Marine Act did not expressly or impliedly preclude negotiation of faculty compensation; nor did AO-181 limit the Respondent Agency's obligation to negotiate with the Union on the subject of faculty salaries, even though the subject was covered by that directive. FLRC No. 71A-15 (Complainant Union Exhibit No. 2).

It is the events following the decision of the Federal Labor Relations Council which give rise to the dispute in this consolidated matter.

5/ The Respondent Agency asserted that faculty salary scales were "governed by Maritime Administrator's Order 181, the agency's personnel policy issuance for the faculty, which is not subject to negotiation." The Respondent's position was that the Union would be consulted about any future changes in compensation policy, but that future pay proposals "would not be the subject of negotiation." (Emphasis supplied). Complainant Exhibit No. 9.

B. The Attempt of the Parties to Negotiate Ground Rules for the Substantive Negotiations.

After the Council decision, Will, Director of Personnel for Respondent Agency, wrote the Chairman of the Union on November 29, 1972, suggesting a meeting between representatives of the parties. Will proposed that the meeting take place "soon after the first of the year." 6/ The union representatives did not respond until January 31, 1973, and they proposed that the parties meet during the latter part of February or early March. 7/ Will replied on February 15, 1973, that Maritime Administration officials would contact the representatives of the Union to propose a complete review of the collective bargaining agreement, and suggested that it would be more productive if all matters were considered at one time. 8/

On March 6, 1972, Captain Krinsky, Academic Dean of Respondent Activity, met with the union representatives in his office, at his request. Krinsky told the union officials that the personnel representatives of the Maritime Administration responsible for negotiations were actively involved in revising AO-181 and were also involved in other matters affecting personnel at the Academy. Because of these demands on their time, Krinsky requested a delay in commencing negotiations on the salary matters. Although the union representatives were anxious to begin negotiations, they agreed to a delay with the express caveat that the salary matters be given first priority when the parties

6/ Complainant's Exhibit No. 12.

7/ According to the testimony of the union representatives, they had been occupied with problems created by a proposed reduction-in-force and a grievance involving the dismissal of an assistant football coach in addition to their normal academic responsibilities at the Academy. These matters precluded a response to Will's letter until the end of January.

8/ Complainant's Exhibit No. 13.

began their discussions. 9/

On April 25, 1973, the representatives of the parties met at Kingspoint to negotiate the "ground rules" for the substantive negotiations. The Complainant Union negotiating group was headed by Commander Wells of the faculty. The Respondents' Chief negotiator was John M. Golden, Director of Personnel for the Maritime Administration.

The parties immediately found themselves in conflict not only over the ground rules for the substantive negotiations, but also over the scope of the issues to be negotiated. The uncontroverted testimony discloses that the Respondents took the position that the entire collective bargaining agreement had to be negotiated because it contained provisions which were not in conformity with the current Executive Order; notably the grievance procedure. 10/ The Respondents offered to negotiate the salary matters first, and then delay implementation of those items until a complete new agreement had been negotiated. The representatives of the Complainant Union found this unexceptionable, and steadfastly maintained that they were only interested in negotiating the salary matters as authorized by the Council's decision. In addition to disagreement on the scope of negotiations, the parties disagreed on the basic ground rules. The Respondents proposed to hold the negotiating sessions alternately in Kingspoint and in Washington, D.C. The past practice had been that all negotiations were held at Kingspoint or at the Regional Office of the Maritime Administration in New York

9/ There is some conflict in the testimony concerning whether the Respondents requested a delay solely for the purpose of revising AO-181 or because management officials were engaged in several administrative matters affecting the Academy. I do not find it necessary in treating the issues here to determine whether the work involved in revising AO-181 was the sole cause for the request for delay in negotiations. It is sufficient that a delay was requested and the union officials agreed thereto.

10/ The Respondents maintained that there were other provisions which were likewise outdated because of the amendments to the Executive Order.

City. 11/ The union representatives took issue with this proposal and insisted that the meetings be held either at Kingspoint or at the Manhattan Regional Office. They pointed out that they had ongoing duties at the Academy, and travel to Washington, D.C. would interfere with their responsibilities to the students.

Another issue in dispute was the proposal of the Respondents that the negotiating temas be limited to four representatives and four alternates on each side, and that the names of the negotiating committees be exchanged at the first session. The Complainant Union took the position that this would restrict them in terms of the composition of their negotiating committee. Moreover, they wanted to be free to have representation from their parent union whenever possible.

A third point of departure between the parties was the official time to be agreed upon for the faculty representatives of the union negotiating committee. The Respondents took the position that official time could not exceed a total of 40 hours during the negotiation, while the union representatives insisted that the official time allotted should be 40 hours for each member of its negotiating committee.

The discussion between the parties lasted several hours and Golden undertook to reduce to writing the pre-negotiating terms, as he understood them. He signed a copy and had it delivered to the union representatives the following day. The document, however, was nothing more than the original proposals advanced by the Respondents at the prior meeting. On April 30, 1973, Wells submitted a modification of the pre-negotiation agreement to the Respondents. The modification provided for: (1) representation on the Union's committee by members of the parent union; (2) the holding of all meetings at Kingspoint; and (3) the grant of official time of 40 hours per representative of the Union committee. Golden rejected the Union's counter proposals in a letter dated May 4, 1973. (Respondent's Exhibit No. 5). The parties did agree, however, to meet again in an effort to resolve their differences on the basic ground rules.

11/ Golden testified that the authority to negotiate salary matters was vested in the Secretary of Commerce and was delegated by him to the Director of Personnel of Commerce. According to Golden, in the past there were personnel employees in the field office who had the capability of negotiating salary matters on behalf of the Director, but following a severe reduction in Maritime Administration staff this capability was now centralized in Washington, D.C.

On May 22, 1973, the representatives of the parties met at Kingspoint. The chief spokesman for the Complainant Union at this meeting was Professor Drucker. Neither of the parties retreated from their prior positions on the pre-negotiation terms. The Respondents continued to insist that it was necessary to negotiate an entire agreement, but were willing to deal with the salary matters first and hold any agreement reached in abeyance until a new contract had been negotiated. The Complainant Union adamantly opposed this condition. The Union also insisted on 40 hours official time per representative and that the meetings be held at Kingspoint or in New York City. Finally, Golden offered to meet with the union representatives at Kingspoint on all contract matters, other than salary items. He proposed holding alternate sessions between Kingspoint and Washington, D.C. on the salary items. The Union rejected this proposal, citing the necessity for its faculty to remain available to the students at the Academy. Golden then offered to hold alternate salary sessions at Cherry Hill, New Jersey - a geographic mid-point - rather than Washington, but the Union representatives maintained that this was not a satisfactory solution.

The meeting ended with the parties still in disagreement. The union representatives charged the Respondents with engaging in dilatory tactics and refusing to bargain in good faith. The parties did agree, however, that they would study each other proposals and meet again.

On June 5, 1973, the Complainant Union charged the Superintendent of the Respondent Activity with commission of unfair labor practices in violation of the Executive Order. The charge asserted that the Respondent Activity refused to negotiate the salary issues unless the Union agreed to reopen and negotiate the entire existing collective bargaining agreement. In addition, the Complainant Union charged bad faith negotiations in that the Respondents insisted on conducting negotiations in Washington, D.C. instead of Kingspoint, New York, as had been the past practice.

On June 7, 1973, Golden wrote to Wells suggesting that the parties continue the pre-negotiation discussions "at the earliest practical date." He proposed meeting in Washington, D.C. on June 19 or 21, 1973, but left the precise choice of dates to the Union. In a letter dated June 14, 1973, Commander Ferenczy, Chairman-Elect of the Complainant Union, took the position that it would serve no useful purpose to meet until the unfair labor practice charge had been

satisfactorily resolved. There was no further contact between the parties on the contract negotiations until Golden replied to the unfair labor practice charge on July 3, 1973. The Complainant Union took issue with the response of the Respondents to the unfair labor practice charge, and on August 21, 1973, Ferenczy restated the Union's position; that no useful purpose would be served in meeting until the charges were resolved. 12/

It should be noted that while the parties were engaged in discussions on the ground rules for the substantive negotiations, they were also involved in discussions on the proposed revision of AO-181. A draft proposal had been given to the Complainant Union on April 24, 1973. The Union took the position that the matters contained in AO-181 were subject to negotiation and suggested a pre-negotiation conference on the subject matter. On August 2, 1973, Golden replied that the Respondents did not consider AO-181 to be negotiable. He did state, however, that the Respondents were willing to meet with the Complainant Union and discuss their proposed changes in the faculty policies in order that the Respondents could understand and give "full consideration" to the Union's recommendations. Consistent with this reasoning, Golden took the position that a pre-negotiation conference was not needed.

Although the specific charges here do not relate to AO-181, it has particular significance in this matter because it contained a section relating to faculty salaries. The proposed revision specifically acknowledged that the Council had ruled the percentage factor used to adjust the salary schedule to the Naval Academy salaries and the number of steps in each rank were subject to negotiation. 13/

On October 26, 1973, William Carpenter, a newly assigned field representative from the parent union, wrote to Golden requesting the parties meet to resolve the pending unfair labor practice charge against the Respondents. Three days later, October 29, the Superintendent of the Respondent Activity, on instructions from Golden, sent a letter to the Union giving notice of intention to terminate the collective

12/ The Union subsequently withdrew this particular unfair labor practice charge against the Respondent.

13/ The pertinent portion of the proposed revision of AO-181 provided as follows: [Continued on next page]

bargaining agreement. The Superintendent stated that the current agreement was not in accordance with the provisions of the Executive Order, as amended. Under the terms of Article XX of the agreement, 14/ the letter was notification of an intention to terminate the agreement in its entirety, effective December 13, 1973. The Respondent Activity expressed an intention to negotiate a completely new agreement with the Complainant Union, and indicated that management representatives would be available to meet for this purpose.

13/ [Continued] 11.02 Faculty Salary Schedule. The faculty salary schedule is based on the first 48 steps of the U.S. Naval Academy Civilian Faculty Salary Schedule adjusted to 120% in recognition of the longer academic year. (The Federal Labor Relations Counsel, in its decision of November 21, 1972, ruled that the percentage factor used to adjust the Naval Academy salary schedule and the number of salary steps for each rank are subject to negotiation with the Academy Chapter of the United Federation of College Teachers.)

14/ Article XX of the Agreement provided as follows:

ARTICLE XX

DURATION, REOPENING, AMENDMENT

Section 1. The effective date of this Agreement shall be the date of approval by the Academy and the United Federation of College Teachers.

Section 2. The Agreement shall remain in full force and effect for one year following date of approval or so long as the UFCT meets the requirement for exclusive recognition under E.O. 10988. Any change proposed by either party or intention to terminate the Agreement in its entirety, must be announced in writing not less than sixty days prior to the expiration date. Such notices must be acknowledged by the other party within ten days of receipt and a conference held on the subject of such notice within thirty days.

Section 3. If, by mutual agreement both parties find their interest adversely affected by any provision of this Agreement, or find through experience the necessity for adding further provisions, they shall negotiate an amendment for a supplement to the existing Agreement. Also, modification or amendment of this Agreement may be required because of changes in applicable statutory law or Federal Personnel regulations effectuated after the date of this Agreement. Any such amendments or supplements will be subject to review on the same date as the Agreement.

[Continued on next page]

The union representatives took the position that the collective bargaining agreement could not be unilaterally terminated by the Respondents. According to the Union's interpretation, Article XX would not permit termination of the collective bargaining agreement other than by mutual consent.

On November 20, 1973, a meeting was held between the union representatives and the academic dean. Krinsky repeated the intention of the Respondent Activity to terminate the contract under the provisions of Article XX. He refused to discuss the subject further on the ground that it was a matter for the attorneys. From the exchange of correspondence in the record, it is evident that the participants at this meeting agreed that the Christmas holidays would be the best time to engage in negotiations over the salary matters. They also agreed to have a meeting on November 28, 1973, to continue negotiations on the basic ground rules and to discuss the proposed revision of AO-181.

The parties met at the Academy on November 28, 1973, as agreed upon. Ferenczy and Carpenter were the chief spokesmen on behalf of the Complainant Union. Each party continued to adhere to its respective position on the three issues which were in dispute over the ground rules. In order to break the stalemate, Golden stated that he would be willing to withdraw all of management's proposals including those agreed upon, and start from scratch. 15/ After a lengthy discussion it became apparent to the parties that they would not reach an agreement on the ground rules and the meeting was adjourned.

14/ [Continued] Section 4. Except where otherwise provided by law, rule or regulation, such termination or amendment to this Agreement shall become effective on the date agreed upon by the duly authorized representatives of both parties.

15/ At the hearing the union witnesses testified that Golden flatly stated he was withdrawing all proposals, and they would have to start from scratch. Golden denied this, and testified that he was merely seeking a solution in order to get the negotiations moving. Considering that parties continued to attempt to negotiate the ground rules after Golden's statement, and considering that the Respondents did not in fact withdraw those items previously agreed upon, I credit Golden's version of the events.

On December 14, 1973, there was an exchange of letters between Golden and Ferenczy. Golden suggested that the parties meet during the Christmas vacation in Washington, D.C., to attempt to negotiate the salary matters. The union representative rejected the suggestion of meeting in Washington, D.C., but indicated a willingness to meet at Kingspoint. Ferenczy also indicated an intention to file unfair labor practice charges against the Respondents.

On January 11, 1974, Golden wrote to Ferenczy asking that the negotiations be resumed. In this letter, management retreated from its position regarding the location alternate meetings on the salary items and proposed that every third meeting be held in Washington. Management also withdrew its demand for exchange of the names of the members of the negotiating teams, but requested assurance of continuity of the members on the Union Committee. Management did not retreat, however, from its position regarding the amount of official time to be granted to the faculty representatives during negotiations.

The union response to management's proposals consisted of further counter-proposals. The union representatives acceded to management's limitation on the amount of official time to be allowed the faculty members on the negotiating committee. But the union representative continued to demand that the meetings be held at the Academy or in New York City. They also insisted that the negotiations be limited solely to the faculty salary items, and stated that the Union would proceed with the unfair labor practice charges against the Respondents.

On January 29, 1974, Golden wrote to Ferenczy setting forth the concessions management was willing to make and suggested the parties request the services of the Federal Mediation and Conciliation Service to resolve their differences. The Union did not consent to use of this procedure to resolve the dispute with management, but proceeded with the unfair labor practice charges against the Respondents.

Concluding Findings

The thrust of the argument advanced by the Complainant Union in Case No. 30-5454 is that the Respondents engaged in dilatory stratagems in order to avoid bargaining on the salary items found negotiable by the Council. The Complainant contends such conduct constitutes a refusal to bargain in

good faith as required by Executive Order. As support for its contention, the Complainant relies heavily on the fact that the Respondents insisted on broadening the scope of the negotiations to include bargaining for an entire new agreement rather than limiting the discussions to the specific salary matters. The Complainant also points to the proposals made by the Respondents for the ground rules as further evidence of an unwillingness to bargain in good faith. The insistence on having alternate meetings between Kingspoint and Washington, D.C.-- a departure from past practice; the request for the exchange of names of the bargaining teams-- viewed by the Union as limiting its committee composition; and the insistence on allotting a total of 40 hours official time for the faculty members of the Union Committee are cited as examples of the Respondents' efforts to avoid negotiating on the salary items.

While the frustration of the Complainant Union is understandable-- especially when one considers that the efforts to reach negotiations on the salary matters extended over a period of several years and involved appeals to two forums - I do not view the evidence in this record as supporting a finding that the Respondents failed to consult and confer or negotiate in good faith. The record evidence shows that the Respondents made the initial overture to commence discussions on the salary matters after the Council's decision in November 1972. Although there was a two month delay on the part of the Complainant Union in responding to this overture, it is quite apparent that both parties were seeking to start the bargaining process at a mutually convenient time. Nor is this conclusion altered by the fact that the Respondents requested a delay in starting the negotiations when representatives of the Union met with the Academic Dean in March 1973. The union representatives were informed that the management officials charged with the negotiating authority were occupied with several other administrative tasks affecting the Academy personnel; including drafting a revision of Administrator's Order 181. Although the union representatives made it clear that they did not want the proposed revision of AO-181 to interfere with the negotiations on the salary matters, they did agree to the short delay.

When the negotiating representatives of the parties finally met for their first meeting on April 25, 1973, they were sharply divided on both the scope of the substantive negotiations and the preliminary ground rules that were to control the bargaining procedure. The critical question to be considered here is whether the proposals advanced by the Respondents were such that they evinced a desire to

delay or impede the negotiations. In my judgment, they did not. The Union had an understandable singleness of purpose--to finally engage in negotiations on the salary items--after having fought so long for the opportunity to bargain on this subject. But the Respondents' proposal that the negotiations include the entire agreement was valid and legitimate in the circumstances of this case. There is no dispute regarding the fact that the existing collective bargaining agreement was negotiated according to the requirements of the prior Executive Order, and the grievance provisions, as well as several other minor provisions, were not in conformity with the current Executive Order. Hence, there was a valid basis for the proposal to broaden the negotiations to include an updating of the entire contract. The Respondents' insistence on enlarging the scope of the negotiations did not indicate an unwillingness to negotiate in good faith. To the contrary, their attempt to update the agreement in one series of negotiations is strong evidence of a desire to use the bargaining process to finalize a complete agreement with the Union and stabilize the bargaining relationship. The fact that the Respondents were willing to negotiate the salary items first further supports this conclusion.

The proposal to alternate the situs of the meetings, even though a departure from past practice, does not, without more, constitute a refusal to bargain. The Respondents offered a creditable explanation for this proposal--that the management officials vested with negotiating authority were now headquartered in Washington, D.C., and the burden of negotiating rested equally with the Union and management.

The request for the exchange of names of the members of the bargaining committees and limiting the committees to those so named was considered by the union representatives as an attempt to limit its selection of bargaining representatives. I do not view this proposal as having such a result. It is apparent that the Respondents were seeking to insure continuity among the negotiating committees in order to facilitate the bargaining process. But more important, nothing in this proposal was designed to dictate to the Union who its representatives should be on the bargaining committee.

While Management's position on the amount of official time it was prepared to grant to the faculty members on the negotiating committee might well be characterized as parsimonious, it was nevertheless within the range of the

amount of official time permitted by Section 20 of the Executive Order. 16/

In a case involving "official time" 17/ the Council referred to its 1971 Report to the President in which it stated:

In order to promote flexibility in the negotiations of agreements for the use of official time, we recommend that the limitations established by the Order on negotiations of such official time be in alternative forms, either: (1) a maximum of 40 hours; or (2) a maximum of one-half the total time spent in negotiations during regular working hours. These limitations refer to the amount of official time during normal working hours of the activity which may be authorized each employee representative in connection with the negotiation of an agreement, from preliminary meetings on ground rules, if any, through all aspects of negotiations, including mediation and impasse resolution processes when needed. (Emphasis supplied). Report and Recommendations on the Amendment of Executive Order 11491, Federal Labor Relations Council, June 17, 1971, p. 30.

The Council stated in the Philadelphia Metal Trades case that "the intent which is reflected by the language of Section 20 and of the Report was that while the general policy prohibiting official time for union negotiators should be retained, some relaxation of the prohibition would be permitted by providing a limited exception to the general

16/ Section 20 provides in pertinent part:

Sec. 20. ...Employees who represent a recognized labor organization shall be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to 1/2 the time spent in negotiations during regular working hours, for a reasonable number of employees, (Emphasis supplied)

17/ Philadelphia Metal Trades Council and Philadelphia Naval Shipyard, FLRC No. 72A-16 (April 27, 1973), Report No. 36.

policy. The exception provided was to permit the parties to negotiate, within stated ceiling, some limited provision for official time for union negotiators."

It is apparent that the Respondents here were prepared to negotiate for official time for the faculty members of the bargaining committee within the stated exception provided by Section 20 and the Council interpretation of its meaning. The mere fact that the Respondents were insisting upon an amount of time considerably less than that urged by the Union does not demonstrate a lack of good faith. The proposal was clearly within the intent expressed by Section 20. Moreover, Section 20 only sets the upper limits of the amount of official time that is permissible and does not preclude bargaining for a lesser amount.

Thus it is evident that the proposals advanced by the Respondents, when considered under all of the circumstances, do not reflect or manifest an intention to avoid the bargaining process or to delay the negotiations. Nor does the conduct of the Respondents during the protracted negotiations on the ground rules reflect an intent to violate the bargaining requirements of the Executive Order.

The evidence discloses that the Respondents were willing to meet at reasonable times and confer with representatives of the Union. The evidence also discloses that concessions were made by both parties, although concessions or agreement are not required by the Executive Order. Headquarters, U.S. Army Aviation Systems Command, A/SLMR 168 (June 27, 1972). While it is true that at the meeting in November 1973, Golden suggested that all proposals be withdrawn and the parties start from scratch, it is evident from the testimony that Golden was merely attempting to break the stalemate in the negotiations. Moreover, the parties continued to engage in negotiations after this statement was made, and the Respondents did not withdraw any agreed upon proposals from the bargaining table. In addition, the record discloses that it was the Respondents who suggested the parties use the services of the Federal Mediation and Conciliation Services to help resolve their dispute. Considering all of the circumstances, it can not be said that the Respondents were refusing to bargain in good faith with the complaint Union. To the contrary, the record indicates that while the Respondents were engaged in hard bargaining with the Union, they were making a good

faith effort to resolve their differences.

In view of the above, I find and concluded that the evidence in this record does not support the allegations that the Respondents were engaging in dilatory tactics and were refusing to negotiate and confer in good faith with the Union. In so doing, I am not unmindful that during the period of the protracted negotiations on the ground rules, the Respondents injected the issue of Administrator's Order 181, which included an item relating to the faculty salary scales. While the wisdom of requiring consideration of the proposed revision of AO-181 during the course of contract negotiations might well be suspect, it should be noted that the section relating to faculty salary specifically stated the salary scales and percentage ratio were subject to negotiation with the Union. Since the allegations here do not include a charge of refusal to bargain regarding AO-181, it can not be said that the Respondents were seeking to avoid negotiations on the salary items.

Accordingly, I recommend that the complaint in Case No. 30-5454 be dismissed in its entirety, and I find that the Respondents did not violate Sections 19(a)(1) and (6) of the Executive Order.

The allegations of the other complaint in this consolidated proceeding must also fall for want of support in the record. Article XX of the collective bargaining agreement contained a provision which purported to govern the duration of the agreement. Section 2 of that article provided that the contract shall "remain in full force and effect for one year following date of approval or so long as the UFCT meets the requirement for exclusive recognition under E.O. 10988." It is evident from a reading of this provision that the agreement was not for a clearly enuciated fixed term or period of duration. Treasury Department, U.S. Mint, Philadelphia, Pennsylvania, A/SLMR No. 45; National Center for Mental Health Services, Training and Research, A/SLMR No. 55; Department of Housing and Urban Development, Region II, A/SLMR No. 270. At the most, the agreement was for a fixed period of one year from the date of approval by the parties -- in this instance February 13, 1969 -- with no fixed term or duration thereafter. Although the agreement was valid and binding on the parties, it was subject to termination at will by either party after the expiration of the anniversary date.

Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania, A/SLMR No. 104; Veterans Administration, A/SLMR No. 240. 18/

The facts here show that the Respondents endeavored to get the Complainant Union to negotiate a complete new agreement which would conform with the current Executive Order. Because of the Union's continued insistence that negotiations be limited to the salary items, the Respondent finally gave notice of an intent to terminate the agreement. Since the agreement was terminable at will, the Respondents merely undertook to do that which it was entitled to do in any event. Moreover, in electing to terminate the agreement, the Respondents carefully followed the procedures set forth in the contract for termination. The mere fact that the termination occurred during the time that the parties were in a dispute over the scope of the negotiations does not convert an otherwise lawful act into an unlawful one. In my opinion, the Respondents were not seeking withdraw a recognition of the Union as the exclusive representative of the faculty employees nor were they attempting to avoid bargaining with the Union. Rather, the Respondents were employing a legitimate maneuver to ensure that the parties would have to bargain for an agreement which would conform in all respects with the Executive Order.

Accordingly, I find that the record evidence does not support a finding that the Respondents violated Section 19 (a)(1), (5), or (6) of the Executive Order.

In sum, viewing the totality of the circumstances presented here, I find that the Respondent Agency and the Respondent Activity did not engage in conduct which violated the Executive Order. I shall recommend, therefore, that the consolidated complaints in this case be dismissed in their entirety.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law I find that the Respondent Agency,

18/ Although the above-cited cases relate to contract bar situations in which it was held that contracts without a fixed term or duration cannot bar a timely filed petition for an election, I find no basis for withholding application of the principle that a contract of uncertain duration or term is subject to termination at will in an unfair labor practice situation.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



United States Department of Commerce, and the Respondent Activity, U.S. Merchant Marine Academy, Kingspoint, New York, did not engage in any conduct in violation of Sections 19(a)(1)(5) and (6) of the Executive Order and I recommend that the consolidated complaints herein be dismissed in their entirety.

Gordon J. Myatt
GORDON J. MYATT
Administrative Law Judge

Dated: October 31, 1975
Washington, D.C.

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In the Matter of
DEPARTMENT OF THE AIR FORCE
4392d AEROSPACE SUPPORT GROUP
VANDENBERG AIR FORCE BASE, CALIFORNIA
Respondent CASE NO. 72-4735
and
NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1001
Complainant
.....

Frank Sprague, Esq. and James Hunt
4392d Aerospace Support Group
Vandenberg Air Force Base, California
For Respondent

Marie Brogan, President
National Federation of Federal
Employees, Local 1001
P.O. Box 1935
Vandenberg Air Force Base, California
For Complainant

BEFORE: SALVATORE J. ARRIGO
Administrative Law Judge

REPORT AND RECOMMENDATION

Preliminary Statement

This proceeding heard in Santa Maria, California and at Vandenberg Air Force Base, California on December 3 and 4, 1974 and January 6 and 7, 1975 arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for

Labor-Management Relations (hereafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on November 14, 1974 with reference to alleged violations of Sections 19(a)(1), (2) and (6) of the Order as set forth in a complaint dated May 8, 1974 and filed by National Federation of Federal Employees, Local 1001 (hereafter called the Union or Complainant) against Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California (hereafter called the Activity or Respondent). The Union basically contends that Respondent during negotiations for a new collective bargaining agreement followed a course of conduct of bargaining in bad faith. 1/

At the hearing the parties were afforded full opportunity to adduce evidence, call, examine and cross examine witnesses and argue orally. Oral argument was waived and briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact and Conclusions of Law

1. The Negotiations in General

At all times material hereto the Union has been the exclusive collective bargaining representative for a base-wide (general) unit of the Activity's employees. 2/ The Union

1/ Since the complaint was filed on May 8, 1974, only matters which occurred within nine months prior to May 8, may be considered in establishing a violation of the Order. (See Section 203.2(b)(3) of the Regulations.) Accordingly, while I admitted into evidence some testimony and documents relative to events which occurred outside the time period covered by the complaint to provide background information and to shed light on events occurring within the time period covered by the complaint (National Labor Relations Board, Region 17 and National Labor Relations Board, A/SLMR No. 295) I shall discuss such testimony herein only to the extent necessary to resolve those matters which occurred in the nine month period between August 8, 1973 and May 8, 1974.

2/ The Union also separately represents a unit of the Activity's professional employees.

and the Activity were parties to a collective bargaining agreement which was approved on May 7, 1971 and expired on May 6, 1973. After a timely request that the agreement be renegotiated was made, the parties embarked on an extensive but fruitless attempt to agree upon the procedures or "ground rules" for negotiations. By letter dated May 4, 1973 the Union's president Mrs. Marie Brogan requested that the collective bargaining agreement be extended. The Activity's Civilian Control Branch Chief, Allan L. Coleman, by letter dated May 10, 1973 refused to extend the agreement stating, in part, that the grievance arbitration clause of the agreement did not conform to the requirements of the Order.

The disagreement with regard to ground rules continued until sometime in July 1973 when a Federal mediator convinced the parties to proceed with negotiations without ground rules. However one of the remaining obstacles to negotiations was the hours that the negotiations should occur. The Union wished to have negotiations conducted off duty time and the Activity wanted negotiations on duty time. With the assistance of the mediator the parties on July 23, 1974 ultimately agreed to an involved formula which provided that negotiations would occur on Tuesdays and Thursdays on duty time and each of two Union negotiators would be allowed forty hours of official duty time for this purpose. If after forty duty time hours were used further negotiations were required, the negotiations would then be equally split between on duty time and off duty time. If additional negotiation were required after the Union negotiators used forty hours of annual leave or leave without pay on this latter schedule, any negotiations which occurred on duty hours would be considered half official duty time and half leave without pay or annual leave. 3/

Negotiations on the agreement began on August 2, 1973. The Union did not wish to begin negotiations by exchanging a complete proposed agreement in that it felt such a procedure would be too time consuming. Accordingly, the parties initially agreed to take an article from the expired agreement, discuss their respective positions and submit a written proposal on that article at the next negotiating session. After three or four such sessions the parties concluded that little was being accomplished by following this procedure and mutually decided to designate a contract subject and each submit a proposal thereon at one meeting but not discuss the

3/ Although it agreed to this arrangement the Union was not entirely satisfied with it and throughout negotiations sought to deviate from it. However, the Activity held firmly to the agreed upon arrangement.

matter until the next subsequent session. Thus, the parties written proposal would constitute the agenda for that particular negotiating session. If the parties could agree to a proposal then they both "signed-off" on that article. When after discussion no agreement was reached, the matter was "tabled" and the parties proceeded to the next item on the agenda if another matter was scheduled for discussion. Numerous proposals were summarily rejected by both parties with minimal discussion. If no other item was scheduled for presentation the parties would adjourn until the next negotiating session was scheduled. Most meetings were adjourned by mutual agreement. However, on three or four occasions during negotiations the agenda was exhausted and the Union wished to discuss a matter that was not scheduled for discussion that day. On these occasions the Activity rigorously adhered to the parties procedural agreement and would refuse to discuss the matter stating it was unprepared to discuss the particular subject at that time in that no Activity position on the item had yet been formulated.

The parties made little progress in negotiation from August 1973 until March 1974 at which time the Federal Mediation and Conciliation Service entered negotiations upon the request of the Union. Prior to the intervention of the Federal mediators the parties had engaged in approximately twenty-two negotiating sessions and had agreed to only two or three "boilerplate" provisions of a new contract. After the mediator intervened the parties conducted approximately sixteen negotiating sessions between March 6, 1974 and July 2, 1974, eight of which were held with the assistance of the mediators. During this latter period of time in the process of reviewing all of the approximately forty-seven articles proposed for the new contract the parties agreed to approximately twenty-seven articles and two were withdrawn as proposals. ^{4/} The parties reached impasse in negotiations on July 2, 1974. Subsequently the parties forwarded to the Federal Service Impasses Panel for its consideration eighteen proposals on which they could not reach agreement, the Activity contending that approximately seven Union proposals contained items it determined were non-negotiable under the Order. During the negotiating sessions attended by the federal mediators the parties agreed to twenty-two articles and the withdrawal of the two articles mentioned above. The parties were only able to agree to five articles in negotiating sessions conducted

^{4/} The withdrawn proposals dealt with the subjects of dues withholding and the informal resolution of unfair labor practice charges.

without the presence of a mediator. ^{5/}

2. The Contentions of the Parties

Essentially Complainant contends and the Activity denies that the Activity bargained in bad faith during negotiations. Complainant alleges that Respondent's bad faith is demonstrated by: (1) the Activity's proposal to establish a Personnel Policy Review Committee (PPRC) and establishing similar organizations for the purpose of bypassing the Union in its dealings with employees; (2) bypassing the Complainant's president while developing the PPRC and dealing directly with selected Union personnel; (3) cancelling a formal negotiating session to conduct a consultation session in its place; (4) offering proposals during negotiations it "knew" would be unacceptable to the Union thereby demonstrating a desire not to reach final agreement on a contract and; (5) the Activity's refusal to fully utilize negotiating time by failing to discuss negotiable matters which were not on the agenda for a particular negotiating session.

3. The Alleged Unfair Labor Practice Conduct

a. The Personnel Policy Review Committee and Related Matters

The evidence reveals that sometime late in June 1973, James Hunt, Labor Relations Officer with the Activity, met with employee Leroy Grantski to discuss a labor problem. ^{6/} At that time Grantski was the Union's first vice-president and a Union steward for a segment of the base-wide unit as well as an alternate on the Union's team which was negotiating a contract for the professional unit. After concluding their discussion on the specific problem which gave rise to the meeting the parties entered a general conversation on ways to develop a better working relationship between the parties since at that time

^{5/} None of these articles were agreed upon while James Hunt was acting as the Activity's chief negotiator. Throughout the negotiation and apparently prior thereto the Union's chief negotiator and president Marie Brogan and the Activity's sometimes chief negotiator Hunt were personally highly suspicious and antagonistic towards one another.

^{6/} This account is taken from the testimony of Hunt. Grantski was not called as a witness by either party.

negotiations on the professional unit were "stalled". 7/ After some discussion Grantski indicated he would put together a proposal encompassing some of the concepts they had considered.

Subsequently, during negotiations in early July 1975 relative to the professional unit, Grantski presented management with a proposal for establishing committees to consider various aspects of employer-employee relations. The Activity indicated it would later submit to the Union its own proposal on the subject. Thereafter, in a meeting on July 16, 1973 attended by Grantski, Hunt submitted to Francis O'Neill, a vice-president of the Union and spokesman in charge of the professional unit negotiations 8/ a contract proposal providing for the establishment of a Personnel Policy Review Committee (PPRC). 9/ The plan closely followed Grantski's proposal and envisioned a steering committee and various work groups which would review and consider numerous subjects including careers, employee conduct, discipline and grievances, communications and other matters. The proposal provided, inter alia:

"Article # _____

"Section 1. EO 10988, 11491 and 11491, as amended, stress the desirability of employees having a voice in the establishment of working conditions.

"Section 2. Management recognizes the union as an effective vehicle through which employees may express their opinions.

7/ See Vandenberg AFB, 4392d Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435, ALJ finding p.8.

8/ Brogan was the alternate spokesman for this unit's negotiations.

9/ According to the testimony of Hunt and Alfred Van Nice, the Activity's Chief of Labor-Employee Relations, around this time the Activity was in the process of developing an overall labor relations plan for the base (VAFB Labor Relations Plan). The PPRC was not originally part of this endeavor, and it was not until after these discussions with Grantski in June and July 1973 that the PPRC concept was inserted into the base labor relations plan.

"Section 3. The Union recognizes the Vandenberg Personnel Policy Review Committee as the most effective way to have employee opinions influence policy determinations.

"Section 4. Management agrees to appoint employees from the Professional Unit to each of the work groups (except Supervisor's work group) set up by the Personnel Policy Review Committee. The union will name employees for such appointments. The total number of employee appointees to each work group will be equal to, but will not exceed the number of management representative. If there are employee appointees from other units on base the total of all employee appointees on each work group will not exceed the number of management representatives on each group.

"Article:

"Policies adopted as a result of the efforts of the Personnel Policy Review Committee, which are fully negotiable policies may be added to this contract as amendments within (time) of adoption."

O'Neill was primarily interested in how the negotiations could be concluded in a way which would provide a small but meaningful agreement with a grievance procedure. Hunt indicated he would give O'Neill a proposal for a contract which would contain a grievance procedure and encompass the policy review committee concept. Late in July Grantski told Hunt that employee reaction to the plan was mixed and Hunt had no further discussions with Grantski on the plan outside of negotiations. Hunt subsequently submitted another contract proposal relating to the plan to O'Neill but the record is silent with regard to further details concerning the matter until events of October 1973.

Around October 1, 1973, at the conclusion of a discussion with Brogan on a personal matter Hunt talked briefly with Brogan about the PPRC plan. Brogan acknowledged she was aware of the proposed plan and Hunt informed her that there would be a meeting late that week at which time the plan would be proposed to both the professional and base-wide units. Thereafter, Hunt invited Brogan and O'Neill to a meeting which was held on October 4, 1973. 10/

10/ The following account of the October 4 meeting is a synthesis of the testimony of Hunt, Brogan and O'Neill which individual testimony varies somewhat from person to person.

O'Neill invited and brought to the meeting Grantski and two other employees who were on the professional unit negotiating team. Brogan questioned Grantski's presence at the meeting and accused Hunt of bypassing her when dealing with the Union. 11/ Brogan also asked whether the meeting was for "negotiation" or "consultation". When Hunt replied "consultation" Brogan objected that the Activity had informed Brogan that they were preparing for a pending unfair labor practice hearing and accordingly a negotiating meeting for that day had been cancelled. Hunt told the Union that he called for a consultation meeting on October 4 so the meeting would not be charged against the Union's allotted forty hours of negotiating time. During the meeting Hunt gave the Union a copy of a proposal he drafted calling for the establishment of the Personnel Policy Review Committee. The plan was similar to that previously given to O'Neill in July 1973 and called for a complete indepth review of all working conditions affecting civilian employees at the Activity "with employees having a full voice." Hunt gave an explanation of the proposal and the parties engaged in some discussion as to the total number of people on each study group and the number from management and the Union. Negotiations on the agreements for both units would be suspended until the study groups developed proposals. 12/ Although Hunt and

11/ Grantski was an opposition candidate to Brogan for the Union presidency and in December 1973 Grantski was defeated in his effort to replace Brogan.

12/ Hunt testified as follows with regard to the intended operation of the plan:

"...It was envisioned that this would run from a year and a half to a two year study. So it was basically study groups. Initially we envisioned them as a joint union-management study group with proposals being developed and submitted to the Commander for his recommendation or for his consideration with the possibility of waivers being exchanged for Civil Service or Air Force regulations if this was a desirable end result in the studies.

"Another thing envisioned in the proposal was the fact that the union members sitting on the committee would not have to be concerned with official time in that it would be a study group rather than a negotiating team.

"The proposal envisioned ultimately the work policies coming out of there becoming a part of the labor-management contract at Vandenberg Air Force Base.
[Continued on next page]

Grantski were strongly in favor of the plan, the Union saw it as needlessly delaying negotiations on an agreement and Brogan interpreted the plan as a vehicle to bypass the Union. Accordingly, Brogan rejected the plan and accused the Activity of seeking to consult on the matter rather than negotiate on it so the Activity could unilaterally put the plan into effect after rejection by the Union. 13/ Hunt denied any intention to unilaterally implement the plan as presented but acknowledged that the Activity could proceed with a management examination of work policies and practices and thereafter afford the Union its full entitlement to "meet and confer" prior to changing any policies. The parties quarreled over the meaning of the obligation for consultation and negotiation under the Executive Order and decisions of the Assistant Secretary and Hunt and Brogan accused one another of trying to change each others words. At the conclusion of the meeting Brogan presented Hunt with a letter to the Activity dated October 4, 1973, signed by her, which stated as follows:

"Reference your plan to set up a steering committee regarding employee working conditions, promotion opportunities, etc. which was given to me informally at a meeting with Mr. Jim Hunt last week.

"This will confirm what I stated to Mr. Hunt concerning the proposed plan. I objected to the plan as outlined because it was not specific and appeared to be an additional system contrary to the labor-management structure which already exists. The plan will be submitted to the Union's executive committee, however, and then to the general membership and upon approval after some modification (contingent on a vote by the general membership) the results will then be submitted to the management as an article to be negotiated by the union and management teams.

12/ Continued. "So the project and the committee was a study group approach to the thing."

13/ The Union was convinced that the Activity was seeking to avoid negotiations on this and other matters. As the Union interpreted the situation, its refusal to agreed after "negotiations" would allow review by a third party (the Federal Service Impasses Panel) but if "consultation" took place the Activity could act unilaterally without review and without violating the Order.

"In the interim period until a new contract becomes effective, it will be appreciated if the Union representatives are given the opportunity to be present at any discussions held concerning changes of policy affecting the members of the bargaining unit."

Negotiations continued and the PPRC concept was not considered, until, by letter dated January 14, 1974, the Activity informed Mrs. Brogan as follows:

"1. In a number of informal discussions and at a formal meeting on 4 October 1973, management proposed the formation of a Personnel Policy Review Committee. At the meeting, both NFFE Local 1001 units were represented.

"2. The substance of the proposal was to establish a group which would review the full range of working conditions affecting civilian employees with the time of the review anticipated to be between one and one-half to two years. The purpose of the group was to develop proposals for the consideration of the Commander, spelling out changes and revisions in work policies and procedures, to provide Vandenberg with the most effective working climate for its civilian work force.

"3. In our proposal, we pictured work groups made up jointly of management and union representatives for the development of proposals. At the meeting, 4 October 1973, you stated that you disagreed with the proposal in toto but that you would present it to the union's executive board for discussion and a determination as to the union's role. We have had no reply from you since.

"4. In considering your verbal responses and your lack of formal response, it has been decided not to implement the project as proposed to you originally. Management does intend to conduct a management review of work policies, practices and procedures in the same depth as that envisioned in our original proposal, but the work groups will be comprised completely of management personnel. The exception to this would be the inclusion of a union representative from the International Association of Fire Fighters on work groups concerned with the work conditions of the Fire Department.

"5. The proposals developed by this management review group, before being presented to the Commander, will be presented to the union for comments and suggestions. In addition, individual work groups will ask the union to provide constructive input as specific topics are being discussed. The work groups will not seek employee opinions other than through union representatives. You can be assured that we will totally comply with our obligation to meet, confer and negotiate as appropriate."

The parties subsequently met in a negotiating session on January 29, 1974, at which time Hunt again submitted the plan to the Union for inclusion in the agreement. 14/

14/ Hunt testified that he resubmitted the PPRC plan partially as "one list shot" to try to get the Union's acceptance of the plan and partially in compliance with a prior Union demand that the Activity bring to negotiations a compilation of all prior management proposals. Such a request was made in a letter sent by Brogan to Hunt on October 13, 1974, charging the Activity with unfair labor practice conduct relative to the negotiations. That letter read, in pertinent part: "I ask as a remedy that all outstanding proposals which have been submitted to the Union for comments which are negotiable items be compiled into a management proposal and brought to the negotiating meetings at once." However, I find that compliance with the Union's request of October 13 played no part in the Activity's resubmitting the proposal herein. The request had been made over three months before and nine negotiating sessions took place without resubmission. The only proposal purportedly resubmitted was the PPRC plan and the Brogan request was not limited to matters which were not discussed at a "negotiating" session as Hunt testified he interpreted the request. In addition the proposal of January 29 had introductory provisions which were not a part of the original plan and moreover by its letter dated January 14, 1974, supra, the Activity, in effect, withdrew the proposal. Under these circumstances I find that the proposal of January 29 was submitted only as a further effort to obtain the Union's agreement to participate in the establishment of the PPRC.

The plan was virtually identical to that discussed at the October meeting except the proposal contained the following introductory language on the first page:

"Policy Review Project"

"Section 1. EO 10988, 11491 and 11491, as amended, stress the desirability of employees having a voice in the establishment of working conditions.

"Section 2. Management recognizes the union as an effective vehicle through which employees may express their opinions.

"Section 3. The Union recognizes the Vandenberg Personnel Policy Review Committee as the most effective way to have employee opinions influence policy determinations.

"Section 4. The union will have an opportunity to present employee viewpoints to work groups for consideration in developing proposals.

"Section 5. The union will have an opportunity to review proposals developed by work groups and to submit any recommended changes to proposals.

"Section 6. Policies implemented through this process may be added to an existing union-management agreement if all parts of the policy are negotiable. Questions of negotiability will be resolved by Headquarters USAF (DPCEU)."

At the meeting Brogan was assisted by another employee, Virgil Swift. ^{15/} At some unspecified time while Brogan was out of the room Hunt presented the proposal to Swift for negotiation. Swift was not familiar with the plan and after briefly reading it indicated that since the plan excluded the Union from the policy review board it was not an article for the agreement. Swift showed the plan to Brogan upon her return. Brogan looked at the document and after reading the first page commented that this was the Grantski plan that had been discussed previously and rejected. Having

^{15/} The account of this meeting is a composite of the credited testimony of Brogan and Swift whose testimony was given in a more detailed and complete fashion than that of the Activity's witnesses to this event.

noted Section 4 of the article which provides that "the Union will have an opportunity to present employee viewpoints to work groups for consideration in developing proposals", Brogan indicated that she already submitted "proposals" to be negotiated and would again reject the plan for the same reasons conveyed to the Activity at the October 4 meeting. Hunt contended that the plan he offered should be negotiated and Brogan stated, "... all right. You presented it and I rejected it. I do not think there is any need for discussion. I think it is a method of bypassing the Union". Hunt commented that it was management's prerogative to start such a project and regardless of whether the Union wanted it, the Activity would start it if they saw fit.

Sometime in February 1974 the Activity abandoned efforts to pursue the PPRC concept. Thereafter, neither the PPRC proposal nor its implementation was ever discussed with the Union nor was it in issue at the time of impasse in July 1974.

The Union alleges that the Activity established and maintained various other organizations along the lines of the PPRC thereby bypassing the Union in dealings with employees in matters concerning working conditions. Those organizations are the Agency's Civilian Policy Board (SAMTEC), Civilian Management Council and the Commander's Advisory Council.

The Civilian Policy Board (SAMTEC) ^{16/} has been in existence for approximately six years. It is composed of high level management personnel within SAMTEC whose function it is to review matters such as the structure of the organization, work policies and conditions and thereupon make recommendations to the SAMTEC commander for whatever action he deems appropriate.

The Civilian Management Council was first initiated in November 1973 pursuant to a regulation of the Department of the Air Force. That regulation set forth Air Force policy in implementing, inter alia, Section 7(e)

^{16/} SAMTEC is an acronym for Space and Missile Test Center and some of that organization's employees are members of the base-wide unit.

of the Order which at all times material herein 17/ required agency establishment of a system of intra-management communication and consultation with supervisors and groups of supervisors. Accordingly, the Civilian Management Council is composed completely of base supervisors and is concerned with working condition as applied to supervisors. While it is acknowledged by Hunt that if the PPRC had been implemented the Civilian Management Council would have appointed some members to the work groups, since the PPRC never was established Civilian Management Council participation was never realized. 18/

As to the Commander's Advisory Council, the record reveals that by memorandum dated May 15, 1974 the Activity announced the re-establishment of such a Council for the Activity's 4392 Civil Engineering Squadron (SAC). 19/

17/ By the amendments dated February 6, 1975, (E.O. 11838) Section 7(e) was deleted from the Order. Prior thereto Section 7(e) provided: "(e) An agency shall establish a system for intra-management communication and consultation with its supervisors or associations of supervisors. These communications and consultations shall have as their purposes the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness, and the establishment of policies that best serve the public interest in accomplishing the mission of the agency."

18/ On February 1, 1974 an article appeared in the "Missilier", a newspaper distributed at the base. The article stated in part that one of the goals of the Civilian Management Council was to assure that management personnel would have representation on the Personnel Policy Review Committee, indicating that the PPRC was already established. The Activity was the source of the article and Hunt testified that the Activity had not yet at that time given up on the prospect of having a PPRC. However, Hunt further testified that the PPRC would have come into existence only if the Union agreed to its establishment.

19/ The record is devoid of any evidence as to the Council's previous existence. However, an Air Force Manual provision, AFM 40-13 paragraph 1-5, dated May 25, 1972 provides that such councils will not be established in units for which a labor organization has exclusive recognition nor should established councils be continued in such units.

The Squadron is composed of civilian and military employees in approximately equal proportion. The memorandum stated the civilian representatives would be appointed to represent five of the seven sections comprising the Squadron. In a memorandum dated May 20, 1974, the Activity set forth various details relative to the Council's operations including the following: 20/

"a. Purpose: This council is established to provide the Squadron Commander with an effective communications channel in the conduct of the squadron mission and to improve welfare and discipline of assigned personnel. The council will further strive to improve human relations and promote equal opportunity and treatment for all assigned military and civilian personnel. Its objectives are:

- (1) Present and discuss career advisory matters.
- (2) Provide a forum for explaining and emphasizing policies and objectives.
- (3) Identify irritants that detract from career attractiveness and make recommendations for the elimination of irritants and deterrents.
- (4) Make recommendations for increased efficiency of operations and improvement of working conditions, recreation facilities, and other areas related to the morale and welfare of all personnel.

* * * * *

"d. Recorder Duties: DEA will reproduce and disseminate the minutes for the information and guidance of all squadron personnel. In addition, council members will discuss with and provide feedback from the squadron members they represent. These discussions should be held at shop meetings, rap sessions, or other suitable gatherings. Ideas, recommendations, grievances, and suggestions resulting from these discussions will be considered in the agenda of the next squadron council meeting. Items that cannot be resolved within the unit will be forwarded to the combined VAFB councils by a CES council representative or handled through normal channels."

20/ While the memorandum is addressed to "Military Personnel", it nevertheless clearly indicates that civilian employees would be members of the Council and its contents fairly reflect the Council's objectives and activities.

The evidence reveals that at least one unit employee was a member of the Council. Sometime subsequent to May 15, 1974, Ronald Turner, a Squadron employee, a member of the base-wide unit and second vice-president of the Union was recruited by management to be a member of the Council. The Squadron commander desired Turner's presence on the Council because of Turner's Union office and while Turner attended Council meetings, he did not do so as a representative of the Union.

I find and conclude that Complainant has not proven by a preponderance of the evidence that Respondent's conduct with regard to the PPRC plan was violative of the Order. While Union acceptance of the plan might well have ultimately undermined the Union as a viable representative of unit employees there is no showing that the Union's full role in the plan was ever developed. Moreover, although the Activity was obviously quite enthusiastic about approaching labor relations through group discussions with employees via the PPRC plan, it nevertheless abandoned this proposal and discussion on the subject ceased after Brogan clearly indicated that further efforts in this direction would be fruitless. Indeed, in negotiations during the five months prior to impasse the plan was never discussed and was not a part of the issues over which impasse was reached. Although the Union's president and chief negotiator for the base-wide unit may have been apprehensive that the Activity might unilaterally implement the plan in some form and the Activity so indicated, in fact the plan never was put into effect.

As to the Civilian Policy Board (SAMTEC) and the Civilian Management Council, while the Activity envisioned at least the Council playing some role on the PPRC, such never became a reality. In any event I find that the Activity was privileged to utilize its supervisors to review working conditions and make recommendations to superiors. Unit employees were not members of the Board or Council nor is there a scintilla of evidence that the Board or Council at any time obtained information from unit employees or sought to deal directly with them through these organizations.

With regard to the Commander's Advisory Council it clearly was, in part, composed of unit employees and was, in part, established and existed for the purpose of dealing with terms and condition of employment of unit employees. The Assistant Secretary held in United States Army School

Training Center, FortMcClellan, Alabama, A/SLMR No. 42, that an activity's obligation to deal with the representatives of an exclusive collective bargaining agent "carried with it a correlative duty not to treat with others". Moreover, the Assistant Secretary stated that to disregard the exclusive collective bargaining representative and to deal with certain employees on matter affecting working conditions violates the essential principles of exclusive representation. In another case 21/ the Assistant Secretary held that an Activity's dealing directly with unit employees, in a situation somewhat similar as that presented with regard to the operation of the Commander's Advisory Council, was inconsistent with the Activity's obligations under the Order to deal directly with the exclusive collective bargaining representative on matters affecting general working conditions of unit employees and in derogation of the exclusive representative's rights established under the Order. However, in the instant case the complaint was filed on May 8, 1974, one week prior to the institution of the Commander's Advisory Council which the evidence presented at the hearing established to be May 15, 1974, at the earliest. Since the establishment of the Council occurred outside the period encompassed by the complaint and the complaint was not amended, I am precluded from considering the Council and its activities as giving rise to an unfair labor practice under the complaint herein. 22/

Complainant further contends that the Order was violated by the Activity's bypassing Brogan with regard to matters concerning the PPRC and its development. I find that the evidence does not support this allegation. Thus while the Activity's dealings with Grantski may give rise to a suspicion of bypassing Brogan, the only evidence on this subject establishes that Grantski had his dealings with Hunt prior to August 8, 1973 and would therefore fall outside the period encompassed by the complaint. The Activity's dealings on this subject thereafter were in the presence of Brogan and accordingly no bypass in the critical period was shown to have occurred. 23/

21/ Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301

22/ Cf. Veterans Administration, supra; cf. National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No 295; and see Section 203.2(b)(3) of the Assistant Secretary's Regulations.

23/ Although Hunt's presenting the PPRC plan to Swift while Brogan was out of the room during the negotiating session of
[Continued on next page]

The Union also apparently is alleging that Mrs. Brogan was bypassed in other instances as well. The only incident bearing on this allegation on which specific evidence was adduced and which occurred within the time frame encompassed by the complaint was with regard to a survey of work hours which was taken at the request of the Activity beginning in the spring of 1974. However, the credited testimony of the Activity's supervisor Marvin Blankenship reveals that prior to the survey being taken, Brogan was fully advised by management of the Activity's desire to take the survey and the nature thereof and made no objection thereto. Indeed, Brogan designated a Union representative who would be the "point of contact" for the survey and allowed Union representatives to actively participate in taking the survey. Accordingly, I find that the allegation is unsupported by the evidence.

b. Other Allegations.

Complainant also contends that the Activity demonstrated bad faith bargaining by unilaterally cancelling the "negotiating" session scheduled for October 4, 1974 and substituting a "consultation" meeting therefore. While the meeting might have nominally been for "consultation" as opposed to "negotiation," under the circumstances herein the obligations which flowed from the meeting were nevertheless the same. How the parties decided to designate the meeting for the purpose of utilizing agreed upon negotiating time, or otherwise, 24/ is immaterial in this instance. What is important however is that the parties engage in good faith bargaining when they discuss the issue under consideration. Merely calling a meeting "consultation" instead of "negotiation" would not have privileged the

23/ Continued. January 29, 1974 might raise a question of an attempt by the Activity to bypass Brogan at least to garner support for the plan with other Union negotiators, I find such to be insufficient to sustain a bad faith bargaining allegation.

24/ Perhaps the amendments to Section 11 of the Order set forth in E.O. 11838, dated February 6, 1974, will be a substantial assistance to the parties in the future by precluding overdrawn concern and confusion regarding the nomenclature used in describing a particular meeting. In the Report and Recommendations of the Federal Labor Relations Council relative to E.O. 11838, the FLRC recognized that confusion has developed over the apparent interchangeable use of the terms "consult", "meet and confer", and "negotiate" and stated, in part:
[Continued on next page]

Activity to unilaterally put the PPRC into effect where, as here, the matter went to the Union's basic rights in representing unit employees. In any event no unilateral change occurred and the record evidence does not disclose that the Activity was not bargaining in good faith with the Union during the meeting of October 4.

The Union further contends that the Activity violated the Order by offering proposals during negotiations it "knew" would be unacceptable to the Union thereby allegedly demonstrating a desire not to reach final agreement on a contract. Apparently the Union is referring in this allegation to four proposals the Activity made relative to negotiations which were placed in evidence at the hearing: the proposal on the PPRC plan; an article entitled Employee Rights and Responsibilities; 25/ an

24/ Continued. "Section 11(a) comprehends an obligations 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'."

25/ The specific sections of the proposal objected to by the Union with regard to the Activity's proposals on Employee Rights and Responsibilities would require, in essence, that an unfair labor practice charge filed by the Union against the Activity must include and be limited to the prescriptions of Section 203.2 of the Regulations and include a statement citing the relationship of the acts on which the charge is based to a specific provision of the Order and be limited to a maximum 150 words in length. The proposal also provides that the Union accept the Activity's decision as to whether the charge is in compliance with criteria set forth above and prohibits the Union from resubmitting the charge until corrected. The proposal further contains a provision that unfair labor practice charges alleging error or wrongdoing on the part of the Activity in the application or interpretation of the agreement will be processed as a grievance and not as a violation of Section 19(a) of the Order. Additionally, the proposal would require the Union to support employer initiated employee attitude surveys or provide the Activity with information through stewards which would serve as a basis for evaluating Civilian Personnel Management programs. Further, part of the proposal obligated the Union to meet and confer with the Activity on procedures for Union involvement in any program which provided employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting working conditions.

article entitled Employer Rights and Responsibilities; 26/
and a management counter proposal on "Health and Safety". 27/

Understandably the Union objected to the above proposals since agreement to them would have ceded to the Activity substantial rights granted the Union by the Order. In the case of the proposals establishing employee "work groups", acceptance may well have eroded the Union's right to be dealt with as the representative of unit employees in the formulation and implementation of personnel policies and practices affecting working conditions as envisioned in the preamble and throughout the Order.

However, I do not find that the record supports a finding of bad faith bargaining and a desire not to reach final agreement on a contract. Rather, what evidence is available reveals that the Activity did not adhere to any of these proposals to the point of impasse. Moreover, the record is silent on the nature of discussions on the proposals, other than the PPRC, wherein statement's etc., might be evaluated to reveal a lack of good faith in making the proposals, if such occurred. Thus with regard to the PPRC proposal, as treated above, there is no evidence that the proposal was discussed with the Union after January 29, 1974 and indeed the evidence reveals that sometimes in February it was abandoned by the Activity and was not an item over which impasse had been reached. Also, the record is silent on the nature of discussion, if any, had on the employee and employer rights and responsibilities proposals. However, the record does reveal that the proposals were made on some undisclosed date in August 1973, were rejected by the Union and were not in issue at the time

26/ The Employer Rights and Responsibilities proposal is addressed in part to the permissibility of informal meetings between Activity officials and employees without the intervention of Union representatives.

27/ The Health and Safety counter proposal made on January 29, 1974 would establish work groups of employees selected by the Activity to consider whether an adequate occupational health and safety program exists at the base. Proposals for change would be submitted to the Union, and employee representatives and the Union are permitted to meet and confer on a proposal if either party desires to discuss the matter. Unsafe conditions reported to the Union by employees would then be submitted to the work group for consideration.

of impasse having been withdrawn sometime prior thereto. Similarly the record is silent on the nature of discussions, if any, on the Health and Safety counter proposal of January 29. As above, that proposal also was not the subject of impasse having been abandoned by the Activity when it presented a subsequent counter proposal in April 1974. Under these circumstances I find that Complainant has not established bad faith bargaining on the part of Respondent regarding these proposals.

Finally Complainant contends that the Activity demonstrated a lack of good faith by refusing to fully utilize time set aside for negotiations by declining "in many cases" to discuss negotiable matters which were not on the agenda for that particular session. However, the parties had agreed to a procedure by which items would be designated beforehand as to what would be discussed at future negotiating sessions so that they might be adequately prepared on the matter. I do not find that the Activity violated its duty to bargain in good faith by insisting that negotiations proceed along an agreed upon approach. 28/

Recommendation

On the basis of my evaluation of the record evidence I have concluded that Complainant has not proven its allegation that Respondent failed to bargain in good faith during negotiations. From the onset of negotiations the parties experienced substantial difficulties in reaching any agreement. Throughout negotiations personal animosity and rancor existed between representatives of the parties. Negotiations once undertaken, and only after deep dispute on procedures to be utilized, spanned almost a year and involved approximately thirty-eight negotiating sessions. Nevertheless, with the assistance of the Federal Mediation and Conciliation Service the parties ultimately were able to agree on twenty-seven articles of a new agreement and remove a number of others from contention. Of eighteen articles over which impasse was reached, the Activity determined that seven Union proposals were non-negotiable. Negotiations under the circumstances herein can appropriately be described as "hard bargaining" on the part of both the Union and the Activity.

28/ Cf. Army and Air Force Exchange Service, Keesler Consolidated Exchange A/SLMR No. 144, where the Assistant Secretary found that it was a legitimate bargaining approach for an Activity to submit its counter proposals at the meeting in which the subject involved was considered rather than in advance. See also, Report on a Decision of the Assistant Secretary, Report No. 31.



While it is frequently difficult to distinguish between "hard bargaining" and bad faith bargaining, indeed the former is sometimes used to mask the latter, nevertheless it is the obligation of the complaining party to establish and prove what the facts and circumstances were wherein it could be concluded that a respondent was not bargaining in good faith. The burden is upon the Complainant to prove its allegations by a preponderance of the evidence. ^{29/} It is not unusual that recollections of events become dimmed with the passage of time and individuals frequently do not, when events are occurring, record them to assist future recall. However to find a violation of the Order as alleged herein, the record must contain evidence of a failure to bargain in good faith. Such a finding cannot be made based upon unproven suspicious, conclusionary statements of claimed events unsupported by specifics or sketchy accounts of events which might or might not be violative of the Order depending upon the circumstances surrounding the events and the context in which they occurred. Accusations are not proof and allegations are not evidence. In all the circumstances herein while the good faith of the Activity during negotiations with the Union is by no means free from doubt, in my opinion the Union has not proven, by a preponderance of the evidence, the matters alleged herein to be unfair labor practices occurring within the period encompassed by the complaint. Accordingly, I recommend that the complaint herein be dismissed in its entirety.


 SALVATORE J. ARRIGO
 Administrative Law Judge

DATED: August 8, 1975
 Washington, D.C.

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 In the Matter of :
 :
 U.S. SMALL BUSINESS ADMINISTRATION :
 :
 Respondent :
 :
 and :
 :
 LOCAL 2532, AMERICAN FEDERATION OF :
 GOVERNMENT EMPLOYEES, AFL-CIO :
 :
 Complainant :

Case No. 22-6314 (CA)

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For the Complainant

Before: PETER McC. GIESEY
 Administrative Law Judge

^{29/} See Section 203.14 of the Assistant Secretary's Regulations.

Recommended Decision and Order

Statement of the Case

This is a proceeding brought under the terms of Executive Order 11491, as amended, by Local 2532, American Federation of Government Employees, AFL-CIO (hereafter "the Union") against U.S. Small Business Administration, Central Office (hereafter, "SBA"). The Union asserts that SBA through its management employee Carl Lee Grant, Director, Office of Personnel, violated section 19(a), (1) of Executive Order 11491 by certain actions discussed, infra.

Mr. Joseph Foster is president of the Union which represents the employees of SBA for purposes of collective bargaining. He testified that, on February 26, 1975, a member of the Union and employee of SBA called and told him that Mr. Grant wished a meeting with them. At 11:30 a.m. Mr. Foster and the employee went to Grant's office. Following a short wait, Mr. Grant invited them to come into his office. Present were, Melvin Maas, Assistant Director and David Baker. He gave Foster and the employee copies of a "letter of suspension" directed to the employee and requested that they read it. When he had read the letter, Mr. Foster stated that "we were going to appeal". Mr. Grant asked if he had further comments and Foster declined. Mr. Grant then turned to the employee and asked if she had any comment. Foster responded by turning to the employee and stating, "I'll do the talking for you." According to Foster, they "got in a discussion" and Foster observed "[i]t's a damned shame that employees, big shots, can sit around here after they are ordered fired and little people are thrown out on the street." Grant

replied that he didn't know what Foster was talking about. Mr. Maas stated, "he's talking about the events that happened in August." 1/

According to Foster, Grant said,

Well, you've got to check with the Civil Service Commission. It was them that fired them,

1/ This was a reference to matters underlying a Civil Service Commission report on "alleged political influence in personnel actions at the Small Business Administration" of which one result was an August, 1974 "letter of admonishment" to Grant from the Executive Director of the Commission stating in part;

This investigation has made it apparent that you and your staff have processed a number of personnel actions involving merit system violations in which there was no meaningful review for merit system compliance.

* * *

While this investigation does not provide a basis for a comprehensive assessment of your performance in this regard, it does provide strong indications that you have chosen to ignore, rather than prevent, specific violations of the merit system.

The investigation also resulted in Civil Service Commission recommendations to the Administrator, SBA that certain management personnel be removed. The Director of the Civil Service Commission's Bureau of Personnel Management Evaluation in July, 1974, wrote to an official of the American Federation of Government Employees informing him that the promotion of Melvin Maas to Assistant Director of Personnel "was in violation of Federal Merit Promotion Policy and the SBA Promotion Program . . . we have directed SBA to take appropriate corrective action."

At some point after receiving the letter from Grant, Foster told him, "you're trying to make an ass of me." After a "little bit of conversation", Grant told Foster, "I don't like that kind of language . . . , I want you to stop it [d]o you understand me [d]o you understand me, sir?" Foster testified that Grant pointed his finger at him while saying this. When Foster replied that he didn't understand, Grant ordered him out of his office and, according to Foster, took him by the collar and "started to waltz me" to the outside door where he seized him by collar and trousers and "threw" him into the hall.

The versions of this conversation and ensuing events testified to by Grant, Maas and Baker differ slightly. Foster is believed to have said, "I'll make a damned ass out of you" upon reading the suspension letter, and at that point Grant told him "he didn't appreciate that type of language", to which Foster answered that he would "talk any damn way I feel like talking . . ." Grant then told Foster that he would not "tolerate that type of language, do you understand, do you understand me, sir?" When Foster replied "insolently", (according to Baker) "no, I don't understand", according to Grant, he ordered him out of the office. Grant testified that Foster, "with some continued hesitancy on his part and with a smirk on his face, . . . sauntered toward the door, and in a very slow and casual manner, proceeded . . ." Grant stated that, when Foster stopped just outside his office, Grant "told him to continue" and "placed . . . my left hand between Mr. Foster's shoulder blades, and with my right hand, I had his sleeve . . . and proceeded to escort him the rest of the way out of the office."

All witnesses agree that Mr. Grant "escorted" Mr. Foster through and past the offices of the personnel "office" and could have been, and was, observed by some of the employees. One employee testified to having seen Mr. Grant "with his hand on Mr. Foster's arm behind his back and moving him . . ."

Findings of Fact and Conclusions of Law

All witnesses were credible. Some may have been mistaken as to the details of what they saw and heard. The brief encounter between Mr. Foster and Mr. Grant did occur

and somewhere between two and three "damns," one "ass" and one "hell" were spoken by Mr. Foster. As Mr. Foster testified, "I really was angry." I believe him, he appeared at the hearing to be somewhat mercurial in nature in contrast with Mr. Grant's imperious and glacial demeanor.

What I do not believe is Mr. Grant's testimony concerning the basis for his "escorting" Mr. Foster out of his office. He described Foster's conduct, i.e. his words, as "abusive", "insulting", "profanity" and perhaps believes that it was one "hell", three "damns" and an "ass" that moved him to terminate a discussion and physically eject the Union official from an occasion in which it is undisputed that the agent for the employee being disciplined had every right to be present and to participate. What did move Grant to take that action is of no particular importance unless the behavior of Foster was such as to threaten discipline or was so egregious as to be considered indefensible. Foster was acting as the employee's agent. As such, he shares the employees rights.

Thus, as the court stated in N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965); ^{2/}

As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of [protected] activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in [protected] activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.

Id. at p. 587. In balancing these rights, it must be borne in mind that, in negotiations between employees or their agents and management, they must treat with one another as equals. N.L.R.B. v. Red Top, Inc. 455 F.2d 721, 728 (8th

^{2/} Realizing that the Assistant Secretary is in no way bound by decisions affecting the private sector, I have looked to them for guidance only.

Cir. 1972). Accepting witness Grant's version of the incident upon which the Union's complaint is based, it is difficult to find evidence of behavior by Foster which would reasonably cause the fury which underlay Grant's forcible expulsion of Foster. Mr. Grant impressed me as a man of maturity, experience and intelligence. He had known and dealt with Mr. Foster for years. During that time, it is reasonable to infer that he became familiar with Foster's manner of speech. How then explain his finger waving, schoolmasterly indignation at the use of "hell", "damn", and "ass"? Grant also knew, or should have known, that profanity in labor disputes is commonplace and is generally regarded by the courts as inadequate bases for disciplinary action. E.g., N.L.R.B. v. Cement Transport, Inc. 490 F.2d 1024, 1030 (6th Cir. 1974) and cases cited n. 7.

I believe that this record makes it clear that, for reasons known only to Grant (if, indeed, he can be expected to be aware of specific reasons for his emotions), Foster's remarks "furnished the excuse rather than the reason for the . . . action". N.L.R.B. v. Cement Transport, Inc., *ibid.* Grant stated that his anger reached the point of action when Foster referred to him as a "damned ass". Foster denies having made that reference. Were the remark of sufficient gravity to justify the subsequent expulsion, it would be necessary to resolve the question concerning credibility. N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964). However, in today's world, similar language is found in movies rated "G", and in the world of industrial reality, much worse has been commonplace for generations. In short, the verbal exchange was a "trivial rough incident" ^{3/} which cannot serve as justification for the disciplining of an employee or his bargaining agent.

In contrast to the triviality of the asserted basis, Grant's action was a serious interference with the employee's rights. Not only did Grant refuse to treat with the collective

^{3/} Allied Industrial Wkrs., AFL-CIO, Loc. U. 289 v. N.L.R.B., 476 F.2d 868, 879 (D.C. Cir. 1973) citing and quoting Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

bargaining agent as an equal, he publicly demonstrated his disdain for the agent and the process by abruptly terminating discussion and ejecting the president of the Union as if he were an unruly schoolboy. Such actions have the reasonably foreseeable consequence of demonstrating to employees that their right to bargain will be exercised at the peril of humiliation both symbolic and physical. That it is inconsistent with the spirit as well as the letter of Executive Order 11491, as amended, is so obvious as to preclude further discussion. Cf., Army Training Center, Infantry, Laundry Facility, Ft. Jackson, S.C., A/SLMR No. 242.

Recommended Order

It is recommended that respondent be directed by the Assistant Secretary to cease and desist from the above described unlawful conduct and to post a notice of its intent in the form attached in a place in the Offices of the Director of Personnel, SBA and for a period of sufficient time to assure that all employees will have an opportunity to read it.


 Peter McC. Giesey
 Administrative Law Judge

Dated: January 22, 1976
 Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
OF THE SMALL BUSINESS ADMINISTRATION, CENTRAL OFFICE,
OFFICE OF PERSONNEL

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 Office will refrain from refusing to treat with the collective bargaining agent of its employees (Local 2532, AFGE, AFL-CIO), its officers and agents, as equals and will refrain from ejecting its officers and agents from negotiating sessions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights under 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 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: 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 .
DEFENSE SUPPLY AGENCY .
DEFENSE CONTRACT ADMINISTRATION .
SERVICES REGION, LOS ANGELES .CASE NO. 72-4668
Respondent .
and .
THOMAS F. O'LEARY, PRESIDENT, AFGE .
LOCAL 2433 - FOR AUDREY ADDISON .
Complainant .
.....

D. William Jenkins, Deputy Chief
Office of Civilian Personnel, Defense Contract
Administration Services Region, Los Angeles
11099 La Cienega Boulevard
Los Angeles, California 90045
For Respondent

Thomas O'Leary, President
Local 2433, American Federation of
Government Employees, AFL-CIO
524 North Guadalupe
Redondo Beach, California 90277

and

William H. Shoats, National Representative
American Federation of Government Employees,
AFL-CIO
5800 Overhill Drive
Los Angeles, California 90043
For Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

On February 25, 1974, a complaint and an amended complaint under Executive Order 11491 (hereinafter referred to as the Order) were filed by "Thomas F. O'Leary, President, AFGE Local 2433 - for Audrey Addison" ^{1/} (Complainant herein) against Defense Contract Administration Service Region, Los Angeles (Respondent or the Activity herein). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary herein), a Notice of Hearing on Complaint issued on November 13, 1974 with reference to alleged violations of Sections 19(a)(1) (2) and (6) of the Order. Complainant contends that the Activity violated the Act by filing against Ms. Addison numerous "successive, unjustified, proposed, adverse actions"; by interfering with her right and responsibility to represent an employee; by subjecting her and her family to unnecessary humiliating interrogations; by disapproving emergency leave she had requested; and by offering her an "fraudulent" supervisory position created to preclude her from engaging in Union activities. The Activity denies these allegations and the matter was heard in Los Angeles, California on December 5, 1974, January 9 and 10, 1975 and April 17 and 18, 1975.

On January 10, 1975 the hearing was adjourned indefinitely pending approval by the Assistant Regional Director, LMSA-San Francisco, of a proposed settlement agreement by the parties. Thereafter, the Assistant Regional Director refused to approve the proposed settlement agreement and on February 6, 1975 issued a Notice of Resumption of Hearing on Complaint. On February 12, 1975 Respondent took issue with the Assistant Regional Director's decision by filing a motion to dismiss or terminate the hearing relying upon its alleged performance of the settlement agreement. That motion was referred to me for decision and on March 11, 1975 I ruled that under Sections 203.7 and 203.15(f) of the Regulations, settlement offers with regard to outstanding unfair labor practice complaints must be approved by the Assistant Regional Director.

^{1/} Both O'Leary and Addison signed the complaint in that portion of the form designated for signature of the name of the representative or person filing the complaint.

As such approval was not forthcoming the complaint was still viable and accordingly, I denied the motion. In its post-hearing brief to me Respondent renewed its motion to terminate the proceedings. For the reasons stated in my prior ruling described above and set for as Assistant Secretary's Exhibit No. 3(c), I reaffirm my prior ruling and deny Respondent's motion.

At the hearing the parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. A brief was filed by Respondent.

Upon the entire record in this matter, from my reading of the brief and from my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law:

Background

At all times since April 22, 1971, the American Federation of Government Employees, AFL-CIO, Local 2433 (the Union herein) has been the exclusive collective bargaining representative of all the Activity's non-professional employees located at various facilities in the Los Angeles, California area. The Union and the Activity were party to a collective bargaining agreement executed July 14, 1972 which had a two year duration from the date of execution.

Audrey Addison has been a government employee for approximately twenty years. As far back as January 1969 supervision at the Activity expressed dissatisfaction with Ms. Addison's behavior as an employee. On numerous occasions during the period prior to 1971 Ms. Addison broke various employee rules or regulations such as being tardy, AWOL and eating at her desk during duty hours. Approximately fifteen acts of misconduct on Addison's part were recorded on her employee record card at that time, some of which resulted in oral admonishments.

In 1971 the Union engaged in an election campaign at the facility and Ms. Addison was an active participant on behalf of the Union. Upon the Union's being granted exclusive representational rights, Addison became assistant chief steward. Since 1972 Addison has been the Union's chief steward. Sometime in 1971 during negotiations for a collective bargaining agreement the Activity, "in order to preserve a good climate for negotiation", deleted from Addison's employee record card all adverse comments and destroyed all related documentation.

After the Union obtained recognition a continuing source of irritation developed between the Union and the Activity with regard to stewards engaging in employee representation matters at the facility. Ms. Addison and Paul Yampolski, the Union vice-president, were spending between twenty-five and forty percent of their work day on such matters which, the Respondent felt, deprived the Activity of an inordinate amount of the employee's work time. In addition, the Activity informed the Union of its concern with stewards leaving worksites without permission. In particular, with regard to Addison in early 1973 complaints had been received by management of the Activity that Addison was engaged in Union business without having obtained the requisite permission from her supervisor or the supervisor of the section she was visiting. Indeed Addison's supervisor, Helen Baray, received numerous phone calls from other supervisors during this period informing her of Addison talking to employees and questioning Baray as to whether Addison had Baray's permission to engage in Union representation business. Upon Addison's return to the section Baray would inquire about the matter and was generally told by Addison that she was stopped by an employee who had a problem, was not in the vicinity of a telephone, and thereafter could not call and tell Baray of her whereabouts. Baray informed her immediate supervisor of these instances but Baray never admonished Addison about these absences except for telling Addison that she wished it wouldn't happen and Addison would have to coordinate such activity's with her.

Both matters were frequently discussed with Union representatives. Thus, by letter dated June 14, 1973, to Union president Thomas O'Leary, the Activity informed the Union that it had received complaints that several stewards including Ms. Addison were leaving their work stations without supervisory permission and that Addison and other unnamed stewards should be reminded that they must seek permission to leave their work stations on employee representation matters. The letter also stated that if Addison or other stewards continued to disregard these procedures "disciplinary action may have to be imposed". Ms. Addison was furnished a copy of this letter.

Article 4, Section 2 of the collective bargaining agreement provides for the following procedure to be followed by employees seeking Union representation:

"Section 2 Representatives will be available to employees for consultation on matters of dissatisfaction, complaints, grievances, or appeals. In the event employees desire to contact the Representatives servicing their organization the following procedures will be utilized:

a. The employee will obtain permission from his supervisor to arrange for an appointment. Approval for the employee to leave his duty station will be granted subject to workload requirements.

b. The AFGE Council agrees that representatives/stewards will minimize "time off" the job in the accomplishment of their representation duties. Employees are entitled to a reasonable amount of time to confer with their representative.

c. To maintain the privacy of the discussion between employee and representative, the representative will arrange for an office or conference room for their use."

Article 3, Section 6 provides:

"Section 6 An employee shall have the right to bring matters of personal concern to the attention of appropriate officials of the Agency or representatives of AFGE. This right may be exercised individually or collectively. Employees will be required to obtain permission to leave their duty station, but need not reveal details of the matters of concern to their supervisors. The Employer encourages the participation of employees through the AFGE in the formulation and implementation of its personnel policies.

Since 1971, the practice followed by the Union and the Activity relative to stewards engaging in representational activities during work-hours was for the employee desiring Union representation to notify his supervisor who would in

turn notify the steward's supervisor. Thereupon the steward was required to obtain permission from his or her particular supervisor prior to leaving the work area for such purpose. Ms. Addison and her immediate supervisor, Helen Baray, had an agreement that when Mrs. Baray was at her desk and Ms. Addison desired to leave on Union representational business, Addison would inform Baray who would make a note on her desk calendar. If Baray was not at her desk at the time, Ms. Addison was to put a notation on Baray's desk calendar as to where she had gone on Union business. However, as described above, many times Addison was away from the office on Union business and there was no notation left on the desk calendar. Accordingly Baray had no way of knowing what kind of business took Addison away from her desk except when the matter was brought to her attention through inquiries from other supervisors.

The Alleged Unfair Labor Practices

On June 20, 1973, Vangle Mason, an employee of the Activity since 1967, 2/ became the Chief of the Activity's Material Control Branch. Prior to receiving this assignment Mason had received information that the previous Branch Chief had experienced numerous "problems" with the employees in the Branch to the extent that she "lost control" of the employees. Mason began his tenure as Branch Chief by assembling all the employees and informing them that he was not easy to get along with but if the employees did their jobs, they would "get along". 3/ He reviewed the Branch's work hours and the already established periods for lunch and breaks. He informed the employees that their absenteeism and tardiness record was horrendous and there would be virtually no excuse for lateness.

Ms. Addison, a Branch employee, was not present at work on June 20, 1973 and accordingly Mr. Mason met with her separately on June 21. Mason reviewed those matters discussed at the meeting on the prior day. During the discussion, according to Addison, Mason informed her that he had been put

2/ Mason retired in January 1974.

3/ Respondent in its brief correctly describes Mason as "a hard hitting rather blunt supervisor who had strong opinions on how a job should be done and how employees should conduct themselves on the job.... A driver who expected things to be done well and done his way ... universally tough on anyone he felt was not living by the rules". Indeed I further find him to be an excitable and abrasive supervisor in his dealings with subordinates, without regard to their union affiliation.

in his job "purposely to work with her". 4/ He recounted that while in the past he and Addison had not seen "eye to eye" he hoped that they might become more friendly. Addison rejected this overture and informed him that she did not appreciate his "rudeness" or "corny jokes" but would nevertheless respect him as her chief. 5/ Mason and Addison discussed the guidelines for her being released for duty to engage in union representation business. Addison in responding to an inquiry by Mason acknowledged that she knew the regulation that if a person wanted union representation the call should come through the respective supervisor and her supervisor would give her permission to leave the work area. Mason also talked about personal matters during the approximately two hour meeting.

1. The Kalish Incident.

In the afternoon of June 21, 1973, Ms. Addison appeared in the office of Personnel Management Specialist David Kalish. 6/ During that period of time due to an increase in work-load in the personnel office, any employee desiring to visit the personnel office was required to make arrangements for an appointment through the employee's supervisor. No appointment had been made when Addison came to Kalish's office. Kalish checked and found Addison had not received permission from her supervisor to go to the personnel office. Thereupon Mason orally admonished Addison for disobeying the guidelines and by memo dated July 5, 1973 Mason informed Addison that the Activity was proposing to note the incident on her personnel record SF-7B card.

2. The Winkfield Incident.

Geraldine Winkfield, an employee in the Material Control Branch, arrived approximately fifty-five minutes late for work

4/ Although Mason testified at the hearing, he did not deny having made this remark and no additional testimony relative to it was offered.

5/ Addison testified that she had known Mason since he came to work at the Activity, that the relationship was not a good one and they did not "appreciate" one another. According to Addison, shortly before this meeting when Mason was in another position of an undisclosed nature, Mason had "cursed out" Addison.

6/ Kalish could not recall the purpose of Addison's visit and Addison did not recall the incident except that it was on an employee representation matter. Further a memo dated July 5, 1973 from Mason to Addison indicates that in the after-[Cont'd on next page]

on June 26, 1973 and later that day was sent to Mason's office by her supervisor. Winkfield wished to be granted administrative leave for the period of absence. Mason refused to excuse the tardiness and told Winkfield that she would have to take annual leave or be put in AWOL status. When excited Winkfield has a tendency to talk extremely fast, to the extent that her speech may become unclear. As the conversation progressed and became somewhat emotional and louder, Mason told Winkfield to "shut up". Winkfield told Mason not to tell her to "shut up" and about this time Ms. Addison, who was on a ten minute coffee break was passing by Mason's doorway. Winkfield noticed Addison and called her into the room. Addison entered the room and inquired as to the nature of the difficulty. Mason asked Addison what she was doing in his office and Addison replied that Winkfield called her and needed her. Mason told Addison that he didn't invite her into his office and ordered her to "get out". Addison again asked what was wrong and Mason again told Addison to get out of his office. Addison refused and Mason pounding on his desk again ordered Addison out of his office. Addison inquired if Mason was going to throw her out. Thereupon, Mason picked up some cigarettes and matches that were on his desk and left his office. Addison and Winkfield left shortly after. Approximately one hour thereafter Mason called Winkfield and invited her to bring her representative to his office to review the question of the tardiness and leave requirement. Addison accompanied Winkfield and the matter was discussed. Later, through the intervention of Mason's supervisor, Lawrence Lehr, the question of leave was resolved by permitting Winkfield to take compensatory time for the period of tardiness.

3. The German Incident.

On July 3, 1973 Ms. Addison received a phone call from Mr. Finkel, a union representative, concerning difficulties a Mrs. Bloom was having relative to a disability pension matter. Finkel and Bloom were in the lobby at the facility and wanted Addison's assistance. Addison waited until her break period ^{7/} before going to the lobby. There, Bloom and Finkel advised her that Finkel was to assist Bloom in the matter but various records and papers were in the possession of Paul Yampolski, the Union's vice-president. Thereupon Addison went to Yampolski's

6/ [Cont'd]noon of June 21, Addison was in the work area in question "on an employee representative matter...."

7/ Addison does not recall whether her supervisor was present when she left to see Bloom and Finkel..

supervisor, Mrs. Beverly German, and asked her if Yampolski could be released to turn over the papers to Finkel explaining that Bloom was ill and had been waiting in the lobby for two hours. German refused to release Yampolski. Addison then went back to the lobby and informed Bloom and Finkel that in all likelihood Yampolski would come to the lobby on his break. Addison returned to her office approximately fifteen minutes late from her ten minute break period.

The Activity on August 2, 1973 issued a notice of proposed three day suspension to Ms. Addison. The notice alleged insubordination in refusing to leave Mr. Mason's office on July 26, 1973 (the Winkfield incident) and alleged that Addison left her job at that time without receiving express permission from her immediate supervisor (AWOL). The notice stated that this was "at least" the second time Addison left her job without permission to act as an employee representative reciting the Kalish incident on June 21.

On August 20, 1973 the Activity amended the proposed suspension to include an additional five day suspension alleging that Addison left her post of duty without express permission on July 3, 1973 (the German incident). ^{8/}

4. The Emergency Leave and Related Matters.

In early July 1973 Ms. Addison requested "emergency" leave to visit her terminally ill sister in Buffalo, New York. Addison signed two leave request slips each encompassing a two week period and gave them to her supervisor, Helen Baray. Baray agreed that if after the first two weeks Addison required additional leave she would approve it and "turn in" the second leave slip. Thereupon, Addison took approximately three weeks of leave from July 10 to July 31, 1973. Sometime during the first two weeks of leave Mr. Mason received a letter from the Union's president Thomas O'Leary, notifying him of Addison's whereabouts.

Sometime during the second week of Ms. Addison's leave Mason inquired and was informed by Mrs. Baray that she had not heard from Addison. Mason then went to his supervisor, Lawrence Lehr, and explained he was concerned as to when Addison would return since there was a leave request for an additional two weeks leave outstanding. Mason and Lehr, who

8/ Addison was suspended from employment for eight days beginning February 25, 1974. The Activity's Notice of Final Decision of Proposed Suspension dated February 21, 1974 cited Addison with being AWOL and June 26, 1973, leaving her duty station without permission on July 3, 1973, and being insubordinate with Mason on June 26, 1973.

had previously supervised Addison, were aware that Addison had a prior history of taking emergency leave on at least two occasions in the past and extending that leave to a questionably long period of time. Lehr authorized Mason to check and see if the reason for Addison's leave was truly an emergency situation. Thereupon, on the first day of the third week of leave Mason visited Addison's brother who lived in the Los Angeles area. Mason suggested that it was urgent that Addison call the Activity and let them know how long she was going to be gone so they could govern themselves accordingly. Addison's brother notified her in Buffalo, New York and Addison thereupon called Baray and inquired as to the nature of the difficulty. Baray indicated she knew of no problem and took no further action.

Upon Ms. Addison's return from Buffalo Mason called her into his office and questioned her with regard to the details of her "supposed" trip to New York. Addison challenged Mason's use of the word "supposed" and Mason went on to ask specifically where in New York she went, the flight number of the aircraft, the time of departure and arrival. Addison told Mason of the two leave slips which Mrs. Baray had approved but Mason made no comment. Mason continued to question Addison as to her sister's address, the hospital she was in and other details of the trip. Addison answered some of the questions and refused to answer others by telling Mason it was none of his business since she felt Mason displayed a complete lack of sympathy with her sister's illness or Addison's own emotional stress over the matter. Addison informed Mason that she didn't know what action she would take if he called the hospital to verify the condition of her sister or if Addison had been there to visit her. The meeting developed into a "shouting match" between the parties and Mason adjourned the meeting by telling Addison that since he wasn't getting the information he needed to approve her leave, he would put her on AWOL for the last six days of her absence.

On August 2, 1973 Mason drafted a letter to Ms. Addison disapproving the six days of leave taken beyond the first two week period explaining that he had no basis to approve the leave. Higher management became aware of the letter and told Mason to "back off" and the letter was never sent. Union representatives met with management over a seven or eight week period relative to the matter the result being that Addison's leave was finally approved. 9/

9/ Union president O'Leary testified that he knew of no other case where it took so long to resolve a "comparatively simple matter" of an employee's annual leave. However, the record is devoid of evidence that any similar situations existed in the past.

5. The Alleged "Fraudulent" Supervisory Position.

In the summer of 1973 the Activity's Material Control Branch was in the process of being reduced from four sections to three sections. As a result of the reorganization which also reduced the number of employees in each section, four GS-6 positions were found to be in excess. In an effort to maintain as high a grade structure in the Branch as possible, division chief Lawrence Lehr met with a position classifier and decided that some of the GS-6 positions could be retained by setting up an assistant supervisory position in two sections even though this meant having two supervisors over a unit of five to six employees. Thereupon, by letter dated August 9, 1973 Ms. Addison, a senior Branch employee at the GS-6 grade level, was offered one of the supervisory position. 10/ That letter notified Addison, inter alia:

"2. As a part of the reallocation of personnel two GS-520-06 supervisory full time permanent positions are being established as Assistant Supervisory Region Research Sections A and B. Since you are number two on the retention list for the GS-520-06 positions, you are hereby formally offered one of the two positions indicated above. Your answer must be indicated below in the space provided and must be returned to the undersigned by no later than 1130 hours, Monday, 13 August 1973.

4. If you accept the supervisory position, you will be required to discontinue any active role as a union officer and/or representative. If you do not accept the supervisory position, you will be assigned to an overstrength position in DCRL-FCM

10/ Addison was number two on the retention list. The individual who was number one received a similar offer.

and be slotted into the first available position at the GS-06 level available in DCRL-F for which you are qualified. If you fail to provide an answer by the 13 Aug 1973 deadline, the previous sentence applies." 11/

Union president O'Leary assumed that the offer of a supervisory position to Addison was merely a disguised attempt to preclude Addison from performing union representational duties. When employed by the government O'Leary had previously been a Manpower Management Analyst and through his familiarization with personnel matters of this sort O'Leary concluded that two full time supervisors supervising five employees would clearly be unacceptable in Civil Service operations. O'Leary made his view known to various of the Activity's manpower representatives and on August 15 or 16, 1973, Lehr was informed by manpower division that his plan for an additional supervisory employee in that particular situation would be "illegal within the framework of the regulations and policies and procedures of DSA". Thereupon, Lehr withdrew the offers of supervisory positions made to both Addison and the other employee.

6. The Cafeteria Incident.

Ms. Addison's normal work hours are from 7:00 a.m. to 4:30 p.m. On September 17, 1973 Addison came to work at approximately 6:50 a.m. to remove various materials from her desk since the reorganization of which she was a part occasioned her transfer to another section. When Addison arrived at work her desk was among those being grouped and prepared for transfer. There was some confusion as to precisely where Addison was to work and Addison sought out Mr. Lehr to clarify the matter but Lehr was not scheduled to arrive at work until sometime later that day. After standing in the hallway for awhile, Addison proceeded to the cafeteria for a cup of coffee. At 7:30 a.m. as she was approaching the cafeteria Mr. Darrell Winder, Chief, Office of Systems and Financial Management and Addison's fourth line supervisor, was just leaving. Winder told Addison that it was after 7:30 a.m. and she could not to go into the

11/ Addison never responded to this letter.

cafeteria at that time. 12/ Addison commented to Winder that he was on his way out of the cafeteria and that she had been standing around in the hall with no place to go and she needed some tea to settle her nerves. She told him it would take her only seconds and without further comment proceeded to enter the cafeteria, obtain a cup of tea and leave with it immediately.

Discussion

With regard to the AWOL charges placed against Ms. Addison by the Activity, Complainant contends that Addison in every instance either engaged in union activity during her break period or received permission from her immediate supervisor, Baray, to engage in union representation matters on that occasion. Addison testified without contradiction that there was no prohibition placed on her to go wherever she wished during break periods.

12/ A "bulletin" of July 11, 1973 informing all employees of cafeteria hours provided:

"1. Effective IMMEDIATELY the following policy concerning cafeteria coffee breaks and lunch periods is placed in effect and will be strictly adhered to by all DCASR, LA HQ/LA District personnel.

2. Coffee breaks may be taken between the hours of 0900-1000 and between the hours of 1400-1500. The 30-minute lunch period may be taken between the hours of 1100-1300.

3. At all other times between 0730 and 1600 hours, employees are normally expected to be at their work stations.

4. Supervisors are responsible for ensuring that the above policy is made known to all employees and followed by all."

Complainant places considerable reliance on being informed by Baray during the Union's investigation of the AWOL charges in September 1973 that she had no trouble with Addison with regard to being away from her duty station without permission and the arrangement she and Addison had as to leaving a note on Baray's desk calendar when going on union representation business when Baray was not present to give express permission. 13/ However, such evidence is not conclusive as to whether Addison was in fact improperly away from her desk involved in union representation work. Thus, in the Kalish incident there was an outstanding requirement that any employee wishing to see Kalish must have made arrangement for an appointment through the employee's supervisor. Kalish checked and found that no appointment had been made through Addison's supervisor. Accordingly, Addison's presence in Kalish's office for union representation purposes flew in the face of express guidelines and placed her in the position of being improperly engaged in representation matters in Kalish's office at that time. Even being on her break period would not have excused Addison from first making an appointment to see Kalish through her supervisor, which she failed to do. 14/

Similarly when Addison, during the Winkfield incident did not leave Mason's office when ordered and persisted in her attempt to represent Winkfield during that controversy, she obviously did not have the permission of her supervisor. Indeed, Mason was her second line supervisor with authority to withdraw any permission if it had been granted by Baray in the circumstances that prevailed. Further being on her break period did not insulate Addison to engage in union representation activities in Mason's office when uninvited by Mason and expressly told to leave. There was no prior arrangement for Addison's presence in Mason's office as envisioned by the ground rules for representation. Therefore even if on her break, Addison in these circumstances could not engage in such activities without placing herself in a status of being away from her duty station with leave to engage in a union representation matter. I am unconvinced

13/ Baray when testifying had no specific recollection of the conversation. In my judgment Baray was not entirely candid with the Union's representatives in her discussion, seeking rather to avoid any involvement in the situation. A forthright and full reply by Baray would have disclosed Baray's repressed displeasure with Addison in this regard as previously described.

14/ Addison testified that she had virtually no recollection of the circumstances surrounding this incident.

that became a steward as an employee is not required to remain at a duty station during a break period, the steward is therefore free to enter any office without appropriate supervisory permission in contravention of the accepted practice. 15/ While being designated as AWOL may have been technically imprecise, nevertheless I find that in any event Addison's absence constituted an improper absence from her duty station.

As to the German incident, Addison testified that she responded to the call for assistance from Finkel while on her break. Thereupon she engaged in a conversation with Finkel and Bloom in the facility lobby and then proceeded to discuss the matter with supervisor German. Assuming arguendo that Addison was free to engage in union business in the facility's public areas when on a break without obtaining her supervisor's permission, Addison nevertheless extended approximately fifteen minutes beyond her break period to deal with the situation. Therefore, regardless of whether Addison's initial response to a call for assistance in a representation matter was privileged, the remainder of the period that Addison was away from her worksite was without the express permission from her supervisor as charged by the Activity.

I do not find that the arrangement between Baray and Addison with regard to Addison's becoming involved in union representation matters spontaneously while away from her section amounted to a condonation of such activity or served to lull Addison into believing she was authorized to engage in representation activity without following the normal procedures. Thus the record reveals that for sometime prior to Addison's receiving the proposed adverse actions in question the Activity voiced concern to the Union about stewards leaving worksites on representation business without permission. Indeed, by its June 14, 1973 letter to the Union, a copy of which Addison received, the Activity expressly informed Addison of its insistence that she follow the accepted practice of requesting permission before she became involved in representation matters on duty time. Further, Addison was specifically warned in that letter that continued disregard might result in disciplinary action. The Activity's pre-disposition in this regard was personally re-emphasized to

15/ Cf. Department of the Air Force, Vandenberg Air Force Base, California, A/SLMR No. 485.

Addison in her meeting with Branch Chief Mason on June 21. However, Mason nevertheless chose to act as though she was free to act outside the established and accepted procedures for providing duty time union representation.

I also find the evidence establishes that Ms. Addison was insubordinate to both Mason and Winder as set forth in the Activity's disciplinary charge against Addison. During the incident in Mason's office on June 26, 1973 involving employee Winkfield, Addison's presence in Mason's office was not the result of following the accepted procedures for representing an employee nor were the procedures waived in any sense. Rather, after understandably entering Mason's office on Winkfield's request, when Mason repeatedly ordered Addison out of his office Addison was then obliged to leave. Addison claimed that her remark inquiring if Mason was going to "throw her out" was said in jest in an attempt to de-escalate the emotions involved in the situation. I do not credit Addison in this regard. No other words of pacification were spoken at the time nor did any facial expression or laughter accompany this statement. Therefore, I interpret Addison's remark to be in furtherance of her insubordination in refusing to follow a legitimate request to leave Mason's office.

As to the Winder matter, Addison entered the cafeteria after being specifically told not to by her fourth-line supervisor. The published regulation sets forth the hours of permissible use of the cafeteria by employees. The regulation also reveals that supervisors were responsible for ensuring that the policy, which in effect put the cafeteria off-limits to employees after 7:30 a.m., was "followed by all". Addison chose to utterly disregard a direct prohibition from entering the cafeteria enforced by a high ranking supervisor. In my judgment such conduct adequately supports a charge of insubordination. ^{16/} If Addison felt that the circumstances were abnormal and therefore negated the general prohibition against cafeteria admittance after 7:30 a.m., her evaluation was obviously not held by Winder. In such circumstances Addison was obliged to heed the direction given her by Winder at the time.

With regard to Addison's request for emergency leave I find that the evidence is insufficient to support the allegation that Respondent's actions violated the Order.

^{16/} The evidence does not establish that the regulation was disparately applied against Addison.

Thus, it is undenied that Addison had a history of extending emergency leaves. In such circumstances an investigation into the situation does not appear to be unreasonable. While Mason's inquiry lacked sensitivity, moderation or tact, such was in keeping with his underlying personality and general approach in dealing with personnel matters. In any event Mason's determination to place Addison on AWOL status was countermanded and leave, in fact, never was denied her.

I further find that the evidence does not establish that the offer of the supervisory position to Addison was motivated by anti-union considerations. Rather, the evidence reveals that the offer was part of a mistaken but good faith attempt to retain as many GS-6 positions at the Activity as possible in the face of a reorganization. The offer was made to Addison and another employee by virtue of their seniority status and was uniformly withdrawn as soon as management at the Activity realized that the creation of these positions was administratively unfeasible. In these circumstances I cannot conclude as alleged that the supervisory positions were created in the hope that Addison would accept one of them and thereby be ineligible to engage in union activities.

Presumably for the purpose of establishing the Activity's hostility toward Addison's union activity, Ms. Addison testified that she was told by Mrs. Baray sometime in early 1973 that she (Addison) would never get a promotion as long as she was active in the Union. Baray denies having made the statement. I credit the denial. Baray did not impress me as a person who would volunteer any such advice. Indeed, she appeared to diligently avoid any involvement in labor relations especially as it concerned Addison whom she considered "infallible" in these matters.

Addison also testified that a similar statement was made to her by Mason's predecessor, Mrs. Parker, during a meeting with William Hicks, then Chief of the Contract Data Division. ^{17/} Addison also testified that during that meeting Hicks told her that the more he saw of Addison, "the more he hated the darn union." According to Addison, immediately after the statements

^{17/} Although Addison testified that the meeting occurred in 1972, based on Hicks' testimony, I find the meeting occurred in early March 1973.

were made she left the meeting and related what had been told her to Union President O'Leary. O'Leary testified that Addison reported to him that Hicks told her he was sick and tired of hearing about the damn labor union. O'Leary asked Hicks and Parker if they had made the remark to Addison and both replied that they didn't remember. In his testimony Hicks denied ever having made such a remark but recalled having a meeting with Addison dealing with complaints from "activities" outside his division that Addison was discussing union business without having receiving proper authority from her supervisor or the supervisor of the "activity" she was visiting. According to Hicks, Addison said that since it was a union matter she wished to have O'Leary present. When the meeting reconvened, Hicks was accused of having made an anti-union remark to Addison. 18/ None of the management personnel recalled such a statement having been made.

I find the evidence to be inconclusive as to what, if anything, was said to Addison concerning the Union. In any event, I do not find that the evidence supports Addison's version of the alleged remarks made at the meeting. I note particularly that O'Leary in his testimony related that Addison informed him only what Hicks was purported to have said and no mention is made of Parker's alleged statement. Further while the expresseion "damn union" may have been made or some other similar comment, in my view the evidence does not support a finding of hostility towards Addison. The precise context in which the words might have been used would of course give meaning to the phrase but on the sketchy evidence before me I cannot infer that even if the words were used, hostility toward Addison or the Union was proven by a preponderance of the evidence.

Recommendation

In sum, Complainant contends that Ms. Addison was harassed by Respondent because of her activity as an energetic union representative. Such harassment would of course be violative of the Order since it would obviously stifle a union steward's desire to vigorously fulfill union representational obligations. However, the record evidence herein is insufficient to support Complainant's allegations. Thus, in each case of alleged harassment the record reveals that valid grounds existed for Respondent's actions be it with regard to Addison's engaging in representation activities without following proper procedures or insubordination. The record also reflects that the Activity's

18/ Hicks did not recall the precise words he was accused of having spoken.

treatment of Addison's leave request however clumsily pursued was at least presumptively justified based upon Addison's past use of emergency leave. The supervisory offer was adequately explained as essentially an administrative mistake. Moreover, no anti-union motivation or disparate treatment has been established which might color Respondent's treatment of Addison. Accordingly, in these circumstances I recommend that the complaint be dismissed in its entirety. 19/


 SALVATORE J. ARRIGO
 Administrative Law Judge

DATED: January 15, 1976
 Washington, D.C.

19/ In its brief Respondent moved that all testimony and exhibits relating to Addison's eight day suspension be stricken from the record since Addison availed herself to the "agency grievance procedure" to get the suspension reversed, but failed in her attempt. The record reveals that Ms. Addison appealed the procedural aspects of her suspension to the Civil Service Commission and that substantive matters dealing with the suspension could not be appealed to the Commission. As to the substantive aspect of her suspension Section 19(d) of the Order gave Addison the option of filing a grievance or unfair labor practice charge. She chose the latter. Accordingly, Respondent's motion is denied.

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 JUSTICE
 IMMIGRATION AND NATURALIZATION
 SERVICE
 BORDER PATROL
 EL PASO, TEXAS
 Respondent
 and
 ROBERT T. HIDAY and LOCAL 1929
 AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFL-CIO
 Grievants

Case No. 63-6055 (GA)

James J. McClain
 Labor-Management Relations Specialist
 Southwest Regional Office
 Immigration and Naturalization Service
 Terminal Island
 San Pedro, California 90731
 For the Respondent

Pete Evans
 National Representative
 American Federation of Government
 Employees, AFL-CIO
 4347 South Hampton Road
 Dallas, Texas 75232
 For the Grievants

Before: MILTON KRAMER
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Executive Order 11491 as amended.
 It was initiated by the Grievants with the filing of an
 Application for Decision on Grievability or Arbitrability

dated August 16, 1975 and filed August 20, 1975. The
 Application was filed by Robert T. Hiday and Local 1929.
 The Regional Administrator on November 12, 1975 issued a
 Notice of Hearing to be held on January 13, 1976 in
 El Paso, Texas. A hearing was held on that date and place.
 The Grievants were represented by a National Representative
 and the Respondent was represented by counsel.

On August 29, 1974 Robert T. Hiday, an employee of the
 Respondent in a unit represented by Local 1929, was issued
 a letter of reprimand. Local 1929 filed a grievance on
 April 2, 1975 contending that the officer who was designated
 the Grievance Examiner violated Article 10, Section D and
 Article 11, Section C of the multi-unit agreement between
 the Immigration and Naturalization Service and AFGE in not
 affording Hiday a hearing before issuing his final recommen-
 dation on the reprimand. On June 19, 1975 the Respondent
 rejected the grievance on the ground it was not grievable
 under the agreement.

After the conclusion of evidence on January 13, 1976,
 the parties made closing arguments. In the closing
 argument of the Respondent its counsel stated that it would
 rescind the decision of June 19, 1974 and decide the
 grievance on the merits and send me a copy of the communica-
 tion doing so.

On February 4, 1976 this office received a copy of a
 letter dated February 2, 1976 from the Respondent to the
 President of Local 1929 rescinding the letter of June 19,
 1975 rejecting the grievance as not grievable and deciding
 that the denial of a hearing by the Grievance Examiner did
 not violate the collective agreement. This hearing is
 reopened and that letter made a part of the record as
 Exhibit ALJ 1, and the record again closed.

Since the grievance has now been entertained and
 decided on the merits, the controversy is moot.

Accordingly, I recommend that the Assistant Secretary
 dismiss the Application as moot.

MILTON KRAMER
 Administrative Law Judge

Dated: February 12, 1976
 Washington, D. C.

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 HOUSING :
 AND URBAN DEVELOPMENT, :
 DES MOINES INSURING OFFICE :
 Respondent :
 and :
 :
 AMERICAN FEDERATION OF :
 GOVERNMENT EMPLOYEES, :
 AFL-CIO, LOCAL 3452 :
 Complainant :
 :

CASE NO. 62-3945(CA)

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 Regional Counsel
 Department of Housing and
 Urban Development
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 Kansas City, Missouri 64106
 For Respondent

Gary B. Landsman, Esquire
 Staff Counsel
 American Federation of Government
 Employees, AFL-CIO
 1325 Massachusetts Avenue, N.W.
 Washington, D.C. 20005
 For Complainant

Before: WILLIAM B. DEVANEY
 Administrative Law Judge

RECOMMENDED DECISION
Statement of the Case

Pursuant to an amended complaint filed November 11, 1974,
 under Executive Order 11491, as amended, by Des Moines, HUD
 Local 3452, American Federation of Government Employees, AFL-CIO

(hereinafter "Complainant" or, "Local 3452") against the
 Des Moines Insuring Office, Department of Housing and Urban
 Development (hereinafter "Respondent" or "HUD Des Moines")
 a Notice of Hearing was issued by the Regional Administrator
 on February 20, 1975, and a hearing was held on April 22 and
 23, 1975, in Des Moines, Iowa.

The amended complaint alleges that Respondent violated
 Sections 19(a)(1) and (2) of the Executive Order by the
 termination of probationary employee Jack Waterman, a steward
 of Local 3452, effective June 15, 1973 (Asst. Sec. Exh. 1-b).
 All parties were represented by counsel, were afforded full
 opportunity to be heard, to examine and cross-examine wit-
 nesses, and to introduce evidence bearing on the issue in-
 volved herein. Excellent post-hearing briefs were submitted
 by counsel for the respective parties and have been carefully
 considered.

Upon the basis of the entire record, including my obser-
 vation of the witnesses and their demeanor, I make the following
 findings of fact, conclusions and recommended decision.

Findings of Fact

1. On December 10, 1972, Mr. Jack Waterman was given
 an appointment as a GS-9 Realty Specialist 1/ and was noti-
 fied in writing on June 15, 1973, that his probationary appoint-
 ment would terminate effective June 23, 1973, because of
 unsatisfactory performance during his probationary period, more
 specifically because of failure to follow written instructions;
 consistently repeated the same type of errors in daily work
 assignments; and resented constructive criticism (Comp. Exh. 5).
 Mr. Waterman was advised in the same memorandum of his limited
 rights of appeal to the Civil Service Commission within 15
 calendar days after the effective date of termination. (See,
 also 5 C.F.R. §315.806).

2. In early March, 1973, Respondent was advised of
 a potential reduction in force and on March 12, 1973,
 Respondent received a list, prepared by the regional personnel

1/ There was, and is, no contention in this proceeding
 that Mr. Waterman was not a probationary employee. See, for
 example, 5 C.F.R. §§315.801, 315.802.

office, of persons declared surplus in the Des Moines Insuring Office (Res. Exh. 10). Mr. Waterman was included on the list and was so advised by Mr. Paul Buchmann, then assistant to the Director, in late March, 1973. 2/ On April 2, 1973, Mr. Waterman was given a job referred to the Corps of Engineers in Omaha (Comp. Exh. 2), as was Van Harman who was also on the surplus list, and Mr. Waterman was also given administrative leave by Mr. Buchmann in April, 1973, for a job interview with the Nebraska Department of Roads.

3. During the last week of April, 1973, AFGE National Representative Carl Holt met Mr. Waterman at the HUD Des Moines office while he (Holt) was passing out union literature. At that time, Mr. Waterman agreed to participate in the union organizing drive and was appointed acting steward by Mr. Holt since no formal local had been established or chartered at that time.

4. Mr. Waterman became very active in the union organizing effort, passed out literature and authorization cards, personally signed up members; in mid or late May, arranged for meetings at the HUD office and posted notices and bulletins. By the end of April or beginning of May, Mr. Schomer, Mr. Waterman's immediate supervisor, became aware that Mr. Waterman was passing out literature and attempting to organize the union.

5. The only training for realty specialist was on-the-job training. On December 13, 14, and 15, 1972, Harry Schomer took Mr. Waterman on a trip to Davenport, Iowa, for training purposes and further training trips were provided on January 13, 14, 15, 29 and 31; February 1, 2, 7, 8, 9, and 28; March 1, 2 and 3, 1973.

6. From the beginning of his employment, Mr. Waterman evidenced difficulty in following instructions and making adequate progress. Mr. Schomer, who was a completely frank and credible witness, testified, for example, that Mr. Waterman was very weak in preparing repair specifications (Form 477) and that he had told Harold Parry, Director, Housing Management Division, Mr. Schomer's immediate supervisor and

2/ Mr. Waterman's immediate supervisor, Mr. Henry (Harry) Schomer, Mr. Frank Howell, at that time the third Realty Specialist, and even Mr. Buchmann, inter alia, were also on the surplus list.

Mr. Waterman's second line supervisor, that,

"I think I should put him back in and start the process of retraining with Mr. Waterman." (Tr. 170)

Mr. Schomer testified that, prior to rejection of any of Mr. Waterman's work by Mr. Parry, he (Schomer) did not feel that Mr. Waterman was operating proficiently; that he had tried many times to let him solo, i.e., work on his own, but that he could not let him work alone, because of errors and deficiencies, for a considerable period of time. As found above, Mr. Waterman was afforded further on-the-job training and eventually was assigned cases to handle alone but he continued to make errors and was again withdrawn from field work. Mr. Schomer was never satisfied with Mr. Waterman's work, found that Mr. Waterman had a hard time correlating all the facets of a problem into a solution; that he had difficulty following instructions; and that he was very defensive toward criticism.

7. Mr. Schomer repeatedly counseled Mr. Waterman and showed him his mistakes and tried to get a pattern established. Mr. Schomer did not indicate that he thought Mr. Waterman's work was correct. Mr. Parry talked to Mr. Waterman about his work once in his (Parry's) office and once or twice at Mr. Waterman's work area and, on repeated occasions, discussed errors and deficiencies of Mr. Waterman's work with Mr. Schomer. On May 4, 1973, Mr. Parry wrote a memorandum to Dolorse Steffens, Administrative Officer, through Nate Ruben, Director, concerning Mr. Waterman (Exh. 3 to Res. Exh. 6). There is no credible evidence that at the time Mr. Parry wrote this memorandum he had any knowledge of Mr. Waterman's union organizing activity and I fully credit Mr. Parry's testimony that he was not aware of any such activity. I further find that the memorandum of May 4, 1973, was pursuant to Respondent's established policy and practice of periodic review and evaluation of probationary employees and in direct response to the request of the Administrative Officer dated May 3, 1973 (Res. Exh. 11).

8. As stated in the memorandum of May 4, 1973, Mr. Parry asked Mr. Schomer for continued evaluation. On June 7, 1973, Mr. Schomer submitted a further evaluation of Mr. Waterman to Mr. Parry (Res. Exh. 3); and on June 18, 1973, Mr. Schomer wrote a further memorandum to Mr. Parry concerning an incident

of June 13, 1973, when Mr. Waterman, despite specific orders that he was not to perform any field work, was going to do so in Mr. Schomer's absence from the office and that he (Schomer) had told another employee, Mr. Van Harman, to tell Mr. Waterman that, under no circumstances, was he to leave the office for field work.

9. Mr. Parry made a further review of Mr. Waterman's work performance, documented in Respondent's Exhibit 6 (attached Exhibits 1-G through 7(b); See, also, memorandum dated June 6, 1973, from Ruth Roland, Administrative Clerk, to Mr. Parry (Res. Exh. 15)) and wrote a more detailed report to Director Ruben and Administrative Officer Steffens on May 29, 1973, (Res. Exh. 7) in which he recommended that Mr. Waterman be terminated.

10. On June 15, 1973, Mr. Waterman was notified that his probationary appointment was being terminated effective June 23, 1973.

CONCLUSIONS

As stated in its brief, the basic position of Complainant is that Mr. Waterman was terminated because of his union activity. If Mr. Waterman were terminated because of his union activity, there would be, undeniably, a violation of Sections 19(a)(1) and (2) of the Executive Order, Miramar Naval Air Station, Commissary Store, San Diego, California, A/SLMR No. 472 (1975), just as such conduct would violate the essentially similar provisions of 8(a)(1) and (3) of the National Labor Relations Act, Great Dane Trailers, Inc. v. NLRB, 78 LRRM 2384 (4th Cir. 1971) (en'g 186 NLRB 267, 76 LRRM 1849 (1970)), cert. denied, 405 U.S. 1041 (1972). Of course, union activity may not immunize discharge for valid reason unrelated thereto. 2024th Communications Squadron, Moody Air Force Base, Ga., A/SLMR No. 248 (1973); Veterans Benefits Office, Washington, D.C., A/SLMR No. 296 (1973); Department of the Navy, Hunters Point Naval Shipyard, A/SLMR No. 373 (1974); NLRB v. Smoky Mountain Stages, Inc. 447 F.2d 925, 78 LRRM 217 (4th Cir. 1971); NLRB v. Booth American Co., 80 LRRM 3062 (6th Cir. 1972).

Proof that Mr. Waterman engaged in union organizing activity, that Respondent knew of such protected activity, and that Mr. Waterman was terminated creates suspicion that a violation of Sections 19(a)(1) and (2) may have occurred. Complainant's case turns almost entirely on the credibility of Mr. Waterman and I did not find Mr. Waterman to be either a credible or

convincing witness. Mr. Waterman testified that he did not receive a position description until 4 or 5 months after he was employed. The record shows conclusively (Res. Exhs. 13 and 14) that he received it on December 21, 1972. Mr. Waterman testified that he did not know he was on the surplus list. Mr. Buchmann testified that he told Mr. Waterman, as well as each of the employees on the surplus list, that he was on the list. I have fully credited Mr. Buchmann's testimony which is also fully supported by Mr. Waterman's admitted receipt of a letter concerning the possible reduction in force and the job reference of Mr. Waterman to the Corps of Engineers as well as the allowance of administrative leave for another job interview. Mr. Waterman testified that there was never any discussion of mistakes by any supervisor and that his work was always found satisfactory until he began his union organizing activity the last week of April, 1973. The record is overwhelmingly to the contrary, was refuted by the wholly credible testimony of Mr. Schomer, by the various documents returned to Mr. Waterman, and by the equally credible testimony of Mr. Parry and Ms. Roland. Mr. Waterman testified that he received no, or at most minimal, training. The record shows that Mr. Waterman received extensive on-the-job training and that he received at least as much, and probably more such training, than other employees assigned as realty specialists.

Complainant contended that Mr. Waterman was performing satisfactorily until he began his union organizing activity. Respondent has clearly shown that this was not true. I have found that when Mr. Parry wrote his memorandum of May 4, 1973, he did not know of any union activity by Mr. Waterman; but even if it were assumed that Mr. Parry did know of Mr. Waterman's union activity, the record, nevertheless, shows, inter alia, that: a) Mr. Waterman was not performing satisfactorily and that his performance had been a topic of discussion before any such activity took place; b) the memorandum was not the result of any such union activity but, rather, was part of Respondent's regular and established policy and program of periodic review and evaluation of probationary employees; c) Mr. Waterman's problems were real and in no sense contrived.

The very purpose of the probationary period is to determine the fitness of the employee and to terminate his services during this period if he fails to demonstrate fully his

qualifications for continued employment. 3/ The evidence falls short of sustaining the allegation, that Mr. Waterman was terminated because of his union organizing activity, by the burden of proof required by Section 203.14 of the Regulations. Indeed, the overwhelming preponderance of the evidence is decidedly to the contrary. United States Air Force, Webb Air Force, Texas, A/SLMR No. 439 (174).

RECOMMENDATION

I recommend that the complaint be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 28, 1976
Washington, D.C.

3/ 5 C.F.R. §315.803 provides as follows:

"Agency action during probationary period (general).

"The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment."

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. CIVIL SERVICE COMMISSION, :
Respondent :
and :
NATIONAL TREASURY EMPLOYEES UNION, :
Complainant :
and :
U. S. CIVIL SERVICE COMMISSION, :
Respondent :
and :
NATIONAL TREASURY UNION EMPLOYEES, :
Complainant :
and :
INTERNAL REVENUE SERVICE, WASHINGTON, D. C. :
Respondent :
and :
NATIONAL TREASURY UNION EMPLOYEES, :
Complainant :
.

Case Nos.
30-5669 (CA)
35-3241 (CA)
35-3232 (CA)

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Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to complaints filed under Executive Order 11491, as amended (hereinafter called the Order) filed by National Treasury Employees Union (hereinafter called Union or NTEU) in Cases No. 30-5669 and 35-3241 against the United States Civil Service Commission (hereinafter called CSC), and to an amended complaint filed under the Order by NTEU in Case No. 35-3232 against Internal Revenue Service (hereinafter called IRS), an order Consolidating Cases and a Notice of Hearing was issued by Assistant Regional Director for New York, New York Region on November 14, 1974. A number of orders re-scheduling the hearing were issued, the last being issued on February 11, 1975.

The complaints in Cases Nos. 35-3241 and 35-3232 allege, in substance, that IRS and CSC violated Sections 19(a)(1) and (6) of the Order by interviewing employees of the Albany District Office of IRS in regard to personnel policies and practices, grievances, and other matters affecting working conditions without affording representatives NTEU Chapter 61 the opportunity to be present. The complaint in Case No. 30-5669 alleges, in substance, that CSC violated Sections 19(a)(1) and (6) of the Order by interviewing employees of the Manhattan District Office of IRS in regard to personnel policies, etc. without affording representatives of NTEU Chapter No. 47 the opportunity to be present.

A hearing was held in the captioned matter in Washington, D.C. All parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. All 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 evidence and testimony adduced at the hearing, I make the following findings, conclusions and recommendations:

Statement of Facts

A. Albany, (Cases No. 35-3241 and 35-3232)

NTEU Chapter 61 is the exclusive collective bargaining representative of the employees of the Albany District Office of the IRS.

During the weeks of January 28 and February 4, 1974, CSC conducted an evaluation of the personnel management effectiveness of the Albany District Office of IRS in accordance with statutory and executive order requirements and mandates. 1/ On January 4, IRS Albany District Director Donald T. Hartley sent NTEU Chapter 61 President Robert W. Martin a notice, pursuant to CSC instructions, advising the Union of the evaluation, that Robert Bowler would be the CSC team leader and that the CSC team wished to meet with the Union as part of the evaluation. Also, on January 4, Hartley issued a memorandum to Albany District Office employees advising them of the evaluation, that they could arrange to meet with the CSC team and that questionnaires would be distributed.

On January 28 NTEU Chapter 61 President Martin and Chief Steward Walter A. Ludewig met with Ms. Ruth Miller of the IRS Albany District Personnel Office who introduced them to CSC team leader Bowler and Ms. Judith Warren; the latter identified as being from the "national office." Both Union representatives assumed this meant Ms. Warren was from the CSC national office whereas, in fact, she was from IRS national office.

Approximately 12 employees were interviewed during the CSC survey, ten at their own request and two were randomly selected by CSC. An EEO Counselor was also interviewed as were two Union representatives. Employees were questioned concerning personnel policies and practices and were informed that the purpose of the interview was to determine information concerning the effectiveness of the total personnel management program and id not relate to individual employee grievances. Under CSC procedures the Union would not be permitted, on its request, to be present at employee interviews, although the Union never asked CSC to be present during the employee interviews.

1/ 5 U.S.C. §1301; Executive Order 9830; 5 U.S.C. §5110; 5 U.S.C. §4306; Executive Order 11478; Public Law 92-261; Presidential Memorandum dated October 9, 1969; Executive Order 1149 ; Executive Order 10987; Executive Order 11721.

Ms. Warren was employed a a Management Specialist in the National Office of the IRS, but during the period of time material herein she was detailed to work in Albany as part of the CSC team and to take her directions from the CSC team leader, Mr. Bowler. She received guidance and instructions from Mr. Bowler. During the evaluation she interviewed only three employees, including the EEO counselor. She interviewed these employees individually and introduced herself as being from the IRS National Office assigned to the CSC evaluation team.

Neither the Union nor any employees requested that the Union be present during any of the CSC interviews of employees. Nevertheless, the record establishes that the CSC team would not have granted the Union request to be present during such interviews.

On January 30, upon learning that Ms. Warren was an IRS employee, Union representatives met with Mr. John Zahnleuter, Chief of the Administrative Division of the Albany District Office of IRS. The union representatives stated that their rights 2/ were being violated by Ms. Warren interviewing employees without the presence of a Union representative. They requested that Ms. Warren's interviewing activities be stopped. This was done.

Previously, all grievances filed by the Union had been reduced to writing. Further, Article 33 Section 7, of the collective bargaining contract provides that Step 1 of the grievance procedure involves the issue being brought to the attention of the supervisor of the aggrieved. Section 2 of Article 33 provided, in part:

"A grievance is a request for personal relief in any matter of concern or dissatisfaction to an employee, a group of employees or a group of employees or a union, which is subject to the control of the Employer..."

B. Filing of Complaints in Case Nos. 35-3241 and 35-3232.

An unfair labor practice charge was timely filed by the Union against CSC and IRS alleging violations of the Order with respect to the Albany evaluation. By letter dated and mailed on April 30 CSC gave NTEU its final response. This letter was received by NTEU in the due

2/ Although not clear they were apparently referring to their rights under the collective bargaining agreement.

course of the mail.3/

The Complaint in Case No. 35-3241 was filed in the Washington Area Office of the Department of Labor on July 2, 1974. The complaint was forwarded to the Buffalo Area Office where it was assigned its case number 4/ and date stamped, as received, on July 26, 1974.

The Complaint in Case No. 35-3232 was filed in the Buffalo Office of the Department of Labor on July 5, 1975 and alleged violations of Section 19(a)(1) of the Order by the CSC and of Sections 19(a)(1) and (6) by IRS. This Complaint was amended on August 23, 1974 alleging only the violations by IRS.

CSC, in the investigation of this matter in the area office raised the issue that the complaint against it in Case No. 35-3241 was not timely and properly filed.

C. Manhattan (Case No. 30-5669)

During the week of June 10, 1974 CSC conducted an evaluation of the personnel management program of the Manhattan District Office of the IRS. The CSC Team interviewed employees in the collective bargaining unit represented by NTEU Chapter 47. The CSC Team was composed of several CSC employees and Ms. Earline Tompkins, an employee of the IRS National Office. An NTEU representative requested to be present when employees were interviewed. This request was denied in a letter from IRS Deputy Director P. E. Coates, of the Manhattan Office.

In performing this evaluation, as well as the one in Albany, CSC was discharging its duties as mandated in various laws, executive orders etc.5/ The evaluations have two main functions, first to determine whether the activity or office being evaluated is complying with various laws, executive orders, and CSC rules and regulations; and secondly, to advise the activity or office as to ways it can, within its discretion, improve its

3/ This is a factual assumption made because there is no evidence to the contrary.

4/ It was originally assigned a member in the Washington Office. This number was crossed out and the Case Number, 35-3241, was assigned by the Buffalo Office.

5/ See Footnote 1.

management of personnel within the laws and rules.

These evaluations involve the CSC team distributing questionnaires to employees and management representatives and interviewing both employees, managers, supervisors, and union representatives. Only the CSC teams members are present when the employee interviews are conducted.

At the close of evaluation the CSC team advises the activity or office evaluated what steps it must take to bring itself onto compliance with laws, executive orders and CSC rules and regulations and what steps the team recommends be taken to improve the activity's or offices's personnel management. The activity or office then takes the corrective measures necessary to bring it into compliance with laws or regulations and decides which steps, if any, it will take and how they will be accomplished, in order to improve its personnel management.

Conclusions of Law

A. Timeliness of the Complaints in Case No. 35-3241 and 35-3232.

Section 203.2(b) of Assistant Secretary's Rules and Regulations provides, in part:

(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.

(3) A complaint must be filed within (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.

In the subject matter it is undisputed that CSC's April 30 letter was a "final decision" within the meaning of Section 203.2(b). Further, this letter dated April 30 was mailed on that day and, absent any specific evidence to the contrary, will be presumed to have been received

by NTEU in the normal course of the mail.

Therefore, in light of the foregoing it is concluded that the final decision was served, within the meaning of Section 203.2(b) of the Rules and Regulations, on NTEU on April 30, 1974, the date of mailing. Council of Customs Locals, AFGE, FLRC No. 74A-72 (Council Release No. 63).

Section 206.2 of the Rules and Regulations provides:

"Whenever a party has the right or is required to do some act pursuant to these regulations within a prescribed period after service of a notice or other paper upon him by mail, three (3) days shall be added to the prescribed period, provided, however, that three (3) days shall not be added if any extension of time may have been granted." 6/

It is concluded that the provisions of Section 206.2 are applicable to the instant case because NTEU has "the right" to file a complaint within 30 days after a final decision has been served. 7/

Therefore any complaint against the CSC involving the evaluation of the IRS Albany Office had to be filed on or before July 2, 1974.

6/ The Rules and Regulations have since been changed so as to add 5 days.

7/ U. S. Army Training Center, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, FLRC No. 72A-17 (Council Release No. 26) is clearly inapposite. In that case the FLRC held that the Assistant Secretary was not arbitrary and capricious in ruling that the 3 days was not added when the complaint had to be filed 30 days after receipt of the final decision. The FLRC specifically referred to the fact that the situation involved an action to be taken after receipt, rather than service, of the final answer. Clearly, when the Rules and Regulations were changed so as to compute the time from service, rather than from the receipt the distinction between the two terms and the effects were clear.

The complaint in Case No. 35-3241 was filed by NTEU in the Washington Area Office on July 2, 1974. In light of the foregoing it is concluded that it was timely filed.^{8/}

Section 203.4(a) of the Rules and Regulations provide:

"An original and four copies of a complaint and two copies of the entire report of investigation shall be filed with the Area Administrator for the area in which the alleged unfair labor practice occurred, or if it occurred in two or more areas, the complaint shall be filed with the Area Administrator for the area in which the headquarters of the respondent is located."

NTEU filed the complaint in Washington Area Office and not in the Buffalo area office. However, the gravamen of the unfair labor practice complaint is that CSC did not permit Union representatives to be present when employees were interviewed by the CSC evaluation team in Albany. This decision of the CSC team was likely part of CSC national policy, which was set in Washington. ^{9/}

In such a situation, to require a complainant to file only in one specific area office or to file in two such offices, where there is a real possibility that an agency's headquarters office might have made the decision that was, in fact, the alleged unfair labor practice, seems to be misconstruing the Rules and Regulations. Rather a logical reading of the rules and regulations is that if there is clearly a local unfair labor practice, the complaint should be filed locally. However, where the alleged

^{8/} The complaint in Case No. 35-3232 was amended so as to eliminate the CSC as a Respondent, and IRS did not present any evidence as to when it served its final decision, if any, and did not allege that the complaint was untimely. Therefore, this complaint is deemed timely and properly filed.

^{9/} This seemed to be substantiated by the testimony.

unfair labor practice might reasonably involve a policy or decision of the national office of a respondent, it is concluded that it would not violate these rules and regulations to file a complaint involving such policy or decision in the Area Office in which the agency's headquarters is situated. ^{10/} It is therefore concluded that the Complaint in Case No. 35-3241 was properly filed.

B. Section 19(d)

Section 19(d) of the Order provides, in 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...."

IRS contends that when the NTEU Chapter 61 representatives went to Mr. John Zahnleuter, Chief of Administration for the Albany IRS District Office on January 30, 1974 and attempted to resolve the dispute concerning Ms. Warren, this constituted a grievance under Section 19(d) and that therefore NTEU is barred by Section 19(d) from processing this unfair labor practice case, because it raises substantially the same issue.

In order to find that NTEU Local 61 elected to pursue its grievance procedure, and thereby waived the use of the complaint procedure, NTEU's election must be clear and unequivocal. It must be clear that NTEU Chapter 61 was in fact utilizing its grievance procedure.

The fact that the NTEU Chapter 61 representatives went to Mr. Zahnleuter and complained that IRS was violating the contract by allowing Ms. Warren to interview employees without a Union representative being present does not make it a grievance. The NTEU representatives did not state their complaint was a grievance nor did they follow the contract grievance procedure, which they traditionally did,

^{10/} §206.9 of the Rules state that the Regulations are to be construed liberally "to effectuate the provisions of the order."

by going, pursuant to the first step of the grievance procedure, to their immediate supervisor first. Further, they did not file it in writing which, although not required by the contract, was their traditional practice. Rather this was an informal attempt to resolve differences. To hold all such informal attempts to resolve disputes as Section 19(d) grievances barring use of the complaint procedures, would be to frustrate one the very purposes of the Order, which is to encourage the parties to consider and resolve problems informally and amicably, before utilizing formal procedures. To so hold would be to discourage a union from approaching an activity in an attempt to informally settle a dispute, for fear it would be waiving its rights under the Order. Logic dictates that before such election can be found, it must be clear that the labor organization was in fact following a grievance procedure.

In the subject case it is concluded that the NTEU Chapter 61 representatives were not attempting to utilize the grievance procedure when they met with Mr. Zahnleuter, and that therefore, Section 19(d) does not bar the further processing of the complaint in Case No. 35-3232.

C. Alleged Violations of Sections 19(a)(1) and (6) of the Order

The CSC evaluation teams in both the Albany and Manhattan Offices of the IRS were gathering information in order to evaluate whether the offices in question were complying with various laws, executive orders, and CSC rules and regulations and to evaluate the effectiveness of the IRS offices' personnel management programs. The CSC was performing the duties mandated to it by laws and executive orders.

The CSC evaluation teams, by using questionnaires and interviewing employees, union officials, supervisors, etc. were attempting to obtain the information necessary for it to make the evaluations described above. The CSC teams did not make any commitments to employees nor make any "counterproposals". Rather the teams make their suggestions to the agency, which then carries out those suggestions required by law and considers those not required. There is no allegation that IRS made any changes without advising and bargaining with NTEU to the extent required by the Order.

It is concluded that the interviews carried on by the CSC evaluation teams, whether the interviewee was randomly chosen or was one who requested to be interviewed because of a complaint, were not, within the meaning of

Section 10(e) "...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..." Therefore the NTEU representatives had no right, under the Order, to be present at the CSC team interviews. NASA, A/SLMR No. 457, FLRC No. 74A-95. Therefore it is concluded that CSC did not violate Sections 19(a)(1) and (6) of the Order, with respect to either the Albany or Manhattan evaluation.^{11/} Similarly those IRS employees assigned to the CSC evaluation teams ^{12/} were in fact under the control of the CSC team leader and subject to the CSC rules. In such circumstances, the presence of an IRS employee on the CSC evaluating team evaluating the IRS Albany District Office and interviewing employees, while not permitting NTEU to be present, did not constitute a violation by IRS of Sections 19(a)(1) and (6) with respect to the CSC evaluation of either the IRS Albany District Office. ^{13/}

Recommendation

In light of forgoing it is recommended that the Assistant Secretary dismiss the complaints in Cases Nos. 30-5669, 35-3241 and 35-3232 in their entirety.

Samuel A. Chaitovitz
 SAMUEL A. CHAITOVITZ
 Administrative Law Judge

Dated: December 4, 1975
 Washington, D. C.

^{11/} Cf. Department of Navy and Civil Service Commission, A/SLMR No. 529.

^{12/} Ms. Warren in Albany.

^{13/} Although there was some confusion whether NTEU knew in advance that Ms. Warren was an IRS employee, the confusion seemed due to poor communications and not to an attempt by IRS to mislead NTEU.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



Recommended Decision

Statement of the Case

.....
In the Matter of

U.S. DEPARTMENT OF AGRICULTURE	:	
and	:	
OFFICE OF INVESTIGATION	:	
and	:	CASE NOS. 22-5779 (CA)
OFFICE OF AUDIT	:	
Respondents	:	and 22-5821 (CA)
and	:	
NATIONAL FEDERATION OF FEDERAL	:	
EMPLOYEES, LOCAL 1375	:	
Complainant	:	

.....
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For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

Pursuant to an Order Consolidating Cases and a Notice of Hearing issued on April 16, 1975 by the Acting Regional Administrator for Labor Management Services Administration, U. S. Department of Labor, Philadelphia Region, a hearing was held before the undersigned in Washington, D. C.

The proceeding in Case No. 22-5779 was initiated under Executive Order 11491, as amended (hereinafter called the Order) by the filing of a complaint on January 6, 1975 and an amended complaint on January 28, 1975 by National Federation of Federal Employees Local 1375 (hereinafter called the Union, NFEE Local 1375 or NFEE) against U. S. Department of Agriculture and Office of Investigation and Office of Audit (herein collectively called Respondents) alleging that Respondents violated Section 19(a)(1)(2)(5) and (6) of the Order by refusing to negotiate with the Union concerning a new collective bargaining agreement.

The proceeding in Case No. 22-5821 was initiated by the filing of a complaint on February 14, 1975 by the Union against the U. S. Department of Agriculture alleging that the Department of Agriculture violated Sections 19(a)(1)(4)(5) and (6) of the Order when it invoked Section 3(b)(4) of Order in determining that the Department's Office of Investigation and Office of Audit fell within the meaning of that Section. The Notice of Hearing in this case only set the Section 19(a)(1) allegation for hearing.

A consolidated hearing was held in Washington, D. C. at which both parties were represented, were afforded full opportunity to be heard, to enter into stipulations, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Subsequently an additional Notice of Hearing on Complaint was issued in Case No. 22-5821 to permit hearing with respect to the Union's allegation that the Department of Agriculture's conduct also constituted a violation of Section 19(a)(5) of the Order. On October 2, 1975 the parties entered into a stipulation that no further hearing was necessary but reserving the right to file briefs. 1/

1/ This stipulation is attached hereto and marked as Appendix "A" and is made a part of the record herein.

Subsequently the parties filed supplemental 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 evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendation.

Finding of Fact

1. On September 25, 1964 the Department of Agriculture Office of the Inspector General, granted exclusive recognition to NFFE Local 1375 for a unit consisting of all investigatory employees in grades GS-5 through GS-13.

2. On October 10, 1966 the Office of the Inspector General granted exclusive recognition to NFFE Local 1375 for a unit consisting of all auditors in grades GS-5 through GS-13, with the usual supervisory and management exceptions. Both of the foregoing recognitions were made under Executive Order 10988.

3. On April 10, 1968 the Office of the Inspector General and NFFE Local 1375 entered into a collective bargaining agreement under which the two separate units described above were merged into a single collective bargaining unit. 2/

4. The Department of Agriculture is an executive department of the United States of America. The duties performed in the Office of Audit and the Office of Investigation, were originally joined in the Office of Inspector General, but on January 9, 1974 they became

2/ This finding of fact is based on a stipulation entered into by the parties and set forth on pages 6 and 7 of the transcript of the hearing. The Union, in its brief contends that the units were kept separate. However, I am constrained to conclude that I am bound by the stipulation entered into by both parties. The Union did not at any time request to withdraw from the stipulation or to reopen the hearing in order to litigate this issue.

separate entities. On that date the functions, delegations and responsibilities pertaining to the investigative activities of the Office of Inspector General were transferred to the Office of Investigation. Similarly, the functions, delegations and responsibilities pertaining to the audit activities of the Office of Inspector General were transferred to the Office of Audit.

5. The Joint Advisory Committee (JAC) is a committee composed of members of NFFE Local 1375 and Office of Inspector General (hereinafter called OIG) which met periodically to discuss labor-management matters pertaining to OIG. Such a meeting was held from November 5, 1973 through November 7, 1963. During the discussions, NFFE Local 1375 representatives advised OIG that it intended to renegotiate the contract, and this notification was made a part of the minutes of the meeting. The minutes were signed by Neal W. Renken, president of NFFE Local 1375, among other persons, on November 7, 1973.

6. Between November 1973 and the end of 1974, preparations were made by the Agency to renegotiate the contract with NFFE Local 1375. On January 7, 1974, in response to a December 11, 1973 inquiry, the Agency offered to meet with NFFE with respect to its concerns as a result of the impending reorganization of OIG. In February 1974, Mr. E. Joseph Taccino of the Department of Agriculture and Mr. Neal W. Renken, president of NFFE Local 1375, met to discuss renegotiations of the new collective bargaining agreement. The parties discussed and apparently agreed that it was desirable that an amendment of certification petition with respect to the bargaining unit, as a result of the reorganization, be filed as soon as possible with the Department of Labor. On April 1, 1974, a meeting was held between NFFE Local 1375 and the newly split activities, the Office of Investigation and Office of Audit. 3/ At the meeting, the status of the reorganization was discussed, as were a number of other Union matters.

7. On April 10, 1974 the Agreement between the Agency and NFFE Local 1375 terminated. The contract provided that it would be for an initial period of two years and then would renew itself thereafter for 1 year periods. Its expiration date, upon appropriate notice, was the anniversary date of its execution, April 10, 1968. The Union contends the contract remained in full effect until January 2, 1975. It should be

3/ Herein referred to as OI and OA respectively.

noted that the next anniversary date and therefore the next expiration date of the contract would have been April 10, 1975, 3 months subsequent to the date of the unfair labor practice complaint in Case No. 22-5779. The Union's contention that the contract expired on January 2 is rejected.

8. From early Spring to October 1974 there were a number of meetings and exchanges of correspondence between the Agency and NFFE with respect to the reorganization. In May and June 1974, there was an exchange of correspondence between NFFE and the Agency concerning the effect of the reorganization of OIG on NFFE Local 1375. In his letter to Nathan T. Wolkomir, president of NFFE on June 5, 1974, Joseph R. Wright, Jr., Assistant Secretary for Administration of the Agency, noted that a meeting of OI and OA was scheduled for June 10, 1974, with Local 1375, at which time it would be appropriate for the NFFE representatives to raise matters of concern with respect to the reorganization. It was further suggested by Mr. Wright that Mr. John Graziano, Director of OI, and Mr. Leonard Greess, Director of OA, would be available to meet with NFFE if NFFE desired.

9. On June 10, 1974, a meeting was held between the Agency and NFFE. Included in the agenda for that meeting was the discussion of "the status of approval by the U. S. Department of Labor and U. S. Department of Agriculture approval for the reorganization and realignment of NFFE Local 1375 into representative groups for agents and auditors."

10. On May 2, 1974, a reorganization chart for the Office of Audit was approved. On May 14, 1974, a reorganization chart for the Office of Investigation was approved. Shortly thereafter, the American Federation of Government Employees, hereinafter called AFGE, sent a representation petition to the Department of Agriculture hereinafter sometimes referred to as DA or Agency, under which it sought the right to represent eligible employees in the Temple, Texas region of OI. ^{4/} NFFE did not timely intervene in the proceeding involving the AFGE petition for recognition.

^{4/} The petition in Case No. 63-4992(RO).

11. After the organization charts for OI and OA were approved in early May 1974, Mr. Taccino caused to be prepared an amendment of certification petition in early June 1974.

12. A meeting between DA and NFFE Local 1375 was scheduled for September 24, 1974. Included in the matters to be discussed was the reorganization as it pertained to NFFE Local 1375. Since Mr. Renken was not able to attend the meeting, it was rescheduled for October 1, 1974. The scheduled meeting was held on October 1, 1974, and there was some discussion with respect to the reorganization of OIG, among other matters. At this meeting there was brief discussion of the amendment of certification petition.

13. Subsequently, a meeting between DA and NFFE Local 1375 was held on October 16, 1974. At that meeting there was further discussion of the amendment of certification petition. As a result of the meeting, on October 18, 1974, Mr. Graziano provided Mr. Geller Counsel for the Union, with certain information which he had requested.

14. On October 18, 1974, Mr. Geller wrote Secretary Earl L. Butz, Assistant Secretary Wright, and Mr. Greess with respect to renegotiation of the NFFE Local 1375 bargaining agreement. On October 29, 1974, Mr. Morris A. Simms, Acting Director of Personnel, replied to Mr. Geller's letter dated October 18, 1974, and suggested NFFE, OI and OA meet on December 12, 1974, to discuss "the negotiation of an agreement."

15. On November 18, 1974, the Agency and NFFE Local 1375 proceeded with the petition for amendment of certification, affixed the necessary signatures thereto, including that of Mr. Renken, and filed the petition with the Department of Labor. On November 26, 1974, at a meeting held for other reasons, Mr. Geller proposed that contract negotiations be initiated immediately. On or about December 12, 1974, the Department of Agriculture was advised that NFFE Local 1375 had withdrawn its support for the petition to amend the certification.

16. On December 11, 1974, Mr. Taccino wrote Mr. Geller suggesting that the meeting scheduled for December 12, 1974, be rescheduled for the next day. He also stated that "because of representation questions stemming from the petition for a bargaining unit in the Southwest Region of the Office of Investigation and from our pending amendment of certification petition we feel it inappropriate to renegotiate the contract with you at this time." On December 12, 1974, Mr. Wolkomir sent a letter to the Agency in which NFFE

charged that the Agency had refused to enter negotiations with respect to entering a new bargaining agreement.

17. On January 2, 1975, Phil Campbell, Undersecretary of Agriculture invoked, on behalf of the Department of Agriculture, Section 3(b)(4) of the Order and withdrew recognition from NFFE Local 1375 as the bargaining representative for OI and OA.

18. Secretary of Agriculture Earl L. Butz was not in Washington, D. C., on January 2, 1975.

19. On January 3, 1975, Mr. S. B. Pranger, Director of Personnel of the Agency, replied to the charge filed December 12, 1974, and pointed out that the Agency could not negotiate a new contract because of the AFGE petition for recognition, but that the Agency was available to discuss the matter with NFFE.

20. The Office of Investigation had approximately 200 employees on January 2, 1975. It has several major functions, including the investigation of Department of Agriculture employees and others to protect Department of Agriculture programs and operations against criminal and civil fraud, or other forms of misconduct. Virtually every investigation undertaken by OI may involve investigations of employees of the Agency. In fiscal year 1974 there were approximately 3,500 investigations performed by OI. Sixteen percent of such investigation were initiated as investigations of personnel of the Agency. Of the remaining 84 percent of the investigations, most involved a program matter under which some employees of the Department of Agriculture were subject to the investigation. A substantial portion of the total investigative man days of OI directly involve employees of the Agency as subjects.

21. OI performs as a primary function the investigation of Department of Agriculture employees with respect to their honesty and integrity.

22. OI and OA frequently work together in the performance of investigations. Frequently, as a result of audits performed by OA, referrals are made to OI for the investigation of Department of Agriculture employees. Conversely IO frequently requests OA to perform audits of Department of Agriculture employees. From July 1, 1974, through March 31, 1975, OA made 89 referrals to OI. Of those referrals, 29 were subsequently scheduled as personnel investigations. Of the remaining 66 cases, some at least, also involved Department of Agriculture personnel. In an average year, between 30 and 400 OI investigations are reviewed by the Office of General Counsel for referral

to United States Attorneys for prosecution of Department of Agriculture personnel. In calendar year 1974, 101 such files were forwarded to United States Attorneys for consideration for prosecution. A number of such investigations also involve audits of Department of Agriculture personnel by OA.

23. OA is an activity which performs the audit program of the Department of Agriculture. In an effort to establish and maintain operational integrity, it carries on functions which, inter alia, involve looking into the honesty, efficiency and effectiveness of employees in carrying out Department of Agriculture programs. In the performance of its duties OA considers a number of factors such as the funds and resources that are expended or involved, the assets that are involved in carrying out the programs, sensitivity of the programs in terms of manipulation by employees and by the enrollees or recipients of the programs, the beneficiaries of the programs, and the susceptibility to fraud or embezzlement. There is included in most audits by an auditor the considerations involving fraud, embezzlement, program manipulation, or other types of irregularities.

24. In every audit the auditor is looking for various kinds of dishonesty by Department of Agriculture employees so as to determine whether the employees are performing their duties in a lawful manner. The standard which is involved in auditing Department of Agriculture employees with respect to their honesty and integrity is one of total objectivity. The auditor is expected not only to try to establish the guilt of an employee, but also his innocence.

25. The fear of an audit apparently helps prevent the commission of dishonest acts by Department of Agriculture employees. Also, the establishment and implementation of controls in various programs by auditors helps prevent dishonest acts by Department of Agriculture employees. Although finding dishonesty by Department of Agriculture employees is not the usual rule, when auditors find possible violations of law, they prepare investigation referrals to OI for further action. Auditors often join with investigators of OI to form an investigative team.

26. Of the activities of the Department of Agriculture which are subject to audit, most involve federal employees, while 4 or 5 involve only State or local officials. With respect to these four or five activities, however, there are Federal employees involved at the National level.

27. OA performs as a primary function the audit of Department of Agriculture employees with respect to their honesty and integrity.

Conclusions of Law

A. Case No. 22-5779

1. The record fails to establish that the Department of Agriculture and/or OIG refused to meet and bargain with NFFE Local 1375 prior to Mr. Taccino's December 11, 1974 letter to Mr. Geller.

2. From November 7, 1973 until December 1974 Department of Agriculture and/or OIG representatives did meet with NFFE Local 1375 representatives, on a number of occasions and they discussed the reorganization and the desirability of filing a petition, etc. The parties in fact agreed on the latter, at least until December 1974, when NFFE Local 1375 withdrew its support. The record fails to establish that prior to December 11, 1974 Respondents at any time failed or refused to meet and negotiate with NFFE Local 1375 concerning a new collective bargaining agreement or to discuss any other appropriate matters raised by the Union.

3. On December 11, 1974 by Mr. Taccino's letter the Department of Agriculture stated that because of the RO petition pending in the Southwest Region of the Office of Investigation, it would not meet to renegotiate a new contract. Because the two previously separate collective bargaining units had been combined in 1968 into one collective bargaining unit and there was, at that time, a timely representation petition pending for a portion Respondents quite properly refused to negotiate a new collective bargaining agreement with NFFE Local 1375.

To do so would have been to violate its obligation to remain neutral during the pendency of the representation petition. Cf Jacksonville Naval Air Rework Facility, A/SLMR No. 155 and Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, A/SLMR No. 574. 4/

4. It is therefor concluded that Respondents did not violate Sections 19(a)(1), (2), (5) and (6) of the Order by refusing to negotiate a new collective bargaining agreement because it had no obligation to do so, so long as the RO petition filed by AFGE, was pending. Cf Department of the Air Force Headquarters, 31st Combat Support Group, Homestead Air Force Base, Supra.

B. Case No. 22-5821.

1. Section 3(b)(4) of the Order provides:

"3. Application:

(b) This Order... does not apply to-

(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 with the internal security of the agency;.."

4/ Without deciding whether there would have been any obligation to bargain with NFFE Local 1375 over a unit different than the overall unit, it is noted that the record does not establish that NFFE Local 1375 ever demanded to bargain concerning such a less than "overall" unit.

2. Respondents contention that an agency's Section 3(b)(4) determination can only be raised in a representation proceeding is rejected. Respondents seem to rely on the fact that Section 202.8(a) and (b) of the Assistant Secretary Rules, 5/ which applies to representation procedures, specifically states that a Section 3(b)(4) determination can be reviewed whereas Section 203 of the Rules, 6/ nowhere specifically provides for such a review. In fact Section 202.8 (a) and (b) provides that when review of a Section 3(b)(4) determination is raised in a representation proceeding, and the issue raised is the propriety of the determination of the head of the agency, a hearing is to be held before an Administrative Law Judge and the hearing procedure is to be similar to that of an unfair labor practice hearing. It seems clear that special provisions had to be made, because such a hearing was not going to follow the normal representation case procedures. No such special provisions were necessary with respect to unfair labor practice cases because, presumably, the normal hearing procedure would be followed. Thus it is concluded that a Section 3(b)(4) determination that results in the withdrawal of recognition of a recognized collective bargaining representative can appropriately be reviewed in an unfair labor practice procedure.

3. It is concluded that especially because the Secretary of Agriculture was outside of Washington, the Undersecretary quite appropriately could act in his stead and issue such a Section 3(b)(4) determination. See. 5 U.S.C. 3345, and 7 CFR §2.15(a).

4. The scope of review of an agency head's determination under Section 3(b)(4) is set forth in Audit Division, National Aeronautics and Space Agency, FLRC No. 70A-7 issued April 29, 1971; and the decision of the Assistant Secretary on remand, A/SLMR No. 125. 7/ FLRC held that the Order clearly provided for third party review of Section 3(b)(4) determinations at least to prevent arbitrary or capricious findings by an

5/ 29 CFR 202.8(a) and (6).

6/ 29 CFR 203.

7/ Hereinafter referred to as the NASA Case.

Agency head that the unit in question was a primary function related to internal security. Therefore the standard of review is whether the determination that the employees in question have "a primary function related to internal security" within the meaning of Section 3(b)(4) was made in a arbitrary and capricious manner.

5. FLRC held that Section 3(b)(4) sets two conditions. First a factual one, that the employees in question have as a "primary function" investigation or audit of agency employees for the purpose of ensuring honesty and integrity. The second condition is of a discretionary nature, that 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." The FLRC went on and stated that while the discretion of the agency head is "excepted from review by the express terms of Section 3(b)(4)," that section is silent on whether the factual conditions are reviewable. It was then with respect to these factual issues that the "arbitrary and capricious" standard of review is to be applied.

6. The Union contends that the reason the Undersecretary of Agriculture determined to apply Section 3(b)(4) in the instant case was not because of internal security considerations, but rather because he did not wish the Union to represent these employees. It is concluded that the reason an agency head determines to apply Section 3(b)(4) of the Order is discretionary and not reviewable. Rather the only test is whether the determination is arbitrary and capricious, looking only at the factual considerations required by Section 3(b)(4). 8/

7. Further the Union seems to contend some different standard of review should apply because the instant case involved withdrawal of recognition, rather than initial recognition. No where in the Order or in the Nasa Case, does it indicate such a different standard of review and therefore the Union's contention is rejected.

8/ It is concluded moreover, that although circumstances were somewhat suspicious, the record does not establish that the determination to apply Section 3(b)(4) was made for discriminatory purposes.



8. An action is "arbitrary and capricious" only where it is not supportable on any rational basis. *CF NASA, Supra*, and the cases cited in the Hearing Examiners' Report and Recommendations.

9. Based on the facts found herein it is concluded that employees in both the Office of Investigation and in the Office of Audit, have as a primary function the responsibility of ensuring that employees of the Department of Agriculture perform their work with honesty and integrity. Thus it is concluded that the determination to invoke Section 3(b)(4) and the determination to exclude these employees from the coverage of the Order was not arbitrary and capricious.

10. It is further concluded that nowhere does the Order require an agency to bargain about such a determination; rather Section 3(b)(4) places it in the agency's head's sole discretion.

10. Finally it is concluded that the Department of Agriculture did not violate Sections 19(a)(1) and (5) of the Order by applying Section 3(b)(4) and thereby excluding employees of the Office of Audit and Office of Investigation from the coverage of the Order. 8/

Recommendations

Upon the basis of the foregoing findings and conclusions the undersigned recommends that the complaints herein against the Respondents be dismissed in their entirety.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: January 20, 1976
Washington, D. C.

8/ Although not clearly alleged, the Union in its brief seemed to allege that the Department of Agriculture failed to bargain about the impact or implementation of this decision. Without deciding whether any such obligation exists, the record does not establish any request by the Union to bargain about such implementation and impact or any refusal to bargain by the Department of Agriculture.

.....
In the Matter of
DEPARTMENT OF THE NAVY
MARE ISLAND NAVAL SHIPYARD
VALLEJO, CALIFORNIA
Respondent
FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO
VALLEJO, CALIFORNIA
Complainant
.....
CASE NO. 70-4608

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On the brief
For Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This proceeding heard in San Francisco, California on July 24, 1975 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 June 13, 1975 with reference to alleged violations of the Order. The complaint filed by Federal Employees Metal Trades Council, AFL-CIO, Vallejo, California (hereinafter called the Council or Complainant) alleged that Department of the Navy, Mare Island Naval Shipyard, Vallejo, California (hereinafter called the Activity or Respondent) violated the Order by the Activity's representative telling the Council President at a meeting on December 10, 1974 that he would not talk to him during the meeting.

At the hearing the parties were represented and had full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties and have been carefully considered.

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

At all times material herein the Council has been the exclusive collective bargaining representative for various employees of the Activity. The Council is composed of numerous constituent local unions including United Brotherhood of Carpenters and Joiners of America, Local Union No. 1068. However, representational rights are vested in the Council and not the local unions.

On August 8, 1974 the Activity established a new job classification, that of Shipwright/Joiner. Prior thereto employees in the woodworking field were classified either as a Shipwright or as Wood Craftsman. According to the Activity, the composite and more flexible Shipwright/Joiner classification was established to give employees a way to broaden their knowledge in the woodworking field and allow them to develop secondary skills and allow better utilization of the workflow in assignment of jobs. After discussion and agreement with the Council, the Activity gave woodworking employees the opportunity to volunteer which of the three retention registers they wished to be carried on. However, some woodworking employees (carpenters) opposed the new classification from its inception and indeed representatives of Carpenters Local Union 1068 informed the Activity of their desire to have retention registers for Shipwright and Wood Craftsman only. In addition, the carpenters were confused over the classifications and registers and asked Council President Billy G. Sweigert to arrange a meeting with management so the matter might be clarified. Council President Sweigert thereupon

contacted the Activity and a meeting was arranged between representatives of Local 1068, the Council and the Activity.

Accordingly, on December 10, 1974 the parties met in the office of Production Superintendent Robert Summers. Those present at the meeting included Paul Kanouff, President of Local 1068, Harry Lescano, Secretary-Treasurer, Local 1068; Council President Sweigert; Council Vice President George Kinyone; Summers and his staff assistant Leonard Joy; and Kenneth Fowers, labor relations coordinator for the shipyard and his assistant, Don Wilson. The discussion took place at a conference table with Summers and Sweigert at either ends of the table and Kanouff and Lescano sitting to one side of the table adjacent to one another.

The discussion was primarily between Summers, Kanouff and Lescano. The union participants gave their reasons against combining the two trades and Summers attempted to explain the operation of the new classification and dispell any misunderstandings the carpenters may have had. 1/ This conversation progressed for approximately ten minutes when Summers, after attempting to explain the advantages of the new classification system and feeling he was close to convincing the carpenters representatives, made a statement to the effect that the only problem seemed to be that labor didn't trust management. At that point, Sweigert, who up to this time had not entered the conversation to any material degree, stated he did not trust Summers and never did trust him. Not wishing to have the discussion diverge to other matters Summers replied to Sweigert that he was not talking to him but was talking to Kanouff and Lescano. The conversation then resumed between Summers, Kanouff and Lescano for a few minutes when Sweigert stated that the Council was the exclusive representative of the employees and Summers would have to address him since only the Council could make a final decision in the matter. Summers again replied to Sweigert that he was not talking to him. Sweigert commented that if Summers would not talk to him he would see Summers in court.

1/ Generally, witnesses for Complainant testified to a version of the discussion most favorable to support the complaint and witnesses for the Activity gave versions more favorable to Respondent's position that no violation of the Order occurred. The account which follows is based upon my credibility resolutions and, in my judgment, reflects most closely the words spoken by the participants, given the circumstances surrounding the meeting.

Sweigert and Kinyone arose and left the room. Summers then announced that the discussion could not continue in the absence of Sweigert and thereafter no further discussion on the matter was attempted. Kanouff and Lescano left the room within ten seconds after Sweigert's departure.

Discussion and Conclusions

I do not find in the circumstances of this case that Complainant has proven by a preponderance of the evidence that Respondent has violated the Order. Thus the evidence reveals that although the Activity and the Council had previously resolved the question of carpenters' classifications to their mutual satisfaction, Sweigert arranged the meeting of December 10, 1974 so that carpenters' representatives and the Activity could discuss the matter. The conversation that took place at this meeting was primarily carried on between the carpenters' representatives and the Activity. Summers' reply to Sweigert's remark that he didn't trust Summers was merely intended to keep the discussion on the issue giving rise to the meeting. Summers' subsequent remark to Sweigert that he was not talking to him when Sweigert stated that Summers would have to talk to him before a final decision was made can also be interpreted as merely reminding Sweigert that the conversation, at the moment, was between the carpenters' representatives and Summers. Indeed the discussion which occurred did not involve an attempt to vary the terms of the agreement between the Council and the Activity but rather, only comprised an explanation of the operation and advantages of the new classification arrangement. At no time did Summers indicate that he would not listen to suggestions, respond to questions or discuss the matter with Sweigert nor did he attempt to circumvent the Council during the discussion with the carpenters. 2/ Summers' statement, in my view, can fairly be construed as merely informing Sweigert that he was, at that time, engaged in a conversation with the carpenters which had been requested by Sweigert.

What occurred herein was, in my opinion, basically a misunderstanding on Sweigert's part. Unfortunately, it led to the filing of an unfair labor practice complaint which was not resolved informally. 3/ In any event Sweigert's

2/ I note the Activity did not attempt to continue the conversation with Kanouff and Lescano after Sweigert left the meeting.

3/ See Vandenberg Air Force Base, 4392d Aerospace Support Group A/SLMR No. 435, FLRC No 74A-77, Report No. 79 wherein [Cont'd on next page]

precipitous withdrawal from the meeting without questioning or seeking a clarification of Summers' statement prevented Summers from giving any further explanation of management's attitude toward the Council and detailing to what extent Summers would or would not discuss the matter with Sweigert. If Summers, in fact, was attempting to deal with the carpenters to the exclusion of the Council, I find and conclude such was not established by the record evidence in this case.

Recommendation

I recommend that the complaint herein be dismissed in its entirety.


SALVATORE J. ARRIGO
Administrative Law Judge

DATED: February 26, 1976
Washington, D.C.

3/ Cont'd. the Federal Labor Relations Council stated that "...the primary responsibility for maintaining cooperation between labor organizations and management lies with those parties themselves. 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."

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
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Sections 19(a)(1), (4), and (6) of the Executive Order. The Respondent filed an Answer and a Motion to Dismiss and a supporting Brief dated February 21, 1975. The Complainant filed an Amended Complaint dated and filed March 24, 1975 alleging the same facts as the original complaint and alleging that Respondent violated Sections 19(a)(1) and (6) of the Executive Order. Under date of April 1, 1975 the Respondent responded to the Amended Complaint by reiterating its earlier Answer, Motion to Dismiss, and Brief.

The Complaint and Amended Complaint alleged that the Respondent violated the Executive Order: by questioning Mrs. Mary Ellen Bowers (second vice-president of the Local) on October 24, 1974 about a complaint she had written to Congressman Henry B. Gonzalez, thereby allegedly violating her right under Section 1(a) of the Order to assist her union in making a presentation of its views to Congress, allegedly in violation of Section 19(a)(1) of the Executive Order; and by depriving the Local of its rights under Section 10(e) of the Executive Order in not giving it the opportunity to be present at a formal discussion "between Management and Employees concerning grievances etc." allegedly in violation of Section 19(a)(6).

The Assistant Regional Director on June 9, 1975 issued a Notice of Hearing on the Complaint to be held in Houston, Texas on August 5, 1975 and referred the Motion to Dismiss to the Administrative Law Judge for consideration at the hearing.

A hearing was held in Houston, Texas on August 5, 1975. The Complainant was represented by a National Representative and the Respondent by counsel. The principal witness for the Complainant was unavoidably and understandably unable to appear. After hearing the testimony of six witnesses and receiving a number of documents as exhibits, the hearing was recessed to September 26, 1975 to obtain the testimony of the missing witness (Mrs. Bowers). At the resumed hearing the representative of the Complainant stated that the witness was no longer an employee of the Government and refused to testify. Additional exhibits were received in evidence. Closing arguments were waived and the time for filing briefs was extended to October 28. The Respondent filed a brief that day. The Complainant did not file a brief.

In the Matter of

UNITED STATES AIR FORCE, LACKLAND
AIR FORCE BASE
HEADQUARTERS AIR FORCE MILITARY
TRAINING CENTER (ATC)
LACKLAND AIR FORCE BASE, TEXAS
Respondent

Case No. 63-5430 (CA)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1367
Complainant

Captain Charles L. Wiest, Jr.
Labor Counsel
Office of the Staff Judge Advocate
San Antonio Air Logistics Center
Kelly Air Force Base, Texas 78241
For the Respondent

Glen J. Peterson
National Representative
American Federation of Government
Employees
P. O. Box BB
Boerne, Texas 78006
For the Complainant

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated February 8, 1975 and filed February 10, 1975 alleging that the Respondent violated

Facts

The Complainant, Local 1367 of the American Federation of Government Employees, is the certified exclusive representative of the GS and wage grade employees of the Lackland Air Force Base other than supervisors, professional employees, security guards, and employees engaged in personnel administration. Although it has been such exclusive representative since 1971, there is no collective agreement between the parties.

In August 1974 the employees in the Commissary were told that the Commissary would be open and that they would be required to work on August 31, the Saturday preceding Labor Day, and that they would receive "holiday pay" for that day. Some or many of the Commissary employees preferred to have that day off duty. Mary Ellen Bowers, a sale store checker, addressed a letter to Congressman Henry B. Gonzalez protesting their being required to work that Saturday and requesting his assistance. She brought the letter to work before mailing it and suggested that others write similar letters to Congressman Gonzalez. Instead of writing similar letters, about fifteen other Commissary employees added their signatures to Bowers' letter, the signatures continuing on a second page. Although at least two of the signatures (Bowers and Lagunas) to the letter to Congressman Gonzalez were officials of Local 1367, they did not sign the letter as union officials or intend to act in that capacity but considered the letter a personal communication to the Congressman.

Shortly thereafter Julie Korda, an employee in the Commissary, complained to management that her signature on the Gonzalez letter had been obtained by trickery and said that another employee, Guadalupe R. Lagunas, had suggested on Saturday, August 31, that the checkers engage in a slowdown.

On September 17, 1974, Kendall C. Klaus, Chief of the Labor-Management Relations Section of Respondent's Civilian Personnel Office, had a meeting with Frank Suarez (President of the Local), Birdele Lee (Executive Vice President), and Victor Ruiz (Staff Representative of the Local). The purpose of the meeting was to give the Complainant an opportunity to inquire into Korda's allegations and whether representatives of the Local had solicited union membership on duty time. Thereafter Ruiz wrote a letter to Congressman Gonzalez stating

that Klaus had said that he would not tolerate the employees writing to their Congressman. Klaus did not in fact make such a statement. Congressman Gonzalez wrote to the Respondent inquiring about the accusation Ruiz had made.

In October 1974 Lt. Col. Harold Sattler, a squadron commander, was appointed by the Base Commander to conduct an investigation into the facts and circumstances concerning Ruiz' letter to Congressman Gonzales, Korda's complaint that her signature had been fraudulently obtained, and the question of the slowdown. Sattler's function was solely to gather the facts and report them to the Base Commander. If, as a result of the investigation, any action was to be taken, it would be taken by the Base Commander.

On October 24, 1974 Sattler interviewed four people in the course of his investigation: the manager of the Commissary, the head cashier, Mrs. Bowers, and Mrs. Korda. Mrs. Bowers did not ask for a union representative, nor was one present. She was not placed under oath. The interview was recorded and transcribed. Mrs. Bowers was not reluctant to answer questions and answered all questions willingly.

After the interviews on October 24 the Complainant asked that the investigation be stopped and it was stopped. On October 30 Sattler was directed to resume the investigation and that if an employee requested that a union representative be present one would be permitted to be present as an observer.

The same day Colonel Sattler resumed his investigation. Among those he interviewed that day was Mrs. Lagunas. She asked for a union representative to be present and the interview was adjourned to the next day to permit Mrs. Lagunas to obtain a union representative. Before the adjournment Col. Sattler showed Mrs. Lagunas the questions he was going to ask her.

The next day the interview resumed. Mrs. Lagunas was accompanied by Victor Ruiz, Staff Representative of the Complainant. Col. Sattler stated that Mr. Ruiz was permitted to be present as an observer but would not be permitted to make any comments or suggestions or give advice. Ruiz declined to stay under those conditions, told Lagunas she need not answer any questions she thought might prejudice her, and left the room. Ruiz did not assert any right of the Complainant to be represented at the discussion.

Sattler then advised Lagunas that under the Fifth Amendment to the Constitution of the United States she had the right to remain silent, that anything she said could be used against her, that she had a right to a lawyer, and that she could stop the questioning at any time. 1/ He then had her swear that she would tell the truth. 2/ Sattler then asked Lagunas questions on a number of matters including the alleged slowdown and the obtaining of Korda's signature on the letter to Congressman Gonzalez. Although Sattler told Lagunas that she was not under investigation and that he was only trying to ascertain the facts concerning certain matters and report them to the Base Commander, Lagunas thought she might be disciplined as a result of the investigation.

Discussion and Conclusions

The first item of the "Basis of the Complaint" is that the Respondent violated Section 19(a)(1) of the Executive Order when on October 24, 1974 it required Mrs. Bowers to give a sworn statement concerning her letter to Congressman Gonzalez thereby interfering with her right under Section 1(a) of the Order which guarantees her the right to assist a labor organization including presentation of its views to Congress.

The record does not support the allegations. Mrs. Bowers was not required to give a sworn statement. 3/ There is nothing in the record to show that in writing the letter Mrs. Bowers was acting on behalf of the Complainant or as a member; what indications there are in the record are to the contrary. 4/ Thus even if we assume that questioning Mrs. Bowers at all about her letter interfered with her communicating with her Congressman (an assumption not supported by the record), such conduct would be a violation of 5 U.S.C. §7102, not of the Executive Order. This item of the complaint should be dismissed.

1/ Exh. R 2, P. 7.

2/ Exh. R 2, p. 8.

3/ Exh. R 3.

4/ See Exh. R 2, p. 9; see also Tr. p. 36.

The second item in the complaint alleges a violation of Section 19(a)(6) of the Executive Order by depriving the Complainant of its rights assured by Section 10(e) of the Executive Order to 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."

The right of a labor organization to be represented at such discussions means the right to be represented as a participant, not merely as an observer. Being permitted to be present only as an observer would frustrate not only the labor organization's interests in the discussion but could also frustrate its fulfilling its obligation imposed by the second sentence of Section 10(e), the obligation to represent the interests of all employees in the unit. Should agency management deny to a labor organization the opportunity to be represented at such discussions as a participant, it would violate the proscription of Section 19(a)(6) against refusing to confer.

The only discussions between management and an employee, shown by the record, at which the union was not represented as a participant, were the discussion between Sattler and Bowers on October 24, 1974 and the discussion between Sattler and Lagunas on October 30 and 31, 1974. The question then is whether either or both of those discussions were formal discussions and if they were whether they concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

I conclude that the discussion with Lagunas was formal in nature within the meaning of Section 10(e). Col. Sattler held the discussion pursuant to special direction from the Base Commander. The discussion took place as part of an investigation of allegations of serious misconduct one of which pertained directly to Mrs. Lagunas. Such a discussion, in which the employee is placed under oath, cannot be characterized as an informal discussion. The discussion here thus meets the test of a formal discussion within the meaning of Section 10(e) of the Executive Order. There remains the question whether it concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

There are numerous decisions of the Assistant Secretary on both sides of the line separating discussions between an employee and higher level management at which the labor

organization was or was not entitled to be represented. The more significant decisions are set forth in the margin. 5/

Upon the basis of those decisions, especially the two F.A.A. cases involving Air Traffic Controllers, A/SLMR Nos. 429 and 430, I conclude that the Complainant was not entitled to be present at Sattler's discussions with Lagunas and Bowers. As in those cases, the discussions here involved were simply part of investigation into possible wrongdoing. Col. Sattler did not have authority to impose discipline. His function was only to ascertain the facts and report them to the Base Commander. The discussions did not concern grievances; no grievance was pending. Nor did they involve personnel practices and policies; Col. Sattler had no authority over such matters nor was he authorized even to make a recommendation concerning them. Nor were they concerned with "general working conditions" as the scope of that term is delineated in Department of Defense, Texas Air National Guard, A/SLMR No. 336. Instead they concerned individual conduct at a particular time concerning a particular incident, actual or supposed or suspected. This case is precisely analogous to the two F.A.A. cases, Nos. 429 and 430.

The fact that Lagunas was apprehensive that Sattler's investigation might lead to disciplinary action is irrelevant in light of the Texas Air National Guard case, A/SLMR No. 336. That also was the situation in the F.A.A. cases in which the Assistant Secretary found that the union was not entitled to be represented. In the T.A.N.G. case the Assistant Secretary said, in footnote 8:

5/ U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, A/SLMR No. 242; Department of the Army, Transportation Motor Pool, Fort Wainright, Alaska, A/SLMR No. 279; Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336; Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 421; Department of Transportation, Federal Aviation Administration, Las Vegas Air Traffic Control Tower, A/SLMR No. 429; Federal Aviation Administration, Cleveland ARTC Center, A/SLMR No. 430; Federal Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

"In my view, an individual employee is not entitled in every instance to have his exclusive representative present because of a concern that a meeting may ultimately lead to a grievance or adverse action."

Furthermore, the complaint in this case does not allege that the individual's rights under the Executive were infringed by the absence of the union, but that the Complainant's rights were infringed. I conclude that the Complainant's rights were not infringed in this case.

Of special interest in this case is the Recommended Decision and Order of the Administrative Law Judge in Department of Defense, U. S. Navy, Norfolk Naval Shipyard, Case No. 22-5283 (CA), March 4, 1975. In that case he set forth many of the views expressed above, concluding that there was no violation of Section 19(a) by the exclusion of the union from discussions with employees in which discipline was contemplated.

In that case the Administrative Law Judge found that his conclusion was not affected by the then recent decisions of the Supreme Court on February 19, 1975 in National Labor Relations Board v. J. Weingarten, Inc., 95 S. Ct. 959, 43 L. Ed. 2d 171, 43 Law Week 4275 and International Ladies' Garment Workers Union v. Quality Manufacturing Company, 95 S. Ct. 972, 43 L. Ed. 2d 189, 43 Law Week 4282. I iterate that conclusion and the views expressed in explanation.

In those cases the Supreme Court upheld decisions of the National Labor Relations Board which had been set aside by the Courts of Appeals for the Fourth and Fifth Circuits. So far as relevant here and in the Norfolk Naval Shipyard case, the facts in the two Supreme Court cases were identical. An employee was called in by management for an interview which the employee reasonably feared might result in the imposition of discipline. The employee requested union representation. The request was denied, and results unfortunate for the employee eventuated as a proximate consequence. The N.L.R.B., departing from its earlier precedents, held that the employer violated Section 8(a)(1) of the National Labor Relations Act which declares it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act. The right guaranteed by Section 7 that the N.L.R.B. found had been interfered with was "the right . . . to engage in concerted activities for the purpose of . . . mutual aid or protection." The Supreme Court held that such construction of the provision of Section 7 was a permissible construction and that the

Courts of Appeal "impermissibly encroached upon the Board's function," the "'special function of applying the general provisions of the Act to the complexities of industrial life'" "in light of changing industrial practices and the Board's cumulative experience."

Those decisions are not persuasive of the result I should reach in this case, just as they were not persuasive in the Norfolk Naval Shipyard case, Case No. 22-5283. There is no provision in the Executive Order like the above-quoted excerpt from Section 7 of the National Labor Relations Act. But more fundamentally, the Supreme Court held in those decisions that the Board's "newly arrived at construction of Section 7" was a permissible construction, as had been its earlier contrary construction over a period of some thirty years, arrived at in the light of its greater accumulation of expertise in changing industrial practices. I read the decisions of the Assistant Secretary cited in footnote 5, especially the F.A.A. cases and the T.A.N.G. case, as expounding the application of his expertise under the Executive Order in this area in the manner described above. Perhaps, in the application of his now greater expertise, he will reach a new construction of the last sentence of Section 10(e) of the Executive Order. But until then, I am bound by his past decisions. Moreover, it should be repeated that in this case the complaint does not allege that the employees' rights were infringed by the Complainant not being given an opportunity to be represented at the interviews, but only that the Complainant's rights were infringed.

The Norfolk Naval Shipyard case, Case No. 22-5283, is of further especial interest. The Supreme Court cases discussed above were decided on February 19, 1975. The Norfolk Naval Shipyard Recommended Decision and Order was issued on March 4, 1975. On May 9, 1975, the Federal Labor Relations Council issued an Information Announcement which indicated that the Council had determined that the following is a major policy issue of general application under the Executive Order upon which it intended to issue a major policy statement, and invited comments:

Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On July 24, 1975 the Assistant Secretary wrote to counsel for the respective parties in the Norfolk Naval Shipyard case describing this action by the Council and stating that since some of the issues in that case were related to the major policy issue under consideration and review by the Council, he was deferring action in that case pending resolution by the Council of the above-quoted major policy issue.

The Respondent argues in its brief that if the Council or the Assistant Secretary changes the policy expounded in the cases cited in footnote 5, this case should be decided under the old policy because the events here involved occurred while the old policy was in effect, - - that the new and changed policy should not be given effect ex post facto.

I make no recommendation based on such hypothetical situation. I apply the law as I find it now expounded in the Assistant Secretary's decisions. The fact that he is now giving it new consideration does not change it. I have concluded above that in the present state of the law there was not an unfair labor practice in this case. Furthermore, the policy issue under review pertains to the rights of an employee summoned to an interview with agency management to union representation, not to the rights of the union to be represented at the interview, and it is only the latter question that is involved here, although perhaps the further resolution of the former question will cast additional light on the latter question. But that is all speculative and conjectural, and I must make my Recommended Decision now.

Recommendation

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: FEB 4 1976
Washington, D. C.

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 ELECTRONICS COMMAND
Fort Monmouth, New Jersey

Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, Local 476, Independent

Complainant

Case No. 32-3673 (CA)

Captain James Cheslock, and
Walter Harbot Jr., Esquire, on the brief
U. S. Army Legal Office
Fort Monmouth, New Jersey 07703
For Respondent

Herbert Cahn, President and
Gerald C. Tobin, Esquire, on the brief
National Federation of Federal
Employees, Local 476, Independent
P. O. Box 204
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For Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding, heard in Ft. Monmouth, New Jersey, on June 26, 1975, 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 14, 1975, with reference to alleged violations of Sections 19(a)(1) and (6) of the Order. The complaint filed by National Federation of Federal Employees, Local 476, Independent (hereinafter called the Union or Complainant) alleged that United States Army Electronics Command, Fort Monmouth, New Jersey (hereinafter called the Activity or Respondent) violated the Order in the manner in which it conducted the registration of motor vehicles belonging to Fort Monmouth personnel.

At the hearing the parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties and have been carefully considered.

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

At all times material herein the Union was the exclusive collective bargaining representative of various units of employees at the facility. Some units included employees in grades GS-14 and GS-15 while other units comprised employees only in grades GS-13 and below.

Other unions also hold exclusive representation rights for various units of employees at Ft. Monmouth.

On August 1, 1973, the Department of the Army issued Army Regulation 190-5, captioned "Motor Vehicle Traffic Supervision". ^{1/} This regulation implemented various National Highway Safety Program Standards which had been promulgated under National Highway Safety Act of 1966. Chapter 3 of AR 190-5, governs such matters as registration, possession of a valid state's driver's license, etc.); termination of registration; and driver's records. To implement the general policies of AR 190-5, the Headquarters of the Department of the Army issued AR 190-5-1, effective September 15, 1973, which set forth procedures for registration, inspection, and

^{1/} This regulation also applied to the Department of the Navy and the Air Force, and to the Defense Supply Agency.

marking of privately owned vehicles on Army installations. Specifically, matters prescribed in AR 190-5-1 include the applicability of the regulation; the proper vehicle registration/driver record form to be used by each activity; "control procedures" such as periodic unannounced spot checks of installation traffic by law enforcement personnel; and the procurement, design specifications and placement of decalcomania. The provisions of AR 190-5-1 are mandatory for all Army activities although "limited local supplementation" of the regulation is permitted.

As part of the decalcomania specifications contained in Paragraph 5 of AR 190-5-1, a mandatory numbering code was provided as follows:

"(4) Numbering.

- (a) Commissioner and warrant officers-AA001-AZ999, AAA01-AZZ99.
- (b) Enlisted personnel-BA001-BZ999.
- (c) Civilian employees-CA001-CZ999.
- (d) Commercial and POV's of concessionaires, contractors, and vendors-DA001-DZ999.
- (e) Retired personnel-EA001-EZ999."
(Emphasis supplied.)

The Activity provides parking facilities to employees on the Ft. Monmouth job-site. On June 24, 1974, Major Francis M. Chirico, Provost Marshal at Ft. Monmouth, issued a memorandum announcing a motor vehicle registration program at Ft. Monmouth prescribing the times, dates and locations for said registration which was to commence July 9. ^{2/} The memorandum further provided that, in order to facilitate the registration process, blank registration cards were to be picked up at locations designated in the memo and were to be presented in completed form when Ft. Monmouth personnel reported for registration. Finally, the memorandum set forth, as Inclosure 1, the numbering system and color scheme that was to be used for the registration decals.

The numbering code reported as Inclosure 1 of Major Chirico's June 24 memorandum conformed to, but was also more detailed than, the code provided in Paragraph 5 "Decalcomania",

^{2/} While employees are not obligated to drive their automobiles to work, employees are subject to possible penalty for noncompliance with the Activity's registration requirements. (See Assistant Secretary Exhibit No. 3, Inclosure No. 3.)

of AR 190-5-1. So it was for example, that while AR 190-5-1 provided only that civilian employee decals should be numbered from CA001 to CA999, Inclosure 1 of the Chirico memorandum delineated civilian employees decalcomania as follows:

<u>Civilians - Green</u>	<u>CA001-CZ999</u>
<u>Pl 313 & GS-16</u>	<u>CA001-CA019</u>
GS-15 & 14	CA020-CA999
GS-13 & Below	CB001-

Not only did this numbering system go beyond the requirements of AR 190-5-1, it also deviated from the previous numbering system for motor vehicles that had been in effect at Fort Monmouth. That earlier system in effect since March, 1967, established the following civilian employees' decalcomania:

(3) CIVILIAN-Green on Silver

- (a) Dr. Hans Ziegler (number) 1
- (b) Mr. A. W. Rogers 2
- (c) P. L. 313's (alphabetically) followed by GS-16's (alphabetically) 3 to 50
- (d) All other civilians regardless of grade or seniority 51 to 15000

The only feature of this numbering code that affected unit employees was the distinction made between GS-16's on the one hand (registered numbers 3 to 50) and all civilian employees of GS-15 grade and below on the other (registered numbers 551 to 15000). After the publication of Inclosure 1 in the Chirico memorandum of June 24, 1974, however, it was possible to distinguish by the decal numbers, not only between GS-16 employees and those of a lower grade, but also between GS-15 and 14 employees, on the one hand, and those of GS-13 grade and below on the other.

The numbering system in effect from March 1967 until July, 1974 was a matter of public record ^{3/} but was not distributed publicly. By contrast, the Chirico memorandum, and Inclosure 1 with the employee grade differentiations

^{3/} Major Chirico testified that although the old numbering code was not disseminated, it would have been available for inspection upon the request of any unit employee.

contained therein, was widely circulated within Ft. Monmouth. Mimeographed copies were made available to employees at the commissary hospital, the Hexagon, the guard desk, Green Acres Headquarters Building, and the Post Exchange. ^{4/} Respondent acknowledges that Army Regulations 190-5 and 190-5-1, pursuant to which the registration program was implemented, do not require that a distinction be made between GS-13 and GS-14 employees or that the decal numbering codes be made public. However, according to Respondent, the decision to differentiate GS-15 and 14 employees was made in response to numerous telephone calls from GS-15 and 14 employees who felt that they were worthy of some kind of distinction in their decalomania. Further, as testified to by Major Chirico, the numbering code was disseminated in order to put an end to the large number of telephone calls the Activity had received regarding the details of the new coding system. In any event, the Union was not consulted prior to the issuance of the Chirico memorandum of June 24, 1974. After learning of the June 24 memorandum on approximately July 1, 1974, Mr. Herbert Cahn, President of Local 476, telephoned Mr. Charles Clark who was the staff assistant to Post Commander Colonel DeVan and had occasionally represented DeVan in matters of labor-management relations. Cahn informed Clark of the Union's objections to the procedures to be implemented in the impending motor vehicle registration program. On July 3, Cahn telephoned Mr. Max Coven, an associate of Clark's to again convey his desire to negotiate registration procedures with appropriate representatives of the Activity.

Mr. Cahn next contacted the Activity on July 8, 1975 when he telephoned Major Chirico and urged that no vehicles be registered until a meeting between the Union and the Activity take place to negotiate changes in the registration procedure. Chirico assured Cahn only that he (Chirico) would bring the Union's position to the attention of Colonel DeVan.

On the following day, July 9, 1975, Mr. Cahn wrote a letter to the Commanding Officer at Fort Monmouth, Major General Hugh F. Foster, Jr., requesting that the Activity

^{4/} The memorandum, but not Inclosure 1, was also published in local newspapers such as The Monmouth Message, The Red Bank Register, and The Park Press.

cease and disist from registering vehicles, a process which commenced that same day. Cahn set forth in his letter the Complainant's objections to the registration procedure:

"As I explained to the Provost Marshall, Major Chirico, on 8 July 1974, and to Colonel DeVan, HISA Commaner, the new procedure is highly objectionable in several regards:

1. Privacy of civilian employees is unnecessarily invaded by publicly displaying their salary brackets.
2. Waiting-wives are needlessly identified and exposed to possible compromising situations.
3. Data collected from vehicle registrants goes beyond the need for vehicle identification and control.
4. Failure to comply with registration requirements may interfere with employee's ability to travel normally to and from work."

On July 10, 1975, Cahn spoke with Colonel DeVan by phone and asked that registration be suspended pending a consultation meeting. Colonel DeVan declined to suspend the registration. He did, however, inform Cahn that he had reviewed Cahn's letter of the previous day and had accepted the recommendation contained therein to eliminate the waiting-wives classification. DeVan also offered to issue a supplement to the 24 June letter inviting unit employees to come to him directly if they wanted to discuss "the issuance of high numbers". Cahn refused this offer, remarking that "it doesn't cure the problems", and no such meeting between unit employees and Colonel DeVan was ever held.

Position of the Parties

Complainant contends that the changes in vehicle registration procedures announced by the Activity on June 24, 1975 constituted a change in working conditions under Section 11(a) of Executive Order 11491. As such, the Activity had an obligation to meet and confer with the Complainant prior to the distribution of the June 24 memorandum which announced the new procedure and the failure to meet and confer in a timely

fashion, argues Complainant, constitute a bypass of the exclusive bargaining representative in violation of Sections 19(a)(1) and (6) of the Order. Complainant maintains that its members' right to confidentiality regarding their job status has been violated by the widespread publication of Inclosure 1, distinguishing unit employees by grade for the first time. Such disclosure, argues Complainant, might have an adverse effect upon an employee's social status and his self-respect. It also alerts potential thieves of the approximate income of vehicle owners, thus, presumably, jeopardizing the property and personal safety of GS-15 and 14 employees who are distinguished from employees of lesser income.

The Activity argues that there existed no duty to consult with the Union because the motor vehicle registration program in question did not constitute a change in working conditions, personnel policies or practices under Section 11(a) of the Order. The Activity further contends that assuming, arguendo, that the registration program did constitute a change in working conditions, personnel policies or practices, the Activity still had no duty to notify, meet, confer or negotiate with the Union for three reasons. First, according to the Activity, the registration program was established pursuant to regulations which were issued at the agency headquarters level and apply uniformly to all Department of Army activities therefore constituting a bar to negotiations under Section 11(a) of the Order. Second, the registration program was a matter affecting the Activity's internal security practices and therefore the Activity was excused under Section 11(b), from its Section 11(a) duty to meet and confer. Third, the effect upon employees' working conditions was so trivial that the Assistant Secretary should erect a de minimus barrier to the Union's complaint. Finally, the Activity asserts that because the Union received notice of the registration program prior to July 9, 1975 the date that registration began, the duty to seek consultation fell upon the Union and the Union's attempts to arrange for consultation with the Activity were so untimely as to constitute a waiver of its consultation rights.

Discussion and Conclusions

Since on-the-job parking privileges clearly constitute a working condition ^{5/}and since no employee in this case can use the Activity's parking lots unless his vehicle bears the

^{5/} See General Services Administration, Region 3, Public Buildings Service, Central Support Field Office. A/SLMR No. 583

correct sticker without subjecting himself to possible penalty, I conclude that the use of decals and related motor vehicle registration procedures are matters "affecting working conditions" of unit employees within the meaning of Section 11(a) of the Order. ^{6/}

I further conclude that the Activity was not privileged to act unilaterally in this matter merely because the new registration program had its origin in regulations issued at agency headquarters level uniformly applicable to all Department of the Army activities. While the Activity was obligated to change the system of registration, it nevertheless was free to exercise its discretion as to how to implement the Department of Army regulations. The time, dates and locations of registration and the separate classification of GS-13 and GS-14 and 15 employees in the decal numbering code were clearly areas over which the Activity was left wide discretion under the Department of the Army regulations. In my view, the Respondent had an obligation to notify the Union and afford it an opportunity to bargain on the matter before it made a general announcement to employees that the change was envisioned. The Assistant Secretary held in National Labor Relations Board, A/SLMR No. 246, that: ". . . the right to engage in a dialogue with respect to a change in employee working conditions becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and ample opportunity to explore fully the matter prior to the implementation of such change. If, as here, a party to an exclusive bargaining relationship were free to make unilateral changes in established working conditions of unit employees, the obligation established under Section 11(a) to meet and confer on such working conditions with an exclusive representative would become meaningless."

^{6/} Respondent argues at the threshold, however, that because motor vehicles belonging to Ft. Monmouth civilian employees are presently registered and bear decals, there has been no change in working conditions. I reject this contention since the new regulation obligated employees to replace the existing decals utilizing a different system of employee identification and an implied sanction exists with regard to those employees who fail to do so.

Accordingly, I find that the Activity's failure to give proper notification to the Union of the pending change in the registration system and accord it an opportunity to negotiate on matters relative thereto violated Sections 19(a)(1) and (6) of the Order. 7/

I reject Respondents contention that the Union had constructive notice of the registration plan on June 24, 1974 and waived any right to negotiate on the matter by not contacting Major Chirico until July 8, one day before the plan was put into effect. The Activity had the obligation to timely notify the Union qua Union, of its intentions with regard to the matter being considered herein. This it failed to do. I do not find that the Activity's notice which reached the Union's President by sheer chance satisfied the Activity's obligations in this respect. 8/ Moreover, I have found that the Union's President did not receive notification until approximately July 1, on which date he notified a staff assistant to the Post Commander. Thus the Activity was put on notice on that date through a responsible agent of the Activity that the Union objected to the planned implementation and declined to discuss the matter. Having been so notified the Activity nevertheless chose to ignore the Union and proceed unilaterally. U. S. Department of Air Force, Norton Air Force Base A/SLMR No. 261 cited by the Activity herein is distinguishable on the facts of that case. Norton dealt with an activity's changing the tour of duty of a shift of employees. Complainant therein conceded that there was no obligation on the part of the activity to negotiate with the union on the change itself and alleged only a failure to negotiate on the impact of the change. With regard thereto, the activity notified the union of it's intentions to change the tour of duty seventeen days prior to informing the affected employees and almost five additional weeks before any reassignment actually occurred during which period the union never made a request to bargain on the matter.

7/ Cf. National Labor Relations Board, supra; Anaheim Post Office, U. S. Postal Service, Anaheim, California, A/SLMR No. 324; New York Army and Air National Guard, Albany, New York, A/SLMR No. 441.

8/ See my discussion of a similar contention in Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, South Carolina, Case No. 40-5987 (CA), Recommended Decision and Order dated October 10, 1975 and case cited therein.

The Activity contended at the hearing, in the case herein, 9/ that the automobile registration requirement is a matter with respect to its internal security practices and therefore the Activity is not obliged to meet and confer with the Union on this subject. 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 organization unit, work project or tour of duty; the technology of performing its work; or its internal security practices. . . ." (Emphasis supplied.)

I do not interpret the physical act of registering employees' automobiles to constitute "internal security practices" within the meaning of Section 11(b) of the Order. The questions presented by the complaint filed by the Union in no way suggests that the Activity's internal security was a matter of concern or that the matter could not be resolved without any interference with internal security at Ft. Monmouth. Even if internal security is tangentially related to registration procedures, it is difficult to perceive how the procedures for actually registering automobiles and the numbering on decals affects the internal security of the facility. 10/ Accordingly, I reject Respondent's contention.

Finally, I find no merit in Respondent's argument that the matter giving rise to the complaint affects unit employees so remotely that it should be dismissed on a de minimus basis. While the Activity might well consider the registration process to be a trifling matter, obviously the Union did not and as an exclusive collective bargaining representative it speaks for and on behalf of unit employees. Moreover, the unilateral conduct found herein requires a finding of violation of the Order and an appropriate remedy since such

9/ The Activity did not raise this defense in either its response to the complaint or in its brief.

10/ I note the Army regulations covering registration requirements include matters containing little or nor security implications e.g. requiring for registration evidence of vehicle ownership; possession of a valid state driver's license; certification of continuing possession of motor vehicle liability insurance of a specified amount; and evidence of requirements for safety mechanical vehicle inspection.

conduct has the effect of evidencing to employees that the Activity can act without regard to the employees' exclusive representative thereby undermining, demeaning and disparaging the Union in the eyes of the employees it represents. 11/

Remedy

In its post-hearing brief, Complainant has prayed for, in addition to other forms of relief, a rescission of the vehicle registration procedure "until such time as the Activity and the Union meet and confer concerning its implementation and impact". The Ft. Monmouth vehicle registration program has now been completed. All unit employees have presumably complied with the June 24, 1974 memorandum and arranged for the registration of their vehicles at the times and dates, and in the locations, prescribed therein. Motor vehicles belonging to unit employees of GS-15 and 14 grades presumably bear registration decals with a numbering code that is distinguishable from the numbering code of decals issued to unit employees of GS-13 and below.

A rescission of the "vehicle registration procedure" which Complainant seeks, implies a return to the status quo ante and re-registration of motor vehicles at times, dates and locations negotiated by the parties. However, the status quo ante provided for a system of registration which is contrary to current Department of the Army regulations uniformly applicable to all constituent organizations within the Department of the Army. Accordingly, I am constrained to recommend a remedy which does not include rescission but will require that the Activity, upon request of the Union, bargain with the Union on vehicle registration and re-register vehicles consistent with any agreement which might be reached by the parties.

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.

11/ Cf. New York Army and Air National Guard, supra; Veterans Administration Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 388; Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301; and United States Army School Training Center, Fort McClellan, Oklahoma, A/SLMR No. 42.

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 U. S. Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

(a) Instituting a motor vehicle registration program affecting employees represented exclusively by the National Federation of Federal Employees, Local 416, Independent, or any other exclusive representative, without notifying the National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative, and affording such representative the opportunity to meet and confer on the decision and other aspects of the matter to the extent consonant with law and regulations.

(b) Refusing to meet and confer in good faith with the National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative with respect to the registration of civilian employees' motor vehicles.

(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 action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Upon request, meet and confer in good faith with the National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative, with respect to registration of civilian employees' motor vehicles and act in accordance with any agreement reached on the matter.

(b) Notify the National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative, of any intended change in civilian motor vehicle registration and, upon request, meet and confer in good faith on the decision and other aspects of the matter to the extent consonant with law and regulations.

(c) Post at its facility at U. S. Army Electronics Command, Fort Monmouth, New Jersey, 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 203.26 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.


 SALVATORE J. ARRIGO
 Administrative Law Judge

Dated: January 30, 1976
 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 refuse to meet and confer in good faith by instituting a motor vehicle registration program or change thereof affecting employees exclusively represented by National Federation of Federal Employees, Local 476, Independent or any other exclusive representative, without notifying National Federation of Federal Employees, Local 476, Independent or any other exclusive representative, and affording such representative the opportunity to meet and confer on the decision and other aspects of the matter to the extent consonant with law and regulations.

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

WE WILL, upon request, meet and confer in good faith with the National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative with respect to the registration of civilian employees' motor vehicle and act in accordance with any agreement reached on the matter.

WE WILL notify National Federation of Federal Employees, Local 476, Independent, or any other exclusive representative, of any intended motor vehicle registration program or change thereof and, upon request, meet and confer in good faith on the decision and other aspects of the matter to the extent consonant with law and regulations.

 (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 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



..... :
In the Matter of :
DEPARTMENT OF THE NAVY :
NAVY COMMISSARY STORE COMPLEX, OAKLAND :
Activity :
and :
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES :
Petitioner :
and :
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES :
AFL-CIO, LOCAL 1533 :
Intervenor :
and :
DEPARTMENT OF THE NAVY :
NAVY COMMISSARY STORE COMPLEX, OAKLAND :
Respondent :
and :
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES :
AFL-CIO, LOCAL 1533 :
Complainant :
and :
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES :
Party of Interest :
..... :

Case No.
70-4671 (RO)
70-4726 (CA)

STUART FOSS, ESQUIRE
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 For the Party of Interest-Petitioner

Before: BURTON S. STERNBURG
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on May 2, 1975 in Case No. 70-4726(CA) under Executive Order 11491, as amended, by Local 1533, American Federation of Government Employees, AFL-CIO, (hereinafter called AFGE), against the Department of the Navy, Navy Commissary Store Complex, Oakland, (hereinafter called the Respondent or Activity) and an "objection to conduct affecting the results of an election" filed in Case No. 70-4671(RO) on April 18, 1975, by AFGE, a Notice of Hearing on Complaint 1/ was issued by the Assistant Regional Director for the San Francisco, California Region on September 11, 1975.

The complaint alleges that the Respondent violated Section 19(a)(3) of Executive Order 11491, as amended, by virtue of its actions in allowing the National Association of Government Employees (hereinafter called NAGE) access to its restricted premises for purposes of conducting an organizational campaign and soliciting signatures on union authorization cards, despite the fact that NAGE did not have "equivalent status" to that of AFGE, the currently recognized exclusive representative of the employees involved.

1/ The Assistant Regional Director for the San Francisco Region consolidated the two cases by Order dated September 11, 1975.

The "objection to conduct affecting results of an election" is based upon the identical conduct cited in the Complaint in Case No. 70-4726(CA) described above.

A hearing was held in the captioned matter on October 30, 1975, in San Francisco, 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 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, conclusions and recommendations:

Findings of Fact

1. Local 1533, AFGE, was recognized on June 19, 1967, by the Respondent as the exclusive representative of a unit composed of employees located in the Commissary Store, U. S. Naval Air Station, Alameda, California, and the Navy Commissary Store Regional Office, Oakland, California. Thereafter, the Respondent and the AFGE entered into a collective bargaining agreement which, after a number of extensions, expired on or about January 20, 1973. The last collective bargaining session between the parties was held on May 9, 1973.

2. Of the approximately 88 employees included in the unit, 17 work in the Navy Commissary Store Regional Office and the remaining 71 employees work in the Commissary Store located on the U. S. Naval Air Station in Alameda. There is a distance of six miles between the Commissary Store in Alameda and the Commissary Store Regional Office in Oakland. The Commissary Store Regional Office is in an unrestricted public area freely accessible to employees and non-employees alike. The Commissary Store on the Naval Air Station in Alameda, however, is located in a restricted area enclosed by a chain link fence on the Naval Air Station. Access to the numerous gates surrounding the Naval Air Station is limited by the Marine guards to the some 5000 employees and an indefinite amount of dependents possessing official passes or identification. While an outsider may observe the Commissary Store from a public thoroughfare outside the gates, it is impossible to distinguish between employees and customers. Moreover, upon leaving the Commissary Store parking lot which is visible from outside the chain link fence, the drivers of the respective automobiles may select one of many alternative routes and gates

to proceed to their ultimate destinations. Thus, an outside union organizer might be hard pressed to successfully hand-bill or solicit employees or even distinguish a customer from the employees, many of whom had staggered hours of work.

3. On February 5, 1975, Mr. Charles Tucker, a non-employee organizer for NAGE, telephoned Mr. Larry Buckley, the Respondent's Employee Relations and Services Division Director and informed him of his desire to organize the Respondent's commissary employees and the difficulty he envisioned in contacting such employees working within the fenced confines of the Naval Air Station in Alameda. Other than pointing to the fact that the employees were working in a restricted location, admission to which was by pass or proper identification only, Mr. Tucker made no mention of what attempts, if any, besides standing outside the gate on the main thoroughfare and surveying the situation, he had made to contact the Commissary Store employees. Mr. Buckley, who admittedly made no investigation of other possible avenues of communication with the employees nor inquired of Mr. Tucker as to what attempts had been made by him or NAGE to contact the Commissary Store employees by means other than direct confrontation on the job, then contacted Chief Warrant Officer Haskins who was in charge of the Commissary Store and arranged for Mr. Tucker to gain access to the Commissary Store during the two hour lunch period normally accorded the employees therein.

4. On February 5, 1975, Mr. Tucker entered the Commissary Store employees' lunchroom during the employees two hour lunch break and proceeded to explain the NAGE organization and program, offer literature and sign up employees. During such period, Tucker spoke to some 40 to 50 employees.

5. On February 6, 1975, Tucker, without asking for permission, entered the Commissary Store Regional Office in Oakland and proceeded to conduct an organizational campaign in the complex's lunchroom during the employees' luncheon break. Tucker spoke to approximately 6 people before departing the building following the end of the lunch period.

6. On February 12, 1975, NAGE filed an RO petition in Case No. 70-4671 which is involved herein.

7. On March 8, 1975, AFGE filed a 19(a)(3) charge upon the Respondent wherein it alleged that the Respondent unlawfully allowed NAGE access to its premises for purposes of conducting an organizational campaign.

8. Thereafter, pursuant to an agreement for consent election, signed under protest by AFGE, 2/ an election was held on April 11, 1975, which resulted in a majority of the valid votes being cast for representation by NAGE.

9. On April 18, 1975, AFGE filed a timely objection to conduct affecting results of the election. The basis of the objection and the instant complaint subsequently filed on May 2, 1975, was the Respondent's action in allowing NAGE access to its premises for purposes of conducting an organizational campaign.

DISCUSSION AND CONCLUSIONS

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 or become an intervenor in such a pending 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, such as the Complainant herein, 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 of special circumstances, i. e. 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

2/ According to the uncontradicted testimony of Mr. Peter Lowe, a representative of AFGE, he under letter dated March 3, 1975, informed the U. S. Department of Labor that AFGE was the currently recognized exclusive representative of Respondent's employees, that there was an unfair labor practice pending against the Activity and requested that the petition of NAGE be denied. Further, according to Mr. Lowe, he signed the consent election agreement following a further protest and only after being informed by a Labor Department representative that the Department could conduct the election without his consent and that absent such consent the AFGE ran the danger of not being on the ballot.

not enjoying "equivalent status" is violative of Section 19(a)(3) of the Order and constitutes improper pre-election conduct justifying the setting aside of an election.

U. S. Army Natick Laboratories and Geological Survey Center, Menlo Park supra; Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247.

The Assistant Secretary further noted in his "Natick" decision "that before an agency or activity grants access to its facility by non-employee representatives of a labor organization in these circumstances, it must ascertain that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility". In view of the foregoing quotation, it would appear that irrespective of the existence of "special circumstances", an agency or activity would be engaging in conduct violative of Section 19(a)(3) of the Executive Order if it allowed access to its premises without first inquiring into the past efforts of the labor organization which is requesting utilization of its premises.

Applying the principles set forth by Assistant Secretary in the above cited cases it is clear that the Respondent-Activity herein did not make a full inquiry or investigation concerning whether or not NAGE "had made a diligent but unsuccessful effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility". Moreover, and aside from the absence of inquiry or investigation by the Respondent-Activity the record fails to establish that NAGE had in fact made a "diligent, but unsuccessful" effort to contact the employees away from the Respondent-Activity's premises. In this latter connection, it is noted that no showing, whatsoever, was made that NAGE could not have, due to prohibited cost or otherwise, reached the employees by radio, television or newspaper advertisement. Additionally, the record shows that approximately seventeen out of the eighty-eight employees in the unit who worked in the Naval Commissary Store Regional Office in Oakland were freely accessible and might well have been used either as a conduit to disseminate information and organizational cards to the remaining employees in the unit or a possible source of information for the names and addresses of such employees. In view of the foregoing, I find that NAGE had not exhausted all the means available to contact the Respondent-Activity's employees before seeking direct access to the restricted premises. A one time visit to, or survey of, the physical layout of the Naval Air Station in Alameda, without any

attempt whatsoever to handbill departing cars from the thoroughfares outside the gates falls short of a "diligent" effort to reach employees. Accordingly, on the basis of the foregoing findings and considerations, I find that the Respondent violated Section 19(a)(3) of the Executive Order by virtue of its actions in allowing NAGE access to its restricted premises for purposes of conducting an organizational campaign at a time when NAGE did not enjoy "equivalent status" with AFGE, the currently recognized exclusive representative of the Respondent's employees involved herein.

With respect to the Representation proceeding in Case No. 70-4671, I find that Report Number 58, Ruling of the Assistant Secretary, 3/ does not preclude consideration by the Regional Director of the conduct of NAGE and the Activity occurring prior to the filing of the election petition. Report No. 58 envisions a valid election petition and not one tainted by assistance from an activity as the case involved herein. To hold otherwise would allow an activity or a union to control the fate of the employees involved. Thus, an activity or a union could coerce or threaten employees or even enter into a conspiracy designed to limit the employees free choice of representative, and by such means secure the requisite number of signatures necessary for the filing of an election petition. The petition would then be insulated from attack by virtue of Report No. 58.

Report No. 58 is similar in content to rules adopted in the private sector by the National Labor Relations Board 4/ and is designed to avoid delay in election proceedings based upon conduct which experience has indicated is generally too remote in time to have had any appreciable effect on the outcome of an election.

3/ Report Number 58 reads as follows: Conduct occurring prior to the filing of the election petition may not be considered as grounds for setting aside the election.

4/ Ideal Electric and Manufacturing Co., 134 NLRB 1275; F. W. Woolworth Co., 109 NLRB 1446; Great & Pacific Tea Co. 101 NLRB 1118.

The National Labor Relations Board's rule to this effect and Report No. 58 were not designed to insulate unlawful activities underlying an election petition and tainting its validity. In this latter regard, I note that the National Labor Relations Board, whose decisions of course are not binding on the Assistant Secretary, has seen fit to set aside elections on the basis of illegal assistance, irrespective of the fact that such assistance occurred prior to the critical date contained in its rule which is similar in content to the Assistant Secretary's Report No. 58. 5/ Accordingly, I shall recommend that the Regional Director set aside the election involved herein and delay any new election until such time as NAGE presents a new petition supported by newly acquired legally obtained signatures and the Regional Director deems the circumstances permit the free choice of a bargaining representative.6/

Recommendations

Case No. 70-4671 (RO)

In view of the above considerations, I make the following recommendations:

1. That the intervenor's objection to conduct affecting results of election be sustained.

2. That the election be set aside and that any new election be delayed until such time as NAGE or any other interested labor organization presents a new election petition predicated upon newly and legally acquired signatures of employees in the unit.

Case No. 70-4726 (CA)

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(3) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following recommended order which is designed to effectuate the policies of the Order.

5/ Weather Seal Incorporated 161 NLRB 1226.

6/ Contrary to the contention of NAGE, I do not find AFGE's conduct in consenting to the election without a hearing as being a bar to, or a waiver of, its rights concerning the alleged objectionable conduct. In so finding, I note AFGE's continuing protest and the fact that the

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Department of the Navy, Navy Commissary Store Complex, Oakland, California shall:

1. Cease and desist from:

(a) Assisting a labor organization, which is not a party to, or an intervenor in, a pending representation proceeding which raises a question concerning representation, in the conducting of a membership solicitation campaign by permitting that labor organization the use of its facilities in the same manner as permitted a labor organization which is currently recognized as the exclusive representative of its Commissary Store employees.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Post at its facilities 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 Commander of the U. S. Naval Air Station, Alameda, California, 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 Commander, U. S. Naval Air Station, Alameda, California 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 twenty (20)

Footnote 6/ continued.

consent election agreement merely waived a hearing on such issues as jurisdiction and appropriateness of the units, etc., and would not have been the proper forum for litigation of the alleged objectionable conduct.

days from the date of this Order as to what steps have been taken to comply herewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: January 29, 1976
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 RELATIONS IN THE FEDERAL SERVICE

WE hereby notify our employees that:

WE WILL NOT assist a labor organization, which is not a party to a pending representation proceeding which raises a question concerning representation, in the conducting of a membership solicitation campaign by permitting that labor organization to use our facilities in the same manner as permitted a labor organization which is currently recognized as the exclusive representative of our Commissary Store 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 of the Labor-Management Services Administration, U. S. Department of Labor whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



REPORT AND RECOMMENDATION

Statement of the Case

.....
In the Matter of :
 :
NATIONAL LABOR RELATIONS BOARD, :
REGION 17, AND NATIONAL LABOR :
RELATIONS BOARD :
 :
Respondents :
 :
and :
 :
DAVID A. NIXON :
Complainant :
.....

Case No. 60-3721(CA)

David A. Nixon, Esq.
National Labor Relations Board
Region 17, Suite 616, Fourth at
State, Two Gateway Center
Kansas City, Kansas

John L. Johnson, Esq.
National Labor Relations
Board Union
1536 Federal Office Building
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222
For the Complainant

George Norman, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.
For the Respondents

Before: WILLIAM B. DEVANEY
Administrative Law Judge

This case arises under Executive Order 11491, as amended (hereinafter also referred to as "Executive Order" or "Order"). It was initiated by a complaint filed July 17, 1974 (Ass't. Sec.'s Exh. 3) and amended complaint filed on August 22, 1974 (Ass't. Sec.'s Exh. 2). Both the original complaint and the amended complaint alleged violations of Section 19(a)(1) and (4) of the Executive Order. As amended, the complaint asserted that Respondents acted with discriminatory motivation in rendering the professional appraisal of Complainant dated June 14, 1974; that the appraisal entailed a discriminatory, disparate test applied to Complainant, pretextual in nature and more onerous than that applied to other employees in Region 17; that concerted, protected conduct of Complainant, including the filing of complaints under the Executive Order and the filing of grievances under the collective bargaining agreement of the National Labor Relations Board Union, had been relied upon by Respondents in said appraisal as the basis for Complainant's adverse appraisal in derogation of Complainant's rights under the Executive Order and specifically in violation of Sections 19(a)(1) and (4) of the Executive Order.

A hearing was held in Kansas City, Missouri, on October 8, 9, 10 and 11, 1974, before the undersigned. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs were timely filed by the parties which have been carefully considered. 1/ Upon the basis of the entire record, 2/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

1/ Complainant and counsel for Respondents, Mr. Norman, each submitted very comprehensive briefs which have been of great assistance.

2/ Complainant filed with his Brief an "Appendix - Motion" in which he moved that the transcript of testimony be corrected as therein set forth. No opposition to Complainant's Motion was filed by Respondents and Complainant's Motion to Correct Transcript is hereby granted, except as hereinafter noted. The correction of p. 6, l. 12 should be changed from

Background

David A. Nixon, the Complainant herein, is a GS-14 non-supervisory attorney and has held this grade and rating since February 1972. Two prior cases involved the annual appraisal of Complainant for the appraisal period ending June 1972 [Case No. 60-3035(CA)(1973), A/SLMR No. 295 (1973), A/SLMR No. 467 (1974), FLRC No. 73A-53] and for the appraisal period ending June 1973 [Case No. 60-3449(CA) (1975)]. The background facts pertaining to complainant's employment history were fully set forth in the decision of Judge Burrow in Case No. 60-3035(CA) and in the decision of Judge Sternburg in Case No. 60-3449(CA) and need not be repeated here in any detail. Complainant's immediate supervisor during the period covered by the appraisal of June 14, 1974, was Regional Attorney Harry Irwig who has been his supervisor since January, 1971, and who, as Complainant's immediate supervisor, prepared

Footnote continued from page 2.

"is intended" to "constituted"; on p. 179, L. 2 the date "July 9" should be changed to "August 9" in order that the requested change on p. 179; L. 6 be consistent therewith; the requested change on p. 218, L. 10 should be on L. 11; p. 218, L. 15 should be L. 16; p. 243 L. 10 should be L. 11 and L. 18 should be lines 19-20; p. 244 L. 12 should be L. 13; p. 253-254 lines 25-1 should change "December 6 memoranda, he wrote, 'The matter which is part of the appraisal,' to "December 6 memoranda, the matter which he wrote, and which is part of the appraisal"; p. 255 L. 1 ",rebuttable, of"; p. 330 L. 9 should be L. 10; p. 331 L. 15 should be L. 16; p.331 L. 18 should be L. 19; p. 335 L. 4 should be L. 5; p. 335 L. 13 should be L. 14; p. 336 L. 20 should be L. 21; p. 356 lines 17 and 22 should be lines 18 and 22; p. 361 lines 21 and 25 should be L. 21 only; and p. 25 L. 25 should change "counsel" to "Council"; p. 364 L. 8 should be L. 9; p. 538 lines 20 and 22 should be 20 and 21; p. 626 L. 18 should be L. 19; p. 656 L. 15 should be L. 16; page 682 L. 16 should be L. 15; p. 684 L. 21 should be lines 21-22; and p. 742 L. 18 should be L. 19. In addition, on my own motion, the following correction is made on page 64, line 19: insert the word "not" at the end of the line following the word "do". The corrections of the transcript hereby made are shown in full in Appendix A, attached hereto and made a part hereof.

the professional appraisal covering the period June 15, 1973, to May 31, 1974, in which he recommended that Complainant be rated "not well-qualified for GS-14 supervisor or any higher position in this Agency" (Comp. Exh. 1, p. 10). A copy of the appraisal prepared by Regional Attorney Irwig was transmitted to Complainant on June 10, 1974 (Comp. Exh. 11a). The Regional Director, Thomas C. Hendrix, by memorandum dated June 14, 1974, concurred in the recommendation of Regional Attorney Irwig and also recommended that Complainant "be placed on the promotion register as not well qualified for a position as a GS-14 supervisor, Assistant Regional Attorney, Regional Attorney or Regional Director" (Comp. Exh. 1), and transmitted therewith the Professional Appraisal of Complainant to Eugene L. Rosenfeld, Assistant General Counsel, Division of Operations-Management. 3/ The Executive Assistant to the General Counsel, Robert H. Anderson, by memorandum dated July 22, 1974, advised Regional Director Hendrix that after review of the Professional Appraisal submitted, the Appraisal Review Panel had placed Complainant on the register and in categories indicated below:

- "Grade GS-14 Supervisory Positions
"not well-qualified
- "Assistant Regional Attorney Positions
"not well-qualified
- "Regional Attorney Positions
"not well-qualified
- "Regional Director Positions
"not well-qualified" (Comp. Exh. 11b, p.2).

Regional Director Hendrix transmitted a copy of the memorandum of July 22, 1974, to Complainant by his memorandum dated July 25, 1975 (Comp. Exh. 11b).

As stated by Judge Sternburg in his decision in Case No. 60-3449(CA), on June 24 and 25, 1971, Regional Director Hendrix and Regional Attorney Irwig had rated Complainant not qualified for a GS-14 non-supervisory position. Thereafter, Local 17 NLRBU and Complainant filed grievances under the contract grievance procedure and on November 15, 1971, Associate General Counsel John Irving issued his decision in which he found merit

3/ Complainant did not exercise the contractual right to file exceptions to the appraisal to the Appraisal Review Panel. [Joint Exh. 1, A VI, Sec. 3(d), p. 20; Tr. 300, 302-303).

to the grievances and ordered that a supplemental appraisal be issued. Following the submission of a generally complimentary appraisal, Complainant was promoted to GS-14 non-supervisory attorney in February 1972. In June, 1972, Regional Attorney Irwig and Regional Director Hendrix accorded Complainant a Professional Appraisal as "not qualified to be a supervisory GS-14 attorney", which appraisal was the subject of the Complaint in Case No. 60-3035(CA). In June 1973, Regional Attorney Irwig and Regional Director Hendrix issued a Professional Appraisal of Complainant as "not-qualified" for supervisor GS-14 position", which appraisal was the subject of the Complaint in Case No. 60-3449(CA).

At the hearing in this case, the parties were not permitted to relitigate facts litigated in Case No. 60-3035(CA) or 60-3449(CA); however, both parties were given leave to call to the attention of the undersigned any portions of the testimony or evidence in the prior cases deemed relevant and material for background purposes and each party has directed attention to prior, specifically identified, testimony and evidence and due consideration has been given to all such material to which attention has been directed.

Contentions and Issues

1. Claimant's Contentions

In his brief (hereinafter referred to as "Comp. Br.") Complainant states his contention, and the issues to be decided, as follows:

Complainant contends that the Appraisal, both by reason of its express written content and by reason of the state of mind of the Respondents' agents in their preparation of the Appraisal, constituted conduct prohibited by Sections 19(a)(1) and 19(a)(4) of Executive Order 11491, more particularly, that Respondents' act of expressly citing and relying upon Complainant's concerted and protected activities of filing grievances under the collective bargaining agreement and complaints under the Executive Order necessarily had a prohibited, chilling effect, violative of the Order (Comp. Brief, p. 2., see also, p. 26).

It is further contended that the charged agents prepared the Appraisal with a deliberate discriminatory design, bent upon fashioning colorable pretextual basis for an appraisal adverse to Complainant in reprisal for Complainant's pursuit of rights assured by the Executive Order. (Comp. Brief, p. 2. See, also, p. 27).

2. Respondent's Statement of the Issues.

In their Brief (hereinafter referred to as "Res. Br.") Respondents, while stating the issues somewhat differently, view the issues essentially as Complainant views the issues. Respondents state the issues as follows:

Did Respondents act with discriminatory motivation in rendering the appraisal of June 1974?

Did the content of the appraisal entail a discriminatory test, pretextual in nature? 4/

Did Respondents expressly rely upon Complainant's concerted, protected conduct, including his filing complaints (under the Order) and grievances? (Res. Br. p.2, II, A-C).

4/ Respondents included the word "disparate" and the phrase "more onerous than applied to other employees of Region 17" (Res. Br. p.2, II. B). Although this is the phraseology of the complaint, Complainant at the outset of the hearing waived, solely for the purpose of this proceeding, access to co-worker Wacknov's appraisal and, as noted, Complainant, in his statement of the issues, does not assert that he was accorded disparate treatment as the result of a standard more onerous as to him than applied to other employees of Region 17. The paucity of evidence bearing, even remotely, on comparative standards persuades me that Complainant's statement of the issues is proper and quite correctly delineates the issues for determination in this proceeding.

Findings and Conclusions

At the outset, it must be emphasized that the proscription of Sections 19(a)(1) and (4) is that

"Agency management shall not -

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

* * * *

(4) discipline or otherwise dis-
criminate against an employee
because he has filed a complaint or
given testimony under this Order;"

Only to the extent of determining whether the grounds for the adverse appraisal were pretextual in nature is either the merits or wisdom of the appraisal subject to review in a complaint proceeding; and discriminatory motivation is actionable under the Order only if agency management has interfered with, restrained, or coerced complainant in the exercise of rights assured by the Order which are, basically, as set forth in Section 1 of the Order, 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. Of course, any discipline or other discrimination against Complainant because he has filed a complaint under the Order would constitute a violation of Section 19(a)(4).

I. The 19(a)(4) Allegation

Regional Attorney Irwig in the Appraisal stated,

"On May 23, Mr. Nixon received a communication from Assistant General Counsel Eugene L. Rosenfeld to which were attached copies of memoranda from Chief Administrative Law Judge Goslee and Administrative Law Judge Wagman. In substance, the attachments concerning certain allegedly contumacious conduct in which Mr. Nixon engaged during the hearing in the Stephens case referred to above. Mr. Rosenfeld's memorandum asked

for Mr. Nixon's comments concerning this matter by May 30. Inasmuch as the matter is before the General Counsel, I am not commenting on the contents of this communication. ..." (Comp. Exh. 1, p.8).

The statement of the Regional Attorney to this point was beyond reproach; however, he continued, stating,

"... Nonetheless, I feel free to express my opinion of Mr. Nixon's action upon receipt of this communication.

"It seems to me that any competent attorney receiving such a communication would bear in mind that he was expressly given an opportunity to state his view of the incident involved, would realize that no disciplinary action had been taken, would consider the matter fully, would state his view of the incident, and withhold any further steps on his part until he knew what, if any, action concerning the matter was taken by the General Counsel.

"Mr. Nixon did not do so. Instead, at 9:12 a.m. on May 23 (or within at the most one hour after he presumably received Mr. Rosenfeld's communication) he notified Director Hendrix of his intention to file a complaint against the Agency under Executive Order 11491 based on Mr. Rosenfeld's communication... There is no question but that Mr. Nixon is entitled, as a matter of right, to file a complaint under Executive Order 11491 anytime he so desires, regardless of its merits or lack of merit. But this hasty action, without waiting to see what, if any, action the General Counsel might take, and even before responding to Mr. Rosenfeld's communication, does not speak well of him as a competent attorney, which he claims to be. Rather, it shows that he acts on impulse and before all the facts are available to him." (Comp. Exh. 1, p. 8).

The Regional Attorney was correct in his statement that Complainant has the absolute right to file a complaint under

the Executive Order. The adverse comment and criticism of Complainant because he did so; and because he had not withheld such action pending action by the General Counsel, was, however well intended, a direct effort to circumscribe Complainant's unqualified right to file a complaint under the Order and the adverse criticism of Complainant because he gave notice of intention to file, and subsequently did file on May 28, 1974 (Res. Exh. 5), a complaint under the Order violated Section 19(a)(4). The Regional Attorney concluded, in the Appraisal, that because Complainant filed a charge under the Order before he, the Regional Attorney, considered it appropriate, the Complainant had demonstrated that he was not a competent attorney and that Complainant acts on impulse. An adverse Professional Appraisal because Complainant filed a complaint under the Order cannot be equated to comment or criticism of case handling also made the subject matter of a grievance, National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, Case No. 60-3449(CA) (1975), since the adverse comment was grounded on the fact that Complainant had filed a complaint under the Order. Discrimination against an employee because he has filed a charge under the National Labor Relations Act is a violation of the essentially like provision of §8(a)(4) of that Act. Friedman-Harry Marks Clothing Co., Inc., 1 NLRB 411, enf'd 301 U.S. 58 (1937); Snow Company, 41 NLRB 1288 (1942). The inevitable chilling effect of the action of the Regional Attorney on the right of Complainant, or any other employee, to the free and unimpaired exercise of rights assured by the Executive Order was clear, direct and unmistakable. By basing Complainant's adverse appraisal, in part, on the fact that Complainant had filed a complaint under the Order, the Regional Attorney also interfered with, restrained, and coerced Complainant in the exercise of the rights assured by the Order in violation of Section 19(a)(1). The recommendation of the Regional Attorney was approved by the Regional Director and, ultimately, by the Appraisal Review Panel. Accordingly, an appropriate order will be recommended to remedy this violation. 5/

5/ Complainant did respond to the memorandum of Assistant General Counsel, Rosenfeld (Comp. Exh. 15) and the General Counsel, Peter G. Nash, by memorandum dated August 9, 1974 (Res. Exh. 2), while expressing concern, declined to discipline Complainant. Careful consideration has been given Complainant's assertions of untrustworthiness of Respondent's witnesses Irwig and Hendrix (Comp. Brief p. 23) which assertion I find to be without merit. For example, Mr. Irwig testified that he

It is fully recognized that Complainant also asserts that the mere reference by the Regional Attorney to grievances filed by Complainant violated the Order. The same contention was raised in Case No. 60-3449(CA), and I find, as Judge Sternburg there found, that comments by the Regional Attorney as to case handling, even though made the subject of a grievance, is not immunized from fair comment in a professional appraisal. I fully agree with the conclusion of Judge Sternburg that,

"In such circumstances, the subject matter of Mr. Nixon's grievances by their very nature became an integral part of the case itself and are accordingly subject to fair comment or criticism." [National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, Case No. 60-3449(CA) (1975) at p. 10].

Accordingly, such matters will be considered hereinafter in relation to the overall appraisal.

Footnote continued from page 9.

had examined the transcript of testimony in the Stevens case (Tr. 528-529) on or about May 23, 1974, and Complainant indicated that he intended to impeach this witness on this score because Complainant had the transcript in his possession (Tr. 529); however, Complainant testified that he first sought the transcript on May 24, 1974, the day after he received the Rosenfeld memorandum (Tr. 719); that the transcript was not located initially; and that late on May 24, he was called to Mr. Hendrix's office and Mr. Irwig told him the transcript, which had been misfiled, had been found and the transcript was then delivered to Complainant (Tr. 726-727). As the asserted basis for impeachment was the lack of access to the transcript, because in the exclusive custody of Complainant, Complainant's own testimony refutes the basis for the assertion. If, to the contrary, Complainant implies that, despite their testimony, consideration was, in fact, given to the merits of the issue raised by the Rosenfeld memorandum, the record, including the Appraisal, is devoid of any support whatever for such contention.

II. The Section 19(a)(1) Allegation

Complainant has asserted that his Appraisal of June 1974, was prepared with a deliberate discriminatory design, was based on assertions pretextual in nature and in reprisal for Complainant's pursuit of rights protected by the Executive Order.

During the appraisal period involved herein, Complainant was designated, and acted as, chief spokesman for Local 17, NLRBU, in negotiations on compensatory leave (Comp. Exh. 22) out of which a mutually acceptable statement was issued by the Regional Director on January 10, 1974 (Comp. Exh. 29). There is no evidence or testimony indicating any union animus. Indeed, the statement on compensatory leave as issued on January 10, 1974, reflects proposals urged by Complainant. Nor was there any comment in the Appraisal which implies the slightest animosity toward Complainant because of his activity on behalf of Local 17. Complainant's claim for compensatory time, which did invoke the comment of Regional Attorney Irwig, is discussed hereinafter. At this point, suffice it to say that the evidence does not convince me that this related to, or was ever injected into the negotiations on compensatory leave. On September 17, 1973, Regional Director Hendrix submitted to Mr. R. Anthony Murphy, Prsident of Local 17, a draft of a memorandum on the subject of compensatory leave which he had previously discussed with Mr. Murphy (Comp. Exh. 21). On the same day, September 17, 1973, Complainant and seven other field attorneys signed a petition requesting a day of compensatory leave for any field attorney who travels or works on a Sunday or holiday (Comp. Exhs. 20, 21, 22, p.3). The statement on compensatory leave which resulted from the negotiations, in which Complainant was chief spokesman for Local 17, was issued January 10, 1974. Complainant's claim for time arose on February 15, 1974, and thereafter.

The Regional Attorney stated in the Appraisal of Complainant, in part, as follows:

"... His work performance has been as erratic as it was during prior periods. One piece of work may be

quite acceptable, 6/ while the next shows serious deficiencies. This makes it necessary for me to supervise him in a substantially more detailed manner than should be necessary. This is evident from a perusal of certain Appendices to this appraisal. As can also be seen from this appraisal, he seems to be unable to recognize problem areas in case handling, and he seems to be either unwilling or unable to carry out instructions. Similarly, he seems to be unwilling to accept responsibility for his work product.

"He has claimed that instructions given him were not, in fact, given; that he understood something different; and, he has claimed that he had a conversation concerning a certain case-handling matter of which the other party to the conversation has no recollection. I note that in all these instances no third party was present." (Comp. Exh. 1, p. 1).

* * * *

"... It seems to me that he lacks the stability and the modicum of humility which a supervisor must have if he is to work harmoniously with staff members under his supervision and to develop their full potential. Moreover, I consider it not at all unlikely that he would use the same kind of intemperate language against his subordinates if a difference of opinion were to arise between them, and such differences are unavoidable.

6/ Complainant exhibited a high degree of professional competence in the trial of this proceeding and in his Brief and conducted himself throughout in a manner fully consistent with the highest legal standards and decorum. The fact that I do not accept all of Complainant's contentions, or, indeed, find some to be without merit, does not lessen his professionalism in urging them. This is, after all, the essence of an adversary system.

"In view of the foregoing, I am constrained to recommend that Mr. Nixon be rated Not Well-Qualified for GS-14 supervisor or any higher position in this Agency." (Comp. Exh. 1, p. 10).

The Regional Director stated, in part, as follows:

"I have reviewed the enclosed appraisal. The Narrative Comment appears to be accurate and is fully documented. Without attempting to assign particular weight to any one of the illustrative instances Mr. Irwig sets forth, I conclude that it is clear that Mr. Nixon's performance has not significantly changed from that covered by prior appraisals. Based upon my review, it is my opinion that Mr. Nixon has not demonstrated that he is ready to undertake the duties and responsibilities of supervision. ..." (Comp. Exh. 1)

In order to determine whether the Appraisal was prepared with a deliberate discriminatory design and was based on assertions pretextual in nature, the illustrative instances set forth as the basis therefor have been carefully examined:

a. Connell Typesetting Company. The comments of the Regional Attorney concerning the form and adequacy of Complainant's draft of proposed dismissal language shows no discriminatory design and was not pretextual in nature. Of course, it was the Regional Attorney who deemed the draft inadequate; but it was the duty and responsibility of the Regional Attorney to be satisfied that such documents meet the requirements and standards of the Agency.

b. Stephens Produce Co. The first matter commented on by the Regional Attorney concerned Complainant's draft of Response In Opposition to Objection to Petition to Revoke Subpoena which had been served on a Board agent. Again, it was the responsibility of the Regional Attorney to insure that such documents are in form and content satisfactory to him and the final version is vastly different from the initial draft. The disagreement concerns the oral instruction given by the Regional Attorney on August 22, prior to Complainant's preparation of the August 22, draft. Complainant in a memorandum dated August 25, 1973, asserted that no "explicit statement" was made that he was to assert that the 5 day period was not applicable

to the subpoena involved; however, Complainant in his testimony conceded that the Regional Attorney had, at least, stated that such an argument might be made, although he had stated that he didn't know how successful it might be. Rather than "belying" the Appraisal, Complainant's testimony, while denying the emphasis given, gives support to it. Weighing all factors, I fully credit the statement of the Regional Attorney that he told Complainant on August 22, to assert that the five-day period was not applicable with respect to subpoenas served on a Board Agent and that in such a case, the period begins to run when the General Counsel denies the request for permission to testify, as stated in the Regional Attorney's memorandum of August 23, 1973. Accordingly, I find nothing indicating a discriminatory design nor were the comments pretextual in nature.

Thereafter, on August 24, 1973, the Regional Attorney wrote a memorandum to Complainant in which Complainant was rebuked for taking Respondent's Objections to Petition to Revoke Subpoena with him to Moberly, Missouri without forwarding the Objections to the Chief Administrative Law Judge or without placing a copy in the formal file, as requested, which had required that the Regional Attorney call counsel for Respondent to obtain a copy of Respondent's Opposition, dispatch a clerical employee to the Attorney's office to pick up the copy, make required additional copies and mail them to Washington. There was nothing pretextual about the cause which give rise to the memorandum nor can I discern any discriminatory design in the statement that "none of this would have been necessary had you used the kind of thoughtfulness which, in my opinion, can, and should, be expected of an attorney of your grade and length of service." This is not very much different than a partner in a law firm who has failed to file or serve a document and a senior partner is suddenly thrust into a position similar to that faced by the Regional Attorney. You do not expect a partner to permit this to occur; nor should a Regional Attorney expect one of his senior and more experienced attorneys to permit this to occur. Complainant, however, took violent exception to the Regional Attorney's memorandum and responded by a three page memorandum dated August 31, 1973, in which he denominated the memorandum as "Respondents' Continued Acts of Discrimination, Cases Nos. 60-3035(CA) and 60-3449(C)" and sent copies thereof to Edmund L. Burke, Area Administrator, U.S. Department of Labor, Peter G. Nash, General Counsel and George Norman, Counsel for Respondents, National Labor Relations Board. The Regional Attorney stated in the Appraisal

that he was at a loss to understand why Complainant sent a copy of his memorandum to the Regional Administrator. The decision of Assistant Secretary in Case No. 60-3035(CA) had issued on August 6, 1973, A/SLMR No. 295 (The Order, inter alia, Staying Remand was issued September 28, 1973). The complaint in Case No. 60-3449(CA), initially filed July 26, 1973, was then pending but Notice of Hearing had not issued (Notice of Hearing issued October 17, 1973). Although Complainant stated in his memorandum of August 31, 1973, that he wished "to put the officers of Labor-Management Relations of the U.S. Department of Labor on notice of this latest and discriminatory reprisal" and "to flag the attention of said officers the urgent need for immediate appropriate affirmative action on my pending complaint", Complainant took no action to amend his complaint in either 60-3035 or 60-3449 nor did he file a charge based on such asserted "discriminatory reprisal" and, certainly, the Regional Attorney was correct that sending the Regional Administrator a copy of a memorandum, rather than taking some appropriate action to raise the asserted "discriminatory reprisal", was difficult to understand. Even though it is appreciated that Complainant's purpose may have been somewhat different, namely, as he stated, to urge action on his pending complaints, the comment of the Regional Attorney does not, in any event, show any discriminatory design; nor does the Regional Attorney's response of September 6, 1973, a copy of which was also forwarded to the Regional Administrator, the General Counsel and Mr. Norman.

c. Hollister, Incorporated. On October 18, 1973, Complainant submitted a memorandum to the Regional Attorney concerning language of a Settlement Agreement which he recommended be approved. The language was set forth on an attached Settlement Agreement form as follows:

"NON-ADMISSION OF GUILT --
By entering into this Agreement, the Charged Party does not admit having committed any unfair labor practice."

The Regional Attorney replied the same day that the language proposed was acceptable in this case except the heading "NON-ADMISSION OF GUILT" which he stated the Regional Director would not accept. The Regional Attorney further stated that in view of intervening events (additional charges had been filed against Hollister) the matter seems to have become academic, at least for the time being; but to bear this in mind and if appropriate advise respondent's counsel of the regional position.

On or about October 18, 1973, Counsel for Hollister, Mr. Newman, called the Regional Director who gave Complainant the following transmittal slip, which was undated,

"By entering into this agreement the Charged Party does not admit to having violated the National Labor Relations Act.

"Newman called
I said O.K."

On or about January 29, 1974, settlement was renewed and Complainant submitted to the Regional Attorney a Settlement Agreement, apparently the same document he had attached to his October 18, 1973, memorandum, which, in any event, again contained a "NON-ADMISSION OF GUILT" heading. By memorandum dated January 29, 1974, the Regional Attorney reviewed his prior advice of October 18, 1973, that such a heading was not acceptable; stated that an undated pink slip in the Regional Director's handwriting was to the same effect and indicated that the Regional Director had advised Mr. Newman, attorney for Hollister, accordingly; and that the Regional Director had reaffirmed his position. Accordingly, the Regional Attorney suggested that Complainant call Mr. Newman and advise him that if he were unwilling to settle without such a clause, a complaint would be issued. Complainant called Mr. Newman who told Complainant that the Regional Director on October 18, 1973, had, indeed, refused to agree to the "NON-ADMISSION OF GUILT" heading.

Although the Regional Attorney stated at this point of the Appraisal that,

"This claimed misunderstanding on Mr. Nixon's part would seem to detract from his claim of a perfect memory referred to elsewhere in this appraisal." (Comp. Exh. 1, p. 3)

It is recognized that this entire matter, as well as other matters, was used by the Regional Attorney to illustrate and to justify his statements, inter alia, that it is necessary to supervise Complainant in a substantially more detailed manner than should be necessary; that Complainant seems either unwilling or unable to carry out instructions; that he has claimed that instructions given to him were not, in fact, given; that he understood something different; etc.

Complainant's assertion that the Regional Attorney's quoted comment is "spurious and reflective of a cast of mind bent on manufacturing an adverse Appraisal" cannot be accepted. First, there was the written memorandum of the Regional Attorney which quite plainly stated that the "NON-ADMISSION OF GUILT" heading was not acceptable. Second, there was the Regional Director's handwritten note which set forth the language to be used and which concluded "Newman called. I said OK." The most that can be said of Complainant's testimony is that the Regional Director handed Complainant the pink slip and said "Newman called me and he made his pitch." I cannot credit Complainant's testimony that the Regional Director consented to the "non-admission clause"; that he ever said "I really don't see any problem with it"; that he ever said "it doesn't change anything substantively" (Tr. 68-69). Complainant himself immediately thereafter stated,

"I thought that Mr. Hendrix wrote out what Mr. Newman wanted in the course of his discussion with Mr. Newman, and then after some further discussion, before handing it to me, said Newman called, and I said, Okay." (Tr. 69).

This latter statement is fully consistent with the language written out by the Regional Director which, on its face, imports that the Regional Director said "O.K." to Newman to the language stated. The Regional Director credibly testified, for example:

"I wrote this down. I told Mr. Newman this is what I would accept for a nonadmission clause in haec verba, and I wrote this. Newman called, I said okay on here for your benefit so that you would know that I approved that language." (Tr. 149)

* * * *

"I realize who you are talking to on the other side, and so I then put this down and I may have said at the same time, I talked to Newman, this is what he and I agreed to, and then I left you because I didn't want to interrupt your conversation ..." (Tr. 151).

Complainant may have been uncertain in January but in the face of two written statements, one from the Regional Attorney and the other from the Regional Director, which should, at least, have made him aware that the "NON-ADMISSION OF GUILT" was questionable, if not, indeed, verboten, persisted in resubmitting a document previously specifically disapproved without further inquiry. In doing so, he subjected his action to comment in his appraisal; and the Regional Attorney's reference to the matter was neither spurious nor reflective of any cast of mind or bent to manufacture an adverse Appraisal. Complainant would read only the words "Newman called. I said O.K." in the Regional Director's memorandum and ignore the language of the nonadmission clause which the Regional Director had carefully written out, a result which would utterly divorce fact from reality.

d. Letter to Congressman Bolling. On October 29, 1973, Complainant wrote a letter to Congressman Bolling seeking the Congressman's assistance in obtaining the removal of Judge Burrow from Complainant's Case No. 60-3035(CA). Copies of this letter were sent to President Nixon, the Secretary of Labor, the Assistant Secretary of Labor for Labor-Management Relations, the Chairman of the Federal Labor Relations Council, the General Counsel of the National Labor Relations Board, and to others. In his Appraisal of Complainant, the Regional Attorney stated,

"... Mr. Nixon seeks to enlist administrative and/or political pressure in a case which is in litigation before a duly designated forum. To engage in such conduct is improper for any attorney, even if the attorney is also the complainant. Moreover, Mr. Nixon's characterization of Judge Burrow, in my opinion, exceeds the limits of permissible argument. I am quite certain that Mr. Nixon would be quite vocal in accusing opposing counsel in a case before this Agency of unprofessional conduct, if such opposing counsel engaged in the same type of conduct Mr. Nixon has engaged in by his letter."

As Complainant stated in his letter to Congressman Bolling, he had filed a motion, dated October 12, 1973, requesting Judge Burrow to disqualify himself and written Opposition, dated October 19, 1973, had been filed by counsel for Respondents and received by Complainant on October 26, 1973. Complainant's

emotional involvement is understandable and illustrates the difficulty of maintaining the detached judgment of counsel when one elects to represent himself; but the request for extra-legal intervention while this matter was in active litigation justified the comment by the Regional Attorney that such conduct was improper and unprofessional when engaged in by an attorney for the Board. But more important, there was nothing pretextual in nature nor discriminatory in design in the comments and the Executive Order neither protects nor immunizes the professional conduct of an attorney from fair comment in the preparation of a professional appraisal of the attorney for supervisory responsibility.

e. Vincent Metal Works. The Regional Attorney noted in his Appraisal that Complainant's draft complaint required extensive additions and corrections.

f. Sperry Vickers. This matter involved numerous memoranda between Complainant and the Regional Attorney (Comp. Exh. 1, App. 18 through 23,) and in his Appraisal of Complainant the Regional Attorney stated:

"Since he obviously did not even consider the possibility that the facts involved might be an important, perhaps the principal defense against a complaint alleging a refusal to bargain, I spelled the problem out in detail by memorandum of December 5 ... Mr. Nixon replied under date of December 7... A review of these memoranda indicates to me that Mr. Nixon never understood there was a possible problem. Moreover, even though he did not find any acceptable precedent, and consequently should have realized that an unusual and possibly novel issue was presented, he failed to suggest submission of the case to Advice. (The case was referred to Advice.)" Comp. Exh. 1, p. 4).

In his memorandum to the Regional Director dated December 17, 1973, recommending submission to Advice as a case of first impression the Regional Attorney did state that:

"Contrary to Mr. Nixon, I do not think that under the particular circumstances here, a violation of Section 8(a) (5) can be established." (Comp. Exh. 10-a).

Advice, on June 28, 1974, concluded that complaint should issue, absent settlement (Comp. Exh. 10-b). Obviously, the action of Advice was not known to the Regional Attorney when the Appraisal of June 14, 1974, was prepared and transmitted.

Although Complainant is correct that his conclusion was upheld, it is true that Complainant, while he stated, "my search of the law did not disclose the presence of any case precedent on all fours with the instant case, relating to the factual situation obtaining herein", did not suggest submission of the case to Advice. The propriety of the comment is not before me beyond determining whether it evinces a violation of the Executive Order. Respondents have not established, beyond the criticism of Complainant for failing to recommend submission of the case for advice, any policy or practice that the field attorneys are required, or expected, to recommend cases for submission to Advice. Although it might be assumed that it is a function of supervision to make such evaluation, Complainant presented no evidence that other field attorneys are not criticized when they have made no recommendation that a case be submitted to Advice which has been so submitted. Consequently, standing alone there is no valid basis on which I can conclude that the criticism of Complainant in this regard was pretextual or discriminatorily motivated; but even if the Appraisal were pretextual and were discriminatory as to Complainant in this regard, there is no evidence that Respondents thereby interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order or that Respondents thereby disciplined or otherwise discriminated against Complainant because he had filed a complaint or given testimony under the Executive Order.

g. Computing Mailing. On December 6, 1973, the Regional Attorney wrote Complainant a memorandum concerning a copy of a consent election stipulation which he received in the mail, presumably from the attorney for the Union, Mr. Eisler. The Regional Attorney was highly critical because Complainant had written the Stipulation, which counsel for the parties had signed, and had failed to insert either the name of the Union or the employer, and their addresses, or the case number; but was also critical of the fact that Complainant had written an eligibility provision that provided that employees must be on the payroll on a specific date, December 4, 1973, in order to be eligible to vote rather than providing that employees on the payroll for the period ending on a specific payroll date would be eligible to vote. The Regional Attorney's characterization of the decepts vis-a-vis the omission of names, addresses, and case number as "a case of extreme negligence or lack of attention to the business at hand ..." was a harsh rebuke; and the Regional Attorney's further statement,

"... particularly considering that you are a GS-14 attorney with this agency and that you are aspiring to a supervisory position. If your own work shows deficiencies of this kind, how could you possibly supervise other, presumably less experienced staff members."

strongly indicates that the Regional Attorney was "making a record" for the next appraisal of Complainant, since such comment appears unwarranted by any other consideration. Not only was such comment wholly undiplomatic but it reasonably provoked a grievance by Complainant.

In his Appraisal of Complainant, the Regional Attorney stated:

"It appears to me that Mr. Nixon's reaction to my December 6 memorandum [by filing a grievance] shows conclusively that he is incapable of accepting constructive criticism even when he knows, or should know, that the criticism is fully warranted; that he is unwilling to accept responsibility for his work; and that he tries to excuse his shortcomings, regardless of the mental gymnastics in which he must engage to do so. Further, inasmuch as Mr. Nixon apparently thinks that his handling of the aspect of case here in issue was free of fault, that it meets our casehandling standards, that it certainly does not warrant any criticism, it follows that he would accept such case handling from a staff member under his supervision without criticism, without corrective action. This is not the kind of supervision this Agency needs." (Comp. Exh. 1, p. 4)

Complainant's testimony, which was fully confirmed by the testimony of William O. Eisler, attorney for the petitioning union, and which was wholly credible and uncontradicted on this matter showed that Complainant met with counsel for the parties on December 4, 1973; that Earl Engle, attorney for the Employer, insisted upon the eligibility language, which Complainant wrote on the form as a working document, but which Complainant told the parties the Board would not approve and asked Mr. Engle to change his position, nevertheless, Mr. Engle stated that it was

going to be that way or he was going to insist upon a hearing; that Mr. Engle signed the working document, which he dated December 4, 1973, while Complainant was out of the room; that one or both attorneys asked for a xerox copy which Complainant furnished; and that Mr. Eisler later signed the working document, which he dated December 5, 1973, and the signed working document was returned to the Regional Office apparently by Attorney Eisler.

Had the Regional Attorney known the facts, or had he made any effort to ascertain the facts, it is inconceivable that he could have issued the harsh rebuke to Complainant he did issue about submitting an incomplete document for approval since, obviously, Complainant had not submitted the document, had not signed the document, and was not aware that anyone else had "submitted" the document. Indeed, from the testimony of Attorney Eisler, which I fully credit, it is clear that the Union had satisfied itself that the language insisted upon by the Employer did not create any problem, i.e., did not affect the right of any employee to vote who would otherwise be eligible; and that it freely agreed to the eligibility language insisted upon by the Employer in order to obtain a quick, consent election.

While it is true that Complainant wrote the eligibility language on the working document, in view of the agreement of the parties, it does not appear that the results would have been any different had Complainant written the standard language and the parties had thereafter altered the language as was done in Coca-Cola Bottling, 17-RM-504 (Comp. Exh. 1, App. 24-4), in which case Mr. Hurley recommended approval of the Stipulation as amended and the Regional Office approved the Stipulation on November 23, 1973.

The statement in the Appraisal that Complainant's reaction to the memorandum of December 6, 1973, by filing a grievance "shows conclusively that he is incapable of accepting constructive criticism even when he knows, or should know, that the criticism is fully warranted ..." etc., penalized Complainant because he filed a grievance to protest the harsh rebuke which was not warranted on the facts. This is not to suggest that professional conduct which is made the subject of a grievance is in any manner immunized from fair comment in a professional appraisal; but fair comment on professional performance must be limited to comment and evaluation of the professional performance. Respondents interfered with, restrained and coerced Complainant in the exercise of rights assured by the Executive Order in violation of 19(a)(1) thereof by their adverse professional Appraisal of Complainant, in part, because he filed a grievance under the collective bargaining agreement.

h. Copies vs. Original. In his Appraisal of Complainant, the Regional Attorney commented adversely on a recommendation by Complainant that eight (8) copies of a motion be submitted to the Board rather than an original, i.e., a signed copy, and seven (7) copies. Complainant did not present to the Regional Attorney the facts as set forth in his explanation of the matter in his testimony, namely, that the parties had signed the stencil. As incongruous and insubstantial as the criticism may appear, for having made a recommendation which was very properly rejected, there is, nevertheless, nothing to indicate that the comment of the Regional Attorney interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order.

i. Compensatory Time (Computing Mailing). As noted hereinabove, the memorandum of the Regional Director, which reflected the result of the negotiations in which Complainant was chief spokesman for Local 17, issued January 10, 1974, and provided in part as follows:

"All work, performed by members of the bargaining unit of the Regional Office on a Saturday, Sunday or an official holiday ... must, in order to furnish the basis for compensatory leave credit, be authorized in writing by the immediate supervisor of the employee involved.

"In the absence of exceptional circumstances, an employee seeking compensatory leave credit regarding the performance of the above-described work, will, prior to performing the work, make a request of his immediate supervisor for the above-described written authorization. ...

"Compensatory leave will be granted ... and be used by the employees in accordance with the Administrative Policies and Procedures Manual and Section 4, Article XVIII of the presently effective Agreement between the General Counsel of the National Labor Relations Board and the NLRB Union, covering Field Professional Employees. ..." (Comp. Exh. 29)

Article XVIII, Section 4, provided, in part, as follows:

"Section 4. At no time may an employee accrue compensatory leave credits in excess of 60 hours. At the close of the last full pay period in each quarter an employee may not carry forward to the next quarter more than 40 hours of compensatory leave credits. ..." (Joint Exh. 1, p. 47).

Although neither party relied upon Article XVIII, Section 2 of the Agreement covering Field Office Professional Employees, notice is hereby taken of the provision thereof which provides:

"Section 2. Whenever a Regional Director or his designee has either directed, authorized, or approved overtime work ... employees shall earn overtime credits equal to the full hour and half hour actually worked. ..." (Joint Exh. 1, p. 46).

The petition signed by Complainant and seven other Field Attorneys on September 17, 1973 (Comp. Exh. 21) had sought a full day of compensatory leave for work on a Sunday or holiday; however, the memorandum of January 10, 1974, which memorialized the result of negotiations, provided otherwise.

On February 15, 1974, Complainant advised the Regional Attorney that a witness in a pending case would be available for interview only on February 18, a holiday, and requested that this holiday work be authorized and that he receive compensatory time. The Regional Attorney authorized the work as follows:

"Exact time to be in accordance with established rules."

At Complainant's request, the Regional Attorney added the words "or practice" (Comp. Exh. 1, App. 26). On March 5, 1974, Complainant submitted his claim for compensatory time of three (3) hours ^{7/} which he stated included, "time devoted to personal

^{7/} As previously noted, I find wholly unconvincing Complainant's argument that he was then seeking to negotiate a minimum allowance for work on a holiday. The notation on the memorandum of the Regional Director of March 4, dated March 5, 1974, does state that the form makes no provision for a minimum of four (4) hours (Comp. Exh. 1, App. 27). This is

needs incurred, e.g., dressing for interview". The Regional Attorney, after meeting with Complainant, allowed 1 1/2 hours for the interview time and driving time.

In the Appraisal the Regional Attorney stated:

"In my opinion, Mr. Nixon's conduct in including in his claim time spent on activities which he must have known not to warrant compensatory time, falls short of accepted professional standards." (Comp. Exh. 1, p. 6).

The memorandum of January 10, 1974, reads, "All work", "performance of the above-described work" and requires "authorization in writing". Section 2 of Article XVIII of the National agreement, although not referred to by the parties, specifically provides that "employees shall earn overtime credits equal to the full hour and half hour actually worked". The Regional Attorney authorized, "Exact time to be in accordance with established rules or practice". The Regional Attorney was correct in a literal sense that the memorandum of January 10 referred to "work" and his authorization was for "exact time" (but in accordance with established rules or practice) and Section 2 of Article XVIII was specific to "the full hour and

Footnote continued from page 24.

true and the President of Local 17 testified there was no agreement concerning a minimum allowance. That there was no such agreement is further apparent from the memorandum of January 10, 1974, as well as the fact that Complainant, who had been the chief spokesman for Local 17 in the negotiations preceding the issuance of the January 10, 1974, memorandum did not claim four (4) hours. Not only does it clearly appear that negotiations had been completed upon issuance of the memorandum of January 10, 1974, but the notation by Complainant does not request bargaining and if he had sought further bargaining he did not direct any such request to the Regional Director. Finally, as indicated above, the original request of September 17, 1973, had been for a full day of compensatory leave for work on a Sunday or holiday. No minimum allowance was granted in the memorandum of January 10, 1974, which reflected the results of those negotiations.

half hour actually worked", which may well mean that any claim for any time not "worked" was not to be allowed; but what may appear clear beyond doubt to some may appear very different to others. See, for example, Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). Even though the Regional Attorney's memorandum of March 4, 1974, which uses the phrase "actual number of hours used", which may itself be subject to differing interpretations, Complainant did not contest the disallowance through the grievance procedure and there is no rational basis on which it can be concluded that Complainant was "negotiating" or otherwise engaging in concerted activity or in the exercise of any right assured by the Executive Order. Accordingly, whether the comment had any rational relationship to accepted professional standards is not properly before me since there is no evidence to indicate that the comment, even if pre-textual, interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order.

j. McGraw Edison. The Regional Attorney noted that Complainant's draft complaint fell short of the standard of thoroughness, completeness, and expertise expected of a GS-14 field attorney which he thoroughly documented. Complainant's assertion that the flaws were de minimus cannot be accepted. But more important, there is no evidence that the comment interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order.

k. Missouri Builders Supply. Complainant had, indeed, erred in the rate of pay stated for a back pay computation which Ms. Borel had noted and computed at the correct rate for which Complainant was grateful; however, Complainant did, further instruct Ms. Borel to add interest. The propriety of the inclusion of this item in the Appraisal is not before me beyond determining that there is no evidence that such reference was in violation of 19(a)(1) of the Executive Order.

l. Request for Assistance. The comment in the Appraisal referred only to the notation by the Regional Director on April 8, 1974, that he recalled no discussion with Complainant about the McGraw Edison case. The Regional Attorney provided the requested assistance. The Regional Director quite credibly testified that he did not recall any discussion about the case with Complainant. In his memorandum of April 5, 1974 (Comp. Exh. 1, App. 31) Complainant stated:

"I also note, in line with my conversation with the Director on Tuesday (April 2), that I would like to have another attorney assigned as co-counsel in this matter to assist me."

From Complainant's testimony, what actually occurred was that the Regional Director, having learned of the death of Complainant's mother, went to Complainant's office to offer his condolence and said,

"If there's anything we can do to help you, don't hesitate to ask." (Tr. 225).

I have not the slightest doubt that the Regional Director did make such a statement, as I know I have made and know were made to me, under similar circumstances. But I do not find convincing Complainant's testimony that he gave any such explanation of his statement in his memorandum of April 5, 1974, to the Regional Attorney. Complainant did not question the Regional Attorney about any such conversation and the statement in the Appraisal is not consistent with any such explanation having been given. Consequently, the Regional Attorney quite correctly stated that Complainant represented that he had discussed assistance in the McGraw Edison case with the Regional Director and that the Regional Director stated that he had no recollection of any discussion of McGraw Edison with Complainant. Under no interpretation is there any basis on which it could be concluded that such statement interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order.

m. Compensatory Claim (McGraw Edison). On May 1, 1974, Complainant submitted a request for authorization for travel on Sunday, May 5, 1974, and estimated the number of hours as a "full day". The Regional Attorney authorized the travel, hours to be determined later, and noted that Complainant should advise time of departure from duty station and time of arrival at destination. There followed a plethora of comments from Complainant beginning with his memorandum of May 1, 1974, entitled "The Unreasonable and Discriminatory Emasculation of My Rights to Adequate Compensation" (Comp. Exh. 1, App. 33) and ending with Complainant's memorandum of May 9, 1974 (Comp. Exh. 1, App. 38). 8/ The Regional Attorney very correctly

8/ Complainant's reference to the 1974 amendment of the Fair Labor Standards Act is misplaced unless his position has been misconstrued. Professionals are, in any event, excluded from coverage.

stated in his memorandum of May 2, 1974, that "your assertion ... is, at best, premature" (Comp. Exh. 1, App. 34). On May 11, 1974, the Regional Attorney authorized a full day of eight (8) hours (Comp. Exh. 1, App. 32). The comment of the Regional Attorney in his Appraisal that,

"Somehow, I am unable to reconcile Mr. Nixon's conduct and his written communications in this matter with professional conduct," (Comp. Exh. 1, p. 7)

was not pretextual but resulted from Complainant's action which was subject to evaluation in his professional appraisal; nor is there any basis on which it could be concluded that the recitation and comment interfered with, restrained, or coerced Complainant in the exercise of any right assured by the Executive Order.

n. Connell Typesetting Company, et al. On May 18, 1974, a Motion to Reopen the Record was filed by counsel for the Kansas City Typographical Union No. 80, in a case which had been submitted and transferred to the Board. Complainant had recommended the filing of a motion requesting the Board to issue an Order to Show Cause why the Board should not reopen the record and supplement the record as requested. The Regional Attorney stated on May 20, 1974, that he did not think a motion to the Board requesting the Board to issue a Motion to Show Cause was appropriate and this would be done by the Board in routine fashion unless all other parties have advised the Board of their positions. Complainant responded on May 21, 1974, and again expressed his opinion that a motion seeking issuance of a Motion to Show cause was the preferred action; set forth reasons that the supplemental material strengthened the case; and recommended, if the Show Cause suggestion was not adopted, that nothing be submitted. On May 22, 1974, the Regional Attorney advised Complainant that:

"We will not move the Board to issue an order to show cause. If we do not hear from the Board by COB 5/29, we will file a response ... taking the position that GC has no objections

to the motion being granted for the reason that the facts shown in it would assist the Board in fashioning an appropriate remedy if the respondents are found to be in violation of the Act."
(Comp. Exh. 1, App. 43)

Complainant prepared a Response, which was filed on May 31, 1974, in which he concluded,

"Accordingly, it is the position of the General Counsel that the Motion, dated May 18, 1974, filed by the Union, should be granted."

Although Complainant is correct that no reference was made to the intervening response of the Employers by the Regional Attorney, nevertheless, the comments of the Regional Attorney in his Appraisal of Complainant, including the concluding statement that "... there is simply no excuse for a staff attorney to blithely disregard case handling instructions given by his supervisor" were directed to Complainant's professional conduct and the Regional Attorney did not thereby interfere with, restrain, or coerce Complainant in the exercise of any right assured by the Executive Order.

o. Willingness to Work Beyond Office Hours. In his developmental interview, the Regional Attorney solicited Complainant's comments as to why he believed he should be rated Well Qualified and, inter alia, Complainant asserted his willingness to work beyond office hours. The Regional Attorney commented that Complainant's approach to compensatory leave, not his entitlement to it, did not reflect such willingness. The Regional Attorney also stated that Complainant complained that the Hollister cases, which had been handled by him, were assigned to him for compliance. Complainant's objection had taken the form of a grievance (Comp. Exh. 37) and the Regional Attorney testified as follows:

"Q. [By Mr. Norman] now will you please tell us what Mr. Nixon, if anything was assigned to do with respect to that case?"

"A. He was assigned to pursue the routine writing of these letters, to see to it that the letters I described earlier would go out, that's all."

"Q. And now, you state here that the Complainant took to the form of a

grievance, which is incorporated herein by reference. Would you tell us why you made that statement in the appraisal?"

"A. To indicate the source of this complaint, where it can be found and for that reason, also, in order to avoid any accusations of myself stating what Mr. Nixon's complaint was. I just put it in the copy of the grievance."

"Q. Now what was your reaction to Mr. Nixon's complaint as a supervisor."

"A. I was disgusted." (Tr. 471).

The statement in the Appraisal was as follows:

"I am also reminded of the fact that Mr. Nixon, on March 1, complained that on February 27, he had been 'assigned the duty of acting as Compliance Officer in the Hollister Incorporated Cases Nos. 17-CA-5734, 17-CA-5818.' The Hollister cases had been handled by him (see above) and that they were assigned to him in routine fashion, after the Settlement Agreement had been approved by the Regional Director, for compliance. There was no assignment or designation to '[act] as Compliance Officer.'" (This complaint took the form of a grievance which is incorporated herein by reference so that Mr. Nixon's attitude may be evaluated in connection with all pertinent facts, particularly the established practice of this office and the volume of work entailed in this specific instance.)"
(Comp. Exh. 1, p. 9).

As stated earlier, I agree completely with the conclusion of Judge Sternburg in Case No. 60-3449(CA), that the filing of a grievance does not, and cannot, insulate an attorney's case handling or other errors from fair comment and criticism in a professional appraisal. Complainant's grievance in this

instance did not involve his case handling or any error by Complainant in the performance of his duties, but was a grievance challenging the assignment of cases for compliance to field attorneys. The Regional Attorney believed the grievance was utterly frivolous; but to adversely criticize Complainant because he filed a grievance, as to which the Regional Attorney testified "I was disgusted", did interfere with, restrain, or coerce Complainant in the exercise of his right to utilize the grievance procedure in violation of 19(a)(1) of the Executive Order.

Concluding Comments

I have found that Respondents violated Sections 19(a)(4) and (1) of the Executive Order by adversely criticizing Complainant in his professional Appraisal because he gave notice on May 23, 1974, of his intention to file a complaint under the Executive Order, rather than at some later time; and that Respondents violated Section 19(a)(1) of the Executive Order by adversely criticizing Complainant in his professional Appraisal because he filed a grievance with regard to the Computing Mailing matter and because he filed a grievance with regard to the assignment of Compliance in the Hollister cases. National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 295 (1973); Department of Defense Arkansas National Guard, A/SLMR No. 53 (1971); Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, Case No. 71-3030 (1975). In these three instances there was, as Complainant asserts, a "showing of out-and-out animus and hostility toward Complainant's engagement in activities protected by the Order" (Comp. Br. p. 26); but I do not find any credible evidence that such "animus and hostility toward Complainant's engagement in activities protected by the Order" was reflected in, or affected, any other comment in the professional Appraisal of Complainant herein involved. Stated otherwise, the comments in Complainant's Appraisal, except in these three instances, were based upon Complainant's case handling and professional conduct. There was no evidence whatever of union animus. 9/

9/ Complainant's references to testimony of the Regional Director in Case No. 60-3449(CA) (Comp. Br. p. 26) must be viewed in light of the conclusion of Judge Sternburg that "I find insufficient basis for a finding of 'disparate treatment'". Moreover, in the period covered by the Appraisal involved in this proceeding, Complainant's activity on behalf of Local 17 consisted of acting as chief spokesman in negotiations which resulted in the January 10, 1974, memorandum on compensatory leave. There was no evidence that relations were other than amicable and the results reflected proposals of Complainant adopted by the Regional Director.

In a discharge case, if a cause for discharge is discrimination because of the exercise of a protected right, reinstatement may be ordered even though other lawful grounds for discharge are shown. On the other hand, if discharge is, for cause, engagement in protected, concerted activity does not immunize the discharge. This is not a discharge case and, while three specific references in the Appraisal have been found to be in violation of the Executive Order and a new appraisal will be recommended, an appraisal for placement on the registers for supervisory positions must be made by Respondents' reviewing authorities since it would be wholly improper to substitute my judgment for theirs. It is recognized that an appraisal encompasses many factors, only one of which is technical or professional ability. I am fully aware that the most able attorney may wholly lack the ability to supervise others. Except as noted, the factors relied upon and the comments made have specifically, been found not to have been in violation of Section 19(a)(1) of the Executive Order. It is also recognized that Complainant testified that Ron Brown, then president of Local 17, said to Complainant in a very loud voice,

"Get your goddamn hands off me. Don't ever lay your hands on me again." (Tr. 319).

which strongly infers a continuing difficulty by Complainant to get along with fellow staff members and Gerald A. Wacknov, also a fellow GS-14 field attorney and former president of Local 17, testified that in 1970 or 1971, there was a personality problem and Complainant could not take orders from the Regional Attorney effectively (Tr. 616), a difficulty that the record shows has continued to manifest itself. Consequently, while I, as did Judge Sternburg in Case No. 60-3449(CA), agree that certain of the alleged deficiencies attributed to Complainant in his 1974 Appraisal are of little import, most of the comments and alleged deficiencies were of substantial import, were based squarely on the professional conduct of Complainant and were not in violation of Section 19(a)(1) of the Executive Order. 10/ Accordingly, the request of Complainant that he be

10/ On September 8, 1975, after the foregoing decision had been written but not yet issued, a motion by Complainant seeking leave to call attention of the undersigned to the decision of the National Labor Relations Board in Hawaiian Hauling Service, Ltd., 219 NLRB No. 126, 90 LRRM 1001 (1975), was received. The motion is hereby granted. Although the cited decision has been

found well qualified must be denied.

RECOMMENDATION

Having found that Respondents engaged in conduct which was in violation of Sections 19(a)(1) and (4) of the Executive Order by adversely criticizing and adversely rating Complainant for supervisory positions, in part, because he filed a complaint under the Executive Order and, in part, because he filed grievances under the negotiated collective bargaining agreement. I recommend that the Assistant Secretary adopt the following order:

Footnote continued from page 32.

Carefully considered, it is not deemed applicable to the present case. First, as previously noted, this is not a discharge case. Second, the comment of the regional Attorney in the Appraisal of Complainant was that:

"... I [Regional Attorney Irwig] consider it not at all unlikely that he [Complainant] would use the same kind of intemperate language against his subordinates if a difference of opinion were to arise between them, and such differences are unavoidable." (Comp. Exh. 1, p. 10).

Such comment in a professional appraisal for recommendation for supervisory or other higher positions does not constitute an infringement upon any right of Complainant assured by the Executive Order. By comparison, the Board majority in Hawaiian Hauling Service, Ltd., supra, specifically stated:

"... Precluding a union from calling into question the credibility of management witnesses ... would so heavily weight the mechanism [grievance procedure] in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances. ... An arbitrator's award which tends to destroy the effectiveness of that mechanism ... is clearly repugnant to the policies of the Act." (90 LRRM at 1013).

RECOMMENDED ORDER

Pursuant to Sections 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 National Labor Relations Board, Region 17, and National Labor Relations Board shall:

(1) Cease and desist from:

(a) Disciplining or otherwise discriminating against Complainant David A. Nixon, or any other employee, by adverse criticism or rating in any professional appraisal, or in any other manner interfering with, restraining, or coercing Complainant David A. Nixon, or any other employee, because any such employee has filed a complaint or has given testimony under the Executive Order.

(b) Adversely rating or criticizing Complainant David A. Nixon, or any other employee, in any professional appraisal, or otherwise interfering with, restraining, or coercing Complainant David A. Nixon, or any other employee, in reprisal for the filing or processing of grievances pursuant to the terms of a collective-bargaining agreement.

(2) Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post in the Office of Region 17, Kansas City, Kansas, 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 Regional Director of Region 17 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 field attorneys 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) Forthwith rescind, withdraw and expunge from all personnel files the professional appraisal of Complainant David A. Nixon, dated June 14, 1974.

(c) Promptly as possible after rescinding, withdrawing and expunging the professional appraisal of Complainant David A. Nixon, dated June 14, 1974, reappraise Complainant David A. Nixon for the period June 15, 1973, through May 31, 1974, without reference to, consideration of, or in reliance upon any complaint filed or testimony given by David A. Nixon under the Executive Order and without reference to, consideration of, in reliance upon, or in reprisal for the filing or processing of grievances pursuant to the terms of a collective-bargaining agreement.

(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 herein.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 15, 1975
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:

NATIONAL LABOR RELATIONS BOARD, REGION 17, and NATIONAL LABOR RELATIONS BOARD WILL NOT discipline or otherwise discriminate against David A. Nixon, or any other employee, by adverse criticism or rating in any professional appraisal, or in any other manner interfere with, restrain, or coerce David A. Nixon, or any other employee, because any such employee has filed a complaint or given testimony under the Executive Order.

NATIONAL LABOR RELATIONS BOARD, REGION 17, and NATIONAL LABOR RELATIONS BOARD WILL NOT adversely rate or criticize David A. Nixon, or any other employee, in any professional appraisal, or otherwise interfere with, restrain, or coerce David A. Nixon, or any other employee, in reprisal for the filing or processing of grievances pursuant to the terms of a collective-bargaining agreement.

NATIONAL LABOR RELATIONS BOARD, REGION 17, and NATIONAL LABOR RELATIONS BOARD WILL forthwith rescind, withdraw and expunge from all personnel files the professional appraisal of David A. Nixon dated June 14, 1974, and WILL promptly thereafter reappraise David A. Nixon for the period June 15, 1973, through May 31, 1974, without reference to, consideration of, or in reliance upon any complaint filed or testimony given by David A. Nixon under the Executive Order; and without reference to, consideration of, in reliance upon, or in reprisal for the filing or processing of grievances pursuant to the terms of a collective-bargaining agreement.

(Agency or Activity)

Dated _____ By _____
(Signature) (Title)

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



Appendix B cont'd.

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, 911 Walnut Street, Room 2700, Kansas City, Missouri 64106.

..... :

In the Matter of :

DEPARTMENT OF TRANSPORTATION :

OFFICE OF THE SECRETARY OF :

TRANSPORTATION :

Respondent :

and :

Case No. 22-5891 (CA) :

AMERICAN FEDERATION OF GOVERNMENT :

EMPLOYEES, AFL-CIO, LOCAL 3313 :

Complainant :

..... :

Mr. David Cassidy
 Vice President for Office
 of Secretary of Transportation
 Local 3313 - AFGE
 Box 476
 Washington, D. C. 20044
 For the Union

Robert I. Ross
 Attorney-Advisor, TGC-10
 Office of the Secretary of
 Transportation
 Washington, D. C. 20590
 For Management

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on April 1, 1975, under Executive Order 11491, as amended, (hereinafter called the

Order) by Local 3313, American Federation of Government Employees, AFL-CIO (herein called the Union or Local 3313 AFGE) against the Department of Transportation, Office of the Secretary of Transportation, (hereinafter called the Activity) a Notice of Hearing on Complaint was issued by the Assistant Regional Director for Labor-Management Services for the Philadelphia, Pennsylvania, Region on July 11, 1975.

The Complaint alleged that the Activity violated the Order in three basic respects. One of these, involving an alleged failure to consult concerning a reorganization, was withdrawn. The remaining items left for determination at this hearing are whether the Activity violated Section 19(a) (1) 1/ of the Order by its alleged conduct in cancelling a room reserved for a meeting by the Union and by engaging in conduct which constituted harassment of a union official.

A hearing was held before the undersigned in Washington, D. C. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Both parties were afforded a full opportunity to argue orally. 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

A. Background.

The Union, at all times material, represented a unit of professional employees and a unit of nonprofessional employees of the Office of Secretary of Transportation located in Washington, D. C. At times material herein

1/ Although reference to Section 19(a) (1) was apparently inadvertently omitted from part 2 of the complaint, it was included in the Notice of Hearing. Further, the Section 19(a) (1) allegation was fully litigated and argued and the Activity has not at any time raised an objection to its consideration. Therefore, this matter is being treated as if the complaint had been amended to include a Section 19(a) (1) allegation.

there was a collective bargaining agreement covering the nonprofessional unit, but not covering the professional employees.

B. Cancellation of Meeting Room.

The Union requested to meet with representatives of the Office of the Assistant Secretary of Transportation for Policy, Plans and International Affairs (hereinafter called TPI) to discuss a rumored reorganization of TPI. On February 19, 1975 such a meeting was held in the office of Deputy Assistant Secretary for TPI, Dr. Irwin P. Halpern, who was there as the Activity's representative. The Union's representatives included, *inter alia*, David Cassidy, Vice President of the Union for the Office of the Secretary and a member of the professional unit.

At the meeting Dr. Halpern reviewed TPI's reasons for contemplating reorganization and the goals and objective to be sought thereby, and answered questions of the Union representatives present. Mr. Cassidy indicated that he would meet with the employees of TPI, and explain what the Activity had told him. 2/ Dr. Halpern indicated that he hoped they would use the knowledge obtained at this meeting in talking with other TPI employees to answer their questions and to allay any fears they might have and that he looked forward to receiving the comments of the employees.

A few days later Mr. Cassidy contacted the Office of The Assistant Secretary for Administration ("TAD") and reserved conference room 10432 for 10:30 a.m. on Friday, February 28, 1975, for a "meeting of TPI employees." A few days later Mr. Cassidy showed Dr. Halpern a notice to TPI employees on Union letterhead discussing TPI's goals and objectives for the contemplated reorganization, announcing that the Union had initiated consultation thereon, and calling all TPI employees to a meeting to discuss the contemplated reorganization on Friday, February 28, 1975, at 10:30 a.m. in conference room 10432. Mr. Cassidy asked Dr. Halpern whether that notice competently conveyed TPI's goals and objectives as discussed in the meeting of February 19, 1975, and Dr. Halpern noted on the notice that it did.

2/ Mr. Cassidy did not specify the time and place of the contemplated meeting.

Sometime thereafter, the notice was posted on the Union's bulletin board where it was seen by Robert K. Adams, Chief of TPI's Management Staff, and by J. M. Schulman, Acting Director of Personnel Operations, TAD, on February 27, 1975. Upon investigation they concluded that, despite what Mr. Cassidy advised TAD when reserving the room, no one in TPI had authorized a meeting of TPI employees during duty time. Mr. Schulman directed that the room reservation be cancelled. Mr. Schulman called Mr. Cassidy at his work station on February 27, at 3:00 p.m. in order to advise Mr. Cassidy of the cancellation. Mr. Cassidy received a note advising him of the telephone call and that the meeting room was cancelled because it was a Union meeting. Mr. Cassidy did not return the telephone call until the morning of the meeting. He insisted upon holding the meeting in that room despite the cancellation. When the time for the cancelled meeting arrived, a number of employees of TPI assembled in front of the appointed room. The room was locked, however, and after remaining a short while the employees returned to their work.

Article V Section D of the Agreement covering non-professional employees states that the Union will not conduct internal Union business during duty hours. Internal Union business was defined as Union meetings; conferences and training sessions, except as management may determine is of mutual benefit; Union local election campaigns; preparing for consultations, negotiations and grievance presentations; and similar types of actions.

C. Alleged Harassment of Union Steward Cassidy.

Prior to February 28, 1975, the practice had long existed that Mr. Cassidy would occasionally and generally discuss his Union activities with Mr. Beshers, Mr. Cassidy's supervisor, and Mr. Walsh, another supervisor. Mr. Cassidy, the Chief Steward, did not report specific instances requesting permission to perform his Union duties or specifically account for his time.

Apparently on or about February 28, 1975, Mr. Robert Adams, Director of Management Staff, TPI, advised Mr. Beshers to generally be aware of the amount of duty time Mr. Cassidy devoted to Union business. Sometime soon after this meeting, Mr. Beshers advised Mr. Cassidy that Mr. Cassidy was subject to a provision of the agreement covering the non-professional employees which requires that stewards ask permission to take away time from work and identify the purpose of such an

absence. ^{3/} Mr. Behsers might have said he was instructed to do this by Mr. Shulman. Mr. Beshers finally said they would have to work something out. Mr. Cassidy left with the impression he should speak to Mr. Adams and Mr. Walsh to work out a resolution. Between this conversation, on February 28 and March 10, Mr. Cassidy had an informal discussion with Mr. Adams in the hall. Mr. Adams vaguely suggested that Mr. Cassidy may wish to periodically give Mr. Beshers an estimate of the time he planned to spend on Union business. The record fails to establish that during this period between February 28 and March 10, Mr. Cassidy's conversations with Mr. Beshers and Mr. Adams interfered with Mr. Cassidy's conduct as Chief Steward or that Mr. Cassidy in any way altered the past practice.

On March 10, Mr. Cassidy met with Mr. Adams, Mr. Beshers and Mr. Walsh. Mr. Cassidy stated that he did not think that the contract provision concerning seeking permission to leave his job site, etc. applied to him. Mr. Adams then said that, that concluded the meeting. Mr. Cassidy has continued to perform his Chief Steward duties in accordance with the past practice, without seeking permission, etc., and there have been no repercussions.

Conclusions of Law

A. The meeting.

Based on the record herein it is concluded that Union's decision to have a meeting on duty time to explain to TPI employees ^{4/} the possible reorganization, to answer questions, to receive employee comments and suggestions and to allay employee fears was approved by the Activity. At first, the approval given at the Union-Activity meeting on February 19, 1975, was somewhat ambiguous. However, after the Union followed normal procedures and obtained a meeting room, Mr. Halpern, perhaps inadvertantly, specifically approved and initialed the Union announcement that set forth,

^{3/} Article 4, Section B of the Agreement. It states further that permission shall be granted unless there are compelling reasons to the contrary.

^{4/} Both Union and non-union members were invited to the meeting.

inter alia, the time and place of the meeting. Therefore, it is concluded that the activity specifically approved the meeting to be held on duty time.

The Activity's conduct of unilaterally cancelling the meeting room, shortly before the meeting was scheduled, without prior discussion with the Union representatives would necessarily have the effect of discrediting the union and therefore interfering with employees' rights assured by the Order. The fact that it made an attempt to notify Mr. Cassidy at 3:00 p.m. the day before the hearing that it had already cancelled the room hardly mitigated the effect of the Activity's action.

It is concluded that this meeting was not the type of internal Union business meetings which Section 20 of the Order states can not be held on duty hours. Section 20 was intended to apply to the normal union meetings involving internal union matters. The meeting in question was not limited to Union members, but rather was for all TPI employees represented by the Union, including both members and non members of the Union. Further, its purpose was to explain the Activity's plans and objectives, with respect to the reorganization to the employees, to allay the fears of the employees and to receive the employees' comments and then to transmit them to the Activity. Such can hardly be considered as a meeting involving internal Union business. Rather, the meeting was for the benefit of the Union and the Activity and was not the type of purely internal Union business that Section 20 envisioned. 5/

In light of all of the foregoing it is concluded that the Activity's conduct in cancelling the meeting room violated Section 19(a)(1) of the Order.

5/ Moreover, even if it were the type of meeting covered by Article 20, the Activity's conduct of cancelling the room without first communicating with the Union and discussing the matter, would tend to undermine the Union in the eyes of the employees and would interfere with the employees rights assured by the Order. Further, it is concluded that Article 4 Section B of the Agreement covering nonprofessional employees, because this was not an internal Union meeting and because it involved more than the nonprofessional employees.

B. The Alleged Harassment.

It is concluded that the Activity's suggestion to Mr. Cassidy that he alter his existing practice and comply with the terms of the nonprofessional agreement when conducting Union business, did not constitute harassment or a violation of the Order. It was a suggestion made only to Mr. Cassidy, not to Union members generally; he was consulted, the matter was discussed, and he was not forced to change his practice. In fact, when Mr. Cassidy finally indicated he refused to go along with the suggestion, the matter was dropped. This hardly constitutes harassment. To so hold would be to make any Activity suggestion that Union representatives change their practices a violation of Section 19(a)(1). Rather than encouraging meaningful bargaining and exchanges of views, such a holdup would stifle meaningful communications. Thus, it is concluded that the Activity's suggestion and conduct concerning Mr. Cassidy's accounting for his time while performing Union business did not constitute a violation of Section 19(a)(1) of the Order.

Recommendation

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

That Respondent be found not to have engaged in conduct which violated Section 19(a)(1) of Executive Order 11491, as amended, with respect to its suggestion to Mr. Cassidy that he seek permission to leave his work site to conduct Union business and;

That Respondent be found to have engaged in conduct proscribed by Section 19(a)(1) of Executive Order 11491, as amended, by its unilaterally and without notice cancelling the room reserved by Local 3313, American Federation of Government Employees, AFL-CIO, in which it was to hold a meeting of Respondent's employees in order to explain the objectives of a proposed reorganization and to receive the employees' concerns and comments and;

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

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations,

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 RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

the Assistant Secretary of Labor for Labor-Management Relations hereby orders the Department of Transportation, Office of the Secretary of Transportation, shall:

1. Cease and desist from:

a. Interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

a. Post at its Offices in 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 Assistant Secretary of Transportation for Policy, Plans and International Affairs, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Department of Transportation, Office of the Secretary of Transportation, shall take reasonable steps to insure that such notices are not altered or 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 date of this Order as to what steps have been taken to comply of this Order as to what steps have been taken to comply therewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 4, 1976
Washington, D. C.

Interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by 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 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: 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 :
 :
 Small Business Administration :
 Richmond, Virginia District Office :
 Respondent :
 and :
 American Federation of Government :
 Employees, Local 3146, AFL-CIO :
 Complainant :

Case No.
22-5625 (CA)

John Kolofolias, Esq.
Bala Cynwyd, Pennsylvania
For the Respondent

Frank B. Nolte, President of Local 3146
Richmond, Virginia
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 18, 1974, alleging that Small Business Administration, Richmond, Virginia District Office (hereinafter called the Respondent Activity) violated Sections 11(a) and 19(a)(6) of Executive Order 11491, as amended, the Regional Administrator for the Philadelphia Region issued a Notice of Hearing on Complaint on January 27, 1974. 1/ In essence, the Complaint alleged that the Respondent Activity implemented an Agency regulation changing personnel policies and practices without consulting, conferring, or negotiating with American Federation of Government Employees, Local 3146, AFL-CIO

1/ The Notice of Hearing on Complaint inadvertently cites an alleged violation of Section 11(2) rather than Section 11(a). Upon review of the sections alleged in the Complaint to have been violated, it is evident that this was a typographical error.

(hereinafter called Complainant Union), as the exclusive representative of the employees in the District Office. The Complaint further alleged that the procedures followed in the local-level implementation of the Agency regulation violated the terms of the collective bargaining agreement in effect between the Complainant Union and the Respondent Activity.

A hearing was held on the issues presented by this case on March 4, 1975, at Richmond, Virginia. The Respondent Activity was represented by counsel and the Complainant Union was represented by its President. All parties were afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Oral argument was made at the conclusion of the hearing by the Complainant Union, and a subsequent brief was filed by the Respondent Activity.

Upon the entire record in this case, 2/ including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following:

2/ At the hearing the parties were granted permission to withdraw certain exhibits and provide the Reporter with duplicate copies thereof. Examination of the exhibits submitted by the Reporter discloses that each of the parties failed to comply with these instructions. As a result, the following exhibits are missing from the official record:

- Complainant's Exhibit No. 6 -- Letter of August 6, 1974
- Complainant's Exhibit No. 7 -- Letter of October 9, 1974
- Complainant's Exhibit No. 8 -- Memorandum of Nov. 4, 1974
- Respondent's Exhibit No. 2 -- Memorandum of July 18, 1974
- Respondent's Exhibit No. 3 -- Memorandum of Nov. 8, 1973
- Respondent's Exhibit No. 6 -- Agency Standard Operating Procedure 33-35
- Respondent's Exhibit No. 7 -- Agency Standard Operating Procedure 33-90
- Respondent's Exhibit No. 8 -- Agency Notice dated March 22, 1974
- Respondent's Exhibit No. 9 -- Agency Standard Operating Procedure 33-52

To the extent that the contents of the missing exhibits are described by the testimony, they will be relied upon on this decision. However, where it is necessary to consider the missing document in order to evaluate its contents, no reliance whatsoever will be placed on the missing exhibit.

Findings of Fact

A. The Collective Bargaining Agreement

The Complainant Union has exclusive recognition for a unit of employees in the Respondent Activity's Office consisting of "all non-supervisory general schedule employees, including professional employees and excluding all supervisors, management officials, employees engaged in Federal Personnel work, except in purely clerical capacity, and guards." The parties negotiated a collective bargaining agreement which became effective March 19, 1973, for a term of two years. The agreement automatically renews itself for two-year periods unless written notice is given by either party of a desire to amend or terminate. The parent union of the Complainant Union however, has national consultation rights with the Agency.

The negotiated agreement contains provisions relating to the administration of matters covered by the agreement. Article IV specifically provides for governing laws and regulations applicable to the agreement. It is substantially a restatement of the requirements of Section 12 of the Executive Order. This provision contains the following:

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 Agency policies and regulations in existence at the time this agreement is 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; ... (emphasis supplied).

Article VI of the negotiated agreement provides, in pertinent part:

a. The employer agrees to confer in good faith with the Union in the interest of soliciting and considering the Union's views and recommendations on the local implementation of a National or Local SOP covering any negotiable issues within 30 days of the issuance of the National or Local SOP.

Other pertinent provisions of the collective bargaining agreement bearing on the issues in this case are as follows:

Article XXI

Merit Staffing and Promotions

a. It is agreed that the employer should utilize to the maximum extent possible, the skills and talents of its employees. To this end, the Union fully supports the goals and purposes of the Agency's Merit Promotion Program....

* * * * *

c. An employee who is absent from the District Office during the posting period may apply for vacancies for such employee qualifies by filing the proper forms in advance with the District Office, which will advise such employee, upon request, of all the series for which he or she may qualify. (emphasis supplied).

No promotion of an SBA employee to a vacated position shall be made without posting the vacancy except when the position shall be filled by reassignment, reinstatement,....

* * * * *

e. All job opportunity announcements for which the area of consideration is Agencywide (sic) and for which District Office employees may apply, will be posted on all District Office bulletin boards for a period of at least ten (10) working days prior to the closing date whereas job opportunity announcements for which the area of consideration is the Richmond, Virginia Area shall be placed in all Office bulletin boards for a period of at least five (5) working days prior to the closing date. In every case, a copy of the above job opportunity announcement shall be provided to the President of the Union when it is issued.

* * * * *

Article XXV

Acceptable Level of Competence
and Annual Performance Evaluation

a. The method of determining acceptable level of competence and the protection of the rights of the employee involved shall be in accordance with applicable Regulations of the Civil Service Commission, the FPM implementation thereof and the existing pertinent Agency procedural (sic).

* * * * *

B. The New Standard Operating Procedure

On May 18, 1973, the Agency forwarded a draft of a proposed New Career Development Program, affecting employees in the Finance and Investment (F&I) Branch of its operations, to the national headquarters for the Complainant Union for comment. This new proposed program was known as SOP 33-90, and the draft was given to the parent union under its national consultation rights with the Agency. Prior to the development of SOP 33-90, the Agency operated under a merit promotion plan known as SOP 33-35. 3/

The proposed new SOP related to F&I Employees in the central office of the Agency as well as in the field offices. Under the terms of the new proposed regulation, F&I employees were to be divided into two categories consisting of (1) grades GS-5 through GS-9, and (2) grades GS-11 through GS-14. 4/ These employees throughout the entire Agency were required to register and be evaluated. However, there were differences in the procedures to be followed for the two categories of employees. The evaluation of employees in grades GS-5 through GS-9 were to be compiled and submitted to the Regional Office, who in turn would prepare a summary for the Central Personnel Office of the Agency. Employees in grades GS-11 through GS-14, however, were to be evaluated and placed in certain categories for promotion purposes. They were to be classified as Immediately Promotable (IP), Promotable after Additional Development (PAD), or Temporary Hold (TH). This list containing the new classifications was to be forwarded

3/ SOP 33-35 was in existence at the time the negotiated agreement between the Complainant Union and the Respondent Activity became effective on March 19, 1973.

4/ On January 10, 1975, the Agency issued a supplemental to SOP 33-90 making it applicable to GS-15 grades, and providing for changes in the areas of consideration. (Complainant Union Exhibit No. 9).

to the Central Office of Personnel of the Agency. In essence, the proposed plan for this group of employees envisioned the Central Office compiling a list of eligibles available for promotion.

The new regulation proposed to fill positions in grades GS-5 through GS-11 in accordance with the existing merit promotion program (SOP 33-35). For positions at the GS-12 level, whether in the field or at Agency level, a register of eligibles would be supplied by the Central Personnel Office. The successful candidate would be chosen from this register by means of a selecting official or a promotion panel of the requesting Regional Office or, if at the Agency level, a panel of the Central Office. The method of selection depended on the number of candidates found eligible for the vacant position. All positions for grades GS-13 through GS-14 would also come from a register of eligibles provided by the Central Personnel Office. However, all appointments would be handled by the Central Office.

On June 18, 1973, the National Union advised the Agency that it had reviewed the draft of the proposed new SOP and that it had "no comments or suggestions to offer". At the time the National Union was given a draft of SOP 33-90, the Agency's Central Office also solicited the views of Local Unions representing units of employees throughout the Agency. It is conceded for the purposes of this record, that the views of the Complainant Union were never solicited, nor was it advised of the proposed new career program for the F&I employees.

C. Local Implementation of the SOP

The Central Office of the Agency issued a memorandum on November 8, 1973, to which was attached a copy of the proposed new program (designated Temporary Handbook). This memorandum indicated that the document would be "converted into a Standard Operating Procedure" to be issued at a later date. 5/

5/ The record is unclear as to when the officials of the Complainant Union first saw this memorandum. The union president testified that he did not see the document until the program was in the first stages of implementation in May 1974. In view of the absence of communication with the union officials concerning the F&I career program and considering the admission that there was no discussion prior to the local implementation, I find that the Complainant Union did not become aware of SOP 33-90 until May 1974.

The Agency announced, by means of a telegram dated May 15, 1974, that the F&I career program would become operational on that date, and effective May 23, 1974. Personnel actions affecting grades GS-12 through GS-14 in the finance and investment function of the Agency were to be handled under the program. Pursuant to this directive, personnel at the Respondent Activity registered in late May and the second phase procedures were initiated. This involved the categorization of the employees into groups of Immediately Promotable, Promotable after Additional Development, and Temporary Hold. This process was completed by the Respondent Activity some time in June 1974. Several employees, including the Union President, were dissatisfied with their categorizations and grieved under the Agency grievance procedure. 6/

It should be noted, that between the time the Agency was developing SOP 33-90 and the time it was actually implemented, the Regional Office having jurisdiction over the Respondent Activity, and the Respondent itself, were under intensive investigation from outside sources. The Union President stated that the situation was "extremely volatile", and that "the Richmond District Office was under intensive investigation problems and there was much stress at that time". As a result of this situation many top level management changes were made at the Regional level, and there were a number of vacant positions at the top management level in the Respondent Activity.

On August 6, 1974, Nolte registered an official Union protest against the implementation of SOP 33-90 at the local level. He took the position that the Respondent Activity was violating the terms of the negotiated agreement by failing to consult and confer in good faith with the Union prior to implementation of the regulation at the local level. He also asked that all procedures under the new regulation be halted until proper negotiations took place. As a result of this official protest, there was a meeting at the

6/ Frank Nolte, President of the Union, was classified in June as "Promotable after Additional Development". He immediately grieved this rating. As a result, he was re-classified "Immediately Promotable" sometime in December 1974.

regional level between representatives of the Complainant Union and representatives of the Respondent Activity on September 2, 1974. The representatives of the Respondent Activity took the position that they were powerless to act and that all authority rested with the Central Office of the Agency. On October 1, union officials met with representatives of the Agency's Central Office. The Agency took the position that the matter had to be resolved at the regional level. When all subsequent efforts failed to resolve the differences between the parties, the Complainant Union filed an unfair labor practice charge against the Respondent Activity.

D. Actions Subsequent to Implementation of SOP 33-90

After the Union's official protest on August 6, 1974, the Respondent Activity filled several top level management positions under the procedures required by the new regulation. George Hunter, Chief of the Finance and Investment Division in the Agency's Indianapolis office, was detailed to the Respondent Activity. The detail was scheduled to last from November 10, 1974, to March 9, 1975. Prior to the detail, Hunter was a GS-13. While in the Richmond office, Hunter was permanently assigned and promoted to the position of Chief of the Finance and Investment Division -- a GS-14 position. Similarly, Gene Sullivan, a GS-12 senior loan officer from another office was detailed to the Respondent Activity. This detail was to be for a period beginning March 21, 1974 and ending July 21, 1974. During Sullivan's detail he was permanently assigned to the Respondent Activity. On September 25, 1974, he was promoted to the position of Chief of the Finance Division. This resulted in a promotion to GS-13, and was effected under the procedures established by SOP 33-90. Finally, Jerry Dwight, a GS-12 loan officer from one of the Agency's Texas offices, was transferred to the Respondent Activity. Under the SOP 33-90 procedures, Dwight was promoted to the GS-13 position of Chief of the Portfolio Management Division of the Respondent Activity.

The Contention of the Parties

The basic contention of the Complainant Union is that the Respondent Activity unilaterally changed working conditions, established by contract at the local level, by implementing the new SOP practice promulgated at the highest agency level

without conferring and consulting in good faith with the Complainant Union. 7/ The Complainant Union argues the negotiated agreement provided that it was subject to "published agency policies and regulations in existence at the time the agreement was approved," and that the agreement contained provisions relating to the existing agency merit promotion plan. Since SOP 33-90 was issued during the term of the negotiated agreement, and since it modified the existing merit promotion plan, the implementation at the local level, without benefit of notification and good faith negotiation with the Union in its representative capacity, was a violation of the obligations imposed upon the Respondent Activity by the Executive Order. Moreover, it constituted a unilateral change in the terms of the collective bargaining agreement in derogation of the Union's representative status.

The Respondent Activity contends that it had no control over the directive issued at the highest agency level, and that it was compelled to implement the directive when ordered to do so. In addition, the Respondent Activity contends that it was not required under the terms of the Executive Order to negotiate the contents or the implementation of the Agency directive relating to the F&I career program. 8/ The Respondent Activity further asserts, by way of a motion to dismiss filed at the hearing, that any failure to consult and confer with the Complainant Union on local implementation of SOP 33-90 was unintentional, and the Respondent Activity had sought to remedy this oversight. Secondly, that unilateral implementation of SOP 33-90 was, at best, a breach of the terms of the negotiated agreement for which the proper remedy was through the contract grievance procedure.

7/ The union president stated the basic issue to be as follows:

"Can SBA issue a regulation during the term of a labor agreement, negotiated at a local level, that would render the provisions of that agreement moot?" (Transcript, page 10).

8/ The Respondent Activity does cite the fact that it did, however, consult with the parent union of the Complainant Union, pursuant to its national consultation rights.

Concluding Findings

The threshold question here is whether, in the circumstances of this case, the Agency could by policy or regulation modify the terms of an existing collective bargaining agreement, negotiated at the local level, without conferring or consulting with the exclusive bargaining representative. The compelling answer to this question is that the Agency could not take such action without violating the requirements imposed upon it by Sections 11(a) and 19(a)(6) of the Executive Order.

By its very terms, the negotiated agreement here incorporated the language of Section 12(a) of the Executive Order 9/ making it subject to "published agency policies or regulations in existence at the time the agreement was approved, and subsequently published agency policy and regulations required by law or by regulations of appropriate authorities or authorized by the terms of a controlling agreement at a higher agency level. The undisputed facts here disclose that SOP 33-90 was the result of an agency decision alone, and not one compelled or mandated by law or by the regulation of an "appropriate authority". 10/ Nor

9/ Section 12(a) of the Executive Order states, in pertinent part:

(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.

10/ It is now well settled that the term "appropriate authorities" as used in Section 12(a) of the Executive Order has been interpreted to mean authorities outside the agency concerned, which are empowered to issue regulations and policies binding on such agency. IAM Local 2424 and Aberdeen Proving Ground Aberdeen, Maryland, FLRC No. 70A-9 (Report No. 5); Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390. See also, Study Committee Report and Recommendation, (1969), Section E(5).

was the Standard Operating Procedure issued pursuant to the terms of a controlling agreement at a higher agency level. 11/

It is readily apparent, that the facts of this case fall squarely within the rationale explicated by the Assistant Secretary in the Pascagoula case, *supra*, and in Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608. In both of these cases the agency attempted to unilaterally modify the terms of an existing negotiated agreement by means of a directive issued at a higher agency level. 12/ The Assistant Secretary held that the agencies violated Section 19(a)(1) and 19(a)(6) of the Executive Order by attempting to unilaterally modify the terms of an negotiated agreement by issuing a directive or regulation at a higher agency level. In my judgement, this principle controls the facts in the instant case. The collective bargaining agreement between the Complainant Union and the Respondent Activity clearly contain provisions relating to merit staffing and promotions of employees in the bargaining unit. When the Respondent Activity, pursuant to the directives of the Agency, sought to implement the F&I career program, it was effectively modifying the terms of the negotiated agreement. I find that to do so without according the Complainant Union the right to confer and consult regarding the change in personnel policies and practices affecting the working conditions of unit employees violates Section 19(a)(6) of the Executive Order.

11/ The mere fact that the parent body of the Complainant Union enjoyed national consultation rights and was consulted by the agency regarding SOP 33-90, does not elevate the relationship between the parent union and the agency to one having a controlling agreement at the higher agency level.

12/ In the Pensacola case, the agency sought to circumvent two arbitration awards interpreting the terms of the existing agreement. This does not change the application of the controlling principle, however, as the arbitration awards were considered to be an extension of the negotiated agreement.

Although the Complaint alleges a violation of the rights imposed by Section 11(a) and does not cite Section 19(a)(1), I find that the violation of Section 11(a) in the circumstances of this case necessarily has a concomitant coercive effect on employees in the exercise of rights assured by the Executive Order and violates Section 19(a)(1). Naval Air Rework Facility, Pensacola, Florida, supra.

Having concluded that the Respondent Activity violated the Executive Order has indicated above, there are several issues which should be addressed here. First, the Respondent Activity cites the fact that the president of the Union did not officially register a protest until August 6, 1974; even though he complied with the procedures of SOP 33-90 in May 1974, and filed a grievance over his characterization in June. It is of little comfort to the Respondent Activity to assert this as a defense in view of (1) its admission that it did not notify or consult or confer with the Complainant Union prior to the implementation of SOP 33-90 at the local level, and (2) Complainant Union's failure to immediately protest the Respondent Activity's unilateral action does not alter the unilateral change in the terms and conditions of employment established by the negotiated agreement. Naval Air Rework Facility, Pensacola, Florida, footnote 7, supra.

Secondly, the Respondent Activity asserts that while its actions may have violated the terms of the negotiated agreement in effect between the parties, the proper remedy is through the contract grievance procedure rather than by the unfair labor practice procedure. The situation here, however, is not one of interpretation or application of the negotiated agreement, but rather involves conduct on the part of the Respondent Activity which unilaterally modified terms of the existing negotiated agreement. Moreover, the language of Section 19(d) of the Executive Order 13/ grants the aggrieved party the option of utilizing a negotiated grievance procedure or the unfair labor practice complaint procedure, but not both.

13/ Section 19(d) of the Executive Order provides, in pertinent part:

(d) ... 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.

Cf. Department of the Air Force, Base Procurement Office, Vandenburg Air Force Base, California, A/SLMR No. 485. Accordingly, I find that this argument, advanced in support of the Respondent Activity's motion to dismiss, is without merit and the motion is hereby denied. 14/

The Remedy

Having found that the unilateral implementation of SOP 33-90 by the Respondent Activity modified the terms of the existing negotiated agreement in violation of the requirements of the Executive Order, the remedy recommended here is designed to place the parties in the position they were before the violations occurred. In keeping with this objective, it will be recommended that the Respondent Activity rescind implementation of SOP 33-90 as it applies to the finance and investment employees of the Richmond District Office, and negotiate with the Complainant Union upon request, regarding application and implementation of the program during the term of the negotiated agreement. Further, that the Respondent Activity revoke all promotions made pursuant to the procedures set forth in SOP 33-90, and reconsider them under the terms of the negotiated agreement and agency policies and regulations in existence at the time the negotiated agreement was approved on March 19, 1973.

Recommendations

Having found that the Respondent Activity engaged in conduct which violates Section 19(a)(1) and Section 19(a)(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.

14/ The Respondent Activity also indicated that it had taken steps to correct the failure to consult and confer with the Complainant Union and therefore should be absolved of any finding of an unfair labor practice. In view of the finding that the Respondent unilaterally modified the terms of an existing agreement without satisfying the ongoing obligation to negotiate with the exclusive representative as required by the Executive Order, I find that this defense is without merit.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.25(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Small Business Administration, Richmond, Virginia District Office shall:

1. Cease and desist from:

(a) Unilaterally implementing Standard Operating Procedure 33-90 at the Richmond, Virginia District Office during the term of the negotiated agreement with American Federation of Government Employees, Local 3146, AFL-CIO, executed March 19, 1973.

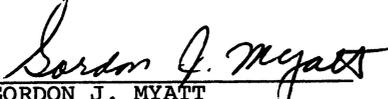
2. Take the following affirmative action in order to effectuate the purposes and the provisions of Executive Order 11491, as amended;

(a) Rescind Standard Operating Procedure 33-90 insofar as it applies to the Richmond, Virginia District Office retroactively to May 15, 1974, the date of its implementation, and abide by the terms and conditions of the negotiated agreement of March 19, 1973, with American Federation of Government Employees, Local 3146, AFL-CIO, unless modifications thereto are negotiated in accordance with the requirements of Executive Order 11491, as amended.

(b) Revoke all promotions made pursuant to the procedures established by Standard Operating Procedure 33-90 since its implementation at the Richmond, Virginia District Office on May 15, 1974, and reconsider all candidates for the positions so vacated under the terms and conditions of the negotiated agreement of March 19, 1973 and the published Agency policies and regulations in existence at the time the negotiated agreement was approved.

(c) Post at the Small Business Administration, Richmond, Virginia 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 Principle Officer in charge of the Respondent Activity 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. Reasonable steps shall be taken to ensure that said notices are not altered or defaced or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


GORDON J. MYATT
Administrative Law Judge

Dated: FEB 17 1976
Washington, D.C.

Appendix

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 continue to implement Standard Operating Procedure 33-90 regarding the F&I Career Program at our Richmond, Virginia District Office, prior to the expiration of the negotiated agreement of March 19, 1973, with American Federation of Government Employees, Local 3146, AFL-CIO.

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

WE WILL rescind Standard Operating Procedure 33-90 as it applies to the Richmond, Virginia District Office, retroactive to its implementation date of May 15, 1974, and abide by the terms of the negotiated agreement of March 19, 1973, with American Federation of Government Employees, Local 3146, AFL-CIO, unless the terms of said negotiated agreement are modified in accordance with the requirements of Executive Order 11491, as amended.

WE WILL vacate all promotions made pursuant to the unilateral implementation of Standard Operation Procedure 33-90 after its date of implementation of May 15, 1974, at the Richmond, Virginia District Office, and will reconsider eligible candidates

for the positions so vacated pursuant to the terms and conditions of the negotiated agreement of March 19, 1973 and published Agency policies and regulations in existence at the time the negotiated agreement was approved.

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 Assistant 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.

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In the Matter of
:
:
Small Business Administration
:
Richmond, Virginia District Office
:
Respondent
:
and
:
American Federation of Government
:
Employees, Local 3146, AFL-CIO
:
Complainant
:
.

Case No.
22-5625 (CA)

John Kolofolias, Esq.
Bala Cynwyd, Pennsylvania
For the Respondent

Frank B. Nolte, President of Local 3146
Richmond, Virginia
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

ERRATUM

On February 17, 1976, a decision was issued in the above-captioned matter finding violations of Executive Order 11491, as amended. Footnote No. 2 of that decision referred to a list of exhibits for which permission had been granted to both parties to withdraw and supply the official reporter with duplicates thereof. It was stated in the footnote that duplicates had not been supplied as directed, and no reliance would be placed on missing documents not described in the oral testimony.

Subsequent to the issuance of the decision it was discovered that the missing exhibits had in fact been submitted, and were inadvertently misplaced. Having examined and considered the documents in the light of the decision, I find that they do not alter the findings and conclusions contained therein.

Footnote No. 2 of the decision, however, is hereby deleted in toto, and the misplaced documents are hereby a part of the official record in this case.


GORDON J. MYATT
Administrative Law Judge

Dated: February 27, 1976
Washington, D.C.

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 :
AUSTIN SERVICE CENTER :
Respondent : Case No. 63-5065(CA)

and :

NATIONAL TREASURY EMPLOYEES UNION :
and CHAPTER 72, NTEU :
Complainants :
.....

Joseph A. Rose, Jr.
Regional Counsel
John McAleney
National Field Representative
National Treasury Employees Union
8301 Balcones Drive
Austin, Texas 78759
For the Complainants

Thomas J. O'Rourke
Staff Assistant
Office of the Regional Counsel
Midwest Region
Internal Revenue Service
219 South Dearborn Street
22nd Floor South
Chicago, Illinois 60604
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 August 9, 1974 and filed August 12, 1974, alleging violations of Section 19(a)(1), (2), and (6) of the Executive Order. The complaint described eight

alleged violations under "Charge I" and another violation under "Charge II". Over date of September 11, 1974, the Respondent filed a Response to Complaint. On December 11, 1974, the Regional Administrator dismissed the complaint "in its entirety". The Complainant requested review of the dismissal by the Assistant Secretary. On June 10, 1975, the Assistant Secretary concurred in the dismissal of the complaint with respect to the items alleged under "Charge I" but reversed the dismissal with respect to the allegations of "Charge II". Accordingly, he remanded the case to the Regional Administrator to reinstate the complaint with respect to Charge II and to issue a Notice of Hearing with respect to Charge II which alleged violation of Section 19(a)(1) and (6) of the Executive Order. On July 19, 1975, the Regional Administrator issued a Notice of Hearing on "alleged violations of Sections 19(a)(1), (2) and (6) of Executive Order 11491, as amended." The Hearing was scheduled for September 23, 1975, in Austin, Texas.

The portions of the complaint reinstated and with respect to which the Notice of Hearing was issued alleged that on or about January 8, 1974, the President of Chapter 72 of NTEU requested copies of all "Furlough and Recall" rosters for WAE ("when actually employed") employees; that such information was essential to the administration of the collective agreement between the parties; that the request was denied on January 15, 1974; that on February 5, 1974, the National President of NTEU requested that the information be furnished; and that on February 13, 1974, that request was denied.

Hearings were held as scheduled on September 23, 1975, in Austin, Texas. The Complainants were represented by a National Field Representative and a Regional Counsel. The Respondent was represented by an assistant in a Regional Counsel's office. At the conclusion of the hearing the time for filing briefs was extended to November 10, 1975. On November 3, 1975 (received November 5, 1975) Counsel for the Respondent requested an additional extension of time to November 20, 1975. On November 6, 1975, an Order was entered extending the time for good cause to November 20. Complainants did not receive a copy of the Order until November 13 and before that day had already mailed their brief which was received in the Office of Administrative Law Judges on November 13. The Respondent's brief was received November 19.

On November 20 the Complainants mailed a revised brief with a motion that in view of the circumstances the revised brief be accepted. That motion is granted and all briefs are accepted as timely filed.

Facts

Chapter 72, National Treasury Employees Union, is the recognized exclusive representative of a unit of employees of the Austin Service Center of the Internal Revenue Service. Other chapters of NTEU represent other units of employees at all the other Service Centers of Internal Revenue Service except one where the employees are represented by a local of another national union. The nine Chapters of NTEU that represent employees at service centers engage in much of their collective bargaining in a coordinated manner jointly with the Chapters in the other eight Service Centers; the current collective bargaining agreement between those nine Chapters and the Service Centers where they represent employees is a single document executed by various Internal Revenue Service officials and several National Executive Vice Presidents and the General Counsel of NTEU.

Article 26 of the current agreement, 1/ effective at all times material hereto, is entitled "Furlough and Recall - Seasonal Employees". The Service Centers have seasonal employees who are employed for roughly the six months of the year around April 15. These employees are referred to as WAE employees, "when actually employed". At the Austin Service Center they are included in the unit represented by Chapter 72. That Center has about 3,700 employees of whom about 2,000 are WAE employees.

Article 26 provides that when it becomes necessary to furlough WAE employees the Center would furlough first those employees who indicated a desire for early termination of work status. When it became necessary to furlough additional WAE employees in a Section all employees in the Section would be given a special "merit evaluation" on three factors with varying weights: quantity of work with a weight of 8, quality of work with a weight of 8, and dependability with a weight of 4. Those with the lowest total score would be furloughed first and those with the highest score would be

1/ Exh. C 3.

furloughed last. When it came time to recall WAE employees the reverse procedure would be followed based on the last merit evaluation the employees received. 2/ Each employee was given his score showing his rating in each category. 3/ Seniority was not a factor in furlough or recall of WAE employees. The Furlough and Recall Rosters were used only for furlough and recall and were not used in considering promotions; in case of promotion the employee's supervisor would make a separate promotion evaluation with an additional factor of learning ability and with the factors common to both evaluations having different weights.

On January 8, 1974, Nina Taylor, then President and Chief Steward of Chapter 72, prepared and personally delivered to each of the four Division Chiefs of the Respondent a request that she be furnished with a copy of the Furlough and Recall rosters for each of the sections in the Division. 4/ The request was not made with respect to any pending grievance, formal or informal, or with respect to any pending or proposed negotiations. The same day Vickie Roberts, Chief of Employee Relations in the Personnel Division, called Taylor and told her that because of Chapter 335 of the Federal Personnel Manual Taylor could not be furnished the roster of WAE employees with the grades because it would not be right for employees to be told the scores of other employees. Taylor asked about getting the roster without the scores on them and Roberts said she would consult with Mr. Raines, Chief of Personnel, about the matter, and Raines would communicate with Taylor. This inquiry of Taylor's was not intended as a suggestion which if acceptable to Respondent might be acceptable to the Complainants. The inquiry was made more out of curiosity; at no time would Taylor have accepted the rosters without the scores or without the names.

2/ That was the procedure at all times here relevant. At the time of the hearings a new multi-unit agreement had been negotiated and agreed on with a somewhat different procedure, but the new agreement had not yet become effective.

3/ Exh. R 5.

4/ Exhs. C1, R1.

On January 15, 1974, Roberts had a meeting with Taylor and an attorney from NTEU's national office. Roberts, on behalf of the Respondent, offered to furnish the Complainant the scores without the names of those who had the scores and, if a grievance should be filed, to show the score of the grievant. The Complainant rejected the offer, contending that the complete roster, showing names and scores of each employee, was necessary.

On February 5, 1974, the National President of NTEU wrote to the Director of the Respondent asking for the same material as Taylor had requested, stating that such information was necessary to police the administration of Article 26 of the agreement in fulfillment of its obligation under Section 10(e) of Executive Order 11491. 5/ On February 13 the Director responded. He stated that it had been and still was the practice of the Respondent, with respect to releasing information from the Furlough and Recall rosters, to advise any employee who requested it his own evaluation score and his relative standing on the roster; also, if the Union required information to process a grievance, management would provide a sectionwide list of scores identifying only the grievant's score. 6/

At the other Service Centers party to the multi-unit agreement the NTEU Chapters were furnished with the Furlough and Recall rosters but without the scores; none of the other Chapters has taken the position that the rosters without the scores were inadequate for the Chapter to perform its functions.

Initially the Furlough and Recall rosters for the Sections were prepared manually. The Section Chief assembled the "Furlough and Recall Evaluation and Rating Form" 7/ for each of the WAE employees in his Section and listed the names and ratings in order of the rating score. 8/ Miss Taylor had once been shown a Section Furlough and Recall roster by a Section Chief. She noticed that two of the names had the

5/ Exh. R 7.

6/ Exh. R 8.

7/ Exh. R 5.

8/ Exh. R 4.

correct scores opposite their names but were misplaced in the score sequence. She pointed this out to the Section Chief who immediately corrected it and thanked Miss Taylor for pointing out the error in the listing. Since the Spring of 1975 the rosters have been prepared by computer.

At the hearing the Respondent offered to furnish the Complainant with copies of the Section Furlough and Recall Rosters with the names blocked out or with the scores blocked out. It took the position that to furnish the complete rosters would be in violation of Chapter 335 of the Federal Personnel Manual and an unwarranted invasion of the privacy of the employees. The Complainant took the position that copies of the rosters with the names but without the scores, or with the scores but without the names, would be "absolutely useless. . . . It would be absolutely no help at all." 8/

Discussion and Conclusions

This case is controlled by two decisions of the Assistant Secretary and related decisions of the Federal Labor Relations Council. Department of Defense, State of New Jersey, A/SLMR Nos. 323 and 539; Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California, A/SLMR No. 573.

In the first of those two cases the respondent, in the processing of a grievance concerning a promotion, refused to give the complaining union access to documents showing the evaluation panel's evaluations of the six "Best Qualified" candidates for the promotion. In A/SLMR No. 323 the Assistant Secretary referred to the Federal Labor Relations Council the question whether the respondent in that case was correct in its contention that the Federal Personnel Manual prohibited the disclosure of the information. The FLRC responded that applicable laws and regulations, including the policies set forth in the Federal Personnel Manual, do not preclude disclosing to the grievant or his representative, in the context of a grievance proceeding, necessary information provided the manner in which the information is made available protects the privacy of the employees involved.

8/ Tr. 31.

In the Berkeley Experiment Station case, A/SLMR No. 573, it was held that the same result was required even though no grievance was pending. It held that if the union needed personnel information to police the agreement between the parties, to determine if there was an "incipient grievance", in the fulfillment of its obligation under Section 10(e) of the Executive Order to represent all the employees in the unit without discrimination, it is entitled to the information although in "sanitized" fashion to protect the privacy of the employees involved. See especially pp. 9-10 of ALJ Arrigo's decision, adopted by the Assistant Secretary.

At the hearing in this case the Respondent offered to furnish to the Complainants rosters showing the scores in rank order without the names, or the names in rank order without the scores, and in the case of a grievance to add the grievant's name or score. This was rejected by the Complainants as inadequate, indeed, as "absolutely useless" to enable the Complainants to police Article 26 of the agreement in fulfillment of their obligation under Section 10(e) of the Executive Order.

Such a characterization is simply an assertion, not proof. The only evidence in support of such assertion was the testimony of Nina Taylor, the then President and Chief steward of Chapter 72, that some time ago a Section Chief had once shown her the complete Furlough and Recall roster of his Section, showing both names and scores, and she noticed that two of the names were listed in the wrong order according to their scores. When she called the error to the attention of the Section Chief, he corrected it promptly.

Such possibility of error is insufficient reason for overstepping the bounds of invasion of privacy contrary to the policy of the FPM and FLRC as expressed in the cases cited above and in National Labor Relations Board, Region 17 and David A. Nixon, FLRC No. 73A-53, Report No. 59. The roster showing the scores without the names (except the grievant's, if any), which I believe is the preferred method of sanitizing, would reveal such error. It may be that an occasional innocent error is inevitable in human affairs, and if so, it is simply inevitable, and will be corrected when discovered. That is insufficient reason for invading privacy and confidentiality. And since the Spring of 1975 the Furlough

and Recall rosters are prepared by computer, further reducing the likelihood of error. Whatever the imperfections of computer operations, it must be assumed computers "know" a higher number from a smaller number.

The Complainants argue that the "sanitization" doctrine in the decisions cited above is applicable only in promotion situations. I do not read them as so limited. Rather they express a policy of protecting the privacy of federal employees to the extent feasible consistently with the legitimate necessary rights of others. I believe the offer of the Respondent made at the hearing, and made substantially in earlier communications 10/ was a reasonable offer. It would furnish the Complainant with the complete roster in order of rank with either the names or the scores blocked out, except that in a grievance it would in addition furnish both the name and score of the grievant. This was all to which the Complainants were entitled, as I read the earlier decisions. The Complainants have consistently rejected such offers. Since such offers, at least the offer made at the hearing, was reasonable, - indeed, since it offered all to which the Complainants were entitled, and perhaps more, 11/ - I shall recommend that the complaint be dismissed. I assume the offer did not have a time limit; it did not expressly have a time limit.

The footnote in the Assistant Secretary's decision in the Berkeley Experiment Station case is inapplicable here. In that case the Administrative Law Judge held that when the union asked for more information than it was entitled to obtain and the agency correctly so notified the union, it became the obligation of the union to narrow its request. The Assistant Secretary rejected that conclusion of the ALJ and held that when the union asked for information which it was entitled to obtain only in "sanitized" form, the union was not required to make a second request and the agency was obligated to furnish the sanitized information pursuant to the original request. Here the agency offered the union sanitized information in either of two forms,

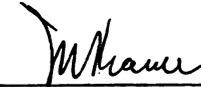
10/ See, e.g., Exh. R 8.

11/ I believe the preferable form of sanitizing rosters is to omit the names. It preserves anonymity and confidentiality to a greater degree.

either of which would have satisfied the agency's obligation. The union rejected both, holding to the position it was entitled to an unsanitized form of the rosters. It should not have been incumbent upon the agency to make the choice for the union.

RECOMMENDATION

The complaint should be dismissed.



MILTON KRAMER
Administrative Law Judge

Dated: February 19, 1976
Washington, D.C.

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 :
:
AEROSPACE GUIDANCE AND METROLOGY :
CENTER, NEWARK AIR FORCE STATION, :
NEWARK, OHIO :
Respondent :
and :
LOCAL UNION 2221, AMERICAN FEDERATION :
OF GOVERNMENT EMPLOYEES, AFL-CIO :
NEWARK, OHIO :
Complainant :
.....

CASE NO. 53-7988 (CA)

This case arises under Executive Order 11491, as amended (hereinafter also referred to as "Order"). It was initiated by a complaint filed May 9, 1975 (Ass't. Sec. Exh. 1) which alleged violations of Sections 19(a)(1) and (6) of the Order on, or about, January 24, 1975, by dissemination of policy letter dated January 24, 1975, entitled "Holiday Work Curtailment Policy for 1975 Christmas Holiday Season" by Respondent Newark Air Force Station, by threatening bargaining unit employees with disapproved leave requests, derogatory entries in their AF Form 971s, and disciplinary action as a reprisal for not scheduling 40 hours of annual leave for the 1975 Christmas holiday season; and by Respondent's refusal to meet and confer in good faith with AFGE Local 2221, AFL-CIO (hereinafter "Local 2221") when Respondent unilaterally implemented a policy concerning the "taking or granting of leave" and a policy affecting bargaining unit employees which adversely impacted and amended a negotiated agreement.

A Notice of Hearing was issued on September 26, 1975, (Ass't. Sec. Exh. 3) and a hearing was held in Newark, Ohio, on October 9 and 10, 1975, before the undersigned. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved, and briefs, which were timely filed by the parties and received on or about December 15, 1975, 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 of Fact

1. In mid-year, 1974, Headquarters, Air Force Logistics Command (AFLC) directed that each installation, including Newark Air Force Station, operate under a minimum workload schedule during the 1974 holiday period (21 December 1974 - 1 January 1975). This curtailment of work during the holiday period was designed to maximize energy savings by reducing industrial operations to the absolute minimum consistent with the mission of the agency.

2. Major General George Rhodes, Chief of Staff, AFLC, by letter dated November 4, 1974, advised all AFLC installations of the proposed policy to curtail operations during the

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For the Complainant

Before: WILLIAM B. DEVANEY
Administrative Law Judge

the 1975 holiday period 25 December 1975 - 4 January 1976). General Rhodes set forth guidelines associated with the proposed policy including: Only minimum essential personnel to provide support will be required during the curtailment period; in January, 1975, employees will be required to schedule five days of annual leave during the curtailment period; and during the remainder of calendar year 1975, annual leave requested for vacation purposes prior to the holiday curtailment will not be approved if such action would reduce the leave balance accrued by the end of the year to less than 40 hours. General Rhodes directed that recognized unions be advised and consulted on this proposed policy; requested that management and union views and recommendations be forwarded to Headquarters by December 9, 1974; stated that such input would be considered in developing final command policy for the 1975 year-end work curtailment; and concluded with the statement that command policy would be disseminated during the first week of January, 1975 (Res. Exh. 3).

3. A copy of General Rhodes' letter of November 4, 1974, was transmitted to Local 2221 by memorandum dated November 12, 1974, from the civilian Personnel Officer, and views and recommendations were requested by November 18, 1974 (Res. Exh. 2). Richard Mahlmeister, Vice President of Local 2221, responded by memorandum dated November 18, 1974 (Res. Exh. 4). Local 2221 opposed the "so called Holiday Shutdown" and concluded,

"One must realize, that before us is an issue of highest magnitude. If the proposed action is allowed (sic), all of us have allowed a precedent to be set. Namely none of us has the absolute right to indicate when we want to use our leave." (Res. Exh. 4).

Local 2221 also stated:

"5. The Civil Service Commission, through Section 6302(d) of Title 5, United States Code, Reflects the following thought ... The taking of annual leave is an absolute right of the employee, subject to the right of the head of the department or establishment concerned to fix the time at which leave may be taken (39 Comp. Gen. 611, citing 16 Comp. Gen. 481)." (Res. Exh. 4).

4. By letter dated January 13, 1975, General Rhodes advised all installations that, for planning purposes, an interim policy of curtailment for the 1975 Christmas holiday season had been adopted and he then set forth the AFLC Interim Holiday Work Curtailment Policy which included: AFLC activities will operate under a minimum workload schedule for the period (25 December 1975 through 4 January 1976); employees will be required to schedule five days of annual leave for use during the curtailment period; during the remainder of calendar year 1975, annual leave requested for vacation purposes before the holiday curtailment will not be approved if such action would reduce the leave balance accrued by the end of the leave year to less than 40 hours. The letter of January 13, 1975, directed that appropriate recognized unions be advised and that each installation meet and confer on the implementation of this policy (Res. Exh. 5).

5. On January 20, 1975, Colonel Neville, Commander, AGMC, met with Mr. Robert Novak, President of Local 2221. Mr. Novak was shown the January 13, 1975, letter and reviewed it. It is perfectly clear from Mr. Novak's testimony that Col. Neville told him he had no alternative about the interim policy determination of AFLC Headquarters; that pursuant to that policy he would require employees to schedule five days Christmas leave. This was confirmed by Col. Neville's memorandum of the meeting (Res. Exh. 8). Mr. Novak also met with Mr. Donald A. Larson, Chief of Employment - Management Relations, on January 20, 1975, during which the interim curtailment policy was further discussed and Local 2221 was invited to make proposals.

6. On January 21, 1975, Mr. William Talley, III, Acting Chief, Employment Management Relations Branch, Civilian Personnel Division, in a memorandum to Local 2221, transmitted a copy of the AFLC letter of January 13, 1975, summarized the AFLC policy, and invited Local 2221 to exercise its right to consult and confer on the implementation and impact of the AFLC policy (Res. Exh. 7).

7. On January 22, 1975, Mr. Larson submitted to Local 2221, as requested, Respondent's written proposal for implementing the AFLC policy (Res. Exh. 9) and on January 23, 1975, Messrs. Novak, Mahlmeister and Kennedy, for Local 2221, met with Messrs. Larson and Daves and Mrs. Smith, for Respondent. The minutes of the January 23, 1975, meeting (Comp. Exh. 4, Res. Exh. 10), as well as the testimony, clearly

shows that Respondent sought to negotiate on the method of implementation and the impact of the AFLC interim planning policy and stated that Respondent had no authority to negotiate the policy itself, while Complainant sought to negotiate the policy, not its implementation and/or impact. Mr. Novak testified, for example,

"Mr. Larson offered to initiate the interim policy and the implementation therein. He cited, on several occasions, what he was restricted to. It was publication of higher authority that he could not negotiate the policy itself. He offered to talk about the impact. He offered to bring the implementation and how the effect was on several occasions. ..." (Tr. 121).

In his letter, dated January 23, 1975, to Mr. Larson (Comp. Exh. 11), Mr. Novak stated, in part:

"... Contrary to paragraph 2 of your 22 January 1975 Letter, the Union feels negotiations are not limited to merely the adverse impact of the AFLC Policy Letter. The Union feels the AFLC Policy, itself, is entirely a negotiable matter as it has to do with the bargainable subject of 'The Granting of Leave.'" (Comp. Exh. 11).

See, also, Union Proposal (Comp. Exh. 12).

8. Local 2221's collective bargaining agreement with Respondent, signed April 26, 1972, for a period of 2 years from the date of approval, had expired but the parties had agreed to abide by its terms until a new agreement was completed. Article 22 of the 1972 agreement provided, in part, as follows:

"Article 22
"LEAVE

"Section A: The Employer will establish leave schedules before the end of January of each year. If any dispute between two or more employees desiring the same leave

period cannot be resolved by the employees, it shall be resolved by granting the time to the employee with the earliest service computation date. Ties in SCD shall be resolved in favor of the employee with the most continuous time in grade in the work unit.

"Section B: Every reasonable attempt consistent with the workload will be made to satisfy the desires of employees with respect to approving extended annual leave for special vacations." (Comp. Exh. 1).

Article 3, entitled "Legal and Regulatory Restrictions" provided in part, as follows:

"Section A: In the administration of all matters covered by the agreement ... Management officials, employees, and the Union, are governed by existing or future laws and 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 ...

"Section B: Examples of authority for the purpose of policy and/or regulations include, but are not limited to:

1. Federal Personnel Manual System
2. Air Force Manual (40-1)
3. Air Force Regulations (40 Series)
4. Memorandum of Agreement
5. AFLC Supplements to AFRs
6. AGMC Supplement to AFRs" (Comp. Exh. 1).

A new agreement was signed sometime in June, 1975 (Tr. 56) and the language of Art. 3, Sec. A is unchanged; Art. 3, Sec. B, is unchanged except for the addition of two further examples. Art. 22, Sec. A has been changed to provide that

in the event of a tie, the employee with the lowest number shown by the last four digits of their Social Security number will be given preference; and a sentence was added stating "The January schedule will take preference over subsequent requests for changes or additions". Art. 22, Sec. B is unchanged except for the addition of the phrase "and short periods of unscheduled leave." (Res. Exh. 18).

9. On January 24, 1975, Colonel Neville issued a memorandum to all supervisors placing into effect the AFLC interim policy (Res. Exh. 11). The memorandum of January 24, 1975, instructed supervisors not to approve any leave schedule that does not include the holiday curtailment period (40 hours). Pursuant to the memorandum of January 24, 1975, Respondent unilaterally scheduled leave, not requested by employees, for the holiday curtailment period (Res. Exhs. 19, 20, 21).

10. By letter dated June 2, 1975, Mayor General Buckingham, Chief of Staff AFLC, issued a revised work/leave program for the period 25 December 1975 - 4 January 1976, which superseded the AFLC interim policy of January 13, 1975. General Buchinham's letter stated, in part:

"... except to the extent modified by commanders based upon local circumstances and conditions, the requirement contained in the AFLC letter of 13 January 1975, that employees develop their leave schedules and schedule five days of annual leave for use from 25 December 1975 - 4 January 1976, will continue in full force and effect until the completion of applicable local negotiations concerning the implementation of the revised work/leave program." (Res. Exh. 12).

11. On July 11, 1975, Local 2221 and Respondent entered into a memorandum agreement whereby, inter alia, pursuant to the letter of June 2, 1975, the previous interim AGMC policy of mandatory holiday leave was rescinded and employees were permitted to rescheduled or to retain their present leave schedules as they may elect. (Res. Exh. 14 (back)).

Conclusions

On January 13, 1975, Headquarters AFLC issued an interim policy of curtailment of work during the 1975 Christman holiday season (25 December 1975 to January 4, 1976) and directed each installation, including Respondent, to require employees in January, 1975, to schedule five days (40 hours) annual leave for use during the curtailment period and thereafter to deny approval of annual leave requests for vacation purposes if approval would reduce the leave balance accrued by the end of the leave year to less than 40 hours. Each installation, including Respondent, was instructed to meet and confer on the implementation of this policy. Respondent did so. Respondent advised Complainant that it had no authority to negotiate the interim policy itself but could only negotiate and confer about its implementation and/or impact. Complainant sought to negotiate the AFLC policy itself. From its proposal on January 23, 1975, it was apparent that Complainant's objective was to negotiate the AFLC policy. Thus, Complainant proposed that: employees will not be required, intimidated, or coerced to schedule leave to meet the requirements of management; employees will be permitted to work during a Christmas Holiday Curtailment regardless of whether or not he has an accrued annual leave balance (of 40 hours); employee requests for annual leave will not be denied during the calendar year to require any employee to maintain an accrued leave balance; employees will not be required to hold leave in abeyance to cover work curtailment periods; leave will be scheduled at the discretion of the employee; for employees who do not have sufficient leave and/or who do not desire to take leave, during this period, gainful employment will be made available for them (Comp. Exh. 12). Consequently, although it is recognized that Complainant on January 23, 1975, interposed various issues including questions of procedure, re-opening negotiations on the new collective bargaining agreement, etc., the central issue was, and remained, Respondent's insistence that it was without authority to negotiate the AFLC policy determination and Complainant's insistence that the AFLC policy itself was negotiable. I find no evidence to support any assertion that Respondent refused to negotiate or consult with respect to impact or implementation of the AFLC policy determination and, to the contrary, find that Respondent did offer to negotiate or consult on all aspects of the implementation and impact of the AFLC policy determination, including Complainant's proposal, within the ambit of its authority, recognizing, however, that it had no authority or control over the AFLC policy determination which it was directed to implement.

The meeting of January 23, 1975, never really came to grips with impact or implementation, not because of any failure or refusal of Respondent to confer or negotiate fully and in good faith, but solely because Complainant insisted on bargaining on the policy determined by AFLC. When it became clear to Complainant that it could not negotiate the AFLC policy itself, it terminated the meeting.

The policy determination by AFLC was a policy published by higher authority, was issued to achieve uniformity of work curtailment during the 1975 Christmas holiday season, did apply uniformly to employees of more than one subordinate activity, and was designed to maximize energy savings. 1/ As the Federal Labor Relations Council has stated:

"higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations ..."

1/ AFLC is not a party to this proceeding, Iowa State Agriculture Stabilization and Conservation Service Office, Department of Agriculture, A/SLMR No. 453 (1974), and AFLC is not obligated to meet and confer with Complainant pursuant to Section 11(a) of the Order. National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas and American Federation of Government Employees, Local Union 2284, AFL-CIO, A/SLMR No. 566 (1975) (Supplemental Decision and Order), A/SLMR No. 457, FLRC No. 74A-95 (1975). For these reasons, as well as the more direct and immediate reason that the authority of AFLC, under Sections 11(b) and 12 of the Executive Order, has not been litigated, or indeed challenged by Complainant, except as the authority of AFLC under Section 12 may be limited as set forth in Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (1974), it is assumed, but not decided, that AFLC's policy decision was within the reserved authority of AFLC. Cf., Federal Railroad Administration, A/SLMR No. 418 (1974); Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329 (1973); United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 (1973).

United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC 71A-15 (1972).

For the reasons stated in U.S. Merchant Marine Academy, supra, and in Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SLMR No. 322 (1973), the policy determination by AFLC properly limited the scope of negotiations available to Complainant, i.e., to negotiate or confer only as to the impact and implementation of the AFLC policy determination, unless such right were limited as set forth by the decision of the Assistant Secretary in Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (1974) 2/ (hereinafter referred to as "Pascagoula").

2/ A threshold question must be determined. Respondent contends that as the alleged refusal to bargain occurred in January, 1975, and that as the Executive Order, as it then stood, did not permit determination of negotiability by the Assistant Secretary, the provisions of the Executive Order as of January, 1975 control and negotiability may not be determined in this proceeding, i.e., the amendments to the Executive Order by E.O. 11838, dated February 6, 1975, effective ninety days thereafter (on or about May 6, 1975) granting the Assistant Secretary authority to make initial negotiability determinations (Sections 6(a)(4) and 11(d)), may not be applied retroactively. The amendment of the Executive Order in this regard, which granted the Assistant Secretary authority to make initial negotiability determinations in unfair labor practice complaint cases necessary to resolve the merits of the alleged unfair labor practice, substantially altered procedure. Previously, interposition of a claim of non-negotiability did effectively remove the initial determination of negotiability from the complaint procedure. Refusal to bargain allegations were, necessarily, when negotiability was properly raised, held in abeyance pending determination of negotiability by the Council. Nevertheless, the amendment of the Executive Order created no new, or additional, unfair labor practice by granting the Assistant Secretary authority to make initial negotiability determinations. If negotiable, the same conduct was an unfair labor practice whether the determination of negotiability was made initially by the Council or by the Assistant Secretary. Accordingly, I conclude that the amendment of the Executive Order constitutes a procedural change, and not a change of substantive rights, and therefore, the provisions of the Executive Order as amended by E.O. 11838 govern, and that an initial determination of negotiability may be made in this proceeding to determine the alleged unfair labor practice pursuant to Sections 6(a)(4) and 11(d) of the Executive Order, as amended.

In Pascagoula, supra, the Assistant Secretary stated:

"...I conclude that the unilateral local implementation by the Respondent of NAVSHIPS Instruction regarding mobility requirements was violative of Section 19(a)(6) of the Order. In arriving at this conclusion, I find that the NAVSHIPS Instruction at issue herein was not the regulation of an 'appropriate authority' within the meaning of Section 12(a) of the of the Order which properly may supersede or modify the terms of the parties' negotiated agreement. Further, I find that the Merchant Marine, 3/ Shepherd Air Force Base 4/ and Lackland Air Force Base 5/ decisions ... are distinguishable from the instant proceedings because they involved higher level regulations affecting the scope of negotiations, rather than, as in the instant case regulations which, in my view, modified the terms of an existing negotiated agreement. (p. 3).

* * * *

"The Study Committee in its Report and Recommendation, (1969), made clear that only if a regulation meets one of the standards set forth in Section 12(a), can it serve to supersede or modify the terms of an existing agreement.

* * * *

"... Thus, as noted above, in Section E.5 of the Report and Recommendations, the Study Committee indicated that negotiated agreements under the Order should be governed by, among other things, 'regulations subsequently required

3/ Cited above, FLRC 71A-15 (1973).
4/ Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60 (1973).
5/ Cited above, A/SLMR No. 322 (1973).

by law or other appropriate authority outside the agency.' (Emphasis added.) And, consistent with this view, the Council has held that the term 'appropriate authorities' as used in Section 12(a) of the Order 'was intended to mean those authorities outside the agency concerned, which are empowered to issue regulations and policies binding on such agency.' 6/ As the NAVSHIPS Instruction was an issuance of a higher echelon within the same agency as SUPSHIPS, Pascagoula, under Section 12(a) of the Order and Article 1.4 of the parties' negotiated agreement, I find that it was not the regulation of an 'appropriate authority' as that term is used in the Order and, therefore, it cannot serve as authority for the unilateral modification of the negotiated agreement during the life of such agreement.

"Based on the foregoing, I find that the decision of the Council and of the Assistant Secretary relied on 7/... are inapposite herein because, as noted above, those decisions involved regulations by a higher echelon or by an agency which did not modify the terms of an existing negotiated agreement." (pp. 4-5).

* * * *

"Having found that, under the circumstances of this case, the Respondent was not entitled to modify unilaterally the terms of its negotiated agreement based on the issuance of an Instruction by NAVSHIPS, it is now necessary to consider whether the Implementing Instruction issued by SUPSHIPS, Pascagoula, did, in fact, change the terms and conditions of the negotiated agreement. ...

* * * *

6/ Citing, 1AM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9.
7/ Footnotes 3, 4 and 5, supra.

"... I find that the NAVSHIPS Instructions did more than simply add a provision to eligibility for promotion. Rather, I view such Instructions to have, in effect, changed the standards for selection set forth in Section 9.1, Article 9 of the parties' negotiated agreement. ... Under these circumstances, I find that the Respondent's local implementation of the NAVSHIPS Instruction resulted in a unilateral modification of the parties' negotiated agreement. ..." (pp. 5-6).

Although various nuances have been advanced, Respondent, in essence, contends that the limitation of Pascagoula is not applicable because: a) existing laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual and published agency policies and regulations in existence at the time of the agreement was approved, etc., as set forth in Section 12(a) of the Order and in Article 3 of the negotiated agreement (Comp. Exh. 1), granted management the right to fix the time at which leave may be taken and, consequently, the AFLC policy was issued fully in accordance with the provisions of Section 12(a) of the Order; b) the AFLC policy, and Respondent's implementation of it did not, in any event, change or modify the terms and conditions of the negotiated agreement. With regard to both a) and b), it is recognized that the 1972 agreement had expired by its terms and that the new agreement (Res. Exh. 18), although negotiations had been partially or fully completed, 8/ was not signed until sometime in June, 1975. The parties had, nevertheless, agreed that the terms of the 1972 agreement would be followed until the new agreement was completed. Accordingly, the 1972 agreement will be considered as an ongoing agreement, in accordance with the agreement of the parties.

8/ The record does not clearly show which condition applied, although Mr. Novak at the January 23, 1975, meeting referred to "re-opening" negotiations which would imply that negotiations had been completed.

5 U.S.C. §6302(d) provides, in part, as follows:

"(d) The annual leave provided by this subchapter ... may be granted at any time during the year as the head of the agency may prescribe."

The Federal Personnel Manual provides, in part, as follows:

"b. Agency Authority.

"(1) General. Annual leave provided by law is a benefit and accrues automatically. However, supervisors have the responsibility to decide when the leave may be taken. This decision will generally be made in the light of the needs of the service rather than solely on the desires of the employees ..." (FPM 630-3-4-b).

Air Force Regulation 40-630 (September 1971) provided, in part, as follows:

Section B, Paragraph 10 a.

"10. How Annual Leave is Requested and Approved

"a. When Annual Leave is Granted.

... Supervisors consider the employee's desire and personal convenience as well as the work situation when granting leave. ... However, the final determination as to the time and the amount of annual leave granted at any specific time is made by the supervisor authorized to approve leave."

"11. Requiring Employees To Take Leave

"... employees may be placed on annual leave as the needs of the service require. The required use of annual leave must be based on factors that are reasonable and equitable, and which do not discriminate among employees."

As the foregoing demonstrate, 9/ management's reserved right to determine when leave may be taken, including the reserved right under AF Regulation 40-360 to place employees on annual leave as the needs of the service require, was provided by existing laws and regulations of appropriate authorities within the meaning of Section 12(a) of the Order and the AFLC policy of January, 1975, pursuant that reserved right met the standards set forth in Section 12(a) even if it superseded or modified the terms of an existing agreement. Indeed, Complainant in its letter of November 18, 1974, recognized that it was a right of management "to fix the time at which leave may be taken" (Res. Exh. 4).

The 1972 negotiated agreement in Article 22, entitled "Leave", provided, in part, as follows:

"Section B: Every reasonable attempt consistent with the workload will be made to satisfy the desires of employees with respect to ... leave." (Comp. Exh. 1).

Article 22 recognized that the granting of leave at any particular time was subject to "workload"; but standing alone would be equivocal. However, Article 22 does not stand alone. Article 3 specifically provided that administration of all matters covered by the agreement are subject, inter alia, to "Federal Personnel Manual System" and "Air Force Regulations (40 Series)", the legal effect of which was to incorporate by reference these regulations and make them part of the negotiated agreement. Article 22 must, therefore, be read in conjunction with FPM 630-3-4-b and AF Regulation 40-360, Sec. 2, ¶¶10a and 11. The negotiated agreement, therefore, provided, inter alia, that management had the responsibility to decide when leave may be taken; that this decision will generally be made in the light of the needs of the service; that the final determination as to the time and amount of annual leave granted at any specific time is made by the supervisor authorized to approve leave; that employees may be placed on annual leave as the needs of the service require; and that, consistent with the workload, every reasonable attempt will be made to

9/ See, also, NAGE, Local R3-84 and Washington, D.C. Air National Guard, FLRC No. 72A-23 (1973); Leaves of Absence - Administrative Authority - "Nonwork Days", 19 Comp. Gen. 955 (1940); Leaves of Absence - Annual - Administrative Authority Without Employee's Consent 28 Comp. Gen. 526 (1949); 39 Comp. Gen. 611 (1960).

satisfy the desires of employees with respect to leave. The AFLC policy, and its implementation by Respondent, did not modify or change the terms of the negotiated agreement.

The policy determination by AFLC properly limited the scope of negotiations available to Complainant to negotiating or conferring as to the impact and implementation of the AFLC policy. Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (1974); Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60 (1973); Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SLMR No. 322 (1973); United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC 71A-15 (1972).

Complainant was advised in November, 1974, of the proposed policy of AFLC and its comments were solicited and submitted. Respondent recognized its obligation to advise Complainant of the interim policy determination of AFLC and to meet and confer concerning the implementation and impact thereof and Respondent did so and met fully its obligations to consult, confer, or negotiate with respect to the impact and implementation of the AFLC policy determination. There was no evidence to support the other allegations of the complaint. Accordingly, Respondent did not engage in conduct in violation of Sections 19(a)(1) or (6) of the Executive Order.

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: February 9, 1976
Washington, D.C.

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 ARMY :
 U. S. ARMY TRANSPORTATION CENTER :
 AND FORT EUSTIS, VIRGINIA :
 :
 Respondent :
 :
 and : Case No. 22-5924 (CA)
 :
 NATIONAL ASSOCIATION OF GOVERNMENT :
 EMPLOYEES, LOCAL R4-6 :
 :
 Complainant :
 :

Captain William L. Whitacre
 Staff, Judge Advocates Office
 Headquarters
 U. S. Army Transportation Center
 Fort Eustis, Virginia
 Representing the Respondent

Vincent E. Lucas, Esquire
 National Representative, NAGE
 Tower Box 65
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 Hampton, Virginia 23666
 Representing the Complainant

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter called the Order). Notice of Hearing on Complaint was issued on June 20, 1975 by the Assistant Regional Director for the Philadelphia, Region

on a complaint filed on May 2, 1975, by National Association of Government Employees, Local R4-6, (hereinafter called the Union) alleging that Department of Army, U. S. Army Transportation Center, Fort Eustice, Virginia, (hereinafter called the Activity or Respondent) violated Section 19(a)(1) and (2) of the Order by allegedly asking an applicant for promotion how much time he spent on Union duties and by allegedly failing to promote the applicant because of the Union activities.

A hearing was held before the undersigned in Fort Eustice, Virginia. All parties were represented at the hearing and were afforded an opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. All parties were given an opportunity to argue orally. All parties submitted briefs, which have been duly 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 of law and recommendations:

Findings of Fact

The Union is the collective bargaining representative for a unit composed of the activity's non-supervisory wage grade employees, with certain exceptions. At all times material herein this unit was covered by a collective bargaining agreement and Mr. Clarence Brimmer was an Aircraft Mechanic, a member of the collective bargaining unit and a union steward.

A position as Aircraft Repair Inspector became vacant. This position is in the collective bargaining unit and is in effect, a quality control position that is responsible for insuring that the quality of the maintenance done by the mechanics and crew chiefs is up to the highest standards possible. The position in question involves the maintenance of rotary winged aircraft, as opposed to fix winged aircraft.

On August 27, 1974, Mr. Jackie M. Leeson, a supervisor, 1/ interviewed three employees for the vacant position of Aircraft Repair Inspector. The three employees were William Feick, Roland Melton and Clarence Brimmer. Mr. Leeson had known the three employees for some time and was well

1/ Mr. Leeson became a supervisor during July, 1974.

aquainted with their work, abilities, and knowledge. He testified that, because of his knowledge of the abilities of the three employees, the interviews were really just a formality.

The interviews were very short. Supervisor Leeson only asked Mr. Brimmer two questions. Although the record is somewhat confused, he apparently asked Mr. Brimmer either how long he had been in the Civil Service or in aviation. Next he asked Mr. Brimmer how much time he spent on Union business. During his interviews of Mr. Melton and Mr. Feick, Supervisor Leeson asked very few questions, but those few he did ask dealt with how much experience the applicants had.

Mr. Feick had very little experience with rotary winged aircraft. Most of his experience had been with fixed winged aircraft. Mr. Melton and Mr. Brimmer had extensive experience with rotary winged aircraft. Mr. Melton was a crew chief. The crew chief is totally responsible for the day to day maintenance of a helicopter and is responsible for intermediate inspections. 2/ Also he flies with the pilots and monitors everything with them. Every 100 flying hours a periodic inspection occurs, which involves disassembling the aircraft and making sure everything is working properly. This work is done by a mechanic. Mr. Leeson testified that he felt the crew chief position required more knowledge of the operation of the aircraft than the mechanic position. Mr. Leeson testified that he chose Mr. Melton for the position of Aircraft Repair Inspector because he considered Mr. Melton to be the most qualified and to have the best ability of the three applicants.

The collective bargaining agreement provided a grievance procedure. 3/ On August 30, 1974, Mr. Brimmer and Mr. Ralph Pringle approached Mr. Acree Henderson, Mr. Leeson's supervisor, and gave Mr. Henderson a grievance form, apparently pursuant to the agreement, concerning the filling of the Aircraft Inspector Position. The grievance dealt with the failure to select Mr. Brimmer, allegedly because of his Union

2/ These are done every 25 hours of flying time.

3/ Article XXVII.

Activity and the question asked concerning his Union activity. The matter was investigated and on October 7 the Union was advised of the Activity's position. By grievance form dated February 24, 1975, the Union and Mr. Brimmer submitted another grievance form. On March 6, 1975, the unfair labor practice charge was served in the subject case.

Conclusions of Law

Section 19(d) of the Order provides, in part, that "Issues which can be raised under a grievance procedure may, in the discretion of the agrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures.."

In the subject case it is clear Mr. Brimmer and the Union first tried to resolve the dispute concerning the failure to promote Mr. Brimmer, allegedly because of his union activity, and the question asked about Mr. Brimmer's union activity through the grievance procedure. Then, because they were dissatisfied with the grievance process and the results, Mr. Brimmer and the Union decided to utilize the Order's unfair labor practice procedure. That is exactly what Section 19(d) was trying to avoid. Section 19(d) provides that once Mr. Brimmer, the agrieved party, 4/ elects to pursue the grievance procedure, he is limited to that avenue to raise his complaint. If he is dissatisfied with the result or the way the grievance is handled, he must use whatever methods are available to see that the grievance is handled to his liking. But Section 19(d) of the Order specifically forecloses him from attempting to then utilize the unfair labor procedures of the Order. Once Mr. Brimmer chose to utilize the grievance procedure to resolve the disputes involving this filling of the vacant position and the questioning during the interview, he waived or lost his right to have them considered under the unfair labor practice procedures of the Order.

4/ In this case clearly Mr. Brimmer is the aggrieved party. Section 19(d) can not be avoided by having the Union file the unfair labor practice charge, and not Mr. Brimmer. Mr. Brimmer filed the grievance and clearly the unfair labor practice proceeding is aimed at correcting the alleged injustice done to Mr. Brimmer.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



In light of the forgoing it thus concluded that Section 19(d) of the Order bars any consideration on the merits of the subject case 5/ and requires that it should be dismissed.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the Assistant Secretary of Labor for Labor-Management Relations dismiss the complaint in this case in its entirety.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 11, 1976
Washington, D. C.

5/ Although it is concluded that the merits of the disputes should not be reached, if they were I would conclude that the record establishes that Mr. Melton was chosen for the vacant position because he was considered to have better qualification than Mr. Brimmer, and that the Union failed to meet its burden of establishing that a reason Mr. Brimmer was denied the position was his union activity. However, the questioning of Mr. Brimmer, during the interview, concerning his union activity would constitute a violation of Section 19(a)(1) of the Order. Although such questioning might be permissible where adequate assurances are given by the Activity when the questions are asked, no such assurances were given by Mr. Leeson and Mr. Brimmer was not given any justification for why the questions were asked.

.....
In the Matter of :
 :
DEPARTMENT OF TRANSPORTATION :
OFFICE OF ADMINISTRATIVE OPERATIONS :
 :
Respondent : Case No. 22-5952
 :
and :
 :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 3313 :
 :
Complainant :
.....

Robert Ross, Esq.
Office of the General Counsel
Department of Transportation
Washington, D. C.
For the Respondent

David Cassidy
Local 3313, American Federation of
Government Employees
Box 476
Washington, D. C. 20044
For the Complainant

Before: FRANCIS E. DOWD
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended, and the Rules and Regulations promulgated thereunder by the Assistant Secretary of Labor for Labor-Management Relations. The Complaint was filed by Local 3313 of the American Federation of Government Employees (referred to hereinafter as Complainant or AFGE) on May 29, 1975, charging the Office of Administrative Operations, Department of Transportation (hereinafter referred to as

Respondent or DOT) with violating Sections 19(a)(1), (2), (4), (5), and (6) of the Executive Order. The Complainant, on July 21, withdrew all but the 19(a)(1) allegations. On September 8, 1975, Assistant Regional Director, Kenneth L. Evans informed Complainant as follows:

"It does not appear that further proceedings are warranted on the alleged violation of Section 19(a)(1) which asserts that Respondent refused to discuss with the union representative an employee's problem or grievance at the time it was going on. I am prepared, however, to issue a notice of hearing based upon your 19(a)(1) allegation that an agent of the Respondent asserted that he did not have to deal with the labor organization you represent.

I am of the opinion that, even assuming your telephone call could be construed as requesting that the Respondent discuss with you an alleged grievance, the evidence indicates that Article 25 of the Activity/Union contract sets out the grievance procedure for processing grievances and it is clear that the manner you pursued in filing the alleged grievance did not comply with the contract.

I am, therefore, dismissing that portion of your 19(a)(1) allegation." (footnote omitted)

In this same letter, the Complainant was informed that a notice of hearing would be issued "based upon your 19(a)(1) allegation that an agent of the Respondent asserted that he did not have to deal with the labor organization you represent." Thereafter, the Assistant Regional Director issued a notice of hearing and the transmittal letter dated September 29, 1975 suggests that an issue to be considered at the hearing was whether or not Respondent's Agent interfered with the rights assured by the Order by asserting tht he did not have to deal with the Complainant. I agree that this is the issue to be resolved herein.

A hearing on the Complaint was held on November 18, 1975 in Washington, D.C. The Respondent was represented by counsel and the Complainant by both its President and

its Vice-President. Each party was afforded a full opportunity to call, examine and cross-examine witnesses and adduce relevant evidence. Post-hearing briefs were received by both parties and have been carefully considered.

On the basis of the entire record and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation to the Assistant Secretary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Department of Transportation in Washington, D.C., has a Motor Pool Section which, inter alia, operates a shuttle bus service between four federal office buildings. Willie Van Field is the dispatcher and supervisor of the Motor Pool Section. His boss is Raymond Ednie, Chief of the Transportation Branch. Ednie's immediate superior is Gerald Shirey.

The Motor Pool Section employs four shuttle bus drivers who operate staggered schedules so that bus frequency from 7:00 a.m. until approximately 6:00 p.m. is every 15 minutes. The names of the drivers on April 1, 1975 were: Mr. Tyson, Kenneth Tapscott, George Johnson and Lawrence Travis. These drivers have regularly assigned schedules. In the event that a driver is unavailable for work on a particular day, it is necessary that an adjustment be made in the work schedules. In preparation for such contingency, the Motor Pool Section has devised a 3-man schedule which is used to determine what changes will be made, depending on the week of the month and the identity of the absentee. These various schedules were placed into evidence and much of the testimony was directed to this subject. I find and conclude that on April 1, 1975, the 4-man schedule was as follows:

<u>Driver</u>	<u>Schedule</u>
Travis	A
Ellis	B
Johnson	A-1
Tapscott	B-1

I further find that the procedure for change from a 4-man to a 3-man schedule, to the extent applicable here, was as follows:

<u>Four-Man Schedule</u>		<u>Three-Man Schedule</u>
When B is absent		
A	works	A
B-1	works	B
A-1	works	C

Further, on April 1, 1975, Tyson was driver B but he was absent all day. Ellis, who replaced him in the morning, did not return to work that afternoon. According to the schedules placed in evidence, and about which there is no dispute, the absence of Ellis would normally result in the selection of B-1 (Tapscott) to work 3-man schedule B. With this background in mind, we can now discuss the events which occurred between 12:30 p.m. and 1:30 p.m. on April 1, 1975, and which triggered the filing of the unfair labor practice charge.

The "Interrupted Lunch Period" of Driver Tapscott

According to Kenneth Tapscott, he completed his morning B-1 route at 12:28 p.m. leaving his bus at the bus stop. Precisely what he did between 12:28 and 12:45 is unclear but I credit the testimony of George Johnson who said that when he finished his morning half of the B route at 12:43, Tapscott was standing on the corner talking to Travis. Johnson parked his bus at the bus stop and Travis (the A driver) took Johnson's bus to continue his own afternoon schedule, 1/ leaving at 12:45.

Thus, at this point in time, the first bus to arrive at the bus stop, namely Tapscott's, was still parked there and the second bus (Johnson's) had already been driven away. At the hearing, neither Tapscott nor Johnson were asked to comment on whether they were in any way puzzled or surprised to observe that Tapscott's relief driver (Ellis) had not appeared on schedule and that the first bus was still parked at the bus stop. Neither of them notified management of this fact.

1/ Actually, Travis only worked a few hours, left work in the middle of the afternoon, and failed to relieve Tapscott at 2:58. For this, he was later disciplined by being given a one-day suspension without pay.

In any event, Johnson testified that Tapscott and he chatted for a few moments, then Tapscott got a soda from the machine, and together they took the elevator and went upstairs to the dayroom to eat their lunch. According to Johnson this all took about 5 to 10 minutes. (Tr. 89) Considering what they did, however, I would have to conclude it took at least 10 minutes, if not more. I conclude that they arrived at the dayroom at approximately 12:55 or 1:00.

Mr. Tapscott's testimony is somewhat confusing. At first he stated that he commenced work at 6:30 a.m., but later agreed it must have been 9:30 a.m. However, when discussing his lunch break he testified that his normal break on the 4-man schedule was from 12:28 p.m. to 3:30 and that his duties would be completed at 5:58. This is correct and is in accord with the 4-man B-1 schedule in effect on April 1. On the other hand, he testified (Tr. 22) that he expected to get off that day at 3:30. But this would only be true if he were the A or B driver on the 4-man schedule, which he was not. Nor do I believe Tapscott when he claims to have received Van Field's telephone call at 12:55 (Tr. 38). If this were true, he had time to complete his lunch since he didn't resume driving until 1:30. Obviously, Van Field's call came later.

While Tapscott and Johnson were in the dayroom, Supervisors Ednie, Van Field and Shirey were back in their respective offices. At approximately 1:15 p.m. Ednie was called into Shirey's office and advised that a bus rider had phoned to complain that the bus frequency had been reduced to about once every 30 minutes. Ednie in turn went into Van Field's office and after Van Field completed a phone conversation, asked him if there were any problems with the bus service.

Van Field stated that he was not aware of any problem. (Earlier that day, assistant Dispatcher Ellis had informed Van Field that he was leaving early and that he had notified the other operators that a 3-man operation would be in effect). Accordingly, at about 1:20 p.m., Van Field called

the dayroom 2/ and when Tapscott answered the phone he inquired whether he knew that the 3-man operation was in effect. Tapscott replied in the negative. Van Field then asked to talk to Johnson, asked the same question, and received the same negative reply.3/ Van Field and Ednie then checked the 3-man schedules and saw that it was Tapscott who should be out driving the bus. Van Field also noted that Tapscott's lunch hour had commenced earlier than Johnson's. Accordingly, he instructed Tapscott to resume driving immediately. Tapscott, who by this time (according to my findings) should have about completed his lunch, apparently was unhappy with this interruption and chose to call his union representative to complain. Specifically, Tapscott testified that Van Field "ordered me to leave my lunch and go back to work which I felt was unfair. I was on my lunch. So I called my union representative." The person he called was David Cassidy, vice-president of the union.

Tapscott's Phone Call to Cassidy

According to Tapscott, he called Cassidy after Van Field instructed him to change immediately to the 3-man operation and commence driving. In my opinion, however, it is not inconceivable that Tapscott may have called Cassidy before he talked to Van Field because he expected such a call from Van Field. Certainly, if this is what happened, it would explain Van Field's insistence that Cassidy's phone call was the first he knew about any possible problem with the bus schedule on April 1, 1975. On balance, however, I accept Tapscott's testimony on this point.

As to the substance of Tapscott's call, Mr. Cassidy testified that "Mr. Tapscott said he was concerned that he would probably have to drive until 6:30 and wouldn't

2/ With respect to the time of the call, I credit the testimony of George Johnson (Tr. 89), who impressed me with his ability to recollect details of the day in question. This testimony corroborates Raymond Ednie who stated that at the time of call he looked at the schedule and observed that if Tapscott got to the bus quickly enough he would make the 1:30 departure time. I reject Complainant's statement in its brief that Johnson places the time of the call at 12:50.

3/ Ellis was subsequently disciplined for having lied to his supervisors by telling them he had informed the other drivers of the change to a 3-man schedule.

be able to get a break to eat or to take care of other necessary matters because he wouldn't be able to leave his bus (Tr. 45)." Cassidy also testified that Tapscott told him "there was only one other driver on the street and he wasn't working at that time (Tr. 45)." Cassidy also quotes Tapscott as follows: "He said that there was only one other driver available and that driver was eating lunch and evidently was going to keep eating lunch to 2:30. (Tr. 51)" He identified the other driver as Johnson. He apparently made no mention of Travis who actually was driving a bus at that hour. (As previously noted, Travis drove away in Johnson's bus shortly before at 12:45 p.m.)

I credit this testimony and infer from it that Tapscott (at 1:30 p.m.) already knew or had reason to believe that Travis was not going to be relieving him later in the afternoon as required by the 3-man schedule. Otherwise, there would be no basis for his making this statement to Cassidy.4/ When this fact is coupled with Tapscott's failure to advise management that Ellis did not take over his bus at 12:30, I can't help but conclude that Tapscott was in some way involved in the alleged conspiracy suspected by management and discussed in their opening statement at the hearing.

Cassidy's Phone Call to Van Field

Van Field testified that between 1:15 and 1:30, he received a phone call from someone whose voice he didn't recognize at the time, but who identified himself as a Union representative and said he wanted to "discuss Tapscott's case." Van Field replied that he knew of no such case. The Union representative, according to Van Field, also stated that there was a "shuttle bus operator problem;" Van Field replied that he was unaware of any problem.

The foregoing is essentially corroborated by Cassidy's version of the same conversation. Cassidy testified that he inquired "about Tapscott" and that it looked like

4/ In its brief, Complainant refers to Tapscott's phone call as follows: "Tapscott correctly predicted that he was going to be denied the customary breaks..." (emphasis supplied).

Tapscott "was going to be driving five solid hours without any chance for a break." Since Van Field at that hour was not yet aware that Travis was going to leave early he correctly replied, in my opinion, that "he wasn't aware of any problem." This same response would also have been correct if he actually had not yet learned from Ednie that a bus rider had called to complain about the bus service.^{5/} But even if Cassidy's call came after Van Field called Tapscott I could still understand why Van Field would not view this matter as a "problem," since his selection of Tapscott to work two additional hours from 1:30 to 3:30 was in accordance with existing schedules.

On cross-examination, Cassidy quoted Van Field as saying that "if there was a problem, he wasn't aware of it and it would come through proper channels if there was a problem, and that it was a management problem. He didn't have to deal with the Union." Van Field, however, testified that he said he was unaware of any problem but if he found a problem and if it did concern a matter of the Union, he would be happy to discuss it with them. Van Field further testified that Cassidy asked him twice whether he was refusing to deal with the Union and he replied "no" both times.

I have carefully reviewed the entire testimony of Van Field and of Cassidy. To the extent that there is any inconsistency between their respective versions of this phone call, I adopt Van Field's version as the more accurate one. His testimony at the hearing was credible and consistent with his prior statement; his version of what happened in many respects is corroborated by Ednie and Johnson. Further, the Van Field testimony that Cassidy twice asked him if he was refusing to deal with the union hardly sounds "made up" and suggests to me, as it also did to Respondent, that the Union was attempting to entrap Van Field into making a reply which could be later asserted as an unfair labor practice. I conclude that Van Field did not commit an unfair labor practice and I believe the Union has blown this entire matter out of proportion. Moreover, I share Respondent's suspicion that perhaps the Union was involved in a contrived situation designed to produce an incident leading to the filing of an unfair labor practice charge.

^{5/} As pointed out in Complainant's brief, Ednie's prior written statement contradicts his testimony at the hearing but, under all the circumstances, I do not find this dispositive with respect to my findings herein.

Cassidy's Phone Call to Ednie

After completing his conversation with Van Field, Cassidy immediately telephoned Ednie who replied, according to Cassidy, that (1) he wasn't aware of any problems and if he found out about a problem he would take care of it; and (2) if there was a grievable matter, I could file a grievance. Cassidy concedes that both Ednie and Van Field referred to getting information about problems "through proper channels" but he claims he didn't know what that meant.

Ednie testified that he received a call from Cassidy almost immediately after he left Van Field's office and returned to his own office. Cassidy asked if he was aware of the bus scheduling problem involving his people and that he wanted to negotiate about it. Ednie replied that he was aware of the problem, that it was a management problem, and that there was nothing in the way of a grievable matter that he knew of. Further, Ednie says he told Cassidy that if this generated a grievance, he would be glad to talk to him at a later time but for the present he considered this strictly a management problem.

As in the prior conversation with Van Field, Cassidy asked whether Ednie was refusing to negotiate and Ednie says he replied "No, I was not but I didn't feel at this point that we had anything to negotiate." On cross-examination, Ednie explained this reply as follows:

"The business of establishing bus driver schedules basically, and the business of on-the-spot changes to those schedules to accommodate the service that we are required to provide, is a management business and at that point Union is not involved, to my knowledge."

Ednie also testified, in cross-examination, that the "well-being of the employees involved" is considered by management in making schedule changes.

I find no essential conflict in the testimony of Cassidy and Ednie but to the extent that it becomes necessary, I credit Ednie. Actually, Ednie had more to say about the conversation than Cassidy who originated the call. Frankly, I agree with Respondent's position that these facts simply do not add up to a refusal to deal with or negotiate with the Union. Furthermore, the fact that Cassidy asked Ednie,

as he did Van Field, whether he was refusing to negotiate sounds very much to me like an inept attempt to entrap or induce management into committing an unfair labor practice.

Recommendation

Having found that Respondent has not engaged in conduct violative of Section 19(a)(1), I recommend that the complaint be dismissed.

Francis E. Dowd
FRANCIS E. DOWD
Associate Chief Judge

Dated: March 30, 1976
Washington, D.C.

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, :
NAVAL AMMUNITION DEPOT, :
CRANE, INDIANA, :
Agency and Activity :
 :
and : Case No. 50-9667 (GR)
 :
LOCAL 1415, AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, AFL-CIO, :
Applicant :
 :
..... :

Mr. James C. Causey, Jr.
Labor Relations Advisor,
Labor Disputes & Appeals
Section, Office of Civilian
Manpower Management, Department
of the Navy,
Washington, D. C. 20390

Mr. David D. Smith
National Representative- AFGE
1729 Sanwela Drive
Indianapolis, Indiana 46260

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

Recommended Decision on Grievability

Statement of the Case

An Application For Decision on Grievability was filed on or about May 22, 1973 under Section 13 of Executive Order 11491, as amended (hereinafter called the Order) by Local 1415, American Federation of Government Employees, AFL-CIO (hereinafter called the Union, Local 1415 AFGE and the Applicant) concerning the Grievability of the alleged failure of the Department of the Navy, Naval Ammunition Depot, Crane, Indiana (hereinafter called the

Activity) to abide by its collective bargaining agreement with Local 1415, AFGE by failing to apply Article XX in the discharge of a probationary Wage Grade Employee. On February 26, 1974 the Assistant Secretary issued a decision which concluded, in agreement with a decision issued below by the Acting Assistant Regional Director, that the matters in dispute should be decided under the grievance procedure. On February 7, 1975 the Federal Labor Relations Council (hereinafter called FLRC) issued a decision in Case No. 74A-19, in which it set aside the Assistant Secretary's decision and remanded the case for further consideration. On April 3, 1975, the Assistant Secretary issued a second decision in which he concluded that the grievance was not on a matter for which a statutory appeals procedure exists and remanded the case to the Assistant Regional Director for further investigation concerning whether the subject grievance was subject to the grievance procedure. On June 25, 1975, the Acting Assistant Region Director, Chicago Region, issued a Notice of Hearing on Application for Decision on Grievability or Arbitrability under Section 13 of Executive Order 11491, as amended.^{1/}

A hearing was held before the undersigned in Indianapolis, Indiana. All parties were represented and afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. Subsequent to the close of the hearing both parties filed briefs, which have been duly considered.

Upon the basis of the entire record, ^{2/} including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. General Background.

At all times material herein, the Union has been the collective bargaining representative for a unit of the

^{1/} The various previous decisions will be described and discussed in greater detail hereinafter in the Conclusions of Law.

^{2/} Page 115 line 8 of the transcript is hereby corrected so that it states:

"Q. Because they have not done good work?"

Activity's employees described as a depot-wide unit including all general schedule and wage board, non-supervisory, employees excluding professional employees, federal personnel employees, supervisory and managerial employees, and temporary employees with appointments that are for less than one year.

The parties entered into a collective bargaining agreement effective July 19, 1972, which is the one under which the subject grievance was filed. The agreement sets forth a grievance procedure (Article XXIX) which provides for grievances concerning the interpretation or application of the agreement and an arbitration procedure (Article XXX). There is no dispute that the unit represented by the Union includes probationary employees and that they can utilize the agreement's grievance and arbitration procedures.

On December 18, 1972, the Activity informed Richard L. Shoultz, a probationary wage grade employee, that his employment would be terminated effective January 5, 1973. On December 22, 1972, Mr. Shoultz filed a grievance under the negotiated grievance procedure contending that, with respect to his termination, the Activity had violated Article XX of the Agreement; that Article is entitled Acceptable Level of Competence. By letter dated January 3, 1973, the Activity advised Mr. Shoultz that his termination was not grievable under the agreement.

B. Article XX of the Agreement.

It is clear that the unit includes probationary employees, both General Schedule and Wage Grade; and that they are generally covered by the collective bargaining agreement. Article XX, Acceptable Level of Competence, of the 1972 agreement provides, in Section 1, that when a "supervisor's evaluation leads to the conclusion that an employee's work is not of an acceptable level of competence the employee will be notified in writing... at least 60 days in advance of the date on which he will become eligible for a within grade increase..." It further provides that failure to inform the employee does not delay the determination to be made at the completion of the employees waiting period. Section 2 provides that when a supervisor determines that an employee's work is not of an acceptable level of competence he shall notify the employee in writing no later than the date the employee becomes eligible for the within grade increase. Section 3 provides that if a negative

determination is made without the 60 day advance notice, the supervisor "shall make another determination no later than 60 days after the date on which the employee completed the waiting period." Finally, Section 4 provides that the Activity agreed to give employees an opportunity to request "reconsideration of the negative determination.."

Preparatory to the negotiations beginning in 1968, the Union submitted its bargaining proposals to the Activity negotiating team for consideration. Those proposals contained an Article XX entitled Acceptable Level of Competence. Because of the title of the proposal and several key phrases used, such as "within-grade increase", and "request reconsideration of a negative determination", Activity negotiators apparently assumed that the wording was essentially drawn from and based upon Federal Personnel Manual (FPM) Chapter 531, Subchapter 4-9, which concerns "acceptable level of competence" determinations for within-grade salary increases for General Schedule employees. Based upon the similarity between the language of the proposal and that in the cited provisions of the FPM, and the fact that much of the wording was unique to Chapter 531, the Activity treated the proposal as directed to the within-grade salary increase process. The Activity attempted to approximate more closely the language of FPM Chapter 531, Subchapter 4-9 with its counter-proposal prepared by Mr. Riester, principal advisor to the Activity's negotiating team. The resulting product of negotiations over Article XX in the first agreement was language which, when compared with the FPM and the initial proposal, indicated some movement by the parties to incorporate the substance of the "acceptable level of competence" determination provisions in the FPM. It should be noted that nothing occurred during negotiations over Article XX that indicated that the Union intended to have the article serve as a "catch-all" provision covering supervisory evaluations in general.

No issue arose over the wording of Article XX during the term of the initial agreement or of the following one. Over one hundred temporary employees were separated for cause during this period, and approximately three to six probationary employees were separated each year and the provisions of Article XX were never applied. Many of these separations of both the temporary and probationary employees were for cause. No probationers were given the notification prescribed in Article XX in any separation action nor for that matter were any wage grade employees given the Article XX notice in any

separation action ^{3/}. On the other hand, General Schedule employees who were being denied their within-grade increases were given the notification and process provided for in Article XX. Thus, as the parties prepared to negotiate the 1972 agreement, the history of Article XX was that it had only been applied in the case of level of competency determinations required by regulations for General Schedule employees being considered for within-grade step wage increases.

In May of 1972, the Activity submitted its bargaining proposals to the Union, including its proposal concerning Article XX. It was therein stated that:

"Management proposes either deletion or revision of the entire article to conform to FPM 531. Since the procedure is outlined in FPM, it serves no advantage in being placed in the negotiated agreement..."

This intent was clearly conveyed to the Union by the Activity at the bargaining table. While apparently deletion of Article XX was not a viable alternative, the minutes of the negotiating session of June 13, 1972, signed by the Union's chief negotiator, further corroborate that the Activity made clear its purpose as to the proposal. The Activity proffered an article based upon FPM Chapter 531, Subchapter 4-9, and the language finally adopted, without objection or argument by the Union, was essentially that drafted by Mr. Riester, a negotiator and chief advisor to the Activity's negotiating team. The language of Article XX moved even closer textually to that of the FPM. In particular, the addition to the introductory part of Section 1 of the article was taken verbatim from Subchapter 4-9b; the change in Section 1a was similarly effected by replacing the prior language with a sentence from subchapter 4-9b; in Section 1b., "acceptable level of performance" became "acceptable level of competence"; the new Section 3 was a direct

^{3/} No wage grade employees have been denied within grade raises because it is automatic.

incorporation from Subchapter 4-9 (3) and Section 4 of the new article substituted the words "request reconsideration" for "appeal" of a negative determination.

The provisions of Article XX were raised in a grievance for the first time in the fall of 1972 when Leota Ellis, a probationary employee, attempted to grieve her termination. The Union was informed that the matter was not grievable, and that FPM Chapter 351 provided the only grounds for a probationer to appeal a separation action. The Union chose not to contest the Activity's decision, and sometime thereafter Mr. Shoultz also received notification that he would be terminated.

C. Employee Richard L. Shoultz

Mr. Shoultz had been an employee of the Naval Ammunition Depot in previous years and had been reemployed on January 18, 1972, as a heavy duty equipment mechanic at the second step of his wage grade, based upon his prior experience and rate. At that point he commenced a new probationary status of one year. As a wage grade employee, Shoultz was subject to the Federal Coordinated Wage System, contained in FPM Supplement 532-1, for purposes of eligibility for his within-grade increase to the next, or third rate. Subchapter 8-5b, of the Supplement indicated the waiting period was 78 calendar weeks, or one and one-half years, which meant that Mr. Shoultz would not have been eligible for the next rate until July of 1973. The termination of Mr. Shoultz did not involve, in any respect, a determination of his eligibility for within-grade increase, which would not have occurred for some six or seven months. 4/

Conclusions of Law

Section 6(a)(5) of the Order provides that the Assistant Secretary shall "decide questions as to whether a grievance is subject to negotiated grievance procedure or subject to arbitration under an agreement as provided in Section 13(d) of the Order."

4/ Even with respect to a General Schedule employee the evaluation for purposes of a within-grade increase would not be made that far in advance of the date of initial eligibility, particularly since there was no obligation under the provisions of FPM 531, S4-9 to inform an employee that he was not performing at the appropriate level prior to the 60 days required in that regulation.

Section 13 of the Order deals with Grievance and Arbitration procedures and subparagraph (d) provides, in part, "... 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 be referred to the Assistant Secretary for decision."

In his original decision in the subject case, in which he reviewed the Acting Assistant Regional Director's Report and Findings on Grievability, the Assistant Secretary concluded, "In my view, there is sufficient evidence upon which one may reasonably conclude, as contended by AFGE, that probationary employees are protected from improper termination by Article XX (Acceptable Level of Competence) of the negotiated agreement, and have a right under such agreement to process grievances concerning their terminations through the grievance procedure." He went on and concluded that in light of the foregoing and, because the determination of whether the Agreement, including Article XX, applied to the termination in question involved interpretation and application of the agreement, the matter "should be resolved through the negotiated grievance procedure." 5/

The FLRC's review of the Assistant Secretary's Decision is the leading case interpreting Sections 6(a)(5) and (13) of the Order, Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19. The FLRC held that 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..." FLRC went on and stated that in making such a determination the Assistant Secretary, "Must consider relevant provisions of the Order, including

5/ The Assistant Secretary also stated that whether the Activity violated the agreement should be resolved through the grievance procedure. The FLRC did not indicate any disagreement with this conclusion.

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." Further, the FLRC held that the Assistant Secretary must also consider any other existing laws and regulations, including policies set for in the Federal Personnel Manual. FLRC explained that the question of grievability can not be "considered in vacuo" but must also consider "the existing legal and regulatory structure" especially where special meaning is attached to words and phrases by the Order, statutes and regulations and there is "no indication that any other than the special meaning is intended by the parties." The FLRC instructed that the Assistant Secretary consider the applicability of the established meaning of such words and phrases when resolving grievability disputes.

The FLRC stated, in effect, that the Assistant Secretary's determination that AFGE's contention was reasonable and therefore, it was left to the grievance procedure to interpret whether Article XX applied to the discharge in question was not sufficient and remanded the case to the Assistant Secretary to determine whether the subject matter of the grievance was in fact on a matter covered by Article XX of the negotiated agreement.

The FLRC stated, however, that the Assistant Secretary must first consider any applicable laws and regulations concerning statutory appeals procedures and determine, as required by Section 13(d) of the Order, whether the grievance is over a matter for which a statutory appeal exists. In his April 3, 1975 decision on remand from the FLRC the Assistant Secretary "concluded that the instant grievance is not on a matter for which a statutory appeal procedure exists." Therefore, that question is not before me.

With respect to the other question raised, whether the instant grievance is on a matter subject to the grievance procedure, the Assistant Secretary specifically instructed that evidence be received and considered concerning whether the parties intended Article XX of the Agreement to cover probationary employees.

Thus, in the subject case, in light of the decision of the FLRC and the Assistant Secretary, it is concluded that Sections 6(a) (5) and 13(d) of the Order require a

determination of whether the Article XX and the other requirements of the contract were intended by the parties, to apply to the termination probationary employee Shoultz. 6/

There is no dispute that probationary employees are in the collective bargaining unit represented by the Union, are generally covered by the subject collective bargaining agreement and, therefore, presumably can utilize the agreement's grievance and arbitration procedures. The remaining question is simply, does Article XX apply to the termination of probationary employee Shoultz and is he entitled to the type of notifications provided for in Article XX. 7/

Article XX of the Agreement is entitled Acceptable Level of Competence. This phrase is not a common one, but it has a special meaning in the Federal sector. This was recognized by the FLRC in its decision in the subject case. The phrase applies to the evaluation or determination made by a supervisor in determining whether a general schedule employee merits a within grade wage increase. The term Acceptable Level of Competence is specifically set forth and described in Federal Personnel Manual (FPM) Chapter 531, Subchapter 4-9, 8/ which deals with within-grade step increase for General Schedule employees. This

6/ I can not limit my determination to whether the Union's contention is reasonable or not, and if it is, to defer to the grievance or arbitration procedure to determine whether Article XX applied to the termination of probationary employees. I must actually decide whether Article XX does or does not apply to the termination of probationary employees under the circumstances here present.

7/ Presumably, if he is covered by Article XX and entitled to the notifications, the grievance procedure would be utilized as the proper method to determine if the Activity complied with the Article XX requirements.

8/ See also 5 USC § 5335; 5 CFR 531.401-531.407.

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term does not seem to appear anywhere else or to deal with any form of general evaluation of employee performance or with decisions to terminate employees.

The entire bargaining history of Article XX and its past applications indicate that the parties basically meant to incorporate the general terms of FPM Chapter 531, Subchapter 4-9, into the Agreement. Article XX constantly refers to the determination with respect to within-grade step wage increases. The record fails to establish that the Union at any time advised the Activity that it interpreted the term "Acceptable Level of Competence," or the evaluations that went with it, in any manner other than the way it is commonly used in the Federal sector. It is concluded that the weight of the evidence establishes that the parties intended Article XX to apply to evaluations of General Schedule employees relative to their within-grade step increases and not to evaluations or determinations to terminate a probationary Wage Grade Employee, like Mr. Shoultz. 9/ Therefore, it is concluded that Mr. Shoultz could not grieve concerning the alleged failure of the Activity to comply with the Article XX requirements with respect to his termination.

Recommendation

In light of all the foregoing, it is hereby recommended that the Assistant Secretary of Labor for Labor-Management Relations find the subject matter is not grievable.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: February 27, 1976
Washington, D. C.

9/ This is my determination based on the weight of the evidence. It does not indicate that the interpretation of Article XX urged by the Union was not reasonable or that an arbitrator could not reasonably find in agreement with the Union's contention.

..... :
In the Matter of :
: DEPARTMENT OF TRANSPORTATION :
: FEDERAL AVIATION ADMINISTRATION :
: EASTERN REGION :
: Respondent :
: and : Case No. 30-6161 (CA)
: NATIONAL ASSOCIATION OF GOVERNMENT :
: EMPLOYEES, LOCAL R2-73 :
: Complainant :
:

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National Association of Government Employees
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For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint filed on December 11, 1975, under Executive Order 11491, as amended, by the National Association of Government Employees and its Local R2-73 (hereinafter called the Union or NAGE), against the Department of Transportation, Federal Aviation Administration,

(hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for the New York, New York Region on January 12, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1), (2) and (6) of the Executive Order by virtue of its actions in denying promotions to "union activists" and failing to consult and confer with the Union with respect to plans and proposals affecting working conditions and reassignments of bargaining unit personnel.

A hearing was held in the captioned matter on February 9, 1976, in Jamaica, 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

Mr. Macklis, who previously worked for the Respondent during the period 1957-1959, was rehired by the Respondent as a GS-5 Voucher Examiner in August 1971. According to Mr. Macklis, he returned to the Agency because he was led to believe by his former supervisor Lester Lord, who was then Division Chief, that there would be GS-6 positions available in the near future and that he would be eligible upon learning "household" vouchers. After about six to fourteen months on "household" vouchers Mr. Macklis requested a promotion to a GS-6. Mr. Lord promised to work on a G-6 but told him that no action could be taken at that time because of a freeze on promotions. Subsequently, after failing to receive a GS-6, Mr. Macklis along with Mr. Facina, who apparently had also worked on "household"

1/ At the commencement of the hearing the parties announced that they had entered into a written settlement agreement with respect to the 19(a)(6) allegations of the complaint and that they only intended to litigate the remaining 19(a)(1) and (2) issues predicated on the non-promotions of employees Abraham Macklis, Ann Minnus, Martin Facina and Bette Cabot. Accordingly, and since the Complainant did not offer any evidence whatsoever bearing on the 19(a)(6) allegation of the complaint, it will, hereinafter, be recommended that the 19(a)(6) allegation of the complaint be dismissed for lack of prosecution.

vouchers, filed a grievance wherein they requested payment for the monetary difference between a GS-5 and a GS-6 for the months that they had been performing work on "household" vouchers. The grievance was processed through arbitration and resulted in a favorable ruling by the arbitrator on March 26, 1973. Several months later, in accordance with the ruling of the arbitrator, Mr. Macklis was paid some two hundred plus dollars.

Subsequent to the award of the arbitrator, Mr. Macklis applied for a approximately 30 positions in and out of the voucher section. Although he was listed among the best qualified for about 50% of the positions, Mr. Macklis was not selected. 2/

Mrs. Ruth Berger, Macklis' immediate supervisor, testified that Mr. Macklis was one of her best producers and that she had written him and Mr. Facina, another employee, up for outstanding awards around the time when Mr. Macklis filed the above-described grievance concerning his temporary work on "household" vouchers. According to Mrs. Berger, the outstanding awards were turned down by Mrs. Goldmacher who was then the branch chief. Further, according to Mrs. Berger, for the period from the date the grievance was filed to the arbitrator's award, Mr. Macklis' production and attitude deteriorated. Following the award, however, Mr. Macklis' attitude and performance improved. Mrs. Berger, who I find to be an extremely straightforward and credible witness, further testified that with respect to the one promotion in her section which she knew about and for which Mr. Macklis was considered a qualified applicant, the applicant finally selected over Mr. Macklis was well qualified. In fact, if the decision had been left up to her, Mrs. Berger testified that she would have had difficulty in making a selection between Mr. Macklis and the employee actually selected.

Mr. Macklis attributes his failure to achieve a promotion to a GS-6 to the fact that he filed a grievance and points out that since such time a number of supervisors, particularly Mr. Lord, have been cool to him and have avoided any conversations with him.

Mr. Facina began working for the Respondent as a GS-5 in 1970 or 1971 and remained a GS-5 until his retirement on November 30, 1975. As noted above, Mr. Facina was a party to the grievance concerning his work on "household" vouchers and was also recommended by Mrs. Berger, his immediate supervisor, for an outstanding award. Since the

2/ Only four of the jobs were located in the accounting section where Mr. Macklis worked.

filing of the grievance Mr. Facina unsuccessfully applied for two GS-6 positions. According to Mr. Facina he has not encountered any change in attitude by his immediate supervisor Mrs. Berger or his fellow employees since the date of the grievance.

Ann Minnus began working for the Respondent in the accounting section as a GS-5 in August 1969. Following a general upgrading in the accounting section, Mrs. Minnus became a GS-6 in 1970. Since her employment in August 1969, Mrs. Minnus filed two informal grievances. The first, on an unspecified date, concerned "the atmosphere, the weather, the air conditioning and blower system that everyone was complaining about in (her) office" Mrs. Minnus testified that the problem was corrected and that she does not believe that this grievance had anything to do with her subsequent failure to achieve a promotion.

Mrs. Minnus' second grievance concerned the failure of the Respondent in October 1974 to inform her while she was out on sick leave of promotional openings for the position of purchasing agent. According to Mrs. Minnus, prior to filing her second grievance, her supervisor, Mr. Gilmartin, had always been cordial to her. Following the filing of the second grievance he stopped speaking to her even to the extent of saying good morning. Further, according to Mrs. Minnus, since she was not notified of the available positions which had already been filled, she was entitled to priority consideration for the next available vacancy. Although she never received such priority consideration, she did appear on the qualified list for the next vacancy. Inquiries into the matter concerning Respondent's failure to accord her priority consideration failed to bring any promised response.

Mrs. Minnus further testified that during testing for possible candidates for the upward mobility program she was subjected to two derogatory remarks by the personnel staffing specialist handling the testing. 3/

Lastly, Mrs. Minnus testified that of the many unspecified jobs she had unsuccessfully applied for, only

3/ The record does not disclose whether or not the personnel staffing specialist was a supervisor or part of management.

two were located in the accounting department where she worked.

Bette Cabot was hired as a GS-3 mail room clerk in 1970. Subsequently she transferred to the payroll branch and through promotions and a general branch upgrading she became a GS-6. Since becoming a GS-6 she has applied for, or bid on, some thirty position vacancies. Despite being listed among the best qualified for the available positions she has never been selected for promotion.

Although Miss Cabot did not file any grievances, she did on numerous occasions complain to the immediate supervisors involved about working conditions. The complaints involved, among other things, air conditioning and paint odors.

Miss Cabot was admonished about threatening an individual slow down with respect to her own work as a reprisal for not receiving a higher performance evaluation than her fellow employees. According to Miss Cabot, she made the threat because she was tired of doing other employees' work and getting the same evaluation. Following this incident, she feels that the attitude of the supervisors changed towards her and that she developed a reputation as a trouble maker. Further, according to Miss Cabot, her "priority consideration was put aside" on a particular job and she was continually told not to apply for other job openings since the selections had already been made.

Miss Cabot, who did not join the Union until several months prior to the instant hearing, was usually told in answer to her questions, that she was not selected for the various positions because she was too fat, did not wear dresses, etc.

Discussion and Conclusions

Section 203.15 of the Regulations imposes upon a complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. In the instant proceeding the complainant has failed to sustain this burden.

All the record indicates is that three of the four alleged discriminatees, Mr. Macklis, Mr. Facina and Mrs. Minnus, filed grievances and subsequently were unable to achieve promotions to higher positions. The fourth alleged discriminatee, Miss Cabot, did not file a grievance, but rather informally complained on her own about various working conditions.

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Accordingly, and particularly in view of the absence of any evidence of union animus, a showing that the four alleged discriminatees were the only employees denied promotions, or that the alleged discriminatees were better qualified than the employees finally selected for the vacant positions, insufficient basis exists for a finding that the alleged discriminatees participation in the filing of grievances or complaints played any part in their failure to achieve promotions to, or selection for, vacant positions.

Moreover, with respect to the activities of Miss Cabot which consisted solely of individual complaints, it is indeed questionable whether the participation in such activities is, in any event, protected by the Order. In this connection it is noted that the Order was designed to protect an employee's right to join a union, participate in its activities and reap the benefits of any collective bargaining agreement. The right to individually complain about working conditions, etc., does not fall within this limited sphere.

In view of the foregoing considerations, I find that the Respondent did not violate Sections 19(a) (1) and (2) of the Order.

Recommendation

It is hereby recommended to the Assistant Secretary that the 19(a) (1) and (2) allegations of the complaint be dismissed in their entirety.

It is further recommended that the 19(a) (6) allegation of the complaint be dismissed for lack of prosecution.

Burton S. Sternburg
BURTON S. STERNBURG
Administrative Law Judge

Dated: March 30, 1976
Washington, D. C.

. :
In the Matter of :
: DEPARTMENT OF THE TREASURY :
: BUREAU OF ALCOHOL, FIREARMS :
: AND TOBACCO, BOSTON, MASSACHUSETTS :
: Respondent :
: and : Case No. 31-9067 (CA)
: NATIONAL TREASURY EMPLOYEES UNION :
: Complainant :
. :

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Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint filed on January 20, 1975, under Executive Order 11491, as amended, by the National Treasury Employees Union, (hereinafter called

the Union or NTEU), against the Bureau of Alcohol, Tobacco and Firearms, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Assistant Regional Director for the New York, New York, Region on October 24, 1975.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (3) of the Executive Order by virtue of its actions in denying an investigative employee the right to hold the position of vice-president in the Union.

A hearing was held in the captioned matter on January 21, 1976, in Boston, Massachusetts. 1/ 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 Activity are parties to a collective bargaining contract covering:

All non-professional General Schedule and Wage Grade employees employed by the regional office of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

Excluded, among others, from the unit covered by the collective bargain agreement are "all employees of the Criminal Enforcement Divisions of the various regions of the Bureau of Alcohol, Tobacco and Firearms".

On some unspecified date prior to 1970, Secretary of the Treasury John Connally, pursuant to Section 3(b)(3) of Executive Order 11491, as amended, determined that the rights conferred by the provisions of the Executive Order, except Section 22, "shall not apply to the Intelligence Division and the Enforcement Branch of the Alcohol, Tobacco and Firearms Division in the Internal Revenue Service"

1/ A hearing in the matter scheduled for November 12, 1975, was continued due to the unavailability of complainant's witnesses.

In November 1973, the Union chartered Chapter 102. Following the establishment of Chapter 102 an election of temporary officers was held. Robert D. MacDonald a Special Agent with the Bureau of Alcohol, Tobacco and Firearms was elected vice-president of Chapter 102 pending a formal election which was subsequently held in June 1974.

On April 22, 1974, some four months after Mr. MacDonald was elected vice-president of the Union, Mr. MacDonald was called into the office of Group Supervisor Mazaka and ordered to request permission for outside employment in order to serve as vice-president of NTEU Chapter 102. When Mac Donald questioned this order, the parties held a meeting with Special Agent in Charge Montouri who reiterated the order. MacDonald then filed the request for permission for outside employment. Nothing further occurred until May 28, 1974, when he again met with Mr. Mazaka and Mr. Montouri in the latter's office. At this time Mr. MacDonald was informed that his request for permission was denied and that he could not serve as vice-president of the Union after June 4, 1974, the date of the scheduled election. Although, pursuant to Mr. MacDonald's request, Mr. Montouri promised to supply the reasons for the Respondent's denial of his request, no such explanation was ever formally given.

The record further reveals that in addition to the criminal investigating activities generally assigned to special agents, the special agents since sometime in 1973 have been conducting security investigations of the Department's employees and prospective employees. However, Mr. MacDonald has not been called upon to conduct such security investigations.

Discussion and Conclusions

The NTEU, the Complainant herein, contends that the Respondent violated Sections 19(a)(1) and (3) of the Order "by controlling who holds union office and coercing bargaining unit employees in the exercise of their Section 1(a) rights". 2/ According to the NTEU, by forcing Mr. MacDonald to give up his position as vice-president of the Union, the

2/ NTEU makes it clear that "Mr. MacDonald is not the complainant here, and does not claim personal, individual injury".

Respondent interfered in the Union's internal process of choosing its officers and more specifically the employees right to designate unilaterally their representative.

The Respondent on the other hand takes the position that inasmuch as Mr. MacDonald has been excluded from coverage of the Order by virtue of the action taken by the Secretary of the Treasury pursuant to Section 3(b)(3) of the Order, no basis exists for a 19(a)(1) and (3) finding predicated solely upon Respondent's refusal to allow Mr. MacDonald to remain vice-president of the Union. According to Respondent, a contrary holding would make Section 3(b)(3) a nullity. Alternatively, Respondent argues that inasmuch as special agents such as Mr. MacDonald make security investigations a conflict of interest could possibly arise if he was forced to investigate a member of the unit and then subsequently defend him in an action brought by the Respondent.

Inasmuch as the Secretary of the Treasury has determined in accordance with Section 3(b)(3) of the Order that the Intelligence Division and Enforcement Branch of the Alcohol, Tobacco and Firearms Division, wherein Mr. MacDonald is employed, should be excluded from coverage of the Order, it follows that Mr. MacDonald does not possess any of the rights accorded by the Order. Accordingly, since Mr. MacDonald had no right to hold union office, the Respondent's action in requiring his resignation from the office of vice-president was not violative of the Order as to him.

The NTEU which appears to concede this conclusion since it has not filed the instant complaint on behalf of Mr. MacDonald maintains, however, that irrespective of Section 3(b)(3), a 19(a)(1) and (3) violation of the Order is established because both the Union and the unit employees choice of representatives has been interfered with. In support of this position, the NTEU cites a number of decisions wherein the Assistant Secretary has made it clear that a union has an absolute right to select its representatives without any interference by an agency. Additionally, the NTEU cites decisions of the National Labor Relations Board in the private sector wherein employer action against supervisors excluded from coverage under the National Labor Relations Act was found to be violative of the Act in that such action had the effect of coercing and restraining unit employees in the exercise of their protected rights. ^{3/}

^{3/} U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242; Internal Revenue Service, Omaha District Office, A/SLMR No 417; Talladega Cotton Factory Inc., 106 NLRB 295, enf. 213 F2 209.

I find the cases relied upon by the NTEU to be inapposite. In both the cited decisions of the Assistant Secretary the violation turned on the actions of the agencies involved in refusing to meet with the union's designated representatives. In the instant case no such refusal is present. In fact while it might well be argued that it is implicit in the Respondent order that Mr. MacDonald would be discharged if he did not resign from the position of union vice-president there is no showing whatsoever that the Respondent would not meet with and/or recognize Mr. MacDonald as the NTEU's representative. The decision was Mr. MacDonald's alone.

The National Labor Relations Board case relied upon by the NTEU involved the discharge of a supervisor for failing to interfere with and stop the union activities of the employees in the unit. Inasmuch as the discharge of the supervisor emphasized the extent to which the employer would go to stop the employees protected activities, such action was deemed to be a restraint on the employees protected rights. In the instant case no such illegal activity or motivation is disclosed.

While it is true that the Respondent's 3(b)(3) determination to exclude Mr. MacDonald and other special agents from unit coverage and official positions in the Union lessens the available pool for union elective positions, the fact remains that any such 3(b)(3) determination has such a consequent effect since it always removes employees from the unit. To find a violation as urged by the Union would make a nullity of Section 3(b)(3) since such action would accord, contrary to a literal reading of Section 3(b)(3), Section 1(a) rights to the affected employees.

In view of the foregoing considerations, I find that the Respondent did not violate Sections 19(a)(1) and (3) of the Order by virtue of its actions in denying Mr. MacDonald the right to hold the office of vice-president in the Union.^{4/}

^{4/} In view of my decision in this regard I find it unnecessary to reach Respondent's alternative defense predicated on "conflict of interest".



Recommendation

Upon the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the complaint herein against Respondent be dismissed in its entirety.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated:
Washington, D. C.

.....
In the Matter of

THE DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND
FIREARMS

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 81,
SAN FRANCISCO, CALIFORNIA
Complainant

Case No. 70-4708

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Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended. A complaint was filed on April 4, 1975, alleging violations of Section 19(a)(1) and (6) of the Executive Order (Ass't. Sec. Exh. 1(a)). The Area Director on, or about, July 30, 1975,

advised Complainant that the alleged violation of 19(a)(6) could not "be considered within the context of an unfair labor practice, as was decided in Assistant Secretary Report No. 49" (Ass't. Sec. Exh. 1(c)). In addition, the Area Director stated that the alleged harassment in violation of Section 19(a)(1) of the Executive Order had not been raised in the charge as required by Section 203.2(4)(b) of the Regulations (Ass't. Sec. Exh. 1(c)). An amended complaint was prepared (Ass't. Sec. Exh. 1(d)) but the copy in the file is neither signed nor dated; however Complainant did not object to receipt of Ass't. Sec. Exh. 1(d) and did not assert that the Amended Complaint had not been signed and filed. Complainant, by letter dated August 12, 1975, objected to the dropping of the harassment and the 19(a)(6) allegations and requested an appeal of such decision (Ass't. Sec. Exh. 1(e)). The disposition of this request was not shown. A notice of hearing issued September 24, 1975 (Ass't. Sec. Exh. 1(f)) and an Order Rescheduling Hearing to the United States Tax Court on the date previously scheduled, issued October 1, 1975, and pursuant thereto a hearing was held on November 19, 1975, before the undersigned in San Francisco, California.

All parties were represented by counsel and 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 recommendation.

Findings and Conclusions

The amended complaint alleged that on or about August 19, 1974, Elizabeth Rice filed a grievance under the negotiated grievance procedure and that,

"During the first step meeting Mr. Dennis Young, Chief, Field Operations, informed NTEU representative Frank MesKimen and the aggrieved employee that '... in the future there should be no more grievances filed. Take them informally to your area supervisor.'"

which statement interfered with, restrained or coerced an employee in the exercise of the right ensured by Section 19(a)(1) of the Executive Order.

Only Elizabeth Rice and Frank MesKimen were called as witnesses. From the testimony and evidence, the relevant facts are undisputed. Ms. Rice had sought a GS-12 job outside the bargaining unit and was not selected. She filed a grievance under the negotiated grievance procedure. At that time Mr. Kennum was her immediate supervisor, having just been appointed an Area Supervisor, and when Mr. MesKimen presented the grievance to Mr. Kennum, Mr. Kennum and Mr. MesKimen agreed to waive Step 1 and immediately go to Step 2 of the negotiated procedure.

Step 1 having been waived, Mr. Young received and handled the grievance at Step 2 of the negotiated grievance procedure. Mr. Young informed Ms. Rice and Mr. MesKimen that, as the grievance concerned a position outside the bargaining unit, it was not cognizable under the negotiated grievance procedure; 1/ however, he would consider the grievance under the agency procedure, and he then set forth the reasons the grievance was denied and advised Ms. Rice and Mr. MesKimen of the right to appeal his decision. Ms. Rice testified that Mr. Young stated:

"THE WITNESS: He said 'I don't want any more of this,' referring to what had happened -- transpired before he said it.

"JUDGE DEVANEY: Which was?

"THE WITNESS: The entire Step 2 Grievance Meeting.

* * * *

"JUDGE DEVANEY: He waived this first step for both parties and he was saying, 'I think this is bad. We will have no more of it. We will go back to the supervisor'; correct?

"THE WITNESS: Yeah. "Go talk to your supervisor if you have a problem.'"

* * * *

1/ See, Article 8 (Jt. Exh. 1).

"THE WITNESS: He said, 'I don't want any more of this in the future. If you have any problems, take it up with your Area Supervisor,' or something to that effect."

* * * *

"Q. Are you aware of what Step 1 of the grievance procedure is?

"A. Yes. It is an informal meeting between the grievant and maybe his union representative, or some other person, and his first line -- his immediate supervisor.

"Q. Exactly?

"A. Yes.

"Q. Now, I ask you, is that not what Mr. Young told you to do with future grievances?

"A. Yes."

Mr. MesKimen testified to like effect. He stated, for example,

"A. He said words to the effect that I don't want any more grievances. I want them taken informally to the Area Supervisor."

It is undisputed that Mr. Young told Ms. Rice and Mr. MesKimen that he did not want any more grievances initiated with him; that in the future he wanted grievances taken to the Area Supervisor. Mr. Young did no more than insist on adherence with the negotiated grievance procedure which provides that, "The nature of the grievance will first be brought to the attention of the supervisor by the grievant and/or his local union representative." (Emphasis supplied.) By no stretch of the imagination did Mr. Young's statement,

"interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order"

in violation of Section 19(a)(1) of the Executive Order. Mr. Young accepted the fact that Step 1 of the negotiated procedure had been

waived in this instance and made his determination that the negotiated grievance procedure was not applicable to the grievance in question because it concerned a job outside the bargaining unit. Mr. Young then accepted the grievance under Respondent's unilateral grievance procedure and denied the grievance on the merits. Grievant, Ms. Rice, and her local union representative, Mr. MesKimen, were advised of the right to appeal.

Following termination of the grievance meeting, Ms. Rice was asked to stay after a break to talk about an entirely separate matter. Following the break, about 30 minutes, Ms. Rice and Mr. MesKimen returned and Mr. Young and Mr. Kennum, asked Ms. Rice about an undated memorandum from Acting Area Supervisor Rouleau to Chief, Field Operations (Mr. Young) concerning a complaint by Mr. Vic Di Rocco, Plant Manager - Heublein, to Officer in Charge Scimeca on Tuesday, August 20, 1974, about a make nude centerfold from Playgirl Magazine, asserted to have been taken to the Heublein plant by Inspector Rice and which she had had one of Heublein's rectifiers, Mr. Earl Mack, hang over the activity blackboard in the cistern room above the assigned officer's desk (Pet. Exh. 3). Ms. Rice testified that they (Messrs. Young and Kennum) "wanted a summary of what had happened".

Ms. Rice stated that she though she might have taken the picture to the plant; admitted that Mr. Mack showed her the posted picture; but denied participation in the posting of the picture. With the complaint from Plant Manager Di Ricco, confirmed by Mr. Scimeca's conversation with Heublein employees Mack and Bennett, Respondent had a right, if not, indeed, an obligation, to ask Ms. Rice "what had happened". There is no evidence that Respondent engaged in harassment of Ms. Rice in violation of 19(a)(1) of the Executive Order. As Respondent had already denied Ms. Rice's grievance on the merits, it would be difficult to contend seriously that Respondent's inquiry about any unrelated matter was intended to effect a withdrawal of a grievance already disposed of; and is wholly without merit where, as here, Respondent acted pursuant to a complaint lodged by Plant Manager Di Rocco and the record clearly shows that Respondent's questioning of Ms. Rick was not a feigned inquiry.

Moreover, propriety of agency action may be challenged under the Executive Order only to the extent that there is violation of the Executive Order, or, specifically in this case,

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if such action has interefered with, restrained, or coerced an employee in the exercise of rights assured by the Order, which, in turn, means those rights set forth in Section 1(a) of the Executive Order, namely, 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. The record is devoid of evidence of interference, restraint or coercion of Ms. Rice in the exercise of any right assured by the Executive Order. Accordingly, whether Respondent did or did not harass Ms. Rice is not properly before me beyond determining that there was no violation of the Executive Order.

For the foregoing reason, it is unnecessary to decide whether, if harassment in violation of Section 19(a)(1) had been shown, a violation could be found where the Regional Administrator advised Complainant that the allegation of harassment had not been raised in the charge and the amended complaint contained no allegation of harassment, although the allegation was litigated without objection by Respondent.

RECOMMENDATION

Having found that Respondent has not engaged in conduct prohibited by Section 19(a)(1) 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: April 12, 1976
Washington, D.C.

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In the Matter of :
ARMY AND AIR FORCE EXCHANGE :
SERVICE, DIX-McGUIRE CONSOLIDATED :
EXCHANGE, FORT DIX, NEW JERSEY :
Respondent :
v. : Case No. 32-4017 (CA)
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, LOCAL 1999 :
Complainant :
.

Dennis M. Sullivan, Esquire
Assistant General Counsel
Labor Relations Law Branch
Army and Air Force Exchange Service
Dallas, Texas 75222
For the Respondent

Joseph Girlando
National Representative
American Federation of Government
Employees, AFL-CIO
300 Main Street
Orange, New Jersey
For the Complainant

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION

This proceeding was initiated upon the filing of a complaint by American Federation of Government Employees, AFL-CIO, Local 1999 ("the Union") against Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey ("the Activity") on May 2, 1975.

The complaint alleges that the Activity violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended by failing to participate in the selection of an arbitrator as required by the negotiated agreement of the parties. The Activity contended that its refusal to proceed to arbitration was justified because the Union's attempt to involve arbitration was not timely.

A hearing was held before me at Fort Dix, New Jersey on November 19, 1975. Both parties were present and were afforded a full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Both parties filed briefs which have been carefully considered.

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

At all times material herein the Union was the exclusive collective bargaining representative of certain Activity employees. On February 12, 1974, the parties executed a written labor-management agreement ("the Agreement").

By letter of April 15, 1974, Ms. Diane Dashner, the Union's Vice-President charged the Activity with violating Article XXIII the agreement, by failing to exchange information with regard to a wage survey. The parties met to discuss this on April 24, 1974, but were unable to resolve their differences.

As a result, on May 2, 1974, the Union wrote to Federal Mediation and Conciliation Service, ("FMCS") requesting a list of five possible arbitrators. By letter to the parties dated May 13, 1974, FMCS submitted the names and biographies of 5 arbitrators and requested the parties to inform FMCS of the arbitrator selected.

By letter of May 15, 1974, the Union requested the Activity

to meet to select an arbitrator. The Activity's General Manager, Mr. Richard J. Walsh, replied by letter of May 17, 1974, writing:

In view of our feeling (1) that the contract has not been violated and (2) that an unresolved grievance does not exist; and in view of our willingness to meet and consult with you, we cannot be a party to the selection of an arbitrator.

Additionally, we will not be a party to the sharing of the cost of an arbitrator in this matter unless it is officially determined, by procedures delineated in the Rules of the Assistant Secretary of Labor for Labor-Management Relations that this is a matter for arbitration.

By letter of May 20, 1974, the Union advised FMCS that the Activity had refused to cooperate in selecting an arbitrator and that the Union had selected one of the five proposed arbitrators, Mr. G. Allan Dash.

By letter of May 30, 1974, FMCS stated that it could not appoint an arbitrator absent a joint request by the parties because the parties' contract did not authorize such appointment upon the request of one party only.

On May 30, 1974, the parties met once more in an effort to resolve their differences. When they were unable to come to terms, on June 28, 1974 the Union filed an Application for a Decision on Arbitrability with the Assistant Secretary of Labor for Labor-Management Relations.

By Report and Findings on Grievability and Arbitrability dated September 13, 1974, Assistant Regional Director Benjamin B. Naumoff found that an arbitrable issue existed and that therefore the dispute must be resolved through the contract's grievance procedures. However since he was unable to ascertain whether or not the parties had held a meeting pursuant to the grievance procedure he held:

Accordingly, rather than determine that arbitration is the proper recourse at this point, I shall order the parties to re-invoke Article XIX, Section 3, and direct them to perform pursuant to the grievance

machinery requirements outlined therein. In the event the grievance machinery is unsuccessful in resolving the dispute, then at that point, arbitration pursuant to Article XX will then be pursued. 1/

1/ The applicable portions of the parties' February 12, 1974 agreement read:

ARTICLE XIX
GRIEVANCE PROCEDURE

Section 3. Grievances over the interpretation and application of this agreement may be submitted in writing by the Union representative to the General Manager. The General Manager or his designated representative and the Union representative will meet within five (5) working days after receipt of the grievance to discuss the grievance. The General Manager or his designated representative shall give the Union representative his written answer within ten (10) working days after the meeting. If the dispute is not settled by this method, the Union or the Employer may refer the matter for arbitration. Nothing herein will preclude either party from attempting to settle such grievances informally at the appropriate level.

Section 4. If grievances are not settled by the methods described above, either the Employer or the Union may invoke arbitration by sending written notice to the other party within ten (10) working days from the date an answer is received, or, if no answer is received within the allotted time, arbitration may be invoked within ten (10) working days from the date the answer was due. Nothing herein will preclude the parties from attempting to settle the grievance at any stage of the proceedings.

ARTICLE XX
ARBITRATION

Section 1. If the Employer and the Union fail to settle any grievance process under the negotiated grievance procedure, such grievance will be submitted to arbitration within 15 days by the Union or the Employer.

In accordance with that directive, representatives of the Union met with the Activity's General Manager, Mr. Walsh, and other representatives on September 30, 1974 again without success.

As a result, on October 1, 1974, Mr. Walsh wrote to the Union reiterating the Activity's position that it had acted properly. The letter concluded, "This reply constitutes a written answer in compliance with Article XIX, Section 3 of the agreement."

The Union contends that it answered this letter by a letter dated October 7, 1974 written to Mr. Walsh by Mr. Joseph Girlando, National Representative of American Federation of Government Employees. The Activity contends that, that letter was not received by it and was not sent by the Union until January, 1975. That letter reads:

I am in receipt of your letter to Mrs. Diane Dashner dated October 1, 1974.

Needless to say, we are in dispute on the issue cited in your letter. Therefore the Union is invoking Section 4 of Article XIX entitled Grievance Procedure and therefore consider this letter as "written notice" as contained in the section.

The enclosed form is being executed and forwarded to the Federal Mediation and Conciliation Service.

On September 23, 1974, Mr. W. J. Usery, Jr., then the Director of FMCS wrote to Ms. Dashner and to Mr. Walsh:

"We have not received arbitrator appointment instructions from either party in the case cited above. Please indicate status on the form below and return entire letter, even if both parties have settled the case.

The form below the letter contained a "case settled" group of blocks and a second block which read:

2. () Case not settled
Please appoint arbitrator _____

At the very bottom of the letter/form were signature and date blocks for the employer representative and for the Union representative.

On either October 15 or October 18, 1974, Ms. Dashner telephoned Mr. Roy Rittenhouse, the Activity's Personnel Manager. Ms. Dashner was at home on maternity leave. Her husband, Burton Dashner was going to take some insurance papers to Mr. Rittenhouse's office that day. Ms. Dashner recalls advising Mr. Rittenhouse at that time that her husband would also be bringing the form that FMCS sent on September 23 although Mr. Rittenhouse does not recall this. In any event when he visited to bring the insurance papers, Mr. Dashner also brought a copy of the FMCS form which Ms. Dashner had signed on behalf of the Union. Mr. Dashner asked Mr. Rittenhouse to join in requesting the selection of an arbitrator, however Mr. Rittenhouse refused to sign the form. The evidence is unclear as to whether or not Mr. Dashner left the form or took it with him.

Mr. Rittenhouse stated that one reason for his refusal to sign the form was his belief that the language "please appoint arbitrator" usurped the Activity's right to participate in the selection of an arbitrator.

On November 11, 1974, Mr. Girlando mailed a copy of the form to FMCS. The form was completed by Ms. Dashner but not by the Activity. In his covering letter, Mr. Girlando again requested FMCS to appoint an arbitrator. By letter of December 11, 1974, FMCS declined to act in the absence of a joint request.

On January 17, 1975 Mr. Girlando wrote to Mr. Walsh:

"As a result of our September 30 meeting and your October 1st letter relating to our disagreement on the interpretation and application of the negotiated Article XXIII the Union wishes to invoke Article XX of the agreement.

"The agreement continues by requiring the parties to request a list of five impartial arbitrators from the Federal Mediation and Arbitration Service. Enclosed is this request. If it meets with your approval please invoke it by affixing your signature and returning it to me or if you wish, forward it to F.M. and C.S. and return to me one file copy for my record."

By letter to the Union dated January 27, 1975, Mr. Walsh replied:

"Your letter of 17 January 1975, stating your desire to invoke arbitration comes approximately 3 1/2 months after my written reply of 1 October 1974. This is certainly well beyond the 10 day period set forth in Article XIX, Section 3 of the agreement. Consequently, because your request is untimely, I do not agree that arbitration may be invoked."

By letter of February 19, 1975, Mr. Girlando sent a photocopy of his October 7, 1974 letter and again asked the Activity to join in requesting arbitration. By letter of February 28, 1975, the Activity again refused. Mr. Walsh then wrote.

"Notwithstanding the receipt or non-receipt of your letter of October 7, in the absence of a response from management, you were obligated to invoke arbitration within 15 days per Article XX, Section 1 of the agreement. It was my understanding that this was not done. Consequently, I must again reiterate my view that your request to invoke arbitration is not timely."

On May 2, 1975, the Union filed a complaint charging the Activity with violations of Sections 19(a)(1) and (6) of the Executive Order.

At the hearing, Ms. Diane Dashner, Mr. Burton Dashner and Mr. Joseph F. Girlando testified for the Union while Mr. Richard J. Walsh and Mr. Roy F. Rittenhouse testified for the Activity.

Ms. Dashner recounted the history of the parties' problems, as indicated by the aforesaid correspondence. She did not recall when she first saw or received a copy of the disputed October 7th letter. With respect to the meeting between her husband and Mr. Rittenhouse, she recalled advising Rittenhouse in advance that her husband would be bringing the FMCS form. She also recalled signing the form before giving it to her husband.

Mr. Dashner recalled hearing his wife tell Rittenhouse on a phone conversation that her husband would be bringing the form; he stated that he believed that the meeting took place

on October 15 rather than October 18, 1974. He further testified that when he presented the form to Rittenhouse, Rittenhouse refused to sign or accept the form.

Mr. Girlando testified that the disputed October 7, 1974 letter was typed in the District Union Office; was mailed by U.S. mail; and was not returned by the U.S. Postal Service as undelivered.

Mr. Walsh testified that he received no answer to his October 1, 1974 letter throughout 1974.

Mr. Rittenhouse stated that on October 18th Mr. Dashner presented him with a copy of the FMCS form but he refused to sign it for two reasons - 1. He already received a copy and 2. Mr. Walsh was the individual to sign.

Following the meeting, Mr. Rittenhouse wrote in a memorandum for record dated 22 October 1974:

"Since I had not received any correspondence from the Labor Organization indicating a reply to our letter, 1 October 1974, which indicated our findings in the grievance meeting that Mr. Otten and Mr. Walsh attended, I felt it was inappropriate to sign the form as requested. I so indicated this to Mr. Dashner and I am of the understanding that he returned said form to his wife."

When asked why the Agency did not join in this request for arbitration, Mr. Rittenhouse replied,

"Because it usurped our - at least I felt it usurped our prerogative to select - to have the prerogative to select an arbitrator - it says appoint one."

At the hearing, Counsel for the Activity stipulated that October 18, 1974 was within 10 working days of the Union's receipt of the October 1 letter. Counsel also agreed that if the Union's notice had been properly served, the Activity would be in violation of the parties' agreement.

CONCLUSIONS OF LAW

The Union contended that the Activity failed to fulfill its obligation to participate in the selection of an arbitrator

and that the Activity's conduct fell far short of its obligation to meet and confer in good faith. I agree.

For almost the entire two year history of this dispute over Article XXIII of the parties agreement, the Activity has wielded every avoidance tool it could seize to sidestep resolving the Article XXIII problem through arbitration. In this proceeding, the Activity argues that the Union was barred from its contractual right to invoke arbitration because it did not send written notice to the Activity within 10 working days of the Union's receipt of the Activity's October 1, 1974 letter. It urges that the October 7, 1974 letter was never sent and that the October 15 or 18, 1974 meeting similarly fails to qualify a written notice. 2/

In a skillfully developed brief, the Activity tries to prove by inference that the October 7, 1974 letter was manufactured well after that date and Article XIX(4)'s time limit.

The Activity also refused to consider Mr. Dashner's delivery of the FMCS form to Mr. Rittenhouse as proper notice. Some of the Activity's rationales, justifications and explanations of its position include:

1. The Activity did not join in the selection of an arbitrator when Dashner brought the FMCS form to Rittenhouse because the form deprived them of their right to help select an arbitrator (Counsel, Tr. 83).
2. The FMCS form was not important. It was merely a follow-up of an earlier unsuccessful attempt by the Union to select an arbitrator (Counsel, Tr. 83).
3. Referring to the FMCS form, "...yes, we may have filled it out and sent it back in but that doesn't have anything to do, in our view, with whether or not we were proceeding down the line under the terms of the contract to go to arbitration or not," (Counsel, Tr. 83).
4. Rittenhouse refused to accept the FMCS form on the grounds that he already had a copy and the form would have to be signed by Walsh (Rittenhouse, Tr. 111).
5. Mr. Dashner was not authorized to bring the FMCS form to Rittenhouse. "...he was not there as a "party" to the collective bargaining agreement. Instead he was serving as a messenger or courier for Mrs. Dashner" (Brief, P. 23).

2/ In view of the Activity's stipulation that notice served on October 18, 1974, would have been timely, it is irrelevant for purposes of notice whether this meeting took place on October 15 or October 18.

6. Mr. Rittenhouse first testified that the reason why the Activity did not meet to jointly request an arbitrator was, "I have no idea after our response on 1 October why, if arbitration was being pursued, the Labor Organization didn't come back to request the mutual agreement of arbitrator." (Tr. 117). Then he stated that he didn't join in executing the FMCS form because "the form did not indicate a joint request." He next explained it was because the form usurped the Activity's prerogative to join in the selection of an arbitrator (Tr. 118-119). He summarized his views as follows:

"What I'm saying very clearly is, that there had been no prior knowledge that the Union was going to arbitration, number one; number two, that when the form was presented to me, that it was presented that an arbitrator would be appointed by the Federal Mediator, I believe it said, and, number three, that I went back to Mr. Dashner and said, "If Diane has any questions, have her contact me! The next thing I done in the interest of the Labor-Management Relation was to contact the specialist in my region." (Tr. 119-120)

7. "Notwithstanding the receipt or non-receipt of your letter of October 7, in the absence of a response from management, you were obligated to invoke arbitration within 15 days per Article XX, Section 1 of the Agreement." (Walsh, February 28, 1975 letter, C. Ex. 21).

8. The purpose of time limits in a collective bargaining agreement is to "compel each party to conduct these matters in an expeditious and responsible manner. This prevents labor unrest which often arises out of smoldering unsettled disputes and also causes cases to be heard while the evidence is still fresh and the principal witnesses are available." (Brief, P. 26).

9. "Respondent did what any party would do under the circumstances. They raised a proper contractual defense to proceeding to arbitration." (Brief, P. 27).

In support of its contention that the October 7, 1974 letter was not sent until 1975, the Activity points out that there was no return receipt; that no time-stamped copy was produced; that Girlando failed to contact Walsh during the remainder of 1974; and asks why, if the letter was sent on or about October 7, the Dashner-Rittenhouse meeting was necessary.

The Union offered the sworn testimony of Mr. Girlando that the letter was duly mailed on or about October 7, 1974. I find no reason to disbelieve that testimony. There was no requirement that a return receipt be obtained nor did this appear to be the practice in the prior correspondence between the parties. There is no indication that the Union date-stamped this type of correspondence. Finally neither the Union's failure to follow-up the letter in 1974 nor the October 15/18 meeting are sufficient to discredit Mr. Girlando's testimony.

Even if that letter was not dispatched in 1974, I find that the notice requirement was satisfied by Mr. Dashner's delivery to Mr. Rittenhouse of the copy of the FMCS form which Ms. Dashner had duly signed on behalf of the Union.

Article XX, Section 4 of the Collective Bargaining Agreement states that either party may invoke arbitration by, "sending written notice" to the other. The agreement does not describe any specific format for giving notice. In the absence of any such requirement, the law is very liberal in interpreting as notice any writing that would apprise the other party of what is desired or intended. I find that the FMCS form clearly fulfilled that requirement. Since October 18 was timely, it is irrelevant as to when this meeting took place. Rittenhouse was a proper party to receive service. As the Activity's personnel officer he had been one of its representatives at the critical September 30, 1974 meeting. As to who could deliver the form, a mailman or a messenger boy would have sufficed. It also is irrelevant as to whether or not the form was left with Mr. Rittenhouse. The significance of the document was that it constituted written notice to the Activity of that which the Activity already knew - that the Union wished to arbitrate.

I am not at all impressed by the Activity's argument that the Union failed to comply with Article XX, Section 1 which provides for submission to Arbitration within 15 days. The record is replete with indications that despite the Union's efforts, FMCS would not proceed with arbitration absent the Activity's cooperation.

Having thwarted compliance with Article XX, it is the height of Chutzpah for the Activity to assert that this was a pre-requisite on the Union's part. 3/

3/ Chutzpah is a Yiddish word exemplified by one who murders his mother and father and then asks the judge to have pity on an orphan.

In summary, I find that the Activity violated Section 19(a)(1) and (6) of the Executive Order in refusing to proceed to arbitration with the Union in accordance with the parties' agreement after receiving due and timely notice of the Union's desire to invoke arbitration.

The Activity has expended an huge amount of time, skill and energy in combatting the Union's desire to give effect to the provisions of the Collective Bargaining Agreement that the parties negotiated and agreed to. It is unfortunate that these resources were not utilized in resolving their problems face-to-face instead of engaging in time-consuming and wasteful battles of avoidance and delay.

RECOMMENDATION

Having found that the Activity has engaged in certain conduct prohibited by Section 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 the Executive 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 Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey shall.

1. Cease and desist from:

a. Refusing to proceed to arbitration regarding a grievance with respect to Article XXIII of its February 12, 1974 Collective Bargaining Agreement with American Federation of Government Employees, AFL-CIO, Local 1999.

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

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

a. Upon request of American Federation of Government Employees, AFL-CIO, Local 1999, proceed to arbitration on the grievance.

b. Advise the appropriate officials of said Union that it is willing to proceed to arbitration.

c. Post copies of the 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 General Manager of the Respondent and posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager 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 therewith.


EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: April 21, 1976
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, upon request of American Federation of Government Employees, AFL-CIO, Local 1999, proceed to arbitration regarding a grievance with respect to Article XXIII of our February 12, 1974 Collective Bargaining Agreement with said Union.

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

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 Assistant Regional Director for Labor-Management Services, 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 :
FEDERAL AVIATION ADMINISTRATION :
Respondent :
and : Case No. 30-6123(CA)
NATIONAL ASSOCIATION OF AIR TRAFFIC :
SPECIALIST :
Complainant :
.....

Joseph Winkler AEA-16
Federal Aviation Administration
Eastern Region - Federal Building
JFK International Airport
Jamaica, New York 11430
For the Respondent

Clinton Worthley
66 Ledgewood Drive
Smithtown, New York 11787
For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The Respondent herein is charged with an unfair labor practice under the provisions of Executive Order 11491 (hereinafter referred to as the Order).

Statement of the Case

The amended complaint, filed September 17, 1975, alleges that Respondent engaged in violations of Section 19(a)(1) and (2) of the Order by taking disciplinary action against Complainant's Facility Representative because of his union activity. Respondent admits the issuance of a letter of warning to the union

official, but denies any improper motivation for its action, claiming that its purpose was corrective only.

Pursuant to Notice of Hearing issued September 26, 1975, by the Assistant Regional Director for the New York Region, a hearing was duly held before the undersigned on November 18 and 19, 1975, at Westbury, Long Island, in accordance with the Order and the applicable Regulations thereunder (20 C.F.R. Part 203).

Upon all the evidence adduced, my observation of the witnesses, and consideration of the briefs of the respective parties, filed March 1, 1976, I make the Findings of Fact, reach the Conclusions of Law, and submit the Recommendation set forth below.

Findings of Fact

1. At all pertinent times the Complainant was the exclusive bargaining representative of Air Traffic Control Specialists employed at Respondent's Flight Service Stations and International Flight Service Stations.

2. On or about July 1, 1974, the International Flight Service Station at Kennedy Airport was merged into the New York Flight Service Station at MacArthur Airport, Islip, Long Island. Soon afterwards, the newly-appointed Facility Chief of the combined Facility initiated a training program to familiarize all of the Air Traffic Control Specialists with the work of both stations; and also directed his supervisors to try to eliminate what he considered excessive tardiness and sick leave.

3. In early December, 1974, Michael Winokur, who had previously been designated by Complainant first as Health and Safety Officer and then as alternate Facility Representative, became the acting Facility Representative at Islip upon the transfer of his predecessor to Oklahoma.

4. On December 11, 1974, Winokur called in and notified the Facility that he would be two hours late in reporting because he had to go see a doctor. Due to a delay in the doctor's office, he was an additional forty minutes late in reporting for work.

5. On December 12, 1974, Winokur overslept and was seventeen minutes late for work.

7. On the two days on which Winokur was tardy, his immediate supervisor was Carl Negrón, who had just been promoted to supervisor the previous month. In addition to noting Winokur's

tardiness, Negrón watched him closely and spoke to him on several occasions about leaving his position on watch without prior permission in order to fix the coin mechanism on a vending machine in which he (Winokur) had a financial interest and in order to conduct conversations with people at other locations in the Facility. Negrón also spoke to Winokur about taking personal phone calls.

7. On or about December 15 or 16, 1974, the Facility Chief called a Labor Management Relations Specialist at Kennedy Airport to discuss a proposed warning letter that was planned to be issued by Negrón to Winokur. As a result of that discussion, the Facility Chief initiated, through the Air Traffic Division, a security check as to the ownership and operation of the vending machines in the Control Tower at MacArthur Airport. Unbeknownst to the Facility Chief, Winokur had obtained written clearance from Respondent's Regional Counsel as to possible conflict of interest several years before and had since participated in the vending machine operation with Respondent's knowledge and consent.

8. Under date of January 2, 1975, the letter of warning was issued citing Winokur for tardiness and leaving his position without permission on December 11 and 12. The letter was signed by Negrón with the full knowledge and approval of the Facility Chief.

9. By letter dated January 6, 1975, the Facility Chief was officially notified by Complainant that Winokur had been designated its Facility Representative, effective as of December 30, 1974.

10. Prior to December 11, 1974, the Facility Chief had been familiar with Winokur's activity as Health and Safety Officer of the Union, and had been advised of his designation as alternate Facility Representative; moreover, he was aware that Winokur became acting Facility Representative upon his predecessor's transfer to Oklahoma.

11. Although he had been a member of the Union prior to his promotion to supervisor in November, 1974, Negrón disclaimed any knowledge of the identity of the Facility Representative prior to the official notification on January 6, 1975.

12. At the time of the events in question, there were 53 Air Traffic Control Specialists at the Facility, 37 of whom were assigned to rotating watches. Many employees, including supervisors, were late for work from time to time; and although a majority of Air Traffic Control Specialists on watch requested permission before leaving their positions, many of them left their positions from time to time without prior permission.

13. During the period from July, 1974 to November, 1975, only one letter of warning (other than that issued to Winokur) was issued for tardiness, and that had been directed to a former Facility Representative shortly after he assumed that office.

14. The only other letters of warning issued during the above period were two, or perhaps three, such letters for excessive sick leave. No warning letter for leaving a position without permission was issued to anyone except Winokur.

15. On January 21, 1975, Respondent made inquiry of the Assistant Airport Manager as to Winokur's activities in connection with the vending machines. Winokur was later questioned about the machines by a representative of Respondent's Security Division. The investigation was terminated upon production of the clearance letter from the Regional Counsel.

16. Pursuant to Paragraph 63(d) of the FAA Handbook on Conduct and Discipline, the warning letter is an informal disciplinary measure; a copy of the written warning should not be placed in the employee's personnel folder, but copies may be retained in local files and the issuance noted on SF-7B cards.

Conclusions of Law

Despite the testimony of several of Respondent's witnesses to the effect that they did not know that Winokur was Complainant's Facility Representative prior to January 6, 1975, Respondent is chargeable with the Facility Chief's awareness, prior to December 11, 1974 and thereafter, of Winokur's status as alternate and acting Facility Representative. Since the warning letter was issued with the Facility Chief's knowledge and approval, there is no question that Respondent had knowledge of Winokur's union activity at the time disciplinary action was taken.

With respect to both tardiness and leaving positions on watch without permission, it appears that letters of warning were not issued to ordinary offenders. Such letters were apparently reserved for Facility Representatives charged with either or both infractions shortly after assuming office. It should be observed too that although Winokur had been tending the vending machines in which he had an interest for several years, no corrective measures were taken against him with respect thereto until he took over the duties of Facility Representative. In view of the disparate treatment thus accorded and the timing of the disciplinary action taken against Winokur, it may be reasonably inferred that the issuance of the warning letter was motivated, at least in part, by anti-union animus. An agency or

activity may not predicate its differentiation of discipline upon conduct which is protected under the Order - i.e. - membership in a labor organization. Tennessee Valley Authority, A/SLMR No. 509.

Section 1(a) of the Order protects the right of employees to "assist a labor organization", which expressly "extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative". Discriminatory action due to union activity thus interferes with or restrains the exercise of rights in violation of Section 19(a)(1) of the Order, as well as tends to discourage membership in a labor organization in violation of Section 19(a)(2) of the Order. See Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136; Miramar Naval Air Station, Commissary Store, San Diego, California, A/SLMR No. 472. I therefore conclude that in issuing the letter of warning dated January 2, 1975, Respondent violated Section 19(a)(1) and (2), and I 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 Federal Aviation Administration, Eastern Region, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Executive Order by disciplining an employee for assisting the National Association of Air Traffic Specialists.

(b) Discouraging membership in the National Association of Air Traffic Specialists by discriminating against an employee in regard to hiring, tenure, promotion, or other conditions of employment based on union membership considerations.

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

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

(a) Expunge from any and all local files or other records of the New York Flight Service Station/International Flight Service Station and of the Eastern Region the letter of

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 employees in the exercise of rights assured by the Order by disciplining an employee for assisting the National Association of Air Traffic Specialists.

WE WILL NOT discourage membership in the National Association of Air Traffic Specialists by discriminating against employees in regard to hiring, tenure, promotion, or other conditions of employment based on union membership considerations.

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

WE WILL expunge the letter of warning issued to Michael Winokur under the date of January 2, 1974, and any notation or other memorandum thereof, from any and all local files, SF-7B cards or other records of the Federal Aviation Administration.

warning issued to Michael Winokur under date of January 2, 1975; and expunge any notation or other memorandum of the issuance of such letter, or of the contents thereof, from any and all SF-7B cards or other records maintained by the Federal Aviation Administration

(b) Post at the New York Flight Service Station/ International Flight Service Station, MacArthur Airport, Islip, Long Island, 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 Facility Chief of such stations and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that the 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.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: May 18, 1976
Washington, D.C.

(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: Suite 3515, No. 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 :
 :
 Internal Revenue Service, :
 Cincinnati District, Cincinnati, :
 Ohio :
 Respondent : Case No. 53-7260 (CA)
 and :
 Chapter 9, National Treasury Employees :
 Union (NTEU) :
 Complainant :

Robert A. Remes, Esq.
 Washington, D.C.
 For the Respondent
 Michael E. Goldman, Esq.
 Washington, D.C.
 For the Complainant
 Before: GORDON J. MYATT
 ADMINISTRATIVE LAW JUDGE

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on May 17, 1974, alleging that Internal Revenue Service, Cincinnati District (hereinafter called Respondent Activity) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Assistant Regional Director 1/ for the Chicago region issued a Notice of Hearing on Complaint on November 11, 1974. The gravamen of the complaint is that the Respondent Activity refused to allow an employee to be accompanied by a representative of the Complainant Union during a discussion with management regarding his performance evaluation; which, in this instance, is asserted to be a part of the grievance

1/ This title has been officially changed to Regional Administrator.

process contained in the negotiated grievance procedure. It is alleged that this conduct violated the right of the exclusive representative to be represented during "formal discussions" as required by Section 10(e) 2/ of the Executive Order, and of the rights assured the employee by the Order.

A hearing was held in this case on December 12, 1974, in Cincinnati, Ohio. All parties were represented by counsel, and were afforded opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by counsel and have been duly considered in arriving at the determination in this case.

Upon the entire record in this case, including my observations of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following:

Findings of Fact

John C. Rassenfoss, a GS-11 Revenue Agent assigned to the Respondent Activity applied for a GS-12 position which had become available in the District Office. Rassenfoss was not selected for this promotion, and he filed a grievance pursuant to the grievance procedure contained in the negotiated agreement in effect between the parties. 3/ The grievance asserted, among other things, that Rassenfoss' performance evaluation, which was considered by the promotion panel,

2/ Section 10(e) of the Executive Order provides, in pertinent part:

...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/ The parties herein were subject to a negotiated agreement called the Multi-District Agreement (MDA) which was executed on April 5, 1972 and became operative on July 1, 1972. At the time of the signing of the agreement, the name of the Union was National Association of Internal Revenue Employees (NAIRE). This name was subsequently changed to National Treasury Employees Union (NTEU).

contained certain procedural deficiencies. 4/ The grievant asked that a promotion certificate containing only his name be submitted to the selecting official for the next available vacancy. 5/ At all stages during the processing of the grievance through the steps required by provisions in the negotiated agreement (Article 33), Rassenfoss was represented by Terrance Ladrigan, Chief Representative of the Complainant Union.

On November 19, 1973, there was a meeting on the Rassenfoss grievance between the District Director, Paul Schuster, and the union representatives pursuant to the fourth step of the negotiated grievance procedure. 6/ A final decision was not issued by the District Director within the time limit set forth in the agreement, and on November 30, 1973, he requested and received an extension until December 18, 1973.

4/ The grievance stated that the performance evaluation was not prepared by Rassenfoss' supervisor, nor was it shown to him prior to submission to the promotion panel. For this reason, it was contended that the evaluation was unfair and subjective.

5/ The relief requested was pursuant to Article 7, Section 14B (1) of the negotiated agreement.

6/ The fourth step of the grievance procedure contained the following provisions:

Adverse decisions rendered by the division chief may be appealed to the Office of the District Director, within ten (10) days of the decision rendered in Step 3... Such meeting, if held, will take place within fifteen (15) days of the date of the Union's notice of Appeal. The Union will be provided with a written answer to the grievance not later than fifteen (15) days after the close of the meeting, if one is held.

The District Director determined, independent of consultation with the union representatives, that certain procedural deficiencies had occurred in the performance evaluation of Rassenfoss. He felt he could not make a final response concerning the relief requested by the grievance until a determination had been made as to what the result of the promotion action would have been had no procedural errors occurred. In order to accomplish this objective, the District Director ordered the grievants' supervisor to prepare another performance evaluation covering the same period of time. This evaluation was to be submitted to a reconstituted ranking panel to determine where the grievant would have been placed in terms of the promotion certificate.

On December 12, 1973, Rassenfoss was informed by his supervisor, Jack Elliott, that he wanted to have a meeting with him to discuss the performance evaluation. Rassenfoss testified that he was told by Elliott that the evaluation was for the purpose of "reconstituting, reconstructing the promotion action which resulted in the grievance having been filed." Elliott stated that it was his understanding that the evaluation was being made as a part of "some investigative process being performed by the District Director in connection with a grievance...."

Shortly after being informed by Elliott of the need for the meeting to discuss his evaluation, Rassenfoss contacted Ladrigan and told him of the proposed meeting. Ladrigan made an oral request of the District Director to be allowed to be present at the meeting. The District Director denied this request stating that the "evaluation discussion should be a free and open exchange between a supervisor and an employee." 7/ Schuster's response to Ladrigan concluded with the following statement:

"The discussion which will be held with Mr. Rassenfoss is for the purpose of discussing his performance with him and providing any appropriate counseling. The discussion is not a part of any present grievance and will in no way limit the avenues available to him if he is dissatisfied with the evaluation."

7/ Joint Exhibit No. 4.

On December 14, 1973, Rassenfoss met Elliott to discuss the evaluation. 8/ The record is clear that Rassenfoss did not participate in the discussion to any appreciable extent because he felt his union representative should have been present. Nor did Rassenfoss sign the evaluation at the conclusion of the discussion.

The evaluation was submitted the same day to a reconstituted ranking panel, and it determined that Rassenfoss did not qualify for the Highly Qualified List. This determination prevented him from being placed on the Best Qualified List, which would have allowed him to be the sole person on the certificate of promotion as requested in his grievance. With these results in hand, the District Director issued a formal response on December 17, 1973, pursuant to the fourth step requirements of the grievance procedure. The District Director denied the relief requested by Rassenfoss in the grievance.

Contention of the Parties

The Complainant Union contends that the discussion on the performance evaluation was part of the grievance process and constituted a "formal meeting" within the scope of Section 10(e) of the Executive Order. It urges that the refusal to inform the representatives of the Complainant Union of the scheduled meeting and to afford them an opportunity to be represented constitutes a violation of Section 19(a)(6) of the Executive Order. It is further urged that by denying Rassenfoss representation by the exclusive representative, the Respondent Activity violated rights assured him under the Executive Order.

8/ The first paragraph of the narrative of the evaluation stated as follows:

The purpose of this evaluation is to restate as to perspective and amend where applicable your evaluation for the period 2/5/73 through to 10/5/73 discussed with you on 10/12/73. Furthermore, this evaluation will be used in a promotion panel for GS-512-12 IRA, Stabilization positions, which will be recovered and reconstituted; and determined Best Qualified List.

The Respondent Activity asserts that the discussion between Rassenfoss and his supervisor was not a formal meeting within the meaning of Section 10(e). It contends that the discussion related solely to matters peculiar to Rassenfoss and had no unit-wide ramifications. Moreover, that it was simply part of the investigative process initiated by the District Director to ascertain facts which would enable him to issue a final response required by the fourth step of the negotiated grievance procedure. In addition, it is contended that the December 14 meeting was a "counseling session" between the employee and his supervisor and therefore was not a formal discussion within the ambit of Section 10(e). Moreover, the Respondent Activity asserts that Rassenfoss never made a formal request to be represented by the Union during the course of the discussion. Hence, he "waived" any right to such representation.

Concluding Findings

This case presents an issue which is a refinement of several rationales relating to the right of a union to be represented at "formal discussions" between management and employees, and the entitlement of employees to be represented during such discussions. The decisions have established the basic proposition that discussions between employees and management officials which do not have unit-wide ramifications and which relate solely to the application of policies to the employee involved, are not the type of discussions encompassed within Section 10(e). Hence, the employee has no right under the Executive Order to union representation and the union has no right to be represented at such discussions. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336; Department of the Treasury, Internal Revenue Service, Mid-Atlantic Service Center, Philadelphia, Pennsylvania, A/SLMR No. 421. In addition, it has been held that a "performance interview" only affects the employee involved and is not a formal discussion within the scope of Section 10(e). Department of Health, Education, and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 419.

The case law has also established, however, that discussions between employees and supervisors on grievances -- whether such discussions are at an informal or formal stage of the grievance procedure -- are "formal discussions" of grievances within the contemplation of Section 10(e), and the exclusive representative must be given an opportunity to be represented. Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448. This is true whether or not the grievance might have general impact on unit employees. Department of the Treasury, Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, A/SLMR No. 498.

The critical question here is whether, in the circumstances of this case, the performance evaluation was a part of the grievance process. If so, then a violation has indeed occurred.

In my judgment, the performance evaluation cannot be divorced from the grievance process in this case. The parties were involved in the fourth step grievance procedures when the District Director determined it was necessary to secure a procedurally accurate evaluation to determine where the grievant would have qualified in terms of the promotion competition. It is evident, not only from the testimony but also from the narrative of the evaluation itself, that the evaluation was given as a part of the grievance process. It played an integral part in formulating the Respondent Activity's response pursuant to the requirements of the grievance procedure. This was understood by the employee as well as by the supervisor giving the evaluation. To contend here that the evaluation was not inextricably interwoven into the grievance process is, in my judgment, to ignore the circumstances which gave rise to the second evaluation.

The Respondent Activity argues that the evaluation was part of the investigative process utilized by the District Director to enable him to act on the grievance. As such, it is urged that the Complainant Union had no right to be present under the holdings in Department of Transportation, Federal Aviation Administration, Las Vegas Air Traffic Control Tower, Las Vegas, Nevada, A/SLMR No. 429 and Federal Aviation Administration, Cleveland ARTC Center, Oberlin, Ohio, A/SLMR No. 430. A careful reading of those cases, however, indicates that the union involved was denied the right to be present during the course of an interview by a Facility Review Board investigating the conduct of the employees involved. In each case it was held that the employee was not entitled to have a union representative present because the nature of the proceeding was investigative and did not concern a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. (Emphasis Supplied). Clearly, these cases are distinguishable from the instant case. There can be no doubt on this record that the sole issue here was generated by the grievance filed by Rassenfoss. Nor can the right of the District Director to conduct an investigation be challenged. But the performance evaluation here arose out of the grievance and involved the

grievant himself. Therefore, it cannot be isolated from the entire grievance process on the ground that it is a management investigation. To hold otherwise would allow management to effectively separate out segments of the grievance process, and abridge the rights granted unions and employees by the Executive Order in grievance proceedings. 9/

It is also argued by the Respondent Activity that Rassenfoss did not make a verbal request for union representation and therefore consciously waived his right to have a union representative present during the discussion. The facts do not sustain this argument. When Rassenfoss was informed that there would be a discussion on his performance evaluation, he contacted his union representative who in turn made a formal request of the District Director to be allowed to attend. This request was denied, and it was known to both the employee and his supervisor. The mere fact that Rassenfoss did not utter the "magic words" requesting representation cannot be deemed a waiver of the right assured him under the Executive Order. Clearly, to have made such a request would have been a futile act on his part; especially since he and his supervisor were well aware that a formal request had been made by the union representative and denied by the District Director.

In sum, I find that the performance evaluation, in the circumstances of this case, was an integral part of the grievance process and the failure of the Respondent Activity to notify and afford the Complainant Union an opportunity to be represented at the evaluation discussion violated the obligations imposed by Section 10(e) of the Order. It follows that such conduct constitutes a violation of Section 19(a)(6). In addition, I find that the failure to allow the Union to be represented at the evaluation discussion had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Executive Order. I find that such conduct is a violation of Section 19(a)(1) of the Executive Order.

Having found that the Respondent Activity engaged in conduct which violates Section 19(a)(1) and Section 19(a)(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.

9/ Cf. United States Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Internal Revenue Service, Cincinnati District, Cincinnati, Ohio 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 condition of employees in the unit without affording Chapter 9, National Treasury Employees Union (NTEU), the employees' exclusive representative, the opportunity to be represented at such discussions.

(b) interfering with, restraining, or coercing its employees by failing to provide Chapter 9, National Treasury Employees Union (NTEU), 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.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order.

(a) Notify Chapter 9, National Treasury Employees Union (NTEU) 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 Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, copies of the attached notice market "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, Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, 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 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 of Labor for Labor-Management Relations in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


GORDON J. MYATT
Administrative Law Judge

Dated: March 4, 1976
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 conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters effecting general working conditions of employees in the unit without affording Chapter 9, National Treasury Employees Union (NTEU), 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 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 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.

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 :
 :
Activity :
 :
and : Case No. 22-6505 (CA)
 :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 2667 AFL-CIO :
Complainant :
 :
..... :

LE ROY B. CURTIS, Chief
Labor-Management Relations
Branch, Equal Employment Opportunity
Commission
2401 E Street, N. W.
Washington, DC 20506

DOUGLAS KERSHAW
American Federation of Government
Employees
8020 New Hampshire Avenue
Hyattsville, Maryland 20783

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended, herein called the Order. On November 24, 1975 a complaint was filed by American Federation of Government Employees, Local 2667 (AFL-CIO) hereinafter called AFGE Local 2667 or the Union, alleging that the Equal Employment Opportunity Commission, herein called EEOC,

the Activity and the Respondent, violated Sections 19(a)(1), (2) and (4) of the Order by removing Doris X (McGruder) from her duties because she was President of AFGE Local 2667. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor Management Relations, herein called the Assistant Secretary, a Notice of Hearing on Complaint with respect to the allegations that Sections 19(a)(1) and (2) of the Order were violated, was issued on February 18, 1976 by the Acting Regional Administrator for the Philadelphia Region.

A hearing was held before the undersigned in Washington, D.C. on April 13 and 14, 1976. Both parties were represented at the hearing and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Both parties filed briefs which have been duly considered.

Upon the entire record in this matter, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation:

Findings of Fact

1. At all times material herein AFGE Local 2667 was the certified exclusive collective bargaining representative for a nationwide unit of EEOC employees which included Ms. Doris McGruder.
2. In July 1975 Ms. McGruder was elected President of the Union.
3. Ms. McGruder was an investigator employed in the Activity's Office of Equal Employment Opportunity (EEO).
4. Activity's EEO Office is a headquarters operation and it is its function, and that of the EEO investigators, to enforce and administer the Respondent's in house equal opportunity program. In performing this function the EEO investigators' duties include investigating charges that certain of the Activity's managers and supervisors engaged in conduct which violated its equal employment opportunity program.
5. Prior to Ms. McGruder becoming President of the Union, an Activity representative had discussions with Ms. Alicia Columna, then President of the Union, concerning the Activity's consideration of removing the EEO Office from the bargaining unit pursuant to Section 3(b)(4) of the Order.

6. Ms. McGruder had some discussions prior to the election with Activity representatives concerning whether there was a conflict of interest between the duties as an EEO Investigator and Union President. Ms. McGruder could get no definitive answer as to whether the Activity considered such a conflict of interest to exist.

7. On October 2, 1975, Mr. Robert Rosas, Special Assistant to the Chariman, sent a memorandum to Ms. Maxine B. Cade, Director, Office of Equal Employment Opportunity, stating the following:

"It has come to my attention that the Union President is planning to travel to Albuquerque to investigate the Clarence Weahkee case. In my opinion this is a possible conflict of interest and you are hereby directed to contact the Executive Director at the earliest possible date so that he can assign a Field investigator to conduct the investigation. Until a final decision is reached regarding Ms. McGruder, you are also directed to reassign her to duties as a decision writer and under no circumstances is she to continue to investigate any EEO charges.

8. Following that memorandum, Ms. Cade, on October 2, 1975, sent a memorandum to Ms. McGruder transmitting Mr. Rosas memorandum and stating the following:

"Pursuant to the attached memorandum dated October 2, 1975, from Mr. Robert Rosas, Special Assistant to the Chariman, I have been directed to remove you as the investigator on the Clarence Weahkee case and to have it investigated by a field investigator. Therefore, pursuant to those instructions, your removal as the investigator on the Weahkee case is effective immediately. Furthermore, pursuant to those same instructions, I hereby am temporarily suspending you from all of your pending investigations and assigning you the duties of a Decision Writer. If you have any questions concerning the above, please do not hesitate to contact me".

9. Following the issuance of the above two memoranda, Ms. McGruder, on October 2, 1975, filed an unfair labor practice charge, the one in the subject case, with the Respondent alleging violations of Section 19(a)(1), (2) and (4) of the Order.

10. Ms. McGruder filed a grievance under the negotiated grievance procedure and by memorandum dated October 6, 1975 requested to meet with representatives of the Activity on October 7, 1975, and with her representative, a Union Official.

11. Ms. McGruder sent the Activity a memorandum dated October 7, 1975, in which she stated, in part, "... The purpose of that meeting is to discuss my grievance and to try to informally resolve it in accordance with Step I of the Negotiated Grievance Procedure."

12. By memorandum to EEOC Chairman, Lowell W. Perry, dated October 28, 1975, Ms. McGruder invoked Step 4 of the Grievance procedure. In this memorandum she stated under "Nature of Grievance Including Provision of Agreement In Dispute" that the Activity violated, inter alia, Articles 20, 18 and 5 of the Agreement and "Executive Order 11491, as amended..." In this memorandum she states that on October 2, 1975, she was removed from the Weahkee investigation and suspended from all her investigative duties and reassigned to decision writing in retaliation against her because she filed grievances against certain Activity representatives and because EEOC officials were attempting to circumvent and impede the internal EEO process. Among the adjustments sought is that Ms. McGruder be restored to her investigative duties and be returned to the investigation of the Weahkee case.

13. During the pendency of the subject unfair labor practice charge, the Activity filed a Clarification of Unit (CU) Petition with Assistant Secretary for Labor Management Relations on October 31, 1975. This attempted to raise the question whether the entire Office of Equal Employment Opportunity should be excluded from the bargaining unit pursuant to Section 3(b)(4) of the E. O. 11491, as amended, because it has as its primary function the investigation of the conduct and work of employees of the agency and the agency head determining that the Order cannot be applied in a manner consistent with the internal security of the agency.

14. On November 11, 1975, the office of the Assistant Secretary for Labor for Labor Management Relations advised the Respondent that it should withdraw the CU petition. It stated that it would be proper to have the Agency head make a determination to remove the Office of Equal Employment Opportunity from the bargaining unit pursuant to the provisions of 3(b)(4). The Respondent withdrew the CU petition on November 18, 1975.

Conclusions of Law

The Activity contends that Section 19(d) of the Order bars the consideration of the instant case because Ms. McGruder raised her October 2, 1976 reassignment under the negotiated grievance procedure. 1/

The Complainant seems to defend on two grounds, first the Union appears to indicate in its brief that the grievance and the subject complaint case involve different issues and secondly the Union indicated at the hearing that it is seeking a different remedy in the unfair labor practice case than in the grievance. More specifically, with relation to this second contention, the union contends that in the unfair labor practice proceeding it is seeking a notice to all employees that the action taken to declare Ms. McGruder, as President of the Union, to be in a conflict of interest situation, has been rescinded and a statement from the Chairman of the EEOC concerning employee participation and the labor organization; while with respect to the grievance filed by Ms. McGruder, the remedy sought was that the reassignment be rescinded, she be restored to her investigative duties, including to the Weahkee Case, and that the agency cease frustrating and obstructing the EEO policy.

The union did not raise the fact that apparently Ms. McGruder brought and signed the grievance on her own behalf, as an individual, 2/ but signed the unfair labor practice case as a Union official.

There is no evidence in the record to indicate that the issue raised in this unfair labor practice case could not

1/ The applicable portion of Section 19(d) of the Order states, "... issues which case 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...."

2/ She was apparently represented in the grievance by a Union representative.

or would not be entertained or considered in the grievance procedure. It is therefore concluded that whether Ms. McGruder's October 2, 1975 reassignment violated the Order was grievable and would have been considered under the grievance procedure.

It is concluded further that the issue of whether Ms. McGruder's October 2, 1975 reassignment violated the Order was in fact raised by the grievance. The fact that a different theory was raised during the grievance to support contention that the reassignment violated the Order, than is raised to support the same contention in the subject case, is not sufficient to void the operation of Section 19(d) of the Order. Section 19(d), clearly applies to whether basic issues are raised i.e., whether the reassignment violated the Order, not whether specific theories are raised. To conclude otherwise would permit a party to fractionalize a case and to litigate the same question of whether an unfair labor practice was committed in both forums, the very thing Section 19(d) was aimed at avoiding.

Finally, it is concluded that with respect to her reassignment, Ms. McGruder is essentially the "aggrieved party" within the meaning of Section 19(d) of the Order and the one who must elect which procedure, grievance or unfair labor practice, she wishes to pursue. She chose the grievance procedure and therefore it is concluded that Section 19(d) of the Order bars consideration of this matter under the unfair labor practice procedures and that the subject complaint should thus be dismissed.

In light of the foregoing conclusions, it is not necessary to make any further conclusion with respect to the specific merits of the contention that the reassignment of Ms. McGruder violated Sections 19(a)(1) and (2) of the Order. 3/

3/ In the event a decision on the merits were to be made, I would find that her duties as EEO investigator, required her to investigate the charges of EEO violations on the part of management and supervisors. These allegations were made by Activity employees, who are the very ones who vote for her as Union President and whom she must represent as Union President. It is concluded that this would place her in an apparent conflict of interest situation. Because of this apparent conflict of interest, Section 1(b) of the Order provides that Ms. McGruder was not privileged to participate in the management of the Union. Thus it is concluded the reassignment of Ms. McGruder because of this apparent conflict of interest, was privileged by the Order and did not violate the Order.

Recommendation

In view of the foregoing, it is recommended that the subject complaint be dismissed in its entirety.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: June 16, 1976
Washington, D. C.

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 - Activity :
 and : Case No. 22-6401 (CA)
 TIDEWATER VIRGINIA FEDERAL EMPLOYEES :
 METAL TRADES COUNCIL, AFL-CIO :
 Complainant :

Thomas E. Calloway, Sr.
 International Representative, Laborers'
 International Union
 1901 North Moore Street
 Rosslyn, Virginia 22209
 Richard F. Lake, President
 Tidewater Metal Trades Council
 422 Cavett Street
 Portsmouth, Virginia 23702
 For the Complainant

John J. Connerton
 Labor Disputes and Appeals Section
 Labor and Employees Relations Division
 Department of the Navy
 Office of Civilian Manpower Management
 Washington, D.C. 20390
 For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated September 15, 1975 and filed September 22, 1975 alleging violations of Section 19(a)(1) and (5) of the Executive Order. An amended complaint dated September 24, 1975 was filed September 26, 1975. As amended, the

the complaint alleged that the Respondent refused to permit J.D. Thomas, a Chief Steward, to represent D.C. Brothers, a shop laborer, at a pre-action investigation and instead contacted Annette Gaskins, a Steward, to represent Brothers, and that such "appointment" of Gaskins to represent Brothers was contrary to past practice at the Respondent's Shipyard. On September 30, 1975 a second amended complaint dated September 26, 1975 was filed. The second amended complaint alleged the same facts and asserted that they constituted violations of Sections 19(a)(1), (5), and (6) of the Executive Order. The Complainant on December 18 requested that it be permitted to withdraw its assertion that the alleged conduct constituted a violation of Section 19(a)(5) and the Regional Administrator approved such withdrawal on January 5, 1976. 1/

On December 30, 1975 the Regional Administrator issued a Notice of Hearing to be held in Washington, D.C. on February 10, 1976 and by his Order Rescheduling Hearing Place the hearing was changed to Norfolk, Virginia. Hearings were held in Norfolk on February 10, 1976 at which the Complainant was represented by an International Representative of the Laborers' International Union and by the President of the Complainant and the Respondent was represented by a Labor Relations Advisor of the Office of Civilian Manpower Management of the Department of Navy. Both sides examined and cross-examined witnesses and introduced exhibits. On Motion granted over objection 2/ the complaint was amended to reinstate Complainant's assertion that the conduct alleged constituted a violation of Section 19(a)(5) of the Executive Order.

With the concurrence of all concerned closing arguments were deferred to February 26, 1976 and were made in Washington, D.C. At the conclusion of the closing arguments the time for filing briefs was extended to March 29, 1976. The Respondent filed a brief that day. By telephone call on March 30, 1976, confirmed by letter dated March 31, the Complainant advised the Administrative Law Judge that it was not filing a brief because it considered a brief unnecessary.

Facts

The Complainant is the exclusive representative of various units of non-supervisory graded and ungraded employees of the Norfolk

1/ Exh. R-1.

2/ Although the Respondent objected to the Motion, it expressly concedes that the granting of the Motion was not surprise or prejudicial. Brief, p. 1, fn. 1; Tr. 2-33.

Naval Shipyard. One of the components of the Complainant is Local 649 of the Laborers' International Union. At all times relevant hereto, J.T. Thomas was the Chief Steward of Local 649 in Respondent's Shop 72, and H. Peake and Annette Gaskins were stewards of Local 649 in Shop 72.

Early in July 1975 D.C. Brothers, a laborer in Shop 72, was the subject of a "preaction investigation", contemplating discipline. There was a collective bargaining agreement in effect between the Complainant and the Respondent which had been executed August 22, 1973 to remain in effect for two years and fifteen days from its approval by the Office of Civilian Manpower Management. Article 31, Section 2 3/ provided:

"When it is determined by the supervisor having authority that formal discipline or adversaction may be necessary, an investigator will normally be appointed ... to conduct a preaction investigation of the incident or knowledge of thincident by the supervisor. ... The investigator assigned will conduct whatever inquiry is necessary. ... A discussion will be held with the employee as part of the preaction investigation. It is agreed that during any discussion held with the employee as part of the preaction investigation the employee shall be advised of his right to be represented by the cognizant steward. If the employee declines representation, the cognizant steward or appropriate chief steward in his absence shall be given the opportunity to be present to represent the Council."

Brothers was advised of his right to be represented at the preaction investigation and elected to be represented. The Complainant Metal Trades Council was so advised and designated J.D. Thomas, the Chief Steward of Local 649 in Shop 72, to represent Brothers in the preaction investigation. Thomas was familiar with the incident that gave rise to Brothers' preaction investigation.

On July 7 Thomas called Mrs. Booth, a clerk in the Personnel Office, or Mrs. Booth called Thomas. Thomas told Booth that he would represent Brothers at the preaction investigation to be conducted on July 8. Booth so advised J.M. Garner, the Assistant Administrative Officer in Shop 72. Garner called Thomas and told him that under the Respondent's interpretation

3/ Exh. J 1, pp. 71-72.

of Article 31, Section 2 of the Negotiated Agreement the Chief Steward could not represent an employee in a preaction investigation unless the other stewards in the shop could not attend. Garner requested that Thomas provide a "cognizant" steward, meaning a steward other than the Chief Steward. Thomas told Garner he did not know who it would be but someone would be there to represent Brothers.

The next morning, July 8, Thomas appeared himself to represent Brothers. Garner again told him that since he was the Chief Steward he could not represent Brothers unless both Peake and Gaskins, the stewards under Thomas, were unavailable. Thomas said that if Garner would put that interpretation by management of Article 31, Section 2 of the Agreement in writing, he would get either Gaskins or Peake to represent Brothers.

Garner said he would do so but when he left the room where he had been talking with Thomas it occurred to him that management did not have an obligation to furnish its interpretation in writing. He called Miss Dolores Griffin, a Personnel Management Specialist, who agreed a written interpretation was not required. She said that since Brothers had asked for representation he was entitled to have it and suggested that Garner request one of the stewards and request him or her to come and represent Brothers.

Garner had learned earlier that morning that Peake was on an assignment that made him unavailable to represent Brothers. Garner called Gaskins' supervisor and told him to tell Gaskins that Brothers had asked for representation and was entitled to representation and since she was a steward in his unit she was requested to come to the investigation where she would be given the opportunity to represent Brothers. Garner then returned to Thomas and told him what he had done. Thomas objected, saying that it was not Management's right to contact the stewards directly but that he would not interfere with Gaskins coming to represent Brothers and that he would take the matter up through appropriate channels.

Thomas then left. Gaskins appeared and was given an opportunity to discuss the situation with Brothers to familiarize herself with the subject of the preaction investigation. She then represented Brothers in the interview with the preaction investigator.

In the past, and since the effective date of the Negotiated Agreement, Thomas had, as Chief Steward, represented employees in preaction investigations on three occasions. July 7 and 8 was the first time he had been denied the right to do so.

Evidence was introduced concerning a subsequent disagreement over the propriety of Thomas attempting to represent Brothers in a subsequent preaction investigation, the Respondent invoking arbitration in that dispute, the Respondent withdrawing its request for arbitration, and incidents preceding and following the withdrawal. I find that evidence ambivalent and unpersuasive of the proper determination of any issue in this case.

The Respondent introduced considerable evidence concerning the negotiations that culminated in Article 31, Section 2. I find such evidence far from conclusive and, in view of the discussion below, irrelevant.

Discussion

Under the Executive Order, as distinguished from the National Labor Relations Act, an employee does not, at least not yet, have a right to be represented at a preaction investigation, nor does the union have a right, at least not yet, to be represented at such a meeting. See the Recommended Decisions of the Administrative Law Judge in Department of Defense, U.S. Navy, Norfolk Naval Shipyard, Case No. 22-5283 (CA), March 4, 1975 4/; United States Air Force, Lackland Air Force Base, Headquarters Air Force Military Training Center (ATC), Case No. 63-5430 (CA), February 4, 1976. Any such right, if it exists at the present time, arises from the agreement between the parties.

The Negotiated Agreement between the parties in this case does confer the right in an employee to be represented in a preaction investigation by the "cognizant steward". The basic dispute in this case is over the meaning of the term "cognizant steward" in Article 31, Section 2 of the parties' Negotiated Agreement.

That unusual phrase is nowhere defined, nor is its meaning apparent. The Complainant argues that it means the steward with knowledge of the incident involved; the Respondent argues that it means the local steward in the area as distinguished

4/ On July 24, 1975 the Assistant Secretary advised Counsel for the respective parties that he was deferring action in that case pending resolution by the Federal Labor Relations Council of a major policy issue pending before it involving that issue.

from the Chief Steward, the steward at the lowest level. 5/ The Negotiated Agreement, in several provisions, does appear to differentiate between stewards and chief stewards, but that is not conclusive that the former does not include the latter although rather clearly the latter would not include the former. The Complainant argues that its interpretation is so obvious that the Respondent's interpretation, and its application, constituted a unilateral change in the Agreement in violation of Section 19(a)(1) of the Executive Order. Although the Complainant's interpretation of the critical phrase is substantially closer to its literal meaning than the meaning ascribed to it by the Respondent, I conclude that the term "cognizant steward", used in several Articles of the Negotiated Agreement, is so imprecise and inappropriate that it cannot be held that the Complainant's interpretation of that term in Article 31, Section 2 is the only permissible interpretation. Accordingly, the Respondent's interpretation, even if erroneous, would be a simple breach of contract and not a unilateral change in the Agreement. General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528.

With respect to Garner contacting Gaskins to represent Brothers at the preaction investigation, in normal circumstances that would have been a violation of Section 19(a)(1) of the Executive Order, a violation of Brothers right to be represented by his union through a representative of the union's choice, not management's choice. Management should have contacted the MTC office and advised it that under its interpretation of the Agreement Thomas was not a "cognizant steward" and therefore could not represent Brothers in this matter and for MTC to designate an appropriate cognizant steward. It was not incumbent upon or the right of management to designate the steward.

But in this case there were only three persons who anyone argues could have been the cognizant steward, Thomas, Peake, and Gaskins. Management had already decided, dubiously but arguably, that Thomas was not a cognizant steward. Management knew that Peake was not available; he was working on a hot nuclear assignment from which he could not be released. Peake's unavailability

5/ But see Article 32, Section 5 of the Agreement (Exh. J 1, p. 75) which refers to "a cognizant chief steward". Query, whether that means a chief steward at the lowest level. And see Exh. R 4, par. (a), a management proposal which ultimately resulted in the present Article 31, Section 2. It refers to "the immediate supervisor or other cognizant official". Query, does "cognizant" in that phrase mean "the next lowest"?

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is not contradicted. In these narrow circumstances, I find it was not a violation of the Executive Order for management directly to have contacted the only other available "cognizant steward". If it was a violation, it was such a technical violation, and harmless, that no remedy would be called for.

Recommendation

I recommend that the complaint be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: May 10, 1976
Washington, D.C.

.....
In the Matter of :
UNITED STATES DEPARTMENT OF THE :
TREASURY, INTERNAL REVENUE :
SERVICE, CHICAGO DISTRICT :
Respondent :
and : Case No. 50-11147 (CA)
NATIONAL TREASURY EMPLOYEES UNION, :
CHAPTER 10 :
Complainant :
.....

William E. Persina, Esq.
National Treasury Employees Union
1730 K Street, N.W.
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For the Complainant

Thomas J. O'Rourke, Esq.
Office of the Regional Counsel
Internal Revenue Service
22nd Floor South
219 South Dearborn Street
Chicago, Illinois 60604
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 December 3, 1974 and filed December 9, 1974. The complaint alleged violations of Sections 19(a)(1) and (6) of the Executive Order by the Respondent stating and taking the position that fourteen of eighteen proposals submitted by the Complainant were non-negotiable and that it would not negotiate on the four admittedly

negotiable proposals until the Complainant agreed that the fourteen proposals were not negotiable or until the negotiability or non-negotiability of the fourteen proposals was determined by the Federal Labor Relations Council. On January 13, 1975, in accordance with an extension of time duly granted, the Respondent submitted a Response to Complaint in accordance with Section 203.5(a) of the Regulations, 29 C.F.R. §203.5(a).

Pursuant to Notice of Hearing issued by the Regional Administrator and two Orders Rescheduling Hearing, hearings were held by me on October 16 and 17, 1975 in Chicago, Illinois. Both parties were represented by counsel. At the conclusion of the hearing the time for filing briefs was extended to November 21, 1975 and later was further extended. Both parties filed timely briefs by December 29, 1975.

Facts

The Complainant, Chapter 10 of the National Treasury Employees Union, was certified under Executive Order 10988 as the exclusive representative of most of the Respondent's non-supervisory employees and is still the recognized representative of those employees. On April 5, 1972 Complainant and the Respondent became parties to a Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union. The current Multi-District Agreement was executed May 3, 1974 effective August 3, 1974.

The Chicago District Office of the Internal Revenue Service, for some time prior to 1974, had its offices at 17 North Dearborn Street, Chicago, Illinois. For some years there had been rumors and talk that they were going to move to a new location. In December, 1972, at a meeting called for other purposes, officials of the Respondent informed representatives of the Complainant that the Chicago District was going to move to the new Federal Building being constructed at 230 South Dearborn Street. It was expected that the move would take place in 1974 and the District was committed to most of its space being in open areas without walls or partitions. The Complainant expressed dissatisfaction with the open space concept and management stated it would consider the complaints in deciding on future modifications of the plans.

Meetings were held from time to time thereafter at which the Complainant continued to express its dissatisfaction with the open space concept and other aspects of the move and made a number of oral suggestions. On May 16, 1974 the Respondent

distributed to all employees a circular entitled "Moving Day Status Report #1" in which it advised the employees that the move was going to take place to the new 40-story building, that the Respondent would occupy the sixteenth through the twenty-eighth floors, that it was hoped the move would take place in August and be completed by September 1, and set forth the floors on which the District's various functions would be performed. A copy of Status Report #1 was not shown in advance to the Complainant. The Respondent later apologized for that oversight, and the Complainant expressly does not contend that Complainant's failure to notify the union before it notified the employees was a violation of the Executive Order. 1/ The complaint in this case does not mention such a violation.

On May 21, 1974 the President of the Complainant wrote to the District Director stating that the Complainant had repeatedly expressed its desire to negotiate the formulation and implementation of the plans for the move and its impact on the employees and that it had a right to negotiate on those matters, and asserting that the Respondent could not make the move "until all issues concerning the impact and implementation of the move on bargaining unit employees are resolved." 2/ Labor-Management meetings were held approximately weekly thereafter until some time in August, approximately a dozen meetings in that period, in which the projected move was discussed. The Complainant persistently said they were "negotiating" and the Respondent persisted in referring to the meetings as "consultations". 3/ In June 1974 the Respondent prepared Moving Day Status Report #2 and sent it to the union for its comments before distributing it; the union refused its comments because it insisted on negotiating instead of consulting or conferring. 4/ The same happened in July with respect to Moving Day Status Report #3. The Complainant was afraid of a ploy in which it would be trapped into consulting and later when it tried to negotiate would be faced with an argument that it had waived its right to negotiate by having consulted. 5/ (No such argument was ever

1/ Tr. Vol. 1, p. 104.

2/ Exh. C 1.

3/ This was before th F.L.R.C. Report and Recommendations on the 1975 Amendments to Executive Order 11491, as amended, in which the Council clarified the terms "negotiate", "meet and confer", and "consult", section V, 3, pages 41-42.

4/ Tr. Vol. 1, pp. 38-40; Exh. C 3.

5/ Tr. Vol. 1, pp. 38-39.

made in this case.) On one occasion the union refused to discuss an item the Respondent had listed on the agenda as a consultation item; the union stated it would listen to management's comments but would not consult. 6/

In the course of these May-August discussions the union expressed concern about many areas and made suggestions, none of them in writing and few of them specific. These pertained, primarily, to dissatisfaction with the open area concept and decision. With respect to that the Respondent stated that matters were too far along for that to be changed except perhaps for some slight modifications. The union persisted and urged, among other things, that revenue agents should have separate offices with not more than two revenue agents in an office for efficiency of operations. The Respondent demurred. Revenue agents were not part of the unit represented by the Complainant but the Complainant wanted to talk about their facilities from the point of view of efficiency of operations and because, while those agents were not part of the unit, many of them were members of the union.

The union raised a large number of other matters about which it was concerned and on some of which it had suggestions, seldom specific and never in writing, although it insisted that these were negotiations and not just consultations. Among them were such matters as possible problems about the adequacy of elevator service, working hours, the security of women's wash-rooms, whether the toilet facilities complied with city regulations, the furnishing of refrigerators, fire safety, the availability of electrical outlets for coffee pots, the adequacy of the number of conference rooms, the number of telephones per employee, the availability of lockable desk drawers or filing cabinets especially for women's bulky pocketbooks, the assignments of overtime work and pay after the actual move began in July 1974, the adequacy and currency of blueprints shown them, and the like. The Respondent never refused to discuss any of these matters. It acceded to some of the suggestions and satisfied some of the concerns expressed by the Complainant, but the union felt aggrieved because such accessions were not made pursuant to written agreement. The union never asked for a written agreement.

In August 1974 the union felt frustrated and invoked the services of the Federal Mediation and Conciliation Service. The first mediation session was held on August 19, 1974 and was a protracted day of mediation; it began in the morning

6/ Tr. Vol. 1, pp. 38-39.

and continued until about 10:00 P.M. Except for joint mediation for an hour or so at the beginning and a brief joint session at the end of the day, the mediation sessions were separate mediation. Near the end of the day the mediator suggested that the Complainant reduce its proposals to writing and submit them to the Respondent. The next day the Complainant did so. Later in August the FMCS conducted further mediation, both separate and joint. Management proposed that mediation be terminated and the parties return to bilateral conferences. Nothing productive eventuated from that day of mediation.

On September 27, 1974 the parties met to confer on the union's written proposals. The move had begun in July, was performed over weekends, and was completed the Labor Day week-end in 1974. It was what transpired on that day, September 27, 1974, that is the sole subject of the complaint in this case. 7/

There were eighteen proposals, some of them rather general and some still seeking specified working conditions for revenue agents (who were not in the unit represented by the union). 8/ Management stated that fourteen of the proposals were not negotiable and four were negotiable, and stated that it would negotiate the four negotiable proposals if the union would agree that the other fourteen were not negotiable. The union refused and said it would (and later did) submit the fourteen proposals to the Federal Labor Relations Council for determination of their negotiability. The Respondent did, however, immediately confer with the Complainant on all the proposals, both those considered by it to be negotiable and those considered non-negotiable.

With respect to the non-negotiable items the Respondent discussed them with the Complainant to obtain clarification and offered to assist the Complainant in rephrasing them to bring them within the area of negotiability. The union declined, and said it would submit them to the Council.

The four proposals considered negotiable by the Respondent were the adequacy of electrical outlets for coffee pots to serve all employees, the fire safety of the new building, a lockable drawer or file cabinet for all employees, and a refrigerator on each floor for the use of the employees.

7/ Exh. AS 4.
8/ Exh. C 5.

John E. Swan, the Respondent's Personnel Officer, had been the Chief Management spokesman since September 9, 1974. With respect to the availability of electrical outlets for coffee pots, he said he did not know of any employees who wanted one and did not have it, and if the union would tell him of any employee who wanted such an outlet and did not have one he would remedy the situation. The union did not advise him of any such deficiency. Management did not offer to embody that commitment in a written agreement, nor was it asked to do so.

With respect to a lockable desk or file drawer, management said it thought every employee had one. Swan stated that if any employee did not have one and wanted it he or she should ask the appropriate supervisor for one and if the request was not satisfied that way the union should communicate with him and he would see to it that the employee would receive one. The union did not, then or thereafter, notify Swan of any employee who was without a lockable drawer. Management did not offer, nor was it asked, to embody that commitment in a written agreement.

With respect to the fire safety of the building, the union's proposal was that "The Employer will assure an adequate fire alarm system to protect the safety of employees." Swan explained that the new building was considered fireproof with an adequate fire alarm system and that the Respondent had no control over the building or its equipment. The Complainant did not point to any inadequacies in the fire alarm system or to any way it could be improved.

The fourth proposal that was considered negotiable was that management make available on each floor a 17-foot refrigerator for the exclusive use of employees. This was discussed at some length, management raising questions of maintaining sanitary conditions around the refrigerators, the possibility of thefts of the contents, the responsibility for defrosting, and possible budgetary problems which would be looked into. The budgetary problem was later looked into and it was learned that the Respondent's appropriation was more restrictive than that of most agencies and had no account that permitted the purchase of such refrigerators and the union was so notified.

At no time, despite Swan's statement near the beginning of the meeting on September 27 that it would negotiate on the four admittedly negotiable proposals only if the union would agree that the other fourteen proposals were not negotiable, did management refuse to discuss any of the proposals, both those it considered negotiable and those it considered not negotiable. The meeting lasted about seven hours. At the conclusion of

the meeting that day Swan stated management was prepared to resume discussions at any time the union requested it to try to resolve the remaining differences. The union did not request another meeting and on October 16, 1974 sent to the District Director the unfair labor practice charge.

Discussion and Conclusions

The meetings and discussions described above took place before the Federal Labor Relations Council Report and Recommendations in January 1975 on the 1975 Amendments of Executive Order 11491 as amended, in which the Council clarified the meaning of the terms "negotiate", "consult", and "meet and confer". Sec. v, 3, pages 41-44 of the Report and Recommendations. Perhaps for that reason the parties, in their meetings, discussions, and correspondence prior to September 27, 1974 appear to have taken adamant positions with both feet firmly planted in mid air on the nature of their meetings and discussions.

But the nature of the meetings and discussions prior to September 27, 1974 and their conduct furnish only background to this case and are not issues to be determined in this proceeding. The complaint is based solely on what happened on September 27, 1974. 9/ It asserts that the Respondent violated Sections 19(a) (1) and (6) of the Executive Order by its alleged refusal to negotiate on proposals concededly negotiable until the resolution of the negotiability or non-negotiability of the proposals management said were non-negotiable. 10/

It is by now well-established that when a change in operations is decided to be made the agency upon request of the recognized exclusive representative is obligated to negotiate or "meet and confer" with the representative concerning the implementation and impact of the change. 11/ It is conceded by the Respondent that near the beginning of the meeting on September 27, 1974 on the eighteen proposals submitted by the Complainant, the Respondent stated that it would not negotiate on the four concededly negotiable proposals unless the Complainant would concede that the other fourteen proposals were non-negotiable or until the negotiability of the fourteen proposals was determined.

9/ Exh. AS 4, section 3.

10/ Ibid.

11/ See, e.g., United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289; Office of Economic Opportunity, Region V, Chicago, A/SLMR No. 251; U.S. Department of the Interior, Bureau of Indian Affairs, Data Center, Albuquerque, N. Mex., A/SLMR No. 341.

Such a position by management, standing alone, would constitute a violation of Section 19(a)(6). Management does not have the right to condition negotiations on concededly negotiable proposals on the representative surrendering other rights, in this case the right granted by Section 11(c) of the Executive Order to obtain a determination of the negotiability of allegedly non-negotiable proposals. Such conduct would constitute a violation not only of Section 19(a)(6) but also of Section 19(a)(1), not only derivatively but directly.

The Respondent contends that its conduct was not in violation of Sections 19(a)(1) and (6) for two reasons.

The first argument of the Respondent is that the union's eighteen proposals constitute a "package", that "package bargaining" is recognized as a legitimate technique in the Federal sector, and that it was entitled to know which parts of the package were negotiable before bargaining on the package. I find this argument unpersuasive and the Respondent's citations of precedent inapposite.

The eighteen union proposals were not submitted as a package, nor were they innately of that nature. Except for the fact that all or most of them arose from the move to new quarters, the eighteen proposals were in large part unrelated to each other. There was no likelihood and little if any possibility that concessions by one side on some of them could be traded off for concessions by the other side on others. Neither side in fact treated the eighteen proposals, or counter-proposals with respect to some of them, as an integrated package of proposals. In such circumstances any concepts of "package bargaining" and its techniques and rights inherent therein or arising therefrom are irrelevant.

However, the second argument of Respondent in support of its position that its conduct was not an unlawful refusal to negotiate is persuasive. A review of the evidence convinces me that whatever Respondent may have said at the beginning of the September 27 meeting, and however the parties may have characterized their conduct, ^{12/} what actually took place did in fact satisfy the Respondent's obligation to negotiate. ^{13/}

Although Swan stated near the beginning of the meeting that management would not negotiate on the four negotiable

^{12/} NASA, Kennedy Space Center, A/SLMR No. 223.

^{13/} See Decision of the Administrative Law Judge in Office of Economic Opportunity, Region V, Chicago, A/SLMR No. 251, p. 10.

proposals unless the union conceded the non-negotiability of the other fourteen proposals, when the union promptly refused to make such concession the Respondent promptly continued the "meeting" and "conferred" on the four proposals and others. Such temporary and fleeting aberration from the obligation to negotiate is not a refusal to "meet and confer" in violation of the Executive Order.

In Vandenberg Air Force Base, 439 2d Aerospace Support Group, FLRC No. 47A-77, Rpt. No. 79, when the parties reached an impasse on one item the Activity stated that it would not continue the negotiations on 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 this case the statement that the Respondent would not negotiate was followed, not the next day but the same day at the same session, by the continuation of the discussions. If what followed constituted negotiations, it follows a fortiori from the Vandenberg Air Force Base case that such a micro-interruption of the conference, not perceptible to the human eye, was not a violation of the obligation to bargain.

What followed did comply with the Respondent's obligation to negotiate. It acceded to two of the four negotiable proposals, the request for electrical outlets for coffee pots and the request for lockable drawers. That it did not put such agreements in writing is without significance; it was not asked to do so. With respect to the request for refrigerators, the parties discussed several problems with relation thereto including possible budgetary problems which the Respondent said it would investigate. It conferred on that subject as long as the Complainant wanted. That was all the negotiating that was possible that day, until the budgetary problem should be resolved. ^{14/} With respect to the fire alarm system, the union's proposal was quite vague. It was simply that management "assure an adequate fire alarm system". Management stated that the building was of modern fire-proof construction, that it believed the fire alarm system was modern and adequate, and that it did

^{14/} After the meeting on September 27 management looked into the budgetary question, was informed that their appropriation did not include any account that could be used to purchase refrigerators and so advised the union.

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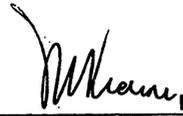
not have control of the operation of the building which was operated by General Services Administration. The Complainant did not point to any defect or deficiency in the fire alarm system or suggest any improvement. In such circumstances, it is not perceived what further negotiating on that subject could have been expected of the Respondent, nor does the Complainant describe any.

At the conclusion of the seven-hour meeting that day, Swan, the chief management spokesman, stated that management was willing to resume discussions any time the union requested it. The union did not request another meeting. In such circumstances the union cannot be heard to complain that there was insufficient negotiating. 15/ By not requesting further conferring and instead initiating an unfair labor practice proceeding predicated on a statement by management near the beginning of the seven-hour session, Complainant appears to have been more interested in vindicating its position concerning that statement than in resolving any remaining differences between the parties. See Vandenberg Air Force Base, 4392d Aerospace Support Group, F.L.R.C. No. 74A-77, Rpt. No. 79.

I cannot avoid the inference that in the period May through September 1974 the Complainant appears to have been engaging in a fencing match with a major objective of trying to find the Respondent in an unfair labor practice. Games are fun, and sometimes develop character and qualities of leadership, and should be encouraged -- on the playing fields of Eton and Camp Randall, not in proceedings under the Executive Order.

CONCLUSION

The Complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: April 7, 1976
Washington, D.C.

15/ Internal Revenue Service, Fresno Service Center, A/SLMR No. 489, Decision of the Administrative Law Judge, pp. 13-14.

.....
In the Matter of
DEFENSE PROPERTY DISPOSAL SERVICE
DEFENSE SUPPLY AGENCY
ELMENDORF AIR FORCE BASE, ALASKA
Respondent
and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1668, AFL-CIO
ANCHORAGE, ALASKA
Complainant
.....

CASE NO. 71-2996

Jack Fairclough, Esq.
Counsel, Defense Depot
Ogden, Utah 84401
For the Respondent

Burton Goldberg
National Representative
American Federation of Government
Employees, Local 1668
For the Complainant

Before: THOMAS W. KENNEDY
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on November 22, 1974 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, San Francisco Region, a hearing in the within matter was held before Administrative Law Judge Thomas W. Kennedy 1/ on January 23, 1975 in Anchorage, Alaska.

1/ Judge Kennedy died subsequent to the close of the hearing herein. Thereafter, the undersigned was duly designated and assigned to prepare a recommended decision based on the entire record in this matter.

The proceeding herein was instituted under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on July 15, 1974 by American Federation of Government Employees, Local 1668, (herein called the Complainant) against Defense Supply Agency, Elmendorf Air Force Base, (herein called the Respondent). It was alleged that Respondent violated Section 19(a)(1),(2),(5) and (6) of the Order by (a) refusing to abide by the recognition accorded Complainant at Elmendorf Air Force Base, (b) denying employees their rights under an existing contract between Complainant and the Elmendorf Air Force Base, (c) refusing to meet with the Complainant as the bargaining agent of the employer at the Base, and (d) through its representative, Forrest C. Harris, stating publicly that the Complainant and employees have no rights and privileges.

Respondent filed a response to the complaint herein in which it denied having violated the Order. Further, it was averred that in September 1972 it was announced by the Assistant Secretary of Defense that the Defense Property Disposal Program, formerly operated by the Army, Navy, Air Force and Marine Corps, was being assigned to the Defense Supply Agency; that the functions of these groups were then transferred to the Defense Supply Agency (hereinafter called DSA); that the former employees were placed under a separate and distinct organization not subject to prior union contracts; that while the issue was resolved on February 28, 1974 by the Assistant Secretary's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, MD A/SLMR No. 360, the Federal Labor Relations Council granted review of said case on May 3, 1974 and stayed the implementation of A/SLMR No. 360. Respondent contended that since the allegations in the complaint herein stem from the failure to comply with A/SLMR No. 360, which DSA is not required to follow, no basis exists for this proceeding.

Both parties were afforded full opportunity at the hearing to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, the parties filed briefs 2/ which have been duly considered.

2/ In view of the stipulation by the parties re the applicability of A/SLMR No. 360 to the instant case, the undersigned granted the parties additional time to file briefs after the Supplemental Decision and Order in A/SLMR No. 360 was issued on February 17, 1976.

Upon the entire record in this case, from all of the testimony and evidence adduced at the hearing, and in light of the determinations made by the Assistant Secretary and the Federal Labor Relations Council in A/SLMR No. 360 regarding the issue posed herein, I make the following findings, conclusions and recommendations:

Findings of Fact 3/

1. As evidenced by the memorandums of agreement between complainant and Elmendorf Air Force Base, Alaska, dated June 3, 1973, Local 1668 was the recognized bargaining representative of all Air Force Civil Service Employees serviced by the Central Civilian Personnel Office, Elmendorf Air Force Base with specified exclusions from such unit.

2. In August 1972, the Assistant Secretary of Defense authorized the transfer of all Department of Defense surplus property operations from the military branches to the Defense Supply Agency (DSA). On September 11, 1972 the Defense Property Disposal Service (DPDS) was established under DSA and it was composed of Defense Property Disposal Offices (DPDO's). Employees performing surplus personnel property disposal functions in the Army, Navy, and Air Force, and in DSA, were transferred to the new DPDS within the DSA. This action amounted to a "transfer in place" since the transferred employees, although under DSA, continued at the same duty stations performing the same duties with no change in job descriptions, classifications or grades. The DPDO employees were no longer employees of the military branches, but were deemed to be employees of the DSA.

3. This reorganization resulted in the establishment of three conus regions in the United States. One of these is headquartered at Ogden, Utah - the Defense Property Disposal Region, Ogden. The DPDO at Elmendorf Air Force Base, composed of 33 employees, became a part of the Ogden Region and came under the jurisdiction of the Civilian Personnel Office, Defense Depot Ogden on May 23, 1973.

3/ At the hearing herein the parties stipulated that the issue of recognition by Respondent as to Defense Property Disposal Office employees would be resolved by the final Decision in A/SLMR No. 360; that the parties would, however, litigate other acts alleged as unfair labor practices herein.

4. In addition to Elmendorf Air Force Base, there are 40 other DPDO's within the Ogden Region, all of whose employees were formerly an integral part of the Army, Navy, and Air Force installations in western U.S. and Alaska. The said DPDO Ogden received 26 individual petitions for representation within the region. Two were withdrawn when the AFGE council of Locals No. 205 filed a representation petition for a region-wide unit of all DPDO's. No unit determination has been made thereof.

5. Record facts show that surplus property at the Elmendorf Air Force Base, valued at 18-20 million dollars, had not been inventoried for 15 years; that the Air Force concept of salvage was different from the DSA's; and that problems existed at Elmendorf with respect to the surplus property operations.

6. Forrest C. Harris was assigned on April 23, 1974 by the DPDO - Ogden to correct the problems at Elmendorf, and he was instructed to inventory, catalog and prepare the property for sale within a short period of time.

7. In May 1974, shortly after his arrival, Harris called a meeting of all personnel at Elmendorf to discuss the conditions of surplus property at his base. He stated that whatever steps were needed to straighten out the situation would be taken; that he was there as a "hatchet-man" to correct the deficient operations, that the door was always open and if employees did not like his methods they could leave their jobs. Harris commented on the inadequacy of the work done and the failure to conduct an inventory of the yard property. He stated that the people causing the problem could be weeded out.

8. On May 23, 1974 employee Dianne M. Thomas wrote the DPDO Region, Ogden complaining of the personnel situation at Elmendorf. She criticized Harris and M/Sgt. W.H. Penton in their treatment of her at the base. About one week later Arthur Beardsly, trustee of the local, and Ross E. Blodgett, job steward, went to see Harris re Dianne Thomas' complaint since the latter asked the union to represent her in that regard. Both at that meeting, and subsequent ones in June 1974, Harris remarked that the employees had no union nor any representation and thus no complaint; that he would have nothing to do with the union; that he met with the union officials out of courtesy and not because of obligation. Testimony by Blodgett reveals that at one meeting Harris claimed that people were trying to down grade his character and he made some comment about suing the union.

9. Record facts show Harris stated that to accomplish the tasks he would cancel leave, require overtime, and insist upon work being performed during lunch times. However, these impositions were never put into effect and employees were never required to abide thereby.

10. At the request of the National Office, American Federation of Government Employees, Respondent continued to withhold dues from employees' pay, and has continued to do so for all union members who had valid dues withholding authorization in effect on May 20, 1974.

Conclusions

Complainant contends that Respondent has violated the Order in two prime respects: (1) by refusing and failing to recognize Local 1668 as the bargaining agent of the DPDO employees at Elmendorf Air Force Base, and by correlatively refusing to negotiate with said union as to grievances or other complaints voiced by said employees; (2) threatening union's officials and interfering with the rights of such employees by stating to them that they had no union or representative at the base.

(1) In respect to Respondent's obligation to recognize Local 1668 and negotiate with it as the bargaining agent of DPDO employees at the base, the parties hereto stipulated that the ultimate decision in A/SLMR No. 360 would be controlling. To that extent they agreed that the cited case would be determinative as to whether Respondent violated the Order by refusing to abide by the negotiated agreement and to recognize Complainant as the representative of the Defense Property Disposal employees at Elmendorf Air Force Base.

On February 28, 1974 the Assistant Secretary issued his original decision in A/SLMR No. 360. In that case Lodge 2424, IAM, AFL-CIO, was certified on July 29, 1970 as the bargaining representative of all wage grade employees assigned to the Aberdeen Proving Ground Command. On August 9, 1972 the parties thereto executed a two year agreement covering said unit. There were 15 wage grade employees who performed property disposal functions at Aberdeen, Md. and were part of the activity-wide unit at the Command. After September 11, 1972, when the Defense Property Disposal Service was organized, these 15 employees were "transferred in place" into the DPDO at Aberdeen. However, they continued to work in the same areas and perform the same functions as they did under the command of the Army. The DSA, DPDO, Aberdeen Proving Ground, refused to continue to accord recognition to the IAM lodge for those supply employees transferred to the DPDO at Aberdeen and failed to honor the existing negotiated agreement covering these employees.

In its initial decision the Assistant Secretary held that the DSA, DPDO, Aberdeen Proving Ground, violated 19(a)(5) by failing to accord recognition to IAM and to honor the negotiated agreement between the Army and IAM. On appeal to the Federal Labor Relations Council the latter disagreed with the concept and criteria spelled out by the Assistant Secretary in respect to his enunciated doctrines of both "co-employer" and "successorship". It remanded the case to the Assistant Secretary for appropriate action. A supplemental decision in A/SLMR No. 360 was issued on February 17, 1976 by the Assistant Secretary in which he found that the recognized unit was not transferred substantially intact to the gaining employer, since only a small segment of those employees of the recognized unit was involved in the transfer. Accordingly, he found the DSA, DPDO, Aberdeen Proving Ground was not a successor employer. Moreover, since the Council rejected the co-employer doctrine fashioned by the Assistant Secretary, and there was no basis for finding Respondent to be a successor employer, the supplemental decision held that the DSA, DPDO, Aberdeen Proving Ground was under no obligation to accord recognition to the IAM lodge with respect to the DPDO employees. The complaint was dismissed.

The transference of the Air Force employees herein who performed property disposal functions, to the DSA was part of the same reorganization resulting in the transfer of similar employees from the Army to the DSA in A/SLMR No. 360. In the instant case this transfer likewise involved only a small segment of the established and recognized unit. It is clear that under supplemental A/SLMR No. 360 the Respondent herein is not deemed a successor employer nor a co-employer; that, as to the DPDO employees transferred to DSA, Respondent is thus not obliged to recognize Complainant as their bargaining agent nor abide by the negotiated agreement between Complainant and the Elmendorf Air Force Base Command. In agreement with Respondent, I would conclude that the refusal by Harris, as the management representative, to discuss the grievance of Dianne Thomas or others with the Union, as their representative, was not violative of the Order; that such grievance should be properly handled through agency grievance procedures. Accordingly, I conclude that Respondent did not violate Section 19(a)(1), (2), (5) and (6) of the Order by failing and refusing to recognize Complainant herein as the representative of the transferred DPDO employees and to honor the existing negotiated agreement under which they were included prior to the transfer.

(2) In respect to remarks made by Harris upon entering his duties and meeting with employees, it is contended that the statements to employees were coercive in nature and were violative of the Order. I am persuaded that the comments by Harris relating to his function as "hatchet man" were referable to an intention by him to improve the surplus disposal condition at the base. His implied threats to transfer individuals responsible for the condition out of the base, or his suggestion that individuals dissatisfied with his corrective methods could quit, were not motivated by anti-union considerations. Rather, as I conclude, they were grounded on an intention to rectify the deficient operations of the DPDO at Elmendorf and to inventory as well as organize the surplus property during his assignment thereat.

Likewise am I convinced that the threats to cancel leaves, impose overtime work, and require employees to work during lunch time, were made by Harris in an effort to induce realization of his program concerning the surplus property. While I do not agree with Respondent that the failure to put into effect these changes militates against finding a threat to do so to be coercive, I conclude such threats ^{4/} were in no manner designed to interfere with the employees' union organization or membership therein. Harris may have promised harsh measures in order to accomplish his task, but unless they were motivated by union animus, or calculated to interfere with rights assured by the Order, such will not be characterized as interference, restraint or coercion. The record will not support a conclusion that these statements made by Respondent's representative were so illegally motivated. This is also true with regard to the remark by Harris that the transferred employees had no union representative at the base after the reorganization of DPDO employees. I do not view this statement as conveying the idea that such employees were precluded from joining or being represented by a labor organization. This expression by Harris, perhaps clumsily stated, indicated that these DPDO individuals were not part of the union so represented by Complainant and the latter could not speak for them to management. Accordingly, I conclude that the remarks and statements by Harris did not constitute a violation of 19(a)(1) of the Order.

^{4/} Neither do I agree that Respondent's threats could not be coercive if not made to unit employees. Employees may well be interfered with or coerced although not part of the unit represented by a particular labor organization.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint against Respondent herein be dismissed in its entirety.


WILLIAM NAIMARK
Administrative Law Judge

DATED: 28 APR 1976
Washington, D.C.

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 :
 :
 :
 NATIONAL TREASURY EMPLOYEES :
 UNION, CHAPTER 17; and :
 THOMAS SCHAFFER :
 :
 Complainants :
 :
 and :
 :
 DEPARTMENT OF THE TREASURY, :
 INTERNAL REVENUE SERVICE, :
 UTAH DISTRICT, :
 SALT LAKE CITY, UTAH :
 :
 Respondent :

Case No. 61-2525(CA)

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For the Complainants

Robert Wilson, Esquire
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Internal Revenue Service
Office of the Regional Counsel
Two Embarcadero Center -- Suite 900
San Francisco, California 94111

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 (hereafter referred to as the Order), a complaint was filed on December 9, 1974, by the National Treasury Employees Union, Chapter 17, and Thomas Schaffer (hereafter referred to in combination as the Chapter or Complainants) against the Department of the Treasury, Internal Revenue Service, Utah District (hereafter referred to as Respondent). Said complaint alleges that Respondent interfered with the rights of Thomas Schaffer to serve as a union official and interfered in the internal affairs of the union in violation of Sections 19(a)(1) and (3), respectively.

In accordance with the notice of hearing issued on June 25, 1975, by the Regional Administrator for Labor-Management Services Administration, Kansas City Region, a hearing in this matter was held before me on September 30 and October 1, 1975, in Salt Lake City, Utah. The post-hearing briefs filed by the parties in support of their respective positions have been considered and are hereby made a part of the record.

Respondent's motion in the alternative that a two-page attachment to Complainants' brief be stricken is hereby granted. Leave to submit post-hearing evidence was not requested or given and the filing of said attachment was improper in the absence of leave to do so. It is stressed that no consideration whatsoever was given by the undersigned to the attachment or to any of the statements in Complainants' brief referable thereto.

Based upon the entire record herein, including the stipulations of fact by the parties, the evidence adduced, and my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation:

Findings of Fact

Since approximately 1970 Thomas Schaffer has been very active in union affairs and from July, 1972, to July, 1974, served as president of Chapter 17. At the time he assumed the presidency there was for the first time a provision in the collective bargaining agreement for a union

steward. It was union practice for the steward to be appointed by the president. 1/ Schaffer appointed himself steward and during his tenure of office he served in the dual capacity of president and steward. Ron Harrington served as the executive vice-president during Schaffer's presidency.

Long before the election of officers to be held on May 8, 1974, Harrington asked Schaffer if he intended to run for another two-year term as president. Harrington's own decision as to running for president depended on whether Schaffer was going to run. Harrington had no intention of opposing Schaffer because he thought Schaffer would be an unbeatable candidate in view of his popularity with the members and his demonstrated competency as a union leader. At that time Schaffer was undecided about what he was going to do. He definitely wanted to serve another term as steward because he felt he was the only person in the Chapter having the expertise to perform those duties. However, he was unsure about another term as president because he found during the time he was serving as both president and steward that the combination of those duties was too much for one person. 2/ As early as the beginning of 1973 there were discussions between Schaffer and Harrington concerning Harrington's running for president and then appointing Schaffer steward, but these discussions were "cat-and-mouse" maneuvers with neither man committing himself to the other.

It was not until sometime in January or February, 1974, that Schaffer definitely decided not to seek re-election after he had received Harrington's assurance that upon being elected president he would appoint Schaffer steward. Prior to this time there was only an "understanding" between the two men that this would be the game plan. Despite his agreement to appoint Schaffer steward and his intention to do so, Harrington continued to have reservations about it because he wasn't

1/ Prior to April 4, 1974, it was just unwritten policy for the president to appoint the steward, but on that date said policy was adopted and became part of the by-laws of the union.

2/ Presidential duties were the administrative operation of the Chapter. The steward's duties were primarily in the area of handling and litigating grievances or complaints brought by the employees.

sure that Schaffer would do the job the way he wanted it done. He wanted to appoint himself steward as Schaffer had done because he felt that to function as head of the union in the Salt Lake District included being the steward. On the other hand, there was the practical consideration that Schaffer as a member of the bargaining unit would be allowed administrative time to perform those duties whereas Harrington, who was not a member of the bargaining unit, would not be allowed such time. 3/

On May 8, 1974, Harrington was elected president and Ted Pierce was elected executive vice-president. They were to begin serving in these positions on July 1.

On May 14 Harrington conferred about a tax matter with his boss, Evan Wride, Chief of Intelligence Division, at the end of which conference Wride said it was his understanding that Harrington was going to appoint Schaffer. He mentioned that at the management meeting he had attended that day there seemed to be a consensus of opinion that Schaffer should not be appointed. The meeting lasted 10-15 minutes and about 15 seconds was spent on the steward subject.

The following day Harrington saw Roland Wise, District Director of the Utah District. When their business discussion ended Harrington inquired as to the reasons for management's feelings that Schaffer should not be appointed steward. The Director responded that one reason was that Schaffer was an excellent revenue agent, but for the past several years had devoted a lot of time to the union and he would like to see him spend 100% of his time being an agent. The other reason was that the steward position was a personal development type job and he would like to see other employees at IRS have the opportunity to serve in that type of position. Harrington testified that he understood these statements as being the Director's personal views and not that of management.

The Director went on to say that he did not really care who Harrington appointed because he was willing to work with anyone who was appointed. Schaffer testified that in the performance of his steward duties there had always been a good and cordial relationship between

3/ Harrington was a special agent in the Intelligence Division and Schaffer was a revenue agent. Revenue agents were included in the bargaining unit but special agents were not. Under the collective bargaining agreement only members of the bargaining unit were allowed administrative time (6 hours per pay period) to perform the duties of steward.

himself and the Director. Harrington told the Director about his own desire to be steward to which the Director responded that there would be no discrimination between a special agent and a revenue agent -- that as far as he was concerned there was no difference. Harrington assumed from those comments that he would be given official time to perform steward duties the same as Schaffer had which was an important consideration, but he later learned he was wrong in that assumption.

Harrington testified that he did not construe either of the foregoing conversations as an attempt by either Wride or the Director to influence his selection of steward. He stressed that even after those conversations he still fully intended to appoint Schaffer steward.

It is important to note at this point that on February 27, 1974, the Chapter authorized funds for two persons (the president-elect and the person who was going to be steward) to attend the Union District Conference in New Orleans on May 22. It was determined that if either of these men could not attend then the executive vice-president would go as alternate. During the middle of March registration fees were paid and reservations were made in the names of Harrington and Schaffer.

On May 16 Harrington informed Schaffer he (Harrington) would not be able to go to the conference because he had to be in court on one of his tax cases and that he wanted Pierce (the alternate) to go in his stead. Schaffer insisted that Harrington and not Pierce should go and said that if Harrington did not go he, Schaffer, would go alone. After repeating that it was impossible for him to attend and that Pierce should go in his place, Schaffer said that Pierce would not go and stated categorically, "this is the way it's going to be." (TR. 182). According to Harrington, it was at this moment that the full realization came to him that Schaffer would be intent on doing things his way without regard for his opinion and that if he appointed Schaffer steward he would undermine his authority as president. He, therefore, told Schaffer he was not going to appoint him steward -- that he was going to appoint himself. He also told Schaffer about his conversations with Wride and the Director and about his understanding that he would be allowed official or unofficial time to perform the duties of steward. 4/

4/ On May 21 Schaffer spoke with the Director about the allowance of time *inter alia*, and the Director said that the time would and could not be allowed. Schaffer so informed Harrington the same day and Harrington said, "Well, if that's the case that would make a difference in my decision." (TR. 77).

On May 20 Schaffer told Harrington that unless he appointed him steward he would recommend that an unfair labor practice charge be filed against management. Harrington responded that he was not going to be bullied, that he would run the Chapter as he saw fit, and that if Schaffer, Tobias and Connery (national union officials) felt so inclined they could remove him from office. The same day and again the following day Ted Pierce, at the behest of Schaffer, tried to convince Harrington to appoint Schaffer steward. Harrington refused to do so and did in fact appoint himself steward.

Based upon charges filed by Schaffer in December, 1974, Harrington was removed as president by a majority vote of the members at a meeting on January 7, 1975, despite Harrington's defense that his conversations with Wride and the Director had no influence whatsoever on his decision not to appoint Schaffer steward. The charges were presumably made on the basis that Harrington had been guilty of malfeasance in office by allowing himself to be influenced by management in matters involving internal union affairs.

Upon Harrington's removal, Pierce became president and named Schaffer steward.

Conclusions of Law

Complainants have not established to my satisfaction that the views concerning Schaffer as steward which were expressed to Harrington by Wride and the Director on May 14 and 15, 1974, respectively, constituted an interference by management with the rights of Schaffer to serve as a union official or an interference by management in the internal affairs of the union in violation of Sections 19(a)(1) and (3), respectively.

When the conversations occurred it was understood by everyone that Harrington had already decided to appoint Schaffer steward. The comments by Wride and the Director were made only with respect to the choice Harrington had made and cannot logically be construed as a suggestion that Harrington should choose another. It is clear that management did not really care who was appointed steward and that management would work amicably with whomever was made steward, just as they always had in the past.

The Director's views concerning Schaffer as steward were made pursuant to a direct inquiry by Harrington. No conversation he had with either Harrington or Schaffer about union matters was initiated by the

Director. The conversation with Harrington was initiated by Harrington more as a matter of curiosity than anything else. He was not seeking the Director's advice because he had already decided upon his choice.

There is no indication in this case that Wride or the Director were attempting to influence Harrington's decision, nor is there any indication that their remarks either directly or indirectly influenced Harrington's decision not to appoint Schaffer steward. There were no threats or promises by management. The only threats in this case were those made to Harrington by Schaffer that if he were not appointed steward he would recommend the filing of unfair labor practice charges.

Harrington is the only one who really knows why he decided not to appoint Schaffer and I accept his testimony that his conversations with Wride and the Director in no way affected or influenced his decision. I believe his emphatic statement that even after those conversations it was still his intention to appoint Schaffer steward.

The domineering and overbearing behavior by Schaffer during the heated discussion on May 16, 1974, in my opinion justified Harrington's fears that if he appointed Schaffer steward he would in effect continue to control the Chapter and so undermine Harrington's position that Harrington would be head of the Chapter in name only. I am persuaded that the sole reason Harrington decided not to appoint Schaffer steward was his fear of eventual complete domination. I believe it was a reflex survival-type decision completely removed from and in no way associated with the discussions had with Wride and the Director.

I do not agree with the thrust of Complainants' argument that mere comments by management with respect to the selection of a union official is violative of the Order where, as in the instant case, such comments were not intended or designed to persuade or influence the person having the responsibility of selection and where such comments in no way affected the selection made.

It is concluded that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (3) 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
JOYCE CAPPS
Administrative Law Judge

Dated: May 27, 1976
Washington, D. C.

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 :
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U.S. DEPARTMENT OF THE ARMY :
U.S. ARMY TRAINING CENTER ENGINEER :
and FORT LEONARD WOOD, :
FORT LEONARD WOOD, MISSOURI :
 :
Respondent :
 :
and :
 :
NATIONAL ASSOCIATION OF GOVERNMENT :
EMPLOYEES, LOCAL R14-32 :
 :
Complainant :
..... :

Major R. Aldinger
Office of Staff Judge Advocate
Fort Leonard Wood, Missouri
For the Respondent

Paul J. Hayes
Belleville, Illinois
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
Statement of the Case

Pursuant to a complaint filed April 28, 1975 alleging of that Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood (hereinafter called the Respondent Activity) violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, the Regional Administrator for the Kansas City Region issued a Notice of Hearing on Complaint on July 10, 1975. The gravamen of the complaint was that the Respondent Activity eliminated a position held by a civilian employee, James Chaffin, at the Non-Commissioned

Officers' (NCO) Club because the employee had been engaged in activities on behalf of National Association of Government, Local R14-32 (hereinafter called the Complainant Union).

A hearing was held in this case on October 21, 1975 at Fort Leonard Wood, Missouri. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by both parties and have been duly considered in arriving at the decision in this case.

Upon the entire record in this matter, including my observation of the witnesses and their demeanor while testifying, I make the following:

Findings of Fact

The Complainant Union was certified on July 10, 1974 as the exclusive representative of two units of civilian employees of the non-appropriated fund activities at Fort Leonard Wood. Included in the units represented by the Complainant Union were the civilians employed by the main NCO Club and its two annexes at the Post.

In July 1974, Sergeant-First Class Lawson was the branch manager of the main NCO Club. Although the Table of Distribution and Allowances (TDA) 1/ authorized six non-commissioned officers for the club system (four for the main club and one for each of the annexes), Lawson was the only NCO serving in this capacity at the main club. Because he was understaffed, Lawson prevailed upon Lieut. Col. Jimmy Norris, Chief of the non-appropriated fund division and the installation club manager, to authorize the hiring of a civilian employee to assist him. Colonel Norris testified that at the time he gave the authorization for the hiring of a civilian, he considered it to be of an emergency nature because of the scarcity of military personnel at the post capable of assisting in the club operation. He testified that he so informed Lawson, and instructed him to eventually work the newly hired employee into the NCO Club system--presumably into other civilian positions which were of a more permanent nature.

On July 15, 1974 Jim Chaffin was hired through the civilian personnel office as a supply clerk in charge of

1/ Respondent activities Exhibit No. 1.

kitchen supplies at the main NCO Club. Chaffin was hired on an indefinite full-time appointment. This was the most permanent type of appointment for civilian employees 2/ in the non-appropriated fund division.

Chaffin's duties consisted of maintaining a daily inventory of all food items in the kitchen, issuing food items and supplies to the chefs, requisitioning supplies and food items and making trips to the warehouse to secure needed supplies. He was responsible for knowing at all times the amount of supplies on hand, the quantity that had been dispensed and maintaining all items under a lock and key to prevent loss or pilferage.

Sometime in August 1974, Master Sergeant William Smith reported to the Respondent Activity and was assigned to the NCO Club. Because of his higher rank, Sergeant Smith became the branch manager and Sergeant Lawson became an assistant manager. Smith instituted stricter controls and new procedures over the stocks and supplies maintained in the club kitchen. One of the procedures eliminated the need for taking a daily inventory and provided for a more effective means of keeping track of the items at the club.

During the latter part of the summer of 1974, it was determined that the Complainant Union qualified as the "dominate union" to participate in conducting a survey for fixing the wage rates of wage-board employees at Scott Air Force Base in Belleville, Illinois. Glen Arrington, President of the Complainant Union, was given the responsibility for securing a team of five union members stationed at the post to assist as a data collectors for the survey. Chaffin was approached by Arrington and agreed to be one of the union members acting in this capacity. Sometime in October, after Chaffin accepted the assignment on behalf of the Union, Sergeant Smith told Chaffin that he was invaluable at the club and he bemoaned the fact that Smith would not be available during the time that he was participating in the wage survey. Smith wanted to know whether Chaffin's activities on behalf of the Union meant that he intended to become a union shop steward. After Smith's statement about how much he (Chaffin) was needed at the club, Chaffin called Colonel Norris in an attempt to be relieved of the survey responsibilities. Norris informed him, however, that he had to participate as planned.

2/ Other types of appointments for civilian employees were part-time, temporary and on-call.

The survey began the first week in November and lasted for approximately three weeks. On November 25, shortly after Chaffin returned to the Respondent Activity, he was drinking coffee with Sergeants Smith and Lawson. During the course of their conversation, Smith made a statement to the effect that Chaffin was becoming so involved with the Union that his job at the club would have to be abolished. Chaffin became concerned about the statement and reported it to the union president. Arrington promptly filed an unfair labor practice charge against the Respondent Activity based on Smith's comment to Chaffin. This matter was resolved by the parties with a letter of admonishment being issued to Smith by Colonel Burack, the Director of Personnel and Community Activities. 3/

Sometime in October 1974, First Sergeant Anderson reported to the Post and was assigned duties on a part-time basis at the NCO Club. This was subsequently changed to a full-time assignment at the club. On December 6, 1974 First Sergeant Holland was also assigned to the NCO Club as an assistant manager. Holland received this assignment because he had prior experience and training in the club system. Holland's duties involved the kitchen section of the club and his job description was identical with that of Chaffin. There is testimony in the record by Holland, Chaffin and Smith that Holland's actual duties in the club were the same duties which were being performed by Chaffin.

In early December 1974, Smith called Chaffin into his office and told him that his job was being abolished. Smith indicated that with the additional military personnel assigned to the NCO Club there was no longer any need for a civilian employee to handle the supply duties in the kitchen. 4/

3/ See Complainant's Exhibit Nos. 4a and 4b.

4/ Smith testified that as early as September he had orally recommended to Colonel Norris that Chaffin's position be abolished as a cost saving factor. He stated that he put this recommendation in writing in November because of the increase in military personnel. The military personnel was not charged to the club budget, but civilian employees had to be paid out of the funds earned by the club. Norris testified that although Smith made his recommendation in September, he did not act upon it until the later part of the year.

Chaffin felt that his job was being terminated by Smith because of his activities of the prior month in conducting of the wage survey of behalf of the Union. He informed the union president of his pending termination, and an unfair labor practice charge was filed against the Respondent Activity by the Union shortly thereafter.

On January 15, 1975 Colonel Norris directed that a survey of the club operation be conducted by his civilian administrative officer and an employee of the civilian personnel office. The results of the survey indicated that with the assignment of the military personnel and the anticipated assignment of another Sergeant to the NCO Club system on January 26, 1975 there was no justification for retaining Chaffin on the NCO Club staff. The survey also indicated that all of the duties being performed by Chaffin were duties which were being absorbed and would continue to be absorbed by the military personnel.

On February 7, 1975 Chaffin received official notification that his job would be abolished effective March 8, 1975. The official notification stated that due to "economy measures" his duties were consolidated with the duties of the Mess Steward which was occupied by assigned military personnel. After Chaffin's separation from service on March 8, 1975 he was instructed by the civilian personnel office to report to the post golf course for a job interview as a recreation aide. This job entailed working behind the counter of the club house, collecting green fees and selling golf equipment. Chaffin reported to the manager of the golf course and ascertained that the job was only a temporary position. He subsequently notified the civilian personnel office that he was not interested. He took the competitive examination to be placed on the register for a position in the appropriated fund area at the base, but at the time of the hearing on this matter he had not been called for employment.

Concluding Findings

The Complainant Union contends that Chaffin's job was abolished and he was separated from service because he had been involved in the wage survey activities as a union designated data collector. In my judgment, the evidence contained in the record does not support this contention.

The Complainant Union relies heavily upon the statement made on November 25, 1974 by Sergeant Smith that Chaffin's job would have to be abolished because he was too involved

with the Union. While the timing of this statement weighs in favor of acceptance of the Union's contention, the record is barren of any other persuasive evidence that Chaffin's job was abolished because he engaged in activities on behalf of the Complainant Union. More important, however, is the fact that after the statement was brought to the attention of higher-level management through the filing of an unfair labor practice charge, a letter of admonishment was issued to Smith, with notification to the Complainant Union. This action on the part of management carried with it an implicit disavowal of Smith's conduct and demonstrated a good faith attempt to remedy it.

The Complainant Union attempted to establish a pattern of reprisal by indicating that other union members of the wage survey team suffered retaliation for their participation in the survey. There was testimony that one employee was separated by a reduction-in-force and that another experienced a reduction in work hours after the survey. There is no evidence, however, showing that these employees were singled out for disparate treatment or that the job actions affecting them was due to unlawful motivation. There is simply the naked assertion that their jobs were affected after participation in wage survey--at a military installation other than the Respondent Activity. Without more, this evidence cannot be considered persuasive.

On the other hand, the record clearly establishes that when Chaffin was hired his position was created solely because the military personnel at the NCO Club was far below authorized strength. The record also establishes that as additional military personnel were assigned to the Respondent Activity and identified as having experienced in club systems, they were assigned duties at the NCO Club. In addition, when Holland was assigned to the club his duties were identical to the duties performed by Chaffin; thereby eliminating the need for a civilian employee to perform of this function. The survey conducted by management, albeit after the decision was made to abolish Chaffin's job, clearly supports the elimination of this civilian position for reasons of economy.

For these reasons, I find and conclude of that the Complainant Union has failed to establish by a preponderance of the evidence in the record considered as a whole that Chaffin's separation from employment was for reasons which violated the Executive Order. In these circumstances, I

find and conclude that the Respondent Activity has not violated Section 19(a)(1) and (2) of the Executive Order, and that the complaint herein must be dismissed in its entirety.

Recommended Order

On the basis of the foregoing findings of fact and conclusions of law I find that U.S. Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri did not engage in conduct which violated Sections 19(a)(1) and (2) of the Executive Order 11491 as amended. Accordingly, it is hereby recommended that the complaint in this case be dismissed in its entirety.


 GORDON J. MYATT
 Administrative Law Judge

Dated: July 13, 1976
 Washington, D.C.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



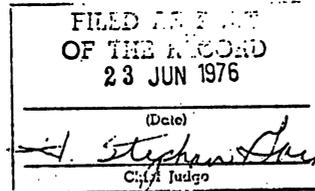
In the Matter of

LOCAL 1592, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. S-E-7

Respondent

ANN M. NOBLE, ESQ.
Office of the Solicitor
U.S. Department of Labor
1961 Stout Street
Denver, Colorado 80202
For the Government



C.C. PATTERSON, ESQ.
427 27th Street
Ogden, Utah 84001
For the Respondent

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is a proceeding under Section 18 of Executive Order 11491, as amended, herein called the Order. A complaint, issued by the Director, Office of Labor-Management Standards Enforcement, was filed on February 17, 1976. The said complaint alleged violations by Local 1592, American Federation of Government Employees, AFL-CIO, herein called Respondent, of Sections 18(a)(1) and (c) and 6(d) of the Order, as well as Section 204.29 of the Rules and Regulations which incorporates by reference Section 401(g) of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519 et seq., 29 U.S.C. 401 et seq.)

It was alleged in the complaint that Respondent, in the conduct of an election on May 23, 1975 of its officers, applied monies received by way of dues or assessments to pay for a notice of election and for Respondent's newspapers - all to promote the candidacy of Neil Breeden for President of the Respondent Union. The Director seeks an order (a) declaring the election null and void and (b) directing that a new election be conducted for President under the Director's supervision. Respondent submitted an answer 1/ at the hearing denying the essential allegations of the complaint.

Pursuant to a Notice of Hearing issued on March 8, 1976, a hearing was held before the undersigned on May 4, 1976 at Ogden, Utah. All parties were represented thereat, 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 this case, from all of the testimony and evidence adduced at the hearing. I make the following findings, conclusions and recommendations.

Findings of Fact

1. Respondent Local 1592 American Federation of Government Employees, AFL-CIO is, and at all times herein-after mentioned was, an incorporated 2/ organization maintaining its mailing address at Building 362, Hill Air Force Base, Ogden, Utah.

2. At all times material herein Respondent Union was, and still is, a labor organization within the meaning of Sections 2(e) and 18(c) of the Order.

3. At all times material herein, Respondent union was, still is, chartered by and subordinate to the American Federation of Government Employees, AFL-CIO, herein called AFGE a labor organization within the meaning of Sections 2(e) and 18 (c) of the Order.

1/ The answer was filed at the hearing as Respondent's Exhibit 1.

2/ At the hearing the Government amended its complaint to alleged Respondent is an incorporated entity.

4. Respondent, purporting to act pursuant to the AFGE constitution and its own constitution and by-laws, conducted an election for officers on May 23, 1975. This election was subject to the provisions of Section 18(a)(1), (6) and 6(a)(4) of the Order.

5. By letter dated May 28, 1975, Rosemary Alder and others, members in good standing of Respondent, protested the election of officers held on May 23, 1975. On July 25, 1975 Vice-President Carter issued a report dismissing the protest. Upon appeal by complainants to AFGE President Webber, the latter concurred on August 25, 1975 with the dismissal. The complainants then filed a complaint with the Department of Labor on August 27, 1975 pursuant to Section 204.63 of the Rules and Regulations.

6. The Director investigated the complaint and concluded there was probable cause to believe a violation of the Order had occurred in the conduct of the aforesaid election, which had not been remedied and may have affected the results of the election.

7. Respondent was notified of the investigative findings and thereafter a conference was held in accordance with the Rules and Regulations, subsequent to which Respondent failed to enter into an agreement providing for remedial action.

8. Respondent union, which has a membership of approximately 3500, represents the civilian employees at Hill Air Force Base, Ogden, Utah.

9. Neil Breeden became President of Respondent union on September 1, 1974, filling out the unexpired term of the previous president of the local union. The said term expired on May 23, 1975 at which time the election herein was held for a new President, 9 Vice-Presidents, and a Secretary-Treasurer. Candidates for the office of president were Neil Breeden, Thomas McLean and Rosemary Alder.

10. The results of the aforesaid election, in respect to the office of the President, were as follows:

Neil Breeden	-	855
Thomas McLean	-	154
Rosemary Alder	-	83

11. Prior to the election on May 23, 1975 Neil Breeden, Respondent's President, prepared and distributed to the union members a document entitled "IMPORTANT NOTICE" 3/ which was paid for entirely by Respondent union. After reciting that nominations for election of officers would take place on March 21, 1975, that an election of officers would occur on May 23, 1975, the notice devoted about half the remaining page to a discussion of membership and its importance. It stated as follows:

During the past five years while serving as editor of the newspaper, Secretary-Treasurer and President, I have asked each of you many times to sign just one member. If you can please do this during 1975 you will double our income and our effectivity. Recently, due to workload, it was necessary that I hire a third secretary, and in the event our workload increases as it has during the past six months, it may be necessary to hire a fourth full time secretary. It is not possible for this office to serve the membership without a sufficient income to pay employee salaries. Presently, I am involved in legislation concerning retirement, increased health benefits, additional Step increases for the Wage Grade employees, reduction in the cost of survivors annuity, etc. Obtaining this legislation requires a considerable amount of lobbying, airline flights to Washington, D.C. and other places. Only Union dues can insure the passage of any AFGE sponsored legislation. During the past five months, I have operated this local as if this was my private business. During these months, the Secretary-Treasurer and I have increased our bank account by \$30,000; however, if I am going to be successful in obtaining federal legislation favorable to the federal employees, it will be necessary that these funds be spent in travel, correspondence, telephone calls, telegrams, etc. What I can do as President

3/ Government Exhibit 2A

is limited by your desire to increase the size of this local. I repeat, if each of you would sign just one member, then this local would be able to eliminate many of the conditions you now find unsatisfactory.

Neil B. Breeden
President, AFGE Local 1592

12. Breeden testified that various statements under "Membership" in the aforesaid "Important Notice" were included to report financial information to the members; that the membership should know the details and what he had to do; and that he still kept tabs on the finances since he was teaching the new Secretary-Treasurer how to keep the books.

13. Respondent union publishes on occasion a newspaper entitled "News and Views". The paper is published, according to Breeden, when there is noteworthy news and the financial condition of the union warrants publication.

14. The "News and Views" issue of March 20, 1975 included on page 2 thereof the "President's Message". 4/ While the message was devoted primarily to news items of concern to the members, a portion of the article dealt with the accomplishments of Neil Breeden during his seven months as President of the local. Breeden commented on his successful handling of past contract violations against management, as well as his intention to file contract violations in the future as needed. Farther, he stated that the programs he initiated were now "taking shape". The printing and publication of this issue was paid for entirely by the Union.

15. The April 29, 1975 issue of News and Views which was published by Respondent, contained a "President's Message - Neil Breeden, Local 1592". Included thereunder were the following subjects which recited, in substance, as follows:

a) "AFGE Election Fever" - mention was made of a "Meet your candidate" meeting on April 18, 1975 at which several candidates stated the Executive Board was dishonest,

4/ Government's Exhibit 2F

crooked, and not conducting their duty as union officers. Breeden commented he did not protest since he wanted their CPA to answer the accusation. A letter from the accountants followed which recited that an audit was conducted and no irregularities discovered. Breeden then remarked that the audit proved there were no illegal acts committed by the Executive Board.

b) "Termination of Service Officer" - under this subject Breeden recited that he and the Board found it necessary to remove a service officer, and that this person is a write-in candidate for President of the local union.

c) "Qualification For President" - Breeden stated that in order to become president of the local, it is necessary that the winner of the forthcoming election be willing to do eleven specified tasks. These involved, for the most part, experience, a willingness to work long hours, travel frequently, govern properly, and place the union ahead of personal gain. Immediately following the last qualification appeared the statement:

"I wish to state that I have all of the above qualifications and these are the actions that I perform six days a week."

16. The aforesaid April 29, 1975 issue of News and View was prepared by Breeden and distributed by him to the members. All contents of the issue were paid for by the union except for the line following the eleven qualification wherein Breeden stated he had the above qualifications and performed accordingly six days each week. Breeden paid just for the excepted line which he deemed political in nature.

17. (a) The issue of "News and Views" dated May 20, 1975 contained a message from President Breeden, and the said paper 5/ was distributed to all the members. In addition to a portion of the message dealing with "Election for AFGE Local President", which was paid for by Breeden, mention is made by Breeden as to certain of his accomplishments as head of the local union. Thus, he states that during his reign as president for the past nine months, "we have signed approximately 100 new members each month." It is also averred that since the paper was founded 5 years ago by Breeden and others no censorship has been allowed with respect to letters submitted to the Editor. This portion of the message was paid for by the union.

5/ Government's Exhibit 3

(b) In the same issue of "News and Views" dated May 20, 1975 several letters to the editor are published. One such letter referred, in part, to the unfair denial of a hearing by the executive board to Rosemary Alder. Immediately following this letter were "President's Comments" which indicated that the decision re a hearing was not Breeden's alone; that there was no choice but to remove Mrs. Alder, and that, as union president and office supervisor, he performed his duty. The union paid for these comments by Breeden.

(c) The said issue of "News and Views" also contained a letter 6/ to the editor from J. Martinez which praised Breeden as a good president. Moreover, a letter was printed from F.A. Bates to the editor remarking that three members of the Alder family were seeking some local office in the forthcoming election; that Breeden was facing an entirely family and the odds were "three against one". Both letters occupied space paid for by the union, and Breeden paid for no part thereof.

Conclusions

The Order sets forth under Section 18 thereof the standards of conduct applicable to a labor organization in the public sector. Provision is made for periodic elections to be conducted subject to recognized safeguards, and under Section 6 (d) of the Order the Assistant Secretary is empowered to prescribe the necessary regulations to effectuate Section 18. In accordance therewith Section 204.29 of the Rules and Regulations provides that election of officers held by labor organization shall be conducted in a fair and democratic manner; and that such elections shall be governed by Section 401(a) through (g) of the Labor Management Reporting and Disclosure Act (LMRDA) to the extent of relevancy.

Section 401(g) of the LMRDA, which is applicable herein, provides as follows:

"No monies received by a labor organization by way of dues, assessments, or similar levy, and no monies of an employer shall be contributed or applied to promote the candidacy

6/. The record indicates, and I find, that the adopted policy and past practice has been to publish all letters sent to the editor unless they contained obscenities or were scurrilous, and these lines were paid for by the local union.

of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election."

The Government contends that the "Important Notice" sent out by Neil Breeden to the union members, which was paid for by the Respondent, promoted Breeden's candidacy for president of the union. It insists that the statements therein did not come within the exemption of "factual statements of issues not involving candidates". Further, it argues that the News and Views issues of March 20, April 29, and May 20, 1975 contain comments by Breeden, as well as letters from other individuals to the editor, which promote and support Breeden's candidacy. Since these particular statements were paid for by Respondent, the Government maintains the election ran afoul of the standards set forth under 401(g) of LMRDA.

Respondent takes the position that the statements made by Breeden in the "President's Message", included in the various issues of "News and Views", as well as the remarks in the "Important Notice" distributed to members, was simply a report to the membership of Breeden's successes and failures. It asserts the President had an obligation to advise the members of his plans for the future and keep them posted in regard thereto. Further, it contends there is no showing that such statements may have affected the results of the election. Contrariwise, the reasonable deduction to be drawn is that these comments did not affect the outcome.

(1) In addition to notifying the members of the impending election for officers on May 22, 1975, the "Important Notice" contained remarks by Breeden re "Membership" and the need to enlist new members. While this language in itself is clearly permissible under 401(g), this particular paragraph includes statements which, in my opinion, exceed the grounds of propriety under the statute. Thus, the incumbent president adverts to his efforts to obtain legislation concerning retirement, increased health benefits, additional step increases for employees, reduction in the cost of survivors annuity, etc. He refers to the increase in the union's bank account by \$30,000 as his accomplishment.

That Breeden recites these efforts within the framework of a plea for more members, so as to obtain sufficient funds to accomplish his plans, does not militate against concluding that these statements were promotional in nature. I cannot abide by Respondent's argument that Breeden merely reported on his successes and failures as president, which he was obliged to do as the head union official, and therefore his comments do not run afoul of the statute. These are factual statements of issues directly involving Breeden as a candidate for reelection, and necessarily tend to promote his candidacy. They point to his accomplishments and plans for the future - all of which, recited in conjunction with the notice of the forthcoming election, impliedly, at least, support Breeden as a candidate for presidency. Since the union's monies were used to prepare and distribute this paper, I find that the "Important Notice" was promotional and outlawed under 401(g) of LMRDA. See Sheldon v. O'Callaghan, 66LC12, 135, U.S. District Ct., So. District of N.Y. October 13, 1971.

(2) Likewise am I persuaded that various comments by Breeden in the "News and Views" issues of April 29 and May 20, 1975 constituted campaign material in support of his candidacy. Thus, the use of union funds to finance these views was improper under the statute.

In the April 29 issue of News and Views Breeden sets forth eleven qualifications for president in the forthcoming election. The space occupied by these requirements was paid for by the union although Breeden paid for the line and a half which recited that he possessed these qualifications and has performed these actions six days a week. It is urged that since these qualities apply to all candidates they do not constitute promotional remarks concerning Breeden. I do not agree. The context in which these qualifications appears render it difficult, if not impossible, to divorce them from the statement by the incumbent that he has such qualifications. They are inextricably related, and, as such, the eleven factors are an integral part of the statement which promotes Breeden's candidacy.

In respect to the comments in said issue regarding the attacks on the Executive Board at the "Meet Your Candidate" meeting, I do not view the comments by Breeden as supportive of his candidacy. They are, for the most part, an attempt to defend the Board's record in light of the audit conducted by the accountants and to answer the charges leveled against it.

The May 20, 1975 issue of News and Views contains several statements by Breeden which I deem promotional in respect to his candidacy as follows: (a) the comments that 100 new members of the local have signed up in his nine months as president; (b) the remarks by Breeden on page 6 concerning Mrs. Alder's removal which resulted in strengthening the union; the letters on page 6 from J. Martinez and K.A. Bates praising Breeden as well as the anonymous letter attacking Mrs. Alder. In both instances I view these comments as running counter to the language in 401(g) which sanctions factual statements of issues not involving candidates. See Usery v. Oklahoma City, et al., U.S. District Court for the Western District of Columbia, May 18, 1976, Sheldon v. O'Callaghan, 66 LC 12, 135, supra.

Further, I conclude that the recitation by the incumbent president of his successes and accomplishment in the March 20 issue, one day before the nomination of officers, was in support of Breeden's candidacy. It cannot be described as mere reporting, particularly in light of the timing thereof. Since the union paid for the cost of the space devoted to these remarks, they fall within the pale of the statute.

Respondent poses the argument that a violation of the permissible publication of statements does not require an automatic finding that the outcome of the election may have been effected. It argues, moreover, that the paragraphs in the Notice and newspaper could scarcely have affected the results, and it cannot be reasonable concluded that the voters were influenced thereby.

Under the LMRDA (402(c)(2)) an election may be set aside if it is concluded that the conduct may have affected the outcome thereof. As I read Wirtz v. Hotel, Motel and Club Employees, Local 6, 391 U.S. 492 a violation of Section 401 of LMRDA constitutes a prime facie case that the violation may have affected the outcome of the election. As the court stated, the effect may be met by evidence which supports a finding that the violation did not affect the result. No such proof was shown herein, and the numerous statements and comments supportive of Breeden's candidacy - in both the "Important Notice" and "The News and Views" - justify the conclusion that such statements may well have affected the outcome of the election.

Accordingly, and in view of the foregoing, it is recommended that the election held by Respondent on May 23, 1975 for the office of President be declare null and void, and that a new election for said office be conducted under the supervision of the Director, Labor-Management Standards Enforcement, U.S. Department of Labor.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: JUN 23 1976
Washington, D.C.

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. ARMY ELECTRONICS COMMAND, :
: FORT MONMOUTH, NEW JERSEY :
: Respondent :
: and :
: NATIONAL FEDERATION OF FEDERAL :
: EMPLOYEES, LOCAL 476 :
: Complainant :
.....

Case No. 32-4190(CA)

Walter Harbort, Jr., Esq.
Legal Office
U.S. Army Electronics Command
Ft. Monmouth, New Jersey 07703

For the Respondent

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Assistant General Counsel
National Federation of Federal
Employees, Inc.
1016 16th Street, N.W.
Washington, D.C. 20006

For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a complaint filed on August 4, 1975 under Executive Order 11491, as amended, by Local 476, National Federation of Federal Employees (hereinafter called the Union and/or Complainant), against the United States Army Electronics Command, Ft. Monmouth, New Jersey (hereinafter called the Respondent and/or Activity), a Notice of Hearing to be held on March 3, 1976 was issued by the Acting Regional Administrator for the New York Region on February 17, 1976. An Order Rescheduling the Hearing to March 31, 1976 was issued by the Regional Administrator on March 2, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Order by reason of the following: "In January 1975 the employer informed NFFE that a reduction in jobs was planned. The means of implementing the reduction was not specified. In April 1975 NFFE observed that a reduction was taking place. NFFE, by letter of April 11, 1975 requested specific details for implementation. To date the employer has not furnished specified information".

A hearing was held in the captioned matter on March 31, 1976 at Ft. Monmouth, New Jersey. 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 and briefs submitted by counsel for the respective parties, I make the following findings, conclusions and recommendation.

Findings of Fact

The Union is the exclusive representative of eight bargaining units at Ft. Monmouth, New Jersey, comprised of general service and wage grade employees, including both white collar and blue collar workers, and professional and

non-professional employees. Only employees in four of the host activity units represented by the Union are involved in this proceeding. 1/ The host activities comprise: (1) the guard force; (2) the Pictorial Audio-Visual Branch in Headquarters Installation Activity; (3) Atmospheric Sciences Laboratories; and, (4) Research Development and Engineering Directorate Laboratories (Professional only).

On January 10, 1975 a meeting was called at the Fort by the Activity's Commanding General, Major General H.F. Foster, Jr., to announce to the Unions having exclusive jurisdiction at Ft. Monmouth that next higher headquarters, U.S. Army Material Command, and the Department of the Army had directed a six percent (6%) cutback in authorized spaces throughout the Activity. Colonel Robert H. Marcum, Director of Personnel Training and Force Development, made a presentation outlining what the six percent (6%) cutback meant in the Activity's components but there was no plan or specific information as to how individual employees on specific jobs would be affected. Hopefully, attrition rather than a reduction in force was expected to attain the desired result. 2/

1/ The Union also represents four tenant activity units at Ft. Monmouth.

2/ Paul T. Coleman, Civilian Personnel Officer testified on cross-examination (Transcript p. 88) regarding the January 10, 1975 meeting that:

"Well, precisely. The Unions were told the numbers, the 6% numbers were flashed on view graphs, the number of positions that had to be affected in each organization. They were told that the organization would be asked to submit revised tables of organization or tables of distribution to reflect those lower in number and that when they did that we would identify the people who were excessed. We would also know what vacancies we had and we would begin a matching process which would hopefully not produce any adverse actions" The next time the thing was discussed was essentially at the request of the Union. As it turned out, in our plotting processes in trying to determine what vacancies we had and what excesses we had, we could foresee no adverse impact and, found no reason for additional calling or meetings.

"Now when Mr. Cahn asked for information I believe it was provided to him at various times. Sometimes in writing, the letters reflected that. At the August meeting he was told the number of people who were then excess and for whom placement efforts were being made."

Attrition is the process wherein a job is not filled competitively if someone retires, resigns or dies. The position which the incumbent held is canceled or an excess employee is placed in the position. The 6% space reduction initially involved 420 overall positions, 141 of which were encumbered. Through the process of attrition the number in an excess category just prior to the hearing was approximately 34 or 35 awaiting placement into authorized positions. Others attending the January 10, 1975 meeting included Malcolm R. Mackenzie, Civilian Personnel Officer, various union officials, including Herbert Cahn, President of NFFE Local 476.

NFFE's Local 476 President testified that there was a meeting on February 3, 1975 with Major General Foster and the Civilian Personnel Officer wherein management states that there was no change in status of the 6% cutback announced on January 10, 1975 and it was not known whether there would be any adverse actions resulting from that cutback. At a joint meeting of all Unions called by the Commanding General on February 20, 1975 an Army Material Acquisition Review Committee Report was discussed but nothing new was presented regarding the 6% cutback.

In the Spring of 1975 there was a projected lack of funds in the Electronics Command Laboratories and it was thought that salaries could not be paid through the fiscal year. About 85 Requests for Personnel Actions or positions that the Laboratories wished to eliminate were submitted to the Civilian Personnel Office. In April 1975, NFFE Local 476 President Cahn received word from employees that a reduction in-force (RIF) was being carried out at the Activity's laboratories and upon contacting Robert Jelling, a personnel management advisor to the Director of Laboratories was told that 43 jobs were to be cut by June 1975. No details were offered relating to specific jobs or employees. However, he was advised there were no professional jobs involved in the reduction in RD Tech Support Activity and Atmospheric Sciences Laboratory. These are the organizations where NFFE had exclusive rights. A letter dated April 11, 1975 3/ from

3/ Complainant Exhibit No. 1. The first paragraph of the letter stated: "I understand that a large number of employees in various Electronic Command Laboratories have been informed this week that their jobs are being abolished."

NFFE President of Local 476 to Major General Foster requested that the Activity provide him with full details of the reduction-in-force including the identity of the jobs affected, names of all employees in jobs being abolished, tables of distribution, personnel charts, retention registers, reasons for job abolishments and identity and job descriptions of Ft. Monmouth vacancies which exist at this time. A reply from Colonel Marcum dated May 14, 1975 advised that no action was in order until the Commanding General is advised of the expected impact of any job abolishments and subsequently approves a reduction in force and based on the Commander's decision and to the extent appropriate, information will be furnished all unions having exclusive recognition in the affected competitive area. 4/

After filing a complaint charge letter dated May 24, 1975 the Local Union 476 President of NFFE was advised by the Activity Chief of Staff on June 13, 1975 regarding abolishment of jobs in ECOM laboratories that: ". . . Approval for such proposed actions must be obtained from Headquarters, AMC at which level Congressional delegations are advised prior to release of such information to union officials, employees or the public media. Since data required for submission to Headquarters, AMC is still in the process of preparation, any release of information at this time would be premature and in violation of our instructions.

"With regard to your statement regarding 'a major reduction in jobs in Ft. Monmouth amounting to some 6% of the authorized workforce,' I understand that you and other union officials attended a meeting in January with General Foster on this subject at which Colonel Marcum outlined the problem of the space reductions and how we intended to handle the problem through attrition and reassignments with a minimum of adverse actions of any type. We are in the process of implementing these reductions in the manner explained in the January briefing, it is still anticipated that few, if any, adverse personnel actions will result from this exercise." 5/

4/ Complainant Exhibit No. 2.

5/ Complainant Exhibit No. 4.

In August 1975 NFFE President Cahn was advised at a meeting with representatives of his union on August 12, 1975 relative to the RIF being considered in the laboratory complex mentioned in his April 11, 1975 letter that improvement of program funding had obviated for the present any plans for such action. This was confirmed by letter dated August 21, 1975 where it was stated that since "RIF action is not presently contemplated in the laboratory complex, your specific request for information is not appropriate." 6/ As to the employees declared to be excess due to the 6% manpower space reduction it was stated: "At the outset 421 positions were cancelled. Of these positions, 141 were encumbered. As a result of coordinated efforts by all concerned, only 63 employees assigned to excess positions remain to be assigned permanent space." 7/ At the hearing the number of employees assigned to excess positions had been further reduced to 34 and over authorized spaces had been obtained to cover them precluding any reductions in force during the fiscal year. 8/ At the hearing on cross-examination, Mr. Cahn testified:

"Q. As of this day are you aware of any adverse personnel actions that have taken place at ECOM as a result of the 6 percent reduction in spaces?"

"A. No."

Discussion and Evaluation

The Complainant charges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by the manner in which it proceeded to carry out a six percent reduction of authorized spaces throughout the Activity and actions pursued for a further reduction in force in the ECOM laboratories without consulting, conferring or negotiating with the exclusive representative as to the impact on affected personnel.

6/ Complainant Exhibit No. 5.

7/ See footnote 5, supra.

8/ Transcript p. 81.

Section 11(a) of Executive Order 11491, 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 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.

The above quoted exception contained in Section 11(b) with respect to those normally categorized as "management prerogatives" is applicable only to the initial decision or action of an agency. Thus, as noted in the last sentence of Section 11(b) and as interpreted by the Assistant Secretary and Federal Labor Relations Council, the agency or activity is obligated, however, to consult and confer with respect to the impact of any such "initial decision" or action on unit personnel. 9/

On the basis of the record before me, the unrefuted evidence is that there was never a decision made or finalized to have a cancellation of spaces or reduction in force in the ECOM laboratories at Ft. Monmouth; there was merely a proposal initiated within the laboratories section or unit when funds were thought to be inadequate but the proposal was dropped when the funds were reported available. A command level decision was therefore not required. The Union was notified as to the status of the situation as it existed on May 14, June 13 and August 21, 1975. Inasmuch as the action or

9/ 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); Griffiss Air Force Base, FLRC No. 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, 1974); New Mexico Air National Guard, A/SLMR No. 362 (Feb. 28, 1974); Army Air Force Exchange Service, A/SLMR No. 451 (October 31, 1974); Federal Railroad Administration, A/SLMR No. 418 (July 31, 1974).

decision, which I find to fall within the exception contained in Section 11(b) of the Order was not approved or finalized, no obligation was imposed upon the Respondent to consult, or confer, with the Complainant 10/ on the proposal cancelled in the planning stage. I therefore conclude as to this issue, the Respondent was not required to furnish Complainant the information and data demanded in his April 11, 1975 letter. Further, the Respondent did not refuse to bargain in violation of Section 19(a)(6) of the Order nor is Respondent shown to have violated Section 19(a)(1) of the Order by restraining, or coercing any employee in the exercise of rights assured by the Order. 11/

With respect to the 6% space reduction, the Electronics Command at Ft. Monmouth was directed through channels by its higher echelons to reduce the authorized spaces at the Activity by this amount. The number of space reductions was determined to be 420. Of this number 141 were encumbered or occupied.

The Complainant concedes that the Respondent did not have to negotiate regarding the 6% space reductions but was under obligation to confer, consult or negotiate on the procedures by which the space reductions were accomplished and the impact on the unit employees.

The Activity was under strength with regard to authorized spaces and only 141 of the 420 spaces required to be cut were encumbered or being utilized. The effect of space reduction was not a 6% reduction in the number of people that were

10/ United States Air Force Electronics System Division (AFSC), Hanscom Air Force Base and Local 975, National Federation of Federal Employees, A/SLMR No. 571; the Assistant Secretary also noted that while agencies or activities are not obligated to negotiate concerning matters within the ambit of Section 11(b), it has been held by the Federal Labor Relations Council that they may negotiate on such subjects and reach binding agreements thereon. See AFGE Counsel of Local 1497 and 2165, and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74-A-48.

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

actually at Ft. Monmouth but a lessening of ability to fill positions by 6%. The unused authorized spaces were not utilized and it was announced by management at the January 10, 1975 meeting that the 141 encumbered spaces would be taken care of by attrition. By attrition the number of encumbered positions had been reduced to 34 at the time of the hearing on March 31, 1976 and was ahead of schedule for absorption by the end of the fiscal year. Over authorized space coverage was obtained for the 34 excess employees and the Command was ordered not to RIF anyone occupying an excess space. The Respondent's position is that there was no change in personnel policies, practices, procedures, or matters affecting working conditions that imposed a duty on it to consult, and, even if there was a duty to confer, consult, or negotiate management fulfilled that obligation.

While the employer is absolved from the duty to consult with the union regarding its mission in carrying out the space reduction, consideration must be given as to whether it is required under the Order to bargain as to the procedures to be utilized in implementing the directive by reason of changes, if any, brought about in the working conditions of employees.

Despite the retention rights provided under Section 12(b) of the Order, 12/ management cannot escape an obligation to bargain with a union as to procedures to be followed in a space allotment reduction when employees are adversely affected or their working conditions changed or impaired. The Federal

12/ Section 12(b) of the Order provides that: 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 other legitimate reasons; (4) to maintain the efficiency of the Government operations estimated to then; (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.

Labor Council stated in Veterans Administration Research Hospital, Chicago, Illinois, 74-A-31 that the reservation of decision making and action authority is not intended to bar negotiations of procedure to the extent consonant with law and regulations.^{13/} The Assistant Secretary followed and applied this principle in Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR 289. ^{14/} In the latter case reduction in force notices had been issued by the agency without notification to the union. While conceding that the employer was not obliged to consult on the RIF decision, it was held that consultation was mandatory as to the procedures management intended to observe in choosing which employees were to be subject to the RIF action.

Also, in Pennsylvania Army National Guard Association of Civilian Technicians, Inc., A/SLMR 475, the Assistant Secretary stated: ". . . I find that the terms and conditions of employment of certain of the unit employees were changed materially as a result of Respondent's Bulletin of January 17, 1974, which increased substantially the emphasis on the recruiting responsibility of technicians by directing that all excepted technicians cease their normal activities and devote their full time to recruiting during the first full working week of each month. Accordingly, although the Respondent was not obligated to meet and confer with the Complainant concerning its decision to effectuate this material change, in my view, it was obligated to meet and confer with regard to the procedures to be utilized to effectuate the implementation of the change in recruiting policy and with regard to the impact of such change on adversely affected employees."

In U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261, the Union therein was notified of the intended action by the employer before it unilaterally acted to eliminate a working shift. In that case the failure of the union to request bargaining was deemed fatal to finding a violation by the Agency.

^{13/} See Naval Public Works Center, FLRC, 71-A-56.

^{14/} Also, see Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR 329.

In this case, announcement of the 6% reduction was made by the Activity on January 10, 1975 at a general meeting with representatives of unions, including Complainant's union, having exclusive jurisdiction of units at Ft. Monmouth. The effect of the space reduction was discussed and the procedures for accomplishing it described. Cancellation of unfilled spaces was a privileged decision of management and as to the encumbered positions the method of reduction was to be by attrition and reassignment. The matter was fully discussed by management at the January 10, 1975 meeting and on February 3, 1975. At various times since the Union has been advised as to the situation and that the space reduction method of attrition has not changed.

I find that the Respondent did notify the Complainant of the authorized 6% space reduction decision and the procedure by which it was to be accomplished before it began reducing encumbered positions by attrition; it invited comment from Complainant's union and others representing exclusive units and the Complainant has been kept informed as to the progress of the space reduction since its inception following the January 10, 1975 announcement. I further find that Complainant's exclusive representative was afforded reasonable notification and an ample opportunity to explore fully the matters involved in the 6% space reduction prior to the Respondent taking any action in the matter. The evidence adduced at the hearing and the documentary exhibits submitted by Complainant, in my opinion, support the position of the Respondent that it was responsive to the inquiries of the Complainant's exclusive representative and it furnished him the available information to which he was entitled. ^{15/}

^{15/} The detailed information referred to in Complainant's Exhibit No. 1 related to the proposed cutback in the laboratories which never materialized and he was informed on May 14, June 13 and August 21, 1975 reasons under the law and regulations why the specific information could not be furnished. At the hearing he attempted to broaden the scope of the request to include the 6% reduction that he had formerly been apprised of in January and February 1975 but the record does not support his position.



In my judgment the opportunity for meaningful exploration regarding the impact of the 6% reduction in space decision was afforded to the Complainant. The evidence establishes and I so find that the Respondent did not refuse to bargain on this matter.

Admittedly there have been no adverse personnel actions as a result of the 6% space reduction and there is no apparent or foreseeable adverse impact on the remaining 34 employees occupying the encumbered positions. If a situation warranting adverse action should develop bargaining on the matter has not been precluded.

Conclusion

In view of the foregoing, I conclude that the Complainant has not met its burden of proving by a preponderance of the evidence that Respondent violated Sections 19(a)(6) and (1) of the Order, as alleged.

Recommendation

Upon the basis of the above findings and conclusions, I recommend that the Complaint herein against the Respondent be dismissed.

Rhea M. Burrow
RHEA M. BURROW
Administrative Law Judge

Dated: May 21, 1976
Washington, D.C.

.....
In the Matter of :
: MARE ISLAND NAVAL SHIPYARD :
: VALLEJO, CALIFORNIA :
: Respondent :
: and : Case No. 70-4714
: FEDERAL EMPLOYEES METAL :
: TRADES COUNCIL :
: METAL TRADES DEPARTMENT :
: AFL-CIO :
: Complainant :
.....

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Before: H. STEPHAN GORDON
Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding, heard in San Francisco, California on November 13, 1975, arises under Executive Order 11491 (hereinafter referred to as the Order) pursuant to a notice of hearing dated September 9, 1975, issued by the Regional Administrator for Labor-Management Services Administration, San Francisco Region. The proceeding was initiated by the filing of a complaint by the Federal Employees Metal Trades Council, AFL-CIO (hereinafter referred to as the Council, FEMTC, or the Complainant) against the Mare Island Naval Shipyard, Vallejo, California (hereinafter referred to as the Activity or the Respondent) on April 10, 1975. An amended complaint, withdrawing allegations of a Section 19(a) (5) violation, was filed on July 14, 1975.

The amended complaint alleged that the Respondent violated Section 19(a) (6) of the Order by circumventing and bypassing the union; more specifically, by issuing a January 21, 1975 memorandum through Captain W. A. Skinner, Production Officer, which established a Productivity Improvement Plan whereby management officials conducted periodic production tours to investigate and record instances of apparent employee idleness.

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

Upon the entire record in this case, from my observation of all 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. Background 1/

Mare Island Naval Shipyard, Vallejo, California, is an industrial fund activity within the Naval Sea Systems Command, Department of the Navy. Work at the shipyard principally involved the repair and refurbishment of naval ships, primarily nuclear submarines. The shipyard employs approximately 6,200 production employees. Since 1963, the

1/ This section relies substantially on the summary set forth in Respondent's brief.

Federal Employee Metal Trades Council, Metal Trades Department, AFL-CIO has been the exclusive representative, in the language of the negotiated agreement, for a unit of "all wage grade employees...and non-supervisory general schedule positions of Physical Science Technicians, Radiological Monitoring Division, Radiological Control Office and the Electrical and Mechanical Engineering Technicians, Hull Propulsion and Auxiliary Test Group, Design Division, and Planning Department (former Test Specialists Production Department)." The parties are currently subject to a collective bargaining agreement which expires July 25, 1977.

2. January 21 Memorandum

At all times relevant to this complaint, Captain W. A. Skinner was the production officer at the Mare Island Naval Shipyard. As such, Captain Skinner is responsible for managing the production department and insuring that the resources assigned to that department are used efficiently and effectively. (Tr. 46) To this end, Captain Skinner, on January 21, 1975, issued a memorandum to the shop superintendents within the production department announcing a "Productivity Improvement Plan." The purpose of the plan, as expressly announced in the memorandum, was "to improve productivity, reduce unnecessary idleness and determine cause for, and correct, production holdups." (Compl. Ex. 1) The memorandum provided that each shop superintendent, accompanied by a general foreman, would make a productivity tour of the waterfront pursuant to a schedule attached to the memorandum as Enclosure 1. Superintendents were further instructed that while on these tours, they were to challenge "apparently idle" workers and ascertain, inter alia, the following information: the identity of the person observed idle, the reason given by the worker for his apparent idleness, the immediate action taken to correct the situation, time, date, location, and any "housekeeping problems" (debris, fire or safety hazards, etc.) which the safety inspector should investigate and correct. (Tr. 54)

This information is entered into a daily tour report (a copy of which was attached to the memorandum as Enclosure 2) which is to be submitted to Mr. Skinner. When these reports are received by Mr. Skinner, he analyzes them to isolate trends, or recurring problems, which might then be remedied so as to improve the shipyard's efficiency. (Tr. 50, 52)

3. Previous Productivity Tours

Captain Skinner testified that productivity improvement plans, a synonym for productivity tours, which were in turn variously described as "white hat patrols" or "rat patrols," had been implemented previous to the January 21, 1975

memorandum. (Tr. 55) Though, "not continuous over the years," these tours were conducted "on and off" depending on production levels at the shipyard and were in existence at least as early as July 1971. (Tr. 55) Though the original instruction to make these tours has not been enforced continuously, it has nonetheless never been cancelled. (Tr. 56) Indeed, when in the view of management, productivity at the shipyard declined, memoranda 2/ such as the one disputed in this case, were issued to shop superintendents to encourage them to "get out on the waterfront and improve (productivity)." (Tr. 56, 59)

The record further established that the Complainant has had notice of these earlier productivity tours. Type-written summaries are routinely made of the monthly meeting between the parties and are reviewed by the Union as to their accuracy before they are published. At least two of these summaries, relating to meetings held in July and September 1972, refer to productivity tours. 3/ Further evidence of the union's knowledge of the productivity tours is a June 1972 circular distributed by the Council to its membership which discussed at length the "patrolling [of] different areas of the shipyard for 'productivity.'" (Resp. Ex. 6)

In light of the above, I conclude that productivity tours were being utilized, however sporadically, at least as early as June 30, 1972, and that the Complainant was aware of these tours. 4/

4. Consultation

Captain Skinner acknowledges that neither he nor any other management official notified the Complainant of the contents of the January 21 memorandums prior to the

2/ As an example, the Complainant introduced as Compl. Ex. 3 a copy of a June 30, 1972 memorandum from the Structural Group Superintendent to all supervisors within that group directing a productivity improvement plan similar to the one in this case. All of the employees in the Structural Group are represented by the Complainant. (Tr. 58)

3/ Resp. Ex.'s 4, 5.

4/ Mr. John Robinson, Secretary-Treasurer of the Union, testified that "to my knowledge there had been no productivity tour from the time I came to the shipyard in 1972 until the 21st of January, 1975." (Tr. 37) He acknowledged, however, that it is possible that tours were conducted of which he was unaware, and I conclude such was the case.

circulation of said memorandum. (Tr. 70) Captain Skinner did, however, generally discuss the productivity problem with the union at several of the monthly meetings in 1974 5/ and in great detail at a meeting on November 4, 1974 (Tr. 60). At that particular meeting, Skinner solicited the union's help in increasing employee productivity arguing that the success of the shipyard was vital to the unit members' continued employment there. In response to this solicitation, representatives of the union observed that productivity was "not a union problem" but rather the responsibility of the supervisors. (Tr. 61-62)

Positions of the Parties

Complainant argues that the Respondent failed to consult with the union with respect to the productivity plan prior to the issuance of a memorandum announcing said plan. Even if the productivity plan is a management prerogative under the Order, management still failed to meet its obligation to consult with the union regarding the impact and the procedures for the implementation of the plan. (Tr. 5)

The Respondent argues that the January 21, 1975, memorandum merely reaffirmed a productivity plan which had been in effect since at least 1972 and therefore the memorandum did not constitute a change in working conditions under §11(a) of the Order. Assuming, arguendo, that the memorandum did constitute a change in working conditions, management still had no obligation to consult with the union since the memorandum was an attempt "to maintain the efficiency of government operations entrusted to them," which is privileged under §12(b)(4) of the Order. Further assuming, arguendo, that no privilege exists, the Respondent maintains that the general problem of low productivity, if not the specific matter of the productivity tours, was discussed with Complainant at a November 4, 1974 meeting and that Complainant's remarks at that meeting, i.e., that low productivity was a problem for management, constitutes a waiver of any right to subsequent consultation with respect to the tours. Finally, the Respondent argues that it had no duty to bargain with the union on the procedures and impact of the tours.

5/ In its Answer, the Respondent avers that it discussed the closing of the cafeteria and presumably, therefore, the larger problem of reduced productivity, at meetings with the union on January 28, March 25, May 6, October 7, and November 26, 1974.

Conclusions of Law

I. Management's Right Under Section 12(b)(4) of the Order.

The initial question is whether the January 21 memorandum and subsequent productivity tours were an exercise of management's right "to maintain the efficiency of government operations" under Section 12(b)(4) of the Order.

An absolutely literal interpretation of the above-cited language would, of course, render almost every management decision non-negotiable, a result clearly at odds with the purpose of E. O. 11491.

In fact, the Federal Labor Relations Council has construed Section 12(b)(4) quite narrowly. 6/ The Council's decision in Little Rock, supra, stands for the proposition that where otherwise negotiable proposals are involved, management's right under Section 12(b)(4) cannot be invoked to deny negotiations unless there is a "substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits." 7/ [Emphasis added.]

It would logically follow that a substantial demonstration by the Respondent of cost savings and increased effectiveness in operations, not offset by adverse consequences, would meet the burden required to invoke Section 12(b)(4) of the Order. The evidence on the record as a whole fails to establish significant adverse consequences as a result of the productivity tours. 8/ Rather, I find that the Respondent has met its burden of substantially demonstrating that productivity tours contributed significantly to cost savings and effectiveness in operations. Thus, prior to the utilization of the productivity tours, a submarine

6/ Local Union 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Arkansas, FLRC No. 71A-46; Federal Employees Metal Trades Council of Charleston and U. S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52.

7/ Ibid., Little Rock, 6.

8/ I do not intend this finding to legitimize productivity tours in all forms. Conceivably, the tours could be conducted so frequently or cause such a disruption in employees' work performance that negotiation between the parties would be required. Such are not the facts in this case, however.

overhaul was completed which was similar to one performed at the shipyard in 1971. While the 1971 overhaul was completed in 240,000 man-days, the more recent overhaul required 300,010 man-days, or an increase of more than 25 percent. Captain Skinner credibly testified that the increased cost and delay in overhauling ships was due to the low productivity and lack of skills of unit employees. To combat the problem the productivity tours were resumed. Supervisors were instructed, in Skinner's words, to "observe people that are apparently idle or not gainfully employed, to find out why they are not working and what their problem is and take action to correct it." The daily tour reports were designed to assist Captain Skinner in identifying employees who were underutilized, insufficiently supervised, or simply loafing. The reports served the additional purpose of helping Captain Skinner determine what organizational changes should be made (e.g., the relocation of tool sheds or the modification of work stations), so as to minimize the "dead time" spent by employees in transit from one location to another. As a result of such tours, productivity increased materially as shipyard supplies were relocated, and various employees were disciplined. Accordingly, I conclude that the January 21 memorandum and disputed productivity tours, in this case, fall squarely within the scope, however narrowly drawn, of Section 12(b)(4).

II. Management's Duty to Consult Regarding Procedures and Impact.

Even though an action is privileged under 12(b), management has a duty to consult regarding the procedures for implementing the action and the impact it will have on unit employees. 9/ However, where management's action involves no change in existing practices, there is no reason to impose a duty to consult respecting procedures or impact.

I have found above that productivity tours were in fact an existing practice and condition of employment and had been utilized at least as early as June 30, 1971. The evidence further demonstrates that the Complainant was aware of their existence.10/ The fact that the tours had

9/ FAA, National Aviation Facilities Experimental Center, Atlantic City, N. J. A/SLMR No. 329; Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289; U. S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341.

10/ A review of union correspondence to its membership (Resp. Ex. 6), as well as the minutes of numerous meetings between the parties during the course of 1974 (Resp. Ex. 4 and 5) establish the awareness of Complainant.

been dormant for some period of time is insignificant. By their very nature they were needed only intermittently.

The Complainant emphasized that the disputed productivity tours differed from past tours in two respects: higher level personnel conducted the tours, and a different method of reporting results was used. These differences do not in and of themselves constitute changes in the nature of the practice itself. Accordingly, I conclude that the disputed productivity tours were a reaffirmation and reutilization of an existing policy and practice and that Respondent was under no duty to bargain respecting procedures or impact.

III. Management's Duty to Bargain Under Section 11(a) of the Order.

In view of the broad language of Section 12(b)(4) and the relatively narrow construction given that Section by the Council, the above holding is not free from doubt. However, even assuming arguendo, that the productivity tours did have a significant impact upon unit employees and, indeed, dealt with "matters affecting working conditions" not encompassed by the management rights clause of Section 12(b)(4) of the Order, the final result would, by necessity, remain the same. Thus, while Section 11(a) imposes a duty upon management to bargain in good faith with the union respecting practices affecting working conditions, this duty is only triggered by a change in working conditions. Having found that the disputed productivity tours were an existing practice and longstanding condition of employment, their utilization under the circumstances described herein did not constitute a change in practice or in employment conditions. Therefore, the Respondent was under no duty to bargain regarding its decision of January 21 to reimplement this previously cited practice.

In conclusion, I find that the disputed productivity tours did not constitute a change in employment conditions but rather, were a reaffirmation of an existing policy and practice. Therefore, whether the disputed productivity tours constituted management actions privileged under Section 12(b)(4), as I have found, or, arguendo, were practices affecting working conditions under Section 11(a), Respondent had no duty to bargain regarding the reinstatement of the tours or about the procedures or impact of the tours. Accordingly, I find that the Respondent's issuance, on January 21, 1975, of a memorandum implementing a productivity improvement plan which was an existing condition of employment, did not constitute a violation of Section 19(a)(6) of the Order.

Recommendation

In view of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.


H. STEPHAN GORDON
Chief Judge

Dated: July 12, 1976
Washington, D. C.

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 :
 U. S. CUSTOMS SERVICE, REGION IV :
 :
 Respondent :
 :
 and : Case No. 42-3057 (CA)
 :
 NATIONAL TREASURY EMPLOYEES UNION :
 :
 Complainant :
 :

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For the Respondent

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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 August 25, 1975, under Executive Order 11491, as amended, by the National Treasury Employees Union (hereinafter called the NTEU or Union), against U. S. Customs Service, Region IV (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Assistant Regional Director of the Atlanta, Georgia Region on October 29, 1975.

The complaint alleges, in substance, that Respondent coerced and restrained its employees in violation of Sections 19(a)(1) and (2) of the Order by virtue of the actions of Supervisor Bondi in directing a statement to Union President Rizzo to the effect that Mr. Rizzo would not be receiving any future raises or transfers because of his actions in successfully prosecuting grievances on behalf of two fellow employees. 1/

A hearing was held in the captioned matter on December 18, 1975, in Miami, Florida. 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. Following the close of the hearing Counsel for both parties filed briefs which have been duly considered. 2/

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

Mr. Ronald Rizzo, a GS-9 customs inspector, was elected president of the Union in September 1974. Shortly thereafter, Mr. Rizzo, in his position as union president, filed three grievances. The grievances, which were the first formal grievances ever filed in Region IV, concerned employees Ruttenberg and Pearson, and the utilization of part-time employees for overtime work. Mr. Rizzo received a favorable decision on all three grievances. Two of the three grievances, i. e. the ones dealing with overtime and employee Ruttenberg, resulted in the prior initial decisions of Supervisor Bondi being overruled.

1/ Although not specifically stated in the complaint, the parties fully litigated the issue of whether or not a temporary transfer of Mr. Rizzo, to a less attractive job, was in furtherance of the alleged threat and violative of Section 19(a)(2) of the Order.

2/ Counsel for the plaintiff, in his post hearing brief, moved to amend the complaint to conform to the evidence. Thus, Counsel would amend the complaint to allege that the threat of Supervisor Bondi tended to discourage other employees from union membership in violation of Section 19(a)(2) of the Order. Pursuant to the authority contained in Section 203.14(g) of the Rules and Regulations and in the absence of any objection from counsel for the Respondent, Complainant's motion to amend the complaint to conform to the evidence is granted.

The customs inspectors in the Miami, Florida, area generally inspect incoming baggage and cargo at three locations. The locations are: (1) incoming baggage from overseas passenger flights at the Miami airport, (2) incoming cargo from overseas cargo flights at the Miami airport, and (3) incoming cargo and baggage at the seaport on Dodge Island. The latter two assignments are considered to be the best since the employees work a set daily shift and are not required to work overtime or be on their feet all day. The assignment to overseas passenger flights is considered the least desirable position since much shift overtime is involved and the employees are on their feet most of their respective shifts which are scheduled around the clock.

During the week March 10-16, 1975, Inspector Rizzo, who had originally been scheduled for inspection duties on the 12 - 8 p.m. shift at the overseas passenger baggage installation at the Miami airport, was pursuant to a reassignment assisting Inspector Pearson in the training department located in the cargo area of the airport. 3/ The record is not clear as to how this reassignment came about. However, the record does indicate that the training department duties had previously been performed by only one employee.

On Wednesday, March 12, 1975, Inspector Rizzo, along with a number of other inspectors, was called in to assist in processing the baggage and passengers arriving on an early morning plane. 4/ Mr. Rizzo arrived around 6 a.m. and joined a group of other inspectors and Supervisor Bondi at the entry deck in the customs area of the airport to await the arriving flight. While the inspectors were awaiting the flight they engaged in a general conversation.

3/ Inspector Rizzo was assisting Inspector Pearson in drawing up a training manual at the request of supervisor Miner.

4/ It is customary to call in those inspectors who are listed on an availability roster for overtime. The inspectors with the least amount of overtime are called in first. No contention is made that the overtime assignment of Mr. Rizzo was discriminatory or otherwise in violation of the Executive Order.

During the course of the conversation the question of who would get the next GS-11 vacancy arose. Some unidentified participant mentioned the names of Pearson and Ruttenberg, the two employees involved in the successful grievances processed by Inspector Rizzo. Thereupon, Inspector Bondi, stated in substance, that they, Inspectors Pearson and Ruttenberg, would probably get the position because of Rizzo's grievance activity on their behalf and that Rizzo because of such grievance activity would not be promoted and would wind up working on the baggage line the rest of his life. Rizzo's testimony to this effect is corroborated by Inspectors Tilly, Ryan and Cox. Supervisor Bondi acknowledges making the above remark but claims that he cited Rizzo's attitude and work performance as the basis for the non-promotion, etc., and not Inspector Rizzo's grievance activity. To the extent that Mr. Bondi's testimony differs from that of Inspectors Tilly, Rizzo, Cox and Ryan, I credit the latter. Inspectors Tilly, Rizzo, Cox and Ryan further testified that they did not take Supervisor Bondi's statement as a joke and understood it to mean that because of Mr. Rizzo's grievance activity he would have only the baggage line assignment to look forward to for the rest of his career. 5/

Following the processing of the early morning flight, Inspector Rizzo reported to his previously assigned 8 a.m. to 4 p.m. shift in the training department located in the cargo area. At approximately 10 a.m. that morning Inspector Rizzo was contacted by Supervisor Bondi and told to report immediately to the 12 noon to 8 p.m. shift on the baggage inspection line and to remain there for the remainder of the week. His day off was changed from Saturday to Thursday. 6/ According to Supervisor Bondi, he changed Inspector Rizzo's shift because he needed employees on the baggage line and felt that there was no necessity for having two men in the training department. Supervisor Bondi further noted that Inspector Rizzo had previously been scheduled for the 12 noon to 8 p.m. shift on the baggage line and that the change to the training department must have been based upon a request from Inspector Rizzo since no other supervisor, as per custom,

5/ Inspector Ryan further testified that the statement of Supervisor Bondi dissuaded her from subsequently joining the Union.

6/ The record reveals that mid-week transfers from one area to another were very seldom made.

had spoken to him about the change. According to Supervisor Bondi, after checking with the acting airport director and other supervisors who were around, he concluded that Inspector Rizzo had been transferred on the basis of his own request. Further, according to Supervisor Bondi, he felt that since Friday and Saturday were usually extremely busy days on the 12 noon to 8 p.m. shift that Inspector Rizzo would be more gainfully employed on the baggage line rather than in the cargo area, hence the change in assignments.

On the following Monday Inspector Rizzo, in accordance with prior scheduling, was assigned to the seaport for a six month tour of duty. Subsequently, due to a resignation, Inspector Rizzo was permanently assigned to the seaport.

DISCUSSION AND CONCLUSIONS

Section 19(a)(1) of Executive Order 11491, as amended, provides that an Agency shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by Section 1(a) of the Order. Among the rights assured by Section 1(a) of the Order is the right to file and/or process grievances. Cf. Department of Defense, Arkansas National Guard, A/SLMR No. 53; National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 295; California National Guard, A/SLMR No. 348; Department of the Navy, Puget Sound Naval Shipyard, A/SLMR No. 582. Inasmuch as the statement of Supervisor Bondi would tend to discourage employees from filing or participating in grievances, it follows that such statement was violative of Section 19(a)(1) of the Order. ^{7/} However, such discouragement, standing alone without any changes in conditions or terms of employment is insufficient to sustain a violation of Section 19(a)(2) of the Order. Accordingly, to the extent that Supervisor Bondi's statement might have discouraged Inspector Ryan or any of his employees not to join the Union, I find such discouragement insufficient to establish a 19(a)(2) violation. Cf. Department of the Navy, Naval Air Research Facility, A/SLMR No. 543.

With respect to the temporary transfer of Inspector Rizzo from the training department in the cargo area to the baggage area on March 12, 1975, I find such transfer to be predicated in part on Mr. Rizzo's grievance activities and hence violative of Section 19(a)(2) of the Order. In reaching this conclusion

^{7/} The fact that Mr. Bondi may have been jesting does not alter this conclusion. Contrary to Mr. Bondi's assertion to this effect, all the inspectors credibly testified that they took Mr. Bondi's statement seriously.

I rely on the timing, i.e., shortly after the threat, the fact that a transfer from one department to another in the middle of a week was not a customary practice and the fact that no evidence was shown indicating a compelling need for Mr. Rizzo's services in the baggage area at the time the decision was made.

RECOMMENDATION

Having found that Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and (2) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order. I also recommend that the Section 19(a)(2) allegation of the complaint which is predicated solely on the threat of Mr. Bondi 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 Department of the Treasury, U.S. Customs Service, Region IV, Miami, Florida, 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 by threatening them with loss of promotions and undesirable assignments for exercising their rights under the Order to file and/or process grievances.

(b) Discourage membership in the National Treasury Employees Union or any other labor organization by discrimination in regard to work assignments and work schedules.

2. Take the following affirmative action to effectuate the purposes and provisions 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 sixty (60) consecutive days thereafter,

in conspicuous places, including all places where notice 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 20 days from the date of this Order as to what steps have been taken to comply therewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: March 16, 1976
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 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 Executive Order by threatening them with loss of promotions and undesirable assignments for exercising their rights under the Order to file and/or process grievances.

WE WILL NOT discourage membership in the National Treasury Employees Union or any other labor organization by discrimination in regard to work assignments and work 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 employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant 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.

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 Defense, :
 U.S. Navy, Norfolk Naval :
 Shipyard :
 Respondent :
 and :
 Tidewater Virginia Federal Employees :
 Metal Trades Council, AFL-CIO :
 Complainant :

Case NO. 22-5751(CA)

James C. Causey, Esq.
 Office of Civilian Manpower Management
 Department of Navy,
 Washington, D.C.

For the Respondent

Henry Nacey, International Representative
 International Brotherhood of Boilermakers,
 Iron Ship Builders, Blacksmiths, Forgers
 and Helpers, AFL-CIO
 Virginia Beach, Virginia

For the Complainant

Before: GORDON J. MYATT
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on December 27, 1974, by Tidewater, Virginia Federal Employees Metal Trades Council, AFL-CIO (hereinafter called Complainant Union) alleging that Department of Defense, U.S. Navy, Norfolk Naval Shipyard (hereinafter called Respondent Activity) violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, the Acting Regional Administrator for the

Philadelphia Region issued a Notice of Hearing on Complaint on February 11, 1975. 1/ A hearing was held in this matter on April 22, 1975, in Norfolk, Virginia. All parties were represented and afforded opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were subsequently submitted by the parties and have been duly considered in arriving at the determination in this case.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following:

Findings of Fact

Jessie Meeks and Everett Woods, two members of the Boilermakers Union, 2/ were normally assigned to the Boiler Shop on the second shift at the Respondent Activity. On October 21, 1974, they were assigned to perform work outside of the Shop on the nuclear submarine, USS. FINBACK, and under the supervision of another Boilermaker foreman. Meeks and Woods were working in conjunction with the Riggers, although employees performing the work of other trades were also assigned to work on the Finback that evening. 3/

The events in this case center around what occurred during and after the lunch hour, which was from 7:30 p.m. to 8:00 p.m. Both Meeks and Woods testified that they

1/ At the hearing the Complainant Union was granted permission to amend the complaint to assert a violation of Section 19(a)(6) of the Order based on the same set of facts.

2/ The Boilermakers are a constituent craft union of the Metal Trades Council, which is the exclusive bargaining representative of the craft employees at the Respondent Activity.

3/ A number of trades were working on the Finback on the evening in question. They consisted of electricians, boilermakers, riggers, steam fitters, pipe fitters, and sheet metal workers. In all, approximately 115 employees were assigned to work on the submarine that evening.

determined a portable light was needed in order to position and work on the tanks that they were installing on the submarine. They stated they left the submarine at 7:30 for their luncheon break. Meeks normally ate his lunch in the Boiler Shop and Woods normally went to his home, which was apparently nearby, to have lunch. They decided that they would draw a portable light from the tool room located in the Boiler Shop at the end of their lunch period. Woods testified that when he returned to the shipyard after lunch, he stopped at the tool room in the Boiler shop to ascertain if Meeks was going to get the portable light. Meeks was waiting for the tool room to open up as the tool room clerk was also at lunch during this same period. Woods then decided to go back to the submarine to wait for Meeks to bring the light. He arrived at approximately 8:13 p.m. and was met at the gangplank by C. E. Smith, Boilermaker general foreman and E. T. Cartwright, Boiler Shop superintendent. They asked him why he was not at his work station when the whistle sounded at 8:00 p.m.? Woods explained that when he returned from lunch he stopped at the tool room in the Boiler Shop to determine if Meeks was going to get the portable light needed on the job. On his way back to the submarine, he stopped and informed the riggers that Meeks was getting the portable light and would be on the job shortly. Woods was instructed to go below to his work station.

Meeks returned to the submarine with the portable light at approximately 8:15 p.m. and was likewise stopped by Smith and Cartwright. He told them that he had to wait until the tool room attendant returned from lunch so that he could draw the portable light needed on the job. He was asked why he did not go the tool room located near the job site rather than to draw equipment from the Boiler Shop tool room. Meeks indicated that he was unfamiliar with the tool room area near the job site.

Smith testified that he and Cartwright started to conduct an inspection tour of the work being performed on the waterfront that evening. 4/ According to Smith,

4/ Cartwright was ill at the time of the hearing and did not testify. Leave to submit a deposition of Cartwright was granted to the Counsel for the Respondent Activity, but he subsequently determined that such testimony was not necessary.

they went aboard the Finback at approximately 7:15 p.m. and found only four employees out of a work force of 115 on board at that time. Smith stated that he decided to wait at the gangplank to check the number of employees who were supposed to be working on the submarine. Smith testified that the employees began returning at 7:55 and continued to straggle on board until 8:15 p.m. He stated that he and Cartwright were particularly concerned about the boilermakers because they were the lead craft to "push" the riggers in order to get the tanks installed.

After questioning Meeks and Woods, Smith and Cartwright spoke to Davenport, the Boilermaker foreman on the job. Davenport went aboard the submarine and told Meek and Woods that they had fouled up. He told the employees that commencing October 29, they would both be transferred to the first shift where they would be under close supervision. He gave them a shift form notice to sign indicating that they were notified of the change. 5/

The following day, after they had clocked in, Meeks and Woods went to Smith's office accompanied by Chief Steward Johnson. Johnson protested that the punishment meted out to the two employees was severe as they had not been involved in any previous infractions of the work rules. He suggested to Smith that the employees had "learned their lesson" and asked that the transfers to the day shift be reconsidered. According to the testimony of the union witnesses, Smith replied that "if they had learned their lesson why hadn't they come directly to him rather than to the union steward?" Smith, on the other hand, testified that he stated that if the employees had learned their lesson, why were they appealing the transfer through the Union? 6/ Smith told Johnson that he

5/ Davenport had consulted with Smith prior to taking the action to change the employees' work shift. Although the decision to take this action was that of Davenport, it is apparent from the testimony that Smith concurred in the action.

6/ According to Smith, he could not understand why the employees were appealing the transfer if they had in fact recognized that they had breached the work rules. He denied stating that the employees should have come to him rather than attempt to get the transfers rescinded through intervention of the union representative.

would think the matter over and let him know the decision at a later date.

After the employees left with Johnson, Smith received a phone call from the foreman in the Boiler Shop inquiring about the whereabouts of Meeks and Woods. According to Smith, the foreman stated that they had clocked in and he had work to assign to them, but was unable to locate them. Smith testified that as a result of this conversation, he did not believe that the employees had learned their lesson. He felt they had committed an identical breach of the shop rules by being absent from their work area without first getting permission from their foreman. Because of this, he decided to initiate a preaction investigation to determine if further disciplinary action was warranted as a result of the infractions that occurred when the employees were working on board the Finback. 7/ Smith subsequently notified Johnson of his intention to initiate the preaction investigation, and he informed Johnson that he would not rescind the order transferring the two employees to the first shift.

The preaction investigation was conducted by a foreman from another shop. He interviewed Meeks and Woods regarding the facts on October 29 and 30 respectively. On November 7, the Complainant Union filed an unfair labor practice charge against the Respondent Activity alleging that the statements of general foreman Smith to chief steward Johnson regarding Meeks and Woods on October 22 violated Section 19(a)(1) and (2) of the Executive Order. The Labor Relations Specialist of the Activity began investigating the unfair labor practice charges on November 18 or November 19.

7/ A preaction investigation is an investigation where an individual from another shop is assigned to inquire into the disputed conduct to determine the facts. This report can then provide the basis for disciplinary action by management which can be grieved pursuant to the negotiated grievance procedure.

On November 21, 1974, Davenport, as the foreman involved, issued "Letters of Caution or Requirement" to Meeks and Woods regarding their failure to return to the Finback at the end of the lunch hour on October 21. The letters were based on the preaction investigation initiated by Smith. Each letter stated that it was issued to bring to the attention of the employee the "deficiency" in his "observance of rules and regulations pertaining to hours of work." The letters also stated that they would not be filed in the employees' personnel records but that the foreman would retain a copy for a period not to exceed one year. Each letter also advised the employee that the action could be grieved within 15 calendar days from receipt of the letter. 8/

Contention of the Parties

The Complainant Union contends that the statements made by the Boiler Shop general foreman to the chief steward of the Union in the presence of the employees urged the by-passing of the exclusive representative in the adjustment of grievances. Further, that the statement implied to the employees that grievances would be more favorably adjusted if they dealt directly with management. Complainant argues that this conduct violates Section 19(a)(1)(2) and (6) of the Executive Order. In addition, the Complainant Union argues that the letters of caution and requirement were issued after the unfair labor practice charge was filed regarding the Smith statement, and therefore was in reprisal for the action taken on the part of the Complainant Union in seeking to have the transfers to the day shift rescinded. It is argued that this conduct constituted separate violations of Section 19(a)(1) and (2) of the Executive Order.

8/ The employees grieved the letters of caution through the Complainant Union. The testimony indicates that Santiago Rivera, a member of the Conference Committee of the Complainant Union, met with the Boiler Shop superintendent accompanied by the employees. Cartwright informed the union representatives that the letters did not mean anything and would not be put into the employees' personnel file. He indicated that the employees should destroy their copies, and that the foreman would be the only one who would retain a copy. Testimony also indicates that copies were kept in the local shop personnel office (as opposed to the main personnel office), but this is of no significance to the issues involved in this case.

The Respondent Activity urges that the statement made by Smith was, at best, isolated and not part of any overall management effort to encourage employees to by-pass the exclusive representative and settle grievances directly with management. It is also argued that the statement attributed to Smith did not suggest that grievances should be settled directly with management rather than through the exclusive representative. Respondent Activity further contends that the letters of caution and reprimand were issued in the normal administrative process, and were not issued in reprisal because the employees sought reconsideration of their transfers through the union representative.

Concluding Findings

In my judgment, the sole issue with any possible merit in this case is the significance to be attached to the statement made by the general foreman to the union chief steward in the presence of the two concerned employees. There is no evidence whatsoever in this record of any concerted action on the part of management officials to cause employees to by-pass the Complainant Union in what is a highly unionized workforce involving many craft unions. At most, the record discloses a single incident in which the Boilermaker general foreman made an isolated statement regarding disciplinary action meted out to two employees for apparent infractions of work rules. 9/

Although the Respondent Activity contends that Smith did not state that "if the employees had learned their lesson, why had they come to the union representative rather to

9/ Management witnesses testified that the shift changes were "administrative actions" and not considered disciplinary. However, it is obvious that a transfer from the second shift to the day shift resulted in a loss of pay differential for the employees involved. When an involuntary transfer of this kind is initiated because of an infraction of the work rules it is evident that it is disciplinary in nature.

[him]?", I find that such statement was in fact made. 10/ In explaining his unfortunate choice of words, Smith testified that he did not intend to suggest more favorable treatment if employees dealt directly with him, but that the employees should have acknowledged to him that they violated the work rules and accepted the shift change.

In determining the possible consequences, in terms of the Executive Order, that flow from this single isolated statement, it is the statement itself and not the intended meaning which must be considered. Viewing Smith's remarks in the light most favorable to the Respondent Activity, I am compelled to conclude that Smith did suggest that the employees should have come directly to him and should not have sought to get reconsideration of the shift change through the intervention of the union representative. I further conclude, albeit reluctantly, that the remarks of Smith carried the implication that employees would receive more favorable treatment when they dealt directly with management and bypassed the exclusive representative. In my judgment the facts in this case are analogous to the facts in U.S. Army School/Training Center, Ft. McCellan, Alabama, A/SLMR No. 42. There the Assistant Secretary held that a solicitation to an employee to deal directly with management was encouragement to bypass the exclusive representative and implied that more favorable treatment would be received should this occur. I find that the Ft. McCellan decision controls the outcome of this case, and I am constrained to hold that a violation of the Executive Order has occurred. Accordingly, governed by the principles set forth in Ft. McCellan, I am compelled to find that the Respondent Activity violated Section 19(a) (1) and (6) as a result of the remarks of general foreman Smith made in the presence of the two employees.

I do not find, however, that the evidence in this record is sufficient to sustain a finding that the letters of caution or requirement were issued in reprisal for utilization of the grievance procedure contained in the negotiated agreement. Other than the fact that the letters were issued

10/ The testimony of Johnson, Meeks and Woods is consistent as to what was said in the meeting with Smith. In deed, their testimony is also consistent with the testimony of Smith. The discrepancy here is not in what was said, but rather in what was meant by the remarks.

after Smith's remarks and after the unfair labor practice charge was filed, there is nothing here to suggest that the letters were retaliatory in nature or in the form of a reprisal. Smith's statement as to the reason he caused the preaction investigation to be launched is entirely creditable. Furthermore, the evidence indicates that the two employees were not interviewed until the end of October. There is nothing in the record to refute the testimony of the management officials regarding the administrative delay in completing the investigatory report which resulted in the letters being issued. The mere fact that the letters were not issued until November 21 is not sufficient basis to establish an unlawful underlying motive. In view of this, I find that the letters were part of the disciplinary action for the infraction of the work rules committed while the two employees were working on the Finback and for no other reason. I find therefore, that this allegation of the complaint is not substantiated by preponderance of the evidence in the record and should be dismissed.

Having found that the Respondent Activity engaged in conduct which violated Section 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 promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of Defense, U.S. Navy, Norfolk Naval Shipyard shall;

1. Cease and desist from:

(a) Soliciting employees represented by Tidewater, Virginia Federal Employees Metal Trades Council, AFL-CIO, to deal directly with management with respect to the resolution of their grievances.

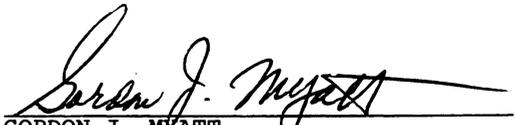
(b) Promising employees benefits in order to restrain them from utilizing the negotiated grievance procedure and their exclusive representative.

(c) 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, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order;

(a) Post at its facility at Norfolk 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 of Norfolk Naval Shipyard, 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 Commanding Officer shall take steps to ensure 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 of Labor for Labor-Management Relations in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


 GORDON J. WYATT
 Administrative Law Judge

Dated: APR 21 1976
 Washington, D.C.

Appendix

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 solicitate employees represented by Tidewater, Virginia Federal Employees Metal Trades Council, AFL-CIO, to deal directly with management with respect to the resolution of their grievances.

WE WILL NOT promise employees more favorable adjustment of their grievances through direct bargaining with management in order to restrain from the use of the negotiated grievance procedure through their exclusive bargaining 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 Section 1(a) of 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: 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 :
COMMUNITY SERVICES ADMINISTRATION, :
Activity :
and :
NATIONAL COUNCIL OF CSA LOCALS, :
AFGE, AFL-CIO :
Labor Organization :
..... :

22-5870 (AP)

Rogers Davis, Labor-Management Relations
Specialist
Personnel and Manpower Division
Community Services Administration
Washington, DC 20506

Randolph G. Johnson, Director
of Personnel
Community Services Administration
1200-19th St., N. W.
Washington, DC 20506

Phillip R. Kete, President
National Council of OEO Locals
AFGE, AFL-CIO
1200-19th St., N. W.
Room 427
Washington, DC 20506

Ms. Margaret Tuttle
National Council of OEO Locals
AFGE, AFL-CIO
1200 - 19th St., N. W.
Room 427
Washington, DC 20506

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION ON GRIEVABILITY

Statement of the Case

Pursuant to an Application for Decision on Grievability or Arbitrability filed on March 12, 1975, under Section 13 of Executive Order 11491, as amended, (hereinafter called the Order) by the Community Services Administration, hereinafter called the Activity or Agency, concerning the grievability of the Activity's alleged failure to abide by its collective bargaining agreement with National Council of CSA Locals, AFGE, AFL-CIO (hereinafter called the Union) in filling a vacant position that is outside the collective bargaining unit. A Notice of Hearing on Application for Decision on Grievability or Arbitrability was issued by the Acting Regional Administrator for the Philadelphia, Pennsylvania Region on June 10, 1975.

A hearing was held before the undersigned in Washington, D. C. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. Subsequent to the close of the hearing both parties filed briefs, which have been duly 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 recommendations:

Findings of Fact

A. General Background

The Union, at all times material herein, has been the collective bargaining representative of a nationwide unit composed of all of the Activity's non-supervisory General Schedule and Wage Grade employees, including professionals. The collective bargaining agreement provides, in Article I, Section 2 that employees engaged in personnel work, management officials and supervisors may join the Union but are excluded from the unit.

On or about January 28, 1975, the Agency issued a Merit Promotion Announcement for the position of Employee Development Specialist, in the Personnel Office of the Agency, GS 235/13. The period for applying closed on February 12, 1975. There were six applicants and a certificate was sent to the selecting official containing

the names of two "in-house" applicants 1/ and two outside applicants. An outside applicant, Barbara Hurlick was rated highest by the panel and was selected on February 19, 1975.

On March 4, the Union filed a grievance under Article 16 Section 11(2) of the Contract contending that the Activity did not adhere to Amendment 11 of the Contract Amendments in filing the vacancy. The Union contended that the position is neither policy making nor supervisory and must therefore be filled, pursuant to Amendment 11, with an "in-house" candidate. By letter dated March 7, the Activity advised the Union that the position in question was not in the bargaining unit and therefore the Activity followed the requirements of CSA Instruction 335-1, the Agency's Merit Placement Promotion Plan Part 7, and FPM 335-3.3. The Activity also stated that under Article 12 Section 5(h) of the Contract non-OEO 2/ applicants could be considered where there are not three highly qualified "in-house" applicants. The Activity went further and stated that because the position was outside the unit and because it could not apply different considerations to in unit applicants and out of unit applicants, it would apply its own uniform standards, not those set forth in the contract. The Activity filed its application for Decision on Grievability on March 12, 1975 and the Notice of Hearing was issued on June 10. The union, by letter of July 1 advised the Activity that it will ask any arbitrator to apply amendment 11 as "agreed to by the parties at negotiations..."

B. The Employee Development Specialist Position

The position in question is in the Activity's Organization and Manpower Branch. 3/ Its functions are to participate in planning and developing the Activity's

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- 1/ One of these was in the bargaining unit.
 - 2/ Community Services' Administration's predecessor.
 - 3/ The Organizational and Manpower Branch is part of Personnel and Manpower Division which is part of the Office of Administration.

Training and Development Program through surveys and contracts with supervisors and executives; to be responsible for programs of "unusual consequence" including, (1) management training, (2) Supervisory Development, (3) Employee Orientation and Management Intern Program; to prepare comprehensive training programs for all other program segments; and to develop contacts with the Civil Service Commission interagency training activities and colleges and universities.

C. The Collective Bargaining Agreement.

Article 16 of the Collective Bargaining Agreement provide for a grievance procedure to resolve grievances over the "interpretation or application of this Agreement." Section 11 of Article 16 provides that if the National Union or the Activity alleges non-adherence, improper interpretation, etc. of the agreement the complaining party shall submit the complaint to the other party. This section provides for meetings and if the matter is not resolved either party may refer the matter to arbitration pursuant to Article 17 of the Agreement. Article 17 is a rather standard arbitration provision.

Article 12 of the Agreement deals with merit promotions. It states that its object, in brief, is to set up a procedure so that the Activity staffed by the best qualified candidates and so that employees have an opportunity to develop and advance. Section 2 states that the employer will fill vacancies with the best qualified candidates, promoting from within whenever possible. Section 3 sets forth those personnel action to be covered by the procedures and includes, inter alia, "a. promotions to positions through GS-15." and "b. Reassignments, transfers... to vacant positions that have been announced." etc. Section 4 set forth the "Areas of Considerations" for the various vacancies and Section 6 through Section 18 sets forth the procedures to be followed under the Merit Promotion System.

D. Amendment 11

Representatives of the Activity and the Union met during 1973 and agreed upon a number of contract amendments. The Activity's Chief Representative was Director-designate Allen J. Arnett and Mr. Kete represented the Union. The parties agreed to Amendment 11, and during the course of the negotiations they reduced it to writing and on or about July 13, 1973, initialed it. It amended Article 12 Section 4A

of the Contract. As initialed it read:

"The parties agree that all vacancies will be posted and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, with the exception of policy and supervisory positions at the division level or equivalent, or when there is an emergency which precludes use of the merit promotion system..."

On or about July 16, 1973, the Union submitted a number of the agreed upon amendments to its membership for ratification. Amendment 11, in the language as set forth above, was one of the amendments so submitted for notification.

By the end of July or the beginning of August, 1973, the Union and the Activity had finished initialing the other Amendments.

The Activity, upon being notified that the Union members had ratified all the amendments, submitted to the Union a type written version of all of the amendments for the Union to proofread. Mr. Kete, the Union's chief negotiator and spokesman proofed it, approved it and returned it to the Activity on August 15, 1973. The typewritten version as submitted by the Activity contained Amendment 11 in the same language as set forth above. The Union made no changes.

The parties apparently met on September 11, 1973, and signed the final copy of the amendments. Mr. Arnett and President of the Nation Council of OEO Locals, Wayne Kennedy, initialed each page and Mr. Arnett signed on behalf of the Activity, and Mr. Kennedy, National President of AFGE Weber, Mr. Kete and others signed on behalf of the Union. However, the evidence seems to establish that, because Mr. Kete had assured Mr. Kennedy that he had already proofed the Amendments, neither Mr. Kennedy nor any other Union representative read the amendments before they signed them. In this signed version, Amendment 11 read as follows:

"The Parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible, with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system..."

There was some evidence that there might have been some kind of a meeting between Mr. Kennedy and some management representative between September 4 or 5 and September 11, 1973, but who participated and whether they discussed any proposed changes in Amendment 11 was not established. Mr. Kennedy advised Mr. Kete that he never discussed nor approved any changes in Amendment 11.

Conclusions of Law

Section 6(a)(5) of the Order provides that the Assistant Secretary shall "decide questions as to whether a grievance is subject to negotiated grievance procedure or subject to arbitration under an agreement as provided in Section 13(d) of the Order."

Section 13 of the Order deals with Grievance and Arbitration procedures and subparagraph (d) provides, in part, "... 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 be referred to the Assistant Secretary for decision."

The leading case interpreting these sections of the Order is Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19. The Federal Labor Relations Council (FLRC) held that 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.." FLRC went on and stated that 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." The FLRC held also that the Assistant Secretary must consider any other existing laws and regulations, including policies set for in the Federal Personnel Manual. FLRC explained that the question of grievability can not be "considered in vacuo", but must also consider "the existing legal and regulatory structure" especially where special meaning is attached to words and phrases in the Order and there is "no indication that any other than the special meaning is intended by the parties." The FLRC instructed that the Assistant Secretary consider the applicability of the established meaning of such words and phrases when resolving grievability disputes.

In the Naval Ammunition Depot Case, Supra, the Assistant Secretary found that there was "sufficient evidence upon which one may reasonably conclude", that the AFGE's contention as to the interpretation of the contract clause in question was correct and that the probationary employees had a right to process grievances concerning their termination through the negotiated grievance procedure. He went on and concluded that in light of the foregoing and because it involved interpretation and application of the agreement in determining whether the agreement applied to the termination in question this "should be resolved through the negotiated grievance procedure." 4/

The FLRC stated, in effect, that this determination that AFGE's contention was reasonable was not sufficient and remanded the case to the Assistant Secretary to determine whether the subject matter of the grievance was in fact on a matter covered by a provision in the negotiated agreement.

Thus in the subject case, in light of the decision by the FLRC in the Naval Ammunition Depot Case, Supra, it is concluded that Sections 6(a)(5) and 13(d) of the Order require a determination of whether the Amendment 11 and the other requirements of the contract were intended by the parties, to apply to the filing of the Employee Development Specialist position. 5/

The determination of whether Amendment 11 applies to the filing of the Employee Development Specialist position necessarily first requires a determination of which of the two versions of Amendment 11 is the one that binds the Union and the Activity.

4/ The Assistant Secretary also stated that whether the Activity violated the agreement should be resolved through the grievance procedure. The FLRC did not indicate any disagreement with this conclusion.

5/ In light of the Naval Ammunition Depot Case, Supra, I can not limit my determination to whether the Union's contention is reasonable or not, and, if it is, to defer to the grievance or arbitration procedure to determine whether Amendment 11 applied to the filing of this vacancy. I must actually decide whether Amendment 11 does or does not apply to filling of this vacancy.

Although, normally, the language that appears in the signed contract binds the parties, where such language is clearly in error and does not reflect what the parties agreed to, it must be reformed so that it does set forth the parties agreement. It could not be contended, for example, that after a full and complete meeting of the minds by the parties as to the substantive terms of a contract, an undetected clerical error was committed in reducing the matter to writing that substantially changed these terms, that the parties would be bound by these new terms to which they had never agreed.

In the instant case the parties had agreed upon the precise language of Amendment 11, initialed it, the Union membership ratified it and the Activity then submitted a clean copy to the Union for proofing before reproduction. Clearly this is the Amendment 11 to which the parties had agreed. 6/ The final version was signed by the Union on the assumption that it incorporated these agreed upon terms. The record does not establish that the Union representatives were advised about any changes in Amendment 11; on the contrary, it established that they were aware of no such changes. To require parties to carefully read a contract that had previously been agreed upon, initialed and proofread, at a signing ceremony, where many of the signers might not even be the negotiators or know all the substantive terms, is very unrealistic and hardly equitable.

In the instant case the signed version differed substantially from the agreed upon one 7/ and it is concluded that the agreed upon version is the one that binds the parties.

6/ Activity Witness Randolph Johnson, Director of Personnel for the Activity, testified that this clause was intended to apply to first line supervisory positions. He was present during the negotiations.

7/ The reason for this difference was never fully explained. The change was not agreed upon. Therefore, it is assumed it was an unintentional clerical error on the part of the Activity when reproducing the Amendments for signature. If not unintentional, it would have been an intentional act of trying to fool the Union and change the agreed upon terms without the Union knowing it. The record herein does not establish this latter intent, and therefore it is assumed to have been an unintentional clerical error.

The Activity contends that Arbitrator Sol Yarkowsky had already rejected this contention concerning reformation of Amendment 11, in a matter pending before him (Case No. 74 K11194). However, the Arbitrator had concluded that this matter was not part of the grievance and therefore was not part of the controversy before him. In reviewing the matter the FLRC also did not deal with this problem. Office of Economic Opportunity, Kansas City Regional Office and National Council of OEO Locals, Local 2691, AFL-CIO, FLRC No. 74A-102. In the instant case the Union raised this reformation question while the grievability question, as opposed to arbitrability, was still pending and before the matter went to arbitration. 8/ It is concluded therefore that the reformation question was timely raised by the Union in this matter.

In light of all of the above it is concluded that the Amendment 11 language that binds the parties is:

"The parties agree that all vacancies will be posted in the competitive service above the entry level will be filled with in-house candidates, with the exception of policy and supervisory positions at the division level or equivalent, or when there is an emergency which precludes the use of the Merit Promotion system..."

The position in question, the Employee Development Specialist, even if a policy or supervisory position, would be subject to the requirements of Amendment 11 unless it were a "policy or supervisory position at the division level..." The record establishes that the Employee Development Specialist position is located below the division level. It is part of the Organization and Manpower Branch which is below and part of its parent division, the Personnel and Manpower Division. 9/

8/ In this regard it should be noted that the Assistant Regional Director for the Philadelphia Region had dismissed a Grievability Application because the Union had attempted to have Amendment 11 reformed when no specific wrong doing had occurred and, therefore, he held there was no necessity to interpret or reform Amendment 11. Case No. 22-5907(AP).

9/ It is thus unnecessary to determine whether the Employee Development Specialist is a "policy and supervisory position" within the meaning of Amendment 11.

Therefore, I am constrained to conclude that the Employee Development Specialist position is subject to the terms of Amendment 11, unless it is determined that to so hold would violate the Order or other laws and regulations.

The Employee Development Specialist, as a training officer, is within the unit exclusions set forth in Section 10(b) of the Order, because it is "an employee engaged in Federal Personnel Work in other than a purely clerical capacity..." See HEW, Regional Office VI, Dallas, Texas, A/SLMR No. 266. Therefore, the position is by action of Order excluded from the collective bargaining unit represented by the Union.

However, the fact that the position in question is not in the unit does not preclude the parties from bargaining concerning the procedures and criteria to be applied in filling such a position.^{10/} The Activity alleges, however, that this would violate Section 12(b) of the Order which reserves to management the right "to hire, promote transfer..." employees in positions within the Agency. The Activity can not waive rights reserved to management by Section 12(b) of the Order, Nation Council of OEO Councils and Office of Economic Opportunity, FLRC No. 73A-67.

It is concluded, however, that the contract and amendments do not impinge on management's rights as protected by Article 12(b) of the Order. They do not take away management's right to promote, etc; they merely set forth standards and procedures to be used in filling the vacant positions, if and when the Activity decides to fill them. The cases cited by the Activity ^{11/} are inapposite because they deal with attempts to limit management's rights to decide whether or not to fill vacancies, etc. However, although Section 12(b) may

^{10/} In fact the Activity Witness, Personnel Director Randolph Johnson, stated that the procedures were meant to apply to first line supervisors, clearly excluded from the unit, and he saw no problem with that.

^{11/} V. A. Research Hospital, FLRC No. 71A-31 and National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, FLRC No. 73A-67.

reserve to management the decisions of whether to fill vacancies, it does prevent an Activity from bargaining and agreeing with a labor-organization concerning the procedures and criteria to be used in filling any vacancy that management determines to fill.

It is therefore concluded that the contract and Amendment 11 procedures were intended by the parties to apply to filling the Employee Development Specialist position, and that such an application, once the Activity determines to fill the position, does not violate management's rights protected by Section 12(b) of the Order.

Whether the Activity did, in fact, comply with the agreement and amendments is a question to be resolved by the grievance procedure.

Recommendation

It is hereby recommended that the Assistant Secretary of Labor for Labor-Management Relations find the subject grievance is grievable.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: February 20, 1976
Washington, D. C.

about Ms. Oldfield not taking Desk Training, Ms. Patterson understood that she had waived it. Believing that she was being deprived of the opportunity of being trained next, Ms. Patterson brought the matter to Ms. Rocco's attention.

6. On June 11, 1975, Ms. Rocco discussed the matter with the section chief, who was the second line supervisor and the person to whom Ms. Holmes was directly responsible.

7. On June 12, 1975, the section chief asked Ms. Holmes if Ms. Oldfield had waived Desk Training. Ms. Holmes then queried Ms. Oldfield as to whether she had so advised Ms. Rocco. Ms. Oldfield said she had not and went to speak to Ms. Rocco about it. After a discussion with Ms. Rocco and the section chief, Ms. Oldfield returned to her desk visibly upset.

8. Ms. Holmes thereupon rushed up to the section chief's desk along side of which Ms. Rocco was seated and began to berate Ms. Rocco in loud, angry tones. She told Ms. Rocco in no uncertain terms not to tell her (Ms. Holmes) how to run her unit; that Ms. Rocco and her Union were not going to tell Ms. Holmes who to train or when to train, and that any training for Ms. Patterson would be given if and when Ms. Holmes decided to do so. Ms. Holmes accompanied her invective by shaking her finger at Ms. Rocco. After three or four minutes, Ms. Holmes returned to her desk. There was no actual threat of physical harm.

9. Although the scene was visible to the employees in the unit and the sound of Ms. Holmes' voice was within the hearing of a number of them, the proof indicates that the words used by Ms. Holmes were intelligible to no one except Ms. Rocco and the section chief.

10. On June 12, 1975, no grievance was pending with respect to the matter under discussion. A formal grievance thereon was filed in November, 1975.

Apart from the essential facts above found, the testimony may be said to indicate that loyalty to the management team on the one hand, and unwillingness to risk possible management disfavor on the other, can produce remarkable impairment of hearing, vision and memory. In a sharp, if inconsequential, conflict in testimony Ms. Rocco insisted that Ms. Holmes had said that she (Ms. Rocco) and her union could go to hell. Ms. Holmes was equally insistent that her remarks were free of any cussing. Yet the section chief testified that she did not remember hearing any profanity, and other witnesses, including those in close proximity to the section chief's desk, said they were unable to hear what words were said.

In any event, whether Ms. Holmes used the word "hell" or not is wholly immaterial. In unfair labor practice proceedings, the Administrative Law Judge does not function as Mrs. Grundy or Emily Post. What must be determined is not the supervisor's choice of words, but the effect of her outburst upon others. Did it inhibit the exercise of employee rights guaranteed by the Order?

Conclusions of Law

Stripped of emotional overtones and underlying personality clashes of apparent long standing, proof of any violation of the Order is at best inconclusive. Looked at in the light most favorable to Complainant, the evidence shows that a supervisor lost her temper and berated a union steward in the presence of other employees. Bearing in mind that no claim is made here of discouraging membership in a labor organization by discrimination in regard to a condition of employment (Section 19(a)(2)), it is difficult to find from the evidence sufficient facts from which it may be reasonably inferred that the supervisor's conduct resulted in a deprivation of rights assured by the Order.

Many of us who are employed in Government have encountered from time to time supervisors, department heads, or executives, and their assistants, who are well-qualified by intelligence, training and experience to direct the work of others, but who by reason of temperament, or perhaps due to personal pressures, tend to abuse the authority with which their positions endow them. They often over-react to minor departures from rigid routines by verbally or administratively punishing unlucky subordinates. Such situations are dealt with in a great variety of ways, but it would be most extraordinary to construe an instance of such human behavior as an unfair labor practice per se.

The decision of the Assistant Secretary relied on by the Complainant (U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242) is clearly distinguishable. The operative factors cited by the Assistant Secretary there were, first, the direct prevention of a steward, or acting steward, from exercising her right to act as representative of a labor organization in presenting views to management; and second, the knowledge of such prevention on the part of other employees, who may have been led to believe that management viewed their exclusive representative with disdain and were thereby discouraged from exercising their rights granted under Section (1)(a) of the Order. Neither of those elements was shown to be present here.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
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At the time of the incident in question, Ms. Rocco had already protested to the section chief concerning what she and Ms. Patterson conceived to be an unfair denial of Desk Training, which was a privilege accorded by agency policy or usage, but was not a right assured by the Order. Ms. Rocco was in no way prevented from performing her duties as a union representative, and in fact, the protest was not dropped, but was carried forward to the filing of a grievance a few months later. Since the proof indicated that the section chief was the only other person who heard what Ms. Holmes actually said, it would not be reasonable to infer from the evidence that employees acquired knowledge of any disparagement of the union and were thus restrained somehow from exercising their right under Section 1(a) of the Order to freely form, join or assist a labor organization.

An employee who is embarrassed or discomfitted by a supervisor's untoward tirade might have some recourse under appropriate provisions of the agency personnel manual, or perhaps under the rules of the Civil Service Commission. Upon the facts developed in this proceeding, however, I find no violation of Section 19 (a) (1) of the Order.

RECOMMENDATION

In view of the foregoing Findings of Fact and Conclusions of Law, I hereby recommend to the Assistant Secretary that the complaint be dismissed in its entirety.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: June 30, 1976
Washington, D.C.

.....
In the Matter of :

U.S. DEPARTMENT OF COMMERCE :
U.S. MARITIME ADMINISTRATION :
Respondent :

and : Case No. 30-5898 (CA)

UNITED FEDERATION OF COLLEGE :
TEACHERS, U.S. MERCHANT MARINE :
ACADEMY CHAPTER, LOCAL 1460, :
NYSUT, AFT/NEA, AFL-CIO :
Complainant :
.....

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For the Respondent

Professor Donald R. Paquette
Associate Professor of Engineering
Vice-Chairman, USMMA Chapter, U.F.C.T.
King's Point, New York 11024
For the Complainant

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 "Executive Order" or "Order"). It was initiated by a Complaint, dated November 22, 1974, and filed November 25, 1974, which alleged violations of Sections 19(a)(1) and (6) of the Executive Order by the failure of Respondent to confer in

good faith by refusing to negotiate proposals for change in personnel policies prescribed by Maritime Administrator's Order 181(Amended) and by using the content and process of revision of this policy order to impact on the negotiation of two salary proposals determined to be negotiable by the Federal Labor Relations Council (hereinafter "Council"); and by unilaterally prescribing, on or about June 10, 1974, terms and conditions of employment of unit employees by changing personnel policies in Maritime Administrator's Order 181 which were not negotiated nor agreed upon by the exclusive representative.

A Notice of Hearing was issued on March 27, 1975, and, pursuant thereto, a hearing was duly held before the undersigned at the U.S. Merchant Marine Academy, Kings Point, New York on June 3, 4 and 5, 1975. All parties were represented and were afforded full opportunity to be heard and to introduce relevant testimony and evidence on the issues involved. Briefs were filed by the parties and have been duly considered. Upon the entire record 1/ 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

1. Complainant, United States Merchant Marine Academy Chapter, United Federation of College Teachers, Local 1460, NYSUT, AFT/NEA, AFL-CIO, has been since 1965, and continues to be, the recognized exclusive bargaining representative of the unit comprised of the teaching faculty of the United States Merchant Marine Academy, Kings Point, New York.

1/ Each party has filed a Motion to Correct Transcript; each motion has been examined and found wholly meritorious; and each is hereby granted. Accordingly, the corrections made, as requested, appear in Appendix B attached hereto. The name of the Administrative Law Judge throughout the transcript should be one word "Devaney", not "De Vaney". In addition, in the course of examining Respondent's requested corrections on page 86 of the transcript, the following errors were noted and the additional corrections of page 86 of the transcript are hereby made: L. 7, the word "pre" at the end of the line should be transposed to appear before "11838", to read "pre-11838 Executive Order; L. 16, the word "visualized" should be "utilized"; and on L. 21 the last word "somegning" should be "something".

2. The U.S. Merchant Marine Academy is an installation operated by the Maritime Administration, Department of Commerce (Respondent) to train civilian officers for the merchant fleet.

3. An agreement was entered into by Complainant and the United States Merchant Marine Academy, Maritime Administration, U.S. Department of Commerce on February 13, 1968, and remained in full force and effect until terminated by Respondent effective December 31, 1973 (Comp. Exh. 18). In the Matter of: U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York and United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460 of NYSUT, NEA/AFT, AFL-CIO, Case Nos. 30-5454(CA) and 30-5455(CA) (Judge Myatt, October 31, 1975).

4. A decision on negotiability issue was made by the Council on November 20, 1972, in, United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (Comp. Exh. 4). As the Council has already determined Respondent's obligation under Section 11(a) of the Order, it is neither necessary nor appropriate to reconsider those contentions in this case. The background of Maritime Administrator's Order No. 181 (M.A.O. 181(Amended)) and Department of Commerce Administrative Orders 202-250 and 202-711 was fully set forth by the Council in FLRC No. 71A-15 (1972) and need not be repeated.

5. On October 27, 1971, the Superintendent of the Academy submitted a revision of A.O. 181 (Amended) to the Personnel Officer of Respondent (Comp. Exh. 5) and in the letter of transmittal stated, in part, as follows:

"At this stage input has not been obtained from the faculty as represented by the United Federation of College Teachers because the changes desired do not involve matters of substance of direct concern to faculty members; rather they relate to the extent of the authority of the Superintendent with respect to faculty matters. However, the United Federation of College Teachers will be consulted before A.O. 181 is revised." (Comp. Exh. 5; Ass't. Sec. Exh. 1, p. 1).

Complainant was furnished a copy of the Superintendent's proposed revision (attachment to Comp. Exh. 5) and Complainant's comments on this proposal as well as Complainant's Proposed Revision of A.O. 181 were forwarded to Respondent (Comp. Exh. 7).

6. On March 6, 1973, the Acting Dean, Capt. Krinsky, met with officials of Complainant and requested a postponement of salary negotiations "because the Maritime Administration was very busy finishing the change of A.O. 181". This was the first knowledge Complainant received of the resurfacing of the proposal to revise A.O. 181. On April 25, 1973, John M. Golden, then Director of Personnel, Maritime Administration, 2/ personally delivered a copy of Respondent's proposed revision of A.O. 181 to Captain Nazzaro (past Chairman of Local 1460), Commander Wells (Chairman of Local 1460) and Mrs. Schaeffer (field representative of the Union) at the beginning of the first salary pre-negotiation meeting. Professor Paquette was not present and Mr. Golden's testimony to the contrary is specifically not credited as contrary to all other testimony and evidence including Mr. Golden's correspondence. I further find that there was no discussion concerning Respondent's proposed revision of A.O. 181 on April 25, 1973.

7. Respondent's proposed revision of A.O. 181 (designated "DRAFT (Revised)" and dated 4/16/73) bore little or no resemblance to the Superintendent's proposed revision of October 27, 1971. Respondent's 1973 proposal represented a complete revision of A.O. 181, including incorporation therein of A.O. 116. Other Administrator's Orders, including A.O. 60 and 151, and Department Administrative Orders, including D.A.O. 202-250, were referred to and provision was made for the first time to reflect changes, such as the addition of Teaching Fellows, since the last prior revision of A.O. 181. Mr. Golden readily conceded that the proposed revision was very, very long and complicated. Nevertheless, Mr. Golden's covering letter, dated April 24, 1973, addressed to Mr. Wells, requested Complainant's comment by May 9, 1973 (Comp. Exh. 8).

2/ On November 1, 1974, Mr. Golden became Deputy Assistant Administrator for Policy and Administration for the United States Maritime Administration.

8. By letter dated April 27, 1973, to Mr. Robert J. Blackwell, Assistant Secretary for Maritime Affairs, Chapter Chairman Wells protested Mr. Golden's position in his covering letter transmitting the proposed revision of A.O. 181 concerning consultation and asserted that Complainant's position was that such changes were subject to negotiation, not consultation, and that Complainant wished to negotiate all changes in A.O. 181. Notwithstanding Respondent's jaundiced view of Mr. Well's letter, it very plainly stated Complainant's position as follows:

"The Federal Labor Relation Council, in its decision on the salary issue, FLRC No. 71A-15, states that the scope of the bargaining obligation in section 11(a) of the Executive Order 11491 may not be limited by an agency's unilateral action based on AO-181(A) without appropriate negotiations will be a unilateral decision and the UFCT will use all means at its disposal to bring the matter to its proper conclusion." Comp. Exh. 9).

Mr. Wells also stated that, because of the complexity of the matter, Complainant would be unable to have a proposal ready by May 9, 1973, but suggested pre-negotiation discussion on May 15 and 16 and that negotiations begin on May 29, 1973.

9. Mr. Wells' letter of April 27, 1973, was referred to Mr. Golden for response and Mr. Golden responded by letter dated May 9, 1973, in which he set forth quite forcefully Respondent's position that the right to issue regulations is a reserved right of management under 12(a) of the Executive Order, was recognized in Article IV, Section 1 of the Agreement with Complainant, and therefore, Respondent was not required to negotiate A.O. 181(A). Mr. Golden further stated that the letter dated April 24, 1973, was in accordance with Section 11(b) of the Executive Order and that at a mutually convenient time Respondent would be glad to meet and confer on the proposed changes as appropriate under Section 11(b) of the Executive Order. Nevertheless, Mr. Golden further stated that Complainant had not indicated what proposed changes in A.O. 181 it considered subject to negotiation (Comp. Exh. 10).

10. By letter dated May 18, 1973, Chairman Wells responded to Mr. Golden's letter of May 9, 1973, and stated, inter alia, that because of the many subtle changes requiring additional

time for study, Complainant would not have its proposal until June 15, 1973; would meet at any mutually convenient time thereafter (except June 26 - July 27, 1973). Mr. Wells again asserted that Complainant considered "All elements of AO 181(a) dealing with working conditions, and related matters, of the faculty unit are negotiable." Finally, Mr. Wells stated that if there were any disagreement on the negotiability of any matter, a request would be made for a determination in accordance with the Executive Order (Comp. Exh. 11).

11. By letter dated June 14, 1973 (Comp. Exh. 13), jointly signed by Chairman-Elect Edward Ferenczy and by Chairman Wells, ^{3/} Complainant submitted its proposal (Comp. Exh. 14) which consisted of changes set forth on Respondent's proposal dated April 16, 1973. Complainant again reiterated its position that all elements of AO 181(A) dealing with working conditions, and related matters, of the faculty are negotiable.

12. Mr. Golden responded to Complainant's letter of June 14, 1973, by a letter addressed to Chairman Ferenczy, dated August 2, 1973, in which he stated, in part:

"... we do not consider Administrator's Order 181 to be subject to negotiation. In accordance with the provision of the Executive Order, we do wish to meet with you and discuss your proposed changes in the faculty policies and the reasons for same, in order that we may better understand your position and give full consideration to your recommendations. Since this meeting will not be a negotiation, a prenegotiation meeting or agreement is not needed." (Comp. Exh. 15).

13. A meeting was held on August 3, 1973, between Complainant and Mrs. Bee which was unproductive. By letter dated August 21, 1973, to Mr. Golden, Chairman Ferenczy again objected to Respondent's position that its proposed revision of A.O. 181 was not negotiable, a position asserted by Mrs. Bee on August 3 (Comp. Exh. 16). Mr. Golden responded by letter dated September 7, 1973, in which he again stated:

"It is our intent to meet and confer with you in good faith relative to

^{3/} Thereafter, correspondence was to and from Chairman Ferenczy.

proposed revision of Administrator's Order 181, Faculty Policies, as required by Executive Order 11491, Section 11(b) ... in accordance with Executive Order 11491 [11(b) and 12(b)] the Assistant Secretary retains the right to prescribe faculty policies by issuance of a revised Administrator's Order 181." (Comp. Exh. 17).

14. On November 15, 1973, Complainant made its initial request for a determination on the issue of negotiability. It seems appropriate to set forth fully the position taken by Respondent on this request separate and apart from the sequence of other events.

Chairman Ferenczy's request for a determination of negotiability of November 15, 1973, was addressed to Mr. Robert J. Blackwell, Assistant Secretary for Maritime Affairs, U.S. Department of Commerce, and stated, in part, as follows:

"In accordance with Section 11(c) (2) and (3) of Executive Order 11491, the Kings Point Chapter of the United Federation of College Teachers hereby requests a determination on the issue of negotiability of the 'personnel policies and practices and matters affecting working conditions' published in Administrator's Order 181, entitled 'Policies Applicable to Faculty of the U.S. Merchant Marine Academy, Kings Point, New York.'

"This request is necessitated by the Maritime Administration Personnel Officer's insistence that the subject matter is not negotiable. He makes this position clear in letters of May 9, August 2, and September 7, 1973, and in 'consultation' meetings with UFCT representatives. ..."
(Comp. Exh. 19).

By letter dated December 26, 1973, Assistant Secretary Blackwell responded to the November 15, 1973, request for a determination on the issue of negotiability and concluded:

"... your request for a determination of negotiability of 'personnel policies and practices and matters affecting working conditions' published in Administrator's Order 181, is not sufficiently specific for me to make a determination as to negotiability." (Comp. Exh. 24) 4/

By letter dated January 27, 1974, Chairman Ferenczy replied to Mr. Blackwell and pointed out that Complainant, in its letter of June 14, 1973, to the Personnel Officer, Mr. Golden, had clearly identified the specific matters it desired to negotiate and that its request for determination of negotiability was directed to its proposed additions and deletions, although it reserved the right to request a determination of negotiability on other matters in A.O. 181. Complainant's letter further stated:

"The Union recognizes that certain provisions of AO 181 which are based on statutory and regularoty requirements imposed by other authorities are not negotiable because they are clearly rights of management. The Union further recognizes that the agency head has the authority to issue regulations for the operation of his department. However, changes that involve clearly negotiable matters in AO 181 cannot be made without

4/ It is recognized that Complainant, in its letter of November 27, 1973, to Mr. Golden (Comp. Exh. 22), stated that "A courtesy request to the Head of the Maritime Administration, Mr. Blackwell, for such determination, had been made. Although not required, we felt it was the proper thing to do. We will pursue this matter through the Director of Personnel to the Federal Labor Relations Council as required." Although Complainant stated its intention to pursue this matter through the Director of Personnel, the Assistant Secretary, Mr. Blackwell, did not refer the matter to the Director of Personnel. To the contrary, the Assistant Secretary assumed jurisdiction and issued a decision on Complainant's request on April 11, 1974, a copy of which he specifically noted was sent to the Director of Personnel (Comp. Exh. 29).

negotiation. Issuance of these changes, without negotiations, is a violation of Section 11(b) of Executive Order 11491.

"The USMMA Chapter of the United Federation of College Teachers requests a determination of negotiability of each proposal, hand-printed or strike-out, identified in the U.F.C.T. proposal of June 15, 1973. ..." (Comp. Exh. 26).

By letter dated April 11, 1974, Assistant Secretary Blackwell responded, in part, as follows:

"... your request for determination of negotiability appears to be premature as such matters have not been placed on the bargaining table. 5/

The Assistant Secretary Concluded:

"In the event one or more specific issues develop in subsequent negotiation ... as to whether a proposal is negotiable it may be presented to me for a specific determination. ..." (Comp. Exh. 29).

5/ Having recited that representatives "did meet and confer with you on August 3, 1973, October 17 and 18, 1973, and November 28, 1973, concerning the proposed revision" and "that careful consideration was given to your views", this statement as a determination of negotiability would be strange under any circumstances; but in context, following Respondent's termination of discussions on November 28, 1973, coupled with the announcement on November 28, 1973, that there would be no further meetings and that Respondent intended to place its revised A.O. 181 into effect, which was confirmed by Mr. Golden's letter of January 29, 1974 (Comp. Exh. 27), such disposition of a request for determination of negotiability becomes ludicrous, e.g., Respondent having refused to negotiate, as Complainant asserts, and having terminated discussions would avoid determination of the request for negotiability on the assertion that there is no bargaining. Of course there was no negotiation if, as asserted, Respondent refused to negotiate because the

By letter dated May 20, 1974, to Assistant Secretary Blackwell (Comp. Exh. 30), Chairman Ferenczy expressed Complainant's disagreement with the conclusion that its request for determination of negotiability was premature and disagreed with the assertion that there were no specific issues for determination as to negotiability. Mr. Golden responded on behalf of the Assistant Secretary by letter dated August 1, 1974 (Comp. Exh. 32) in which he stated:

"... I wish to advise you that if, in connection with negotiations, the UFCT submits specific proposals management will give careful consideration to these proposals and questions of negotiability will be determined at that time ..." (Comp. Exh. 32). 6/

15. Mr. Golden attended the meetings of October 17 and 18, 1973. 7/ On October 17, the parties went through Respondents' proposed revision and, at the same time, discussed Complainant's counterproposals. Early in the discussions the parties reached a point of disagreement and Mr. Golden suggested, and Complainant

Footnote continued from page 9.

matter was "not negotiable"; but that was the very issue to be determined, namely "negotiability". It could scarcely be contended that Complainant had not repeatedly and continuously sought to bargain on its proposals and most assuredly had laid them on the "bargaining table." Stated otherwise, if there were no bargaining it was because Respondent refused to bargain for the reason that it asserted A.O. 181 was not negotiable.

6/ Respondent had, by this time, already unilaterally issued its revised A.O. 181, now designated "MAO 710-181", dated June 10, 1974 (Comp. Exh. 31). Apparently, Respondent's position, as expressed in the Assistant Secretary's letter of April 11, 1974, and in Mr. Golden's letter of August 1, 1974, was that it would not pass on negotiability unless and until an issue was raised in contract negotiations. In short, Respondent's position appears to have been that "negotiability" may be considered only when, as in a Greek drama, the "negotiating" mask is worn.

7/ Also present for Respondent on October 17, 1973, were Mrs. Bee, Mrs. Hoxie and Captain Krinsky. Chairman Ferenczy and Professor Paquette represented Complainant.

agreed, that the items in dispute should be put aside, or tabled, for the time being and they would come back to those matters later. While numerous items were put aside for further study and/or future discussion, considerable progress was made until Section 10 of Respondent's proposal, entitled "Academic Year and Hours of Duty" was reached. Complainant had unusually strong views concerning this proposal as it viewed a possible effect of Respondent's proposal as reducing faculty salaries by 1/12th. After considerable questioning, Mr. Golden admitted that Section 10, as proposed, could have that effect, i.e., could, indeed, reduce faculty salaries by 1/12th. This effect having been denied repeatedly by the local administration, Mr. Golden insisting on Section 10, and Mr. Golden stating in effect "... that if we have to negotiate this document, you will get less than you have here", the meeting of October 17 ended in acrimony.

16. On October 18, 1973, the parties met again 8/and the atmosphere was dramatically changed. Mr. Golden was very cordial and began the meeting by agreeing, *inter alia*, to withdraw proposed Section 10 and to reinstate the prior language; agreeing to include the language from the prior order in Section 11.02 that "It is the policy of the Department of Commerce to adjust the faculty salary schedule so as to provide general pay increases granted by Congress for Federal employees paid under the Classification Act" which had been eliminated in Respondent's proposed revision of 181; and by agreeing that Dean Krinsky should meet with Complainant to discuss "Faculty Committees" and if he could work out acceptable language, he, Golden, would accept such recommendation. Other portions of the proposed A.O. 181, and Complainant's comments were discussed and further agreement reached. At this point Mr. Golden agreed that as soon as he heard from Dean Krinsky on the committee situation and from Professor Paquette on the matter of academic freedom he would develop a new clean draft and resubmit it to the union. Mr. Golden readily admitted that a number of items had been tabled for future discussion. There was no dispute that previously tabled items were not further discussed on October 18, 1973.

Mr. Golden summed up his reaction to the October 18 meeting as follows:

"Actually I left on cloud 99 because it was from a labor

8/ Mr. Golden and Captain Krinsky for Respondent; Professor Paquette and Commander Ferenczy for Complainant.

relations point of view, it's an exciting day when things start falling into place and you get agreement. I think we made considerable progress. We agreed to several things. One, that we would go back and consider all the conversation, the agreements and changes of things that we had discussed during that two-day session and rework these into a new Draft." (430)

17. Whether unable to stand success, whether by deliberate design, whether by incredible ineptitude, or whether by unfortunate circumstances, Respondent's actions soon dissipated the euphoria of October. Dean Krinsky met with Complainant and substantial agreement on "Faculty Committees" was reached and recommended language was forwarded to Mr. Golden by Dean Krinsky and was incorporated in Section 5 of the clean draft. However, the record does not indicate that Complainant ever saw the actual recommendation formulated by Dean Krinsky, following an oral report to Mr. Golden, and subsequently submitted as a written recommendation to Mr. Golden, until it received the clean draft which incorporated Dean Krinsky's recommendations. Professor Paquette did not respond on the academic freedom matter and the former language of A.O. 181 in this regard was retained in the clean draft prepared by Mr. Golden, dated November 16, 1973 (Res. Exh. 1) and transmitted to Chairman Ferenczy by letter dated November 19, 1973 (Comp. Exh. 21). With regard to A.O. 181, Mr. Golden's letter stated:

"In accordance with our prior consultation with you and Academy management concerning revision of Administrator's Order 181, Faculty Policies, the draft order has been revised. Copies are attached for further review.

"Mrs. Edna Bee and I expect to be at the ... Academy on November 28, 1973, and will be glad to meet with you and Academy management about 10:30 a.m. for any further discussion of Administrator's Order 181 which may be appropriate. In view of our lengthy consultation with you on

April 3, 1973 and October 24 and 25 [sic. October 17 and 18], 1973, I believe only a brief discussion concerning Administrator's Order 181 will be needed." (Comp. Exh. 21).

Mr. Golden's letter of November 19, 1973, also stated that there was another meeting scheduled for 1:00 p.m. for resumption of contract negotiations. Complainant's fears that the November 19 letter presaged the end of good faith discussions on A.O. 181 were well founded as developments soon demonstrated.

Mr. Golden became aware of errors in the clean draft before he left Washington for the meeting at the Academy on November 28, 1973. The precise date was not established beyond his testimony that this "embarrassing situation" was called to his attention "just prior to going to this meeting on the 28th". Mr. Golden further stated, "we in fact had omitted a couple of items inadvertently ... and there were a couple of points that we had agreed to with the Union, that for one reason or the other did not get translated into this particular document." Mr. Golden had a handwritten list of errors but did not advise Complainant prior to the meeting, or at the commencement of the meeting, of these errors. Indeed, the meeting opened with an exchange of letters. One dated November 27, 1973, from Chairman Ferenczy to Mr. Golden (Comp. Exh. 22) was handed, in an envelope, to Mr. Golden; and the other, also dated November 27, 1973, from Mr. Golden to Chairman Ferenczy (Comp. Exh. 23) was likewise handed, in an envelope, to Chairman Ferenczy. After the letters were read, Mr. Golden asked, as he had in his letter (Comp. Exh. 23), what matters Complainant alleged were not conducted in good faith, 9/ and Professor Paquette stated that Complainant

9/ Although it is clear that Professor Paquette's response referred to the failure of Respondent to reflect the agreement of the parties in the clean draft of A.O. 181, it is obvious that this had not, in fact, could not, have been the ground for the assertion initially made in Complainant's letter of November 15, 1973, as the clean draft was not completed until November 16, and was not transmitted to Complainant until November 19. It seems apparent from his earlier testimony (Tr. 254) that the cause for the assertion in the letter of November 15, 1973, was the meeting with the Dean to discuss the letter of termination of the Agreement (Comp. Exh. 18).

was not prepared to discuss the clean draft because it did not reflect what had already been agreed upon. Respondent asked why Complainant agreed to the meeting and Professor Paquette replied that they wanted to continue the original discussions, but the November 16th draft was not correct. Respondent then asked "where isn't it correct?"; and Professor Paquette pointed out two examples, whereupon Mr. Golden said after looking at a document, "we have those". Professor Paquette then asked if Respondent knew of other errors and Mr. Golden said there were 14. Professor Paquette asked for a list but Mr. Golden said "No", but that he would tell him what they were and read off a list of which Professor Paquette was able to record only 13 (Comp. Exh. 33). Mr. Golden's justification for his lack of candor in not advising Complainant before, or at the commencement of, the meeting was:

"I was interested in hearing if they had identified any other mistakes that we had not picked up in this process." (Tr. 439).

But Mr. Golden admitted, "it was a disaster."

Mr. Golden did, as noted above, read a list of errors and he affirmed his intention to abide by his previous agreements; but when Professor Paquette asked that a new draft be prepared to properly reflect what had gone on, Mr. Golden refused and announced that this was the last meeting on A.O. 181.

"I am putting it into effect."

There is a conflict in testimony as to whether any of the tabled items (October 17 and 18 meetings) were discussed on November 28, 1973. Mr. Golden testified that the tabled items were discussed and Professor Paquette testified that they were not. I have carefully considered the testimony, including Mr. Golden's testimony that:

"Quite frankly, after Mr. Ferenczy and I got Mr. Paquette simmered back down when he could speak in a reasonable fashion, we did in fact show some progress and were able to, I think, resolve the remaining issues." (Tr. 440).

Upon the basis of all testimony and evidence, I specifically reject Mr. Golden's testimony which was directly contradicted, was contrary to all other probative evidence and testimony, and was inherently improbable in view of all circumstances; and fully credit the testimony of Professor Paquette, which was

corroborated by the testimony of Chairman Ferenczy, and which is consistent with all other evidence and testimony (see, for example, Comp. Exhs. 25 and 28). Accordingly, I find, as Professor Paquette testified, that there was no discussion of any of the tabled items on November 28, 1973, and the meeting ended in discord. Complainant's request to meet further, after the afternoon meeting, was declined by Mr. Golden because of other commitments.

18. No further meetings were held on A.O. 181 prior to its being placed into effect; however, Chairman Ferenczy, by letter dated January 2, 1974, addressed to Mr. Golden, made the following request:

"The Union requests that the matter of A.O. 181 be held in abeyance until the salary negotiations are completed. This should present no problem since you have said, on at least two occasions, that you can live with the existing document. In the meantime, we ask that a new draft, carefully scrutinized to minimize errors and reflecting the discussions of August 2, October 24 and 25 (sic. August 3, October 17 and 18), and November 28, 1973, and omitting nothing that we had agreed to set aside for further discussion, be prepared and forwarded to the Union for study and discussion at the appropriate time ..." (Comp. Exh. 25).

19. Mr. Golden refused Chairman Ferenczy's request of January 2, 1974, in all respects by his reply dated January 29, 1974, in which he stated, in part, as follows:

"... we have no obligation to negotiate Administrative Orders. Our obligation with respect to such issuance is 'to meet and confer', as appropriate.

* * * *

"... Our November 16, 1973 draft of Administrator's Order 181 clearly reflects that management consulted with you in good faith. Careful consideration was given to the UFCT's views and proposed changes and many of your recommendations were accepted.

In revising the draft order to reflect management's decision based on three days of discussions with you, there were a few omissions in the revised draft ... your allegations with respect (sic) errors in the draft are incorrect.

* * * *

"As you were previously advised, further consultation on Administrator's Order 181 is not considered necessary ..." (Comp. Exh. 27).

Professor Paquette further testified that Mr. Golden never supplied a further draft.

20. Chairman Ferenczy replied to Mr. Golden's letter of January 29, 1974, by letter February 11, 1974, in which he stated, in part, as follows:

* * * *

"The clean draft ... was for review of those portions of the order on which we agreed and which you would rewrite to reflect our discussions. Those portions on which we disagreed were tabled for further discussions after a first 'run-through' of the document.

"You are also in error when you state that our attitude had changed, at the meeting of November 28, 1973, 'for no apparent reason.' The reasons are apparent enough: your continued denial of negotiability, the unilateral termination of the negotiated agreement, your November 16, 1973 draft revision errors and omissions, the unilateral change in leave practice at Thanksgiving, and your lack of understanding of our AO 181 meetings ..." Comp. Exh. 28).

21. Respondent unilaterally issued MAO 710-181, effective June 10, 1975 (Comp. Exh. 31). On June 26, 1974, Mrs. Bee and Mrs. Hoxie delivered a copy of MAO 710-181 to Chairman Ferenczy

and Professor Paquette at the Academy and Mr. Golden transmitted two additional copies by letter dated August 11, 1974 (Comp. Exh. 32) ^{10/} MAO-710-181 was substantially different than the November 16, 1973, version. The sentence in Section 11.02, to the effect that "It is the policy of the Department of Commerce to adjust the faculty salary schedules so as to provide general increases granted by Congress for federal employees paid under the Classification Act" which had been eliminated in the April 16, 1973, draft (Comp. Exh. 14), which Mr. Golden agreed to include on October 18, 1973, and which was included in the November 16, 1973, draft (Res. Exh. 1) had again been deleted (Comp. Exh. 31). At least one section represented entirely new language; sections had been restructured and rewritten; and new language had been added in various sections.

22. Following Complainant's filing of the charge in this matter on August 26, 1974, a further meeting was held at the Academy on September 24, 1974. Respondent was represented by Mrs. Bee, Mrs. Hoxie and Captain Krinsky and Complainant was represented by Chairman Ferenczy, Professors Nazzaro and Paquette. After an inane assertion by Mrs. Hoxie, concerning the failure of Complainant to make any proposal concerning A.O. 181, had been laid to rest, the meeting appeared to be excellent and it appeared the parties could reconcile their differences on MAO 710-181. Then Respondent's representatives called for a caucus and retired to another room. After a long interval, they returned, said they thought they had a better idea of Complainant's position and they would adjourn and go back to Washington and develop a response. The response was Mr. Golden's letter of October 4, 1974 (Asst. Sec. Exh. 2) in which he stated, in part, as follows:

* * * *

"... It is management's position that there has been no unilateral change in personnel policies, practices, and working conditions.

10/ The significance of Mr. Golden's statement that

"advance copies of which Mrs. Edna Bee and Mrs. Patricia Hoxie delivered ... on June 26, 1974."

is not apparent as the document shows an effective date of June 10, 1974.

"... Management has not refused to bargain on any negotiable proposal put forth by the UFCT. Further management does not hold its bargaining obligation to be limited in way by MAO 710-181.

* * * *

"... I find that management has not unilaterally changed any negotiable matter by the revised order as alleged. Therefore, I see no reason to rescind the revised order.

* * * *

"... However, it is management's position that any faculty personnel matters which you wish to negotiate, if determined negotiable, should be a part of a total contract package. ..." (Emphasis supplied.)

The Complaint herein was filed November 25, 1974, and a copy served on Assistant Secretary Blackwell by letter dated November 22, 1974 (Asst. Sec. Exh. 4).

CONCLUSIONS

Two preliminary matters must be determined. First, Respondent's contention that its obligation under Section 11(a), to "meet at reasonable times and confer in good faith" does not, or more properly did not at the time the alleged unfair labor practice occurred, connote an obligation to negotiate. Stated otherwise, Respondent contends that prior to the Report and Recommendation of the Federal Labor Relations Council (hereinafter "Council") on the 1975 Amendment of Executive Order 11491, as amended, the term "consult" as used in Section 11(a) did not mean "negotiate" and that the comment of the Council to the contrary constitutes a change in the Executive Order which may not be applied retroactively to impose a new and different obligation than existed when the alleged unfair labor practice occurred. The contention of Respondent must be rejected. The Council recommended no change of the language of Section 11(a) and no change was made. The Council's interpretation simply

clarified what Section 11(a) had always meant. Thus the Council stated:

"Section 11(a) of the Order requires that the parties 'shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions. ...' ... the 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. 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 ... 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. (Labor-Management Relations in the Federal Service, Report and Recommendations p. 42) (1975).

* * * *

"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 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.'" (supra, pp. 43-44).

Second, Respondent contends that as the alleged refusal to negotiate, which culminated in its unilateral issuance of M.A.O. 710-181 effective June 10, 1974, occurred under provisions of the then effective Executive Order which placed jurisdiction to determine negotiability exclusively in the Council, the Assistant Secretary may not determine the issue of negotiability in this proceeding. Stated otherwise, the amendment to the Executive Order by E.O. 11838, dated February 6, 1975, effective ninety days thereafter (on or about May 6, 1975) granting the Assistant Secretary authority to make initial negotiability determinations (Sections 6(a) (4) and 11(d)) may not be applied retroactively. Without doubt, the amendment of the Executive Order in this regard, which granted the Assistant Secretary authority to make initial negotiability determinations in unfair labor practice complaint cases necessary to resolve the merits of the alleged unfair labor practice, substantially altered procedure. Previously, interposition of a claim of non-negotiability did effectively remove the initial determination of negotiability from the complaint procedure. Refusal to bargain allegations were, necessarily, when negotiability was properly raised, held in abeyance pending determination of negotiability by the Council. Nevertheless, the amendment of the Executive Order created no new, or additional, unfair labor practice by granting the Assistant Secretary authority to make initial negotiability determinations. If negotiable, the same conduct was an unfair labor practice whether the determination of negotiability was made initially by the Council or by the Assistant Secretary. Accordingly, I conclude that the amendment of the Executive Order constitutes a procedural change, and not a change of substantive rights, and, therefore, the provisions of the Executive Order as amended by E.O. 11838 govern, and that an initial determination of negotiability may be made in this proceeding to determine the alleged unfair labor practice pursuant to Sections 6(a) (4) and 11(d)

of the Executive Order, as amended. 11/

As the Council made clear in its Report and Recommendations, the authority granted to the Assistant Secretary does not extend to resolution of issues of negotiability which arise in connection with negotiations but, rather, in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions. Thus, the Council stated:

"1. Negotiability Disputes in Unfair Labor Practice Proceedings. Sections 6(a) and 11 should be amended to assign to the Assistant Secretary express authority to resolve those negotiability issues which have arisen not in connection with negotiations, but rather in the context of unfair practice proceedings resulting from

11/ The Council further noted that:

"... the Assistant Secretary has declined to consider 'refusal-to-negotiate' unfair labor practice complaints arising in connection with negotiations and posing negotiability issues unless there exists applicable Council precedent on which he can rely to resolve the negotiability issue." (Labor Management Relations In the Federal Service, Report and Recommendation, p. 60) (1975).

The Council's Decision on Negotiability Issue, FLRC No. 71A-15 (1972), is discussed hereinafter and, for the reasons indicated, may well constitute sufficient precedent to resolve the negotiability issue herein involved wholly apart from the amendment of the Executive Order. Nevertheless, in view of the conclusion reached, that the amended provisions of the Executive Order govern, this specific issue, i.e., whether FLRC No. 71A-15 (1972) constitutes applicable precedent for resolution of the negotiability issue, has not been determined.

unilateral changes in established personnel policies and practices and matters affecting working conditions. In addition, sections 4(c) and 11 should be amended to permit a party adversely affected by such a determination to exercise a right to have the negotiability determination reviewed on appeal by the Council. (Labor-Management Relations In The Federal Service, Report and Recommendation, pp. 58-59) (1975).

* * * *

"... the changes which we here propose would not affect the existing authority of the Council to resolve, under the section 11(c) procedures, negotiability disputes which arise in connection with negotiations ...

"The amendment which we propose would affirm the authority of the Assistant Secretary, in the context of certain unfair labor practice cases, 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 matter affecting working conditions. (supra, p. 61).

* * * *

"The Council also considered and rejected the alternative of requiring the Assistant Secretary to forward negotiability issues to the Council for determination when they appeared in the course of an unfair labor practice proceeding thus deferring his decision in the interim until the Council could resolve the issues concerned." (supra, p. 63).

In the instant case, determination of negotiability in connection with negotiations was, and remains, exclusively the province of the Council. For present purposes, it is immaterial that Complainant did not request a determination of negotiability by the Director of Personnel of the Department of Commerce or that the Assistant Secretary for Maritime Affairs retained jurisdiction and made a decision that determination of negotiability was premature. The authority of the Assistant Secretary to make an initial determination of negotiability results solely from Respondent's alleged unilateral issuance of M.A.O. 710-181. That is, the issue of negotiability resulted from Respondent's alleged refusal to negotiate by unilaterally changing established personnel policy or practice or matters affecting working conditions by its unilateral issuance of M.A.O. 710-181. As there were discussions of the proposed Order, it is true, in a sense, that the issue of negotiability initially arose in connection therewith. Nevertheless, the issue of negotiability in this proceeding was the result of Respondent's alleged refusal to bargain as a result of its unilateral action in issuing M.A.O. 710-181. Respondent's first, and basic, position is that it had no obligation under the Executive Order to "meet and confer" on A.O. 181. Its secondary position is that, if had such an obligation, it has fully complied by conferring in good faith. 12/

I. Reserved Right of Respondent

The Council in its Decision on Negotiability Issue in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (1972), with regard

12/ The refusal to negotiate, if required, although it began in 1973 more than 6 months prior to the charge, was a continuing violation which culminated with the unilateral issuance of M.A.O. 710-181 in June, 1974, which was followed by the filing of the charge herein on August 24, 1974. Respondent's conduct in meetings in August, October and November, 1973, as part of the continuing refusal to bargain, is not barred by §203.2(a)(2) of the Regulations. In addition, the same refusal to bargain continued after the charge was filed.

to Respondent's reserved right vis-a-vis A.O. 181 stated, in part, as follows:

"The circumstances in the present case are quite unique. To recapitulate, the proposals for negotiation relate to a salary plan and schedule which applies only to a single, relatively small unit of professional employees (81), in a single activity of the agency and at a single location, who have a recognized union representative. The agency established the salary plan and schedule for these employees by detailed regulation (M.A.O. 181) and reserved authority to alter the plan or schedule to its Director of Personnel at departmental headquarters ... Some other personnel policies applicable only to the unit are prescribed by the same agency regulation; other special policies for the group, such as those relating to faculty promotions, teaching loads, sabbatical leave, academic freedom, etc., have been established through negotiated agreement between representatives of the local activity and the recognized union.

"In these particular circumstances, if the Council were to sustain the agency head's determination of non-negotiability as to the faculty salary plan and schedule, based on M.A.O. 181, it would be holding, in effect, that an agency may unilaterally limit the scope of its bargaining obligation on otherwise negotiable matters peculiar to an individual unit, in a single field activity, merely by issuing regulations from a higher level. We believe the bargaining obligation in section 11(a) of the Order may not be diluted by unilateral action of this kind.

* * * *

"... the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity. Any other interpretation of the phrase 'published agency policies and regulations,' in the context of the Order, which would permit ad hoc limitations on the scope of negotiations in a particular bargaining unit, would make a mockery of the bargaining obligation. For it would mean that a superior official could unilaterally dictate any limit on the scope of negotiations in a particular agency activity merely by publishing instructions to the activity head with respect to personnel policies and working conditions unique to that activity.

"In other words, with particular reference to the present case, while higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations in the faculty unit at the Academy, higher level "published policies and regulations" which deal only with terms and conditions of employment in that individual unit, such as the faculty salary plan and schedule in M.A.O. 181, do not properly limit the scope of negotiations on this subject matter .. since unilateral prescription of these terms and conditions conflicts with the bargaining obligation of section 11(a). This is not to say that the Maritime Administrator's Order 181 is invalid. Rather, its publication does not, within the meaning of section 11(a), limit the agency's obligation to negotiate with the recognized union on the union's proposed changes in matters covered by that directive ..."

At the outset, Respondent misconceives the underlying rationale of the Council's decision in FLRC 71A-15. It is true, of course, that the negotiability dispute involved two specific union proposals namely: reduction in the number of steps from entry to top of grade in the faculty salary schedule; and change in the percentage factor for adjusting faculty salary compensation. Nevertheless, the Council plainly stated that M.A.O. 181 did not properly limit the agency's bargaining obligation on otherwise negotiable matters peculiar to the faculty unit. The fact that Respondent initiated the changes in A.O. 181 cannot alter its obligation to negotiate with Complainant concerning changes of terms and conditions of employment as prescribed by agency regulation. The Council noted in FLRC No. 71A-15 that some personnel policies applicable only to the faculty unit were prescribed by agency regulation (principally A.O. 181) and that other special policies for the group had been established through negotiated agreement. It is further true that A.O. 181 and A.O. 116 (combined in Respondent's proposed revision and effective Order, M.A.O. 710-191) dealt with policies also covered in the negotiated agreement; that the negotiated agreement (Article XI) specifically incorporated by reference the portions of A.O. 181(A) dealing with Faculty Promotion; and that Article XIX of the negotiated agreement provided that, as to matters not covered, neither party shall make any change without mutual consent and negotiation concerning matters not covered by the agreement which are subject to negotiation under the Order. Collective bargaining agreements rarely, if ever, attempt to cover all terms and conditions of employment and there was no reason that Complainant should have sought to include all portions of M.A.O. 181, or other Administrator's Orders, with which it was satisfied. These existing regulations formed a part of the established terms and conditions of employment and when Respondent sought to change those terms and conditions of employment it was obligated to negotiate such changes, and Complainant's counter proposals, before it could lawfully take unilateral action.

When Respondent undertook its revisions of A.O. 181 there was an effective collective bargaining agreement which remained in full force and effect until terminated by Respondent as of December 31, 1973. Respondent's proposed revision of A.O. 181 was made during the term of collective bargaining agreement and when it terminated discussions and announced, on November 28, 1973, its intention to issue the revised Order unilaterally the agreement was still in full force and effect. Respondent's revision of A.O. 181 sought to supersede

or modify the terms of the parties negotiated agreement and Respondent's refusal to negotiate, its termination of discussions, and its announcement on November 28, 1973, while the agreement was still in full force and effect that it intended to issue a revised Order unilaterally, was intended to modify the terms of the negotiated agreement. Of course, when it implemented the change on June 10, 1974, the agreement, as the result of Respondent's unilateral, although lawful, action had been terminated. See, Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Paccagoula, Mississippi, A/SLMR No. 390 (1974). Technically, therefore, when Respondent actually implemented the change on June 10, 1974, there was no agreement; but this did not permit Respondent to avoid its obligation to negotiate since established working conditions may not be unilaterally changed without affording the exclusive bargaining representative the opportunity to negotiate concerning such proposed change in working conditions. National Labor Relations Board, A/SLMR No. 246 (1973).

Respondent, although it conceded that portions of A.O. 181 were negotiable, refused to negotiate, contending that its obligation was merely to confer in good faith. It was obvious from the terms of A.O. 181 and from the testimony concerning the proposed changes, as the Council has previously noted, that the regulation governs personnel policies applicable only to the faculty of the Merchant Marine Academy; that these policies directly concern terms and conditions of employment; that Respondent's proposed changes affected such vital areas as salary, merit step increases, tenure, etc. Complainant has recognized areas of management rights and has sought to negotiate only those proposals which affect terms and conditions of employment. As noted above, Respondent admitted that portions of A.O. 181 were negotiable and, beyond noting that negotiability is not limited to the two items directly determined to be negotiable in FLRC No. 71A-15, as Respondent contends, it is unnecessary to attempt to individually catalogue such item subject to negotiation. It is sufficient for present purposes to determine simply that Respondent was obligated to negotiate its proposed A.O. 181.

Moreover, as to matters subject to management prerogative, the agency is, nevertheless, obligated to consult and confer with respect to the impact of any such initial decision or action on unit personnel. United States Air Force Electronics System Division (AFSC), Hanscom Air Force Base, A/SLMR No. 571

(1975). Accordingly the whole of Respondent's proposed A.O. 181 was subject to negotiation, either as to the initial decision or as to the impact thereof.

Having begun with a misconception of its obligation to negotiate with Complainant, Respondent by its refusal to negotiate violated 19(a)(6) of the Executive Order by its unilateral issuance of M.A.O. 710-181 unless, as it contends, it has satisfied its obligation to meet and confer in good faith.

II. Respondent's Assertion of Good Faith

As stated earlier, the term "meet and confer" in Section 11(a) of the Executive Order meant "negotiate". Respondent's obligation under the Executive Order was to negotiate in good faith. Semantics aside, if Respondent met its obligation to negotiate in good faith on its proposed revision of A.O. 181 the duty imposed by the Executive Order would be satisfied even if Respondent insisted on a description of the process as something other than negotiating. Respondent's timing of the issuance of its proposed revision of A.O. 181 demonstrated questionable good faith. First, it requested postponement of salary negotiations because it was busy completing A.O. 181. Second, it insisted on proceeding separately with the very, very long and complicated revisions, which it had had under study for 18 months, or longer, at the same time that it undertook contract negotiations.

From the outset of the submission of its proposed revision, Respondent insisted that it had no obligation to negotiate. Indeed, Mr. Golden testified:

"We never offered to negotiate 181. It's not negotiable." (Tr. 464)

At the meeting of August 3, 1973, Respondent's representative was Mrs. Bee. Despite Respondent's assertion of progress at the August 3, 1973, meeting, the record is to the contrary and beyond asserting Respondent's position that A.O. 181 was not negotiable there is no indication that anything was achieved on August 3, 1973. Mr. Golden attended the meetings of October 17 and 18. While maintaining that A.O. 181 was not negotiable, the discussions of October 17 and 18 demonstrated commendable good faith bargaining. The parties had gone through the proposed revision section by section and had discussed

Respondent's proposal and Complainant's counter proposal; had reached agreement on many sections; and had tabled other sections on which they could not agree. Respondent agreed to authorize Dean Krinsky to meet with Complainant to explore mutually satisfactory language on "Faculty Committees" and to accept such language as Dean Krinsky should recommend and to produce a clean draft to reflect the agreement of the parties. At this point, Respondent demonstrated a serious intent to adjust differences and to reach an acceptable common ground. General Electric Co., 150 NLRB 192, 57 LRRM 1491 (1964).

Dean Krinsky did meet with Complainant and substantial agreement was reached with Complainant on language on "Faculty Committees" which Dean Krinsky recommended and Mr. Golden incorporated in the clean draft. However, the clean draft, dated November 16, 1973, and transmitted to Complainant on November 19, 1973, failed to accurately reflect the agreement of the parties reached on October 17 and 18. Respondent with full knowledge of some 14 errors in the clean draft, which in each instance represented matters agreed upon in October but omitted in the November 16 redraft, and with a complete lack of candor withheld such information from Complainant. Shortly after the meeting of November 28, 1973, began, Complainant stated that it was not prepared to discuss the clean draft because it did not reflect what had already been agreed upon. Respondent, rather than disclosing the errors, asked why Complainant agreed to the meeting if the clean draft did not reflect what had been agreed upon. Thereafter, Respondent asked Complainant "where isn't it correct?" Only after Complainant had pointed out two examples, which Respondent stated it "had", did Respondent read a list of the errors. Then, when Complainant asked that a new draft be prepared to accurately reflect the prior agreement of the parties, Respondent refused and announced that this was the last meeting, and Mr. Golden stated "I am putting it [A.O. 181] into effect." Respondent failed and refused to discuss any of the items tabled on October 17 and 18; the meeting was terminated by Respondent; and Respondent declined to meet further on November 28, after the meeting on contract negotiation, for the asserted reason that Mr. Golden had a conflict.

Respondent's overall attitude and conduct on November 28, 1973, and thereafter, casts doubt on the sincerity of Respondent's protestations that the "errors" were inadvertent; but accepting Respondent's representation that the errors were inadvertent, its deliberate withholding of notice of the errors

from Complainant until the meeting had floundered on the seeds of distrust carefully orchestrated by Respondent, ^{13/} its refusal to prepare a new and accurate draft; its announcement that this was the last meeting; its refusal to discuss items tabled for future discussion on October 17 and 18; its adamant insistence that A.O. 181 was not negotiable; its statement that it was going to place A.O. 181 into effect unilaterally; its abrupt termination of the meeting of November 28, 1973; and its refusal to meet later, all demonstrated an abject failure to negotiate in good faith. N.L.R.B. v. Truitt Mfg. Co. 351 U.S. 149 (1956). Indeed, Respondent's refusal to negotiate the items previously tabled and its unilateral termination of the meeting of November 28, 1973, without more, was a violation of Section 19(a)(6) of the Order. Vandenberg AFB 4392nd Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435 (1974). However, the totality of Respondent's conduct on November 28, 1973, is a record of bad faith, an adamant insistence on its predetermined resolve not to budge from its initial position that A.O. 181 was not negotiable, a breach of its prior agreement with Complainant, and a thoroughgoing disregard for good faith, which further constituted a violation of section 19(a)(6) of the Order. N.L.R.B. v. American Insurance Co., 343 U.S. 395 (1952); N.L.R.B. v. Truitt Mfg. Co., *supra*; General Electric Co., *supra*.

On January 2, 1974, Complainant again requested a new, and accurate, draft for study and discussion. On January 29, 1974, Mr. Golden again asserted that Respondent had no duty to negotiate, declined to meet further and furnished no revised draft. Respondent unilaterally issued MAO 710-181, effective June 10, 1975, which was substantially different than the November 16, 1973, version. For example, a provision in Section 11.02, concerning adjustment of faculty salaries, which had been included in the November 16, 1973, version had been eliminated; new sections had been inserted, various sections had been restructured and rewritten; and new language had been added to

^{13/} As Chairman Ferenczy stated in his letter of January 29, 1974, Complainant was also greatly disturbed by Respondent's notice of termination of the negotiated agreement, a change in leave practice at Thanksgiving, and Respondent's lack of understanding of the A.O. 181 meetings.

various sections, all of which represented unilateral change by Respondent. Employer's unilateral change in conditions of employment was a further refusal to bargain since such conduct amounts to a refusal to negotiate. N.L.R.B. v. Katz, 369 U.S. 736 (1962).

On September 24, 1974, Respondent's representatives again met with Complainant. At the meeting it appeared that the parties could reconcile their differences; but Respondent's representatives, Mrs. Bee and Mrs. Hoxie, obviously lacking authority to make any commitment or to negotiate any agreements, requested an adjournment to go back to Washington and develop a response. Respondent's failure and refusal on September 24, 1974, to bargain in good faith through appropriate representatives empowered to negotiate and enter into agreements was a further violation of Section 19(a)(6) of the Order. United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (1972). Respondent's subsequent failure and refusal to negotiate concerning the changes in personnel policies, practices and working conditions, and/or to negotiate concerning the impact of such changes in personnel policies, practices and working conditions which it had unilaterally placed into effect, as well as its refusal to negotiate concerning any such changes except as part of a total "contract package", further demonstrated an infidelity to its duty under the Order and again violated Section 19(a)(6) of the Order by its further refusal to bargain in good faith concerning changes in personnel policies, practices and working conditions established by Administrator's Orders.

Other possible indicia of Respondent's absence of good faith need not be considered as it is clear from Respondent's conduct that it did not meet its burden to negotiate in good faith. Indeed, even if Respondent's position were correct, that its obligation was to "confer" in good faith, it is obvious that even under that standard Respondent has not acted in good faith.

While Respondent has failed to negotiate in good faith and has unilaterally issued M.A.O. 710-181, I am fully aware that Respondent attempted, as it saw the interests of the faculty unit, to produce a good order. Complainant frankly stated that some provisions of M.A.O. 710-181 were well done and a marked improvement. Benevolent paternalism is not, however, an adequate substitute for the duty to negotiate in good faith as required by the Executive Order.

Respondent refused to negotiate in good faith with Complainant concerning proposals for change in personnel policies prescribed by M.A.O. 181 (Amended) and by its unilaterally issuance of M.A.O. 710-181, effective June 10, 1974, without prior good faith negotiation, violated Section 19(a)(6) of the

Executive Order. Such conduct also interfered with, restrained, or coerced employees in the exercise of their rights assured by this Order in violation of Section 19(a)(1) of the Executive Order. The allegation of the Complaint that Respondent used the content and process of revision of this policy order to impact on the negotiation of two salary proposals was not properly before me as an independent violation of Sections 19(a)(1) and (6) of the Executive Order and the parties were not permitted to litigate, or relitigate, in this proceeding matters concerning negotiations which were covered by separate and independent complaints and which were, or should have been, litigated therein. See, In the Matter of: U.S. Department of Commerce, U.S. Merchant Marine Academy Chapter, Local 1460 of NYSUT, NEA/AFT, AFL-CIO, Case Nos. 30-5454(CA) and 30-5455(CA) (Judge Myatt, October 31, 1975). Accordingly, as this allegation has not been litigated in this proceeding, I shall recommend that this allegation of the Complaint, which alleges that Respondent used the content and process of revision of this policy order to impact on the negotiation of two salary proposals, be dismissed.

RECOMMENDATION

Having found that Respondent engaged in conduct which was in violation of Sections 19(a)(1) and (6) of the Executive Order by refusing to negotiate in good faith with Complainant concerning proposals for change in personnel policies prescribed by M.A.O. 181 (Amended) and by its unilateral issuance of M.A.O. 710-181, without prior good faith negotiation, I recommend that the Assistant Secretary adopt the following order:

RECOMMENDED ORDER

Pursuant to Sections 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 U.S. Department of Commerce, U.S. Maritime Administration shall:

1. Cease and desist from:

(a) Refusing to negotiate with United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO, the exclusive representative of the employees of the Respondent, concerning personnel policies prescribed by Maritime Administrator's Orders.

(b) Interfering with, restraining, or coercing its employees in the exercise of the rights assured by Executive Order 11491, as amended, by refusing to negotiate with United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO, the exclusive representative of the employees of the Respondent.

(c) Unilaterally implementing M.A.O. 710-181.

(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, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Rescind M.A.O. 710-181, retroactive to June 10, 1974, the date of its implementation; reinstate and abide by M.A.O. 181 (Amended) (1969), M.A.O. 116, and any other Maritime Administrator's Order which was changed, incorporated in, or affected by the implementation of M.A.O. 710-181, in the form and content as they stood immediately prior to M.A.O. 710-181 becoming effective.

(b) Upon request, negotiate in good faith with the representatives of United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO, the exclusive representative of the employees of the Respondent, concerning personnel policies, practices, and working conditions affecting the faculty unit.

(c) Post at the Merchant Marine Academy, Kings Point, New York, 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 Superintendent, Merchant Marine Academy, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to faculty members are customarily posted. The Superintendent, Merchant Marine Academy, shall take reasonable steps to ensure 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 of 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: February 27, 1976
Washington, D.C.

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

LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to negotiate with United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO, the exclusive representative of the Faculty of the U.S. Merchant Marine Academy, concerning personnel policies prescribed by Maritime Administrator's Orders.

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 M.A.O. 710-181, retroactive to June 10, 1974, the date of its implementation; reinstate and abide by M.A.O. 181 (Amended) (1969), M.A.O. 116, and any other Maritime Administrator's Order which was changed, incorporated in, or affected by the implementation of M.A.O. 710-181, in the form and content as they stood immediately prior to M.A.O. 710-181 becoming effective.

WE WILL, upon request, negotiate in good faith with United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO, the exclusive representative of the Faculty, U.S. Merchant Marine Academy, concerning personnel policies, practices, and working conditions affecting the faculty unit.

(Agency or Activity)

Dated: _____

By: _____
(Signature and Title)

APPENDIX CONTINUED

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, U.S. Department of Labor, 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



.....
In the Matter of

UNITED STATES CUSTOM SERVICE
REGION IV, DEPARTMENT OF
THE TREASURY, MIAMI, FLORIDA
Respondent

Case No. 42-3297 (CA)

and

NATIONAL TREASURY EMPLOYEES UNION
Complainant
.....

DENNIS T. SNYDER, ESQ.
Regional Counsel
Customs Region IV
7370 Northwest 36th Street
Miami, Florida 33166
For the Respondent

WILLIAM HARNESS, ESQ.
1730 K Street, N.W.
Washington, D.C. 20006
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on an amended complaint issued on May 19, 1976 by the Regional Administrator for Labor-Management Services Administration of the U.S. Department of Labor, Atlanta Region, a hearing was held in the above entitled case on July 1, 1976 before the undersigned at Ft. Lauderdale, Florida.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on March 17, 1976 by National Treasury Employees Union (herein called Complainant) against United States

Customs Service, Region IV, Department of the Treasury, Miami, Florida (herein called Respondent). It was alleged therein that: (a) Respondent discriminated against Ron Rizzo on his annual performance rating as the result of Rizzo's union activities and his role as President of National Treasury Employees Union (NTEU), Chapter 146; (b) Respondent's supervisor Brian Richardson told Rizzo on July 18, 1975 that he spent too much time on union activities and thus would not be effective in his inspection duties - all in reply to employee Rizzo's inquiry as to what factors affected Respondent's failure to improve his performance rating. The original complaint alleged a violation of 19(a)(1) by Respondent whereas the amended complaint alleged a violation of 19(a)(1) and (2) on the basis of the aforesaid averments. 1/

Respondent filed a response to the complaint in which it denied the commission of any unfair labor practices. It also moved to dismiss the complaint on the grounds that a clear and concise statement of facts was not filed within six months of the occurrence of the unfair labor practice, as required under Section 203.2(a)(2) and (3) of the Rules and Regulations. 2/

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.

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/ At the hearing Complainant moved to withdraw the 19(a)(2) allegation that Respondent discriminated against Rizzo on his annual performance rating. It asserted that the sole issue to be litigated was whether the statements by supervisor Richardson to Rizzo on June 18, 1975 were violative of 19(a)(1) of the Order. It is recommended that the motion to withdraw the 19(a)(2) allegation in the amended complaint be approved.

2/ No ruling on the motion by the Regional Administrator appears in the formal exhibits introduced into evidence at the hearing. However, Respondent renewed its motion at the hearing. The motion is hereby denied. I deem the charge dated November 5, 1975 - which was filed within 6 months of the statements made on June 18, 1975 and allegedly violative of 19(a)(1) of the Order - sufficiently clear and concise to comply with Section 203.2(a)(3) of the Regulations. See Veterans Administration, Bath, NY, A/SLMR No. 433.

Findings of Fact 3/

1. In and about September, 1974 Ronald J. Rizzo became President of the Miami District Chapter of the National Customs Service Association (NCSA) which represented the customs inspectors at the U.S. Customs Service, Region IV, Department of the Treasury, Miami, Florida and was certified as the exclusive bargaining representative.

2. On November 21, 1975 the National Treasury Employees Union replaced NCSA as the bargaining agent of said inspectors, and the certificate of representation was amended accordingly.

3. During his tenure as president of NCSA, and until March, 1975 when he no longer held office in said union, Rizzo filed approximately 15 unfair labor practice charges against Respondent and presented over 20 grievances to management on behalf of employees. Subsequent to March, 1975 Rizzo assisted in the preparation of various grievances and in their presentation to management.

4. In and during July, 1975 Rizzo worked as a customs inspector, and he had been supervised by Brian Richardson, a U.S. Customs Supervisor and Paul Wyche.

5. Prior to June 18, 1975 Rizzo had been informed by Wyche that he had been given a satisfactory performance rating. Rizzo complained to Wyche, stating that he felt entitled to an "outstanding" rating, or that he should receive, at least, a letter of commendation. Rizzo mentioned that he had set up a cargo training program and had a good seizure (sic) record. Wyche said he would check with other supervisors. Thereafter Wyche contacted Rizzo. He informed the employee that other factors entered into the picture and the rating would remain as given.

3/ Page 7, lines 9-10 of the transcript incorrectly quotes the undersigned as saying to Complainant's attorney "I accept obviously what you say as evidence". The transcript is corrected so that said lines read as follows: "I cannot accept obviously what you say as evidence."

6. Concluding that Wyche must have checked with Richardson, and wanting to learn what were those other factors, Rizzo telephone Richardson on June 18, 1975. They discussed the performance rating of Rizzo and the supervisor said he had no objection to the letter of commendation, but other factors precluded a change in the performance rating. According to Rizzo, he asked Richardson if his union activities, grievances, and "everything like that", were those factors. In reply thereto, Richardson stated that the customs management was only interested in his effectiveness on the job - that Rizzo's union activities or duties interfered with his effectiveness as an inspector - and that would be a negative factor in Rizzo's rating. Further, the supervisor mentioned that it had been true of Grant Tilly, Regional Vice-President of NCSA, and that their union activities interfered with their jobs. 4/

7. On November 11, 1975 Brian Richardson called Fred Loudis, an employee and president of the union, into his office. In a conversation between them Richardson asked Rizzo if he were still president of the union. When Loudis replied in the affirmative, the supervisor said he had a problem with Rizzo; that he told Rizzo in strict confidence that his union activities were hurting him. Loudis replied he didn't know the details but he knew something was in the wind.

On April 9, 1976 Richardson came to see employee Alan Pearson at his house. The supervisor stated he just came back from a tough session with Snyder; that it was tough to recall a conversation of some six months ago. Richardson asked Pearson if he were still in the union, and the employee replied he was a steward but no longer an officer of the union. When asked if Rizzo had a vendetta against the supervisor, Pearson replied with negative and remarked that Rizzo considered Richardson one of the best supervisors and would rather work for him than any other supervisor. Richardson then said that he "talked to Rizzo in regard to Rizzo's union activities and that because of these activities it would cause Rizzo trouble and would hurt the man". Richardson also commented that other supervisors felt the same way; that a letter from Rizzo would

4/ Richardson, who was unable to recall the specifics of this conversation, presented a different version of the discussion with Rizzo on June 18, 1975. In essence, he denied telling the employee that his union activities were hurting him. Based on the clarity and straight-forwardness of Rizzo's testimony, as contrasted with the inability of Richardson to recall the details, I credit the testimony of Rizzo in this regard.

have resolved the problem. 5/

Conclusions

The sole issue presented for determination is whether Richardson's statements to Rizzo on June 18, 1975 were violative of Section 19(a)(1) of the Order. Under this section an employer is prohibited from interfering with, restraining or coercing an employee in the rights guaranteed under the Order. Such rights include the joining and assisting labor organization and engaging in activities on behalf of such organization. Any infringement thereof must necessarily run afoul of the Order.

It is apparent that any threats to employees, express or implied, in respect to their union activities will have a restraining effect upon such employees and constitute an unfair labor practice. Thus, in United States Army Tank Automotive Command, Warren, Michigan, A/SLMR No. 447 a supervisor told an employee that so long as he was active in the union he would never be promoted to a GS-13. The Assistant Secretary concluded that such a statement would constitute interference restraint or coercion even though the motivation for such statement was the belief by the supervisor that the employee spent so much time in union business, it prevented developing his potential. 6/ To hold otherwise would, in the Assistant Secretary's view, penalize employees who, as union representatives, were exercising their rights under the Order.

In the case at bar, I construe the remarks by Richardson to Rizzo on June 18, 1975 as constituting an implied threat based on the employee's union activities. Not only does the supervisor suggest that such activities are an interference, but he characterized such conduct as a negative factor in Rizzo's rating. These utterances must necessarily

5/ These particular findings are based on the credited testimony of Loudis and Pearson regarding their conversation with Richardson.

6/ Since no allegation was made that such statement was an independent violation but merely evidentiary of a discriminatory denial of a promotion, no finding was made that the statement constituted a violation of 19(a)(1).

tend to have a coercive effect upon an employee. This in particularly so when made in response to the employee's inquiry regarding what factors affected his performance rating. 7/ Any doubt as to the intended effect of these utterances is, in my opinion, removed upon examination of the statements made to Loudis and Pearson to the effect that Richardson had told Rizzo his union activities were hurting him. 8/ Such comments indicate that the supervisor was not concerned solely with the efficiency of the employee, but was dismayed by the active role played by Rizzo on behalf of the union. Further, they reveal an antipathy to Rizzo's union activities and an attempt to thwart their continuance. In sum, I find that Richardson's remarks to Rizzo on June 18, 1975 were an infringement of the rights assured him under the order; that they constituted interference, restraint or coercion and were violative of Section 19(a)(1) of the Order.

Recommendations

Having found that Respondent has engaged in conduct which is in violation of Section 19(a)(1) 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 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Custom Service Region IV, Department of the Treasury, Miami, Florida shall

1. Cease and desist from

(a) Threatening employees, expressly or impliably, that if they engage in activities on behalf of the National Treasury Employees Union, or any other labor organization, such conduct would affect the rating of their work performance.

7/ In view of the withdrawal of the allegation as to a discriminatory rating and the failure to litigate this issue, I will make no finding as to whether the refusal to rate Rizzo as "outstanding" was violative of the Order.

8/ In the absence of an independent allegation that the supervisor's statements to Loudis and Pearson were an unfair labor practice, I make no finding that they also constitute interference, restraint or coercion.

(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 Executive Order 11491, as amended.

(a) Post at its facility at the U.S Custom Service, Region IV, Miami, Florida, 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 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 203.26 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: August 31, 1976
 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 threaten, expressly or impliedly our employees that if they engage in activities on behalf of the National Treasury Employees Union, or any other labor organization, such conduct will affect the rating of their work performance.

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, Labor-Management Services Administration, United States Department of Labor, whose address is P.O. Box 3750, Norland Branch, Miami, Florida 33169

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 : Philadelphia Service Center : Philadelphia, Pennsylvania : Respondent : Case No. 20-4283 (CA) and : National Treasury Employees Union and Chapter No. 71 (NTEU) : Complainant :

Neal Fine, Esq. Assistant Counsel National Treasury Employees Union Suite 1101 1703 K Street, N.W. Washington, D.C. 20006 For the Complainant

George T. Bell, Esq. Thomas O'Rourke, Esq. Office of Chief Counsel Internal Revenue Service Room 4425 - IRS Building 1111 Constitution Avenue, N.W. Washington, D.C. 20224 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. It was initiated by a Complaint dated October 19, 1973, and filed on October 25, 1973. The Complaint alleged violations

of Sections 19(a)(1), (2), (3), and (6). The Assistant Regional Director for Labor-Management Services dismissed the 19(a)(3) allegation and issued a Notice of Hearing only as to the 19(a)(1), (2) and (6) allegations (Ass't Sec.'s Exh. 1). Pursuant to the Notice of Hearing and Order Rescheduling Hearing (Ass't Sec.'s Exh. 2), a hearing was held in this matter on July 23 and 24, 1974, in Philadelphia, Pennsylvania. All parties were represented by counsel and were afforded full opportunity to be heard and to introduce relevant testimony and evidence on the issues involved. Excellent and comprehensive briefs were filed by the parties and have been duly considered.

The allegations of the Complaint were based upon 15 charges. Charge No. 1, the 19(a)(3) allegation, was dismissed prior to hearing, and no evidence or testimony was presented by Complainant in support of Charge Nos. 11 and 13. ^{1/} Accordingly, the allegations set forth in Charges 11 and 13 are deemed abandoned.

The remaining charges fall into two categories. First, 19(a)(1) and (6) allegations which concern, principally, Claimant's assertion that the practice of allowing union officials unlimited administrative time for performance of union duties had become a condition of employment and Respondent's unilateral action in changing such practice violated Sections 19(a)(1) and (6). Also included in this category are related restrictions placed on the use of telephones; a memorandum concerning the new Public Service Lobby and a memorandum entitled "Career Counseling" which were issued without prior consultation. The 19(a)(2) allegations will be considered in

^{1/} Charge No. 11 was an assertion that Respondent interrogated an employee concerning a grievance without notification of the designated union representative, which was one of the two areas referred to by the Assistant Regional Director in his letter dated March 25, 1974 (Ass't Sec.'s Exh. 1). Charge No. 13 was an assertion that Respondent cancelled a meeting requested by an employee concerning a personnel action because the employee was to be accompanied by a union representative.

this category since the alleged discrimination relates to Complainant's assertion that as part of the unilateral changes in working conditions, union officers were not accorded the same freedom to use telephones, etc. as other employees.

Second, the 19(a)(1) - disparagement - allegation which, although consisting of several separate and distinct assertions, including surveillance of union officers, derogatory comments, etc., collectively concern alleged disparagement of Complainant's duly authorized representatives.

Complainant filed with its post hearing brief a Motion to Amend Complaint to include an allegation that Respondent violated Sections 19(a)(1) and (2) of the Executive Order on January 5, 1973, by "unwarranted and improper reference ... to union activities" on an Evaluation and Rating form for Helen McCauley, President of Chapter No. 71. Because it did not appear that this issue had been litigated; or that the statement alleged was, on its face, "unwarranted" or "improper", the Motion to Amend Complaint was, by separate Order, denied on October 16, 1974; however, it was Further Ordered that either party might, on or before October 31, 1974, file a Motion to re-open the record for the purpose of taking additional testimony on the issue asserted in the Motion to Amend Complaint. No Motion to re-open the record was filed by either party.

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

A. Asserted Unilateral Changes in Working Conditions (19(a)(1) and (6) Allegation)

1. Contractual Relation

The Philadelphia Service Center was formerly known as "Mid-Atlantic Service Center" and Chapter 71, National Treasury Employees Union, was formerly "Chapter 71, National Association of Internal Revenue Employees" (NAIRE). A collective bargaining agreement (Res. Exh. 1) was entered into

by Mid-Atlantic Service Center and NAIRE on August 13, 1970, which agreement was for a term of 2 years with an automatic renewal clause in the absence of notice by either party of desire to terminate or modify the existing agreement. Article XIX, Section 2 provided, in part, as follows:

"... In the event the notice is to modify, the Agreement will remain in effect during the negotiating process unless ten (10) days notice is given by one party of its desire to terminate the Agreement."

The notice given was not made a part of the record; however, Respondent stated that it continued to honor the terms of the "expired" contract and Complainant's President, Mrs. McCauley, stated that there was an understanding between management and the union that the 1970 agreement would continue until the new contract was negotiated and placed into effect. On April 13, 1973, Internal Revenue Service and NAIRE entered into a Multi-Center Agreement (Comp. Exh. 5) which became effective July 1, 1973, and, pursuant to Article 36, Section 4, all local agreements currently in effect were to terminate upon the National Agreement becoming effective. Article 36, Section 4 further specifically provided that:

"... the terms and conditions of any local agreement will remain in full force and effect until the operative date of this Agreement."

It seems probable from the terms of the local agreement; the absence of testimony or evidence that notice of termination was given; the parties' acknowledgement that the terms of the local agreement were honored; and the terms of the Multi-Center Agreement, that the local agreement, legally, remained in effect until the Multi-Center Agreement became effective. Nevertheless, because it is not necessary for decision of any issue in this case, Respondent's assertion, that "The collective bargaining agreement expired in August 1972 ..." (Res. Brief, p. 27), is not decided. It is sufficient for the purposes of this case that, as Respondent states, "... the Employer continued to adhere to its provisions." (Res. Brief, p. 28).

Article V, Section 4, of the 1970 local agreement provided, in part, as follows:

"Section 4

"The Employer shall authorize a

reasonable amount of official time to designated representatives who are employees of the Service Center, for the following purposes only:

- "A. While attending meetings or consultations as provided for by this Agreement.
- "B. While accompanying the complainant or presenting a grievance ... or replying to a notice of adverse action or appeal.
- "C. For the processing of grievances ...
- "D. Union members will be given a reasonable time on administrative leave to prepare for meetings and consultations." (Res. Exh. 1)

Article XV, Section 4, entitled "Rights of Employees and Employee's Representative" provided, in part, as follows:

- "A. An employee, in seeking resolution of a matter contained in Section 1 above ["Scope" - Complaints and grievances] shall:
 - * * * *
- "2. Have the right to be accompanied, represented and advised by a representative of his own choosing at any state(sic) of the proceeding ...
- "B. When the employee designates another employee of the IRS Service Center as his representative, the representative in

assisting the employee to resolve the matter of personal concern or dissatisfaction, shall:

- "1. Be assured freedom from restraint, interference, coercion, discrimination, or reprisal; and
- "2. Be assured a reasonable amount of official time if he is otherwise in an active duty status as provided for in the IRM Policy Statement P - 1910 - 2." (Res. Exh. 1)

Article XV, Section 5, entitled "Representation at Complaint Level" provided, in part, as follows:

"The Employer and the Union agree that a complaint [complaint means an employee's informal expression of dissatisfaction; grievance means complaint reduced to writing and not satisfactorily resolved at the informal complaint level] should be settled as informally and expeditiously as possible with the employee's immediate supervisor without the intervention of higher levels of management or the Union. The Union will encourage employees to resolve complaints with their immediate supervisor. . . when the Union, with the employee's concurrence, believes the presence of its representative would be beneficial, it shall request the Chief, Personnel Branch to arrange for the representative to be present without charge to leave." (Res. Exh. 1).

Article 5, Section 3, of the Multi-Center Agreement provides, in part, as follows:

"B. The area representatives ... will receive administrative time to confer

with an affected employee concerning any matters for which remedial relief may be sought under the terms and conditions of the Agreement, as follows:

- 1. Chief Representative: 6 hours per pay period.
- 2. Area Representative: 2 hours per pay period.

"C. The chief representative and the area representatives will be credited on July 1 of each year with the total amount of administrative time to which he is entitled under subsection B above for the succeeding year. The administrative time may be used at any time during the year.

"D. The affected employee will receive administrative time when meeting with the chief representative or area representative who is utilizing the time under B above.

"E. The area or chief representative and an affected employee will be permitted a reasonable amount of administrative time to present a grievance, a reply to a notice of proposed disciplinary or adverse action, or disciplinary or adverse action appeal. In relation to the foregoing, additional time will also be granted to permit the employee and/or his representative to interview witnesses or review documents which are not available during non-duty hours.

"F. Any area or chief representative will be granted time to attend formal or informal meetings with the Employer.

"G. 1. An area representative using administrative time under this section will check with his immediate supervisor and inform him of

the approximate time he will be away prior to leaving his work area.

2. An area representative who enters a work area and uses administrative time under this section will check with the supervisor in that work area.

"H. It is agreed that the Chief representative is not entitled to the use of administrative time under Section 3 E until the grievance is at the third stage." (Comp. Exh. 5).

2. Practice

Mr. O'Shaugnessy had been president of Chapter 71 prior to October 1, 1971. Mrs. McCauley was elected president of Chapter 71 and took office October 1, 1971. After October 1, 1971, Mr. O'Shaugnessy held a national office with NAIRE. Mrs. McCauley testified that when she was first elected president she continued to do her own work for IRS; but, as people came with problems, her work time for IRS decreased, and "I was not stopped", until she was spending virtually all her time on union activity. Mrs. McCauley stated, without objection, that Mr. O'Shaugnessy had spent 100 percent of his time on union activity while president of Chapter 71 and Respondent conceded that Mr. O'Shaugnessy spent 100 percent of his time on union activities as a national officer of NAIRE until February, 1973.

On March 7 or 8, 1973, Mrs. McCauley was called to the office of Mr. Edward Kilisky, Chief, Taxpayer Services Division (then Mrs. McCauley's Division Chief). Also present was Mr. Ray Raisner, Chief, Employee Relations. Mrs. McCauley testified that, "At the time I did not work for IRS" and at this meeting she was told she was "going to have to go back and work for IRS." Mr. Kilisky confirmed that Mrs. McCauley was told at that time that she could not spend 100 percent of her time on union business; 2/ that she was required to go

2/ Mr. Kilisky's unchallenged testimony was that the records (Form 3081) submitted by Mrs. McCauley showed a build-up of time on union activity that reached 80 percent and eventually 100 percent; that in October, 1972, when Mrs. McCauley

back to work; and that she would be rated the same as other employees on the amount of time that she spends working. Mrs. McCauley interjected her long standing dissatisfaction at having been given a special achievement award in October, 1972, (a cash award of \$250.00) rather than a high quality award (an in-grade step increase) to which she felt she was entitled. Mrs. McCauley stated that Mr. Kilisky said that he had been told that she (Mrs. McCauley) carried the Director "in her hip pocket" and also that she (Mrs. McCauley) had threatened to "get" the Director, the Assistant Director, and Mr. Kilisky. Mr. Kilisky admitted that he made these statements but stated that his response was simply in response to Mrs. Cauley's statements as to what "people" were saying about him. 3/

On March 16, 1973, Mr. George Campbell, Transcription Branch Chief, told Ms. Mary Ann Smith, a union representative, that she must not have group meetings in the work area; that Mrs. McCauley would not be permitted to enter the work area on non-work (union) business; that Ms. Smith was told that she

Footnote continued from page 8.

received an award for work she was then spending at least a reasonable amount of her time on IRS matters. By January, 1973, she was spending the bulk of her time on union activity (Res. Exh. 2) and by March, 1973, she was, as she very forcefully testified, spending 100 percent of her time on union activity and had ceased filing weekly reports (Form 3081).

3/ It appears clear that both Mrs. Cauley and Mr. Kilisky became agitated and that both got into personalities. I do not find any basis for Complainant's contention that such assertions were "demeaning to her as a Union leader and implied a threat to her future activities" (Comp. Br., p. 3). The meeting was in Mr. Kilisky's office and no other employee was present. There was no evidence or testimony that any restriction on Mrs. McCauley's union activity was the result of any such accusation. Rather, the evidence shows that the meeting of March 7 or 8 was for the sole purpose of informing Mrs. McCauley that she could not continue to spend her time exclusively on union activities; that Mrs. McCauley got into "personalities"; and that Mr. Kilisky responded by stating what he was informed was attributed to Mrs. McCauley. That Respondent neither harbored nor practiced any discrimination against Mrs. McCauley is further shown by the fact that in November, 1973, she was promoted from GS-4 to GS-6.

must use her group supervisor's telephone within reason, i.e., she was not to be the only employee on the telephone; and that she (Ms. Smith) was not to use the group supervisor's telephone to call Mrs. McCauley unless Mrs. McCauley was next in line for the grievance (Tr. 138). I do not credit the testimony of Mrs. McKeever, that Mr. Campbell told Ms. Smith she could not use the telephone for any calls. After this meeting, on incoming calls for Ms. Smith on the supervisor's telephone, callers were asked if the call was official business and if non-business, Ms. Smith was not permitted to receive the call on the supervisor's telephone. I fully credit, as more reasonable and consistent, the testimony of Mr. Campbell that after he had told Ms. Smith that she must curtail her use of her supervisor's telephone, Ms. Smith stated that it would be necessary for Mrs. McCauley to come into the area because she couldn't call her any more, and Mr. Campbell then stated that unless Mrs. McCauley was in the area on official business he would escort her out of the area. A conference room was available for the use of Ms. Smith and/or Mrs. McCauley and discussions at Ms. Smith's desk with employees was highly disruptive to performance of work by other employees. Both Ms. Smith and Mrs. McKeever admitted that there was a well established rule against disrupting work of others and that an employee on break was not supposed to talk to employees working.

Also on March 16, 1973, Mr. Patrick Wilson, then Treasurer of Chapter 71 4/ was called to a meeting in the office of his Branch Chief, Mr. Herb Chalfon. Present were Mr. Joe Kinary, Section Chief, and Mrs. Margareta Carlin, supervisor. Mr. Chalfon told Mr. Wilson that he must work for IRS and not do any union business (wage tax program) during working hours. Local 71 had a contractual arrangement with the City of Philadelphia whereby members of Local 71 could pay delinquent city wage taxes through the union by wage deductions. Fidelity Bank received the wage deductions and paid the City of Philadelphia. The Bank was "compensated" for its services by holding the payments for 90 days and the City of Philadelphia, pursuant to the agreement, waived penalty and interest for late payment. As Treasurer, Mr. Wilson was in charge of the union's wage tax program. Many employees came to Mr. Wilson's desk in conjunction with the program and he received many telephone calls. The union had sought administrative time for

^{4/} Subsequently, Mr. Wilson was elected Vice President and assumed this office October 1, 1973.

this program and Respondent had offered administrative time if all employees in the Service Center could benefit from the same agreement; but the union refused to extend the benefit to non-members and Respondent denied administrative time to Mr. Wilson, except for a mass drive, when Mr. Wilson was granted 7 hours administrative time during the period February 1, to 5, 1973; however, Respondent provided Mr. Wilson space after hours to meet with employees.

Mr. Wilson frankly admitted that, while Mr. Chalfon told him that "the regulation" was that employees were not to come to his desk and that he was not to use his telephone for union business, Mr. Chalfon further stated that he would stretch a point and permit it if Mr. Wilson kept it within bounds. Mr. Wilson further stated that his supervisor, Mrs. Carlin and the Director, Mr. Morrill, concurred in his telling persons who came to his desk or who called him on the telephone when he would be available to talk to them and that Mrs. Carlin simply told him to "Keep it down and no more than five or ten minutes" per call. Moreover, Mr. Wilson stated that he did not restrict his activity after the March 16, 1973, meeting any more than he had previously. Mr. Wilson was told on March 16, 1973, that he would not be permitted to use his supervisor's telephone for union business (he had ready access to another telephone) and callers on union business would be told they must contact Mr. Wilson before or after work or during breaks, and this policy was thereafter enforced.

The testimony showed that there always had been a strict policy that supervisors' telephones were for official business only and that personal calls were permitted only in case of emergency. Mr. Wilson used a telephone in the performance of his duties and had ready access to a telephone on his, or an adjoining, desk. Neither Mrs. McCauley nor Ms. Smith used a telephone in the performance of their duties. A telephone, other than her supervisor's, was readily available to Mrs. McCauley and telephones were available to all employees in non-work areas.

On March 22, 1973, Mrs. McCauley and Mr. Wilson were called to a meeting with the Director of the Philadelphia Service Center, Mr. Norman E. Morrill. The meeting was held in the Director's Conference Room and also in attendance were: Mr. Kilisky, Chief, Taxpayer Service Division, Mr. Raisner, Chief, Employee Relations, and Mr. Stahnten, Chief of Personnel. This was a special consultation meeting

called for the purpose of formally advising Mrs. McCauley and Mr. Wilson that Union officers could not continue to carry out Union business on government time, i.e., Mr. O'Shaughnessy, who was spending 100 percent of his time as National Vice President of the Union, and Mrs. McCauley, who was spending over 80 percent of her time on Union business (100 percent by her testimony), and Mr. Wilson, who was spending an unknown amount of his time on the Union's wage tax program, must cease such Union activities on government time and return to work for IRS. There was no assertion that Respondent placed any limitation on the use of official time as set forth in the local agreement for such purposes as: meetings or consultations, accompanying a complainant or presenting a grievance, etc. Although Mr. Kilisky stated that as far as he knew there was no disagreement with the Union over the time spent by a Union representative before a grievance was actually filed (Tr. 342) and Mrs. McCauley said, at one point, that she did not remember any such disagreement (Tr. 60), the record is abundantly clear that Respondent's unequivocal position was, as stated by Mr. Morrill,

"... they [Union] also have no rights that aren't negotiated - bilaterally negotiated." (Tr. 255)

"It [the local agreement] does not provide for pre-grievance time; and that was one of the ..

* * * *

"A. That was the substantial issue; that's correct.

"Q. Was it management's position that reasonable time wasn't to be provided to an employee - to a union person to interview employees prior to a grievance and it was the union's position that this was contrary?

"A. That's correct. The union, however, was not willing to pursue that issue as a union rights grievance." (Tr. 247).

* * * *

"I don't know that her [Mrs. McCauley's] union business was not official. I don't think we said that she wasn't conducting union business. What we were saying is that she was conducting union business that was not authorized under the existing agreement, because we knew through our personnel records that when a grievance came to the point where the employee requested or the Union advised us that the employee wanted representation, at that point in time, we had a procedure whereby our personnel branch would alert that supervisor that the individual concerned would be on administrative time for meetings with management, looking into reviewing records, attending meetings that related to that grievance. They were also granted time to review documents outside of the grievance procedure, to review documents that we were going to issue on personnel practice and policy and for preparing for consultation, we allowed time for preparation for the union and the actual consultation time. Over and above that time, there was no time provided; and it was in that area that the union felt that they were entitled to time. (Tr. 260-261)

* * * *

"... as the situation developed and as the abuse became more flagrant, we did through consultation meetings attempt to define the time and to get into agreement here, so to speak, so that we could get back to a reasonable position.

"Now, among the things that we were doing at that time, is that I had offered, as I have indicated before, to allow her a good deal of flexibility in changing her lunch and her break periods to accommodate

other employees who had a different lunch schedule than she. I offered the same thing, as I indicated, to Mr. Wilson. Ms. McCauley agreed that that would be beneficial. Now, there was no provision for official use of a telephone for union business. However, recognizing that if they did not have a free time - did not have time on the clock, that of necessity, they had to have some way to communicate with the employees or for the employees to communicate with them. So we still allowed Ms. McCauley to have limited access to her phone and what we said would be reasonable, a reasonable number of contacts, a reasonable length of conversation, so that she could at least arrange to meet with the employees who wanted to meet with her ...

"Q. Was she directed that she could not use the phone for FTS calls for union business or toll calls?

"A. Yes, she was.

"Q. Why was that?

"A. Because the phones are to be used strictly for local use, local use being within the service center. Now, we have an FTS system, which is a government telephone network which again everyone is excluded from using for other than official business; these are official telephones. And so we did inform Ms. McCauley that her phone or any other phones were to be used for local calls." (261-262)

In substance, Mrs. McCauley and Mr. Wilson were told at the consultation meeting with the Director on March 22, 1973, what they had been told on March 7 or 8 and on March 16, 1973,

except, possibly, that the admonition, that use of telephones was authorized only for calls within the Service Center and that FTS is for official government business only, may not have been discussed on March 7 or 8 and March 16. 5/ In addition to the discussions of March 7 or 8 and March 16, 1973, and the special consultation meeting of March 22, 1973, the issue was also discussed in an earlier consultation meeting on January 31, 1973, at which Mr. Conroy, National Field Representative of the Union and Mr. Des Roches, from Respondent's National Office, Labor Relations Branch, were in attendance as well as the Director, Mr. Morrill.

Toll calls made from Mrs. McCauley's extension to the home number of Mr. Wilson were called to Mrs. McCauley's attention. Mr. Wilson, who had gone to Mrs. McCauley's work area after hours, was told by the area supervisor to leave the area when she found him going through files and/or Mrs. McCauley's desk; 6/ and Mr. Wilson was also told not to use Mrs. McCauley's telephone.

On April 3, 1973, the President of Chapter 71 was given a memorandum (Comp. Exh. 2) attaching a notice issued to all employees (Comp. Exh. 1) re "New Public Service Lobby." The notice stated, in part, as follows:

"Shortly we plan to open the new Public Service Lobby ...

"As part of our efforts to increase security around the Service Center, it is essential that this new lobby be closed to all employees except those whose duties call for their presence in the lobby. We realize that closing off this area will result in some slight inconvenience but we are sure that you will understand that to allow free access to and from this area would defeat the purpose of our security measures ..." (Comp. Exh. 1)

5/ Official notice is taken that FTS Telephone Users Guide and/or Directories specifically state that "The FTS is for official government business only."

6/ Mrs. McCauley had requested that Mr. Wilson do so; but the supervisor had not been so informed, nor had Mr. Wilson requested permission of the supervisor to go through Mrs. McCauley's files.

Prior to conversion, the area had been known as the "Personnel Lobby" and had been used once each year by personnel to in-process seasonal employees. There were small men's and women's restrooms, used by unit employees; an exit to the parking lot, also used by some unit employees; and the lobby itself was used as a passage to the Personnel Department.

On January 12, 1973, PSC Today, the bi-weekly newsletter of the Service Center, carried an item entitled "Public Service Lobby" and stated, in part, as follows"

"... Work was started Tuesday on the new Lobby off Door #4 ... and duct shields erected. The erection and refurbishing will probably extend into February. In the interim, we ask that the employees working in that portion of building ... not use the work area adjacent to the duct shielded area as a corridor. We are sorry for the inconvenience but ask for your indulgence and cooperation." (Res. Exh. 4).

The notice of April 3, 1973, stated that the new Public Service Lobby will open shortly, from which the inference is inescapable that the new Lobby was not opened until sometime after April 3, 1973. 7/ Although the evidence and testimony clearly establishes that there was no consultation prior to issuance of the Notice of April 3, 1973, there was no evidence or testimony that the Union requested any consultation after receipt of the Notice of April 3, 1973, which, for the first time, gave notice of Respondent's intention to close the new Lobby "to all employees except those whose duties call for their presence in the lobby."

7/ Complainant's Brief refers to the "five month construction" (p.7) which might justify the inference that the new Lobby was not opened until May, 1973; nevertheless, the only inference drawn from the Notice of April 3, 1973, and Mrs. McCauley's testimony is that the new Lobby was opened sometime after April 3, 1973.

On April 17, 1973, four of the Union's National Office representatives arrived at the Service Center, without advance notification, to discuss a number of pending grievances. A Union representative, identified as Mr. Goldman, 8/ stated that one of the problems was the lack of communication to employees as to where they could get information about promotion opportunities and the result of applications. Mr. Concannon testified that at that point Mr. Raisner stated that they could always go to their supervisors and Mr. Goldman said, in effect, that employees apparently did not know this and stated that it might be a good idea if they were advised. Mr. Raisner stated that a memorandum to that effect could be issued and Mr. Goldman said that would be a good idea. Subsequently, a memorandum, entitled "Career Counseling" (Comp. Exh. 3) was prepared for the Director's signature and issued on May 4, 1973. The memorandum represented no change in policy and reminded employees that they should check the Bulletin Boards frequently for promotion opportunities; that such opportunities are also noted in "PSC Today" or in the "Printout"; and that their first contact for such information and counseling is their immediate supervisor. The memorandum concluded:

"The important thing to remember is that counseling is available to you and that it begins with your supervisor."

8/ Complainant, disputes the identification of Mr. Goldman on the basis of the physical description given by Mr. James Concannon, Assistant Chief of Personnel. Complainant readily admits it has an attorney whose name is Goldman; the Director testified that attorney Goldman was one of the four National representatives present on April 17, 1973; and, although leave was granted to the parties to take the post hearing depositions of Mr. Goldman and/or Mr. Raisner (in 1973, Chief, Employee Relations; but not employed by Respondent at the time of the hearing), neither party deposed Mr. Goldman or Mr. Raisner. Accordingly, as the testimony of Mr. Concannon was not denied, but was fully corroborated by the testimony of the Director, Mr. Morrill, on the basis of advice given him by his staff, I fully credit the testimony of Mr. Concannon concerning the content of the statement attributed to Mr. Goldman.

Article VII, Section 2, of the local agreement provided, in part, as follows:

"The Employer will continue to advise employees upon a request about qualification requirements for positions in the Service. In addition, the Employer will furnish information to interested employees about educational resources both with-in and without the Service in the Philadelphia area. ..."

Article 6, Section 8 D of the Multi-Center Agreement provided:

"Any candidate for promotion who is not selected will upon request be entitled to counselling. Counselling will be accomplished by the employee's immediate supervisor.

The Multi-Center Agreement (Comp. Exh. 5) was signed April 13, 1973, to be operative July 1, 1973. Mr. Morrill, Director of the Philadelphia Service Center stated that "we were operating under the Multi-Center Agreement and not under the prior agreement" (Tr. 256); but Mrs. McCauley stated "it [Multi-Center Agreement] was not in effect" (Tr. 87). Nevertheless, Mrs. McCauley stated that the Director's memorandum of May 4, 1973, "informing the people to seek information from their supervisor and read papers ... was kind of violating the contract that they had just signed" (Tr. 43).

B. Asserted Disparagement of Union Representatives and Asserted Surveillance (19(a)(1) Allegation)

1. March 16, 1973. Ms. Smith and Mrs. McKeever testified that Mr. Campbell told Ms. Smith she was turning all the girls against him and was the cause of all his problems and accused Ms. Smith of being a trouble maker, a loud mouth, and of soliciting grievances. Mr. Campbell denied making any of these statements; however, he stated that it had come back to him that Ms. Smith had solicited a grievance; that she called a group meeting at Controller Two which "was a result of them soliciting a grievance"; that Ms. Smith handled 99 9/10 percent of grievances in the Branch; that in the past year there

had been 10 to 15 grievances, one of which was signed by a couple hundred employees; and that every time he passed the area where Ms. Smith worked she was on the telephone. Although Mr. Campbell was, in the main, a frank and credible witness, I credit the testimony of Ms. Smith and Mrs. McKeever concerning the statements made about Ms. Smith, and do not credit Mr. Campbell's denial that he made these statements, largely because Mr. Campbell admitted essential basis for the statements. However, I do not find any threat by Mr. Campbell to transfer Ms. Smith out of his branch; nor do I credit Ms. Smith's wholly unsupported assertion that Mr. Campbell, at any time during the 5 to 6 years Ms. Smith was under his supervision, failed or refused to forward her request for transfer to personnel. Rather, I fully credit Mr. Campbell's testimony that he could not transfer employees; that a person who wants to transfer must follow the established procedure of making an application to personnel, having an evaluation made, and selecting an area which makes a determination whether they are going to pick the person up; that when Ms. Smith inferred that he had refused to send through her requests for transfer he told her she was mistaken and if she had any doubt to prepare a memorandum and he would initial it and go with her to personnel. 9/

On March 29, 1973, Mary Fijalkowski came to Ms. Smith, her area union representative, concerning a possible adverse action (removal) and Ms. Smith and Ms. Fijalkowski went to Mrs. McCauley's desk, Mrs. McCauley was located in another building and, as Mrs. McCauley was busy talking to someone else, they had to wait a few minutes until she was free. Shortly after they began their discussion with Mrs. McCauley, Mr. Reynolds, Branch Chief, approached and told Mrs. McCauley she was not allowed to conduct Union business on Government time and that Ms. Smith and Ms. Fijalkowski would have to leave or he would go and advise Mr. Charles Malone, Assistant Division Director. 10/ Mrs. McCauley said Mr. Reynolds was

9/ Ms. Smith was re-assigned to the audit division in July, 1974.

10/ Mr. Malone had died prior to the hearing and Mr. Reynolds did not testify because of his physician's orders due to Mr. Reynold's medical condition.

very calm and that later he came back and apologized. Mr. Reynolds left and Ms. Smith and Ms. Fijalkowski remained. Shortly thereafter, Mr. Malone approached and from across the room began to shout (Mrs. McCauley's version varies considerably from Mrs. Smith's and Ms. Fijalkowski) essentially "Get out of here. You have no right to be here. Who are you? You are disrupting... you know you are not supposed to do this" (Tr. 71). I fully credit Mrs. McCauley's testimony concerning this incident and, because she did not give any support to any further discussion with Mr. Malone, I do not credit Ms. Smith's testimony that Mrs. McCauley told Mr. Malone that she was permitted to have employees at her desk, that Mrs. McCauley said she was going to prove it by calling the union national office, or that Mr. Malone then told her not to make any long distance telephone calls; nor do I credit Ms. Fijalkowski's testimony that Mrs. McCauley told Mr. Malone "that she had permission." Nevertheless, the record is clear that Mr. Malone shouted; that this occurred in an area occupied by perhaps 300 to 400 employees; that Mr. Malone's voice was heard by numerous employees; that Ms. Fijalkowski became very upset; and that Ms. Smith and Ms. Fijalkowski left. The record is also clear that Ms. Smith and Ms. Fijalkowski came to Mrs. McCauley's desk without seeking or obtaining permission of Mrs. McCauley's supervisor.

Mr. George J. McGrath, a seasonal tax examiner and union representative, testified concerning certain alleged surveillance. Mr. McGrath stated that Mr. Malone in a meeting, apparently, in November, 1972, on a petition (Comp. Exh. 7) for improved security for night shift workers said, "...something to the effect I was being watched. That every time I talked to Pat Wilson or Helen McCauley, it was noted and that he felt I spent too much time doing this." (Tr. 188). Mr. Malone died in August, 1973, and was unavailable to rebut this statement; however, as Respondent very correctly notes in its Brief (p. 20), Mr. McGrath worked on the night shift until May, 1973, whereas, Mrs. McCauley and Mr. Wilson worked on the day shift. Consequently, the apparent lack of opportunity to converse with Mrs. McCauley and Mr. Wilson impairs Mr. McGrath's credibility. Mr. McGrath stated that in November, 1973, Mr. Kilisky told him he could not put him back on the night shift because he required too much watching; but admitted that he was transferred to the night shift the following

Tuesday. It would strain credulity to conclude that Mr. Kilisky would refuse Mr. McGrath's request for transfer to the night shift for any such asserted reason and then, almost immediately, grant the request. Mr. McGrath also asserted that he was under surveillance by a Mr. Max Guggenheim, identified only as giving weather reports and referring to himself as "the night director or director's representative or something to that effect" but who was not a supervisor to Mr. McGrath's knowledge. Mr. McGrath stated that if they passed in the hall, Mr. Guggenheim "would make an about-face and go in my direction. If I stopped, which I started to do deliberately, Mr. Guggenheim would stop and, at times, he would come quite close to where I stopped to talk to someone...finally, I decided that since we were going to spend so much time together, when I would go on break, I would seek him out and walk along with him (Tr. 195)... anytime I had a break or had time, I did seek him out and follow him or talk to him. I went out of my way to do so ... I joined him where ever I was, I found him and sat down with him and walked with him. He was a very nice fellow, actually." (Tr. 200). In agreement with Respondent, I find Mr. McGrath's testimony too fantastic to be believed and, even if credited, could not constitute "surveillance" of a union official by management. Not only does the testimony fail to establish surveillance of Mr. McGrath but no relation of such activity to management was shown. I did not find Mr. McGrath a convincing or credible witness and can only conclude that he possesses an over active imagination.

On April 16, 1973, Mr. Wilson stopped at the desk of Mrs. Ruth Goldberg to inquire about her husband who recently had suffered a heart attack. Mrs. Goldberg testified that Mr. Reynolds, her Section Chief, came over and asked her if she had a problem and she said "No"; and he then asked Mr. Wilson if he had a problem and Mr. Wilson said "No". Mr. Reynolds then told Mr. Wilson to go. Mrs. Goldberg further stated that later in the day she spoke to Mr. Reynolds and asked him why he had sent Mr. Wilson away; that Mr. Wilson had only come over to inquire about her husband. She said Mr. Reynolds said he didn't know about her husband, and was sorry about that; and further said "I didn't know that's why he came over."

Conclusions

I. Asserted Unilateral Changes in Working Conditions

A. Changes Affecting Use of Official Time

Complainant contends, principally, that it had been the practice that the President of Chapter 71 spend full time on union-related business; that this practice, continued for four years, had become a condition of employment and that when Respondent unilaterally imposed a limitation on the amount of time Mrs. McCauley could spend, as president of Chapter 71, on union-related activity in March, 1973, it violated Sections 19 (a) (1) and (6) of the Executive Order. 11/

As the Complainant concedes, and as the Assistant Secretary has determined, the use of official time for the conduct of union business is not an inherent matter of right under the Executive Order. Department of The Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485 (1975); Department of The Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 512 (1975). A practice may, if consistently followed, ripen into a working condition which may not be unilaterally changed without affording the exclusive bargaining representative opportunity to negotiate concerning such proposed change in working conditions. National Labor Relations Board, A/SLMR No. 246 (1973). A collective bargaining agreement creates mutual rights and obligations which either party may lawfully insist be observed. Veterans Administration Center, Bath, New York, A/SLMR No. 335 (1973).

Complainant's contention concerning a unilateral change in violation of Sections 19(a)(1) and (6) of the Order as concerns the asserted changes affecting the use of official time for union-related activity must be denied for three reasons. First, Complainant has failed to prove its basic premise, namely, that there was a practice, consistently followed, for four years of allowing the President of Chapter 71 unlimited official time for the handling of union-related business. To the contrary, the evidence shows that when Mrs. McCauley assumed the duties of President of Chapter 71 on October 1, 1971, she was not aware of any such practice; that she continued to perform her

11/ The Complaint does not allege any violation of the Order as the result of any limitation on Mr. O'Shaugnessy's utilization of official time for performance of duties as a national officer of the Union. As no violation pertaining to Mr. O'Shaugness was charged or litigated, no decision is made concerning such issue.

regular duties; that when she received a special achievement award for her work in October, 1972, she was spending a reasonable amount of time on her regular duties; but, that by January, 1973, she was spending the bulk of her time on Union business. It is quite true, as Mrs. McCauley testified, that as she took more time for union business she was not immediately stopped and, so, she spent less and less time on IRS work and by January, 1973, the bulk of her time was devoted to union business. At this point, Respondent did take action by calling a special consultation meeting at which representatives from the Union's national office and Respondent's national office were present. Consequently, the "practice" contended for, as to Mrs. McCauley, did not begin until about October, 1972, and Respondent, after it became aware that Mrs. McCauley was spending the bulk of her time on union-related activity, acted with reasonable promptness to terminate the practice. Respondent's insistence that official time be held to a reasonable amount of time produced no improvement, indeed, Mrs. McCauley further increased the time she was spending on union-related business until, by March, 1973, she was spending 100% of her time on union business,, she had ceased filing weekly reports, and she "did not work for IRS." On March 7 or 8, 1973, Mr. Kilisky met with Mrs. McCauley and told her she could no longer spend all of her time on union-related business; and on March 22, 1973, the Director, Mr. Morrill, in a further special consultation meeting told Mrs. McCauley she would be allowed official time only in accordance with the then effective local agreement. 12/

12/ The Complaint in this case did not assert the statement by Mr. Kilisky to Mrs. McCauley, that she would be rated the same as other employees on the amount of time that she spends working, as an independent violation of the Executive Order. Consequently, because such statement was not alleged as a violation of Section 19(a)(1), no finding is made as to whether such statement did or did not deprive, or threaten to deprive, employees or their representatives of rights accorded them under a negotiated agreement. Cf. Department of The Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485 (1975). This case, unlike Vandenberg, supra, is premised squarely, and solely, on the assertion that the unilateral change in practice violated Sections 19(a)(1) and (6).

Second, the then effective Local Agreement specifically provided for "a reasonable amount of official time to designated representatives ... for the following purposes only; A. While attending meetings or consultations ... B. While accompanying the complainant or presenting a grievance ... or replying to a notice of adverse action or appeal. C. For the processing of grievances ... D. ... to prepare for meetings and consultations." (Art. V, Sec. 4; Res. Exh. 1). From the date of her assumption of duties as President of Chapter 71, Mrs. McCauley conceded that she continued to perform her regular duties for a considerable period of time and the record shows, without dispute, that at least until October, 1972, she spent only a reasonable amount of official time on union activities. Between October, 1972, and January 1, 1973, her utilization of official time for union activities further increased. Copies of Mrs. McCauley's weekly reports were not introduced in evidence; however, the testimony strongly implies that official time for union activities shown thereon would have to be analyzed in conjunction with various other records to determine whether the amount of official time for union activities were for the purposes set forth in the Local Agreement. Respondent determined that the utilization of official time was not reasonable for the purposes authorized by the collective bargaining agreement and in the January, 1973, special consultation meeting sought to achieve a resolution. Not only did the January, 1973 meeting fail to achieve any improvement, but Mrs. McCauley's utilization of official time further increased until, by March, 1973, she "did not work for IRS". Thus, on March 7 or 8, 1973, her Division Chief, Mr. Kilisky, informed her that she could no longer spend 100 per cent of her time on union business; and on March 22, the Director, Mr. Morrill, informed Mrs. McCauley and Mr. Wilson, that official time would be allowed only for the purposes set forth in the Local Agreement. For example, that official time was not permitted for "pre-grievance time" or for any union business "not authorized under the existing agreement".

Use of official time for union activities was controlled by then current contractual commitments and there had been no waiver thereof by Respondent. The record shows that once Respondent became aware that Mrs. McCauley was spending a disproportionate amount of her time on union activities it acted with reasonable promptness to bring about compliance with the Local Agreement. Respondent limited official time to the purposes set forth in the Local Agreement and, after repeated

notice, took action to achieve compliance, including advising callers for union representatives on supervisors telephones to contact the representatives during non-work hours; advising union representatives to handle union business, for which the Local Agreement did not authorize official time, during non-work hours; limiting discussions between union representatives and employees in work areas during working hours (the record also shows that Respondent had long had strict rules against disrupting the work of other employees); insisting that union representatives keep telephone calls within reasonable limits. Although union representatives were told that telephones were to be used only for calls within the Service Center (FTS and/or toll calls not permitted), this was not a new policy. There was no evidence or testimony that Respondent ever authorized any union representative to use FTS for non-official calls. Complainant's reliance on the assertion that one union official (Mr. O'Shaugnessy) gave another union official (Mrs. McCauley) an FTS Directory utterly fails to establish any authorization by Respondent for the use of FTS for union business. As the record establishes no authorized practice of permitting union use of FTS, insistence by Respondent on adherence with its long established rules limiting use of FTS to official business was not a unilateral change in working conditions.

Of course, the foregoing comments apply equally to the limitations placed upon Mr. Wilson and Ms. Smith. Mr. Wilson was in charge of the Union's delinquent city tax plan. Official time for this purpose was not authorized by the Local Agreement, a fact recognized by Complainant in its request for official time. Consequently, this matter having been discussed, Respondent imposed no unilateral change in working conditions but, rather, insisted upon compliance with the then controlling current contractual agreement; however, Respondent granted specified official time for Mr. Wilson and further agreed that he could use reasonable official time to receive calls and to make arrangements to meet employees during off-duty hours and made available facilities for his use after hours. Ms. Smith was instructed to discuss union-related matters during non-work hours and not to conduct union business in the work area during working hours and its enforcement represented no change in working conditions. In like manner, her supervisor's telephone was for official business and personal use had always been limited. Although callers on union business were told by the supervisor to contact Ms. Smith during non-duty hours, Ms. Smith was permitted reasonable use of the supervisor's telephone.

In short, the instructions given by Respondent to Union representatives were pursuant to current contractual commitments and long established policy and rules of the Service Center and reflected no unilateral change in personnel policies and practices. Chapter 71's representatives may well have engaged in "gamesmanship" or even "brinkmanship" by continually taking more and more liberties until Respondent "blew the whistle" but the "practices" engaged in by Chapter 71's representatives had not matured into established policies and practices and Respondent's enforcement of current contractual commitments did not violate either Section 19(a)(1) or (6) of the Executive Order.

Respondent, when it became aware of the unauthorized use of official time for union-related activity brought the matter to the attention of Complainant and sought through consultation to reach an amicable resolution, and when this failed, nevertheless, exercised restraint by allowing union representatives reasonable opportunity for employee contact on official time.

Third, execution of the Multi-Center Agreement with provision for allowance of specified hours of official time and various other provisions relating to the use of official time (e.g., chief representative was not entitled to the use of administrative time until the grievance is at the third stage, etc.) made the contractual commitments of that Agreement controlling from its effective date (July 1, 1973) and any prior practice was superceded and rendered a nullity by the Multi-Center Agreement. If, contrary to the conclusions herein, Respondent violated Sections 19(a)(1) and (6) of the Executive Order by a unilateral change in established working conditions in March, 1973, such violation was, in any event, rendered moot on July 1, 1973, upon the effective date of the Multi-Center Agreement.

b) Asserted Refusal to Consult re Lobby

Complainant learned, for the first time, on April 3, 1973, that the new Public Service Lobby was to be closed to all employees except those whose duties called for their presence in the lobby. The notice published in PSC Today on January 12, 1973, had given no indication that the area would be permanently closed off. Rather, the January 12, 1973, notice quite clearly implied that the limitation on employee use of the area was a temporary expedient during construction.

Thus, the January 12, 1973, notice stated, in part, "In the interim, we ask that the employees ... not use the work area adjacent to the duct shielded area as a corridor. ..." The record shows that employees used the door in the lobby for ingress and egress to the parking lot, that employees in the area used the restrooms in the lobby, and that the lobby served as a corridor from one portion of the Service Center to other portions of the Service Center. Such use was conceded by Respondent and in the notice of April 3, 1973, Respondent acknowledged that "... closing off this area will result in some slight inconvenience. ..."

The decision to close off the Public Service Lobby affected working conditions of unit employees. That Respondent had the right under Section 11(b) of the Executive Order unilaterally to decide to take such action in furtherance of internal security has not been questioned by Complainant; nevertheless, an agency or activity is obligated 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 System Division (AFSC), Hansom Air Force Base and Local 975, National Federal of Federal Employees, A/SLMR No. 571 (1975). The April 3, 1973, memorandum stated that Respondent "Shortly" planned to open the new Public Service Lobby and the testimony confirmed that construction was not completed for some time after April 3, 1973. Accordingly, there was ample opportunity for Complainant to request bargaining or consultation concerning the impact of the decision prior to its implementation, but Complainant never requested bargaining or consultation on the impact of the decision. Therefore, Respondent did not refuse to consult, confer, or negotiate with respect to the impact of its decision in violation of Section 19(a)(6) of the Executive Order. 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 (1973). However, Respondent's dissemination of the memorandum of April 3, 1973, to all employees without adequate prior notification to Complainant of the change in working conditions constituted an improper by-pass and undermining of the status of its employees' exclusive bargaining representative and Respondent thereby violated Sections 19(a)(1) and (6) of the Executive Order. Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 388 (1974).

Veterans Administration, Veterans Administration Center, Hampton, Virginia, A/SLMR No. 385 (1974). The fact that Respondent sent a copy of the memorandum personally to Mrs. McCauley, President of Chapter 71, at the same time that it disseminated the same memorandum to all employees neither alters nor lessens Respondent's disregard for the exclusive representative and the inevitable effect of such action in undermining and disparaging Complainant in the eyes of the unit employees. Nor can the failure of Complainant to request consultation or bargaining after notice of Respondent's decision excuse or render nugatory Respondent's disregard for the exclusive representative. Respondent's disregard and by-pass of the exclusive representative was in derogation of the exclusive representative's rights under the Executive Order and thereby constituted a violation of Section 19(a)(6), A/SLMR No. 385, supra, and also violated Section 19(a)(1), A/SLMR No. 388, supra. It is possible, of course, that, but for Respondent's threshold violation of the Order, Complainant would have requested consultation or bargaining as to the impact of such decision. Complainant nevertheless, after notice of Respondent's decision and with adequate opportunity to request bargaining or consultation prior to implementation thereof, failed to do so and Respondent's violation of the Order by its failure to give prior notice to Complainant is not sufficient, under the facts of this case, to constitute, in addition, a refusal to bargain on the impact of its decision in the absence of a request by Complainant for bargaining or for consultation. There is nothing in the present record to indicate that a request for bargaining on the impact of the decision would not have been honored. Indeed, the record is to the contrary, i.e., consultation occurred with some regularity and the record does not show any instance where Respondent refused any request of Complainant to meet and confer.

c) Asserted Refusal to Consult re Career Counseling Memorandum

Respondent's memorandum of May 4, 1973, entitled "Career Counseling" was issued as the result of a suggestion made by a representative from the Union's national office during a discussion of a grievance on April 17, 1973. The May 4, 1973, memorandum was entirely consistent with Article VII of the Local Agreement; did not purport to do more than to advise, in accordance with established procedures and practices,

how to seek information about promotion opportunities; and had been suggested by a representative of Complainant. The May 4, 1973, memorandum did not concern the manner of filling vacancies and did not purport to relate to "Counselling", as the term was used in Article 6, Section 8D of the Multi-Center Agreement, where the term means counselling of any candidate not selected for promotion. The Multi-Center Agreement, although executed, did not become effective until July 1, 1973; but even if it were assumed that the parties "were operating under the Multi-Center Agreement", as stated by the Director, Mr. Morrill, but denied by Chapter 71's President, Mrs. McCauley the May 4, 1973, memorandum, because it concerned identification of job opportunities, was not contrary to either the letter or the spirit of Article 6 of the Multi-Center Agreement which dealt with "Promotions". As a restatement of established practice and policy, the May 4, 1973, memorandum represented no change in or addition to, personnel policies and practices affecting working conditions requiring prior consultation; but even if prior consultations were deemed necessary, the discussion of April 17, 1973, in which a representative of Complainant suggested the issuance of such a memorandum to remind employees as to where they could get information about promotion opportunities and the result of applications, fulfilled any requirement for prior consultation.

d) Alleged Discrimination as to Union Officers

Complainant asserted that the unilateral change in working conditions resulted in union officers not being accorded the same rights as other employees which conduct was in violation of Section 19(a)(2) of the Executive Order. As noted above, there was no evidence or testimony that union officers were subjected to any more restrictive practice in the use of telephones than other employees. In truth, Complainant did not contend that union officers and other employees really should be treated on an equal basis as to the usage of telephones; but, rather, that union officers were more equal than other employees. In the only area in which union officers may have been subjected to restrictions as mere employees (use of supervisors' telephones) the record shows that they were, at the very least, accorded the same rights as other employees.

On April 16, 1973, Mr. Wilson stopped at the desk of Mrs. Goldberg. Mr. Reynolds, the Section Chief, came over and asked Mrs. Goldberg if she had a problem, and she said "no". Mr. Reynolds then asked Mr. Wilson if he had a problem

and he said "no". Whereupon, Mr. Reynolds told Mr. Wilson to return to his work area. From this, Complainant asserts that employees, who are not union officers or representatives, can talk to employees at will about personal matters but that union officials may not do so. There is no convincing evidence that union officials are subjected to any different standards than any other employee. The records show that Respondent had always had strict rules about disruption of employees and, while Complainant has placed considerable emphasis on the fact that Mr. Wilson had simply inquired about the health of Mr. Goldberg, Mr. Reynolds was unaware of the heart attack suffered by Mr. Goldberg and neither Mr. Wilson nor Mrs. Goldberg gave Mr. Reynolds any indication of the nature of their conversation. But more important, there is no credible evidence or testimony that union officers were accorded less freedom in personal conversations during work than other employees.

II. Asserted Disparagement of Union Officials and Surveillance of Members

On March 16, 1973, Mr. Campbell, in the presence of employee McKeever, accused steward Smith of being a trouble-maker, of soliciting grievances and called her a "loud-mouth". On March 29, 1973, Mr. Malone, the Assistant Division Director (now deceased), in the presence of a great many employees, shouted to Ms. Smith and Ms. Fijalkowski, who were at Mrs. McCauley's desk, essentially "Get out of here. You have no right to be here. Who are you? You are disrupting ... you know you are not suppose to do this." Mr. Malone's loud tirade directed, in part, at the Chapter President and, in part, at a union steward, was undeniably seen and heard by a great many employees. Respondent states in its brief, "Possibly Mr. Malone could have used more discretion in his loud directives to Mrs. McCauley ..." From the credited testimony it is plain that Mr. Malone's "loud directives" were directed as much to Ms. Smith and employee Fijalkowski as to Mrs. McCauley. No credence can be attached to Respondent's insubordination argument. While it is true that Mr. Reynolds, Branch Chief, first approached the three and told Mrs. McCauley she was not allowed to conduct union-related business on official time and that Ms. Smith and Ms. Fijalkowski must leave, it is also true that Mr. Malone started toward Mrs. McCauley's desk almost immediately shouting, from afar, and, under the circumstances, there was no realistic opportunity to comply with Mr. Reynolds' instructions, or, on the other hand, no basis to support an allegation of insubordination.

Even if Ms. Smith were not deterred from the performance of her duties, Mr. Campbell's denomination of her as a trouble maker and calling her a "loudmouth" in the presence of a fellow employee, and in the course of Ms. Smith's activity as a steward did disparage Ms. Smith and Complainant; would tend to restrain employees from exercising their right to act as a representative of a labor organization and to present their views to management; and employees would tend to believe that management viewed their exclusive representative with disdain and employees would thereby be discouraged from exercising their rights under Section 1(a) of the Executive Order in violation of Section 19(a)(1). Headquarters, Fort Jackson, South Carolina, A/SLMR No. 242 (1973); Vandenberg Air Force Base, A/SLMR No. 383 (1974). Of course, the same was true of the intemperate conduct of Mr. Malone and his shouted order to Mrs. McCauley, Ms. Smith and Ms. Fijalkowski, inter alia, to "Get out of here. You have no right to be here ..." disparaged Mrs. McCauley (President), Ms. Smith (Steward), and Complainant; tended to demonstrate a total disdain to all employees within sight or sound of management for their exclusive representatives and tended to discourage them from exercising their rights under Section 1(a) of the Executive Order all of which violated Section 19(a)(1) of the Executive Order.

In agreement with Respondent's statement that "... the incident of January to February, 1973, is too fantastic to believe let alone to be called 'surveillance of a Union official by management.'", I find no credible evidence to support Complainant's allegations of surveillance of Mr. McGrath.

Each of the remaining allegations of the Complainant not individually discussed, but including by way of example, the conversation between Ms. Parsons and Mr. Wilson on May 31, 1973 (when Ms. Parsons ordered Mr. Wilson out of the area when he was discovered, after hours, going through Mrs. McCauley's desk and/or union files, albeit with the consent of Mrs. McCauley, but without any notification or request to Mrs. Parsons), have been carefully considered and no violation of the Executive Order has been found therein.

Recommendations

Having found that Respondent has engaged in conduct in violation of Sections 19(a)(1) and (6) of the Executive Order by its issuance of a memorandum to all employees of April 3, 1973, which announced that the Public Service Lobby was to be

closed to all employees except those employed there without prior notification of Complainant; and that Respondent has engaged in conduct in violation of Section 19(a)(1) of the Executive Order by disparaging remarks to union representatives in the presence of employees, I recommend that the Assistant Secretary adopt the following order designated to effectuate the purposes of Executive Order 11491. In all other respects, I recommend the allegations of the Complaint, including

- a) asserted unilateral changes in working conditions affecting use of official time (19(a)(1) and (6));
- b) alleged refusal to consult concerning the impact of closing the lobby in the absence of a request for bargaining after notice of management's decision (19(a)(6));
- c) asserted refusal to consult prior to issuance of the memorandum of May 4, 1973, regarding career counseling, (19(a)(1) and (6));
- d) alleged discrimination as to union officers (19(a)(2));
- e) other allegations of the Complaint not specifically set forth, be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Failing to notify Chapter 71, National Treasury Employees Union, concerning the closing to employees of any portion of the Philadelphia Service Center, or other matters affecting the working conditions of employees in the unit.

(b) Interfering with, restraining, or coercing its employees by preventing a steward of Chapter 71, National Treasury Employees Union, or any other individual acting as a representative of said labor organization, from speaking on behalf of any employee in the bargaining unit at a formal discussion between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

(c) 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 Executive Order:

(a) Notify Chapter 71, National Treasury Employees Union of any decision concerning any intended closing of any portion of the Philadelphia Service Center, or other matters affecting general working conditions of employees in the unit.

(b) Upon request, consult, confer, or negotiate in good faith with stewards and other representatives of Chapter 71, National Treasury Employees Union, at any meeting or formal discussion between management and any of its employees concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(c) Post at its facilities at the Philadelphia Service Center, Philadelphia, Pennsylvania, 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 Director, Philadelphia Service Center, 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 Director shall take reasonable steps to ensure 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 ten (10) days from the date of the Order as to what steps have been taken to comply herewith.

William B. Devaney
 WILLIAM B. DEVANEY
 Administrative Law Judge

Dated: January 27, 1976
 Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

APPENDIX CONTINUED

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 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 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

WE WILL notify Chapter 71, National Treasury Employees Union, of any decision concerning any intended closing of any portion of the Philadelphia Service Center, or other matter affecting general working conditions of employees in the unit.

WE WILL NOT interfere with, restrain, or coerce our employees by preventing a union steward of Chapter 71, National Treasury Employees Union, or any individual acting as a representative of said labor organization, from speaking on behalf of any employee in the bargaining unit at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their 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.

UNITED STATES DEPARTMENT OF LABOR

before the

ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

In the Matter of:

INTERSTATE COMMERCE COMMISSION

Respondent

and

Case No. 22-6500 (CA)

JOSEPH F. WILSON

Complainant

Alan W. Helfetz, Attorney
Interstate Commerce
Commission, for Respondent

James W. Lawson, Attorney for
the Complainant

Before: James W. Mast, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Section 19 of Executive Order 11491, as amended. It was initiated by a charge of unfair labor practice filed

with the Interstate Commerce Commission on August 1, 1975. On November 18, 1975, the Complainant filed a formal complaint with the Department of Labor. The Complaint alleged that the Interstate Commerce Commission committed an unfair labor practice in violation of Section 19(a)(1) of Executive Order 11491 and gave reference to the August 1, 1975, charge for the basis of the Complaint. The original Complaint, served upon Respondents, was amended and served on November 28, 1975 and a corrected amended Complaint was served December 2, 1975. The amended Complaint added Section 19(a)(2) of Executive Order 11491, as amended. On December 12, 1975, the Respondent filed an Answer to the Complaint.

A Notice of Hearing by the Regional Administrator dated February 5, 1976, set the date of hearing for March 25, 1976. The case was postponed on March 22, 1976, pending the assignment of another judge. Upon the assignment of the undersigned, an Order Rescheduling Hearing to April 12, 1976, was issued on March 24, 1976, and on March 31, 1976 an Order Rescheduling Hearing to April 29, 1976 was issued. The hearings were held on April 30, May 3, 4, 5 and 6, 1976, with both parties present and represented by Counsel.

At the beginning of the hearing and again on May 3, 1976, the Respondent moved to dismiss on the grounds that the Complaint fails to state a claim upon which relief can be granted. The motion was dismissed on the basis that the Complaint states a cause of action.

Findings of Fact

Joseph F. Wilson, the Complainant, was born in 1910. He graduated in 1950 from Columbus Law School, where he had been a night student while employed by the Department of Defense. His prior specialization was in accounting. He was employed by the Interstate Commerce Commission in 1950 as an adjudicator, GS-7; upon admission to the bar his title was changed to attorney. He was promoted to attorney GS-12 in the late 1950's. On May 9, 1974, the Complainant received his regular in-grade step increase to step 9. The Complainant was an attorney in the Section of Finance, Office of Proceedings of the Commission.

Mr. Wilson has been a member of the American Federation of Government Employees, AFL-CIO (AFGE) Local 1779 since 1963, and a member of the Professional Association of ICC since 1969. He has been President of AFGE Local 1779 since 1971; he has been Treasurer of the Professional Association since 1969. As President of AFGE Local 1779, he was active in labor management activities. He participated in contract negotiations

and represented employees in grievance proceedings with management.^{1/}
The most recent negotiations between AFGE Local 1779 and the Commission took place in late 1975 and early 1976. During his four year tenure in office of AFGE Local 1779, he participated in five informal grievance proceedings and three formal proceedings. There is no evidence of animosity or bad feelings toward Complainant Wilson during or because of these grievances. During 1972, his total government paid hours of union activities were 121; during 1973, 391 hours; and during 1974, 622 hours. No report on his time spent in union activities during the first half of 1975 was offered.^{2/}

The most recent contract negotiations between AFGE Local 1779 and the Commission were begun in late 1974. The union was represented by William H. Waldermaier, National AFGE Representative, and Complainant Wilson. There was no evidence that the negotiations resulted in substantial animosity between the parties or the representatives of the parties. There was no claim by the Complainant of bad faith bargaining by the Commission. The negotiations could be characterized as normal

^{1/} The unit represented by AFGE Local 1779 and defined in the contract is as follows:

Section 2. The Unit to which this Agreement is applicable consists of all non-supervisor employees in the Interstate Commerce Commission in the Washington Metropolitan area. Excluded from the unit are: (1) professional employees; (2) field employees; (3) Commissioners; (4) Confidential Assistant Heads of Bureaus and Offices; (6) Administrative Officers for a Bureau or Office; (7) Personnel Specialists; (8) employees in the Reproduction and Graphics Branches, Section of Administrative Services, who are covered by an Exclusive Agreement with the Graphic Arts International Union, Local 98-L; and, (9) employees in supervisor positions as defined in this official position description, classification standards, or as defined in Executive Order 11491, as amended.

^{2/} The Commission does not contest the amount of time spent in union representation. Further, it submits that the time spent in union activities is not related to the cause for discharge. The Commission concedes that the time spent in union activities was acceptable to it.

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good faith hard bargaining.^{3/} Agreement on a contract was reached in February 1975. The only significant incident reported was at a session in December 1974. During that meeting Robert Crittenden, Chief of the Job Evaluation and Personnel Programs Branch, who was a management representative, said to Complainant Wilson, "You should not have said those things about Adams."^{4/} You should not have published those things in your newsletter about Adams."^{5/}

The situation involving Complainant Wilson's editorial license had also occurred previously on several occasions. On October 6, 1972, Robert L. Rebein, Managing Director of the Commission, wrote Complainant Wilson as follows:

"Information has recently come to my attention concerning a notice, which you signed, of an AFGE Lodge 1779 local meeting which was posted on the official ICC bulletin board and which meeting was held in the commission's Hearing Room C on September 19, 1972.

^{3/} The AFGE Local 1779 Newsletter of September 24, 1974, stated as follows:

NEW CONTRACT: The local is presently negotiating a new contract with the agency. New key provisions are: administrative leave for officers to conduct union business (particularly concerning grievances); additional time for the local to document evidence in grievance cases, the present 10 to 15 days fixed by management being too short.

The Newsletter of December 1974 stated as follows:

LABOR-MANAGEMENT CONTRACT: The Local is in the process of renegotiating the terms of its agreement with the ICC. Because of the latter's adamant position problems have arisen, relating to productivity, circulation and posting of this Newsletter; representation on behalf of employees in grievance procedures at the informal level; low employee morale; absence of rapport; and behind closed-door decisions. The Local insists on maximum employee protection. Disagreement makes it imperative that certain of these issues must be referred to Department of Labor mediation procedures and, if necessary, to extended arbitration hearings.

Waldermaier commented on the agreeable and productive atmosphere of the negotiations.

^{4/} Curtis Adams is Personnel Director of the Commission.

^{5/} The newsletter to which he was referring was not identified.

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I should like to call your attention to (1) paragraph 5b, page 22-705, ICC Manual - Administration, which specifies the conditions by which employee organizations may be granted use of official facilities, and, (2) AFGE-ICC Agreement, Article VI, which contains the negotiated conditions regarding rights and obligations of the union. The Notice, with particular reference to "GRIEVANCES", leaves much to be desired concerning matters in a grievance case. Further, your literary license eluding to indecency, dishonesty, and injustice casts aspersions on the integrity of the Commission and its officials, and therefore violates the intent and purpose of the Commission's regulations and the AFGE-ICC Agreement.

We should not have to call your attention to the Commission's regulations nor to the provisions of the AFGE-ICC negotiated Agreement. However, as a warning, further violations may result in more severe sanctions as the rules and regulations may direct."

This letter was the response to Complainant Wilson's comments in the September 1972 newsletter as follows:

"GRIEVANCES: The complaint of a Section of Insurance employee on grounds that he was bypassed for promotion is currently under investigation pursuant to a directive issued by the Civil Service Commission. An ICC attorney-adviser, E. Schock, Office of Proceedings, is monitoring the investigation. The complainant, a highly competent employee with an outstanding performance record and seniority over a hand-picked favorite, testified that he exerted every effort to overcome the prejudice against him exercised by his superiors. Upon the advice of his immediate supervisor he went so far as to complete supervisory courses paid for out of his own pocket. Upon the successful completion of the recommended courses, he was told by the supervisor that he would not be the choice for a promotion to an assistant supervisory post. The investigation ordered by the Civil Service Commission was commenced on August 1, and on August 24. The deprived employee, prior to completion of the investigation, was notified that the sought position was filled by another employee with less seniority and less experience. The ICC denied the discriminated employee the courtesy of a waiting period to ascertain the Civil Service Commission's disposition respecting the charges of denial of equal employment opportunity. Decency, honesty, and justice, are concepts not a part of the agency's vocabulary.

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* * * * *

ALL are invited to this next meeting of September 19 to hear the AFGE's 1972 convention program for furthering the careers of Civil Service employees."

On December 19, 1973, Robert L. Rebein wrote as follows:

"A recent notice posted on the ICC bulletin board notifying members of the American Federation of Government Employees (AFGE) Local 1779 meeting for November 27, 1973, and bearing your name as editor (copy attached) contained language which was derogatory and inflammatory. It attacked and reflected on the integrity of a Government official and it condemned or criticized the policies of this Commission, thereby violating both Article VI, Section 3, of our Collective Bargaining Agreement and the internal regulations of the Commission.

While we do not intend to make a formal matter of this particular instance, I wish, in particular, to call your attention to the ICC Manual-Administration regulations cited below and the fact that notices of this type will not be countenanced in the future.

Page 22-705, paragraph 5b, provides:

"b. Use Of Facilities, Employee organization literature may be distributed through mail and messenger service, and items may be placed or displayed on approved bulletin boards provided it does not: . . . (3) attack or reflect on the integrity of any Government official or employee; (4) condemn or criticize the policies of any Government agency;"

Page 22-059, paragraph 2, contains similar prohibitions.

It is also clear that the substance of the attached notice discourages rather than encourages employee loyalty to the Commission, as called for in the above-mentioned Agreement.

As an employee of the agency and official of AFGE Local 1779, we request your fullest cooperation with and conformity to the regulations of this Commission and its Collective Bargaining Agreement with your organization.

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Please acknowledge your receipt and understanding of this communication."

This letter was in answer to Complainant Wilson's comments in the November 1973 newsletter as follows:

"Undermining the Civil Service Merit System:

Evidence that high officials in the administration are monkeying with the civil service merit system was reported by a Washington daily. Solid evidence it says is hard to come by since the reports of abuse are described as "hearsay". In many instances the victims who are dealt out of a deserved promotion have cause to be disgruntled, are often subjected to mistreatment, and at times singled out for deliberate harassment and intimidation.

An example of abuse at the Interstate Commerce Commission was clearly demonstrated in the case of an employee with an unblemished record who was denied an earned ingrade raise. Without prior notice and in violation of law he discovered at a time subsequent to the due date, April 15, 1973, that his ingrade was denied; that although a negligent error was made by the agency, the failure to furnish proper notice and an opportunity to defend against irresponsible action was a matter the powers decided to conveniently overlook; that the mistreatment and humiliation are circumstances the victim must accept and live with for the rest of his life; that protestations would avail him nothing; that constitutional rights have long since been abrogated by irresponsible "high authority"; that victimization at the ICC is a way of life for unfortunates although they are faultless.

Efforts to conciliate this piece of chicanery were attempted time and again. The employee called upon the Local to intercede on his behalf. The Local responded by calling upon the personnel director in an effort to right the gross injustice. Time and again the Local with the help of the AFGE's national office representatives vigorously pleaded the employee's case. The pleas were met with deliberate distortion of the facts, rumor, innuendo, prejudice, evasion, intentional confusion, deception and reprisal - in this instance management's chief stock in trade as a means to defeat the employee's ingrade. The personnel director instead of pursuing a sworn duty to administer the civil service regulations

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impartially chose instead to champion the side of injustice and low violation prohibited by the criminal code, 18 USC 1001.

Advocacy of the unjust treatment of an outstanding employee was illustrated by the personnel director's admission of numerous "errors" in failing to provide the employee 60 days notice and an opportunity to defend, notification that the employee would be given his earned ingrade and a subsequent notice that the ingrade would be withheld. The shabby treatment was climaxed with a perfunctory letter affirming the denial of the ingrade.

The Local sought relief from the abuse by an appeal to the Civil Service Commission. The latter's decision will be discussed in full at the Local's meeting of Tuesday, November 27, 1973. ALL ARE URGED TO ATTEND."

Again on April 16, 1974, Robert L. Rebein wrote Complainant Wilson as follows:

"On December 19, 1973, I wrote to you with regard to posting notices on the ICC bulletin board that contain derogatory and inflammatory statements in violation of the Commission's internal regulations.

Another similar breach has come to my attention, this time concerning your notice of Local 1779's meeting of March 26, 1974 (copy attached).

The language of paragraph 5b, page 22-705 of the ICC Manual-Administration, is clear. And the language of Section 3, Article VI of our Collective Bargaining Agreement, is equally to the point. Such scurrilous and unfounded attacks on the integrity of the Commission and its personnel, under the guise of legitimate membership announcements, will not be tolerated and must cease. The matter in question is currently in litigation, and no ends of justice are served by such improper and irresponsible communications.

Once again, I request your compliance with the same basic standards of decency that guide all other Commission employees."

The letter was in response to Complainant Wilson's comments in the March 1974 newsletter as follows:

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"BUREAUCRATIC INVASION OF PRIVACY: Representative Jerone Waldie will resume hearings soon on the Senate-approved Federal worker privacy bill designed to outlaw snooping into the lives of employees. The bill will provide penalties against the type of fiasco which occurred at the ICC in the cases of the four ICC employees who were deprived one week's pay on charges they were holding "after hour" jobs and other allegations. Unfounded charges of conflict of interest activities were lodged by the ICC's personnel director. Counsel for the employees summoned the latter to give testimony and to stand cross-examination as to such charges. Refusal of the personnel director to appear and answer the questionable charges to account for his part in the denial of due process, the imposition of unjust penalties and unjust attempts to "railroad" innocent employees whose crimes consisted of after-hour employment to meet financial obligations, will never pose a threat to employees again - upon enactment of the privacy bill sponsored in the Senate by Senator Sam Ervin and which the employees hopefully expect enactment soon.

Able Counsel for the Local, pleading on behalf of the four employees, argued before the U. S. Court of Claims: "***the sole evidence against these employees consisted of rumor, heresay, false witness, manufactured evidence and erroneous assertions and matter never proved that the ICC violated the constitutional rights of these employees and other witnesses subjected to custodial interrogation; and that subsequently the ICC subjected the employees to unfair trials. During and after hearings attempts were made to strip the employees of their counsel so they could be made malleable "putty" in the hands of management."

These and similar statements characterize some ICC elements victimized employees are confronted with.

UPWARD MOBILITY: The Local has on numerous occasions directed the attention of the personnel office to the plight of under-paid employees in the Data Processing Section and other sections of the ICC where disadvantaged employees have been placed in dead-end jobs and otherwise singled out for discriminatory treatment. Favorites are hand-picked for choice jobs and better pay.

Key Punch Operators, for example, were supplied with sophisticated data units for "inforex" type of processing. Due to indifference on the part of the personnel

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office they have been dead-ended in Grade 3 jobs. The national office of the AFGE has been alerted to use the influence of the organization, the Civil Service Commission, and in turn the ICC to enlighten the latter in ways to bring about conformity with decent personnel practices.

Those who are not members of this AFGE Local are urged to join NOW and support it. Applications for membership may be obtained from the Local's officers and stewards."

On November 14, 1974, Complainant Wilson sent Personnel Director Adams a proposed text of a newsletter. The proposed comments were as follows:

"Merit versus Spoils: At its October meeting, the Local voted to affirm and reestablish a sound merit system in the wake of the shameful Nixon years of massive and humiliating devastation of the career service. Years of wreckage, abuse, favoritism, hand-picking, influence peddling, denial of due process, and other shameful practices were brought to the attention of President Ford through the efforts of the unions, particularly the American Federation of Federal Employees. The President ordered the Civil Service Commission to investigate and to punish the offenders. Patronage rings and those responsible for subverting the civil service merit system will be exposed. Each agency, including the Interstate Commerce Commission, is required to appoint an official to whom employees may report violations of merit promotion, without fear of reprisal, and hopefully, all but a small handful of top policymaking positions will again be under the merit system.

At the ICC the President of this Local on October 21, 1974, addressed a letter to Chairman George M. Stafford to ascertain whether the ICC will comply with the CSC's directive. The Local requested the appointment of an official possessing education, training and experience in the administration impartially and objectively of civil service regulations and that such person must be an individual of unimpeachable integrity. Action was requested within 15 days. Meaningful action within the period requested was not taken."

On November 15, 1974, Personnel Director Adams responded as follows:

"This is in response to your memo of November 14, 1974, transmitting a draft of the Local's Newsletter. Notwith-

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standing your personal opinion as to the events in Government over the past few years, it has been our policy to follow Civil Service guidelines. I must object to your implication that this Commission has taken no meaningful action to comply with the Civil Service Commission's directive regarding the merit system.

With respect to your letter to Chairman Stafford, you seem to be implying that he was obligated to abide by your request for action within 15 days and that if such action wasn't taken within 15 days, it would not be meaningful. You have been advised by memorandum from the Chairman that the action referred to is under consideration, pending the receipt of further guidance information from the Civil Service Commission. Appropriate steps will be taken in accordance with those guidelines as soon as we have developed workable plans of action."

The text was published with the change to the last sentence and the additional comment as follows:

"Meaningful action hopefully will be taken. In dealing with this problem, the Local recognizes the immensity and significance of the task of making a suitable selection of a qualified candidate in a position to ably and effectively oversee the impartial administration of civil service law. However, the Local also perceives an urgency in a program designed to set promptly in motion the necessary machinery for remedial action. The Local was advised that the ICC will take appropriate steps to implement the CSC's decision in accordance with further guidance when it is furnished."

From 1966 through 1974, Complainant Wilson had been rated satisfactory in his annual appraisal by Commission supervision. No additional comments were made on his annual appraisal forms of those years. On April 25, 1974, Complainant's work was rated at an acceptable level of competence and he received his regular within grade increase. On July 2, 1974, Complainant Wilson's request for a promotion was denied. The memorandum to Complainant Wilson denying the promotion stated as follows:

"Your work attitude and lack of cooperation with your immediate supervisory personnel is in my opinion a very serious matter. I note that on one occasion it became necessary to advise you by memorandum that you were required to proofread a report in a case assigned to you for disposition which was changed in certain

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respects by Review Board No. 5. In another instance, I was advised that after proofreading an order prepared by a member of the Review Board who found that your draft order was inadequate, you forwarded a memorandum indicating that your draft order contained a correct recital of facts and that the revised order contained errors and poor grammatical construction. I believe the submission of comments in the nature described is inconsistent with an orderly procedure for the exchange of ideas; represents an incomplete perspective of your position in the Commission's Organization structure and of the role of the Office of Proceedings; indicates a failure of mature judgment on your part in dealing with your colleagues; suggests counterproductive attitude of arrogance; and fails to recognize that the Review Board represents the view of the Commission under whose name their adopted order or report is issued. A work attitude of such description is not one that should be tolerated."

"Based on all the facts and circumstances, I am of the opinion that you are not at this time entitled to the promotion you seek. Possibly because of your attitude which inhibits you from accepting input and amendments made by others who necessarily participate in the Commission's decision-making process, you have not shown, in my opinion, that you are able to perform duties in a next higher grade."

On February 12, 1975, Robert J. Brooks, Director of the Office of Proceedings of the Commission, issued a warning letter to Complainant Wilson concerning Complainant's unsatisfactory performance. Complainant Wilson was given 120 days to correct deficiencies. The deficiencies noted were Complainant Wilson's quantity of work, quality of work performance, and work attitude. The letter stated as follows:

"Notwithstanding the amount of time spent on union duties, the quantity of production is unsatisfactory at the Grade 12 level. Grade 11 attorneys in this branch have been processing an average 45-50 cases per year (not including temporary authority cases). Additionally, each attorney (except for yourself) processes an average 7 TA's per year. As noted above, you processed 3 TA's and 3 unopposed cases. Suggestions to improve the quantity aspect of your work performance are discussed in connection with MC-F-11855, infra.

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Quality of work performance. During the past 12 months, slightly over 75 percent of the time spent on casework was devoted to No. MC-F-11855, Maislin Transport Corp.-Merger-Maislin Bros. Transport (U.S.) Ltd. By unanimous vote of Review Board No. 5 (Members Pursell, Pohost, and Taylor) on December 2, 1974, your 31-page draft report on which you expended some 801 hours (approximately five months; working time) was rejected as unacceptable for reasons detailed below and returned to the Deputy Director, Section of Finance, with instructions to reassign the case to another examiner to prepare an order. On December 4, 1974, the proceeding was reassigned to a Grade 11 attorney who had been with the Commission approximately 3 months. The attorney drafted a brief memorandum and 7-page order in less than 2 weeks (52 hours) which was circulated to the Review Board on December 13 and adopted on December 19. I am sure you appreciate the importance of expeditious processing of case assignments, both to the parties and to the Commission. It is a matter of serious concern that a senior attorney, as yourself who has been with the Commission in excess of 25 years, should take 5 months' working time on an unopposed case to do unacceptably what a new attorney (with three months' experience) was able to accomplish acceptably in less than 2 weeks.

Work attitude. Your work attitude and lack of cooperation with supervisory personnel has progressively deteriorated during the past two years (on two occasions requiring written memoranda from the Deputy Director and Assistant Deputy Director) to the point where improvement is imperative. A brief chronology of these unfortunate events follows, noting your performance in MC-F-11509, the Assistant Deputy Director's memorandum concerning MC-F-11661, MC-F-11815, the Deputy Director's memorandum of July 2, 1974, and your memorandum of January 10, 1975, titled "Complaint against Reprisal."

- (1) MC-F-11509. Member Pohost's memorandum of February 23, 1973, to Deputy Director Boyd states that you refused to proofread the draft report adopted by the Review Board.
- (2) MC-F-1161. Assistant Deputy Director Isreal's memorandum of October 18, 1973, notes your refusal to proofread your draft report in MC-F-1161.
- (3) MC-F-11815. On May 22, 1974, the draft report unanimously adopted by Review Board No. 5 was forwarded to you, as the

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original draftsman, to proofread. You sent the following memorandum to Board Member Pohost on May 24, 1974.

Memo from: Examiner Joseph F. Wilson
To: Edward Pohost

"I direct attention to the substantial deficiencies of the attached and the characteristically low quality of its composition. I note particularly the use of poor grammatical construction, misuse of terminology, contradictory statements, wrong spellings, misapplication of precedents, lack of coherence, inconsistencies and the failure to properly present and to brief the relevant issues and the protestant's motion for discovery. I would strongly urge a reading of my original draft for proper handling.

I am directing this memo to you because the assignment sheet of October 17, 1973, bears your name. In view of your responsibility for the low quality and as a matter of assistance, a personal favor, I will make myself available at any time to impart the necessary regulatory expertise and report writing. Initially, I would recommend that you study as a special aid in assisting you, my file of financial reports which contains exemplary models of report writing."

Thereafter, on April 11, 1975, Robert Briggs, Supervisory Attorney-Adviser, Section of Finance, reported on Complainant Wilson, to Phillip Isreal, Deputy Director of the Branch. Mr. Briggs, his supervisor since May 1972, described his work during this period as "consistently marginal at the GS-12 level." In noting the deterioration to very unsatisfactory since 1973, he described a "drastic deteriorat[ion]" since May 1974. Briggs evaluated the change as follows:

"In my opinion, Mr. Wilson's most recent efforts indicate more than unsatisfactory performance but, regrettably, raise a serious question as to the completeness of his mental abilities. Thus, in MC-F-12245 (which was circulated to Review Board No. 5 on February 28, 1975), Mr. Wilson did not even consider a directly related section 207 application (also see comments on RB #5 vote sheet). In recent months he appears to have difficulty doing such simple things as properly filling out his time sheet. Thus,

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his time sheet for March 1975, attached, contains at least 4 errors even though he had only one case to report. Most disturbing is his listing of this single case under two mutually exclusive categories, i.e., under Section A (Items completed) and under Section B (Items not completed). Even Grade 11 attorneys who have been with the Commission one or two months are able to fill out their time sheets properly."

Finally, Mr. Briggs commented:

"As Mr. Wilson approaches age 65 with 33-34 years Federal service, it appears that retirement would be in his best interest, as well as the best interest of the Commission."

In late May 1975, Milton Friedman, Branch Chief over Complainant Wilson reported to his superior Mr. Israel. His opinion was that Complainant's quantity of work, quality of work, and work attitude had not improved during the 120 day warning period.

Director Brooks on the basis of his own evaluation and the opinions of Branch Chiefs, Briggs and Friedman, and Deputy Director Israel recommended to Director of Personnel Adams the removal of Complainant Wilson. On July 1, 1975, the termination letter issued over Mr. Adams' signature. The letter detailed at some length Complainant Wilson's deficiencies previously noted. Complainant Wilson was removed from the payroll effective July 31, 1975.

After his removal, alternative space in the Commission Building was made available to Complainant Wilson to use as a union office in order that he might continue to service the contract. Complainant Wilson found the space unacceptable because of lack of privacy.

Conclusions

Complainant Wilson argues that the discharge of the President of the local union has an inherently coercive effect on the employees' union activities and is therefore a violation of Executive Order 11491. This position cannot be sustained; union membership even union leadership does not insulate an employee from discharge for cause. On the other hand, the Commission argues that union animus must be established before a finding of discriminatory discharge can be sustained. This position also cannot be sustained; the discharge of a union adherent and especially of a union leader in and of itself is the best example

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of union animus if the anti-union motivation of the discharge can be established either directly or by inference.

The discharge of a 25 year employee who had a long record of satisfactory service must, of course, be viewed with some suspicion. This is buttressed further with the evidence that only 3 or 4 attorneys, such as Complainant Wilson, have been discharged for non-performance in the last 20 years. Further, the Commission's action against Complainant Wilson was the only removal proceedings initiated against an attorney with tenure during 1975.6/ Another action was contemplated against an attorney who had just transferred to the Commission from another agency, but this attorney was allowed to obtain a disability retirement. Such an alternative was apparently not considered in Complainant Wilson's case despite the Briggs memorandum of April 11 which seems to indicate that possibility.

The evidence, however, establishes cause for discharge. Complainant Wilson's production was much lower than the acceptable level of performance in 1974. While the average production for GS-11 attorneys in the branch was 50 cases including temporary authorities (TA), Complainant Wilson's (a GS-12) was 7 including TA's. Even excluding his time spent in authorized labor relations (622 hours or 31% of his time) his production was approximately 20% of the average product for the remaining 69% of the time (34 cases for the GS-11 attorney). The evidence of quality of work produced, while not as subject to precise proof as in the case of quantity produced, also appears to support the Commission's position. All of his drafts of decisions in 1974 were rejected. These rejections were at least in part because of poor work on the part of Complainant Wilson. The uniform opinion of supervision was that during the critical period from mid-1974 until his termination July 1975, his work product was of poor quality.

Finally, Complainant Wilson's work attitude and lack of cooperation with supervision reflected poor performance. Although attitude can be a code reference to a dischargee's union activities, there are instances here which indicate Complainant Wilson's antagonistic attitude toward supervision, and refusal to accept supervision. Complainant Wilson refused to perform proofreading work in 1973 and wrote a sarcastic memorandum to Board Member Pohost about a decision he proofread in 1974.

Complainant Wilson argues that the reason for discharge were mere subterfuges and that the real reason in whole or in part was the Commission's desire to rid themselves of an aggressive union leader. Noting the suspicious circumstances of the discharge of a 25 year attorney, the argument has a superficial validity. However, the reasons for discharge are substantial. Further, there is no evidence present of

6/ The Commission concedes other attorneys were also deficient.

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independent union animus on the part of the Commission. On the contrary, the Commission apparently has an established contractual relationship with both AFGE Local 1779 and the Professional Association. There is no evidence that the recent negotiations caused the Commission's representatives to take offense to the Union or Complainant. Also, there is no independent evidence of anti-union motivation for the discharge. The number, nature, and atmosphere of grievance proceedings do not warrant a conclusion that these are evidence of anti-union motivation. Finally, the only evidence of a feeling against Complainant Wilson because of his union activities is that related to newsletters. The only threat is that contained in the letter of October 6, 1972, from Mr. Rebein to Complainant Wilson. Although there were subsequent instances of attacks by Complainant Wilson, none resulted in threats. The comments made by Mr. Crittenden in bargaining also fall short of a threat. Further, there appears to be no reason why, if the Commission intended to rid itself of a militant unionist, it would have waited two years from October 1972 or why it would have chosen to remove Complainant Wilson when it did.

On the basis of the foregoing and the entire record, it is concluded that although the circumstances are somewhat suspicious, the evidence falls short of establishing that the cause for discharge, either whole or in part, was Complainant Wilson's union activity. Accordingly, the Complaint must be dismissed as not supported by sufficient evidence.

Recommendation

In view of the findings and conclusions, I recommend that the Assistant Secretary of Labor for Labor-Management Relations dismiss the Complaint.

Issued at Washington, D. C. on
June 15, 1976



James W. Mast, Administrative Law Judge

Department of Housing and Urban Development
451 Seventh Street, S.W., Room 7150
Washington, D. C. 20410

