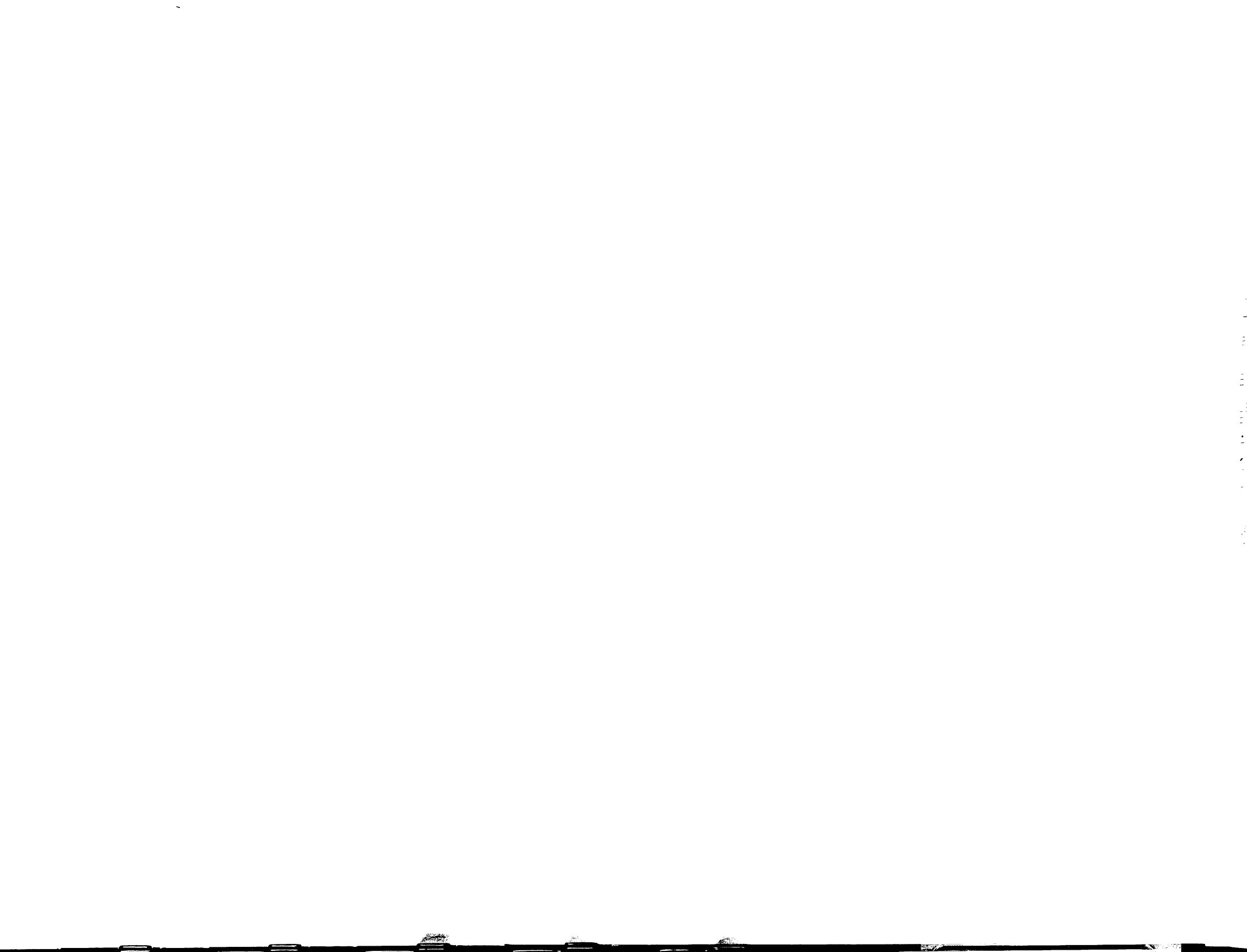


Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended



Volume 6
January 1, 1976 through December 31, 1976

U.S. Department of Labor
Labor-Management Services Administration



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

Volume 6

January 1, 1976 through December 31, 1976

This Volume Includes Assistant Secretary Decisions Nos. 601-776
and Reports on Rulings Nos. 59-61

U.S. Department of Labor
Ray Marshall, Secretary

Labor-Management Services Administration
Francis X. Burkhardt

Assistant Secretary of Labor for Labor-Management Relations

Office of Federal Labor-Management Relations
Louis S. Wallerstein, Director



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PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, covers the period from January 1, 1976, through December 31, 1976. It includes: (1) Summaries of Decisions and the full text of Decisions of the Assistant Secretary after formal hearing or stipulated record (A/SLMR Nos. 601-776); and (2) Reports on Rulings of the Assistant Secretary (originally referred to as Reports on Decisions), which are published summaries of significant or precedent-setting rulings by the Assistant Secretary on requests for review of actions taken at the field level (R A/S Nos. 59-61).

The following table shows the results of the experiment. The first column shows the number of trials, the second column shows the number of correct responses, and the third column shows the percentage of correct responses. The data shows that the percentage of correct responses increases as the number of trials increases, indicating that the subject is learning the task.

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SHOWING DATE ISSUED, AREA OFFICE CASE NUMBER(S) AND TYPE OF CASE

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| 601 | Quantico Education Association | 1-5-76 | 22-5790 | ULP | 39 |
| 602 | Department of the Navy, Navy Exchange, Miramar, California | 1-5-76 | 72-5340 | RO | 44 |
| 603 | Naval Aerospace and Regional Medical Center, Pensacola, Florida and Naval Aerospace Medical Research Laboratory, Pensacola, Florida and Naval Aerospace Medical Institute, Pensacola, Florida | 1-5-76 | 42-2712 42-2713 42-2714 | RA RA RA | 46 |
| 604 | U.S. Army Communications Command Agency, Fort Sam Houston, Texas | 1-5-76 | 63-5420 | RO | 49 |
| 605 | Veterans Administration Center, Bath, New York | 1-26-76 | 35-3125 | RO | 52 |

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

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| 606 | Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey | 1-26-76 | 32-3985 32-3986 | RO RO | 58 |
| 607 | Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, Fairbanks, Alaska | 1-26-76 | 71-3456 | RO | 63 |
| 608 | Naval Air Rework Facility, Pensacola, Florida | 1-26-76 | 42-2529 | ULP | 67 |
| 609 | Defense Contract Administration Services Region (DCASR), Philadelphia | 1-26-76 | 20-5087 20-5091 | CU CU | 73 |
| 610 | Defense Contract Audit Agency, Chicago Region, Chicago, Illinois | 1-27-76 | 50-13039 | CU | 76 |
| 611 | Federal Energy Administration, Washington, D.C. | 1-27-76 | 22-5590 22-5720 30-5650 31-8575 72-4756 72-4834 50-11149 | RO RO RO RO RO RO RO | 78 |
| 612 | U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington | 2-2-76 | 71-3242 | ULP | 87 |
| 613 | Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida | 2-2-76 | 42-2504 | RO | 93 |

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| 614 | Department of Interior, Bureau of Reclamation, Arizona Projects Office, Phoenix, Arizona | 2-10-76 | 72-5349 72-5331 | RA AC | 100 |
| 615 | Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland | 2-17-76 | 22-4027 | ULP | 104 |
| 616 | General Services Administration, Region 3 | 2-17-76 | 22-6292 | RO | 108 |
| 617 | Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey | 2-17-76 | 32-3774 32-3647 | RA ULP | 110 |
| 618 | Norfolk Naval Shipyard, Portsmouth, Virginia | 2-17-76 | 22-5387 | ULP | 112 |
| 619 | Social Security Administration, Mid-America Program Center, BRSI, Kansas City, Missouri | 2-26-76 | 60-3837 | ULP | 117 |
| 620 | U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York | 2-26-76 | 30-5454 30-5455 | ULP ULP | 119 |
| 621 | Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota | 2-26-76 | 51-3089 | CU | 120 |
| 622 | Department of the Navy, Naval Electronics Laboratory Center, San Diego, California | 3-3-76 | 72-5344 | RO | 122 |

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| 624 | Department of Army, Watervliet Arsenal, Watervliet, New York | 3-23-76 | 35-3511 | ULP | 127 |
| 625 | Department of Health, Education and Welfare, Social Security Administration, Bureau of Hearings and Appeals, Puerto Rico | 3-23-76 | 37-1489 | CU | 133 |
| 626 | United States Army, Criminal Investigation Command Third Region, Fort Gillem, Forest Park, Georgia | 3-23-76 | 40-6506 | RO | 135 |
| 627 | Department of the Navy, U.S. Naval Station and Naval Amphibious Base, San Diego, California, and Coronado, California | 3-23-76 | 72-5346 72-5378 | RO RO | 137 |
| 628 | Navy Public Works Center, San Francisco Bay | 3-26-76 | 70-4309 | RA | 142 |
| 629 | Department of the Navy, Naval Support Activity, Long Beach, California | 3-26-76 | 72-5345 | RO | 150 |
| 630 | Internal Revenue Service, National Office, Washington, D.C. | 3-26-76 | 22-5814 | CU | 154 |
| 631 | U.S. Small Business Administration, Central Office Washington, D.C. | 3-26-76 | 22-6314 | ULP | 157 |

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| 632 | Department of Health, Education and Welfare, Social and Rehabilitation Service, Central Office, Washington, D.C. | 3-26-76 | 22-6380 | AC/CU | 160 |
| 633 | Defense Supply Agency, Defense Contract Administration Services Region, Los Angeles, California | 3-26-76 | 72-4668 | ULP | 163 |
| 634 | Energy Research and Development Administration, Headquarters | 3-30-76 | 22-6294 | CU | 164 |
| 635 | Department of the Navy, Naval Avionics Facility, Indianapolis, Indiana | 3-30-76 | 50-13012 | GA | 168 |
| 636 | Department of the Army, U.S. Army Reserves, 425th Transportation Command, Forest Park, Illinois | 3-30-76 | 50-13063 | RO | 177 |
| 637 | Veterans Administration Hospital, New Orleans, Louisiana | 4-30-76 | 64-2438 | RO | 180 |
| 638 | Department of the Army, Fort McCoy, Sparta, Wisconsin | 4-30-76 | 50-13062 | AC | 184 |
| 639 | U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas | 4-30-76 | 63-6055 | GA | 187 |
| 640 | U.S. Civil Service Commission, Washington, D.C. | 4-30-76 | 41-4019 | ULP | 188 |

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| 641 | Department of Housing and Urban Development, Des Moines Insuring Office | 4-30-76 | 62-3945 | ULP | 191 |
| 642 | U.S. Civil Service Commission and Internal Revenue Service, Washington, D.C. | 4-30-76 | 30-5669 35-3241 35-3232 | ULP ULP ULP | 192 |
| 643 | U.S. Department of Agriculture and Office of Investigation and Office of Audit | 5-11-76 | 22-5779 22-5821 | ULP ULP | 194 |
| 644 | U.S. Department of Agriculture, Office of Investigation, Temple, Texas | 5-11-76 | 63-4992 | RO | 196 |
| 645 | Department of Housing and Urban Development, Federal Housing Administration, Fargo Insuring Office, Fargo, North Dakota | 5-11-76 | 60-4406 | RO | 198 |
| 646 | Department of the Navy, Mare Island Naval Shipyard, Vallejo, California | 5-11-76 | 70-4608 | RO | 202 |
| 647 | Federal Aviation Administration, Airway Facilities Sector 37, Tampa, Florida | 5-11-76 | 42-2977 | RO | 203 |
| 648 | Department of Health, Education and Welfare, Office of Secretary, Headquarters, Washington, D.C. | 5-11-76 | 22-6338 | CU | 206 |

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| 650 | Orange-Chatham Comprehensive Health Services, Incorporated | 5-19-76 | 40-6704 | RO | 214 |
| 651 | U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana | 5-19-76 | 50-13010 | ULP | 216 |
| 652 | United States Air Force, Lackland Air Force Base, Headquarters Military Training Center (ATC), Lackland Air Force Base, Texas | 5-19-76 | 63-5430 | ULP | 226 |
| 653 | U.S. Army Electronics Command, Fort Monmouth, New Jersey | 5-25-76 | 32-3673 | ULP | 228 |
| 654 | Department of the Navy, Navy Commissary Store Complex, Oakland | 5-28-76 | 70-4671 70-4726 | RO ULP | 231 |
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| 656 | Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina | 5-28-76 | 40-5987 | ULP | 237 |
| 657 | Defense Contract Audit Agency | 6-4-76 | 30-6173 | RA | 251 |

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| 659 | United States Tank Automotive Command, Warren, Michigan | 6-4-76 | 52-2928 | ULP | 259 |
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| 661 | General Services Administration, Region 4 | 6-11-76 | 40-6705 | RO | 271 |
| 662 | United States Army Tank Automotive Command, Warren, Michigan | 6-11-76 | 52-5931 | ULP | 274 |
| 663 | Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas | 6-15-76 | 63-4716 63-4717 63-4815 | ULP ULP ULP | 281 |
| 664 | National Labor Relations Board, Region 17, and National Labor Relations Board | 6-21-76 | 60-3035 | ULP | 287 |
| 665 | U.S. Department of Commerce, Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana | 6-21-76 | 50-13033 50-13046 | GA GA | 296 |
| 666 | U.S. Department of Agriculture, Grain Division Field Office, New Orleans, Louisiana | 6-22-76 | 64-2665 | ULP | 302 |

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| 668 | Environmental Protection Agency, Region VII, Kansas City, Missouri | 6-22-76 | 60-4069 | ULP | 314 |
| 669 | Army and Air Force Exchange Service, South Texas Area Exchange Lackland Air Force Base, Texas | 6-22-76 | 63-5019 | ULP | 316 |
| 670 | National Labor Relations Board, Region 17, and National Labor Relations Board | 6-22-76 | 60-3449 | ULP | 325 |
| 671 | National Labor Relations Board, Region 17, and National Labor Relations Board | 6-23-76 | 60-3721 | ULP | 333 |
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| 689 | Department of the Navy, Long Beach Naval Shipyard | 8-4-76 | 72-5607 | RO | 416 |
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| 696 | Headquarters, United States Army Field Artillery Center, Directorate of Facilities Engineers, Ft. Sill, Oklahoma | 8-11-76 | 63-6141 63-6158 | RO RO | 445 |
| 697 | Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois | 8-11-76 | 50-13100 | RO | 448 |
| 698 | Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms San Francisco, California | 8-12-76 | 70-4708 | ULP | 451 |
| 699 | General Services Administration, Federal Supply Service | 8-12-76 | 22-6448 | CU | 452 |
| 700 | Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey | 8-13-76 | 32-4017 | ULP | 456 |
| 701 | American Federation of Government Employees, AFL-CIO, Local 41 | 8-13-76 | 22-5968 | ULP | 458 |

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| 703 | U.S. Department of Commerce, National Ocean Survey, National Oceanic and Atmospheric Administration | 8-26-76 | 22-5880 | GA | 468 |
| 704 | Federal Aviation Administration | 9-15-76 | 30-6123 | ULP | 477 |
| 705 | Internal Revenue Service, Cincinnati District, Cincinnati, Ohio | 9-15-76 | 53-7260 | ULP | 479 |
| 706 | U.S. Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio | 9-15-76 | 53-8375 | UC | 481 |
| 707 | Equal Employment Opportunity Commission | 9-16-76 | 22-6505 | ULP | 484 |
| 708 | Norfolk Naval Shipyard | 9-16-76 | 22-6401 | ULP | 486 |
| 709 | U.S. Marshal Service, Dallas, Texas | 9-16-76 | 63-5686 | ULP | 487 |
| 710 | Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington | 9-17-76 | 71-3232 | ULP | 488 |
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| 713 | Defense Supply Agency, Defense Property Disposal Service, Elmendorf Air Force Base, Alaska | 9-20-76 | 71-2996 | ULP | 494 |
| 714 | U.S. Army Reception Station, Fort Knox, Kentucky | 9-20-76 | 41-4587 | RO | 495 |
| 715 | United States Army, Criminal Investigation Command, Third Region, Fort Gillem, Forest Park, Georgia | 9-23-76 | 40-6506 | RO | 497 |
| 716 | Department of the Treasury, Internal Revenue Service, Utah District, Salt Lake City, Utah | 9-23-76 | 61-2525 | ULP | 500 |
| 717 | Department of the Army, Tooele Army Depot, Tooele, Utah | 9-24-76 | 61-2867 | CU | 501 |
| 718 | Fort Carson Exchange, Army and Air Force Exchange Service | 9-24-76 | 61-2881 61-2971 | CU CU | 504 |
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| 722 | Department of the Navy, Naval Avionics Facility, Indianapolis, Indiana | 9-28-76 | 50-13052 | GA | 510 |
| 723 | Department of Health, Education and Welfare, Region II, Social Security Administration, Bureau of Disability Insurance | 10-7-76 | 30-6501 | RO | 516 |
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| 727 | Boston District Office, Internal Revenue Service | 10-13-76 | 31-8958 | ULP | 534 |
| 728 | Department of the Navy, Long Beach Naval Shipyard, Long Beach, California | 10-13-76 | 72-4744 | ULP | 541 |
| 729 | Social Security Administration, Wilkes-Barre Operations Branch, Department of Health, Education and Welfare | 10-19-76 | 20-5293 | ULP | 549 |
| 730 | U.S. Department of Justice, Immigration and Naturalization Service, San Francisco District, San Francisco, California | 10-19-76 | 70-5056 | ULP | 553 |

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| 732 | U.S. Army Electronics Command, Fort Monmouth, New Jersey | 10-20-76 | 32-4190 | ULP | 565 |
| 733 | Department of the Air Force Headquarters, Pacific Air Force Department of Defense Dependent Schools, Pacific | 10-21-76 | 22-5989 | ULP | 567 |
| 734 | General Services Administration, Region 3 | 10-21-76 | 22-5830 | ULP | 572 |
| 735 | Veterans Administration Hospital, Waco, Texas | 10-22-76 | 63-5605 | ULP | 579 |
| 736 | Department of the Navy, Mare Island Naval Shipyard, Vallejo, California | 11-3-76 | 70-4714 | ULP | 582 |
| 737 | U.S. Department of Transportation, U.S. Coast Guard Academy, New London, Connecticut | 11-3-76 | 31-9669 | CU | 588 |
| 738 | Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas | 11-4-76 | 63-5604 | ULP | 591 |
| 739 | Department of the Treasury, U.S. Customs Service, Region IV, Miami, Florida | 11-4-76 | 42-3057 | ULP | 599 |
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| 745 | Department of the Army, Dugway Proving Ground, Dugway, Utah | 11-9-76 | 61-2575 | ULP | 618 |
| 746 | Department of Defense, U.S. Navy, Norfolk Naval Shipyard | 11-9-76 | 22-5751 | ULP | 623 |
| 747 | Department of Defense, Defense Mapping Agency Depot, Hawaii | 11-9-76 | 73-789 | ULP | 626 |
| 748 | Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois | 11-10-76 | 50-13006 | GA | 629 |
| 749 | Community Services Administration | 11-10-76 | 22-5870 | GA | 635 |

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| 750 | Bureau of the Mint, U.S. Department of the Treasury and Bureau of the Mint, U.S. Assay Office San Francisco, California | 11-17-76 | 22-6331 70-4841 | ULP ULP | 639 |
| 751 | Small Business Administration, District Office, Hato Rey, Puerto Rico, and Small Business Administration, Regional Office, New York, New York | 11-17-76 | 37-01554 | ULP | 649 |
| 752 | U.S. Department of Agriculture, Farmers Home Administration, Colorado | 11-18-76 | 61-2884 61-2931 | CU CU | 652 |
| 753 | Northeastern Program Center, Bureau of Retirement and Survivors Insurance, Social Security Administration | 11-18-76 | 30-6596 | ULP | 654 |
| 754 | Philadelphia Service Center, Internal Revenue Service, Philadelphia, Pennsylvania | 11-22-76 | 20-5380 | ULP | 657 |
| 755 | U.S. Department of Commerce, U.S. Maritime Administration | 11-22-76 | 30-5898 | ULP | 658 |
| 756 | General Services Administration Region II, New York, New York | 11-23-76 | 30-6675 | CU | 660 |
| 757 | U.S. Department of Agriculture, Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana | 11-23-76 | 64-3064 | RO | 662 |

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| 758 | Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado | 11-24-76 | 61-2626 | ULP | 664 |
| 759 | Small Business Administration, Region II, New York, New York | 12-6-76 | 30-6108 | RA | 673 |
| 760 | 4500 Air Base Wing, Langley Air Force Base, Virginia | 12-6-76 | 22-6769 | ULP | 676 |
| 761 | Headquarters, 63d Air Base Group, (MAC), United States Air Force, Norton Air Force Base, California | 12-6-76 | 72-5762 | ULP | 679 |
| 762 | U.S. Department of Agriculture, U.S. Forest Service, Pacific Northwest Forest and Range Experiment Station, Forest Sciences Laboratory, Corvallis, Oregon | 12-10-76 | 71-3696 | ULP | 687 |
| 763 | U.S. Information Agency | 12-10-76 | 22-5903 | ULP | 689 |
| 764 | U.S. Customs Service, Region IV, Department of the Treasury, Miami, Florida | 12-13-76 | 42-3297 | ULP | 694 |
| 765 | Veterans Administration Hospital, Miami, Florida | 12-30-76 | 42-3515 | CU | 696 |
| 766 | Department of the Air Force, Kelly Air Force Base | 12-30-76 | 63-6072 | GA | 698 |

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| 767 | Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California | 12-30-76 | 72-3863 | ULP | 702 |
| 768 | Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington | 12-30-76 | 71-3679 | ULP | 709 |
| 769 | General Services Administration, Jackson/Vicksburg, Mississippi | 12-30-76 | 41-4533 | RO | 714 |
| 770 | United States Dependents Schools, European Area, Upper Heyford High School | 12-30-76 | 22-6384 22-6472 | RO CU | 716 |
| 771 | Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania | 12-30-76 | 20-4283 | ULP | 719 |
| 772 | Naval Air Station, Willow Grove, Pennsylvania | 12-30-76 | 20-5591 | RO | 723 |
| 773 | Interstate Commerce Commission | 12-30-76 | 22-6500 | ULP | 725 |
| 774 | U.S. Department of Agriculture, Forest Service, National Forest of Mississippi, Jackson, Mississippi | 12-30-76 | 41-4452 | RO | 726 |
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| 776 | Airway Facilities Field Office, Federal Aviation Administration, St. Petersburg, Florida | 12-30-76 | 42-3321 | ULP | 736 |

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| -- Sam Houston, Tex., Army Communications Command Agency | 604 |
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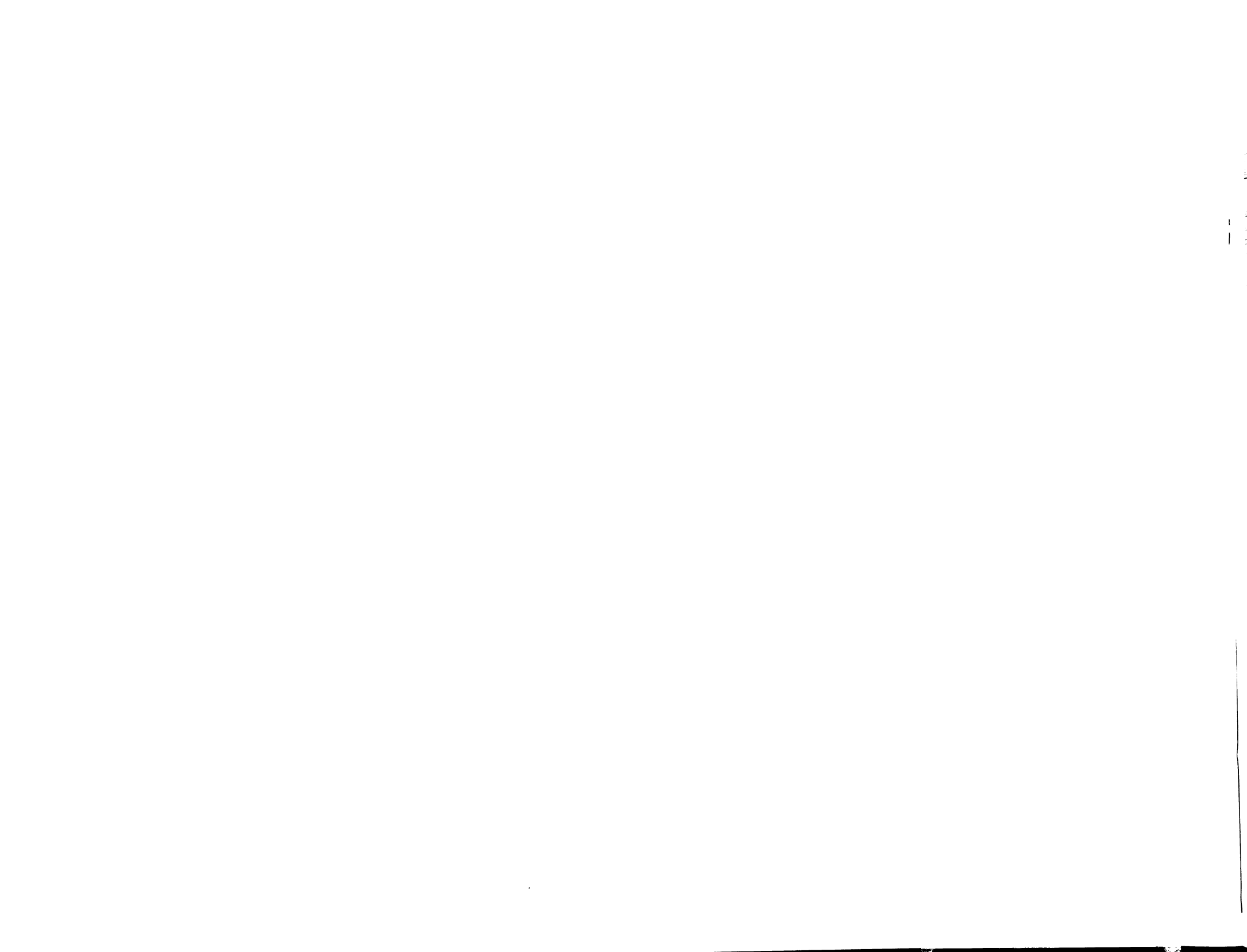
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Decisions of the Assistant Secretary
of Labor for Labor-Management
Relations Nos. 601-776



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

QUANTICO EDUCATION ASSOCIATION
 A/SLMR No. 601

This case involved an unfair labor practice complaint filed by an individual employee (Complainant) alleging that the Respondent Association violated Section 19(c) of the Order by denying him membership in the Quantico Education Association for reasons other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

The Complainant attempted to gain membership in the Respondent by tendering \$11.00, the figure set forth in the Respondent's Constitution as its dues. The Respondent denied him membership based on its contention that an individual seeking membership must tender simultaneously payment not only for the Respondent but also for the state and national labor organizations with which it is affiliated, as its Constitution required a "unified membership" in all three organizations. The Respondent contended that the payment of dues covering membership in all three organizations had been uniformly required as a condition of acquiring and retaining membership in the Respondent and that its Constitution set forth only its part of the dues payment because it had no direct control over the dues structures of the organizations with which it is affiliated.

The Associate Chief Administrative Law Judge concluded that, while the dues provisions of the Respondent's Constitution were ambiguous, the uncontroverted testimony was that the Respondent's dues requirements had indeed been uniformly applied. He also concluded that there was no instance of which he was aware in the public or private sector where an exclusive representative was limited to the collection of monies retained by it and had no right to require financial support of affiliated organizations. Thus, he found that nothing precluded the Respondent from requiring membership in the state and national labor organizations with which it is affiliated as a condition of membership.

The Assistant Secretary adopted the Associate Chief Administrative Law Judge's findings, conclusions, and recommendations and, accordingly, ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

QUANTICO EDUCATION ASSOCIATION 1/

Respondent

and

Case No. 22-5790(CO)

GILBERT GENE LEONARD

Complainant

DECISION AND ORDER

On October 29, 1975, Associate Chief Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Associate Chief Administrative Law Judge's Recommended Decision and Order.

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

1/ The Associate Chief Administrative Law Judge inadvertently referred to the Respondent as the Quantico Educational Association. This inadvertence is hereby corrected.

ORDER

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



IT IS HEREBY ORDERED that the complaint in Case No. 22-5790(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 5, 1976

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

..... :
In the Matter of :
QUANTICO EDUCATIONAL ASSOCIATION : CASE NO. 22-5790(CO)
Respondent :
and :
GILBERT GENE LEONARD :
Complainant :
.....

Maurice Joseph, Staff Counsel
National Education Association
1201-16th Street, N. W.
Washington, D. C. 20036
For the Respondent

Gilbert Gene Leonard
Appearing Pro Se

Before: JOHN H. FENTON
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491. A Notice of Hearing was issued on July 3, 1975, by Assistant Regional Director for Labor-Management Services Administration, Philadelphia Region, based on a Complaint filed on January 21, 1975. Complainant alleges that Respondent violated Section 19(c) of the Order by denying him membership in the Quantico Education Association for reasons other than failure to meet reasonable occupational standards uniformly required for admission, or failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

A hearing in this matter was held on September 16, 1975, in Quantico, Virginia. Both parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. 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

During the 1973-1974 school year, Respondent voted to unify with its state and national parent organizations, the Virginia Education Association (hereinafter VEA) and the National Education Association (hereinafter NEA) respectively. (Resp. Exh. 1). As a result of the decision to unify, Respondent's constitution was amended to provide in relevant part:

"Article IV - Affiliations

The Association is a unified member with (1) Virginia Education Association and (2) the National Education Association."

"Article III - Membership

Section 4. Members must join QEA, VEA and NEA as it is a unified membership." (Resp. Exh. 2).

Membership dues are \$38.00 for VEA, \$25.00 for NEA, and \$11.00 for Respondent, totalling \$74.00. (Compl. Exh. 5). As discussed below, these dues requirements and the above-quoted constitutional amendments were in effect at all times relevant to this complaint.

Article V of the QEA Constitution provides:

"Dues

Professional members shall pay Association annual membership dues of \$11.00 which are established by the voting members of this local Association."

In reliance on this provision, Complainant attempted, on December 4, 1974, to obtain membership in Respondent by tendering \$11.00 to the Building Representative of the

Quantico Education Association. The Building Representative told Complainant at that time that membership in QEA required the payment of \$74.00 in dues. This dues requirement was subsequently affirmed, and Complainant's petition for membership officially denied, by letter dated December 12, 1974 from Mrs. Barbara Gear, President of QEA. (Resp. Exh. 4).

At the hearing in this matter, both the current Treasurer of QEA and a former Building Representative of QEA testified that since May, 1974, the date the aforementioned amendments were approved by the QEA membership, no one has been admitted to membership without paying \$74.00 in dues (Tr. 87, 89).

Finally, the parties have stipulated that QEA is the exclusive bargaining representative of teachers in the Quantico Dependents School System, Marine Corps Base, Quantico, Virginia (Tr. 74). It was further stipulated that the collective bargaining agreement between QEA and Marine Corps Base, Quantico, Virginia, (hereinafter MCB) recognizes only QEA without any reference to VEA, NEA, or any other organization. (Tr. 74).

Conclusions of Law

Section 19(c) of the Executive Order provides as follows:

"A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees or dues uniformly required as a condition of acquiring and retaining membership."

Complainant has presented four arguments in support of his 19(c) complaint: (1) the only dues amount expressly set forth in the QEA Constitution is \$11.00; (2) Section 19(c) of the Order applies to the dues of only that organization granted exclusive recognition, i.e., QEA, and not VEA or NEA; (3) the relevant amendments of the QEA Constitution were made in violation of the procedural requirements of Article 16 of the Constitution and once the revisions were passed, the teachers in the unit were not given appropriate notice thereof; and (4) by unifying its membership with NEA, NEA has

effectively adopted the strike clause in the NEA Bill of Rights, which may place QEA in violation of the Order, and may subject QEA members to punishment for violating statutory, federal employee strike prohibitions. Though not all of these arguments are entirely relevant to a 19(c) complaint, I shall discuss them all.

I. Article V: Provision for \$11.00 in Dues

Article V of the QEA Constitution cannot be read in isolation from the other Articles contained therein. It must be read in conjunction with Article II(4) which provides that membership in VEA and NEA is a prerequisite to membership in QEA. Respondent has argued convincingly that the precise amount of the state and national organization dues are not cited in the constitution simply because to do so would necessitate amending the Constitution whenever VEA and NEA changed their dues. For the sake of convenience, then, Article V omits mention of state and national dues on the reasonable assumption that one, such as Complainant, who relies on the language of the constitution, would understand that membership in VEA and NEA, as required in Article III, impliedly necessitates the payment of dues to those organizations.

Even if one assumes, *arguendo*, that the dues provisions in the QEA Constitution are ambiguous, it does not follow that Respondent is in violation of the Order. Section 19(c) of the Order does not speak to problems of draftsmanship in union constitutions; it requires instead that union membership dues be applied, in fact, to all employees uniformly. Two witnesses for Respondent have testified that QEA's dues requirements have indeed been applied uniformly (Tr. 87, 89). This evidence was uncontroverted by Complainant; it is therefore received as fact and is dispositive of this case.

II. The QEA-MCB Negotiated Agreement Recognizes only QEA and not VEA and NEA

Though the validity of the NEA three-tier dues structure is apparently an issue of first impression under the Order, said dues structure has been upheld in two state cases. In Swartz Creek Community Schools, Case No. 699-80, July 29, 1971, reported in 414 GERRE-1, a teacher challenged \$80.00 in annual dues payments, \$18.00 of which was retained by the local, \$47.00 of which was passed on to the Michigan Education Association, and \$15.00 of which went to the NEA. The

Michigan Employee Relations Council noted that, as in this case, membership in all three organizations was compulsory. The Commission upheld the unified dues structure as "established practice" that was not violative of the Complainant's rights.

In Las Vegas Federation of Teachers v. Clark County School District and Clark County Classroom Teachers Association, Case No. Al-00427, April 23, 1974, reported in 557 GERRE-B-8, a unified dues structure existed between CCCTA on the local level, the Nevada State Education Association, and the NEA. The applicable state bargaining law gave employees the right to join or refrain from joining an organization. Just as QEA is the only organization recognized in the collective bargaining agreement in this case, so, too, was CCCTA the recognized organization for the teacher unit in Las Vegas, *supra*. Noting that unified membership in local, state and national organizations is not uncommon in the labor movement, the Nevada Local Government Employee-Management Relations Board held that the state law was "not intended to prohibit an employee organization from making membership in state and/or national organizations a condition to membership in the local employee organization."

Similarly, it is common in the private sector for some part of the dues required as a condition of membership to be allocated for payment to affiliated organizations. Thus, *per capita* payments are routinely made to parent organizations despite the fact that the parent is neither recognized nor certified as the exclusive bargaining representative employees involved. While employees have the right to prevent any part of their dues from being used to support political activity which they oppose, I am not aware of any case in which *per capita* taxes have been successfully opposed on the ground that the exclusive representative was limited to the collection of monies retained by it and had no right to require financial support of affiliated organizations.

In light of these circumstances, I conclude that the negotiated agreement between QEA and MCB, which recognizes only QEA and not VEA or NEA, does not preclude QEA from making membership in state or national organizations a condition to membership in QEA.

III. Article XVI; Notice of Amendments

A) Article XVI

Complainant has established that, in violation of Article XVI of the QEA Constitution, the proposed amendments were not circulated for thirty days prior to the vote of the QEA membership in May, 1974. (Tr. 64). I conclude that this slight procedural irregularity does not affect the validity of the amendments in question, and is immaterial to the merits of this Section 19(c) complaint. While Complainant did not attempt to exploit the point, it is also clear that the vote for unification, which accomplished a very large raise in dues, was by show of hand rather than by secret ballot. Again, I regard this as immaterial to this Section 19(c) complaint. If Complainant was in fact aggrieved by these circumstances, the proper forum for testing his claim was a proceeding pursuant to the Regulations implementing Section 18 of the Order. Thus, a complaint might have been filed attacking the dues structure as it was modified by unification, under Section 204.2(3) of the Rules and Regulations. As I understand the scheme of the Order, a finding that Complainant was entitled to membership upon a tender of \$11.00 should be made only after a determination is made in such a proceeding that the addition of VEA and NEA dues was violative of the Regulations because accomplished in an undemocratic manner.

B) Notice of Amendments

Complainant went to great lengths at the hearing in this case to establish the exact date on which the aforementioned constitutional amendments went into effect. It appears from the testimony that unification was approved at a statewide teachers meeting in November, 1973. Before this vote became binding upon QEA, or upon any other local, it had to be ratified by the local membership. Because QEA anticipated great difficulty in gathering a quorum of QEA members in order to ratify the unification, representatives of QEA's Executive Board decided to visit the schools within the Quantico Dependents School System and conduct separate ratification votes within each individual school (Tr. 51). Official ratification was completed in May, 1974. It was not until August, 1974, that the QEA constitution was retyped so as to reflect the unification-related amendments.

Complainant contends that QEA leadership did not effectively circulate copies of the amended constitution within the unit. (Tr. 83). Due largely to an inefficient mail system at the base (Tr. 78), it does appear that the manner in which QEA notified unit employees of the constitutional amendments was less than perfect. It is undisputed, however, that a copy of the amended Constitution was attached to a newsletter that was circulated to QEA members in April, 1974 (Resp. Exh. 1). It is also clear that Complainant was aware of the constitutional amendments before he tendered his \$11.00 in dues and when said dues were tendered, the Building Representative again informed Complainant of the effect of the amendments. Even if Complainant did not receive the most effective notice of the amendments, he has not shown that he was prejudiced thereby or why he should be relieved of the \$74.00 dues requirement.

IV. NEA Strike Clause

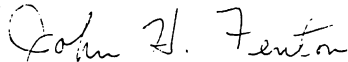
Complainant established that the NEA Bill of Rights (Compl. Exh. 6) asserts that each teacher has the right "to withdraw services collectively when reasonable procedures to resolve impasse have been exhausted." He contends that membership in an organization asserting such a right is incompatible with his status as an employee of the Federal government. Various laws do prohibit strikes by such employees. Moreover, the Order at Section 19(b)(4) makes it unlawful for a labor organization to engage in or condone such activity, and at Section 2(e)(2) exempts from the definition of a labor organization any group which assists or participates in a strike against the government or imposes a duty or obligation to conduct, assist or participate in such a strike. This is of small comfort to Complainant for several reasons. First, it is not germane to his contention that he has the right to membership at a cost of \$11.00 rather than \$74.00 per annum. Second, asserting the right to strike is in any event not banned by the Order, which was amended in 1971 to delete the phrase in Section 2(e)(2) which prohibited a union from asserting the right to strike, in order to avoid the Constitutional problems described in United Federation of Postal Clerks v. Blount, 325 F. Supp. 829 (1971).

Accordingly, in the absence of any evidence that Complainant was denied membership in the Quantico Education Association for any reason other than Complainants' failure

to pay the annual dues required of all QEA members, an insufficient basis exists for finding a violation of Section 19(c) of the Order.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary for Labor-Management Relations dismiss the subject complaint.



JOHN H. FENTON
Associate Chief Judge

DATED: October 29, 1975
Washington, D. C.

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

DEPARTMENT OF THE NAVY,
NAVY EXCHANGE,
MIRAMAR, CALIFORNIA
A/SLMR No. 602

The subject case involves a representation petition filed by the National Federation of Federal Employees, Local 63 (NFFE). The Activity asserted that the petition was filed untimely because it was filed after the Activity and the incumbent exclusive representative, the American Federation of Government Employees, Local 1476, AFL-CIO, (AFGE) had entered into a negotiated agreement. The NFFE contended, in this regard, that no agreement was in effect at the time its petition was filed.

The Assistant Secretary found that the NFFE petition was filed untimely. In this connection, he noted that the president of AFGE Local 1476 had been duly appointed as the AFGE's chief spokesman and that the Activity and the AFGE concluded a valid and binding agreement on April 10, 1975, the terms of which had been initialed by the parties at the conclusion of a previous negotiating session. In these circumstances, and noting additionally that the representatives of the AFGE and the Activity who initialed the various articles of the agreement were fully authorized to negotiate and execute a binding agreement on behalf of their principals, that the initialed articles of the agreement contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship, and that the affixing of the parties' signatures after the filing of the instant petition constituted a mere formal execution of the previously agreed upon provisions, the Assistant Secretary concluded that the petition herein was filed untimely during the term of an existing negotiated agreement and that, therefore, dismissal of the NFFE's petition was warranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVY EXCHANGE,
MIRAMAR, CALIFORNIA

Activity 1/

and

Case No. 72-5340(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 63

Petitioner

DECISION AND ORDER

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

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

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, the National Federation of Federal Employees, Local 63, herein called NFFE, seeks an election in a unit of all employees of the Barber and Beauty shops, Naval Air Station Miramar, San Diego, California, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

The American Federation of Government Employees, Local 1476, AFL-CIO, herein called AFGE, currently is the exclusive representative of the employees in the petitioned for unit. The appropriateness of the unit is not at issue herein. 2/

1/ The name of the Activity appears as amended at the hearing.

2/ In view of the disposition herein, I find it unnecessary to rule on the AFGE's motion that it be granted status as an intervenor in the subject case.

The NFFE contends that its petition, filed on May 5, 1975, was timely because no negotiated agreement existed at the time of filing which would constitute a bar to an election. On the other hand, the Activity asserts that the provisions of a negotiated agreement, which had been initialed previously by representatives of the AFGE and the Activity, constitute, in effect, a valid negotiated agreement which served to bar the instant petition.

The evidence established that on April 14, 1974, prior to the termination of a negotiated agreement, the AFGE notified the Activity of its desire to negotiate a new agreement. After establishing ground rules for negotiations, the AFGE national representative designated the president of AFGE Local 1476, John F. Conroy, as the AFGE's chief spokesman in his stead, with the concurrence of the AFGE's executive board. The record reflects that Conroy was vested with full authority to negotiate and execute a binding agreement with the Activity on behalf of the AFGE. At three negotiating sessions subsequently held on April 25, June 6, and June 11, 1974, the AFGE met with the Activity and discussed the articles of the expired agreement. After modifying various articles and retaining others in their original form, the chief spokesmen for the Activity and the AFGE, at the conclusion of the negotiating session on June 11, 1974, signified their agreement on particular articles or sections by affixing their initials thereto. 3/ At the conclusion of the June 11, 1974, negotiating session, the parties had agreed in this manner on all matters with the exception of the AFGE's proposal with respect to commission percentages. In this latter regard, the negotiators agreed to table this wage issue pending a ruling by the Federal Labor Relations Council (Council) in a related case. However, in early 1975, after conferring with the AFGE membership, Conroy informed the Activity's chief spokesman that the AFGE was willing to withdraw its proposal in this regard and conclude an agreement. Thereafter, on April 10, 1975, Conroy met with the Activity's chief spokesman to confirm the withdrawal of the AFGE's proposal and to review the language and the initialing of the articles accomplished during the negotiating sessions held in 1974. The record reveals that it was the understanding of the AFGE and the Activity that a binding agreement had been reached on all issues as of their meeting of April 10, 1975. On May 5, 1975, the instant petition was filed. Subsequently, on May 8, 1975, a "smooth copy" of the negotiated agreement consisting of the initialed articles was signed by the Activity's Exchange Officer and Conroy.

The NFFE contends that the initialed articles of April 10, 1975, did not constitute a formal agreement which would bar its petition of May 5, 1975, as Conroy, who initialed the agreement and withdrew the AFGE's proposal, did not have the authority as chief spokesman to bind the AFGE. Under all of the foregoing circumstances, however, I find that

3/ The record reflects conflicting testimony regarding the participation of Conroy in the April 25 and June 6 meetings. However, there is no conflict regarding Conroy's participation and activities at the June 11 meeting. Under these circumstances, I find it unnecessary to determine whether Conroy participated in the earlier two meetings.

January 5, 1976

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

there was a valid and binding negotiated agreement in effect when the NFFE filed its petition in the matter, and that, therefore, dismissal of the NFFE's petition is warranted. Thus, the record reflects that Conroy was the duly appointed chief spokesman for the AFGE with full authority to negotiate and execute an agreement on behalf of the AFGE. Further, the evidence establishes that, in his capacity as the AFGE's chief spokesman, Conroy met and negotiated with the Activity's chief spokesman, and, on April 10, 1975, formally withdrew the AFGE's wage proposal and concluded a valid and binding agreement, the terms of which had been initialed previously by the parties at the conclusion of their June 11, 1974, negotiating session. In these circumstances, and noting additionally that the representatives of the AFGE and the Activity who initialed the various articles of the agreement were fully authorized to negotiate and execute a binding agreement on behalf of their principals, that the initialed articles of the agreement contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship, and that the affixing of the parties' signatures on May 8, 1975, constituted a mere formal execution of the previously agreed upon provisions, I find that as of April 10, 1975, there was a valid and binding negotiated agreement between the Activity and the AFGE.

Accordingly, as the petition herein was filed untimely during the term of an existing negotiated agreement, I shall order that it be dismissed. 4/

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 72-5340(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 5, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

4/ Cf. United States Department of the Navy, U. S. Naval Station, Pearl Harbor, Hawaii, A/SLMR No. 504 and United States Air Force, 321st Combat Support Group, Grand Forks Air Force Base, North Dakota, A/SLMR No. 319.

NAVAL AEROSPACE AND REGIONAL MEDICAL CENTER,
PENSACOLA, FLORIDA
AND
NAVAL AEROSPACE MEDICAL RESEARCH LABORATORY,
PENSACOLA, FLORIDA
AND
NAVAL AEROSPACE MEDICAL INSTITUTE,
PENSACOLA, FLORIDA
A/SLMR No. 603

This case involved three separate RA petitions filed by the Naval Aerospace and Regional Medical Center (Center), the Naval Aerospace Medical Research Laboratory (Laboratory), and the Naval Aerospace Medical Institute (Institute), all in Pensacola, Florida. As a result of a reorganization, the Laboratory and the Institute were removed from the command responsibility of the Center and were established as separate commands in Pensacola. The Activity-Petitioners took the position that the single certified exclusively recognized unit, which included all of the employees of the three Activities, was rendered inappropriate by the reorganization and that three units conforming to the new organizational realignment should be established to reflect the changes brought about by the reorganization. The American Federation of Government Employees, Local 1960, AFL-CIO (AFGE), contended, on the other hand, that the effect of the reorganization was superficial and that its existing unit is still viable.

The Assistant Secretary found that the certified unit continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition. In this regard, it was noted that the reorganization did not result in any change in the day-to-day terms and conditions of employment of the employees involved, including their physical locations, their job functions, and their immediate supervision. In addition, the Assistant Secretary found that altering the unit involved in the manner sought by the Activity-Petitioners, where a history of collective bargaining existed, would tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations, noting particularly that the three Commands involved report to the same Naval organizational command and are serviced by the same Consolidated Civilian Personnel Office.

Accordingly, the Assistant Secretary ordered that the three RA petitions be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AEROSPACE AND REGIONAL
MEDICAL CENTER,
PENSACOLA, FLORIDA

Activity-Petitioner

and

Case No. 42-2712(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960, AFL-CIO

Labor Organization

NAVAL AEROSPACE MEDICAL
RESEARCH LABORATORY,
PENSACOLA, FLORIDA

Activity-Petitioner

and

Case No. 42-2713(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960, AFL-CIO

Labor Organization

NAVAL AEROSPACE MEDICAL INSTITUTE,
PENSACOLA, FLORIDA

Activity-Petitioner

and

Case No. 42-2714(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960, AFL-CIO

Labor Organization

DECISION AND ORDER

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

Upon the entire record in the subject cases, including a brief filed on behalf of the Activity-Petitioners, the Assistant Secretary finds:

On March 16, 1971, the American Federation of Government Employees, Local 1960, AFL-CIO, herein called AFGE, was certified as the exclusive representative in a unit of essentially all nonprofessional employees of the Naval Aerospace Medical Center, Pensacola, Florida. Subsequently, the AFGE and the Naval Aerospace Medical Center entered into a three year negotiated agreement dated February 28, 1972. The agreement was amended on October 24, 1972, to reflect the change in the Activity's designation to the Naval Aerospace and Regional Medical Center, herein called the Center. Thereafter, the Chief of Naval Operations reorganized certain shore activities of the Bureau of Medicine and Surgery, herein called BUMED, effective July 1, 1974. The effect of this reorganization on the Center was the removal of two component activities, the Naval Aerospace Medical Research Laboratory, herein called the Laboratory, and the Naval Aerospace Medical Institute, herein called the Institute, from the responsibility of the Center's Commanding Officer and their establishment as separate activities with different chains of command. The Activity-Petitioners took the position that this reorganization so substantially changed the character and scope of the existing unit as to render it inappropriate. In this regard, it contended that as a result of the reorganization there now existed three separate units conforming to the new organizational realignment. 1/

The AFGE contends, on the other hand, that the reorganization was superficial and that its existing unit is still viable. Alternatively, it takes the position that the subject RA petitions are not appropriate for the purpose sought and that CU petitions should have been filed. Under these circumstances, it asserts that the petitions in the subject cases should be dismissed.

The record reflects that prior to July 1, 1974, the effective date of the reorganization, there was a single activity composed of three elements: the Hospital and its dispensaries, the Institute, and the Laboratory, all designated as the Center. The primary missions of the three elements were diverse, but each was encompassed within the overall mission of the Center. Thus, the mission of the Hospital was medical care and services on both an in-patient and out-patient basis; the mission of the Institute was medical training of personnel and the mission of the Laboratory was basic medical research in the aerospace field. Organizationally, the three elements were under the command of the Commanding Officer of the Center who reported to BUMED. The Commanding Officer of the Institute reported directly to the Commanding Officer of the Center, who also was the Commanding Officer of the Hospital, and the Officer-in-Charge of the Laboratory reported directly to the Commanding Officer of the Institute.

1/ The Activity-Petitioners further indicated that should it be determined that petitions for clarification of unit (CU) should have been filed in this matter in order to achieve the desired result, the instant petitions be treated as such.

The reorganization was designed to make easier the identification and accounting of the expenditure of funds by each of the components. As a consequence of the reorganization, the organizational character and status of the three components, as well as the chain of command, were altered. Thus, the Institute and the Laboratory were removed from the responsibility of the Center and were elevated to the status of independent commands. The Commanding Officer of the Institute and the Officer-in-Charge of the Laboratory were elevated to Commanding Officer status coequal with that of the Commanding Officer of the Center with identical authority and responsibility for their respective organizations. While all continued to be responsible ultimately to BUMED, the Institute as one of four such institutes, reported to and through the Naval Health Sciences Education and Training Command, and the Laboratory, as one of 10 such laboratories, reported to and through the Naval Medical Research and Development Command, both of which commands are located in Bethesda, Maryland. In addition, employees of the Institute and the Laboratory were placed under separate areas of consideration for reductions in force as a result of their change in command status. Finally, based on their new status, the Commanding Officers of the Institute and the Laboratory were established as the responsible authorities in Pensacola, with the assistance of the Consolidated Civilian Personnel Office, for the negotiation of agreements and for the implementation of personnel policies and practices involving their respective employees.

The evidence established that the employees of the Center, the Institute, and the Laboratory continued after the reorganization to perform the same duties in the same physical locations under the same immediate supervision as prior to the reorganization. ^{2/} Further, the employees of the three activities continue to be serviced by the Pensacola Naval Air Station Consolidated Civilian Personnel Office, except that they are now treated as three tenant activities instead of one. A single area of consideration for promotions also remains the same, and the Center continues to perform certain non-reimbursable services for the Institute and the Laboratory such as data processing.

The Activity-Petitioners claim that requiring the three separate Commanding Officers, who have separate funding requirements, to join together and negotiate an agreement will reduce effective dealings and efficiency of agency operations. In addition, the Activity-Petitioners note that grievance handling would, in their view, be unwieldy if the three Commanding Officers had to designate one of their number to make grievance determinations for the other. In the AFGE's view, however, requiring three negotiated agreements for three small groups of employees where one agreement previously had covered such employees would reduce effective dealings and efficiency of agency operations.

^{2/} There was an indication that the Center anticipates moving in January 1976 into new quarters which are located approximately five miles from the present location. However, at the time of the hearing in this matter, the locations of the Center, Institute, and Laboratory were in close proximity.

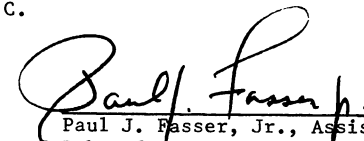
It contends additionally that problems created by the reorganization via a vis the bargaining unit could be resolved at the bargaining table, and it notes, in this regard, that all three of the Activities involved continue to report upwards to BUMED.

Under the current circumstances outlined above, I find that the certified unit continues, after the reorganization, to remain appropriate for the purpose of exclusive recognition. In this regard, noted particularly was the fact that the reorganization did not result in any change in the day-to-day terms and conditions of employment of the employees involved, including their physical locations, their job functions, and their immediate supervision. Moreover, in my view, where, as here, there is a history of collective bargaining in the unit involved and the exclusively recognized unit remains essentially intact following a reorganization, to alter the unit in the manner sought herein by the Activity-Petitioners clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations. Rather, the result sought by the Activity-Petitioners i.e. - the establishment of three new units - under the circumstances herein would, in my judgment, tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations. In this latter regard, it was noted that the three commands involved herein continue to report to the same organizational command, BUMED, and are serviced by the same Consolidated Civilian Personnel Office. Based on all of the foregoing considerations, I shall order that the petitions herein be dismissed. ^{3/}

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 42-2712(RA), 42-2713(RA), and 42-2714(RA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
January 5, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{3/} In view of the above disposition, the treating of the instant petitions as CU petitions would not require a contrary result.

January 5, 1976

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

U.S. ARMY COMMUNICATIONS
COMMAND AGENCY, FORT SAM
HOUSTON, TEXAS
A/SLMR No. 604

This case involves a representation petition filed by the National Federation of Federal Employees, Local 28 (NFFE) for a unit of all nonprofessional employees of the U.S. Army Communications Command Agency, Fort Sam Houston, Texas (USACC-FSH). The NFFE contended that, in the alternative, if the Assistant Secretary found the petitioned for unit to be inappropriate, the claimed employees, who at one time were employed in the Telecommunications Center Division (TCD) of the Headquarters, Fifth U.S. Army, Fort Sam Houston, should be considered to have remained in that unit which is exclusively represented by the NFFE and which is covered by a three year negotiated agreement. The Intervenor, American Federation of Government Employees, AFL-CIO, Local Union 2154 (AFGE), asserted that the claimed employees do not constitute a unit separate and distinct from the employees of Headquarters, Fort Sam Houston, who are exclusively represented by the AFGE and are covered by a three year negotiated agreement. The USACC-FSH was in agreement with the NFFE that the claimed unit is appropriate for the purpose of exclusive recognition, and that there is no agreement bar to the petitioned for unit.

The Assistant Secretary concluded that, as previously found in Department of Defense, U.S. Army, U.S. Army Communications Command Agency, Fort Sam Houston, Texas, A/SLMR No. 398, the employees in the petitioned for unit had not remained a part of the NFFE's unit of the employees of Headquarters, Fifth U.S. Army, nor were they part of the AFGE's unit of the employees of Headquarters, Fort Sam Houston. Rather, in his view, the Army-wide reorganization of July 1, 1973, which placed all communications related functions under the central command of the United States Army Communications Command (USACC), also created a new organizational entity, USACC-FSH, separate and distinct from Headquarters, Fort Sam Houston and Headquarters, U.S. Fifth Army. Accordingly, as the claimed unit was a new entity, the Assistant Secretary concluded there was no bar to the NFFE's petition.

Furthermore, the Assistant Secretary concluded that the unit sought was appropriate for the purpose of exclusive recognition under the Order. He noted, in this regard, that the claimed employees are

engaged in similar job functions; that they have little or no work contact with the other employees located on Fort Sam Houston; that they have not transferred to or interchanged with employees of any other activity located at Fort Sam Houston; that the area of consideration for reduction-in-force and promotion actions is USACC-FSH rather than basewide; that the claimed employees are under the direct supervision and administrative control of the Director of USACC-FSH; and that USACC-FSH does not report to Headquarters Fort Sam Houston but, rather, through channels, to its own headquarters located at Fort Huachuca, Arizona. In addition, the Assistant Secretary found that the claimed unit, which would include all employees of USACC-FSH, and which the Activity agreed was appropriate, would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY COMMUNICATIONS
COMMAND AGENCY, FORT SAM
HOUSTON, TEXAS

Activity

and

Case No. 63-5420(RO)

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 28

Petitioner

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL UNION 2154

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, National Federation of Federal Employees, Local 28, herein called NFFE, seeks an election in a unit of all nonprofessional employees employed at the U.S. Army Communications Command Agency, Fort Sam Houston, Texas (USACC-FSH). The NFFE contends that, in the alternative, if the Assistant Secretary finds the petitioned for unit to be inappropriate, the claimed employees, who at one time were employed in the Telecommunications Center Division (TCD) of Headquarters, Fifth U.S. Army, Fort Sam Houston, should be considered to have remained in that unit which is covered by a three year negotiated agreement which was effective on May 16, 1973. The Intervenor, American Federation

of Government Employees, AFL-CIO, Local Union 2154, herein called AFGE, asserts that the claimed employees do not constitute a unit separate and distinct from the employees of Headquarters, Fort Sam Houston, who are represented exclusively by the AFGE and are covered by a three year negotiated agreement which was effective on November 1, 1973. The AFGE maintains in this regard that its agreement constitutes a bar to the petition herein. 1/ The USACC-FSH is in agreement with the NFFE that the claimed unit is appropriate for the purpose of exclusive recognition and contends that there is no negotiated agreement or other bar to an election in the petitioned for unit. It further asserts that there has been no active representation of employees by any labor organization in the petitioned for unit. 2/

The record in A/SLMR No. 398 and in the instant proceeding reveals that located at Fort Sam Houston are the Headquarters of Fort Sam Houston and of the Fifth U.S. Army, as well as a number of other organizations, including the three directorates of the USACC. The record indicates that USACC-FSH was formed pursuant to a two step procedure. On February 4, 1973, the functions of the TCD of Headquarters, Fifth U.S. Army were transferred to the Communications and Electronics Division of Headquarters, Fort Sam Houston (C&E-FSH). 3/ Thereafter, pursuant to an Army-wide reorganization, entitled "Operation Steadfast," effective July 1, 1973, all communications related functions were placed under one central command, the USACC, which is headquartered in Fort Huachuca, Arizona (USACC Headquarters). In A/SLMR No. 398, it was found that USACC-FSH is responsible to USACC Headquarters through the U.S. Army Communications Forces (USACCF) located at Fort McPherson, Georgia. 4/

1/ The NFFE's petition was filed on February 6, 1975.

2/ In Department of Defense, U.S. Army, U.S. Army Communications Command Agency, Fort Sam Houston, Texas, A/SLMR No. 398, issued June 20, 1974, a unit petitioned for by the NFFE, which included the employees of the USACC-FSH, claimed herein, as well as employees of two other directorates of the United States Army Communications Command (USACC), was found to be inappropriate for the purpose of exclusive recognition.

3/ The employees of TCD were notified of the transfer of functions and were offered jobs in the new organization. All employees accepted this offer.

4/ The record in the instant case reveals that there are two chains of command. Thus, in addition to reporting directly to USACCF, Fort McPherson, Georgia, on some matters, it also reports on other items to the U.S. Army Communications Command, Continental United States (USACC-CONUS), located at Fort Ritchie, Maryland.

The mission of the USACC-FSH is to provide communications to Headquarters, Fort Sam Houston, and all tenants on the installation. 5/ The communications support provided consists of telephone service, public address system service, maintenance and electronics systems, the transmission and delivery of messages, and the operations of the military affiliate radio system (MARS Station). The record reflects that the employees in the claimed unit are under the direct command of the Director of USACC-FSH who, as indicated above, reports to USACC Headquarters through intermediate facilities. 6/ In this regard, the record reveals that the Director of USACC-FSH now possesses authority over personnel matters for the employees in USACC-FSH, although he has designated the Fort Sam Houston Civilian Personnel Office as his agent for personnel and labor relations matters. The immediate supervision, job functions, and work locations of the employees of the USACC-FSH have remained essentially the same as prior to the reorganization. The record reveals that there has been no interchange of employees of the USACC-FSH and Headquarters, U.S. Fifth Army, or Headquarters, Fort Sam Houston, nor have any transfers occurred. Additionally, there is only a minimal work contact among such employees. Further, the area of consideration for reduction-in-force actions is within USACC-FSH and, since December 1974, the area for promotion actions also has been limited to USACC-FSH, although prior to that time, and at the time of the Decision and Order in A/SLMR No. 398, the area of consideration for job opportunities was basewide.

Under these circumstances, and as noted in A/SLMR No. 398, I find that the employees in the petitioned for unit have not remained a part of the NFFE's exclusively recognized unit of employees in Headquarters, Fifth Army, nor are they a part of the AFGE's exclusively recognized unit of employees of Headquarters, Fort Sam Houston. Rather, in my view, the reorganization of July 1, 1973, which established the USACC, also created a new organizational entity, USACC-FSH, which is separate and distinct from Headquarters, Fort Sam Houston and Headquarters U.S. Fifth Army. Accordingly, as the claimed unit is a new entity and the employees are no longer part of any existing unit, I find that there is no agreement bar to the petition herein.

Moreover, and based on the foregoing, I find that the claimed unit is appropriate for the purpose of exclusive recognition. Thus, such unit contains employees who share a clear and identifiable community of interest which is separate and distinct from employees of Headquarters, Fifth Army and those of Headquarters, Fort Sam Houston. In this regard,

5/ The tenants include, Headquarters, Fifth Army and, among others, Headquarters, Brooke Army Medical Center; the Academy of Health Sciences; Headquarters, Health Services Command; and the Defense Mapping Agency.

6/ Prior to the reorganization of July 1, 1973, the Director of the USACC-FSH was the Chief of the Communications and Electronics Division of the Headquarters, Fort Sam Houston.

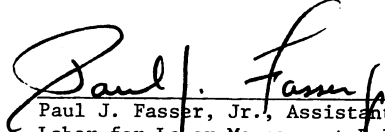
it was noted that the record reflects that the employees of the USACC-FSH are engaged in similar job functions; that they have little or no work contact with the other employees located on Fort Sam Houston; that they have not transferred to or interchanged with employees of any other activity located at Fort Sam Houston; that the area of consideration for reduction-in-force and promotion actions is USACC-FSH rather than base-wide; that the employees in USACC-FSH are under the direct supervision and administrative control of the Director of USACC-FSH; and that the USACC-FSH does not report to Headquarters, Fort Sam Houston, but, rather, through channels to USACC Headquarters at Fort Huachuca, Arizona. Furthermore, noting that the claimed unit would include all the employees of the USACC-FSH, and that the Activity is in agreement with respect to the appropriateness of such unit, I find also that the unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the following unit which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees in the U.S. Army Communications Command Agency, Fort Sam Houston, Texas, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 28; or by the American Federation of Government Employees, AFL-CIO, Local Union 2154; or by neither.

Dated, Washington, D.C.
January 5, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

January 26, 1976

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

VETERANS ADMINISTRATION CENTER,
BATH, NEW YORK
A/SLMR No. 605

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3306, (Petitioner) seeking an election in a unit of all professional and nonprofessional employees, including canteen employees, of the Activity. The Activity and the Petitioner were in essential agreement as to the scope of the requested unit. However, contrary to the Activity the Petitioner and the National Federation of Federal Employees, Local 491, (Intervenor) agreed that Administrative Coordinators for Nursing are not supervisors and should be included in the unit. The Intervenor contended further, contrary to the Petitioner, that temporary employees and cemetery employees should be included in the claimed unit.

At the hearing and in its brief to the Assistant Secretary, the Intervenor raised a number of issues which were rejected by the Hearing Officer. The Assistant Secretary found that the Hearing Officer properly had rejected attempts by the Intervenor to raise issues which had been the subject of previously filed unfair labor practice complaints against the Activity or were related to issues decided previously by the Assistant Regional Director or by the Assistant Secretary.

Except for a temporary part-time chaplain employed at the time of the hearing, the Assistant Secretary found that temporary employees employed by the Activity should be excluded from the unit found appropriate because they did not have a reasonable expectancy of continued employment. The Assistant Secretary also found that cemetery employees located at the Activity do not share a clear and identifiable community of interest with employees employed by the Activity. The Assistant Secretary concluded that Administrative Coordinators for Nursing should be excluded from the unit found to be appropriate because they are supervisors. In this connection, he found they possess and exercise the authority, using independent judgement, to assign personnel from one hospital ward to another and to call personnel in to work overtime.

The unit found appropriate by the Assistant Secretary included professional and nonprofessional employees of the Activity. At the hearing, the parties were unable to stipulate as to the professional status of certain employee classifications. The Assistant Secretary found a number of those employee classifications to be professional. However, because of the lack of record evidence with respect to the remaining employee classifications in question, the Assistant Secretary made no findings concerning their professional status. Rather, he indicated that the employees in such classifications could vote as professionals subject to challenge in the election he directed.

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

VETERANS ADMINISTRATION CENTER,
BATH, NEW YORK

Activity

and

Case No. 35-3125(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3306

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 491

INTERVENOR

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, including a brief filed by the Intervenor, National Federation of Federal Employees, Local 491, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3306, seeks an election in a unit of all professional and nonprofessional employees, including canteen employees, of the Veterans Administration Center, Bath, New York, excluding management officials, employees engaged in Federal personnel work in other than

a purely clerical capacity, guards, 1/ and supervisors as defined in the Order.

The Activity and the Petitioner are in essential agreement as to the scope of the requested unit but the Activity contends that Administrative Coordinators for Nursing are supervisors and therefore should be excluded from the unit. Contrary to the Activity, the Petitioner and the Intervenor agree that Administrative Coordinators for Nursing are not supervisors and should be included in the unit. The Intervenor further contends, contrary to the Petitioner, that employees classified as temporary and cemetery employees should be included in the claimed unit.

The Activity and the Intervenor, the current exclusive representative, are parties to a negotiated agreement which was effective for a period of two years from April 13, 1972, and automatically renewable every two years on the second anniversary date thereafter. By its terms, the negotiated agreement is applicable to a unit of all professional and nonprofessional employees, including canteen employees, and excluding all supervisory and management employees as mutually agreed upon and listed on an attachment to the agreement by the parties.

The Veterans Administration Center, located at Bath, New York, consists of a 208 bed general hospital and a more than 80 bed domiciliary including nursing home care units. There are approximately 576 full-time permanent employees at the Center, including medical and professional personnel, employees engaged in trades and crafts, and administrative personnel. Overall direction of the facility is vested in the Center Director. Under the Director the facility is broken down organizationally into two primary segments with medically related matters under the jurisdiction of the Chief of Staff and administrative functions under the jurisdiction of the Assistant Center Director.

The record discloses that, at the hearing in this matter, the Hearing Officer on several occasions rejected attempts by the Intervenor to raise issues which, in the Hearing Officer's view, were the subject of previously filed unfair labor practice complaints against the Activity or were related to issues decided previously by the Assistant Regional Director or by the Assistant Secretary. In its post-hearing brief to the Assistant Secretary, the Intervenor made the following contentions

1/Subsequent to the filing of the petition herein, Executive Order 11491 was amended to delete the separate representation policy governing guards which had required separate units for guards and had permitted new units of guards to be represented only by labor organizations which represented guards exclusively. At the hearing, the Petitioner and the Intervenor indicated that they were prepared to represent guards if the Assistant Secretary should include them in the unit. The Activity raised no objection to such inclusion.

which previously had been rejected by the Hearing Officer: (1) it would be improper for the Assistant Secretary to rule on the instant petition because the Intervenor was not given adequate notice of the scope of the hearing which was expanded to include matters that it was not prepared to cover; (2) the petition was filed untimely under the provisions of Section 202.3(c)(1) of the Assistant Secretary's Regulations; (3) the solicitation of signatures in support of the petition was conducted during work hours and in work areas in violation of Section 20 of the Order; and (4) the petition was "tainted" because the Petitioner's President, who signed the petition and participated in the collection of the showing of interest in support of the petition, is a supervisor.

With regard to the contention concerning the scope of the hearing, the Intervenor claims that it was informed that the sole issue to be covered at the hearing was the status of temporary employees but, at the hearing, the scope was widened to include the status of cemetery employees as well as temporary employees. I find no merit in this contention noting particularly that the Intervenor admitted on the record that it had refused to sign a stipulation limiting the scope of the hearing in this matter. I find also that the timeliness, Section 20, and "taint" issues could not appropriately be raised at the hearing. Thus, prior to the hearing, in an administrative review of an action taken by the Assistant Regional Director, the Assistant Secretary made a determination that the petition was filed timely within the meaning of Section 202.3(c)(1) of the Regulations and such determination was not appealed to the Federal Labor Relations Council. Similarly, prior to the hearing herein, the Assistant Regional Director made a determination that the showing of interest in support of the petition was adequate and was not solicited in violation of Section 20 of the Order. The Assistant Regional Director also made a determination prior to the hearing that the Petitioner's President was not a supervisor within the meaning of the Order. 2/

2/ It should be noted that Section 202.2(f)(1) of the Assistant Secretary's Regulations provides that, "The Area Director shall determine the adequacy of the showing of interest administratively, and such determination shall not be subject to collateral attack at a unit or representation hearing. If the petition is dismissed or the intervention is denied a request for review of such dismissal or denial may be filed with the Assistant Secretary." Further, Section 202.2(f)(2) provides, in part, that with respect to challenges to the validity of showing of interest, "the Assistant Regional Director shall take such action as he deems appropriate which shall be final and not subject to review by the Assistant Secretary unless the petition is dismissed or the intervention is denied on the basis of the challenge." (There was neither a dismissal of the petition nor a denial of an intervention in this case.)

-3-

Moreover, I reject the Intervenor's contention that the Petitioner's President signed the instant petition. Thus, inspection of the petition reveals that it was, in fact, signed by J. D. Gleason, National Vice President of the American Federation of Government Employees, AFL-CIO. 3/

The record reflects that the parties are in agreement as to the scope of the requested unit, and I find the requested unit to be substantially the same as the unit currently represented exclusively by the Intervenor. Further, the record discloses that the employees of the Veterans Administration Center at Bath, with the exception of cemetery employees and employees who work in the canteen service, operate under the same supervisory hierarchy and are subject to common personnel policies and practices promulgated by the Activity. In this connection, it was noted that the parties agreed to the inclusion of the canteen employees in the petitioned for unit, and that the record indicates that employees in the canteen service have been included historically in the existing exclusively recognized unit.

As noted above, however, there is disagreement among the parties with regard to the inclusion in the petitioned for unit of temporary employees, cemetery employees, and Administrative Coordinators for Nursing. Further, the parties were unable to stipulate at the hearing as to the professional status of certain other employee classifications.

Temporary Employees

The record reveals that the appointment period for temporary employees has never exceeded one year, that most temporary employees hired by the Activity have been terminated at the end of their appointments, and that few temporary employees are appointed to permanent positions. In this latter connection, the record also shows that, in order to be appointed to a permanent position, temporary employees must go through the same competitive process

3/ In this regard, compare U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 413, wherein it was held that a Hearing Officer's refusal to accept evidence pertaining to the supervisory status of the Petitioner warranted the remanding of the case for the purpose of obtaining additional evidence. Such remand was necessary to determine whether or not the petition was defective on its face and should be dismissed.

-4-

as other applicants and that previous temporary status in a permanent position is of no particular advantage. Further, the record discloses that temporary employees are hired to fill positions of limited duration in nature, such as certain seasonal groundskeeping activities, replacements due to illness, covering work load peaks, etc. Within these parameters, as well as employment ceiling and budget limitations, the numbers of temporary employees at the Activity can vary widely. Except for 6 or 7 temporary cemetery employees, at the time of the hearing in this matter the Activity employed a temporary part-time chaplain, a temporary dental technician and a temporary draftsman.

The record discloses that the temporary part-time chaplain is employed on a part-time basis not to exceed 20 hours per week and that his duties are essentially the same as the approximately 5 permanent full-time chaplains and the 2 permanent part-time chaplains employed at the Activity. His appointment is for one year periods subject to renewal at the end of each fiscal year. The evidence also reveals that the temporary part-time chaplain position at the Activity has been authorized as a continuing position and that the incumbent's appointment has recently been approved for another year. In these circumstances, as the temporary part-time chaplain has a reasonable expectancy of continued employment for a substantial period of time, I shall include him in the unit found appropriate. 4/

The temporary dental technician has a 700 hour appointment (approximately 4 months) and was hired to replace a permanent employee who is on sick leave. According to the record, he has no likelihood of retention when the career employee returns. Similarly, the temporary draftsman with a not-to-exceed 1 year appointment was hired for the specific purpose of assisting the Engineering Division concerning a number of projects and has no likelihood of retention when the projects are completed. Under these circumstances, I find that neither the temporary dental technician nor the temporary draftsman has a reasonable expectancy of future employment. Accordingly, I shall exclude them from the unit found appropriate. 5/

4/ Cf. United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, A/SLMR No. 227.

5/ Cf. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495.

Cemetery Employees

The record reveals that prior to July 1, 1974, the Veterans Administration cemetery at Bath, New York, was under the jurisdiction of the Activity. The lone cemetery employee, a sexton, was employed on a permanent full-time basis and included in the bargaining unit represented by the Intervenor. However, on or about July 1, 1974, the cemetery at Bath, New York, was integrated into the National Cemetery System of the Veterans Administration and came under the jurisdiction of the Superintendent of the Woodlawn National Cemetery at Elmira, New York. 6/ At the time of the hearing in this matter, the cemetery at Bath employed 3 permanent employees and 6 or 7 temporary employees and the Elmira cemetery employed 3 permanent employees.

The record reveals that the Bath and Elmira cemeteries are responsible to a different parent organization within the Veterans Administration than the Activity. Thus, the Bath and Elmira cemeteries are under the National Cemetery Service while the Activity is under the Department of Medicine and Surgery. In this connection, they are under a separate line authority and separate budget. Further the superintendent at Elmira does the hiring of cemetery employees for both locations, whereas the Activity's responsibility is limited to administrative support of the superintendent at Elmira by arranging interviews and maintaining personnel records for both cemeteries. The record also discloses that the Philadelphia Regional Office of the National Cemetery Service establishes Bath and Elmira cemetery policies and dictates, to a great extent, personnel policies and practices affecting cemetery employees. Moreover, the record reveals that the employees at the Bath cemetery perform the same grounds maintenance duties as the employees at Elmira and that the employees of both cemeteries are under the supervision of the superintendent at Elmira. Under these circumstances, I find that the cemetery employees at Bath do not share a clear and identifiable community of interest with employees of the Activity. Accordingly, I shall exclude cemetery employees from the unit found appropriate.

Administrative Coordinators for Nursing

The Activity contends that two individuals employed on a full-time basis as Administrative Coordinators for Nursing are supervisors and should be excluded from the unit. One Administrative Coordinator for Nursing is assigned to the evening shift (3:30 p.m. to midnight) and the other is assigned to the night shift (midnight to 8:00 a.m.).

6/ The Woodlawn National Cemetery, located approximately 50 miles from the Bath cemetery, was formerly under the jurisdiction of the Department of the Army.

The Activity asserts that the primary responsibility of the Administrative Coordinators for Nursing is to act in the capacity of the Chief of the Nursing Service during the evening and night shifts when there are no other individuals present in the line of authority of the Nursing Service to handle the kinds of problems that arise which ordinarily would be referred to the Chief Nurse if she were present. In this connection, the record indicates that when the Administrative Coordinators for Nursing are on duty during the evening shifts, the Chief Nurse and the Assistant Chief Nurse are not on duty. Further, the record shows that although head nurses are on duty during the evening and night shifts, their authority is focused on the particular ward that they are responsible for, except on the weekends when they rotate the duty to relieve the Administrative Coordinators for Nursing.

It is clear that the Administrative Coordinators for Nursing possess and exercise the authority, using independent judgement, to assign personnel from one ward to another and to call personnel in to work overtime. Thus, the record reflects that during the evening and night shifts the head nurses on duty direct their staffing requests to the Administrative Coordinator for Nursing on duty who is responsible for assigning personnel to meet changing work load requirements. Under these circumstances, I find that the Administrative Coordinators for Nursing are supervisors within the meaning of the Order inasmuch as they have the authority and exercise independent judgement to make assignments of personnel from ward to ward and to call personnel in to work overtime. Accordingly, I find that the Administrative Coordinators for Nursing should be excluded from the unit found to be appropriate.

Professional Employees

As noted above, the Petitioner seeks an election in a unit including all professional and nonprofessional employees of the Activity. However, at the hearing the parties were unable to stipulate as to the professional status of certain employee classifications. The record discloses that the employees in the following classifications perform duties and have responsibilities which require knowledge acquired through study resulting in an advanced degree; have duties which require the use of independent judgement; and perform work which cannot be standardized in relation to a given period of time: Chaplain, Dentist, Physician, Psychologist, Registered Nurse, Social Psychologist, Social Worker, Speech Pathologist and Vocational Rehabilitation Specialist. 7/

7/ In this regard, see the criteria for professional status set forth in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

Accordingly, I find that employees in these classifications are professional employees within the meaning of the Order. However, in view of the lack of record evidence with respect to the remaining employee classifications in question, I will make no findings concerning their professional status. Rather, employees in such classifications may vote as professionals subject to challenge in the election directed herein.

Based on all the foregoing circumstances, I find that the proposed unit contains employees who share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Consequently, I find that the unit sought by the Petitioner is appropriate for the purpose of exclusive recognition, and I hereby direct an election in the following unit:

All professional and nonprofessional employees, including canteen employees, of the Veterans Administration Center, Bath, New York, 8/ excluding temporary employees who do not have a reasonable expectancy of continued employment, cemetery employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professional unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

Voting group (a): All professional employees, including professionals who are canteen employees, of the Veterans Administration Center, Bath, New York, excluding nonprofessional employees, temporary employees who do not have a reasonable expectancy of continued employment, cemetery employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

8/ Inasmuch as current representation policy treats guards the same as other employees, and as the Petitioner and the Intervenor indicated on the record that they were prepared to represent guards if they should be included in the appropriate unit and the Activity raised no objection to such inclusion, I shall include guards in the unit found appropriate.

Voting group (b): All nonprofessional employees, including nonprofessionals who are canteen employees, of the Veterans Administration Center, Bath, New York, excluding professional employees, temporary employees who do not have a reasonable expectancy of continued employment, cemetery employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 3306; or the National Federation of Federal Employees, Local 491, or by neither organization.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 3306, the National Federation of Federal Employees, Local 149, or by neither organization. In the event that majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes in voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Director indicating whether the American Federation of Government Employees, AFL-CIO, Local 3306, the National Federation of Federal Employees, Local 491, or neither labor organization was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following employees will constitute a single unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order.

All professional and nonprofessional employees, including canteen employees, of the Veterans Administration Center, Bath, New York, excluding temporary employees who do not have a reasonable expectancy of continued employment, cemetery

employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

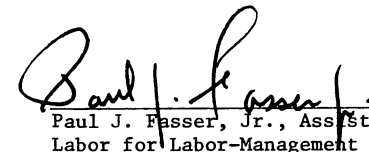
2. If a majority of the professional employees does not vote for inclusion in the same unit as nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

- (a) All professional employees, including professionals who are canteen employees, of the Veterans Administration Center, Bath New York, excluding nonprofessional employees, temporary employees who do not have a reasonable expectancy of continued employment, cemetery employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.
- (b) All nonprofessional employees, including nonprofessionals who are canteen employees, of the Veterans Administration Center, Bath, New York, excluding professional employees, temporary employees who do not have a reasonable expectancy of continued employment, cemetery employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 3306; the National Federation of Federal Employees, Local 491; or by neither.

Dated, Washington, D. C.
January 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

January 26, 1976

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

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY
A/SLMR No. 606

This case arose as a result of representation petitions filed by the National Federation of Government Employees, Local Union 1340 (NFFE) and by the American Federation of Government Employees, AFL-CIO, Local Union 2335 (AFGE).

The NFFE requested a unit of all the Activity's unrepresented employees, including those petitioned for by the AFGE, and also including two existing units presently exclusively represented by the AFGE which were not covered by any procedural bars and certain employees presently represented by the National Association of Government Employees, Local Union R2-43, which had intervened previously but whose intervention status was denied by the Assistant Secretary when it failed to appear at the hearing. The AFGE requested two separate units: (1) all employees employed in the Supporting Services Division, Graphic Arts Branch, Printing and Distribution Section and (2) all employees employed in the Management Systems Division.

The Assistant Secretary found that the unit petitioned for by the NFFE, which was essentially a residual unit, was appropriate for the purpose of exclusive recognition. In this regard, he noted that the employees are supervised at the divisional level, have work related relationships, are in frequent contact with one another, and are subject to common personnel practices and policies administered on an Activity-wide basis. Also, noting the Activity's agreement as to the appropriateness of such unit, the Assistant Secretary found that the unit sought by the NFFE would promote effective dealings and efficiency of agency operations.

The Assistant Secretary further found that one of the two units petitioned for by the AFGE was appropriate for the purpose of exclusive recognition. In this connection, particular note was taken of the fact that, with limited exceptions, the employee classifications in the claimed unit are unique to the section involved; all the employees are located in one building where the work of the section is performed; the claimed employees normally do not interchange or come in work contact with other employees outside the section; and, finally, the majority of the claimed employees possess specialized and technical skills different from other employees of the Activity. Under these circumstances, the Assistant Secretary determined that the claimed employees constituted an appropriate functional unit.

With regard to the other unit petitioned for by the AFGE, the Assistant Secretary noted that the claimed employees in the division involved were divided into two separate groupings providing unrelated services, with separate supervision, and with little, if any, direct work contact between these two functional activities. Under these circumstances, the Assistant Secretary concluded that the unit sought was inappropriate for the purpose of exclusive recognition and he ordered that the petition be dismissed.

The two existing units represented by the AFGE encompassed by the petition filed by the NFFE had been found by the Assistant Secretary in U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482, to be viable and appropriate for the purpose of exclusive recognition. In accordance with Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, the Assistant Secretary considered the appropriateness of these units without regard to the prior grant of recognitions where there was no evidence of a collective bargaining history, and found that the record did not reflect any change in the scope and character of such units since the decision in A/SLMR No. 482. Therefore, it was concluded that such units remained appropriate for the purpose of exclusive recognition.

Accordingly, the Assistant Secretary ordered elections in the units found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

Intervenor 1/

DECISION, ORDER AND DIRECTION OF ELECTIONS

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

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

Activity

and

Case Nos. 32-3985(RO) and
32-3986(RO)

Upon the entire record in these cases, the Assistant Secretary finds:

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 2335

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL UNION 1340

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 32-3985(RO), the American Federation of Government Employees, AFL-CIO, Local Union 2335, herein called AFGE, seeks an election in a unit of all Class Act and Wage Grade employees of the Activity employed in the Supporting Services Division, Graphic Arts Branch, Printing and Distribution Section, excluding all professional employees, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. 2/

Cross-Petitioner and Intervenor

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

In Case No. 32-3986(RO), the AFGE seeks an election in a unit of all Class Act and Wage Grade employees of the Activity employed in the Management Systems Division, excluding professional employees, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

Activity

and

Case No. 32-4008(RO)

In Case No. 32-4008(RO), the National Federation of Federal Employees, Local Union 1340, herein called NFFE, seeks an election in a unit of all employees of the National Aviation Facilities Experimental Center (NAFEC), Atlantic City, New Jersey, excluding professional employees, management officials, supervisors, guards and firefighters

NATIONAL FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 1340

Petitioner

and

1/ The Notice of Hearing in this matter was served on the National Association of Government Employees, Local Union R2-43 (NAGE), the exclusive representative of certain Air Traffic Control Specialists in the Activity's Simulation and Analysis Division, Experimental and Evaluation Branch, which had intervened in Case No. 32-4008(RO). However, as the NAGE did not appear at the hearing, its status as an intervenor herein is hereby denied. See, in this regard, Section 202.5(a) of the Assistant Secretary's Regulations.

2/ The unit appears as amended at the hearing.

who are under an agreement bar, and employees in units under existing exclusive recognitions held by the NFFE. 3/

The Activity contends that the unit petitioned for by the NFFE is appropriate and that the units petitioned for by the AFGE in Case Nos. 32-3985(RO) and 32-3986(RO) are inappropriate because the employees in those units do not share a clear and identifiable community of interest. Moreover, it asserts that the units petitioned for by the AFGE will not promote effective dealings and efficiency of agency operations. Thus, in the Activity's view, the appropriate unit is the unit petitioned for by the NFFE, including not only the unrepresented employees claimed by the AFGE, but also the employees in two units represented currently by the AFGE which units are not covered by procedural bars. (See footnote three above).

The AFGE contends that its petitioned for units are separately appropriate for the purpose of exclusive recognition, and that, in addition, its currently recognized units (described at footnote three above) should not be included within the unit petitioned for by the NFFE. The NFFE took no position with regard to the appropriateness of the units petitioned for by the AFGE, but indicated a desire to appear on the ballot should the Assistant Secretary find such units to be appropriate.

BACKGROUND

The record reflects that prior to March 1972, there were 17 existing exclusively recognized units in the Activity. Of these units, the AFGE represented six, the NAGE one, and the NFFE ten. In March 1972, the Activity instituted a reorganization. Following this reorganization, petitions were filed with the Assistant Secretary seeking a determination with respect to the effect of such reorganization on the continued appropriateness of some 14 of the 17 existing exclusively recognized units. 4/ The Assistant Secretary ultimately found that certain of the units no longer existed as a result of the reorganization and that, therefore, the Activity was under no obligation to continue to recognize the exclusive representative involved. With regard to certain other units, the Assistant Secretary found that the primary effect of the reorganization was to redesignate their organizational locations

3/ The petitioned for unit in Case No. 32-4008(RO) would encompass, among others, the two units petitioned for by the AFGE in Case Nos. 32-3985(RO) and 32-3986(RO) and two existing units which the AFGE currently represents exclusively and for which there exist no procedural bars. These two latter units cover Wage Grade employees in the Plant Services Branch of the Supporting Services Division and General Schedule employees in the Quality Control Section of the Aviation Facilities Division.

4/ With respect to the three other units, petitions were filed seeking amendments of certification or recognition to reflect the redesignation of their organizational locations.

but that the scope and character of such units had not been affected by the reorganization. He concluded, therefore, that such units remained viable and appropriate for the purpose of exclusive recognition. Among those units found to remain viable and appropriate were the two units represented exclusively by the AFGE, described at footnote three above. In the exclusively recognized units where petitions had been filed for amendments of certification or recognition, and where certain changes in the designations of their organizational locations had occurred without affecting the scope and character of such units, the Assistant Secretary amended the prior certifications or recognitions in order to reflect such changes. 5/

The Activity

The parties stipulated herein that the Activity's mission is to operate and administer a national test facility which is responsible for research, development, and implementation of Federal Aviation Administration programs and to conduct test and evaluation projects relating to aviation concepts, procedures, hardware, and systems. The parties further stipulated that "all personnel policies, practices, programs, including but not limited to employment classifications, training, labor relations, occupational health and safety compensation, merit promotions, equal employment opportunity, [and] agency grievance procedures are administered on a centerwide [Activity-wide] basis by the Manpower Division Personnel Office for all employees of the National Aviation Facilities Experimental Center, including those covered by the three petitions under present consideration."

Case No. 32-4008(RO)

The unit petitioned for by the NFFE in Case No. 32-4008(RO) is essentially a residual unit of all unrepresented nonprofessional employees of the Activity 6/ and those employees in units for which the AFGE and the NAGE are the exclusive representatives but which are not covered by any procedural bars. 7/ The record reveals that the

5/ See U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR Nos. 481 and 482.

6/ The record reveals that at the time of the hearing in the instant proceeding a certification of representative was to be issued for a unit of all the professional employees of the Activity.

7/ As indicated above, the unit claimed by the NFFE excluded, among others, guards and firefighters covered by an agreement bar. In this regard, the record reflects that the AFGE is the exclusive representative at the Activity for two units - General Schedule uniformed police (guards) located in the Air Transportation Security Staff, and General Schedule firefighters, located in the Operations Staff, Aviation Facilities Division - and that there were negotiated agreements covering the employees in these two units at the time the NFFE's petition herein was filed.

employees petitioned for by the NFFE are supervised at the divisional level, have work related relationships, are in frequent contact with one another, and are subject to common personnel practices and policies administered on an Activity-wide basis.

Under these circumstances, I find that the unit petitioned for by the NFFE in Case No. 32-4008(RO), which is essentially a residual unit, is appropriate for the purpose of exclusive recognition under the Order. Moreover, and noting also the Activity's agreement as to the appropriateness of such unit, I find that the unit sought by the NFFE will promote effective dealings and efficiency of agency operations.

As noted above, the claimed unit would encompass employees in two units for which the AFGE is the exclusive representative, but for which there was no agreement bar at the time the petition was filed by the NFFE. 8/ These units consist of: (1) all Wage Grade employees in the Plant Services Branch, Supporting Services Division and (2) all General Schedule employees in the Quality Control Section, Aviation Facilities Division.

In Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, the Assistant Secretary found that, with respect to units of exclusive recognition which are encompassed within a petition for a broader unit and in which there is no evidence of a collective bargaining history, the appropriateness of such units may be considered without regard to prior grants of recognition upon the filing of a petition encompassing such units. In this regard, it was noted that with respect to the above described units represented exclusively by the AFGE, in A/SLMR No. 482 the Assistant Secretary found both units to be viable and appropriate for the purpose of exclusive recognition. Further, the record does not reflect any change in the scope and character of such units since the decision in A/SLMR No. 482. Accordingly, I find that the above described units represented by the AFGE remain appropriate for the purpose of exclusive recognition. Therefore, with respect to these two units, I shall order self-determination elections to determine whether or not the employees desire to remain in their existing units.

Case Nos. 32-3985(RO) and 32-3986(RO)

The record reflects that prior to the March 1972 reorganization, the AFGE was the exclusively recognized representative of the nonprofessional employees in the Activity's Administrative Services Division.

8/ As noted above at footnote one, the NAGE did not appear at the hearing in this matter and its intervenor status was denied. In my view, the NAGE action herein constitutes, in effect, a disclaimer of interest with respect to any employees it represents who are covered by the NFFE's petition in this matter. Accordingly, such employees will be included in the unit found appropriate in Case No. 32-4008(RO).

In A/SLMR No. 482, the Assistant Secretary found that, as a result of the reorganization, this division had been abolished and the employees previously included within such unit were assigned to other existing organizational entities. Thus, the evidence established that approximately 16 employees who had been in the unit are now located in the Printing and Distribution Section, Graphic Arts Branch, which is petitioned for by the AFGE in Case No. 32-3985(RO). Further, approximately 12 General Schedule employees formerly in the unit are now located in the Management Systems Division which is petitioned for by the AFGE in Case No. 32-3986(RO).

With respect to Case No. 32-3985(RO), the record discloses that the Printing and Distribution Section of the Graphic Arts Branch, which is in the Supporting Services Division, performs the printing and distribution functions for the Activity. The record reveals that the employee classifications in this claimed unit, with limited exceptions, are unique to this Section and include, among others, offset press operators, bindery workers, platemakers, printing clerks and assistants. The claimed employees are all located within one building where the work of the Section is performed, and the evidence establishes that normally they do not interchange or come in work contact with other employees outside the section. 9/

As the majority of the employees in the claimed unit possess specialized and technical skills different from other employees of the Activity and noting particularly that Section 10(b) of the Order specifically provides, in part, that a unit may be established on a functional basis, I find that a self-determination election in the unit sought in Case No. 32-3985(RO) is warranted. Thus, in my view, the employees involved constitute a functionally distinct grouping of employees who share a clear and identifiable community of interest. Further, I find that the establishment of such a functional unit containing employees with unique and specialized skills and who, therefore, are likely to experience unique labor-management relations problems will promote effective dealings and efficiency of agency operations.

In Case No. 32-3986(RO), the record discloses that the employees in the Management Systems Division are divided into two separate groupings providing two unrelated services - Staffing Validation and Library Technical Services. The Staffing Validation group is staffed by approximately 5 management analysts who study the Activity's organization in terms of its efficiency of performance and its structure and who make recommendations with regard to changes to enhance the effectiveness of the Activity's operation. In the performance of their job functions, the Staffing Validation group works throughout the Activity much of the time at the request of various management officials. The Library Technical Services group provides the technical reference material to employees seeking such information. It is staffed by approximately 5 library technicians. With regard to the supervisory

9/ The Section's mail clerks have certain contact with other employees in the Activity when they deliver the mail and printed material throughout the Activity.

hierarchy, the record reveals that the management analysts are supervised by a Supervisory Management Analyst, whereas the library technicians are supervised by the Administrative Librarian. The evidence establishes that there is little, if any, direct work contact between these two functional activities.

Under these circumstances, I find that the employees in the claimed unit of the Management Systems Division do not share a community of interest with each other, separate and distinct from other employees of the Activity. Nor, in my view, would such a unit composed of two divergent groupings of employees promote effective dealings or efficiency of agency operations.

Accordingly, I find that the petitioned for unit in Case No. 32-3986(RO) is inappropriate for the purpose of exclusive recognition and, therefore, I shall order that the petition in such case be dismissed. However, as the employees are encompassed in the unit petitioned for by the NFFE in Case No. 32-4008(RO), they shall have an opportunity to participate in the election directed in that case.

Having found that, in addition to the residual unit petitioned for by the NFFE in Case No. 32-4008(RO), the employees petitioned for by the AFGE in Case No. 32-3985(RO) and the employees represented exclusively by the AFGE in two existing units - the Wage Grade employees in the Plant Services Branch, Supporting Services Division, and the General Schedule employees in the Quality Control Section, Aviation Facilities Division, may, if they so desire, also constitute separate appropriate units, I shall not make any final determination at this time, but shall first ascertain the desires of the employees by directing elections in the following groups:

Voting Group (a): All General Schedule and Wage Grade employees in the Graphic Arts Branch, Printing and Distribution Section, Supporting Services Division, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, excluding management officials, professional employees, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All Wage Grade employees employed in the Plant Services Branch, Supporting Services Division, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, excluding management officials, professional employees, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (c): All General Schedule employees employed in the Quality Control Section, Aviation Facilities Division, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, excluding management officials, professional employees, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

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Voting group (d): All employees of the Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, excluding General Schedule Uniformed Police located in the Air Transportation Security Staff, General Schedule Firefighters, Operations Staff, Aviation Facilities Division, employees of the National Aviation Facilities Experimental Center in units for which NFFE Local 1340 is the current exclusive representative, management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The employees in voting groups (a), (b), and (c) shall vote whether they desire to be represented by the AFGE, the NFFE, or neither. If a majority of employees in any or all of these voting groups selects the AFGE, the labor organization seeking to represent them in separate units, they will be taken to have indicated their desire to be represented separately in such units and the appropriate Area Director is instructed to issue a certification of representative to the labor organization seeking to represent them separately. However, if a majority of employees in any or all of the voting groups does not vote for the AFGE, the labor organization seeking to represent them in separate units, the ballots of the employees in these voting groups will be pooled with those of the employees in voting group (d). 10/

The employees in voting group (d) shall vote whether they desire to be represented by the NFFE, the AFGE, or neither. 11/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 32-3986(RO) be, and it hereby is, dismissed.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees

10/ I find that, under the circumstances described above, any unit resulting from pooling of ballots constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

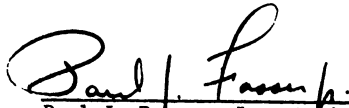
11/ The record reveals that the AFGE intervened properly in Case No. 32-4008(RO). Accordingly, all votes cast in voting group (d), including those pooled from voting group (a), (b), and/or (c), are to be accorded their face value.

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who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote in voting groups (a), (b), (c), and (d) shall vote whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees; AFL-CIO, Local Union 2335; the National Federation of Federal Employees, Local Union 1340; or neither.

Washington, D.C.
January 26, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

January 26, 1976

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

DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FAIRBANKS AGENCY OFFICE,
FAIRBANKS, ALASKA
A/SLMR No. 607

This case involves a representation petition filed by the American Federation of Government Employees, Local 2330, AFL-CIO (AFGE) seeking a unit of the Activity's professional and nonprofessional employees employed in the Fairbanks Agency Office of the Bureau of Indian Affairs located in Fairbanks, Alaska. The Activity is under the jurisdiction of the Juneau Area which is responsible for the affairs of the Alaska Natives within its area of jurisdiction. The Activity contended that the claimed unit was inappropriate without the inclusion of the employees employed in the five day schools located within the Activity's jurisdiction.

The Assistant Secretary found the unit sought appropriate for the purpose of exclusive recognition. He noted, in this regard, that the employees petitioned for are all located physically at the headquarters in Fairbanks, that they administer a variety of programs of the Bureau of Indian Affairs under the direction of a Superintendent also stationed at headquarters, and that they have frequent work contacts. He found also that such employees share a clear and identifiable community of interest separate and distinct from the Activity's other employees employed at the five day schools. In this regard, he noted that the five day schools are located in villages in remote areas accessible only by air or water and are from one to four hours airflight time from Fairbanks; that communications with the schools by the Activity headquarters is minimal; that the work schedules of each are different; that the schools' personnel, unlike that of the headquarters' personnel, are concerned only with teaching Native People; that the teachers in the schools are hired by a different means than other employees; that there have been little or no transfers between headquarters' personnel and the teachers; and that there is no interchange between these employee groups. He also found that the claimed unit would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

The record indicates that the overall mission of the Bureau of Indian Affairs, hereinafter called BIA, is to provide services to individuals who are classified as Indians and who in Alaska are referred to as the "Native People." The BIA is composed of some 11 areas, one of which, the Juneau Area, headquartered in Juneau, has jurisdiction over the State of Alaska. Within the Juneau Area are 4 Agencies; the Activity herein, the Fairbanks Agency Office, and the Anchorage, Bethel, and Nome Agency Offices headquartered in those respective cities.

The Juneau Area Director is responsible for the operation of the entire Juneau Area and is assisted by three Assistant Area Directors for administration, programs, and education. The record reveals that area-wide policies and procedures are developed at the Juneau Area level in accordance with guidelines and directives received from BIA headquarters in Washington, D.C., and are forwarded by the Juneau Area Director to the field. 2/

The record indicates that the 4 Agency Offices within the Juneau Area are similar, and that their minor differences are based on the needs and the geography peculiar to the State of Alaska. Each Agency has a superintendent as its head who is located at its headquarters and there is no interchange of employees between Agency Offices other than by transfer as a result of promotion. Reduction-in-force areas are separate within each Agency and there are no "bumping" rights between the Agencies.

The Activity is under the direction of a Superintendent who, in turn, reports to the Area Director in Juneau. The Superintendent is responsible for the day-to-day operations of the Activity which is composed of nine divisions: Administration, Credit, Employment, Housing, Plant Management, Tribal Operations, Realty, Social Services and Education. These divisions provide services relating to, among other things, personal property, supplies, procurement, loans and credit, vocational training and job placement, housing, maintenance, usage of the lands of the Native People, social services, and education to the approximately 44 villages within the jurisdiction of the Fairbanks Agency Office. There are approximately 44 positions at the Activity headquarters, all located in Fairbanks, and approximately 25 positions in the five day schools which are located within the Activity's jurisdiction.

The record reveals that the five day schools of the Activity, located in the villages of Tetlin, Beaver, Shyluk, Grayling, and Venetie, are under the jurisdiction of its Division of Education. The five villages are in remote areas, termed "the bush," and are accessible

2/ The record reveals that while informal grievances are handled at the Agency Office level, formal grievances and employee appeal rights begin at the Juneau Area level and that all Juneau Area employee personnel folders are kept in the Juneau Area office.

A/SLMR No. 607

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FAIRBANKS AGENCY OFFICE,
FAIRBANKS, ALASKA

Activity

and

Case No. 71-3456

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2330, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 2330, AFL-CIO, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees employed by the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office in Fairbanks, Alaska. The Activity contends that the proposed unit is inappropriate because it fails to include employees employed in the five day schools geographically located in villages outside Fairbanks, Alaska, which schools are assigned administratively to the Fairbanks Agency Office. On the other hand, the AFGE asserts that the unit petitioned for is appropriate because the employees involved share a similarity of skills, occupations, and working conditions, and constitute a distinct functional group separate and apart from any other employees. 1/

1/ The AFGE indicated that it desired to participate in an election only in the petitioned for unit.

only by air or water. In this regard, the record reveals that the five day schools are from one to four hours airflight time from Fairbanks. The schools are staffed with a principal-teacher (who is responsible for the school's operation), a teacher, a teacher-aide, a maintenance employee, and a cook, with the latter two positions usually being filled by residents of the particular area where the schools are located.

The record reflects that communication with the schools by Activity headquarters is minimal, and that visits by officials from headquarters to the day schools are infrequent. ^{3/} Moreover, the record indicates that the schools are on a 9:00 AM to 3:00 PM schedule while the headquarters' employees are on a 9:00 AM to 5:00 PM schedule, and that the schools operate nine and a half months of the year while the headquarters' employees are on a full twelve month schedule. Although the Activity's Education Specialists, who are employed in the Division of Education at headquarters, and the teachers, who are employed in the schools, have similar educational qualifications, i.e., a Bachelor degree in education, and a teacher can progress up to the position of an Education Specialist, and an Education Specialist may perform as a teacher if he or she has the required training, the record reflects, in fact, that there are no teachers employed at headquarters, nor have any Education Specialists transferred to the "bush." With regard to hiring policy, the record indicates that Education Specialists are hired in accordance with the usual Activity procedures, whereas the teachers are hired by the BIA's centralized recruiting system for teachers located at Albuquerque, New Mexico. Moreover, the Juneau Area policy is to attempt to rotate the teachers every two or three years. Normally, the movement is from small to large schools and such rotation by teachers is not limited to schools within the various Agency Offices in which the teachers are currently employed, but is throughout the Juneau Area.

Under all of these circumstances, I find the petitioned for unit to be appropriate for the purpose of exclusive recognition under the Order. Thus, it was noted that the employees of the headquarters of the Fairbanks Agency Office are all located physically in Fairbanks, as is the Superintendent of the Fairbanks Agency Office; that these employees administer a variety of programs of the BIA under the direction of the Superintendent of the Fairbanks Agency Office; and that they have frequent work contacts. Accordingly, I find the employees of the Fairbanks Agency Office at Fairbanks share a clear and identifiable community of interest. Moreover, I find that such a community of interest is separate and distinct from the other employees of the Fairbanks Agency Office employed at the five day schools under its jurisdiction. In this regard, it was noted that, although the school employees at the five schools contribute to the accomplishment of the Activity's overall mission, their community of interest with the claimed

^{3/} An objective of Activity headquarters is to visit the schools once every two months if possible.

employees located at Fairbanks is limited essentially to this extent. Thus, as noted above, the headquarters' personnel are concerned principally with the administration of a variety of programs, while the personnel at the schools are concerned with teaching Native People, and, unlike the headquarters' personnel, work only some nine and one-half months each year. Further, the headquarters' personnel are all located in Fairbanks, while the schools are isolated from the headquarters, and from each other, and, in fact, are from one to four hours away from Fairbanks by airplane. The record reflects also that there is limited and infrequent contact between the two employee groups; that the teachers are hired by a different means than other employees; that there have been little or no transfers between headquarters' personnel and the teachers; and that there is no interchange between these employee groups. Moreover, in my view, such a unit, limited to employees located in the geographic area of Fairbanks, who are involved in administering all the programs of the BIA, and which does not include a number of physically isolated schools with whom contact and interchange by the headquarters is minimal and irregular, would promote effective dealings and efficiency of agency operations.

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals, unless the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All professional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting group (b): All nonprofessional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding professional employees, management officials, employees engaged in Federal personnel work in other than

a purely clerical capacity, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the American Federation of Government Employees, Local 2330, AFL-CIO. The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 2330, AFL-CIO. In the event that a majority of the valid ballots of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Director indicating whether or not the American Federation of Government Employees, Local 2330, AFL-CIO, was selected by the professional employees.

The unit determination in the subject case is based in part, then, upon results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding nonprofessional employees,

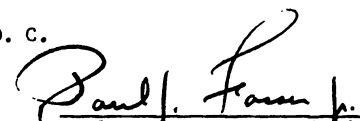
management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(b) All nonprofessional employees of the Department of Interior, Bureau of Indian Affairs, Fairbanks Agency Office, located in Fairbanks, Alaska, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit, or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they wish to be represented by the American Federation of Government Employees, Local 2330, AFL-CIO.

Dated, Washington, D. C.
January 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

January 26, 1976

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

NAVAL AIR REWORK FACILITY,
PENSACOLA, FLORIDA
A/SLMR No. 608

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1960 (AFGE), alleging that the Naval Air Rework Facility, Pensacola, Florida (Activity), and the Secretary of the Navy, Department of the Navy, Washington, D.C. (Agency) violated Section 19(a)(1) and (6) of the Order based on the Agency's directing the Activity to terminate environmental differential pay for two classes of the latter's employees, which differential pay had been awarded in two separate arbitration cases (Schedler-Lynch awards) processed under the negotiated agreement between the Complainant and the Activity, and on the latter's terminating of such pay.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Agency violated Section 19(a)(1) of the Order by directing the Activity to terminate differential pay paid pursuant to the Schedler-Lynch arbitration awards. He found also that the Activity violated Section 19(a)(1) and (6) of the Order by unilaterally terminating such payments. The Assistant Secretary viewed the Agency's action as, in effect, constituting an effort to circumscribe valid arbitration awards which it had failed to appeal properly through the means provided by the Executive Order, i.e. by filing exceptions to the awards with the Federal Labor Relations Council pursuant to Section 4(c)(3) of the Executive Order. The Assistant Secretary found further that, under the particular circumstances of the case herein, the Civil Service Commission's (CSC) response to the Agency's letter questioning the propriety of the differential payments made by the Activity pursuant to the two arbitration awards, did not constitute a regulation of an appropriate authority within the meaning of Section 12(a) of the Order and that, therefore, the CSC's letter to the Agency could not serve as a basis to overturn the Schedler-Lynch awards, which were based on specific facts and circumstances arbitrated pursuant to the provision of the parties' negotiated agreement.

In this regard, the Assistant Secretary agreed with the Administrative Law Judge's conclusions that even though the Agency's request to the CSC referred to the fact that certain unspecified arbitration awards had been rendered, it constituted merely a request for clarifying information regarding the CSC's interpretation of the Federal Personnel Manual's (FPM) provisions concerning environmental differentials, and that the CSC's response did not, and was not intended to, reflect a CSC policy interpretation that any particular arbitration award, based on the

pertinent facts developed during a specific arbitration proceeding, was invalid under the pertinent provisions of the FPM. In this connection, he noted that the evidence established that the Agency's request to the CSC asked for general guidance from the Bureau of Policies and Standards of the CSC with respect to the handling of the environmental differential pay situation in the various activities within its jurisdiction, and set forth the reasons why the Agency believed oxygen was not an explosive or incendiary material, and its position with respect to when it deemed environmental payments pursuant to the poisons (toxic chemicals) category of the FPM would be proper. The Assistant Secretary also noted that the response of the CSC to the Agency's letter was not intended as a directive to the Agency or the Activity to discontinue complying with any specific arbitration award. Thus, in a subsequent letter to the AFGE's staff council, the CSC was explicit in disavowing any intention to rule upon the propriety of arbitration awards which were not appealed, or to act in any manner as an appellate body. As this latter correspondence indicated, the CSC's reply to the Agency's letter was merely a general reply in clarification of a particular section in the FPM.

Accordingly, the Assistant Secretary ordered that the Activity and Agency herein cease and desist from the conduct found violative of the Order and that they take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AIR REWORK FACILITY
PENSACOLA, FLORIDA

Respondent

and

Case No. 42-2529(CA)

SECRETARY OF THE NAVY,
DEPARTMENT OF THE NAVY,
WASHINGTON, D.C.

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
AFL-CIO, LOCAL 1960

Complainant

DECISION AND ORDER

On April 17, 1975, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent Naval Air Rework Facility, Pensacola, Florida, hereinafter called Activity, and the Respondent, Secretary of the Navy, Department of the Navy, Washington, D.C., hereinafter called Agency, had engaged in certain unfair labor practices and recommending that they take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Activity and Agency filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

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

the entire record in this case, including the exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, to the extent consistent herewith.

The complaint herein alleged that the Agency and the Activity violated Section 19(a)(1) and (6) 1/ of the Order based on the Agency's directing the Activity to terminate environmental differential pay for two classes of the latter's employees, which pay had been awarded in two separate arbitration proceedings (the Schedler-Lynch awards) processed under the negotiated agreement between the Complainant and the Activity, and on the latter's terminating of such pay.

The Administrative Law Judge concluded that the Agency violated Section 19(a)(1) of the Order by directing the Activity to terminate the environmental differential pay awarded under the Schedler-Lynch arbitration decisions, as such actions, in his view, "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 that such directive, in effect, interfered with the exclusive bargaining relationship between the Activity and the exclusive representative. He concluded, further, that the Activity violated Section 19(a)(6) of the Order by unilaterally terminating the environmental differential pay awards made to its employees pursuant to the Schedler-Lynch arbitration awards as such action constituted a change in established conditions of employment settled by arbitration. Moreover, he found that this unilateral action on the part of the Activity also violated Section 19(a)(1) of the Order.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations and I shall repeat them only to the extent necessary.

The record reflects that since Executive Order 11491 has been in effect, the Activity and the Complainant, American Federation of Government Employees, AFL-CIO, Local 1960, hereinafter also referred to as AFGE, have been parties to two negotiated agreements which have contained certain provisions authorizing additional pay for employees engaged in hazardous or "dirty" work at the Activity's facility. Such payments are authorized by statute and by the implementing regulations of the Civil Service Commission (CSC) which are found in the Federal Personnel Manual Supplement S32-1 (FPM). The relevant directives appear in Sub-chapter 8-7 of that Supplement and in Appendix J to the Supplement, which are incorporated by reference in the current negotiated agreement. The regulations indicate that the situations listed in Appendix J, which

1/ As noted by the Administrative Law Judge, the Section 19(a)(6) complaint against the Agency had been dismissed previously by the Assistant Regional Director and such dismissal was sustained on review by the Assistant Secretary.

contains a schedule of specific differential rates and categories for employees working under adverse conditions, are illustrative only and that the parties may negotiate additional coverage for local situations or negotiate additional categories not included in Appendix J.

On or about October 4 and October 25, 1972, respectively, two arbitrators directed the Activity to pay environmental differential pay to two categories of its employees. The awards were based on the arbitrators' interpretations of the CSC standards as applied to certain employees, i.e. those working in the Oxygen Shop were considered as working with incendiary materials, and certain Aircraft Surface Treatment Workers were concluded to be working in close proximity to poisons (toxic chemicals). The Activity did not file exceptions to the Schedler-Lynch awards with the Federal Labor Relations Council and, in fact, after accepting both awards by letter dated November 2, 1972, the differentials were paid to the particular employees for over a year. However, during the Spring of 1973, while reviewing the Department of the Navy's adherence to, and proper administration of, applicable pay laws, the Compensation Branch of the Agency's Office of Civilian Manpower Management (OCMM) questioned the propriety of these differential payments made by the Activity pursuant to the two arbitration awards. Because it felt that the payments were improper under applicable laws and the FPM, the OCMM, by letter dated May 22, 1973, forwarded its views to the Chief of the Pay Policy Division, Bureau of Policies and Standards of the CSC. In its letter the OCMM expressed concern about different interpretations regarding the two areas of environmental differential pay involved; noted (without specifying) that there were arbitration awards with respect to these matters; and set forth its views why the employees should not be considered as eligible for differential pay under the various categories of Appendix J. On August 20, 1973, the Chief of the Pay Policy Division, CSC, advised OCMM that the latter's interpretation of the FPM Supplement and of Appendix J with respect to the propriety of such differential pay was "fully in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials."

Thereafter, the OCMM Director, by letter dated October 26, 1973, notified the Activity that it could no longer condone the payment of these differentials for employees of the Activity and directed the discontinuance of the differential payments as soon as possible. Although the Activity's Commander disagreed with this conclusion, he was informed that he had no leeway in this matter and, thereafter, by letter dated November 6, 1973, he provided the AFGE with a copy of the OCMM's correspondence, requested that it study and evaluate the impact of the action on unit employees, and invited it to meet and confer on the matter prior to the Activity's taking any action thereon. On or about November 21, 1973, having received no response from the AFGE, the Commanding Officer of the Activity wrote the AFGE's local president, citing its failure

to forward the matter to the AFGE's National Office, and informing the AFGE of the Activity's intent to comply with the instructions of the OCMM by terminating the environmental differentials in question on December 8, 1973. The AFGE did not respond to this letter and made no request or demand to meet and confer concerning this action. Thereafter, on December 8, 1973, the payment of environmental differentials, pursuant to the October 1972 arbitration awards, was terminated.

The Respondents contend, among other things, that the OCMM's directive of October 26, 1973, was an interpretation of a regulation or policy uniformly applicable to all agency facilities. In this regard, it is asserted that this was an interpretation not of the Agency, but of the CSC, an "appropriate authority" and was, therefore, binding on the Agency. Thus, the Agency contends that the OCMM letter of October 26, 1973, was, in effect, a statement regarding the meaning of the intent of the FPM which governed the actions of the parties, and that this interpretation was concurred in by the CSC, an "appropriate authority." Therefore, under Section 12(a) of the Order, 2/ the terms of which were incorporated in the parties' negotiated agreement, the Agency had the "duty" to direct cessation of the environmental pay differential authorized by the arbitration awards. Moreover, the Respondents contend the Complainant was afforded an opportunity to meet and confer over the implementation of the directive, which opportunity the Complainant did not avail itself of. The AFGE contends, on the other hand, that this case presents the question whether agency management can change the terms and conditions of employment of unit employees without first negotiating with their exclusive representative when the matter involved is clearly negotiable. In this regard, the AFGE argues that the Activity failed to live up to its bargaining obligations under the Order by presenting it with a fait accompli concerning the environmental differentials, and that the Agency further violated the Order by directing the Activity to cancel the environmental differentials in derogation of the Complainant's representative status and the prior arbitration awards.

I concur in the Administrative Law Judge's conclusion that the Respondent Agency violated Section 19(a)(1) of the Order by directing the Respondent Activity to terminate differential pay paid pursuant to the Schedler-Lynch arbitration awards. I find further that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by unilaterally terminating such payments. In my view, the Agency's action herein, in effect, constituted an effort to circumscribe valid arbitration awards which it had failed to appeal properly through the means provided under

2/ Section 12(a) of the Order reads, 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....

the Executive Order, i.e. - by filing exceptions to the awards with the Federal Labor Relations Council pursuant to Section 4(c)(3) of the Order. Further, under the particular circumstances herein, I find that the CSC's response to the Agency's letter of May 22, 1973, did not constitute a regulation of an appropriate authority within the meaning of Section 12(a) of the Order and that, therefore, the CSC's letter to the Agency could not serve as a basis to overturn the Schedler-Lynch awards, which were based on specific facts and circumstances arbitrated pursuant to the provisions of the parties' negotiated agreement. ^{3/} In this regard, I agree with the Administrative Law Judge's conclusion that, even though the Agency's request to the CSC of May 22, 1973, referred to the fact that certain unspecified arbitration awards had been rendered, it constituted merely a request for clarifying information regarding the CSC's interpretation of the FPM provisions concerning environmental differentials, and that the CSC response did not, and was not intended to, reflect a CSC policy interpretation that any particular arbitration award, based on the pertinent facts developed during a specific arbitration proceeding, was invalid under the pertinent provisions of the FPM. In this connection, the evidence establishes that the OCMM's letter of May 22, 1973, requested general guidance from the Bureau of Policies and Standards of the CSC with respect to the handling of the environmental differential pay situations in the various activities within its jurisdiction. Thus, the letter set forth the reasons why the Agency believed oxygen was not an explosive or incendiary material, and the letter further set forth the Agency's position with respect to when it deemed environmental payments pursuant to the poisons (toxic chemicals) category of the FPM would be proper.

Further, the record reflects that the response of the CSC to the OCMM's letter was not intended as a directive to the Respondents to discontinue complying with any specific arbitration awards. Thus, in a subsequent letter to the AFGE's staff counsel, dated August 19, 1974, the Chief of the Pay Policy Division of the Bureau of Policies and Standards, CSC, described the coverage of Appendix J; how the parties may determine coverage or add categories by negotiations; and how clarification and guidance could be sought from the CSC. With respect to the effect of its earlier letter to OCMM on the arbitration awards, the CSC stated:

^{3/} Clearly, the Agency could not issue a policy or regulation which could effectively serve to modify the terms of an existing negotiated agreement unless such policy or regulation was required by law, or by the regulation of an appropriate authority, or was authorized by the terms of a controlling agreement at a higher agency level. See Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390.

The Commission has consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases; rather, this authority has been delegated to the agencies. Whether or not an arbitrator had exceeded his authority in a specific case would be an appropriate matter for the Federal Labor Relations Council.

The reply we made to Mr. Riley's letter of May 22, 1973, in regard to this particular situation, was only to clarify the meaning and intent of the described categories in Appendix J of FPM Supplement 532-1 for which differentials have been authorized to be paid, and to confirm the propriety of the Department of the Navy's interpretation of the application of the regulations. As indicated above we would, of course, expect Navy to utilize the guidance in determining whether to authorize differential payments based on these circumstances in particular work situations. In this connection, we have made no determinations regarding a specific case nor do we contemplate doing so. (Emphasis added.)

Under all of these circumstances, I am not persuaded that the Agency's action of October 26, 1973, in directing the discontinuance of environmental payments made pursuant to the Schedler-Lynch awards, was merely an implementation of an interpretation of the FPM by the CSC, and, thereby, was privileged under Section 12(a) of the Order. In this regard, it was noted that there has been no determination that the Schedler-Lynch arbitration awards, based on the specific factual situations involved therein, were outside the scope of the parties' negotiated agreement or were violative of the Order. Thus, as noted above, the CSC is quite explicit in disavowing any intention by the CSC to rule upon the propriety of arbitration awards which were not appealed, or to act in any manner as an appellate body. As its correspondence indicates, the CSC's reply of May 22, 1973, was merely a general reply in clarification of a particular section in the FPM. Moreover, the evidence does not establish that the two arbitration awards involved herein were inconsistent with Section 12(a) of the Order. Rather, at most, the record reflects that the arbitrators may have arrived at different conclusions from the Respondents as to the applicability of the FPM to certain factual situations.

Any possible remedy for the Respondents' doubt could have been sought by filing exceptions to the awards with the Federal Labor Relations Council. In the absence of filing such exceptions, it is settled that a party which refuses to comply with an arbitration award issued under a grievance procedure contained in a negotiated agreement may be deemed to have committed an unfair labor practice. 4/ In the instant proceeding it is uncontested that exceptions to the Schedler-Lynch awards were not filed with the Council in a timely fashion and, as indicated above, the evidence does not establish that such awards were inconsistent with Section 12(a) of the Executive Order. 5/

Accordingly, I find, in agreement with the Administrative Law Judge, that the Activity's termination of the arbitration awards constituted a unilateral change in established terms and conditions of employment settled by arbitration 6/ and was, therefore, violative of Section 19(a)(1) and (6) of the Order. In this regard, I view the terms and conditions of employment established by a valid arbitration award to become an extension of the parties' negotiated agreement which may be modified only by the mutual agreement of the parties. 7/ In addition, I agree with the Administrative Law Judge that the Respondent Agency violated 19(a)(1) on the basis that it interfered with, restrained, or coerced employees in the exercise of rights assured by the Order by ordering its subordinate, the Activity, to terminate the environmental pay which employees were entitled to receive pursuant to valid arbitration awards which, as noted above, had become extensions of the negotiated agreement between the AFGE and the Activity.

4/ See Department of the Army, Aberdeen Proving Ground, A/SLMR No. 472, FLRC No. 74A-46. See also Department of the Army, Aberdeen Proving Ground, A/SLMR No. 518.

5/ The Council has found also that not only does the Assistant Secretary have the authority to enforce arbitration awards, but a respondent agency may not, as in this unfair labor practice proceeding, defend itself by questioning the legality of the award by means other than appeals to the Council. See FLRC No. 74A-46, noted above.

6/ See Decision of the Comptroller General of the United States, dated October 31, 1974, File: B-180010 in the matter of the National Labor Relations Board.

7/ See Department of Transportation, Federal Aviation Administration, A/SLMR No. 517, FLRC No. 75A-66. Inasmuch as the Respondent Activity, under the circumstances herein, could not unilaterally change the terms and conditions of employment established by the valid arbitration awards, it follows that the Respondent Activity could not absolve itself of its unfair labor practice by thereafter affording the Complainant an opportunity to meet and confer on the impact of this improper action. Accordingly, I find that the Complainant's failure to meet and confer after notification of the Activity's unilateral action would not require a contrary result.

REMEDY

Having found that the Respondent Activity has engaged in certain conduct prohibited in Section 19(a)(1) and(6) of Executive Order 11491, as amended, and that the Respondent Agency has engaged in certain conduct in violation of Section 19(a)(1) of the Order, I shall order that the Respondents cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

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

A. The Naval Air Rework Facility, Pensacola, Florida shall:

1. Cease and desist from:

(a) Failing to abide by arbitration awards issued under a negotiated procedure contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960, when it has failed to file exceptions with the Federal Labor Relations Council.

(b) Changing terms and conditions of employment resulting from arbitration awards rendered pursuant to the terms of a negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960, unless there is mutual agreement to change such terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of their rights assured by Executive Order 11491, as amended.

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

(a) Reimburse to each of the affected employees all monies deducted or withheld from them since December 8, 1973, by reason of the termination of environmental differential pay awarded pursuant to the Schedler-Lynch arbitration awards.

(b) In the future, either file timely exceptions with the Federal Labor Relations Council, or abide by arbitration awards issued under negotiated procedures contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

THE NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA, WILL, in the future, either file exceptions with the Federal Labor Relations Council, or abide by arbitration awards issued under a negotiated procedure contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960.

THE NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA, WILL reimburse to each of the affected employees entitled to environmental differential pay by reason of the Schedler-Lynch arbitration awards, all monies deducted or withheld from them since December 8, 1973, by reason of the termination of the awards.

THE NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA, WILL NOT fail to abide by arbitration awards issued under a negotiated procedure contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960, when it has failed to file exceptions with the Federal Labor Relations Council.

THE NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA, WILL NOT change the terms and conditions of employment resulting from arbitration awards rendered pursuant to the terms of a negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960, unless there is mutual agreement to change such terms and conditions of employment.

THE NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA, WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of their rights assured by Executive Order 11491, as amended.

(c) Post at its facility at the Naval Air Rework 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 Director, Office of Civilian Manpower Management, Department of the Navy, Washington, D.C., and by the Commanding Officer, Naval Air Rework Facility, Pensacola, Florida, and shall be posted and maintained by the latter for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees of the Naval Air Rework Facility, Pensacola, Florida, are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

B. The Director, Office of Civilian Manpower Management, Department of the Navy, Washington, D.C. shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, at the Naval Air Rework Facility, Pensacola, Florida, by directing the Naval Air Rework Facility, Pensacola, Florida, to discontinue payment of environmental differential pay made pursuant to any arbitration award rendered under the negotiated agreement between the Naval Air Rework Facility, Pensacola, Florida and the American Federation of Government Employees, AFL-CIO, Local 1960.

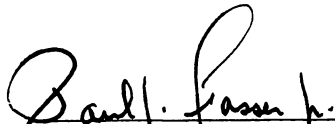
(b) In any like or related manner interfering with, restraining, or coercing employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of their rights assured by Executive Order 11491, as amended.

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

(a) Sign the notice marked "Appendix" described in paragraph A.2.(c) above.

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

Dated, Washington, D.C.
January 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

January 26, 1976

THE DIRECTOR, OFFICE OF CIVILIAN MANPOWER MANAGEMENT, DEPARTMENT OF THE NAVY, WASHINGTON, D.C., WILL NOT interfere with, restrain, or coerce employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, at the Naval Air Rework Facility, Pensacola, Florida, by directing the Naval Air Rework Facility, Pensacola, Florida, to discontinue payment of environmental differential pay made pursuant to any arbitration award rendered under the negotiated agreement between the Naval Air Rework Facility, Pensacola, Florida and the American Federation of Government Employees, AFL-CIO, Local 1960.

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

THE DIRECTOR, OFFICE OF CIVILIAN MANPOWER MANAGEMENT, DEPARTMENT OF THE NAVY, WASHINGTON, D.C., WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees represented by the American Federation of Government Employees, Local 1960, in the exercise of their rights assured by Executive Order 11491, as amended.

DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR), PHILADELPHIA
A/SLMR No. 609

Dated _____ By _____
Commanding Officer, Naval Air
Rework Facility, Pensacola, Florida

Dated _____ By _____
Director, Office of Civilian
Manpower Management, Department
of the Navy, Washington, D.C.

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 Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 300, 1365 Peachtree Street, N.E., Atlanta, Ga. 30309.

This case involved petitions for clarification of unit (CU) filed by the Defense Contract Administration Services Region (DCASR), Philadelphia, (Activity-Petitioner) seeking to clarify an existing exclusively recognized unit represented by American Federation of Government Employees, Local 1902, AFL-CIO, (AFGE Local 1902) to include all civilian employees of DCASR, Philadelphia, Region Headquarters duty stationed at 2800 South 20th Street, Philadelphia and the Defense Contract Administration Services District (DCASD), Philadelphia, except those employees duty stationed in New Jersey, and seeking to clarify an existing exclusively recognized unit represented by American Federation of Government Employees, Local 1801, AFL-CIO, (AFGE Local 1801) to include all civilian employees of Defense Contract Administration Services Office (DCASO), RCA, and those civilian employees of DCASD, Philadelphia duty stationed in New Jersey.

The matter arose as a result of a reorganization in which the Activity-Petitioner abolished the DCASD, Camden and, thereupon, physically and functionally transferred approximately 25 Contract Administration Division employees of the DCASD, Camden, who previously were represented by AFGE Local 1801, to the DCASD, Philadelphia, which contained employees represented by AFGE Local 1902. However, other DCASD, Camden employees remained duty stationed in New Jersey. On this basis, the Activity-Petitioner contended that as a result of the abolishment of the DCASD, Camden, the physically transferred employees had become intermingled with those of the Contract Administration Division, DCASD, Philadelphia and, therefore, accreted to the exclusive bargaining unit represented by AFGE Local 1902. Both AFGE Local 1902 and AFGE Local 1801 concurred with the position of the Activity-Petitioner.

The evidence established that the employees in question physically relocated to the DCASD, Philadelphia when the Contract Administration Division of the DCASD, Camden was merged with the Contract Administration Division of the DCASD, Philadelphia. Although the disputed employees continued to work on contracts predominately in Southern New Jersey, their position classification series and the type of work performed was essentially indistinguishable from those employees of the DCASD, Philadelphia, Contract Administration Division with whom

they had merged. Moreover, the transferred employees worked along-side, shared common supervision and were subject to the same personnel policies with the other DCASD, Philadelphia employees.

Under these circumstances, and noting particularly the physical and functional transfer of the DCASD, Camden, Contract Administration Division employees to the DCASD, Philadelphia and the fact that the parties were in agreement as to the proposed unit clarifications, the Assistant Secretary found that the Contract Administration employees, who previously formed the Contract Administration Division, DCASD, Camden, constituted an accretion to the exclusively recognized unit represented by AFGE Local 1902. Accordingly, he ordered the proposed clarifications.

A/SLMR No. 609

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

DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR), PHILADELPHIA

Activity-Petitioner

and

Case Nos. 20-5087(CU) and
20-5091(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1902, AFL-CIO

Labor Organization

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1801, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNITS

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

Upon the entire record in the subject cases, the Assistant Secretary finds:

In Case No. 20-5087(CU), the Activity-Petitioner seeks to clarify an existing exclusively recognized unit of employees of the Defense Contract Administration Services Region (DCASR), Philadelphia represented by the American Federation of Government Employees, Local 1902, AFL-CIO, herein called AFGE Local 1902, to include all civilian employees of DCASR, Philadelphia and the Defense Contract Administration Services District (DCASD), Philadelphia, excluding employees duty stationed in New Jersey, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by Executive Order 11491, as amended.

In Case No. 20-5091(CU), the Activity-Petitioner seeks to clarify an existing exclusively recognized unit of employees of the DCASD, Camden, including employees of a separate Defense Contract Administration Services Office (DCASO), RCA, located at the Hightstown, Morristown, and Camden facilities of the RCA Corporation represented by the American Federation of Government Employees, Local 1801, AFL-CIO, herein called AFGE Local 1801, to include all civilian employees of the DCASO, RCA, and those civilian employees of the DCASD, Philadelphia duty stationed in New Jersey, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by Executive Order 11491, as amended.

The record reveals that on August 17, 1966, AFGE Local 1801 was granted exclusive recognition for a unit of all civilian employees under the jurisdiction of the DCASD, Camden, including civilian employees of the DCASO, RCA, which office was located within the DCASD, Camden. Similarly, on September 12, 1967, AFGE Local 1902 was granted exclusive recognition for a unit of employees of DCASR, Philadelphia duty stationed at 2800 20th Street, Philadelphia, and employees in the Philadelphia Operations Divisions of the Directorates of Contract Administration, Quality Assurance and Production located at contractors' plants. 1/ Prior to January 1975, the DCASD, Camden and the DCASD, Philadelphia were two of five DCASDs within DCASR, Philadelphia 2/ which were responsible for providing, within their respective jurisdictions, contract administration services and support for the Department of Defense, as well as other Federal agencies. The DCASD, Camden geographically encompassed Southern New Jersey including the counties of Mercer, Burlington, Ocean, Camden, Gloucester, Atlanta, Salem, Cumberland and Cape May. The DCASD, Philadelphia encompassed a geographic area which included the City of Philadelphia, the counties of Bucks, Delaware, Montgomery and Chester in Pennsylvania, and the State of Delaware. Organizationally, both DCASDs were subdivided into Divisions of Contract Administration, Production, and Quality Assurance.

1/ The record discloses that within DCASR, Philadelphia an organizational component entitled Philadelphia DCASD (Test) was established during September 1971. After 20 months of successful operation the component was approved as a permanent organizational entity of DCASR, Philadelphia and was established as the DCASD, Philadelphia.

2/ The other DCASDs are headquartered in Baltimore, Reading and Pittsburgh.

-2-

In January 1975, the DCASD, Camden was abolished and its functions and responsibilities were absorbed by the DCASD, Philadelphia. As a result, the Contract Administration Division of the DCASD, Camden was merged with the Contract Administration Division of the DCASD, Philadelphia and approximately 25 employees of the Camden Division, who were members of the bargaining unit represented by AFGE Local 1801, were physically and functionally transferred to Philadelphia 3/. However, the employees of the Production and Quality Assurance Divisions of the DCASD, Camden and the DCASO, RCA, remained duty stationed in New Jersey and continued, as before, to work on contracts from that particular geographic area. The Activity-Petitioner contends that as a result of the abolishment of the DCASD, Camden, the physically transferred Contract Administration Division employees have become intermingled with those of the Contract Administration Division in the DCASD, Philadelphia and, therefore, have accreted to the bargaining unit represented by AFGE Local 1902. In this respect, it maintains that the bargaining unit definitions of AFGE Local 1902 and AFGE Local 1801 should be clarified to identify properly the employees in these units subsequent to the January 1975 abolishment of the DCASD, Camden. 4/ Both AFGE Local 1902 and AFGE Local 1801 are in agreement with the proposed unit clarifications sought herein by the Activity-Petitioner.

As noted above, the record indicates that the employees in question were physically relocated to the DCASD, Philadelphia when the Contract Administration Division of the DCASD, Camden was merged with the Contract Administration Division of the DCASD, Philadelphia. Although the disputed employees continued to work on contracts predominately from Southern New Jersey, 5/ their position classification series and the type of work performed is essentially indistinguishable from those employees of the DCASD, Philadelphia, Contract Administration Division with whom they have merged. Moreover, the transferred employees now work alongside and share common supervision with the DCASD, Philadelphia employees in the Division of Contract Administration and are subject to the same personnel policies, including promotion and reduction-in-force procedures.

3/ The Activity-Petitioner contends that the DCASD, Camden was abolished and the employees in question were transferred in order to promote efficient employee utilization as the workload fluctuated.

4/ It has been held previously that a petition for clarification of unit (CU) is a vehicle by which parties may seek to illuminate and clarify, consistent with their intent, the unit inclusions or exclusions after the basic question of representation has been resolved. See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160. In my view, and noting particularly the absence of any contention to the contrary, I find that no questions of representation have been raised by the CU petitions in the instant cases.

5/ In this regard, the Activity contends that a recent reorganization, which has been approved by the DCASR, Philadelphia Regional Commander, will require the disputed employees to work on contracts from all areas of the DCASD, Philadelphia.

-3-

January 27, 1976

With regard to the employees of the Production and Quality Assurance Division of the DCASD, Camden, as well as DCASO, RCA, the evidence establishes that they remain duty stationed in New Jersey, at basically the same locations, and continue, as before, to service contracts from that area under essentially the same immediate supervision. Hence, although they are now organizationally under the jurisdiction of the DCASD, Philadelphia, the mission, personnel policies, job classifications and immediate supervision of these employees have remained relatively unchanged.

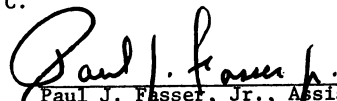
Based on the foregoing circumstances, and noting particularly the physical and functional transfer of the DCASD, Camden, Contract Administration Division employees to the DCASD, Philadelphia and the fact that the parties are in agreement as to the proposed unit clarifications, I find that the Contract Administration Division employees who previously formed the Contract Administration Division, DCASD, Camden constitute and accretion to the exclusively recognized unit represented by AFGE Local 1902. Accordingly, I find that AFGE Local 1902's existing exclusively recognized unit should be clarified to include all civilian employees of DCASD, Philadelphia, Region Headquarters duty stationed at 2800 South 20th Street, Philadelphia, and the DCASD, Philadelphia, except employees duty stationed in New Jersey. Further, I find, based on the foregoing, that AFGE Local 1801's existing exclusively recognized unit should be clarified to include all civilian employees of DCASO, RCA, and those civilian employees of DCASD, Philadelphia duty stationed in New Jersey.

ORDER

IT IS HEREBY ORDERED that the unit exclusively recognized in 1967, represented by the American Federation of Government Employees, Local 1902, AFL-CIO, be, and hereby is, clarified by including all civilian employees of DCASD, Philadelphia, Region Headquarters duty stationed 2800 South 20th Street, Philadelphia and the DCASD, Philadelphia, except employees duty stationed in New Jersey, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

IT IS FURTHER ORDERED that the unit, exclusively recognized in 1966, represented by American Federation of Government Employees, Local 1801, AFL-CIO, be, and hereby is, clarified by including all civilian employees of DCASO, RCA, and those civilian employees of DCASD, Philadelphia duty stationed in New Jersey, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

Dated, Washington, D. C.
January 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

DEFENSE CONTRACT AUDIT AGENCY,
CHICAGO REGION,
CHICAGO, ILLINOIS
A/SLMR No. 610

This case involved a petition for clarification of unit (CU) filed by the Defense Contract Audit Agency, Chicago Region, Chicago, Illinois (Activity-Petitioner), seeking to exclude employees in the job classification Auditor-in-Charge from the existing exclusively recognized unit based on its contention that such employees were supervisors within the meaning of Section 2(c) of the Order.

Although the Auditors-in-Charge are the senior employees assigned to the Sub-office located at their work site, which is physically removed from the Branch Office wherein resides the Supervisory Auditor to whom they are responsible, the Assistant Secretary concluded that the Auditors-in-Charge had not been vested with supervisory authority inasmuch as they did not hire, discharge, promote, or reassign employees, and such direction as they gave to other employees was routine in nature, within established guidelines and dictated by established procedures. Under these circumstances, the Assistant Secretary found that the Auditors-in-Charge were not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE CONTRACT AUDIT AGENCY,
CHICAGO REGION,
CHICAGO, ILLINOIS

Activity-Petitioner

and

Case No. 50-13039(CU)

LOCAL 3259,
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director Paul A. Barry's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(b) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts which incorporated the transcript and exhibits in Case No. 50-11111(RO), 1/ the Assistant Secretary finds:

In Case No. 50-11111(RO), the American Federation of Government Employees, AFL-CIO, (AFGE), filed a petition for a unit of all employees, including professionals, of the Chicago Branch Office, Defense Contract Audit Agency (DCAA). In Department of Defense, Defense Contract Audit Agency, Chicago Branch Office, A/SLMR No. 463, the Assistant Secretary found that the unit sought by the AFGE was inappropriate, noting

1/ The parties stipulated that the testimony adduced at the hearing in Case No. 50-11111(RO) should be considered in rendering a decision in the subject case.

particularly that the centralized planning function performed by the Regional Office had, among other things, resulted in the interchange and transfer of employees among the various field offices in the Region; the area of consideration for competitive promotions was broader than the claimed unit; and effective control and final responsibility for most personnel matters for employees in the Chicago Region resided within the Regional Office. Subsequently, AFGE Local 3259 was certified as the exclusive representative for a unit consisting of all the professional employees of the Chicago Region, DCAA.

In the instant proceeding, the Activity-Petitioner seeks to clarify the status of employees classified as Auditors-in-Charge, GS-12, who it contends are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the exclusively recognized unit.

The record reveals that there are two primary types of operating offices within the Activity. Resident Offices, headed by a GS-13 or GS-14 Supervisory Auditor, are located at major contractor plants and usually have a staff of from 7 to 15 auditors. Their main function is to perform audits at the plant at which the Resident Office is located. Larger offices, designated as Branch Offices, are headed by a GS-14 or GS-15 Supervisory Auditor and have geographical boundaries. The Branch Offices are divided into audit teams, each headed by a Supervisory Auditor, GS-13. These teams consist of a number of Mobile Auditors, GS-12, who, working out of the Branch Office, audit the work of smaller plants within the jurisdiction of the Branch Office, as required. Also, the Activity has Sub-offices which are located at somewhat larger plants requiring a full-time audit staff of from one to five auditors. The senior person assigned to each of these Sub-offices is classified as an Auditor-in-Charge, GS-12. It is the status of individuals in the latter classification which the Activity-Petitioner seeks to clarify in the subject case. There are sixteen such Sub-offices under the jurisdiction of six Branch Offices within the Activity.

All GS-12 Auditors working on a Branch Office audit team, whether they are on mobile assignments or are assigned as Auditors-in-Charge at a Sub-office, are covered by the same job description. The record reveals that the duties performed by the Auditors-in-Charge are within well-established guidelines, as the procedures to be utilized in conducting an audit are established by the DCAA manual and a majority of the work performed is on a demand basis. The evidence further establishes that Auditors-in-Charge do not have the independent authority to approve leave, approve overtime, hire, transfer, reassign or discharge, and that they do not initiate or approve

January 27, 1976

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

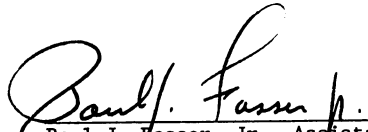
promotions. While the Auditors-in-Charge provide on-the-job training for the less experienced auditors assigned to their Sub-office, the record reveals that this amounts to conveying the lessons of their experience as distinguished from supervision. Moreover, although the Supervisory Auditors solicit comments from the Auditors-in-Charge concerning the performance of the auditors in the Sub-office, the evidence fails to establish that such input effectively leads to promotions or is effective for any other purpose.

Based on the foregoing, I find that the evidence is insufficient to establish that Auditors-in-Charge have been vested with supervisory authority. Particularly noted was the fact that they do not hire, discharge, promote, or reassign employees, or effectively recommend such actions. Further, the record reveals that such direction as they give to other employees is routine in nature, within established guidelines and dictated by established procedures. In these circumstances, I find that Auditors-in-Charge are not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which Local 3259, American Federation of Government Employees, AFL-CIO, was certified on May 9, 1975, be, and herein is, clarified by including in said unit employees in the position classified as Auditor-in-Charge.

Dated, Washington, D. C.
January 27, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

FEDERAL ENERGY ADMINISTRATION,
WASHINGTON, D. C.
A/SLMR No. 611

This case arose as a result of representation petitions filed by the National Treasury Employees Union (NTEU), the American Federation of Government Employees (AFGE), and the National Federation of Federal Employees (NFFE).

The NTEU sought a unit of all professional and nonprofessional employees of the Federal Energy Administration (FEA). The AFGE sought separate units of all professional and nonprofessional employees of the FEA Headquarters, FEA Region I, and FEA Region II, as well as separate units of all nonprofessional employees of the FEA Los Angeles and San Diego Area Offices. The NFFE sought a unit of all professional and nonprofessional employees of the FEA Region V.

The Assistant Secretary found that the agency-wide unit petitioned for by the NTEU was appropriate as the record established that the employees in the claimed unit had a clear and identifiable community of interest in that they share a common mission and common overall supervision, they are employed under uniform personnel policies and practices and they enjoy essentially similar job classifications and duties. The Assistant Secretary also noted that such a unit would promote effective dealings and efficiency of agency operations in that the level of recognition would occur at the same level where labor relations policies and personnel policies and practices are formulated. Under these circumstances, the Assistant Secretary ordered that an election be conducted in the claimed agency-wide unit.

The Assistant Secretary also found that the FEA Headquarters unit petitioned for by AFGE was appropriate. In this regard, he noted that the Headquarters' employees enjoy separate immediate supervision; are concerned primarily with the formulation of policy, as opposed to the implementation of policy; have little or no job related contact with FEA field employees; have limited interchange and transfer with FEA field employees; and enjoy common job functions, working conditions, and location. He also noted that labor relations policies and personnel policies and practices are formulated at the National Headquarters level. Under these circumstances, the Assistant Secretary directed a self-determination election to determine whether the employees of the FEA Headquarters desired to be represented in a separate headquarters unit or in an overall agency-wide unit of all FEA employees.

The Assistant Secretary further found that separate regionwide units as petitioned for by the AFGE and the NFFE were appropriate as the employees assigned to FEA, Regions I, II, and V separately shared a clear and identifiable community of interest separate and distinct from each other and from other FEA employees. He noted that the employees in each region enjoy common supervision and working conditions; they generally perform their work only within the geographic boundaries of their own region; there is limited work integration or interchange of personnel between regions, or between the regions and the National Headquarters, and each region had its own basic concentration and focus of program resulting from the particular circumstances existing within the geographical location of the region involved. Further, noting the position of the FEA with respect to the appropriateness of regionwide units, and the fact that the Regional Administrator, who is responsible for the accomplishment of the mission of the agency within his own region, has been delegated authority and responsibility within the region with respect to hiring, employee discipline, the transferring of employees, handling of grievances, as well as the authority to negotiate collective bargaining agreements, the Assistant Secretary found that such regionwide units would promote effective dealings and efficiency of agency operations. Under these circumstances, he directed self-determination elections to determine whether the employees of FEA, Regions I, II, and V desire to be represented in separate regional units or an overall agency-wide unit of all FEA employees.

The Assistant Secretary also found that separate units of non-professional employees of the FEA Los Angeles and San Diego Area Offices, as petitioned for by the AFGE Local 2202, were not appropriate for the purpose of exclusive recognition, as the employees in the claimed area office units do not enjoy an identifiable community of interest separate and distinct from each other, or from the other employees of FEA, Region IX. In this regard, it was noted that both area offices are organizational components of FEA, Region IX and are subject to the authority and responsibility of that Regional Administrator; the job descriptions and duties of employees in the claimed unit are essentially similar to those of other employees in the Region; and that all employees in the Region enjoy common personnel policies and practices established by the Regional Administrator and essentially similar working conditions. It was also determined that as the Area Managers are, in fact, first line supervisors who have been delegated minimal authority with regard to personnel matters, the claimed area office units would artificially fragment Region IX and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the petitions seeking area office units be dismissed and that elections, including self-determination elections, be held in the other claimed units.

A/SLMR No. 611

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL ENERGY ADMINISTRATION,
WASHINGTON, D. C.

Activity

and

Case No. 22-5590(RO)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor

FEDERAL ENERGY ADMINISTRATION,
WASHINGTON, D. C.

Activity

and

Case No. 22-5720(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

and

NATIONAL TREASURY EMPLOYEES UNION

Intervenor

FEDERAL ENERGY ADMINISTRATION,
REGION II, NEW YORK, NEW YORK 1/

Activity

1/ The name of this Activity appears as amended at the hearing.

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

and
NATIONAL TREASURY EMPLOYEES UNION

Intervenor

FEDERAL ENERGY ADMINISTRATION,
REGION I, BOSTON, MASSACHUSETTS 2/

Activity

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3551

Petitioner

and
NATIONAL TREASURY EMPLOYEES UNION

Intervenor

FEDERAL ENERGY ADMINISTRATION,
REGION IX, AREA OFFICE LOS ANGELES
AND HAWAII 3/

Activity

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2202

Petitioner

and
NATIONAL TREASURY EMPLOYEES UNION

Intervenor

2/ The name of this Activity appears as amended at the hearing.

3/ The name of this Activity appears as amended at the hearing.

Case No. 30-5650(RO)

FEDERAL ENERGY ADMINISTRATION,
REGION IX, AREA OFFICE SAN DIEGO
AND PHOENIX 4/

Activity

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2202

Petitioner

FEDERAL ENERGY ADMINISTRATION
REGION V, CHICAGO, ILLINOIS

Activity

and
NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1273

Petitioner

and
NATIONAL TREASURY EMPLOYEES UNION

Intervenor

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor

DECISION, ORDER AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order
11491, as amended, a consolidated hearing was held before Hearing

4/ The name of this Activity appears as amended at the hearing.

Officer Donald K. Clark. 5/ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 6/

Upon the entire record in these cases, including the briefs filed by the FEA, the NTEU, and the American Federation of Government Employees, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

1. The labor organizations involved claimed to represent certain employees of the FEA.

2. In Case No. 22-5590(RO), the NTEU seeks an election in a unit of all professional and nonprofessional employees of the FEA, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 22-5720(RO), the AFGE seeks an election in a unit of all professional and nonprofessional employees of FEA Headquarters, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 30-5650(RO), the AFGE seeks an election in a unit of all professional and nonprofessional employees of FEA Region II, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order. 7/

In Case No. 31-8575(RO), AFGE Local 3551 seeks an election in a unit of all professional and nonprofessional employees of FEA Region

5/ The Federal Energy Administration (FEA) contends that the record in the instant case is incomplete because it was given insufficient time to present its witnesses and evidence and argues, in this regard, that the record should be reopened. The evidence indicates, however, that the FEA was given more than sufficient time to prepare and present its case in this matter. Accordingly, and noting that the evidence developed in the instant cases during approximately 20 days of hearing affords a sufficient basis upon which to render a decision, the FEA's request to reopen the record is hereby denied.

6/ The FEA and the National Federation of Federal Employees, herein called NFFE, challenged the status of the National Treasury Employees Union, herein called NTEU, to represent the FEA's employees on the basis that the NTEU's constitution allows it to represent only Department of the Treasury employees. The Hearing Officer denied the challenge as untimely pursuant to Section 202.2(g) of the Assistant Secretary's Regulations. In agreement with the Hearing Officer, I find that the challenge raised by the FEA and the NFFE to the NTEU's status to represent the FEA's employees was untimely. Moreover, it was noted that the NTEU indicated that before it filed its petition herein, it had properly amended its constitution to provide that it could represent FEA employees.

7/ This unit appears as amended at the hearing.

- 4 -

I, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 72-4756(RO), AFGE Local 2202 seeks an election in a unit of all employees employed by the Los Angeles Area Office of the FEA, including those employees employed in Hawaii, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 72-4834(RO), AFGE Local 2202 seeks an election in a unit of all employees employed by the San Diego Area Office of the FEA, including those employees employed in Phoenix, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 50-11149(RO), NFFE Local 1273 seeks an election in a unit of all professional and nonprofessional employees employed by FEA Region V, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

The FEA contends that the nationwide unit, as petitioned for by the NTEU, is not appropriate for the purpose of exclusive recognition as such unit will not promote efficiency of agency operations. In the FEA's view, the Headquarters unit and the regionwide units, as petitioned for by the AFGE and the NFFE are appropriate, but it asserts that area office units as petitioned for herein by two AFGE locals are inappropriate.

The NTEU, on the other hand, contends that the claimed nationwide unit is "the" appropriate unit. In this regard, it asserts that an assessment of employee community of interest, effective dealings and efficiency of agency operations leads to the conclusion that only a nationwide unit would be appropriate in this situation. The AFGE contends, however, that there is more than one appropriate unit within the FEA. Thus, it alleges that the petitioned for Headquarters unit is an appropriate unit as such employees have separate supervision and a community of interest separate and distinct from all other FEA employees. The AFGE further contends that separate regionwide units are appropriate as the FEA is organized on a regional basis with labor relations authority delegated to the regional level. The AFGE also asserts that the proposed area office units it seeks are appropriate as they are distinct organizational entities within the FEA whose employees share a separate and distinct community of interest. In the AFGE's view, the nationwide unit petitioned for by the NTEU is not appropriate because there is no genuine community of interest among all FEA employees of all regions and the Headquarters; there could be no effective dealings because of differences of the programs within the

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various regions; there is a large geographical area involved; and a nationwide unit would not promote efficient labor-management relations. 8/

The FEA, established on June 27, 1974, was given the mission of monitoring the production and distribution of all sources of energy throughout the nation. It is composed of a National Headquarters located in Washington, D. C., and ten regional offices located in Boston, Massachusetts; New York City, New York; Philadelphia, Pennsylvania; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Kansas City, Missouri; Denver, Colorado; San Francisco, California; and Seattle, Washington. 9/ The record indicates that the FEA has further subdivided its regional offices into area offices. The FEA's National Headquarters is divided into eleven branches, namely: Communication and Public Affairs; Private Grievances and Redress; Congressional Affairs; Interdepartmental Regional and Special Progress; Policy Analysis; Management and Administration; General Counsel; International Energy Affairs; Conservation and Environment; Energy Resources Development; and Regulatory Development.

At the head of FEA is an Administrator and his Deputy Administrator. Each of the branches at Headquarters is headed by either a Branch Director or an Assistant Administrator who reports directly to the Administrator. Each of the ten regions is headed by a Regional Administrator who also reports directly to the Administrator in Washington, D. C.

The Personnel Office at Headquarters has overall responsibility for all personnel activities for the FEA and all the personnel actions come to it for final approval. The record reveals, however, with respect to hiring, firing and promotions, that although these personnel actions must be reviewed in Washington, D. C., to assure that the proper procedures have been followed, the recommendations of the Regional Administrators are generally followed. The record reveals also that the Personnel Office at Headquarters maintains personnel files and all personnel financial records for all FEA employees.

Responsibility for the conduct of labor relations for the FEA is with the Chief of Employees/Labor Relations. Despite the absence of a bargaining history within the FEA, the record discloses that all matters involving grievances and unfair labor practices have been handled by the Chief of Employees/Labor Relations or his staff. Although the record reveals that the Regional Administrators have been delegated the authority to negotiate collective bargaining agreements covering employees under their supervision, it appears that the exercise of such authority would be with the assistance of the Employees/Labor Relations Office.

8/ The NFFE contends that its petitioned for regionwide unit is appropriate for the reasons enumerated by the AFGE.

9/ There are approximately 3,000 employees employed by the FEA.

The FEA's Headquarters Office contains the majority of its personnel complement. Essentially, the Headquarters employees are responsible for the formulation of national policy, based on information supplied from the field and studies conducted by the Headquarters' staff, to assist in solving problems relating to the production and distribution of energy. The record indicates that the employees in the Headquarters Office have essentially the same job classifications as the employees in the regions with the only distinction being that the Headquarters' employees are involved in policy determinations while the regional employees are involved in actual operations. Further, employees assigned to the Headquarters generally do not travel to the regions, do not have any significant job related contact with regional personnel, and there has been minimal transfer and interchange with respect to Headquarters and regional personnel. 10/

Each regional office is staffed by from 64 to 299 employees and is organized into the following branches: Public Affairs; Appeals and Exceptions; Operations; Allocation and Quality Control; Conservation and Environmental Impact; Resources Development; and Data Collection and Analyses. In addition, each regional office has its own personnel office. The principal function of the regions is the implementation in the field of programs and policies developed by the FEA Headquarters. The Regional Administrator is responsible for the day-to-day operations of the region and, within certain policy guidelines, has wide discretion in the conduct of operations within the particular region involved. As a result, the record indicates that there is some disparity between the regions with respect to certain personnel policies and the implementation of operational policies. The record reveals that the Regional Administrator has the authority to open and close area offices, rent office space, and determine staffing needs and requirements within guidelines set by the Headquarters Office. In addition, the Regional Administrator has the authority to hire, 11/ fire, issue reprimands, institute adverse actions, authorize overtime, negotiate agreements with labor organizations, approve annual and sick leave, grant incentive and achievement awards, promote, resolve grievances, and initiate reductions-in-force subject to review by the Headquarters' Personnel Office. The area of consideration for promotion and reduction-in-force procedures normally is regionwide for most positions.

The record indicates that employees of the regional offices have basically similar job classifications, duties and skills, although individual regions may have certain unique characteristics dependent upon special circumstances within that region. A majority of the field employees are either auditors or investigators who are assigned to a specific duty station within the region, such as a refinery, or

10/ An exception in this latter regard occurs with respect to the employees assigned to the Crude Oil Producers Program who perform their duties in field locations, but who are assigned to, and supervised by, the Headquarters Office.

11/ The Regional Administrator can hire up to grade GS-13, which encompasses all positions that are posted on a Regionwide basis.

work out of the regional or area office. Working conditions, benefits and promotion opportunities are similar within the regions and each region has its own training program based on local requirements. The record reveals that there is limited work integration and employee interchange between the regions in situations where an investigation may cross regional lines and employees in one region may visit another region in order to complete the investigation involved. Moreover, there have been instances where one region has requested the employee of another region, who is an expert in a certain field, to establish a training program for its employees.

The record indicates that within certain regions there are area offices which are established in locations which contain a concentration of energy operations which require monitoring by large numbers of FEA employees. The record reveals that area offices range in size from 6 to 35 employees and are supervised by an Area Manager. While the Area Manager is responsible for the day-to-day operations of the office, he ultimately is responsible to his Regional Administrator. The Area Manager obtains his assignments from his regional office and reports to the regional office. It appears from the record that the Area Manager has no delegated authority with respect to personnel policies, except for granting leave, as these policies are established and implemented at the regional level. As in the regional offices, the great majority of the area office employees are auditors and investigators who are assigned cases by the Area Manager in the area serviced by the area office involved. The area office employees have essentially the same job classifications, skills, duties, working conditions, benefits, and promotional opportunities as the regional office employees.

Based on all the foregoing circumstances, I find that the agency-wide unit petitioned for by the NTEU in Case No. 22-5590(RO), encompassing all professional and nonprofessional employees of the FEA, is appropriate for the purpose of exclusive recognition under the Order. Thus, the evidence establishes that the employees in the claimed unit have a clear and identifiable community of interest in that they share a common mission and common overall supervision, they are employed under uniform personnel policies and practices, and they enjoy essentially similar job classifications and duties. Moreover, noting that the level of recognition would occur at the same level where labor relations policies and personnel policies and practices are formulated, I find that such an agency-wide unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall order that an election be conducted in such unit.

Further, I find that a separate unit of all professional and non-professional FEA employees assigned to the National Headquarters, Washington, D. C., as petitioned for by the AFGE in Case No. 22-5720(RO), is also appropriate for the purpose of exclusive recognition under the Order. Thus, the record reveals that employees assigned to the

National Headquarters enjoy separate immediate supervision; are concerned primarily with the formulation of policy, as opposed to the implementation of policy; have little or no job-related contact with FEA field employees; have limited interchange and transfer with FEA field employees; and have commonality in job functions, working conditions, and location. Under these circumstances, I find that employees assigned to the FEA National Headquarters share a clear and identifiable community of interest separate and distinct from all other employees of the FEA. Moreover, noting the position of the FEA with respect to the appropriateness of a Headquarters unit and the fact that labor relations policies and personnel policies and practices are formulated at the National Headquarters level, I find that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct a self-determination election to determine whether the FEA's Headquarters' employees desire to be represented in a separate Headquarters unit or in an overall agency-wide unit of all FEA employees.

Further, I find that separate units of all professional and nonprofessional employees of an FEA region, as petitioned for in Case Nos. 30-5650(RO), 31-8575(RO), and 50-11149(RO), are appropriate for the purpose of exclusive recognition. Thus, the record reflects that the FEA employees in each region enjoy common supervision and working conditions; they generally perform their work only within the geographical boundaries of their own region; there is limited work integration or interchange of personnel between regions, or between the regions and the National Headquarters; and each region has its own basic concentration and focus of program resulting from the particular circumstances existing within the geographic location of the region involved. Accordingly, I find that professional and nonprofessional employees assigned to FEA Regions I, II and V separately share a clear and identifiable community of interest separate and distinct from each other and from any other FEA employees. Moreover, noting the position of the FEA with respect to the appropriateness of region-wide units and the fact that the Regional Administrator, who is responsible for the accomplishment of the mission of the FEA within his own region, has been delegated authority and responsibility within his region with respect to hiring, employee discipline, the transferring of employees, the handling of grievances, as well as the authority to negotiate collective bargaining agreements, I find that such region-wide units will promote effective dealings and efficiency of agency operations. Accordingly, I shall order self-determination elections among the professional and nonprofessional employees in separate units of FEA Regions I, II and V, to determine whether the employees in such regions desire to be represented in separate regional units or in an overall agency-wide unit of all FEA employees.

Finally, under all of the circumstances herein, I find that separate units of nonprofessional employees of the FEA Los Angeles and San Diego Area Offices petitioned for by AFGE Local 2202 in Case

Nos. 72-4756(RO) and 72-4834(RO), respectively, are not appropriate for the purpose of exclusive recognition under the Order. In this regard, the record discloses that both Area Offices are organizational components of FEA Region IX and are subject to the authority and responsibility of that Regional Administrator, that the job descriptions and duties of the employees in the claimed units are essentially similar to those of other employees in the region, and that all employees in the region enjoy common personnel policies and practices established by the Regional Administrator and essentially similar working conditions. Under these circumstances, I find that the employees in the claimed area office units do not enjoy a clear and identifiable community of interest separate and distinct from each other, or from other employees of the FEA Region IX. Moreover, noting that the Area Managers are, in fact, first line supervisors who have been delegated minimal authority with regard to personnel matters, in my view, the claimed units would artificially fragment Region IX and could not reasonably be expected to promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the petitions in Case Nos. 72-4756(RO) and 72-4834(RO) be dismissed.

Based upon the above determinations, I find that the following employees may constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees of the Federal Energy Administration, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

All professional and nonprofessional employees of the Federal Energy Administration Headquarters, Washington, D. C., excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

All professional and nonprofessional employees of the Federal Energy Administration, Region II, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

All professional and nonprofessional employees of the Federal Energy Administration, Region I, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

All professional and nonprofessional employees of the Federal Energy Administration, Region V, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

As noted above, the units found appropriate include professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in any unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such unit. Accordingly, the desires of the professional employees as to inclusion in a unit with non-professional employees must be ascertained. However, in indicating their desires, the professional employees should be made aware that, dependent upon the outcome of the balloting, they may be included in bargaining units with nonprofessional employees in a headquarters-wide unit, a regionwide unit or a nationwide unit, or they may be included in separate professional units which are headquarters-wide, regionwide or nationwide in scope.

Having found that the petitioned for professional and nonprofessional employees in FEA Headquarters and FEA Regions I, II and V may constitute separate appropriate units, I shall not make any final determinations at this time, but shall first ascertain the desires of such employees by directing elections in the following voting groups:

Voting group (a): All professional employees of the Federal Energy Administration Headquarters, Washington, D. C., excluding non-professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (b): All professional employees of the Federal Energy Administration, Region II, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (c): All professional employees of the Federal Energy Administration, Region I, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (d): All professional employees of the Federal Energy Administration, Region V, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (e): All professional employees of the Federal Energy Administration, excluding all employees in voting groups (a), (b), (c), and (d), nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (f): All employees of the Federal Energy Administration Headquarters, Washington, D. C., excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (g): All employees of the Federal Energy Administration, Region II, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (h): All employees of the Federal Energy Administration, Region I, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (i): All employees of the Federal Energy Administration, Region V, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

Voting group (j): All employees of the Federal Energy Administration, excluding all employees in voting groups (f), (g), (h), and (i), professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

The employees in professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with nonprofessional employees for the purpose of exclusive recognition; and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the AFGE, the NTEU or neither. In the event that a majority of valid votes of voting group (a) are cast in favor of inclusion with the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (f). However, in this event, if a majority of votes cast in the combined voting group is not cast for the AFGE, the labor organization seeking to represent such unit separately, the ballots of the combined voting group shall be pooled as follows: The ballots of the professional employees will be pooled with those in voting group (e) and the ballots of the nonprofessional employees will be pooled with those in voting group (j).

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Unless a majority of the votes of voting group (a) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification of representative will be issued by the appropriate Area Director if the AFGE obtains a majority of the professional employee ballots cast. However, if a majority of employees in voting group (a) does not vote for the AFGE, the labor organization seeking representation in a separate unit, the ballots of the employees in voting group (a) will be pooled with those in professional voting group (e).

The employees in professional voting group (b) will be asked two questions on their ballots: (1) whether or not they wish to be included with nonprofessional employees for the purpose of exclusive recognition; and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the AFGE, the NTEU, or neither. In the event that a majority of valid votes of voting group (b) are cast in favor of inclusion with the nonprofessional employees, the ballots of voting group (b) shall be combined with those of voting group (g). However, in this event, if a majority of votes cast in the combined voting group is not cast for the AFGE, the labor organization seeking to represent such unit separately, the ballots of the combined voting group shall be pooled as follows: The ballots of the professional employees will be pooled with those in voting group (e) and the ballots of the nonprofessional employees will be pooled with those in voting group (j).

Unless a majority of the votes of voting group (b) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification of representative will be issued by the appropriate Area Director if the AFGE obtains a majority of the professional employee ballots cast. However, if a majority of employees in voting group (b) does not vote for the AFGE, the labor organization seeking representation in a separate unit, the ballots of the employees in voting group (b) will be pooled with those in professional voting group (e).

The employees in professional voting group (c) will be asked two questions on their ballots: (1) whether or not they wish to be included with nonprofessional employees for the purpose of exclusive recognition; and (2) whether or not they wish to be represented for the purpose of exclusive recognition by AFGE Local 3551, the NTEU, or neither. In the event that a majority of valid votes of voting group (c) are cast in favor of inclusion with the nonprofessional employees, the ballots of voting group (c) shall be combined with the ballots of voting group (h). However, in this event, if a majority of votes cast in the combined voting group is not cast for AFGE Local 3551, the labor organization seeking to represent such unit separately, the ballots of the combined voting group shall be pooled as follows: The ballots of the professional employees will be pooled with those in voting group (e) and the ballots of the nonprofessional employees will be pooled with those in voting group (j).

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Unless a majority of votes of voting group (c) are cast for inclusion in the same unit as the nonprofessional employees they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification of representative will be issued by the appropriate Area Director if AFGE Local 3551 obtains a majority of the professional employee ballots cast. However, if a majority of employees in voting group (c) does not vote for AFGE Local 3551, the labor organization seeking representation in a separate unit, the ballots of the employees in voting group (c) will be pooled with those in professional voting group (e).

The employees in professional voting group (d) will be asked two questions on their ballots: (1) whether or not they wish to be included with nonprofessional employees for the purpose of exclusive recognition; and (2) whether they wish to be represented for the purpose of exclusive recognition by NFFE Local 1273, the AFGE, the NTEU, or none. In the event that a majority of valid votes of voting group (d) are cast in favor of inclusion with the nonprofessional employees, the ballots of voting group (d) shall be combined with the ballots of voting group (i). However, in this event, if a majority of votes cast in the combined voting group is not cast for either of the labor organizations (NFFE Local 1273 or the AFGE) seeking to represent such unit separately, the ballots of the combined voting group shall be pooled as follows: The ballots of the professional employees will be pooled with those in voting group (e) and the ballots of the nonprofessional employees will be pooled with those in voting group (j).

Unless a majority of votes of voting group (d) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit and an appropriate certification of representative will be issued by the appropriate Area Director if NFFE Local 1273 or the AFGE obtains a majority of the professional employee ballots cast. However, if a majority of employees in voting group (d) does not vote for NFFE Local 1273 or the AFGE, the labor organizations seeking representation in a separate unit, the ballots of employees in voting group (d) will be pooled with those in professional voting group (e).

The employees in professional voting group (e) will be asked two questions on their ballots: (1) whether or not they wish to be included with nonprofessional employees for the purpose of exclusive recognition; and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the NTEU, the AFGE, or neither. In the event that a majority of valid votes of voting group (e) are cast in favor of inclusion with the nonprofessional employee unit in voting group (j), the ballots of voting group (e) shall be combined with the ballots of voting group (j).

Unless a majority of the votes of voting group (e) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit,

and an appropriate certification will be issued by the appropriate Area Director indicating whether the NTEU, the AFGE, or neither was selected by the employees in the professional unit. 12/

The employees in voting group (j) shall vote whether they desire to be represented by the NTEU, the AFGE, or neither. The employees in voting groups (f), (g), (h), and (i) shall vote whether they desire to be represented by the AFGE in voting groups (f) and (g), AFGE Local 3551 in voting group (h), NFFE Local 1273 in voting group (i), the NTEU, or none as appropriate. If a majority of employees in any or all of these voting groups selects the AFGE, or the NFFE Local 1273, the labor organizations seeking to represent them in separate units, they will be taken to have indicated their desire to be represented separately in such units and the Area Director supervising the election is instructed to issue a certification of representative to the labor organization seeking to represent them separately. However, if a majority of employees in any or all of these voting groups does not vote for the AFGE Local 3551, or the NFFE Local 1273, the labor organizations seeking to represent them in separate units, the ballots of the employees in these voting groups will be pooled with those of the employees in voting group (j). 13/

12/ If the ballots in voting groups (a), (b), (c), and/or (d) are pooled with the ballots of voting group (e), they are to be tallied in the following manner: The votes cast by the professional employees in the above groups with respect to whether or not they wish to be included with nonprofessionals shall be pooled with such votes cast by the employees in voting group (e). Although the AFGE was seeking separate units in voting groups (a), (b), (c), and (d), it was a qualified intervenor in the nationwide unit encompassed by voting group (e). Consequently, in the event of pooling, the votes cast for the AFGE in voting groups (a), (b), (c), and/or (d) shall be counted for the AFGE in the election in the nationwide unit. In voting group (d), in the event of pooling, the votes cast for the NFFE, one of the two labor organizations seeking a separate unit, shall be counted as part of the total number of valid votes cast, but neither for nor against the NTEU or the AFGE, the labor organizations seeking to represent the nationwide unit. All other votes are to be accorded their face values. I find that, under the circumstances, any unit resulting from a pooling of votes, as described above, constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

13/ If the ballots in voting groups (f), (g), (h), and/or (i) are pooled with the ballots of voting group (j), they are to be tallied in the following manner: Although the AFGE and AFGE Local 3551 were seeking separate units in voting groups (f), (g), (h), and (i), AFGE was a qualified intervenor in the nationwide unit encompassed by voting group (j). Consequently, in the event

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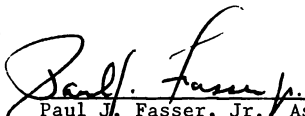
IT IS HEREBY ORDERED that the petitions in Case Nos. 72-4756(RO) and 72-4834(RO) be, and they hereby are, dismissed.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the elections subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation, or on furlough, including those in the military service who appear in person at the poll. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote in voting groups (a), (b), (c), (e), (f), (g), (h), and (j) shall vote whether they wish to be represented for the purpose of exclusive recognition by the National Treasury Employees Union; American Federation of Government Employees, AFL-CIO (AFGE Local 3551 in voting groups (e) and (h)) or neither. Those eligible to vote in voting groups (d) and (i) shall vote whether they wish to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1273; the American Federation of Government Employees, AFL-CIO; the National Treasury Employees Union; or by none.

Dated, Washington, D. C.
January 27, 1976


Paul J. Fasser, Jr. Assistant Secretary of
Labor for Labor-Management Relations

13/ of pooling, the votes cast for the AFGE or AFGE Local 3551 in voting groups (f), (g), (h), and/or (i) shall be counted for AFGE in the election in the nationwide unit. In voting group (i), in the event of pooling, the votes for the NFFE, the labor organization seeking a separate unit, shall be counted as part of the total number of valid votes cast, but neither for nor against the NTEU or the AFGE, the labor organizations seeking to represent the nationwide unit. All other votes are to be accorded their face values. I find that, under the circumstances, any unit resulting from a pooling of votes as described above, constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

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

U.S. DEPARTMENT OF TRANSPORTATION,
FEDERAL HIGHWAY ADMINISTRATION,
OFFICE OF FEDERAL HIGHWAY PROJECTS,
VANCOUVER, WASHINGTON
A/SLMR No. 612

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1348 (Complainant), against the U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington (Respondent), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order based on its failure to consult with the Complainant regarding the implementation and impact of a decision to transfer certain Federal Highway Administration, Portland Regional Office, Office of Federal Highway Projects (OFHP) employees to the Respondent's facility in Vancouver where the Complainant was the exclusively recognized representative.

The evidence revealed that on October 7, 1974, the OFHP, Portland, issued a management report recommending that 15 employees in the Portland Regional Office be transferred to the Respondent in Vancouver. Shortly thereafter, on October 16, 1974, OFHP, Portland, sent the report to the exclusive representative of the employees of OFHP, Portland, the National Federation of Federal Employees, Local 7 (NFFE Local 7), for the latter's comments. On October 22, 1974, the Regional Administrator for OFHP, Portland, decided to transfer the 15 employees herein to Vancouver, effective January 13, 1975, and the following day scheduled a morning meeting with NFFE Local 7 to announce the decision. Invited to the aforementioned meeting was Mr. John Mors, Director of the OFHP in Vancouver who, on October 23, 1974, scheduled an afternoon meeting in Vancouver with unit employees to announce the transfer. Attending this meeting was the Complainant's First Vice President Mr. Ed Lewis, who was invited to the meeting as an employee of OFHP, Vancouver. At no time subsequent to the announcement of October 23, 1974, did the Complainant request discussions with the Respondent regarding the impact and implementation of the transfer herein upon unit employees in Vancouver.

The Associate Chief Administrative Law Judge concluded that the decision to transfer the 15 employees herein was a management right protected by Section 11(b) and 12(b) of the Order and that any duty owed to NFFE Local 7 in Portland, regarding the decision to transfer 15 employees from Portland to Vancouver, was discharged when that union was involved in management's decision-making process. Also, he concluded that the Complainant had the right to be consulted about the impact of the transfer decision upon its own constituency in Vancouver. In this connection, the Associate Chief Administrative Law Judge noted that the Complainant had eleven weeks after the announcement to request bargaining on impact before the actual implementation of the transfer but he found no evidence that the Complainant had demanded bargaining over the impact of the transfer. Accordingly, he recommended that the complaint be dismissed.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Associate Chief Administrative Law Judge and, consequently, ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF TRANSPORTATION,
FEDERAL HIGHWAY ADMINISTRATION,
OFFICE OF FEDERAL HIGHWAY PROJECTS,
VANCOUVER, WASHINGTON

Respondent

and

Case No. 71-3242(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1348, VANCOUVER, WASHINGTON

Complainant

DECISION AND ORDER

On September 24, 1975, Associate Chief Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Associate Chief Administrative Law Judge's Report and Recommendation.

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

IT IS HEREBY ORDERED that the complaint in Case No. 71-3242(CA) be, and it hereby is, dismissed.

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



Dated, Washington, D. C.
February 2, 1976

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of :
OFFICE OF FEDERAL HIGHWAY PROJECTS, :
FEDERAL HIGHWAY ADMINISTRATION :
DEPARTMENT OF TRANSPORTATION, : CASE NO. 71-3242
VANCOUVER, WASHINGTON :
Respondent :
and :
LOCAL 1348, NATIONAL FEDERATION OF :
FEDERAL EMPLOYEES :
Complainant :
.....

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Federal Highway Administration
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For the Respondent

DAN E. BULFER
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and

WILLIAM M. McLOUGHLIN
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Vancouver, Washington 98664
For the Complainant

Before: JOHN H. FENTON
Associate Chief Judge

REPORT AND RECOMMENDATION

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, 29 C.F.R. Part 203. The Complaint here in issue was filed by Local 1348 of the National Federation of Federal Employees (referred to hereinafter as "Complainant") on December 24, 1974, charging the Office of Federal Highway Projects, Region 10, Federal Highway Administration (hereinafter referred to as "OFHP" or "Respondent") with interfering with the exercise by unit employees of protected rights and failing and refusing to consult and confer in good faith, thereby violating subsections (1) and (6) of Section 19(a) of the Executive Order.

A hearing on the Complaint was held on May 15, 1975, in Vancouver, Washington. The Respondent was represented by counsel and the Complainant by both its President and its Special Representative. Each party was afforded a full opportunity to call, examine and cross-examine witnesses and adduce relevant evidence. Post-hearing briefs were received from both parties and have been carefully considered.

On the basis of the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation to the Assistant Secretary.

Findings of Fact

In the spring of 1974, the Portland Regional Office of Federal Highway Projects initiated a management review of its accounting office, the Financial Management Branch. This review was designed to develop findings and recommendations for increasing the effectiveness and efficiency of the Region's financial operations. The review considered, among other things, the existing organization of the Portland Office, the alignment of functions within that office, and the possibility of reassigning individuals from the Portland Office to other FHPA Offices both within and without the Portland Region (Tr. 67). On October 7, 1974, a report of the findings of this management review was issued. The report recommended that a portion of the Portland Financial

Management Branch be transferred to the Vancouver Office and thereby work directly under Mr. John Mors, Director of OFHP in Vancouver (Res. Exh. 1).

After the report had been circulated within the Activity for review, it was mailed on October 16, 1974 to Mrs. Majorie Harris for her comments and suggestions. Mrs. Harris was at that time the representative of Local 7, NFFE, the union representing a unit of employees in Portland, including those who were to be transferred to Vancouver. When no revisions were suggested by Mrs. Harris, the report was transmitted in its original form to the OFHP Regional Administrator for his consideration. The Regional Administrator decided to adopt the recommendation that fifteen of the twenty-one employees of the Portland accounting unit be transferred to the Vancouver Office, effective January 13, 1975. At 10:00 a.m. on the following day, October 23, 1974, a meeting was convened in Portland to notify the Financial Management Branch employees of this decision (Tr. 73).

On the morning of October 23, 1974, after his return to Vancouver from a brief vacation, Mr. John Mors, Director, OFHP, was first advised of the transfer decision and was invited to attend the announcement meeting in Portland (Tr. 75-76). Though Mr. Mors and his aide, Mr. Tousley, were not actually to participate in the announcement, it was felt their presence was necessary in order to answer employees' questions and discuss any concerns the employees might have. In anticipation of a profusion of rumors and telephone calls between the Portland and Vancouver offices after the announcement in Portland, Mr. Mors scheduled a late afternoon meeting that same day to also announce the transfer to the OFHP employees in Vancouver.

Mr. Mors notified the Vancouver employees of the scheduled meeting in the same manner he customarily uses to announce employee meetings. That is, he instructed his secretary to advise certain timekeepers and secretaries, who were strategically located in the various parts of the office, to notify all the remaining employees of the time and location of the meeting. At the time of the Vancouver office meeting, Mr. William McLoughlin, President of NFFE Local 1348, was out of the office on annual leave. He was, therefore, neither notified nor in attendance at the meeting. NFFE Local 1348 First Vice-President Ed Lewis did, however, attend the meeting.

On the morning of October 24, 1974, one day after the meetings were held in both the Vancouver and Portland offices to announce the transfer to the employees, Mr. McLoughlin reported to work. He was informed of the previous day's meetings by fellow employees. At that moment, in the presence of both employees and "a Management individual," Mr. McLoughlin declared his intention to file an unfair labor practice complaint. That same morning, before Mr. McLoughlin was able to formally protest the convocation of the previous days' Vancouver meetings without prior notification and consultation with Local 1348, OFHP Executive Officer Tousley invited Mr. McLoughlin to address the employees who were to be transferred at their scheduled visit from Portland to Vancouver for orientation (Tr. 29,55). Mr. McLoughlin accepted the invitation and did in fact address the employees some time later during their orientation visit (Tr. 55).

At no time subsequent to the announcement of October 23, 1974 did NFFE Local 1348 request an opportunity to discuss with management the transfer's implementation or impact upon the employees of the Vancouver office (Tr. 53, 77, 85).

The Contentions of the Parties

Complainant argues that the reassignment of new employees from the Portland to Vancouver offices was a matter of personnel policy and affected the working conditions of the employees in Vancouver under Section 11(a) of the Executive Order; that even if Respondent was not required, under Sections 11(b) and 12(b), to consult with Complainant concerning its decision to transfer employees, it nonetheless had a duty to meet and confer with Complainant regarding (1) the procedures for implementation of said reassignment of employees and (2) its impact upon the Complainant. Complainant further maintains that the Executive Order required Respondent to consult with Complainant on the aforementioned matters before, rather than after, the October 23, 1974 announcement to the Vancouver employees.

Respondent argues that under Sections 11(b) and 12(b) of the Order, which set forth the so-called "reserved rights" of management, the Activity was under no duty whatever to consult and confer with Complainant; that the duty to "meet and confer" under Section 11(a) exists only if the unit is adversely affected and because Respondent did not feel Complainant was

adversely affected, it had no such duty. Respondent contends that if there did exist an obligation to consult and confer, such consultation was not required prior to the October 23, 1974 announcement to the Vancouver employees but only prior to the January 13, 1975 implementation of the transfer. Finally, once notified of the transfer decision, the burden to initiate consultation shifted to Local 1348; Complainant manifestly failed to meet this burden.

Conclusions

The decision to transfer fifteen of the twenty-one employees in the Portland office to the Vancouver office was one of those which, under Sections 11(b) and 12(b) of the Executive Order, an Activity is free to make without consultation or negotiation with the exclusive bargaining agent. As the Assistant Secretary has observed, however, the reservation to management of the authority to make such decisions and take such actions "was not intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved. . . ." ^{1/} As applied, by the Assistant Secretary to the facts of that case, this obligated management, before issuing its RIF notices to the affected employees, to provide the union with an opportunity to meet and confer concerning the procedures to be followed in selecting the employees for inclusion in the RIF action.

Here, it was incumbent upon the Respondent to notify the exclusive representative of its decision to transfer employees to Vancouver, and to be prepared to confer and consult about the procedures to be followed, or the criteria to be employed, in choosing those to be relocated, before announcing its decision to the employees. This duty, however, was owed to Local 7, and was apparently discharged when that union was involved in management's decision-making process. Complainant did not then represent those employees and has no standing to complain about its noninvolvement in the decision.

^{1/} U.S. Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289. See also Federal Railroad Administration, A/SLMR No. 418.

As the exclusive representative of the unit of employees which would absorb the transferees, Complainant had the right to be consulted about the impact of that decision upon its constituency. So far as I am aware, the Assistant Secretary has, to date, spoken only of the duty to negotiate concerning the impact of a decision on the employees thereby adversely affected. I do not read him as suggesting that such discussions can properly exclude the ramifications of such decisions on employees other than those directly involved in the immediate decision. Put another way, I do not think such discussions could be confined to the subject of what arrangements might appropriately be made for the particular individuals caught in a RIF, reassignment, transfer, etc. Thus, Complainant had the right, upon appropriate request, to be consulted about implementation of the transfer as it affected the transferees at their new workplace, and as it might affect other employees in the Vancouver unit. Thus such matters, for example, as arrangements for space and for parking were clearly bargainable, and Section 19(a)(6) would have been violated had the transfer been accomplished in a time frame which precluded meaningful bargaining about its impact. 2/ Here, however, implementation of the decision was scheduled to take place more than eleven weeks after the announcement, and at no time during this period did Complainant seek to confer about it. President McLoughlin protested the fact that the announcement was not first made known to the Union, he threatened to file a charge, and he accepted an invitation to address the transferees during an orientation visit. But there is no evidence that he demanded bargaining over the impact of the transfer, although there was ample time. Under the holding of Great Lakes Naval Hospital, supra, no violation of Section 19(a)(6) occurs in such circumstances.

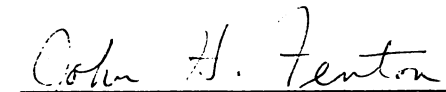
There remains the question whether announcing such a charge without prior consultation with the Complainant served to disparage the Complainant and to discourage membership in a manner violative of Section 19(a)(1). Had the announcement described a fait accompli about a bargainable matter I would recommend that it be found to constitute such a violation. Here, given the fact that bargainable matters relating to actual implementation of the transfer and its impact were so distant as to afford the Complainant apparently ample opportunity for

2/ Federal Railroad Administration, A/SLMR No. 418.

meaningful bargaining, I conclude that announcement of such plans did not tend to undermine or disparage the exclusive bargaining agent. There is no indication on this record that Respondent was not prepared to recognize the Complainant's role in the event the latter indicated an interest in bargaining about impact. It is not required to invite such discussions. There is therefore no basis for finding that Respondents' conduct had a restraining influence on unit employees or a concomitant coercive effect upon their rights assured by the Executive Order.

RECOMMENDATION

Having found that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (6), I recommend that the complaint be dismissed.


JOHN H. FENTON
 Associate Chief Judge

DATED: September 24, 1975
 Washington, D.C.

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

NAVAL AIR REWORK FACILITY,
 NAVAL AIR STATION,
 JACKSONVILLE, FLORIDA
 A/SLMR No. 613

The subject case involved an objection to an election filed by the Intervenor, National Association of Government Employees, Local R5-82 (NAGE), which election was held between the NAGE and the Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO, Naval Air Lodge 1630 (IAM), on September 19, 1974, at the Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida. The objection concerned a leaflet distributed by the IAM two days prior to the election that allegedly contained a material misrepresentation which affected the results of the election.

The Administrative Law Judge found that the statements contained in IAM's leaflet of September 17, 1974, while misrepresenting the role of the NAGE in procedures for the establishment of wage rates for bargaining unit employees, were similar to campaign rhetoric utilized by a union claiming it obtained higher wages than other unions for employees, and were not "much different from 'puffing' which is not considered sufficient to set aside an election." Under these circumstances, despite the misleading character of the statements, he concluded that they were not so gross or deceptive as to warrant setting aside the election.

Contrary to the Administrative Law Judge, the Assistant Secretary found that IAM's leaflet contained gross misrepresentations of a material fact which unit employees would be unable to evaluate and which could reasonably be expected to affect the outcome of the election. However, based on the Administrative Law Judge's credibility findings, as well as other record evidence, the Assistant Secretary further found that the NAGE had ample time to prepare and distribute an effective reply to the IAM's September 17, 1974, leaflet prior to the election held on September 19, 1974, but chose not to do so. On this basis, the Assistant Secretary concluded that the NAGE's objection to the election should be overruled.

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

NAVAL AIR REWORK FACILITY,
 NAVAL AIR STATION,
 JACKSONVILLE, FLORIDA

Activity

and

Case No. 42-2504(RO)

INTERNATIONAL ASSOCIATION OF MACHINISTS
 AND AEROSPACE WORKERS, AFL-CIO, NAVAL
 AIR LODGE 1630

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
 EMPLOYEES, LOCAL R5-82

Intervenor

DECISION ON OBJECTIONS

On September 10, 1975, Administrative Law Judge William Naimark issued his Report and Recommendations on Objections to Election in the above-entitled proceeding, recommending that the Intervenor's Objection No. 1 to the election be overruled. Thereafter, exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations were filed by the Intervenor and a reply brief was submitted by the Petitioner.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Intervenor's exceptions and supporting brief, and the Petitioner's reply brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, only to the extent consistent herein.

As more fully set forth in his Report and Recommendations, the Administrative Law Judge found that the Petitioner had distributed a leaflet on September 17, 1974, two days prior to the election in this

matter, wherein Petitioner misrepresented the role of the Intervenor in the procedures for the establishment of wage rates for employees in the bargaining unit. However, the Administrative Law Judge further found that the misrepresentations contained in the Petitioner's leaflet were similar to campaign rhetoric utilized by a union in claiming it obtained higher wages than other unions for employees and were not "much different from 'puffing' which is not considered sufficient to set aside an election." Under these circumstances, he concluded that, despite the misleading character of the leaflet's statements, they were not so gross or deceptive as to warrant setting aside the election. Accordingly, the Administrative Law Judge recommended that the objection be overruled.

While I agree with the Administrative Law Judge's finding that the contents of the Petitioner's leaflet constituted a misrepresentation, contrary to the Administrative Law Judge, I conclude that the statements contained in the leaflet involved contained gross misrepresentations of a material fact which unit employees would be unable to evaluate and which could reasonably be expected to affect the outcome of the election. Thus, the leaflet questioned the lack of the Intervenor's participation in the establishment of wage rates for unit employees, certainly a vital issue to all employees and, in my view, an important consideration in their choice of a bargaining representative. Moreover, it was noted that the misrepresentation was related to the technical procedures for the implementation of the Monroney Amendment in the establishment of wage rates, and that there is no evidence of an understanding of such technical procedures by unit employees or that they could reasonably be expected to have been able to evaluate the procedures in light of the assertions contained in the leaflet.

It has been held previously that in order to set aside an election on the basis of gross misrepresentations of material facts such as those involved in the instant case, it must be shown that the other party did not have a reasonable opportunity to make an effective reply. 1/ In view of his conclusion that the statements in the Petitioner's flyer did not impair the free choice of employees or have a substantial impact on the election, the Administrative Law Judge found it unnecessary to determine whether the Intervenor had ample opportunity to make an effective reply. However, he did find, based on credited testimony, 2/ that the Intervenor was aware of the Petitioner's leaflet as early as 6:30 a.m. on September 17, 1974, and that at a meeting later on that same date, at approximately 11:30 a.m., its representatives discussed the merits of issuing a reply leaflet. Further, based on record

1/ See Department of the Army, Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 177 and Army Materiel Command, Army Tank Automotive Command, A/SLMR No. 56.

2/ I find no basis for reversing the Administrative Law Judge's credibility findings in the subject case. See, in this regard, Navy Exchange, U. S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

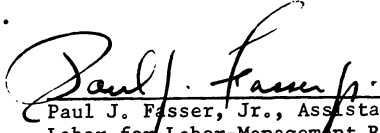
testimony, the Administrative Law Judge found that during the election campaign in this matter, it normally took about 4-8 hours to have leaflets printed.

Under all of these circumstances, I find that the Intervenor had ample time to prepare and distribute an effective reply to the statements contained in the Petitioner's September 17, 1974, leaflet prior to the election held on September 19, 1974, but merely chose not to do so. Accordingly, I conclude that the Intervenor's objection to the conduct of the September 19, 1974, election should be overruled on this basis.

ORDER

IT IS HEREBY ORDERED that the objection to the election in the above-entitled proceeding be, and it hereby is, overruled and that the case be returned to the appropriate Assistant Regional Director for appropriate action.

Dated, Washington, D. C.
February 2, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



REPORT AND RECOMMENDATIONS
ON OBJECTIONS TO ELECTION

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In the Matter of

NAVAL AIR REWORK FACILITY
NAVAL AIR STATION
JACKSONVILLE, FLORIDA
Activity

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO
IAM-NAL 1630
Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, NAGE LOCAL R5-82
Intervenor
.....

Case No. 42-2504 (RO)

Statement

This proceeding arose under Executive Order 11491, as amended, (herein called the Order), pursuant to a Notice of Hearing on objections issued on February 7, 1975 by the Assistant Regional Director, Labor-Management Services Administration, Atlanta Region.

This issue herein concerns the sufficiency of an objection filed by the National Association of Government Employees, Local R5-82 (herein called the Intervenor) to an election held on September 19, 1974 among a unit of employees of Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, (herein called the Activity). A majority of the votes at the election were cast for International Association of Machinists and Aerospace Workers, AFL-CIO, Naval Air Lodge 1630 (herein called the Petitioner).

All parties were represented at the hearing which was held before the undersigned at Jacksonville, Florida, on April 22, 1975. The parties were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Both the Petitioner and the Intervenor filed briefs which have been duly considered.

Upon the entire record in this matter, 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

Pursuant to an Agreement for Consent or Directed Election approved on August 27, 1974, a secret ballot election was conducted on September 19, 1974 in accordance with the provisions of the Order among an appropriate unit of the Activity's employees. The results of the election were as follows:

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Labor Relations Advisor
Department of the Navy
Regional Office - Civilian Manpower Management
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Jacksonville, Florida 32212
For the Activity

Louis P. Poulton, Esq.
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International Association of Machinists
and Aerospace Workers, AFL-CIO
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
For the Petitioner

Michael J. Riselli, Esq.
General Counsel
National Association of Government Employees
2130 Wisconsin Avenue, N.W.
Washington, D.C. 20007
For the Intervenor

BEFORE: WILLIAM NAIMARK
Administrative Law Judge

| | |
|--------------------------------------------------------------------------------------------|------|
| Approximate number of eligible voters | 1707 |
| Void ballots | 4 |
| Votes cast for National Association of Government Employees, NAGE Local R5-82 | 564 |
| Votes cast for International Association of Machinists and Aerospace Workers, IAM-NAL 1630 | 695 |
| Votes cast against exclusive recognition | 88 |
| Valid votes counted | 1347 |
| Challenged ballots | 0 |
| Valid votes counted plus challenged ballots | 1347 |

Challenged ballots were not sufficient in number to affect the results of the Election, and a majority of the noted votes counted plus challenged ballots has been cast for IAM-NAL 1630, the Petitioner herein.

Thereafter, on September 22, 1974 the Intervenor filed objections to conduct affecting the results of the Election. It objected, in substance, as follows:

- 1) On September 18, 1974 the Petitioner distributed a campaign flyer which falsely claimed that wage surveys conducted under the Federal Wage System for the Jacksonville area during NAGE's incumbency did not include the application of the "Monroney Amendment".
- 2) Petitioner's representative circulated false verbal allegations during the campaign that NAGE was under investigation by the Department of Labor for alleged underworld connections.
- 3) Petitioner's representative's fomented rumors that the Intervenor's president was under suspicion of misusing the local union's funds and that NAGE planned to place the Intervenor local under trusteeship.

The Assistant Regional Director issued his Report and Findings on Objections on October 31, 1974. He concluded that objection No. 1 had no merit since the flyer did not constitute gross misrepresentation to the extent it interfered with the employees' free choice. The Assistant Regional Director stated that it is reasonable to infer the employees could readily recognize the flyer as campaign propoganda, and that half-truths or exaggerations - absent deceit or fraud - do not justify setting aside elections. With respect to objections 2 and 3, the Assistant Regional Director concluded they had no merit in view of the Intervenor's failure to submit evidence in support thereof.

Intervenor filed a request for review with the Assistant Secretary of Labor as to the dismissal of Objections No. 1 herein. Under date of February 3, 1975 the Assistant Secretary of Labor reversed the dismissal as to said objection. He concluded that relevant questions of fact and policy are involved and remanded the case for issuance of a Notice of Hearing. Accordingly, the Notice of Hearing issued on February 7, 1975.

B. Objection No. 1

Intervenor objects to the conduct of Petitioner herein based on its circulating a flyer to employees on September 17, 1974 which it contends contains material gross misrepresentations. The flyer, entitled "LET'S TALK MONEY", recites the following:

"DO YOU KNOW HOW YOUR WAGES ARE SET?"

"At least once in each two years a survey is conducted to determine how much privated industry pays employees holding jobs comparable to yours. The survey teams are comprised of equal number of management and Union members. Until 1971, the I.A.M. was part of the survey team. During the last I.A.M. survey we invoked the Monroney Amendment and obtained the largest wage increase in the history of NARF Jacksonville approximately \$1800.00 yearly increase at the Journeyman level, (including the Monroney Amendment money). Has NAGE involked (sic) the Monroney Amendment since they represented you? WHY NOT? Is it that they don't know or just don't care? Is any part of Unionism more important than wages? WHY DID NAGE RAPE YOUR AGREEMENT AND IGNORE YOUR WAGES?"

YOU ALL REMEMBER THEIR PROMISES OF 1970. DID NAGE FUL-FILL THESE PROMISES? WHY DO YOU THINK THEY LIED TO YOU IN 1970? WHY DO YOU THINK THEY WILL LIE TO YOU NOW, IN 1974?"

VOTE RIGHT

ON SEPTEMBER 19, 1974

Promises

I A M

The Petitioner contends that (a) the handbill contained only a series of questions, and thus no factual misrepresentations were made therein, and (b) the Intervenor had ample opportunity to reply to the flyer and clarify the contents thereof.

No position was taken by the Activity as to whether the objection should be sustained and a new election directed.

Intervenor was certified in early 1971 as the collective bargaining representative of the wage rate employees (craft, trade, and labor) attached to the Naval Rework Facility. Thereafter the Activity and Intervenor were parties to collective bargaining agreements, the latest of which expired by its terms but has been extended pending a resolution of this matter. Prior to 1971 the IAM was the representative of these unit employees.

In order to establish a method which assures that wage rates paid by the Federal Government are competitive with rates in private industry, Congress enacted the "Monroney Amendment" in 1968. Under this law, 5 U.S.C. 5343(d), a system is provided for fixing the pay of blue collar Federal employees - craft, trade, and laborers. The lead agency is required to conduct a wage survey in the local area to determine whether there exists a number of comparable positions in private industry to establish wage schedules and rates for the positions for which the survey is made. If the lead agency determines that there are insufficient number of comparable positions as match-ups in private industry locally, it establishes the rates for the positions on the basis of both the local private industry rates and rates paid for comparable positions in the nearest wage area similar in population, employment, manpower and industry to the local wage area.

Operational procedure for this method provides for a local wage committee which is composed of numbers from both the union and management. Both parties appoint data collectors to conduct a survey, as heretofore described, and the data collected is analyzed and reviewed by the agency. The determination is then made by the agency as to whether the "Monroney Amendment" applies, i.e. whether they must also consider the comparable wage rates of private industry in the nearest wage area. If the agency concludes that there are sufficient jobs matters in the local area, the "Monroney Amendment" is not invoked. However, the union may file a minority report with the Department of Defense, Wage Fixing Authority. All relevant data submitted to the agency, including

that provided by the union, must be considered by the agency before it makes a determination whether to invoke the amendment.

It is the practice for a full scale survey to be conducted one year, and then a wage change survey to follow the next year. In May, 1974 a wage change survey was conducted by the agency herein in respect to Respondent's employees, which was followed by a full scale survey in 1975. The record shows that during the years 1972, 1973 and 1974 the wage rates at Respondent's Jacksonville facility were established pursuant to the "Monroney Amendment" with full participation by Intervenor's representatives. The testimony adduced from Alan J. Whitney, vice-president of NAGE, reflects he was a member of the Federal Prevailing Rate Advisory Commission which was set up to administer the pay system for federal wage grade employees. Whitney asserts there was no dispute in those years as to whether the amendment should be invoked - and it was not necessary for Intervenor to file a minority report in view of the fact that the amendment was so invoked. The "Monroney Rates" for all these aforesaid years and for 1975 were established for Respondent's aircraft employees based on the wage data for such employees obtained from Jacksonville and the Miami areas.

The election campaign at Respondent's facility took place between September 5-18, 1974. Both Petitioner and Intervenor distributed leaflets to employees who worked one of three shifts: 7 a.m. - 3:30 p.m.; 3:30 p.m. - 12 midnight; 12 midnight - 7 a.m. The record reflects no campaigning was allowed during duty time and handbills were distributed before shift changes or at break times.

On September 15, 1974 the Petitioner submitted a draft of "Let's Talk Money" - the flyer which is the subject of the objection herein - to the printer and received the printed editions on September 16. On the morning of September 17, at about 6:00 a.m., the said flyer was distributed by Petitioner throughout the station and left at various buildings.

Harold L. Fielding, who was president of Intervenor at the time of the election, testified that he saw the flyer at 6:15 a.m. on September 17; that he went to the NAGE office and showed it to Harry Breen, National vice-president of NAGE, who said it was just literature and had no bearing on the election. According to Fielding, he revisited the union office at 11:00 a.m. Present were Breen, Desmond Hatcher, second vice-president, William Wigginton, third vice-president,

and Barbara Brown, secretary - all representatives of NAGE, Local R5-82. Fielding asked Breen if he was going to answer the flyer, and the latter replied he did not want to go on the defensive and would not respond to it. The local president commented that Breen should put out a flyer stating the union did invoke the Monroney Amendment. Fielding was a wage survey committee man in 1973. In that year and in 1974 he asked Worsowitz if the Monroney Amendment would be invoked and was told it would be. Wigginton was also a member of said committee during those years. Both individuals were aware that the amendment was invoked by the agency.

Testimony by Wigginton and Hatcher reflects that they went to the local's office at 11:00 a.m. on September 17, after having seen the IAM flyer at 6:00 a.m. that day; that the officials, as named by Fielding, were present at the time; that Breen had a copy of the handbill in his hand while in the office; that Fielding asked Breen if he intended to reply to the flyer and Breen said it would not hurt the union and he did not want to go on the defensive.

The version by Breen as to the foregoing differs from that given by Fielding, Wigginton and Hatcher. The national vice-president testified he saw Hatcher in the office at lunch time on September 17, but did not see the other two officials; that he saw the flyer in the evening of that date when talking to employees at the supper break - 7:30 p.m. - 8:00 p.m. - at Hangar 101. Breen claims he was asked by employees why the union didn't invoke the amendment; that he said the union did invoke it, and was told by the workers to prove it. He testified he tried to prepare a flyer the next day but could not get the information he needed. He averred that at 8:30 a.m. on the following morning, September 18, he called Dominic Worsowitz, Industrial Relations Advisor for the Activity, to ask whether the Monroney Amendment was utilized by NAGE; that Worsowitz said he thought it had done so, but would verify it. Later in the day Breen called the Activity's representative again and the latter said the Monroney Amendment was used in the last wage survey. 1/

Based on the record as a whole I am persuaded that Intervenor was aware of the flyer between 6:00 a.m. - 7:00 a.m. on September 17, 1974. Although the national representative Breen denied seeing the flyer until that evening, or discussing

1/ In respect to Breen's testimony re his conversation with the employees and Worsowitz on September 17 and 18 respectively, this evidence is unrefuted and I credit Breen in this regard.

it in the morning with the local officers, it seems highly unlikely, in view of the intense campaign, that this flyer would not have come to his attention almost immediately. Further, the three NAGE local officials corroborate the discussion with Breen at 11:00 a.m. on September 17, in the union office. Accordingly, I credit Fielding, Hatcher and Wigginton and find that: (a) Fielding showed the flyer to Breen about 6:30 a.m. on September 17, and the latter stated it had no bearing on the election; (b) Fielding, in the presence of Hatcher, Wigginton and Barbara Brown, secretary, asked Breen if he intended to reply; the Breen said he did not want to go on the defensive and he did not believe the flyer would affect the election or hurt NAGE; that Fielding asked Breen to respond and circulate a flyer stating NAGE had invoked the Monroney Amendment, and Breen refused to do so. 2/

The unions utilized the sources of a local printer, Copy Center Printing, to print leaflets and circulars during the campaign. While Intervenor had a duplicating machine in its office, campaigning prior to the election was prohibited and the union did not use its own machine to print campaign material at that time. The record reflects, and I find, that it took about 4-8 hours for Copy Center to print customary circulars distributed during the campaign.

Conclusions

The central issue herein is whether the language in the flyer circulated by Petitioner contained gross misrepresentations sufficient to set aside the election. If it be found that the objectionable statements were false, consideration must be given to whether they were so palpably deceptive as to interfere with the free choice by employees in selecting their bargaining representative at the polls. In resolving this consideration it is important to determine whether said employees could reasonably evaluate the statements in the flyer, thus minimizing their impact upon the election.

2/ Apart from whether Breen saw the flyer in the morning of September 17, the record reflects that the local's officers had copies of it at 6:30 a.m. on that date. Accordingly, the Intervenor is chargeable with knowledge thereof at that time.

Petitioner contends it made no representations, but merely asked questions in the flyer re Intervenor's invoking the amendment. I reject this contention. The language employed by Petitioner clearly implies that NAGE did not invoke the Monroney Amendment, and that the Intervenor ignored the wages of the employees. Posing interrogatories does not, in my opinion, preclude a finding that the effect of such questions is to suggest, in much the same manner as an affirmative statement, that certain conduct has occurred. Although the flyer initially queried as to whether Intervenor invoked the Amendment, the language which followed, i.e. "why not? Is it they don't know or just don't care?", carries the obvious implication that NAGE did not protect the wages of the employees by applying the amendment. Accordingly, I conclude that the flyer did contain a representation rather than a mere question as contended by the IAM.

Moreover, and in disagreement with Petitioner, I conclude that the statement - albeit in the form of a query - was a misleading representation. It suggested that Intervenor failed to invoke the Monroney Amendment, and that had it done so the employees would have received wage increases as they did prior to 1971 when Petitioner was their representative and invoked the amendment. In actual practice it is the agency which invokes filing a minority report when the committee decides it is unnecessary to do so. The flyer's language is thus, at least, misleading and the necessary implication is that the Intervenor failed to take action which was detrimental to the employees; that this failure resulted in the workers receiving less wages than they would have received if NAGE were acting responsibly. The flyer's suggestion that the union can, but failed to, invoke the "Monroney Amendment" is certainly misleading in setting forth the role of the union and the extent to which Intervenor participated in the wage fixing procedure.

While misrepresentations prior to an election are not condoned, all false or misleading representations are not deemed sufficient to set aside such elections. In the leading private sector case of Hollywood Ceramics, 140 NLRB. 221, the Board stated that there must be a gross misrepresentation or trickery involving a substantial departure from the truth. This must occur or be made at a time when an effective reply is prevented, and the misrepresentation should be deemed to have a significant impact upon the election.

In assessing the statements made in the flyer with respect

to the Monroney Amendment and the implication that Intervenor did not act in the best interest of employees as to wages, I am persuaded that the language used does not warrant setting aside the election. Though not free from doubt, the references in the flyer to the Intervenor are similar to campaign rhetoric utilized by a union in claiming it obtained higher wages than other unions for employees. In the instant case the IAM suggests to the employees that it has, by invoking the amendment, secured wage increase for the workers, and that NAGE has failed to invoke this legislation so as to prejudice the employees. While this statement is misleading, if not untrue, I would not deem this much different from "puffing" which is not considered sufficient to set aside an election. Hanford House Health Case, 210 NLRB No. 44.

Elections should not be set aside lightly despite untruths or half truths which may creep into campaign propaganda. The touchstone in making a determination in this regard should revolve around whether the comments affect the free choice of an employee and have an impact upon the results of the election. In the case at bar I would conclude that employees could recognize the statements as propaganda. Many of them must have known of NAGE's role in respect to wages, and they could evaluate the contents of the flyer so as not to be deluded into accepting misleading information regarding the fixing of wages. See Cumberland Wood and Chair Corp., 211 NLRB No. 55. See also Gary Dulling Co. 208 NLRB No. 134 where the Board refused to set aside an election though the union stated it had ways of obtaining wage increase in excess of a Pay Board ceiling.

Intervenor adverts to Department of the Army, Military Ocean Terminal, Bayonne, N.J. A/SLMR No. 177 in support of its position that the misrepresentations constituted conduct which improperly interfered with the free choice of employees. However, the cited case involved allegations that the other union acted dishonestly and in an underhanded manner. The leaflet objected to in the Bayonne case implied that the successful union was party to a "deal" with the employer and referred to a "kick-back" arrangement by said union. Thus, it could hardly be said that employees were in a position to evaluate those statements. Contrariwise, the reference herein to the Monroney Amendment did not suggest an odious arrangement between NAGE and the employees, but was similar to exaggerated claims that the IAM obtained more wage increase for employees than the Intervenor. In this posture, I am constrained to conclude that such an assertion could not have impaired the ability of this activity's employees to vote intelligently. See Thiem Industries, 195 NLRB No. 200.

February 10, 1976

Accordingly, I conclude that, despite the misleading character of the flyer's statements, they were not so gross or deceptive as to warrant setting aside the election. 3/

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

Recommendation

In view of the foregoing findings and conclusions I recommend that Intervenor's objection No. 1 to the election held on September 19, 1974 be overruled, and, further, that the case be returned to the Assistant Regional Director, Atlanta Region for final action consistent herewith.


WILLIAM NAIMARK
Administrative Law Judge

DATED: September 10, 1975
Washington, D.C.

DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION,
ARIZONA PROJECTS OFFICE,
PHOENIX, ARIZONA
A/SLMR No. 614

This case arose as the result of a petition for amendment of recognition (AC) filed by the National Federation of Federal Employees, Local 376, Scottsdale, Arizona (NFFE), and an RA petition filed by the Department of Interior, Bureau of Reclamation, Arizona Projects Office, Phoenix, Arizona (Activity). The NFFE contended that a January 1972 reorganization of the Activity resulted in merely a name change to the Arizona Projects Office and that in all other respects the unit remained the same. It further contended that the Activity's RA petition should be dismissed on the ground that it was untimely for the purpose of questioning NFFE's majority status and that, in any case, there had been no change in the character and scope of the unit as a result of the reorganization. The Activity, on the other hand, asserted that as a result of the reorganization in 1972, the character and scope of the unit for which NFFE was recognized had been substantially altered to the extent that it has a good faith doubt that the NFFE continues to represent a majority of the employees and that the unit for which the NFFE was recognized remains appropriate. In either case, the Activity seeks an election to resolve the situation.

The Assistant Secretary concluded that the evidence established that the Arizona Projects Office was, in effect, a new organizational entity which was substantially different from the previously existing Phoenix Development Office. He noted that the mission of the Arizona Projects Office was clearly different from the mission of the Phoenix Development Office whose mission had been completed, and that the employee complement of the Arizona Projects Office was significantly different from the complement which existed in the Phoenix Development Office with substantial increases in the number of employees and job classifications. Under these circumstances, the Assistant Secretary found that there had been a substantial change in the character and scope of the unit which supported a good faith doubt as to its appropriateness. In view of the existence of a question concerning the appropriateness of the unit, the Assistant Secretary found that the NFFE's petition for amendment of recognition was inappropriately filed and should be dismissed.

3/ In view of my conclusion that the statements in Petitioner's flyer did not impair the free choice of employees or have a substantial impact upon the election, I make no findings or conclusions as to whether Intervenor had ample opportunity to reply to the flyer.

The Assistant Secretary further concluded that a unit of all nonprofessional employees assigned to the Arizona Projects Office was appropriate for the purpose of exclusive recognition. In this regard, he found that a substantial number of previous unit employees were transferred into the new organizational entity forming the nucleus of the nonprofessional employee complement, and that it was possible to trace a connection to the previously existing nonprofessional employee unit at the Phoenix Development Office. Under these circumstances, and noting the fact that the Activity and the NFFE were in agreement that the newly formed unit is appropriate for the purpose of exclusive recognition under the Order, the Assistant Secretary directed an election in such unit.

A/SLMR No. 614

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION,
ARIZONA PROJECTS OFFICE,
PHOENIX, ARIZONA

Activity-Petitioner

and

Case No. 72-5349(RA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 376,
SCOTTSDALE, ARIZONA

Labor Organization

DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION,
ARIZONA PROJECTS OFFICE,
PHOENIX, ARIZONA

Activity

and

Case No. 72-5331(AC)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 376,
SCOTTSDALE, ARIZONA

Petitioner

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Eleanor Haskell. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ The Hearing Officer referred to the Assistant Secretary a motion to dismiss the Activity's petition in Case No. 72-5349(RA) made at the hearing by the National Federation of Federal Employees, Local 376 (NFFE). In this regard, the NFFE argued that the RA petition was barred by the negotiated agreement between it and the Activity. Noting that, among other things, the Activity-Petitioner's RA petition questioned the
(Continued)

Upon the entire record in these cases, including the briefs filed by the NFFE and the Activity, the Assistant Secretary finds:

The record reveals that the Phoenix Development Office was established sometime in the early 1950's and was charged with the mission of determining the engineering and economic feasibility of various potential reclamation projects in Arizona and Western New Mexico. In achieving this mission, the employees of the Phoenix Development Office were primarily concerned with the conduct of various engineering and environmental tests and the compilation of assorted data upon which feasibility determinations could be made.

On December 22, 1969, the NFFE was granted exclusive recognition for a unit described as: All nonprofessional nonsupervisory Wage Grade and General Schedule employees of the Phoenix Development Office. Thereafter, the parties entered into a negotiated agreement, effective October 5, 1971, which has been in effect at all times relevant to this proceeding. ^{2/}

In late 1971, it was determined that the Phoenix Development Office had substantially completed its mission, and that, therefore, the Office should be closed. At the same time, it was determined that various construction and reclamation projects, known as the Central Arizona Project, should be initiated, and that a new office to be known as the Arizona Projects Office should be opened to supervise the Central Arizona Project. Accordingly, on January 15, 1972, the Phoenix Development Office was closed and the Arizona Projects Office was opened.

The record reveals that at the time of its closing the Phoenix Development Office was staffed by a total of approximately 95 employees in some 22 job classifications and that the unit for which the NFFE had been granted exclusive recognition was composed of approximately 30 non-professional employees in approximately 16 job classifications. Upon the closing of the Phoenix Development Office and the opening of the Arizona Projects Office, the employees of the former were not transferred in toto to the new office. Rather, each individual's qualifications was assessed as to his ability to function and contribute to the mission of the Arizona Projects Office.

^{1/} continued appropriateness of the unit for which the NFFE was certified based on substantial changes in its character and scope resulting from a reorganization, the NFFE's motion is hereby denied. See Denver Airway Facilities Hub Sector, FAA, Rocky Mountain Region, DOT, Aurora, Colorado, A/SLMR No. 535, in which it was held in similar circumstances that such an RA petition is not subject to the timeliness requirements set forth in Section 202.3 of the Assistant Secretary's Regulations.

^{2/} The agreement was for a two year term and provided for automatic renewal for two year terms thereafter in the absence of timely notice by either party to renegotiate.

A substantial number of employees of the former Phoenix Development Office were hired by the Arizona Projects Office as were a number of other employees. The record reveals that, as of the time of the hearing herein, the Arizona Projects Office had a total complement of approximately 125 employees in some 47 job classifications, of whom approximately 90 employees in approximately 32 job classifications were nonprofessionals. The record further reflects that of the 30 nonprofessional employees in the bargaining unit when the Phoenix Development Office was closed, 25 were selected for employment by the Arizona Projects Office. In this connection, some 18 job classifications were retained which had been utilized by the Phoenix Development Office. These were added to some 29 new job classifications currently utilized by the Activity. ^{3/} The record also indicates that a substantial number of the employees hired by the Activity from the Phoenix Development Office were placed into new jobs with different supervisors than they had worked under in their former office.

The NFFE contends that while in January 1972, the Activity's name was changed from the Phoenix Development Office to the Arizona Projects Office in all other respects the unit remained the same. Thus, in the NFFE's view, there was little or no change in the Activity's functions, personnel, job descriptions or general supervisory hierarchy. Under these circumstances, it asserts that its petition to amend the recognition to reflect the change in the Activity's name is appropriate and should be granted. As to the Activity's RA petition, the NFFE asserts that it should be dismissed on the grounds that it is untimely for the purpose of questioning the NFFE's majority status and that, in any case, there has been no change in the character and scope of the unit as a result of the reorganization. The Activity, on the other hand, contends that as a result of the reorganization in 1972, the character and scope of the unit for which the NFFE was recognized has been substantially altered to the extent that it has a good faith doubt that the NFFE continues to represent a majority of employees and that the unit for which the NFFE was recognized remains appropriate. In either case, the Activity seeks an election to resolve the situation.

Based on the foregoing, I find that the Arizona Projects Office is, in effect, a new organizational entity which is substantially different from the Phoenix Development Office. Thus, the record indicates that the mission of the Arizona Projects Office - to supervise the implementation of the Central Arizona Project - is clearly different from the previous mission of the Phoenix Development Office whose mission had been completed. Moreover, the evidence establishes that the employee complement of the Arizona Projects Office is significantly different from the complement which existed in the Phoenix Development Office with a substantial increase in the number of employees and job classifications. Under these circumstances, I find that there has been a substantial change in the character and scope of the unit which supports a good faith doubt

^{3/} The record is not clear as to which of these new job classifications encompasses nonprofessional positions.

as to its appropriateness. Accordingly, in view of the existence of a question concerning the appropriateness of the unit, I find that the NFFE's petition for amendment of recognition was inappropriately filed and, therefore, I shall order that it be dismissed. 4/

By its RA petition in this matter the Activity seeks an election in a "unit of all nonsupervisory and nonprofessional employees assigned to the Arizona Projects Office." In the past, an RA petition has been dismissed where, subsequent to a reorganization, a newly established unit contained employees who had little or no traceable connection to any prior unit of exclusive recognition. 5/ In the instant case, however, the record indicates that a substantial number of the previous unit employees were transferred into the new organizational entity forming the nucleus of the nonprofessional employee complement. Thus, in my view, it is possible in the circumstances herein to trace a connection to the previously existing nonprofessional employee unit at the Phoenix Development Office. Also noted, in this regard, was the fact that the parties are in agreement that the newly formed unit is appropriate for the purpose of exclusive recognition under the Order. Under these circumstances, I shall direct an election in such unit. 6/ Accordingly, I find that the following employees of the Activity-Petitioner constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees of the Department of Interior, Bureau of Reclamation, assigned to the Arizona Projects Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than

4/ See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, where it was found, in part, that a petition for amendment of certification or recognition is not a proper vehicle to question the appropriateness of an employee bargaining unit.

5/ See United States Coast Guard Air Station, Nonappropriated Fund Activity, Cape Cod, Massachusetts, A/SLMR No. 561.

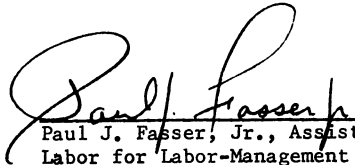
6/ If the NFFE does not desire to proceed to an election in this matter, it should so inform the appropriate Area Director within ten days of the date of this Decision.

60 days from the date below. The appropriate Area Director shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 376.

ORDER

IT IS HEREBY ORDERED, that the petition in Case No. 72-5331(AC) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 10, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

February 17, 1976

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

DEFENSE SUPPLY AGENCY,
DEFENSE PROPERTY DISPOSAL OFFICE,
ABERDEEN PROVING GROUND,
ABERDEEN, MARYLAND
A/SLMR No. 615

On February 28, 1974, the Assistant Secretary issued his Decision and Order in A/SLMR No. 360, in which he found that the Respondent violated Section 19(a)(1) and (5) of the Order by improperly withdrawing recognition from Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, (Complainant) with regard to the Defense Property Disposal Office (DPDO) employees at Aberdeen. In this regard, he found that, as a co-employer, the Respondent had an obligation to continue to accord such recognition. Moreover, he found that the Respondent's admitted threat to terminate dues withholding six months after the date of the unit employees' transfer to the DPDO if no representation petition was filed constituted an additional violation of Section 19(a)(1) of the Order.

On December 9, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal setting aside the Assistant Secretary's Decision and Order and, pursuant to Section 2411.18(b) of its Rules and Regulations, remanding the case to him for appropriate action consistent with its decision.

In remanding the case the Council raised questions concerning the applicability to the instant case of its decision in Headquarters, United States Army Aviation Systems Command (AVSCOM), FLRC No. 72A-30, and, in this regard, whether the Assistant Secretary's procedures available to the Respondent at the critical times in this case, which antedated its AVSCOM decision, clearly provided the Respondent with access to representation proceedings which would have resolved the legitimate doubts of the Respondent arising from the subject reorganization.

Noting his decision in A/SLMR No. 160, which issued on May 18, 1972, some eleven months prior to the April 1973 transfer of employees herein pursuant to the reorganization, in which he outlined, in detail, the mechanism to be utilized by agencies to resolve unit questions resulting from agency reorganizations, and noting also the numerous subsequent cases in which agencies have followed such procedures, the Assistant Secretary concluded that there existed prior to April 1973, as there exists today, a representation procedure under the Executive Order which was available to the Respondent to resolve any unit

questions resulting from the reorganization in this matter. Accordingly, he found that by failing to file an appropriate representation petition (an RA petition) in this matter, the Respondent was deemed to have accepted the risk of an unfair labor practice finding.

The Assistant Secretary further found, consistent with the Council's rationale, that, as the reorganization herein involved the transfer to the gaining employer of only a small segment of those employees of the existing exclusively recognized unit, the Respondent was not a successor employer.

Accordingly, as under the Council's rationale the Respondent was neither a co-employer nor a successor employer, the Assistant Secretary concluded that at all times relevant herein the Respondent was under no obligation to accord the Complainant recognition with respect to the DPDO employees. Therefore, he found that the Respondent's conduct herein could not be deemed violative of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE PROPERTY DISPOSAL OFFICE,
ABERDEEN PROVING GROUND,
ABERDEEN, MARYLAND

Respondent

and

Case No. 22-4027(CA)
A/SLMR No. 360
FLRC No. 74A-22

LOCAL LODGE 2424, INTERNATIONAL
ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

Complainant

SUPPLEMENTAL DECISION AND ORDER

This case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director.

Specifically, the complaint alleged that the Respondent violated Section 19(a)(1), (2), (5), and (6) of the Executive Order by refusing to recognize the Complainant or to apply the terms of an existing negotiated agreement with the Aberdeen Proving Ground which included in its coverage certain employees engaged in property disposal operations at the Aberdeen Proving Ground who were transferred to the Respondent pursuant to a Department of Defense reorganization. The complaint further alleged that the Respondent improperly threatened to revoke dues withholding authorizations for the transferred employees. On February 28, 1974, in A/SLMR No. 360, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (5) of the Order by improperly withdrawing recognition with regard to the Defense Property Disposal Office (DPDO) employees at Aberdeen. In this regard, it was found that, as a co-employer, the Respondent had an obligation to continue to accord such recognition. Moreover, the Assistant Secretary found that the Respondent's admitted threat to terminate dues withholding six months after the date of the unit employees' transfer to the DPDO if no representation petition was filed constituted an additional violation of Section 19(a)(1) of the Order.

On December 9, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal setting aside the Assistant Secretary's Decision and Order and, pursuant to Section 2411.18(b) of its Rules and Regulations, remanding the case to him for appropriate action consistent with its decision.

The essential facts are not in dispute and have fully been discussed in the earlier decisions in this matter. Therefore, I shall repeat them only to the extent deemed necessary for the following discussion.

The Defense Supply Agency, like the Department of the Army, the Department of the Navy, and the Department of the Air Force, is a separate, coequal component of the Department of Defense. On July 29, 1970, the Complainant was certified as the exclusive representative for a unit of all Wage Grade employees (approximately 1,620 employees) assigned to the Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland. Thereafter, on August 9, 1972, a two year negotiated agreement between the Complainant and Aberdeen Proving Ground Command (herein also referred to as the Army) covering the above-described unit was executed. On September 11, 1972, pursuant to a Department of Defense reorganization, the Respondent established the Defense Property Disposal Service which was given the responsibility for all surplus personal property disposal functions for the Department of Defense. As to the actual effect of the reorganization on the unit employees at Aberdeen, the parties stipulated that, prior to the transfer on April 22, 1973, the 15 Wage Grade employees who performed property disposal functions at Aberdeen were part of an Activity-wide unit at the Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland. Following the reorganization and the "transfer-in-place" of these employees into the DPDO at Aberdeen, the transferred employees retained their same job descriptions and classifications, continued to work in the same geographical areas, and performed the same functions and job duties that they had performed while under the command of the Army prior to the reorganization. Moreover, the immediate supervision of these employees remained the same as before the reorganization, although the chief of the DPDO now reported upward through the Respondent's Command, rather than through the Army Command. The Respondent subsequently refused to continue to accord recognition to the Complainant for those supply employees transferred to the DPDO at Aberdeen from the Aberdeen Proving Ground Command and also failed to honor an existing negotiated agreement covering these employees.

In remanding the matter to the Assistant Secretary, the Council considered six major policy issues and enunciated certain principles which it believed properly controlled in the subject case.

One issue involved the applicability to the instant case of the Council's decision in Headquarters, United States Army Aviation Systems Command (AVSCOM), FLRC No. 72A-30. Relying on the Council's Decision

on Appeal in AVSCOM the Respondent had argued that it should not be placed in the dilemma of assuming the risk of violating Section 19(a)(3) or (6) of the Order during the period in which an underlying representation issue was pending before the Assistant Secretary. In rejecting this defense, the Assistant Secretary noted particularly "that the Respondent 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 remanding this aspect of the case to the Assistant Secretary, the Council questioned whether the representation proceedings offered by the Assistant Secretary would have led to the Assistant Secretary's resolution of the Complainant's representative status upon a representation petition filed by the Respondent and whether his procedures at the critical times in this case, which antedated AVSCOM, clearly provided the Respondent with access to representation proceedings which would resolve the legitimate doubts of the Respondent arising from the subject reorganization.

On May 18, 1972, prior to the establishment of the Defense Property Disposal Service in September 1972, some eleven months prior to the transfer of the 15 Wage Grade employees at Aberdeen into the DPDO, and more than one year prior to the issuance of the Council's Decision on Appeal in the AVSCOM case, the Assistant Secretary issued a Decision and Order in Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, in which he outlined, in detail, his views on the mechanism to be utilized by agencies to resolve unit questions resulting from agency reorganizations. ^{1/} In A/SLMR No. 160, the Activity-Petitioner had filed a petition for clarification of unit seeking a determination by the Assistant Secretary that certain exclusively recognized units were no longer appropriate as a result of a reorganization. The Assistant Secretary indicated that by seeking a determination that certain units were no longer appropriate and requesting an election to determine the majority status in what it contended to be a newly established appropriate unit resulting from a reorganization, the Activity-Petitioner, in effect, was attempting to raise a question concerning representation. He noted that "the sole procedure available to an agency or activity to enable it to raise a question concerning representation is a petition for an election to determine if a labor organization should cease to be the exclusive representative (RA)." He noted further that, ". . . where . . . because of a substantial change, subsequent to recognition or certification, in the character and scope of the unit it [an agency] contends that the recognized or certified unit is now an inappropriate unit within the meaning of the Order, it [an agency] may file an RA petition." Finally, he stated that by "seeking to raise a question concerning representation based on its view that a reorganization had rendered certain established units inappropriate . . . the appropriate petition in such circumstances is an RA petition"

^{1/} As noted by the Council, no appeal to the Council was taken from that decision.

Subsequent to the Assistant Secretary's Decision and Order in A/SLMR No. 160, on July 25, 1973, the Council issued its Decision on Appeal in AVSCOM. It indicated, among other things, "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." However, the evidence in the AVSCOM case established that while the Respondent Activity filed a representation petition on June 4, 1971, seeking a determination with respect to the impact of a reorganization on certain existing units, it did not await the decision of the Assistant Secretary with respect to that petition but, rather, continued to negotiate and, in fact, reached an agreement on October 7, 1971, which it then refused to execute. On this latter basis, the Respondent Activity was found to have committed an unfair labor practice. ^{2/}

As a result of the Council's decision in AVSCOM, and because the Assistant Secretary was of the view that a procedure was already in place which would afford agencies the type of procedure outlined by the Council in AVSCOM, the Assistant Secretary did not consider that the establishment of a new procedure was necessary and, in this connection, issued a Report on a Ruling on September 6, 1973, ^{3/} which stated that, "While awaiting the resolution of a petition in which an activity has raised a good faith doubt as to the exclusive representative's majority status or a good faith doubt as to the appropriateness of the existing unit, there is no obligation on the part of the activity to negotiate with the exclusive representative." ^{4/}

Since A/SLMR No. 160, agencies and activities have consistently utilized the procedure established in A/SLMR No. 160 and have filed numerous RA petitions seeking determinations by the Assistant Secretary

^{2/} Cf. also, in this regard, Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, where it was found, among other things, that the Respondent's establishing of new competitive areas during the pendency of an RA petition was violative of the Order.

^{3/} Report on a Ruling, Report No. 55.

^{4/} Cf. Federal Aviation Administration, Atlanta Airway Facility, Sector 12, Atlanta, Georgia, A/SLMR No. 287, where a respondent activity was found to have violated the Order despite the filing of an RA petition where the evidence established, among other things, that it did not have a good faith doubt as to the appropriateness of the unit involved.

with respect to the impact of reorganizations on the scope and character of exclusively recognized units and the employees included within such units. 5/ Moreover, Sections 202.1(c) and 202.2(b) of the Assistant Secretary's Regulations were amended on May 7, 1975, to further codify the use of an RA petition as denoted in A/SLMR No. 160 where an agency or activity has a good faith doubt of the appropriateness of the unit "because of a substantial change in the character and scope of the unit." And, finally, in April 1975, form LMSA 60, the formal document used to file representation petitions was revised to describe an RA petition as one in which, "The Agency has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in the existing unit or that, because of a substantial change in the character and scope of the unit, it has a good faith doubt that such unit is now appropriate." (emphasis added)

Thus, I find that there existed prior to April 22, 1973, the date on which the employees of the Army's property disposal operation were transferred to the Respondent pursuant to the reorganization, as there exists today, a representation procedure under the Executive Order which was available to the Respondent to resolve any unit questions resulting from the reorganization in this matter. Moreover, under such representation procedure the Respondent could have awaited the decision of the Assistant Secretary without risking the commission of an unfair labor practice. Nor do I view as controlling the fact that the Respondent was not questioning the Complainant's exclusive representative status in the Army's unit or that the Complainant was not claiming to represent the transferred employees in a separate appropriate unit. The basic question facing the Respondent as a result of the reorganization and transfer herein was whether or not those employees administratively transferred from the Army to the Respondent remained in the existing bargaining unit and, thus, retained the Complainant as their exclusive representative. In my view, there is no distinction in this situation from those involved in previous cases where agencies or activities, through RA petitions, have sought and obtained a determination as to the representative status of exclusive representatives of certain employees who, by virtue of a reorganization, have been acquired from other agencies or activities. 6/

5/ See e.g. United States Department of Interior, Bureau of Reclamation, Lower Colorado Region, A/SLMR No. 318; Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, Tulsa, Oklahoma, A/SLMR No. 364; Idaho Panhandle National Forests, United States Department of Agriculture, A/SLMR No. 394; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482; Headquarters, U.S. Army Training and Doctrine Command (TRADOC), Fort Monroe, Virginia, A/SLMR No. 507; and United States Coast Guard Air Station, Non-Appropriated Fund Activity, Cape Cod, Massachusetts, A/SLMR No. 561.

6/ See e.g. United States Coast Guard Air Station, Non-Appropriated Fund Activity, Cape Cod, Massachusetts, cited above.

Accordingly, based on the foregoing, I find that at all times material in the subject case there existed a representation procedure which would have led to a resolution by the Assistant Secretary of the Complainant's representative status - i.e. the filing of an RA petition. Moreover, I find, based on the foregoing, that at all times material herein, the Assistant Secretary's procedures which antedated AVSCOM clearly provided the Respondent, upon the filing of an RA petition, with access to representation proceedings which would have resolved any legitimate good faith doubt of the Respondent arising from the subject reorganization. Under these circumstances, by failing to file an appropriate representation petition (an RA petition) in this matter, the Respondent was deemed to have accepted the risk of an unfair labor practice finding consistent with the Council's rationale in its Decision on Appeal in FLRC No. 74A-22.

To find that the Respondent's conduct herein constituted an improper failure to accord the Complainant exclusive recognition it must be ascertained whether the Respondent, subsequent to the reorganization and transfer of employees in April 1973, owed an obligation to accord appropriate recognition to a labor organization qualified for such recognition with respect to DPDO employees at Aberdeen. In rejecting the co-employer doctrine as fashioned and applied by the Assistant Secretary in the instant case, which doctrine when applied in this situation had the effect of establishing a bargaining obligation on behalf of the Respondent, the Council noted that although both the Respondent and the Army are components of the Department of Defense and the latter may have been the progenitor of the reorganization, the Respondent and the Army have separate missions, functions, regulations, administrations, and commands. Moreover, it noted that there was no indication in the record that the Respondent and the Army either before or after the reorganization shared any common control or direction over either the 15 employees transferred to the Respondent or the remaining approximately 1600 employees in the Army's bargaining unit. Accordingly, the Council found that "DSA /Respondent/ 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."

In rejecting the co-employer doctrine in the circumstances of the subject case, the Council noted that the "administrative difficulties" of particular concern herein to the Assistant Secretary may be resolved, in part, by prompt resort to procedures already provided for or available under the Order. "Among others," the Council suggested the applicability of a "successorship" doctrine in reorganization situations. In the Council's view, if an agency or employing entity meets the below named requirements or criteria for determining successorship, the gaining employer would take the place of the losing agency or employing entity as a "successor" under Section 10(a) with the substantive elements of recognition continuing without material change

after the reorganization or the need for a new secret ballot election. In the Council's view, the criteria for a finding of successorship are met 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.

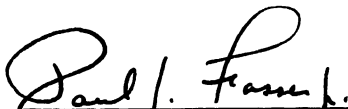
Under the circumstances herein, and noting particularly that the reorganization involved the transfer to the gaining employer of only a small segment of those employees of the existing exclusively recognized unit, I find that the recognized unit had not been transferred substantially intact to the gaining employer so as to meet the Council's requirement for successorship in this regard. Accordingly, under the circumstances herein, I find that the Respondent is not a successor employer within the meaning of the Council's decision. ^{7/}

Accordingly, as under the Council's rationale the Respondent was neither a co-employer nor a successor employer, I conclude that at all times relevant herein it was under no obligation to accord the Complainant recognition with respect to the DPDO employees. Consequently, the Respondent's conduct herein cannot be deemed violative of Section 19(a)(1) and 19(a)(5) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-4027(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 17, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{7/} In view of this finding, I find it unnecessary to make a determination as to the appropriateness of the DPDO bargaining unit or whether a question concerning representation had been raised timely with regard to such unit.

February 17, 1976

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

GENERAL SERVICES ADMINISTRATION,
REGION 3
A/SLMR No. 616

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, (AFGE) seeking an election in a unit consisting of all employees assigned to the Activity's Automated Data and Telecommunications Service, Telecommunications Division Office in Richmond, Virginia. The Activity took the position that the unit sought was not appropriate for the purpose of exclusive recognition as the claimed employees do not share a community of interest separate and apart from certain of its other unrepresented employees in the Telecommunications Division and that the establishment of such a fragmented unit would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary determined that the petitioned for unit was not appropriate for the purpose of exclusive recognition as the claimed employees do not share a community of interest which is separate and apart from certain other employees of the Activity. In this regard, he noted that all of the switchboards of the Maryland, Virginia, and West Virginia Field Office, including the Richmond, Virginia, switchboard to which the majority of the claimed employees are assigned, are under the day-to-day direction of an Area Manager and are subject to uniform personnel policies and practices as implemented by him through the Regional Personnel Office. Also, the employees of all of the switchboards have similar skills, they perform their work based on standard operating procedures, and there has been employee interchange from one switchboard to another. Further, the Assistant Secretary concluded that the proposed fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3

Activity

and

Case No. 22-6292(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

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

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

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit consisting of all General Schedule employees assigned to the Activity's Automated Data and Telecommunications Service, Telecommunications Division Office, Richmond, Virginia, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order. The Activity takes the position that the claimed unit is not appropriate for the purpose of exclusive recognition as the petitioned for employees do not share a community of interest that is separate and distinct from certain other employees of the Activity's Telecommunications Division and as the establishment of such a fragmented unit would not promote effective dealings and efficiency of agency operations. In this regard, the Activity contends that the smallest appropriate unit would be a unit of all of its switchboard employees in its Maryland, Virginia, and West Virginia Field Office.

The majority of the employees in Region 3 of the General Services Administration (GSA) are represented exclusively in 36 bargaining units located throughout the Region. Within the Telecommunications Division there are three units covering most of the employees in the Division outside of the Maryland, Virginia, and West Virginia Field Office. In this connection, two of these units are essentially field office units which cover all of the switchboard employees therein.

Region 3 of GSA is headed by a Regional Administrator and has four operational units designated as the National Archives and Records Service, the Public Buildings Service, the Automated Data and Telecommunications Service and the Federal Supply Service. The claimed employees are located organizationally within the Telecommunications Division, which is one of two divisions in the Automated Data and Telecommunications Service. 1/

The record reveals that there are eight employees within the petitioned for unit, including six telephone operators and one communications clerk located at the Richmond, Virginia, switchboard, which is organizationally part of the Activity's Maryland, Virginia, and West Virginia Field Office. In addition, the claimed unit includes one general communications operator located in Richmond, Virginia, who is organizationally part of the Activity's Records Section. Both the Chief of the Records Section and the Chief of the Maryland, Virginia and West Virginia Field Office report upwards to the Chief of the Telecommunications Division through the Chief of the Operational Branch. As noted above, seven of the eight employees in the claimed unit are attached to the Richmond, Virginia, switchboard, which is one of the eight switchboards in the Maryland, Virginia, and West Virginia Field Office, all of which receive their day-to-day direction from an Area Manager. 2/

The record reflects that each of the switchboards has a Chief Operator who has daily contact with the Area Manager. In addition, the larger switchboards, including the Richmond switchboard, have an additional first line supervisor. The Chief Operator of each switchboard is responsible for preparing the daily schedules, doing the necessary paperwork, and granting annual leave of less than one week. However, the Area Manager must approve annual leave of one week or more, and he provides daily direction in operational matters which may affect the daily schedules. While the Chief Operator may recommend discipline, promotions, and the filling of vacancies, the record reflects that the Area Manager must initiate the required paperwork with the assistance of the Regional Personnel Office and any action to be taken would issue under his name after several levels of concurrence.

1/ The other division is the Federal Data Processing Division.

2/ The other switchboards are located in Roanoke and Norfolk, Virginia, Baltimore, Maryland, and Huntington, Morgantown, Charleston, and Parkersburg, West Virginia.

February 17, 1976

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

The work performed by the telephone operators at all of the Activity's switchboards is performed within nationally standardized operating procedures. Record testimony established that there is very little difference between switchboards and that, therefore, the skills involved are essentially transportable. In this regard, it was noted that while employees of the Richmond, Virginia, switchboard have not been involved in any recent interchange, interchange has occurred involving employees of the eight switchboards under the Activity's Maryland, Virginia, and West Virginia Field Office.

With respect to the one employee designated as a general communications operator in Richmond, the Activity's organizational chart indicates that this employee reports to a supervisory general communications operator in Richmond who, in turn, reports to the Chief of the Records Section. Therefore, it appears that no single individual in Richmond has supervisory authority over both the switchboard employees and the general communications operator.


Based on the foregoing, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition as the claimed employees do not share a community of interest which is separate and apart from certain other employees of the Activity. Thus, the evidence establishes that all of the switchboards of the Maryland, Virginia, and West Virginia Field Office, including the Richmond, Virginia, switchboard, are under the Area Manager's day-to-day direction and are subject to uniform personnel policies and practices as implemented by him through the Regional Personnel Office. In addition, the employees of all of the switchboards throughout the Region have similar skills, they perform their work under standard operating procedures, and there has been interchange of employees from one switchboard to another. Moreover, in my view, the proposed fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations.

Accordingly, I shall order that the petition in the subject case be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-6292(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 17, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 617

This consolidated proceeding involved an RA petition filed by the U.S. Army Electronics Command, Fort Monmouth, New Jersey (ECOM, Fort Monmouth) claiming that because of a Department of Army decision on January 11, 1973, to close a number of installations and institute reduction-in-force actions, there existed a good faith doubt whether the American Federation of Government Employees, Local 1498, AFL-CIO (AFGE Local 1498) continued to represent all nonprofessional, non-supervisory employees at the U.S. Army Electronics Command, Philadelphia (ECOM, Philadelphia). Also involved was an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 476 (NFFE Local 476), alleging that ECOM, Fort Monmouth, violated Section 19(a)(3) of the Order by providing, after the closure of ECOM, Philadelphia, payroll withholding services for union dues of AFGE Local 1498 members, when such members were not in exclusively recognized units, while denying the same services to NFFE Local 476 members.

The Administrative Law Judge concluded that the record established that AFGE Local 1498's exclusively recognized unit at ECOM, Philadelphia, ceased to exist as a distinct, separate and identifiable unit when ECOM, Philadelphia's operations were merged with those of ECOM, Fort Monmouth, during March 1974. In this regard, he noted that any unit located at ECOM, Fort Monmouth, would be of such a substantially different nature that it would, in effect, bear no relationship to the former ECOM, Philadelphia, unit, and that an election in any such unit would be unwarranted unless an appropriate petition was filed for such a unit. Accordingly, the Administrative Law Judge recommended that the RA petition herein be dismissed.

Regarding the unfair labor practice complaint, the Administrative Law Judge noted that ECOM, Fort Monmouth, had acted in good faith by complying with an agreed upon status quo policy of maintaining dues withholding services for ECOM, Philadelphia, employees transferred to ECOM, Fort Monmouth, pending the disposition of the representation matter. As to NFFE Local 476's allegation that ECOM, Fort Monmouth's suspension of dues withholding services for members of that union who transferred out of the U.S. Army Communication Electronics School (Signal School), a tenant organization at ECOM, Fort Monmouth, to some other function at Fort Monmouth, constituted disparate treatment, the Administrative Law Judge found that the situation of ECOM, Philadelphia, employees who were transferred with their function to Fort Monmouth, and thereby might still constitute an existing unit, was basically

different from the Signal School employees herein who chose to transfer out of their existing unit to other Fort Monmouth operations rather than transfer with their functions as part of a reorganization to Fort Gordon, Georgia. He, therefore, recommended that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the cases, including the Complainant's exceptions and supporting brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations that the RA petition and the complaint be dismissed in their entirety.

A/SLMR No. 617

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY, 1/
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Activity-Petitioner

and

Case No. 32-3774(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1904, AFL-CIO

Intervenor

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

Intervenor

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1498, AFL-CIO

Party-in-Interest

DEPARTMENT OF THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-3647(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

Complainant

and

1/ The name of the Activity-Petitioner in Case No. 32-3774(RA) and the Respondent in Case No. 32-3647(CA) has been corrected to reflect the correct designation.

February 17, 1976

Party-in-Interest

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

DECISION AND ORDER

On October 3, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceedings, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint in Case No. 32-3647(CA) and the RA petition in Case No. 32-3774(RA) be dismissed in their entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

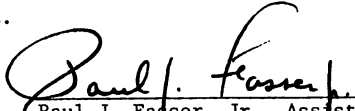
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject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

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 32-3774(RA) be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the complaint in Case No. 32-3647(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 17, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA
A/SLMR No. 618

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(2) of the Order by failing or refusing to rehire Frank J. Nowak because of his union activities.

In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge concluded that there was insufficient evidence to support a finding that Respondent had failed or refused to rehire Nowak because of his membership in, or activities on behalf of, the Complainant. In this regard, the Administrative Law Judge rejected the Complainant's allegation of union animus based on statements alleged to have been made by Nowak's supervisor, noting that the alleged statements occurred more than two years prior to the alleged unfair labor practice, and that, subsequent to the alleged statements, the supervisor had recommended Nowak for a temporary promotion and had retired prior to the alleged failure or refusal to rehire Nowak. The Administrative Law Judge also rejected the Complainant's contention that Nowak was more qualified than any of the crane operators who were hired, noting that the new hires had been properly hired from a Civil Service Commission certificate, and that, although Nowak could have been rehired by lateral transfer, the Respondent was under no obligation to do so.

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



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Respondent

and

Case No. 22-5387(CA)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On October 30, 1975, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5387(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 17, 1976

Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

.....
In the Matter of :
:
NORFOLK NAVAL SHIPYARD :
PORTSMOUTH, VIRGINIA :
Respondent :
:
and :
TIDEWATER VIRGINIA FEDERAL EMPLOYEES :
METAL TRADES COUNCIL, AFL-CIO :
Complainant :
.....

Case No. 22-5387(CA)

A. Gene Niro, Esq.
Branch Representative
Branch Regional Office of Civilian
Manpower Management
Department of the Navy
495 Summer Street
Boston, Massachusetts 02210
For the Respondent

Larry L. Eubanks, Esq.
Suite 503, N.C. National Bank Plaza
Winston-Salem, North Carolina 27101
For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the case

This proceeding is brought pursuant to the provisions of Executive Order 11491 (herein called the Order). The original complaint was filed July 11, 1974; an amended complaint was filed July 31, 1974; and a second amended complaint was filed October 9, 1974. The complaint as amended was dismissed by the Assistant Regional Director for Labor-Management Services, Philadelphia Region, but upon Complainant's request for review,

the Assistant Secretary of Labor for Labor-Management Relations found that there was a reasonable basis for the complaint and directed that it be reinstated.

The complaint as amended alleges an unfair labor practice under Section 19(a)(2) of the Order. The gravamen of the action is the charge that the Respondent discouraged membership in the Complainant union by discrimination in regard to hiring in that it failed or refused to re-hire one Frank J. Nowak, a former president and chief steward of Local 710, because of his union activities.

Pursuant to Order Reinstating the Complaint and Notice of Hearing dated March 24, 1975, and subsequent orders re-scheduling the hearing, the undersigned held a hearing in this matter on July 29, 1975, at the United States Courthouse in Norfolk, Virginia. Both parties were represented by counsel at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter, counsel for the respective parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, 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 and is a certified exclusive representative of certain classes or crafts of employees of the Respondent; Local 710 is an Operating Engineers' union affiliated with the Complainant. Nowak has been a member of that union for some 33 years and was an officer for six years. From 1971 to 1974 he was president and chief steward of the Local.

2. Nowak was employed by Respondent at its shipyard in Portsmouth, Va. continuously from 1959 until April, 1973. For seven years he was a crane operator with the title of Engineman, H. & P. In 1967, he was promoted to Crane Dispatcher

3. Prior to 1971, Nowak had made complaints to management about not receiving his fair share of overtime and about being underpaid. He had also filed complaints alleging that he had been discriminated against because he was Catholic and not a Mason, but upon investigation, such complaints were not upheld.

4. During 1971 and the early part of 1972, in his capacity as chief steward of the Local, Nowak represented eight black employees in their prosecution of grievances based on discrimination in promotion. After protracted discussions with representatives of management, the matter culminated in a conference held in February, 1972, with Admiral Adair, then commanding officer of the Shipyard, and attended by Nowak and H.R. Simpson, his group superintendent, among others. Contrary to Simpson's expressed views, the Admiral directed that the black employees be made eligible for promotion. Several days later, Simpson told Nowak in the presence of other employees that he would never, never forgive Nowak for what he had done.

5. In January, 1972, Nowak was promoted from Crane Dispatcher to Shop Planner (Heavy Duty Equipment Mechanic), but after a few weeks was restored at his own request to the position of Crane Dispatcher.

6. In March, 1972, Nowak was promoted from Crane Dispatcher (WG 11) to Operating Engineering (Hoisting Equipment Instructor) (WG 12) for a period not to exceed four months. This temporary promotion was requested by Simpson with the consent of Nowak and was approved by the public works officer, who had been one of the participants in the February meeting with Admiral Adair.

7. On May 12, 1972, Simpson retired from the Shipyard.

8. Under date of May 28, 1972, upon termination of the temporary assignment as an instructor, Nowak was re-assigned on a Reduction-in-Force to the position of Operating Engineer (Stock-piling), with the same grade and salary he had as Crane Dispatcher. He was assigned to work in the salvage yard.

9. In January of 1973, it was announced that operation of the salvage yard was to be taken over by the Defense Supply Agency. Shortly afterwards, Nowak was notified that his position was identified with that transfer of function. Nowak protested that action and a Civil Service Commission hearing was held on April 19, 1973, with respect to the identification of his position with the transfer. His protest was denied. He was separated from the Shipyard on April 22, 1973, by transfer of function to the Defense Supply Agency.

10. Since April, 1973, Nowak has been employed continuously at the Defense Supply Agency. As an employee of that Agency, he was not eligible to function as chief steward of Local 710 at the Shipyard.

11. During his years at the Shipyard, Nowak was recognized as a highly qualified crane operator, and at the Civil Service Commission hearing, the authorized personnel classification official for the Shipyard testified that he thought Nowak was unquestionably one of the most capable crane operators in the yard.

12. In October and November, 1973, Nowak filed applications for re-appointment at the Shipyard. He was assured by the commander of the yard that he would be given proper consideration for transfer from the Defense Supply Agency to the Shipyard as vacancies should occur for which he qualified.

13. In March, April and June of 1974, in response to requests of the Shipyard, the Civil Service Commission certified a total of 21 eligible candidates for the position of Crane Operator (WG 11).

14. In May, 1974, the Shipyard advertised in newspapers and on television that there were openings for skilled journeyman mechanics, among them Crane Operators.

15. Between April 21, 1974, and July 25, 1974, the Shipyard hired nine Crane Operators (WG 11), one by transfer from another Navy activity and eight from the Civil Service certifications. Nowak's name was not included in any of the Civil Service certificates and he has not been hired.

16. In the opinion of the current president of the Operating Engineers Local, three of the men hired as crane operators in 1974, are considerably less qualified than Nowak. None of the crane operators hired in 1974 were then licensed to operate the cranes used in the Shipyard.

Conclusions of Law

Section 19(a)(2) of the Order provides:

"Agency management shall not ... encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;"

Although it is suggested in Respondent's brief that Nowak's representation of other employees in grievance matters was not extensive, the evidence is overwhelming that for purposes of establishing the likelihood of discouragement of union membership by discrimination, Nowak engaged in the requisite activity on behalf of the union and Respondent had the requisite knowledge of such activity. Bearing in mind that the validity or propriety of Nowak's termination by transfer of function to the Defense Supply Agency is not here under consideration, the essential issue for determination is whether Nowak was not re-hired because of his union activities.

Since Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), is substantially the same as Section 19(a)(2) of the Order, decisions under that provision in the private sector, while not binding upon the Assistant Secretary, provide guidance in similar controversies under the Order. See, e.g., Veterans Administration, Veterans Benefits Office, A/SLMR No. 296. Consequently, the following analytical comment is applicable:

"The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section

outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

Radio Officers Union, etc. v. NLRB, 347 U.S. 17, 42-43, 33 LRRM 2417, 2427 (1954).

The test, therefore, is the "true purpose" or "real motive" in hiring or firing, and a violation of the Section requires an affirmative showing of a motivation of encouraging or discouraging union status or activity. Local 357, International Brotherhood of Teamsters, etc. v. NLRB, 365 U.S. 667, 47 LRRM 2906 (1961). Complainant thus has the burden under 29 C.F.R. §203.15 of proving by a preponderance of the evidence that in not rehiring him, Respondent was motivated by anti-union animus. See Bureau of District Office Operations, Social Security Administration, Department of Health, Education and Welfare, A/SLMR No. 563.

While direct evidence of motivation is not an indispensable element and circumstantial evidence is acceptable, the evidence must do more than give rise to a mere suspicion; it must furnish a substantial factual basis from which the fact in issue can reasonably be inferred. NLRB v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, 33 LRRM 2769 (4th Cir. 1954). In essence, the evidence from which Complainant seeks to draw an inference of animus consists essentially of Simpson's statement that he would never forgive Nowak for what he had done in taking the minority grievances right up to the Admiral (and presumably discomfitting Simpson), and the opinion of Nowak's successor as president of the Local to the effect that three of the employees hired by the Shipyard subsequent to the filing of Nowak's application for re-transfer were not as highly qualified as Nowak.

It is significant, however, that Simpson made his statement in February, 1972; that he retired from the Shipyard in May, 1972; and that in the interim, Nowak was temporarily promoted at Simpson's request. Since the alleged discriminatory conduct, (consisting of the failure to re-employ Nowak when other crane operators were hired) did not occur until the Spring of 1974, some two years later, the timing of Respondent's conduct is clearly not a circumstance from which the required

animus might be inferred. See Department of the Navy, Hunters Point Naval Shipyard, A/SLMR No. 373. In fact, the sequence of events would tend to negate such an inference.

The hiring of persons with less experience than Nowak in the operation of cranes does not of itself give rise to an inference of discrimination, other than the unavoidable exercise of selective judgment inherent in the hiring of any personnel where there is more than one applicant for a vacancy. Since the employees were hired from a Civil Service certificate, their qualifications had already been approved as required under applicable regulations. Although it was possible to hire Nowak by lateral transfer from the Defense Supply Agency, Respondent was under no obligation to do so, and in hiring other men whose names duly appeared on the certificate, Respondent cannot be said to have exercised unsound business judgment. While the Order shields employees from discrimination because of the exercise of protected activities, it should not be interpreted so as to effectuate the granting of a preference to a union official in hiring or promotion. To establish a violation, there must be sufficient proof that the non-selection was based on discriminatory considerations. Office of Economic Opportunity Region V, A/SLMR No. 477.

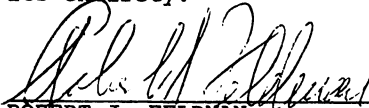
Complainant's reliance on NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967), is not justified. The circumstances of this case do not reflect discrimination so inherently destructive of important employee rights as to obviate the necessity of proof of anti-union motivation. Even if it be assumed that it was proved that Respondent engaged in discriminatory conduct which would have adversely affected employee rights to some extent, Respondent, by showing that it hired others in accordance with Civil Service rules, has sustained the burden imposed by Great Dane Trailers of establishing that it was motivated by legitimate objectives. In short, the record here is devoid of the requisite substantial evidentiary basis to support a finding of improper motivation for the failure to re-hire Nowak. See Dubin-Haskell Lining Corp. v. NLRB, 375 F.2d 568, 64 LRRM 2757 (4th Cir. 1967); Riggs Distler & Company v. NLRB, 327 F.2d 575, 55 LRRM 2145 (4th Cir. 1963);

I therefore conclude that upon all the evidence adduced, it has not been shown that the failure to re-employ Nowak constituted discrimination that discouraged membership in the union, nor that such failure discouraged membership in the

union by means of discrimination. Consequently, a violation of Section 19(a)(2) of the Order has not been proved.

RECOMMENDATION

On the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the complaint herein be dismissed in its entirety.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: October 30, 1975
Washington, D.C.

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

SOCIAL SECURITY ADMINISTRATION,
MID-AMERICA PROGRAM CENTER, BRSI,
KANSAS CITY, MISSOURI
A/SLMR No. 619

This case involved an unfair labor practice complaint filed by the Social Security Local 1336, American Federation of Government Employees, AFL-CIO, (AFGE) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by denying the AFGE's request for a chart of performance appraisals in connection with the processing of a grievance and by the alleged statements of a supervisor that an employee was denied a promotion because of her union activities.

The Administrative Law Judge recommended that the complaint be dismissed. In this regard, based on credibility determinations, the Administrative Law Judge found that the AFGE had failed to sustain its burden of proof in establishing its Section 19(a)(1) and (2) allegation that the employee involved was denied a promotion because of her union activities. As to the allegation of violation of Section 19(a)(1) and (6), while rejecting the Respondent's contention that Section 19(d) of the Order precluded the complaint, the Administrative Law Judge found that the chart was not timely requested since it was not requested until a month after the presentation of the grievance at an advisory arbitration hearing. In addition, the Administrative Law Judge noted that, in any event, the AFGE had not requested the information in a "sanitized" form. In adopting the Administrative Law Judge's Recommended Decision and Order, the Assistant Secretary noted, contrary to the dicta of the Administrative Law Judge, that if the AFGE had requested the chart in a timely manner, the fact that the information was not requested in a "sanitized" form would not warrant a denial of the request in toto, and would not require the exclusive representative to make a second request for the information in a "sanitized" form.

Under these circumstances, and noting particularly the absence of exceptions, the Assistant Secretary ordered that the unfair labor practice complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
MID-AMERICA PROGRAM CENTER, BRSI,
KANSAS CITY, MISSOURI

Respondent

and

Case No. 60-3837(CA)

SOCIAL SECURITY LOCAL 1336,
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On December 9, 1975, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge, 2/ except as modified below.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings that neither employee Gough nor Head Steward Cook requested the chart in question at the March 21, 1974, meeting and that Section Chief Harris did not say or infer that Gough's union activities had affected her performance rating or promotion, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

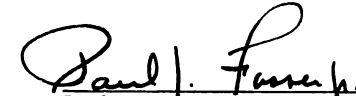
2/ On page 6 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to "Section 19(a)(b)" of the Order, rather than Section 19(a)(6). This inadvertence is hereby corrected.

I agree with the Administrative Law Judge that, under the circumstances herein, the Respondent's refusal to furnish the chart of performance appraisals was not violative of the Order as such request was made after the close of the advisory arbitration hearing involved herein, and there was no showing that receiving the requested information at that stage of the proceedings would have satisfied anything more than the Complainant's academic interest. However, I specifically reject the Administrative Law Judge's dicta that even if the request herein had been timely the Respondent would not have violated Section 19(a)(6) of the Order as such request was not for a "sanitized" version of the chart. Thus, it has been held previously that where there is a specific request for relevant and necessary information which, under normal circumstances, would be required to be produced, the fact that such information may have to be "sanitized" prior to its being made available to the employees' exclusive representative does not warrant a denial of the request in toto, and does not require that the exclusive representative make a second request for the information in a "sanitized" form. See United States Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California, A/SLMR No. 573, at footnote 1.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-3837(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 26, 1976


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

U. S. DEPARTMENT OF COMMERCE,
U. S. MERCHANT MARINE ACADEMY,
KINGS POINT, NEW YORK
A/SLMR No. 620

This case involved unfair labor practice complaints filed by United Federation of College Teachers, U. S. Merchant Marine Academy Chapter, Local 1460 of NYSUT, NEA/AFT, AFL-CIO (Complainant) alleging that Respondent, U. S. Department of Commerce, violated Section 19(a)(1) and (6) of the Order by engaging in dilatory actions in negotiating regarding economic proposals, and that Respondent, U. S. Merchant Marine Academy, violated Sections 19(a)(1), (5) and (6) of the Order by unilaterally terminating the parties' negotiated agreement and by engaging in such conduct in an effort to affect the Agency's position during bargaining.

In recommending that the complaints be dismissed in their entirety, the Administrative Law Judge concluded that the evidence established that, while the Respondents were engaged in "hard bargaining" with the Complainant, they were making a good faith effort to resolve the parties' differences. In this regard, he found that the Respondents were willing to meet and confer at reasonable times with the Complainant, and that there were many meetings between the parties at which a number of concessions were made by both sides. Further, it was noted the Respondents suggested that the services of the Federal Mediation and Conciliation Service be sought to help resolve the parties' dispute.

The Administrative Law Judge further found that the action of Respondent Academy in terminating the parties' negotiated agreement did not violate Sections 19(a)(1), (5) and (6) of the Order as the Academy did not withdraw recognition from the Complainant as the exclusive representative of the unit employees. Nor did it attempt to avoid bargaining with the Complainant. In this regard, he found that the Academy followed the procedures for termination outlined in the agreement for the purpose of negotiating a new agreement which would conform in all respects with the Executive Order.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaints be dismissed in their entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF COMMERCE,
U. S. MERCHANT MARINE ACADEMY,
KINGS POINT, NEW YORK

Respondent

and

Case Nos. 30-5454(CA) and
30-5455(CA)

UNITED FEDERATION OF COLLEGE TEACHERS,
U. S. MERCHANT MARINE ACADEMY CHAPTER,
LOCAL 1460 OF NYSUT, NEA/AFT, AFL-CIO

Complainant

DECISION AND ORDER

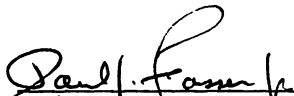
On October 31, 1975, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, both the Complainant and the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order. The Respondent also filed an answering brief to Complainant's exceptions.

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

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 30-5454(CA) and 30-5455(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
February 26, 1976


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
 SOCIAL SECURITY ADMINISTRATION, BUREAU OF
 FIELD OPERATIONS, DISTRICT OFFICE,
 MINNEAPOLIS, MINNESOTA
 A/SLMR No. 621

This case involved a petition for clarification of unit (CU) filed by the Activity-Petitioner seeking to exclude two Operations Analysts from the exclusively recognized unit. In this regard, the Activity-Petitioner contended that the Operations Analysts, a position created at the Activity in December 1974, were both management officials within the meaning of the Order and confidential employees. Contrary to the Activity-Petitioner, the incumbent exclusive representative, the American Federation of Government Employees, AFL-CIO, Local 3129, (AFGE) contended that the employees in question were neither management officials nor confidential employees and should remain in the unit.

The Assistant Secretary found that the two Operations Analysts were not management officials within the meaning of the Order. In his view, the evidence did not establish that these employees had authority to make, or influence effectively, Activity policies with respect to personnel, procedures, or programs. Thus, in regard to their official duties, the record revealed Operations Analysts spent some 80 percent of their time conducting statistical type reviews and that in the preparation of statistical analyses and other reports and recommendations the Operations Analysts served as experts or resource persons rendering resource information with respect to implementation of existing policies.

The Assistant Secretary concluded also that the evidence failed to establish that the Operations Analysts were confidential employees in that they did not serve in a confidential capacity to individuals involved in formulating and effectuating management policies in the field of labor relations.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including in the unit the employees classified as Operations Analysts.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
 SOCIAL SECURITY ADMINISTRATION, BUREAU OF
 FIELD OPERATIONS, DISTRICT OFFICE,
 MINNEAPOLIS, MINNESOTA

Activity-Petitioner

and

Case No. 51-3089(CU)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFL-CIO, LOCAL 3129

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Charles R. Gupton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, including briefs submitted by the parties, the Assistant Secretary finds:

The Activity-Petitioner, herein also called the Activity, filed a petition for clarification of unit (CU) seeking to exclude the newly created position of Operations Analyst, established nationwide by the Social Security Administration in December 1974, from the exclusively recognized unit represented by the American Federation of Government Employees, AFL-CIO, Local 3129, herein called AFGE. 2/ In this regard,

1/ Inasmuch as the instant petition was filed for the purpose of clarifying the status of certain specific employees of the Activity-Petitioner, and as the testimony presented at the hearing was directed solely to the duties of those particular employees, my findings in this proceeding are not to be deemed necessarily determinative of the status of employees in similarly designated positions in other District Offices of the Social Security Administration.

2/ On April 6, 1971, the AFGE was certified as the exclusive representative in a unit of all nonprofessional General Schedule and Wage Board employees stationed at the Social Security Administration District, Minneapolis, Minnesota.

the Activity contends that its two Operations Analysts, Muriel Brandsrud and Marie Gehl, are management officials and confidential employees and should, therefore, be excluded from the certified unit. Conversely, the AFGE contends that the aforementioned employees are neither management officials nor confidential employees and should remain in the certified unit.

The mission of the Activity involves essentially the handling of claims regarding retirement survivors, disability insurance benefits, the Medicare Program and the Supplemental Security Program. The evidence indicates that the two Operations Analysts, GS-105-10, at issue report directly to the District Manager and act in a technical resource capacity. In this regard, the record reveals that they conduct quality control and operations analysis activities in connection with workload processing and other operating concerns in the district, including its three branch offices. The evidence establishes that the Operations Analysts spend in excess of 80 percent of their time conducting statistical type reviews in which they review a random sampling of case folders, check for errors, and compile a statistical analysis to reflect the percentage of errors derived from the sampling. Although material developed by such studies may be used by supervisors in assessing individual performances, the record reveals that the primary purpose of such reviews is to detect error ratios and trends in production quality and not to evaluate work of individual employees. In addition to statistical type reviews, the Operations Analysts conduct regular and special studies on various matters regarding workload processing. The record indicates that, based on these studies, the Operations Analysts may make recommendations with respect to workload processing, training, and equipment, and that such recommendations are usually adopted by the District Manager. The record reveals also that these recommendations consist essentially of ways in which existing office procedures may be improved within established regulations and manual procedures. Further, there is evidence that the Operations Analysts may directly remind employees of procedures or directives which the employees have overlooked or failed to follow.

Based on the foregoing circumstances, I find that the Operations Analysts at issue are not management officials within the meaning of the Executive Order. Thus, in my view, the evidence establishes that such employees do not have the authority to make, or influence effectively, Activity policies with respect to personnel, procedures, or programs. Rather, I find that in their various job functions they serve as experts or resource persons rendering resource information or recommendations with respect to the implementation of existing policies. 3/

3/ See Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596; United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266; and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

As noted above, the Activity-Petitioner asserts also that the Operations Analysts are confidential employees. In this regard, it contends that Operations Analysts: (1) have consulted with the AFGE regarding "flag" procedures; 4/ (2) have attended a "closed" labor-management meeting where office problems were discussed; (3) have attended two meetings where grievances were discussed; and (4) have reviewed the Activity's conformance or nonconformance with Article 18, Safety and Health, of the parties' negotiated agreement. With regard to these contentions, the record reveals that, although an Operations Analyst was asked to check with the AFGE to obtain "input" on the "flag" procedures the AFGE took no position on the "flag" procedures and, in fact, never responded to the Operations Analyst because, in its view, the matter did not affect the working conditions or personnel practices of unit employees. In regard to the Activity's contention that the Operations Analysts participated in a "closed" labor-management meeting involving confidential labor-management matters, the record reflects that the meeting involved concerned a memorandum from the AFGE local president to the District Manager with respect to office problems as the AFGE viewed them; the Operations Analysts did not see the memorandum prior to the meeting; there is no evidence that they participated in the meeting, or that they attended in any capacity other than as resource persons to provide information with respect to operational matters raised by the AFGE's memorandum; 5/ and the memorandum in question was posted by the AFGE on its bulletin board. With respect to the contention concerning the Operations Analysts attendance at meetings where grievances were discussed, the evidence indicates that Operations Analysts have never attended meetings where formal grievances were discussed. Although Operations Analyst Marie Gehl attended one meeting where an employee threatened to file a grievance concerning employee work distribution, the evidence establishes that she attended the meeting only to provide resource information concerning agency workload distribution as outlined in a newly published Agency or Activity guide. Nor is there any evidence that the Operations Analysts would attend grievance proceedings other than as expert resource persons. 6/ Finally, as to the Activity's contention regarding the disputed employees having reviewed the Activity's conformance or nonconformance with a provision of the parties' negotiated agreement, the record reveals that Operations Analyst Marie Gehl was asked to review the safety and health provisions of the parties' negotiated agreement to evaluate compliance therewith. In my view, this direction to the Operations Analyst was no more than an instruction to perform work within the Operations Analyst's job requirements and represented the utilization of Gehl as a resource person rather than as a managerial or confidential employee. Moreover, the record reveals that the Operations Analysts have never discussed labor relations matters, such as contract proposals, with supervisors or with the District Manager.

4/ "Flag" procedures involve inter-office routing slips designed to reflect the movement of case files through the Activity's office.

5/ See Department of Health, Education and Welfare, Office of the Secretary, Headquarters, cited above.

6/ Ibid.

Accordingly, I find that the Operations Analysts are not confidential employees, inasmuch as they do not serve in a confidential capacity to an individual or individuals involved in the formulation and effectuation of management policies in the field of labor relations. ^{7/} Therefore, they may not be excluded from the exclusively recognized unit on this basis.


March 3, 1976

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

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 3129, was certified on April 6, 1971, be, and hereby is, clarified by including in such unit the Operations Analysts of the Activity's District Office.

Dated, Washington, D.C.
February 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF THE NAVY,
NAVAL ELECTRONICS LABORATORY CENTER,
SAN DIEGO, CALIFORNIA
A/SLMR No. 622

This case involved a petition filed by the California Teamsters Public, Professional and Medical Employees Union, Local 911, seeking an election in a unit of security guards employed by the Activity. The Activity took the position, in agreement with the Intervenor, American Federation of Government Employees, AFL-CIO, Local 2135, that the unit sought was not appropriate for the purpose of exclusive recognition as the employees in the claimed unit do not share a community of interest and the claimed unit will not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the unit sought by the Petitioner was not appropriate for the purpose of exclusive recognition as the claimed employees did not share a community of interest which was separate and distinct from other employees of the Security Division. Thus, all of the employees of the Security Division, including the claimed employees, shared a common mission and supervision, and essentially common areas of consideration for both promotions and reductions-in-force. Further, there was an integrated operation within the Security Division involving all of the branches, and a career ladder existed which promoted transfer within the branches as a common form of career progression. Moreover, the Assistant Secretary found that such a fragmented unit within the Security Division would not promote effective dealings and efficiency of agency operations.

Accordingly, under the circumstances herein, the Assistant Secretary ordered that the petition be dismissed.

^{7/} See Pennsylvania National Guard, Department of Military Affairs, A/SLMR No. 376; The Department of the Treasury, U.S. Savings Bond Division, A/SLMR No. 185; and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL ELECTRONICS LABORATORY CENTER,
SAN DIEGO, CALIFORNIA 1/

Activity

and

Case No. 72-5344

CALIFORNIA TEAMSTERS PUBLIC,
PROFESSIONAL AND MEDICAL EMPLOYEES
UNION, LOCAL 911 2/

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2135

Intervenor

DECISION AND ORDER

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

Upon the entire record in the subject case, including a brief filed on behalf of the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The California Teamsters Public, Professional and Medical Employees Union, Local 911, hereinafter called the Petitioner, seeks an election in a unit consisting of all security guards employed by the Activity, excluding supervisors, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and professional employees. 3/ The Activity takes the

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

3/ The unit appears as amended at the hearing.

position that the claimed unit does not meet the criteria set forth in Section 10(b) of the Executive Order. Thus, the Activity contends that the claimed unit of security guards will not ensure a clear and identifiable community of interest and that it will not promote effective dealings and efficiency of agency operations. In the Activity's view, only an Activity-wide or division-wide unit will satisfy the Section 10(b) criteria. The American Federation of Government Employees, AFL-CIO, Local 2135, hereinafter called the Intervenor, essentially agrees with the Activity's position. The Petitioner, on the other hand, contends that the claimed unit of guards is a functional unit within the meaning of Section 10(b) of the Order. In this regard, the Petitioner argues that the recent amendment of Executive Order 11491, which lifted the restriction regarding the representation of guards in mixed guard-non-guard units, should not be interpreted as requiring that guards may not be represented in separate units.

The record reveals that the Activity is engaged in a continuing program of Naval fleet improvement by increasing management usage of automated systems and reducing the size and complexity of hardware by micro-electronics application. The role of the Chief Executive of the Activity is actually filled by two persons, a military officer and a civilian technician director, who act jointly in matters affecting the Activity. Under the Chief Executive are six major departments and seventeen staff offices which employ approximately 1550 employees. The Administrative and Technical Support Department is one of the six major departments reporting to the Chief Executive and is responsible for providing Activity-wide support services. It is divided into twelve offices and divisions, one of which is the Security Division. The employees in the unit sought are found in the Security Guard Branch which is one of the four branches found in the Security Division. 4/

The primary functions of the claimed employees in the Security Guard force involve the physical security of the Activity, the enforcement of Federal regulations within the Activity, traffic control investigations, and the issuance of automobile decals. These functions are interrelated with the primary functions of the Personnel Security and Information Security Branches which involve, respectively, people-related security investigations and information-related security investigations. 5/ In addition, because of the highly classified nature of the work performed,

4/ The other branches are the Personnel Security Branch, the Information Security Branch, and the Fire Protection Force Branch. The record reflects that the only Activity employees currently included in an exclusively recognized unit are the employees of the Fire Protection Force Branch who have been represented exclusively since 1964. This unit presently is covered by a three year negotiated agreement.

5/ Specifically, the Personnel Security Branch is involved in badge issuance, visitor clearances, general personnel clearances, general security investigations, fingerprinting, and travel endorsements for visiting officers. The Information Security Branch is responsible for classification management, industrial security, safe combination and secure container control, and information security regulations.

the entire Activity is concerned with security, and, in this regard, various employees throughout the Activity are assigned specific security related functions in addition to their regular duties which overlap with the security functions of the Security Division. The specific duties of the petitioned for guards, who number some 52 of the 350 employees under the Security Division Chief, include maintaining the various gates, patrolling the Activity's perimeters, visitor clearance and escort services, night patrol of the secured areas, and Activity-wide traffic control. The record reflects that most of the above-mentioned duties are not performed exclusively by guards at the Activity. Thus, gate maintenance, perimeter patrol, and traffic control also are performed by the military and by guards employed by one of the Activity's tenants. Security within the internal working areas is maintained by personnel designated as "area checkers," and the guard force only patrols these areas at night when no one is on duty. The record reveals, in this latter regard, that security violations found in internal working areas must be reported by the guards to the Information Security Branch of the Security Division. With respect to routine visitor clearances, the claimed guards would be involved only at night when the Personnel Security Branch employees are not available. During the regular working day, the Personnel Security Branch issues the routine visitor clearances and its reception desk issues the badges to the visitors. Badges may be returned by the visitors either to the guard force or to the reception desk during the day and must be returned to the guard post at night.

The record discloses that the budget for the Security Guard Branch is allocated through the Security Division which receives an overall budget allotment for security. Therefore, any operational matters involving the expenditure of funds, such as overtime or additions to the guard force's responsibilities, must be resolved with the active participation of the Security Division Chief.

The area of consideration for promotions and reductions-in-force is Activity-wide with respect to the claimed employees and a permanent Activity-wide register has been developed to provide a large enough pool of applicants for the guard positions because of the present high rate of turnover. The record reveals that employees in non-guard positions have, as the result of past reductions-in-force, used their Activity-wide bumping rights to become guards and that guards could do the same throughout the Activity with respect to positions for which they qualify. In this connection, the only specific qualification for a guard position at the Activity is skill in the use of a handgun which guards are required to carry. ^{6/} Within the Security Division, the record discloses that guards have a career ladder which includes the possibility of their transfer to other branches of the division. Thus, a common

^{6/} Although the present guard chief is trying to establish formal training requirements for guards, the only training now available is "on-the-job."

form of career progression for a guard would include a promotion to guard sergeant or fireman as the first step in the career ladder. And the second step of the ladder for a guard sergeant could include a lateral transfer or a promotional transfer either to the Information or Personnel Security Branches or a promotion within the security guard force. On the other hand, for a fireman, the career ladder would be limited to promotion within the Fire Protection Branch.

The evidence establishes that guards are subject to the same personnel policies and practices administered by the Activity's Civilian Personnel Office as are other employees of the Security Division. In addition, guards may serve on a rotational basis as the Security Division representative on Activity-wide employee committees, they have the same Activity-wide facilities and benefits available to them as other Security Division employees, and there is evidence of active participation by guards in the Beneficial Suggestion Program which is administered Activity-wide and in which other Security Division employees also participate.

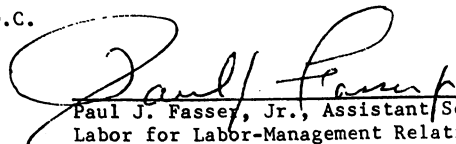
With respect to their working conditions, the record reveals that the claimed guards must wear uniforms and are subject to specific grooming standards. However, firemen in the Security Division and chauffeurs are also subject to similar grooming standards and must wear uniforms. Guards also are required to carry handguns, but they are not deputized to arrest and they have minimal authority to use handguns in the line of duty. Guards also work swing or rotating shifts, but the same is true of the firemen in the Security Division and of other groups of employees throughout the Activity, such as those in the message center, the computer center, and the micro-electronics laboratory.

Based on all of the foregoing circumstances, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition. Thus, all of the employees of the Security Division, including the claimed employees, share a common mission, common supervision, essentially common areas of consideration for purposes of promotion and reduction-in-force, and common personnel policies and practices. In addition, there is an integrated operation in the Security Division among the various branches and a divisional career ladder promotes the transfer of guards to other branches of the Security Division as a common form of career progression. Under these circumstances, I find that employees in the claimed unit do not share a community of interest separate and distinct from other employees of the Security Division. Moreover, in my view, such a fragmented unit within the Security Division would not promote effective dealings or efficiency of agency operations. Accordingly, as the unit sought is inappropriate for the purpose of exclusive recognition, I shall order that the petition herein be dismissed. ^{7/}

^{7/} This is not to say, however, that under no circumstances may a unit of guards constitute a separate appropriate functional unit within the meaning of Section 10(b) of the Order. Thus, the disposition in the instant case is based solely upon the particular circumstances involved.

IT IS HEREBY ORDERED that the petition in Case No. 72-5344 be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 3, 1976


Paul J. Fassey, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF THE AIR FORCE,
4392d AEROSPACE SUPPORT GROUP,
VANDENBERG AIR FORCE BASE, CALIFORNIA
A/SLMR No. 623

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1001 (Complainant) alleging that the Respondent violated Section 19(a)(1), (2), and (6) of the Order. The Administrative Law Judge found the Complainant was contending essentially that the Respondent followed a course of conduct of bargaining in bad faith. In this connection, the Administrative Law Judge found that the Complainant was alleging, in substance, that Respondent's bad faith was demonstrated by: (1) proposing to establish a "Personnel Policy Review Committee" (PPRC) dealing with employee-management relations and establishing similar organizations for the purpose of bypassing the Complainant in dealings with employees; (2) bypassing the Complainant's President by selecting other local officers to help develop the PPRC idea; (3) cancelling a formal negotiating session in order to hold a "consultation" meeting regarding the PPRC plan; (4) offering proposals during negotiations it "knew" would be unacceptable to the Complainant; and (5) refusing to utilize fully negotiating time by failing to discuss negotiable matters which were not on the agenda for a particular negotiating session.

The Administrative Law Judge recommended dismissal of all the allegations against the Respondent. He found, in this regard, that the Complainant had not proven by a preponderance of evidence the allegations encompassed by the complaint.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and, accordingly, ordered that the complaint be dismissed in its entirety.

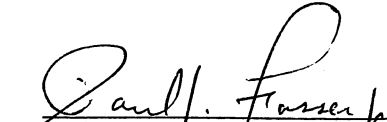
IT IS HEREBY ORDERED that the complaint in Case No. 72-4735 be, and it hereby is, dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
4392d AEROSPACE SUPPORT GROUP,
VANDENBERG AIR FORCE BASE, CALIFORNIA

Dated, Washington, D. C.
March 3, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

Respondent

and

Case No. 72-4735

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1001

Complainant

DECISION AND ORDER

On August 8, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation, the Respondent filed an answering brief, and the Complainant filed a response thereto.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Complainant's exceptions, the Respondent's answering brief, and the Complainant's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations.

March 23, 1976

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

DEPARTMENT OF ARMY,
WATERVLIET ARSENAL,
WATERVLIET, NEW YORK
A/SLMR No. 624

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2352 (Complainant) alleging essentially that the Watervliet Arsenal (Respondent) violated Section 19(a)(1) and (6) of the Order on January 10, 1975, by issuing a "Disposition Form" (DF) to its supervisors requesting that they canvass the Respondent's employees regarding vacation period preferences. The DF instructed supervisors to contact employees concerning vacation preferences under alternate assumptions, i.e. that there would be a two week shutdown of the facility in July 1975 or that no shutdown would occur.

The Administrative Law Judge concluded, among other things, that no final decision had been made to shut down the facility in July, but that, even if such a decision had been made, the Respondent was under no obligation under the Order to meet and confer on such a decision, although, it would be obligated to, upon request, meet and confer on the impact of such decision. However, he found that, assuming arguendo that a decision had, in fact, been made to shut down the plant, and that the Complainant had been informed of such decision, any obligation on the part of the Respondent to meet and confer over the impact of such decision had been vitiated by the Complainant's failure to request bargaining on impact after it had been informed of the decision.

Although the Assistant Secretary concurred in the Administrative Law Judge's recommendation that the complaint should be dismissed, he did so for different reasons than those relied on by the Administrative Law Judge. Thus, he found that the gravamen of the complaint in this proceeding was the contention that the Respondent violated the parties' negotiated agreement by, in effect, modifying vacation preferences as a result of the DF of January 9, 1975. In this regard, he noted the wording of the complaint and the statement of the Complainant's representative at the hearing concerning the Complainant's position. The Assistant Secretary stated that it has been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions

which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. Under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures.

Accordingly, and as the issue in this proceeding involved essentially a differing interpretation of the parties' negotiated agreement, the Assistant Secretary concurred in the dismissal recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF ARMY,
WATERVLIET ARSENAL,
WATERVLIET, NEW YORK

Respondent

and

Case No. 35-3511(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 2352

Complainant

DECISION AND ORDER

On December 22, 1975, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge found, among other things, that the Respondent's issuance of a "Disposition Form" (DF), dated January 9, 1975, to its supervisors on January 10, 1975, which requested that they canvass the Respondent's employees regarding their vacation preferences under two conditions (assuming either a shutdown or no shutdown of the Respondent's facility for two weeks in July 1975) was not violative of the Order. He concluded, in this regard, that no final decision had been made to shut down the facility in July, but that, even if such a decision had been made,

the Respondent was under no obligation under the Order to meet and confer on such a decision. ^{1/} Moreover, he found that, assuming arguendo that the Complainant was informed that a decision had been made to shut down the plant, any obligation on the part of the Respondent to meet and confer over the impact of such decision had been vitiated by the Complainant's failure to request bargaining on impact after it had been informed of the decision.

Although, I concur in the recommendation that the instant complaint should be dismissed, I do so for different reasons than those relied on by the Administrative Law Judge. Thus, I find that the gravamen of the complaint herein is the contention that the Respondent violated the parties' negotiated agreement by, in effect, modifying vacation preferences as a result of the DF of January 9, 1975. Thus, it was noted that not only did the complaint allege that the DF "instructions were issued despite the Union's claim of a contract violation" but, at the commencement of the hearing, the Complainant's representative indicated the Complainant's position as follows:

We do argue that any time that the employer canvass our unit members with requests to their preferences, especially in view of the fact that they had negotiated an agreement, currently in effect, on the methods for which the unit member employees would request vacations of their preference, we say that for them to contact these employees is in violation of that contractual provision. (Tr. p. 9) ^{2/}

^{1/} In reaching his conclusion that the Respondent was not obligated to meet and confer on the decision to shut down its facility, the Administrative Law Judge implied that such an action would fall within the ambit of Section 11 (b) of the Order, and that the matters set forth in Section 11(b) are "nonbargainable". Although, under the circumstances herein, I find it unnecessary to determine whether a decision to shut down a facility is a matter encompassed by Section 11(b) of the Order, it was noted that the Assistant Secretary and the Federal Labor Relations Council have held that, although agencies or activities are not obligated to negotiate with respect to matters set forth in Section 11(b) of the Order, they may negotiate on such matters and reach agreement thereon. See United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base, A/SLMR No. 571 and AFGE Council of Local 1497 and 2165, and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48.

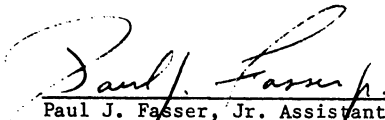
^{2/} The record indicates that the provision which the Complainant believed had been violated in connection with the issuance of the DF of January 9, 1975, was Section 3, Annual Leave, of Article XXII, Leave, (Continued)

It has been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. 3/ In those circumstances, it has been found that the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. Accordingly, and as the issue in the instant proceeding involves essentially a differing interpretation of the parties' negotiated agreement, and as, in my view, the Respondent's conduct did not constitute a clear, unilateral breach of that agreement, I concur in the dismissal recommendation of the Administrative Law Judge and shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 35-3511(CA) be, and hereby is, dismissed.

Dated, Washington, D. C.
March 23, 1976


Paul J. Passer, Jr. Assistant Secretary of
Labor for Labor-Management Relations

2/ of the negotiated agreement which states, in part, that:
The EMPLOYER will, at the employees request, allow a vacation period of not less than two consecutive weeks during the calendar year. Employees preferring a specific period shall submit their requests to their supervisors during the month of January, and their requests will be scheduled by the supervisors on or before 28 February.

3/ See Federal Aviation Administration, Muskegan Air Traffic Control Tower, A/SLMR No. 534 and General Services Administration, Region 5, Public Buildings Service, Chicago Offices, A/SLMR No. 528.

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 ARMY, WATERVLIET :
: ARSENAL, WATERVLIET, NEW YORK :
: Respondent : CASE NO. 35-3511 (CA)
: and :
: AMERICAN FEDERATION OF :
: GOVERNMENT EMPLOYEES, AFL-CIO :
: LOCAL UNION 2352 :
: Complainant :
.....

Angelo M. DiNovo
Chief of Management
Employee Relations Division
Watervliet Arsenal
Watervliet, New York
For the Respondent

Robert C. Ham
American Federation of Government
Employees, Local Union 2352
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on July 31, 1975 by the Assistant Regional Director for Labor-Management Service Administration of the U.S. Department of Labor, New York Region, a hearing in this case was held before the undersigned on August 19, 1975 at Albany, New York.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on March 7, 1975 by American Federation of Government Employees (AFL-CIO) Local 2352, (herein called the Complainant) against Department of Army, Watervliet Arsenal, Watervliet, N.Y., (herein called the Respondent).

The aforementioned complaint alleged a violation by Respondent of Sections 19(a) (5) and (6) of the Order based on management's issuance on January 10, 1975 of written instructions to supervisors directing them to canvas unit members concerning their vacation preferences. It was further alleged that these instructions were issued despite Complainant's claim of a contract violation and without regard for its request to consult on the issue. On July 30, 1975 the union filed an amended complaint which alleged a violation by Respondent of 19(a) (1) and (6) of the Order, based on the same factual allegations, and deleted the 19(a) (5) violation. Respondent denies the commission of any unfair labor practice.

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 witness. Thereafter the parties filed briefs which have been duly considered.

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

Findings of Fact

1. At all times material herein Complainant union is, and has been, the collective bargaining representative of the Respondent's civilian employees paid from appropriated funds at Watervliet Arsenal excluding certain specified classifications. The most recent contract between the parties became effective February 26, 1973, by its terms ran for two years, and still governs the relationship between the parties.

2. Article XXII, Section 3 (Annual Leave), of the aforesaid contract provides, inter alia, that employees will receive a vacation of not less than two consecutive weeks during a calendar year; that employees preferring a specific period shall submit their requests to their supervisors during January, and their requests will be rescheduled by the supervisor on or before February 28.

3. In 1969 or 1970 Respondent adopted a practice whereby it scheduled an annual vacation shutdown for two weeks during the month of July, and employees took their vacations at that time.

4. Since at least 1971 Respondent has, with consent on the part of Complainant, distributed employee lists to supervisors and requested that the latter contact employees for the purpose of scheduling their vacations. Moreover, there was no precedent for consultation with the union on this procedure as long as it was limited to vacation scheduling. 1/

5. Due to widespread dissatisfaction with scheduling vacations during a two week shutdown in July, a Joint Committee was appointed in late 1972 composed of representatives from both management and labor to consider the advisability of a complete shutdown and make appropriate recommendations.

6. On December 20, 1972 a meeting of the Joint Committee was held at which time the union representatives were notified by Respondent that a DF 2/ would issue regarding a vacation survey to be taken among employees by supervisors. This survey, which actually commenced the same date, was conducted by supervisors to ascertain which periods employees preferred for vacations in the event of a shutdown between July 16-28, 1973 or if no shutdown occurred. Respondent decided on February 7, 1973, as a result of the survey conducted, to shutdown the facilities during July 16-28, 1973 for vacations. 3/ There was no shutdown in July, 1974.

7. A DF dated December 26, 1974 was issued to supervisors by Respondent directing them to contact each employee regarding his vacation preference, to record it during January 1975 and to notify the employees of approval or disapproval by February 28, 1975. While management states it did send a copy of the union, the record reflects it was not received by the bargaining agent. Further, Respondent admits it did not consult with the union regarding the December 1974 DF. 4/

1/ See Complainant's letter to Department of Labor, Labor-Management Services, dated November 19, 1973. (Respondent's Exhibit 2).

2/ The DF (Disposition Form) was issued on December 20, 1972.

3/ The union herein filed a complaint against management in Case No. 35-2932 alleging the survey was conducted without consulting with the union. It was dismissed on the ground that the union did not demand consultation or negotiation on the survey.

4/ It is Respondent's position that there was no obligation to consult as to this DF in view of the accepted practice to solicit employees re their vacation preferences. The union allegedly agreed to this procedure when confined to vacations scheduling.

8. On January 9, 1975 management called Stephan V. Carknard, Complainant's president, and George Smith, chief steward of the local union, to its office. They met with Godbout and Alber of the MER Division and were shown a DF dated January 9, 1975 to be issued regarding the canvassing of employees as to vacation preference. Godbout stated it was a change from the December 1974 DF, and Carknard replied he never saw or knew about the 1974 D.F. At this time management furnished the union with copies of both DFs. 5/ The union objected to the contents of the January 9 DF, and voiced particular objection to the proposed shutdown for two weeks as outlined in the said DF.

9. After meeting with management on the morning of January 9, 1975, Carknard called Robert C. Ham, who was president of the union in December 1974, and asked him about the earlier DF issued that December. Ham replied he had no knowledge thereof. Whereupon Carknard called the MER division and requested a consultation meeting regarding the January 9, 1975 DF. A meeting was scheduled for January 16 to discuss the January DF since the union was concerned that the DF had been distributed without consultation, and it also objected to a unilateral canvassing of employees re vacation preferences. The meeting was changed to January 10 instead of the scheduled date since Carknard felt the issue would become moot if the DF went out on January 10 before the parties discussed the matter.

10. Prior to the meeting on January 10, Carknard learned that the January 9 DF had been distributed that morning. At about 2:55 p.m. on January 10 the parties met to consult in accordance with the union's request. Carknard stated at the meeting that the said DF was a contract violation as well as violative of the Executive Order, and the union objected to its distribution without first consulting the union. Major Hildebrandt, representing Respondent, explained the decision had been made to shutdown for vacations. Ham stated that a DF was not necessary, that the employee was required to request leave in accordance with the contract terms. The union representative also complained that the January 9 DF was issued before the union was consulted.

5/ The January 9, 1975 DF rescinded the December 26, 1974 DF. It instructed supervisors to contact each employee re his preference for vacations under two conditions: a) assume a shutdown (which historically occurred the last two weeks of July) plus any additional vacation time accrued; b) assume no shutdown, in which case the employee should schedule all accrued vacation time. If employee has no preference, he should initial and indicated "no preference at this time." (Joint Exhibit No. 2)

Conclusions

Complainant's chief contention is that the January 9, 1975 DF contained matters which were bargainable and should have been discussed with the union before its distribution. It is argued that the proposed shutdown for vacations in July 1975, as well as taking accrued leave, constituted a change in personnel policies and practices affecting working conditions. Therefore, the union asserts, the change renders useless the provision in the negotiated agreement (Article XXII) affording employees a preference as to vacation periods.

While management is obliged to bargain with the exclusive representative on matters affecting working conditions - as set forth in Section 11(a) of the Order, certain matters are exempt from this mandate under 11(b) thereof. Thus, the latter section makes non-bargainable various matters with respect to, inter alia, the numbers, types, and grades of positions or employees assigned to an organizational unit, and the work project or tour of duty. The Assistant Secretary has construed this section as permitting an employer to close down facilities without being obligated to discuss the decision with the bargaining agent. See Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 388; U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261.

In the case at bar, the decision to shutdown the arsenal during the last two weeks in July, 1975 for vacation was, under the rationale adopted in prior cases, not one which Respondent was required to discuss with Complainant. The shutdown itself was not, under the Order, a bargainable subject and the historical practice of closing the premises for two weeks in July, for vacation purposes, would not run afoul of 19(a)(6) of the Order. Accordingly, I would conclude that the proposed resumption of this practice in July, 1975 was not a decision which management was obliged, in any event, to discuss with Complainant herein.

It may well be, however, that the closing down for two weeks in July, 1975 would affect some employees who desired to take vacations at another time. In such an instance, these individuals would necessarily be required to use two weeks leave at the designated period. Thus, the decision itself might have an impact upon the employees. In this posture the Complainant would have a legitimate concern in discussing with management the effect which the July shutdown would have

upon employees. 6/ However, at the time the January 9 DF was distributed, no decision had been reached to close down, and the instructions to the supervisors were to ascertain vacation preferences in the event of such action. Further, at the meeting in January 10 no specific request was made by Complainant's representatives to consult re the impact of the proposed shutdown. Carknard referred thereto to the fact that the issuance of the DF was a contract violation and violative of the Order. Though he expressed concern as to the proposed shutdown, Carknard did not seek a discussion as to the possible effect upon employees and took the position that, in view of the prior distribution that morning of January 10, further consultation was meaningless. The failure, therefore, to ask Respondent to bargain on the impact of a decision - assuming arguendo, that Major Hildebrandt had informed Carknard on January 10 that the decision had been made to shutdown in July - militates against finding a refusal to confer thereon. See U.S. Department of Air Force, Norton Air Force Base, supra. Moreover, when the decision is ultimately announced by management to close down during July, 1975, Complainant will have ample opportunity to ask Respondent to meet and confer on its effect upon the employees. A failure to consult at that time may give rise to a cause of action under the Order. Accordingly, I would conclude that the facts do not support a finding that Respondent refused, upon request, to consult with Complainant upon the effect of the proposed shutdown in violation of 19(a)(6) of the Order. 7/

With respect to the issuance of the January 9 DF, Complainant asserts that this violated the Order since it was a unilateral action which Respondent did not discuss with the bargaining representative. While several decisions have frowned upon an employer's contacting employees directly and by-passing the union representative, I find them distinguishable from the instant case. Thus, in the Wadsworth Hospital Center case, supra, a questionnaire sent by management to employees specifically required employees affected by a closing down of facilities to commit themselves as to whether they would accept

6/ See Department of the Army, Armament Command, Rock Island Arsenal, Rock Island, Illinois, A/SLMR No. 527

7/ Though not free from doubt, it is assumed that the Complaint allegations are broad enough to encompass an alleged refusal to meet and confer with respect to the effect of the proposed decision to shutdown in July, 1975.

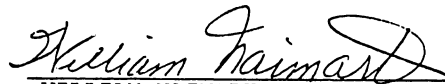
a transfer or a detail. Likewise in Veterans Administration, Veterans Administration Center, Hampton, Virginia, A/SLMR No. 385. The employer dealt with employees directly in regard to a promotion of several employees and did not advise their union representative. In each instance the activity dealt directly with employees in regard to matters about which the employer was obliged to consult with the union. Accordingly, it was held that such by-passing the union tended to undermine the representative's status.

Nevertheless, not all dealings with employees by management are violative of the Order. As stated by the Federal Labor Relation Council in Department of the Navy, Naval Air Station, Fullon, Nevada, FLRC No. 74A-80 not all communications with unit employees over matters relating to the bargaining relationship are proscribed by the Order. The Council concluded only those communication which amount to an attempt to by-pass the bargaining representative and negotiate with the employees, or to urge employees to pressure the union as to a course of action, are so proscribed.

In the instant matter the canvassing of employees re vacation preferences does not, in my opinion, constitute an attempt to disregard the union herein and derogate from the obligation to bargain with the representative. The solicitation of employee's preferences for vacation periods has been an established practice for years. Moreover, it was accepted by Complainant in so far as scheduling of vacation was concerned as being within the framework of Article XXII of the contract between the parties. I do not consider it less acceptable because the January 9 DF solicited a preference for vacation periods in the event of a shutdown during the last two weeks in July, 1975. If management had the right to shutdown during the latter period without discussing the decision with the Complainant, it had a concomitant right to ascertain the preferences of employees for vacation in the event of such an action. To this end, the issuance of the last DF was neither changing the vacation time granted employees under the contract nor dealing directly with employees in regard to conditions of employment. Thus, I conclude that the issuance of such instructions to supervisors on January 10, 1975 was not an attempt to by-pass the bargaining representative in violation of 19(a)(6) of the Order.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Department of Army, Watervliet Arsenal, Watervliet, New York be dismissed in its entirety.


WILLIAM NAIMARK
Administrative Law Judge

Dated: December 21, 1975
Washington, D.C.

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
PUERTO, RICO
A/SLMR NO. 625

This case involves a petition for clarification of unit filed by the American Federation of Government Employees, AFL-CIO, Local 3534, (AFGE) seeking to clarify the description of its existing unit in 3 Bureau of Hearings and Appeals (BHA) offices located in San Juan, Ponce and Mayaguez, Puerto Rico, respectively, by including in the unit the Secretary to the Administrative Law Judge In Charge (ALJIC) in each of the aforementioned 3 offices. The Activity contended that the Secretaries are confidential employees and should be excluded from the unit.

The Assistant Secretary found that employees designated as Secretary to the ALJIC in each of the BHA offices involved herein are confidential employees inasmuch as they act in a confidential capacity to an official who, in his capacity as head of a BHA office, is involved in effectuating management labor relations policies. He noted that each Secretary to the ALJIC in the subject BHA offices has regular access to personnel files which are confidential, oversees promotion reports and evaluations, handles correspondence on unit employee grievances, and prepares memoranda on employee-employer relations relating to an ALJIC's responsibility for labor relations.

Accordingly, the Assistant Secretary ordered that the unit be clarified by excluding the employee designated as Secretary to the ALJIC in each of 3 BHA offices in Puerto Rico.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
PUERTO RICO 1/

Activity

and

Case No. 37-1489(CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL UNION 3534,
SAN JUAN, PUERTO RICO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition 2/ duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Fred Azua, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

The Petitioner, American Federation of Government Employees, AFL-CIO, Local Union 3534, (AFGE) seeks clarification of an existing exclusively recognized unit by clarifying the status of employees designated as Secretary to the Administrative Law Judge In Charge (ALJIC). In this regard, the AFGE contends that employees designated

1/ The name of the Activity appears as amended at the hearing.

2/ The petition herein was amended at the hearing to include the Secretary to the Administrative Law Judge In Charge in San Juan, Puerto Rico.

as Secretary the ALJIC should be included in the existing exclusively recognized unit. On the other hand, the Activity takes the position that these employees perform confidential labor-management duties which require their exclusion from the unit.

The Activity is engaged in the hearing and deciding of appeals and cases for the Social Security Administration under Title 2 of the Social Security Act and is part of Region II of the Bureau of Hearings and Appeals (BHA) in New York. Region II is under the administrative direction of the Regional Chief Administrative Law Judge in New York and is comprised of 21 offices in the states of New York and New Jersey, the Virgin Islands and the Commonwealth of Puerto Rico. There are 3 Region II BHA offices in Puerto Rico located in San Juan, Ponce and Mayaguez, respectively. Each office is headed by an ALJIC. The AFGE is the exclusive representative of a unit of professional and non-professional employees in the aforementioned 3 BHA offices. 3/

The record reveals that the subject ALJIC's formulate and effectuate labor relations policy. Thus, each ALJIC is authorized to adjust grievances at the second step; has overall personnel and administrative responsibility for his individual office; and is a member of the management team specifically designated to conduct labor negotiations on an island-wide basis for the BHA in Puerto Rico. Additionally, the ALJIC in San Juan has dealt with the AFGE in formulating a consent election agreement; a memorandum of understanding regarding further negotiations; leave policy for union officials; and a dues withholding services agreement. Moreover, he acts as the on-site labor relations official in Puerto Rico for Region II of the BHA wherein he regularly develops labor relations policy in coordination with the Regional Chief Administrative Law Judge for the BHA in New York and with the ALJIC's in Ponce and Mayaguez.

The record reveals that the San Juan BHA office contains approximately 60 employees, whereas the Ponce and Mayaguez BHA offices have approximately 13 employees, and that each of the three offices has one employee designated as Secretary to the ALJIC. In addition to typing decisions and correspondence, keeping a master docket of cases, and having overall responsibility for maintaining official files, the Secretaries to the ALJIC handle records relating to personnel and labor relations in their particular office. In this latter regard, the record shows that they regularly have access to personnel files which are confidential, oversee promotion reports and evaluations, handle correspondence on unit

3/ The AFGE was certified on July 12, 1974, as the exclusive representative of a unit of all professional and nonprofessional employees of the BHA offices herein, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, temporary intermittent employees, confidential employees, management officials, and supervisors and guards, as defined by the Order.

employee grievances, and prepare memoranda on employee-employer relations relating to an ALJIC's responsibility for labor relations.

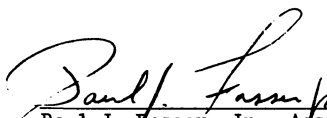
March 23, 1976

Under these circumstances, I find that the Secretary to the Administrative Law Judge In Charge at each of the 3 BHA offices herein are confidential employees inasmuch as they act in a confidential capacity to an official who, in his capacity as the head of a BHA office, is involved in effectuating management policies in the field of labor relations. 4/ Accordingly, I shall exclude the Secretary to the Administrative Law Judge In Charge in each of the 3 BHA offices in Puerto Rico from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local Union 3534, was certified as the exclusive representative on July 12, 1974, at the Bureau of Hearings and Appeals Offices in San Juan, Ponce and Mayaguez, Puerto Rico, respectively, be, and hereby is, clarified by excluding from said unit the employees designated as Secretary to the Administrative Law Judge In Charge in the aforementioned Bureau of Hearings and Appeals Offices.

Dated, Washington, D. C.
March 23, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

UNITED STATES ARMY,
CRIMINAL INVESTIGATION COMMAND
THIRD REGION,
FORT GILLEM, FOREST PARK, GEORGIA
A/SLMR No. 626

This case arose as a result of a petition filed by the American Federation of Government Employees, AFL-CIO, Local 81, (AFGE) seeking an election in a unit of employees of the Criminal Investigation Command, Third Region, Fort Gillem, Georgia. The Activity took the position that the claimed unit was inappropriate. In this regard, it contended that the appropriate unit would consist of the Criminal Investigation Command nationwide, or, alternatively, each of the Activity's field offices. It further contended that, pursuant to Section 3(b)(3) and (4) of the Order, it was exempt from the provisions of the Order due to its investigative mission. The Activity also asserted that, in view of a Department of Defense directive, its employees located in the Panama Canal Zone should be excluded from any unit found appropriate.

The Assistant Secretary found that the evidence adduced during the hearing in this case did not provide a sufficient basis upon which a decision could be made regarding the appropriateness of the unit sought. In this regard, he noted, among other things, that there was insufficient evidence with respect to employee work contacts, personnel and labor relations policies, and the degree of authority granted to the Activity and to each of its individual field offices. In view of a lack of evidence, the Assistant Secretary also made no findings with respect to the Section 3(b)(3) and (4) issues as well as the issue concerning the exclusion of the Activity's Panama Canal Zone employees.

Under the foregoing circumstances, the instant case was remanded to the appropriate Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence.

4/ Cf. Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY,
CRIMINAL INVESTIGATION COMMAND,
THIRD REGION,
FORT GILLEM, FOREST PARK, GEORGIA

Activity

and

Case No. 40-6506(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 81

Petitioner

DECISION AND REMAND

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

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

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 81, hereinafter called AFGE, seeks an election in a unit of all employees of the Third Region of the United States Army Criminal Investigation Command, excluding professional employees, management officials, criminal investigators, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. The Activity contends that the employees sought do not share a clear and identifiable community of interest and that the proposed unit would not promote effective dealings or efficiency of agency operations. In this regard, it takes the position that the appropriate unit would consist of all employees of the Criminal Investigation Command nationwide, or, in the alternative, all employees of each of the Activity's individual field offices. The Activity further maintains that, in view of its investigative mission,

the employees in the petitioned for unit should, under Sections 3(b)(3) and 3(b)(4), be exempt from the provisions of the Order. 1/ Additionally, if the Assistant Secretary finds any unit appropriate, the Activity takes the position that, under Section 3(c), its employees located in the Panama Canal Zone should be excluded from any such unit. 2/

The Activity, which is headquartered at Fort Gillem, Georgia, is one of three regions of the Criminal Investigation Command throughout the United States. The record reveals that the mission of the Activity is to provide criminal investigation support to Army elements located within the states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee; parts of the states of Texas and Kentucky; the territory of Puerto Rico; and the Panama Canal Zone. The Activity has thirteen field offices and eight branch and resident offices which are subordinate to the field offices. While, as noted above, the mission of the Activity is to provide investigative support to certain Army elements, the record discloses that the investigative functions are carried out by military personnel. Thus, the only civilian employees of the Activity who would be eligible for inclusion in the petitioned for unit are the approximately 52 clerical employees located throughout the Third Region.

The record reveals that the employees in the claimed unit have similar duties, i.e., performing stenographic and typing duties in connection with the investigation of criminal cases. However, the record is unclear with respect to the extent of work contacts, if any, that exist between the employees of the various field branch and resident offices in the Activity or between such employees and employees in other regions of the Criminal Investigation Command. Further, the

1/ Section 3(b)(3) of the Order provides, in effect, that employees of any agency, or any office, bureau, or entity within an agency which has as a primary function intelligence, investigative, or security work may be exempted from the coverage of the Order (except Section 22) when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations. Section 3(b)(4) of the Order provides, in effect, that employees of 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 or performance of their official duties may be exempted from the coverage of the Order (except Section 22) when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency.

2/ Section 3(c) of the Order provides, in effect, that the head of an agency may, in his sole judgment, suspend any provision of the Order (except Section 22) with respect to any agency installation or activity located outside the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

March 23, 1976

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

record is ambiguous with regard to the commonality of personnel and labor relations policies affecting the employees in the unit sought. Thus, while the record indicates that personnel policies are common throughout the Region, it does not establish what the common personnel policies are, and whether they are unique to the Activity or are uniform throughout the entire Criminal Investigation Command. Nor does the record disclose who is responsible for establishing and implementing such policies at the Regional and/or Command levels or the degree of authority delegated by the Command to the Activity and to its individual field offices.

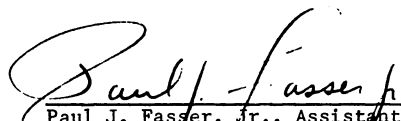
As noted above, the Activity contends that, based on Section 3(b)(3) and 3(b)(4) of the Order, the claimed employees should be exempted from the coverage of the Order. However, to be granted such an exemption it has been held that the head of an agency must clearly indicate that the provisions of the Order cannot be applied in a manner consistent with national security requirements and considerations or the internal security of the agency. ^{3/} In the instant proceeding, although the Activity alleged that it had sought a Section 3(b)(3) and (4) determination from the Secretary of the Army, there is no evidence that such determination had been rendered as of the date of the hearing in this matter.

Under all of these circumstances, I find that the record does not provide an adequate basis upon which to determine the appropriateness of the unit sought by the AFGE. ^{4/} Therefore, I shall remand the subject case to the appropriate Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence as to the appropriateness of the claimed unit.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Assistant Regional Director.

Dated, Washington, D. C.
March 23, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{3/} See NASA Management Audit Office, A/SLMR No. 125; Federal Aviation Administration, Department of Transportation, A/SLMR No. 173; and Naval Electronic Systems Command Activity, Boston, Massachusetts, FLRC No. 71A-12.

^{4/} Although the Activity alleged that, pursuant to a Department of Defense directive, its employees located in the Panama Canal Zone are not subject to coverage under the Order, it has failed to offer such a directive into evidence. For the Assistant Secretary to consider such an exclusion, the appropriate directive and any related evidence thereto should be offered and made a part of the record.

DEPARTMENT OF THE NAVY,
U.S. NAVAL STATION and
NAVAL AMPHIBIOUS BASE,
SAN DIEGO, CALIFORNIA, and
CORONADO, CALIFORNIA
A/SLMR No. 627

This case arose as a result of two petitions filed by the California Teamsters, Public, Professional and Medical Employees Union, Local 911, International Brotherhood of Teamsters (IBT) seeking a unit of all police, guards, and detectives of the U.S. Naval Station, San Diego, California and unit of all guards or, alternately, guards and police at the Naval Amphibious Base, Coronado, California. While the Naval Amphibious Base acknowledged that the petition for the claimed unit of guards was filed timely, the Naval Station contended that the petition for the claimed unit of guards, police and detectives was filed untimely because a valid negotiated agreement existed between it and the International Federation of Federal Police (IFFP) at the time of filing which served to bar the petition.

With respect to the alleged agreement bar, the Assistant Secretary found that the IFFP was defunct with respect to its units at the Naval Station and the Naval Amphibious Base. In this regard, the Assistant Secretary noted particularly that the units involved had no dues paying members of the IFFP; that they had no local officers; and that the IFFP declined to appear at the hearing in this matter and affirmatively disclaimed interest in representing the employees in its exclusively recognized units. Viewing the IFFP's defunctness as an "unusual circumstance" within the meaning of Section 202.3(c)(3) of the Regulations, the Assistant Secretary found that there was no agreement bar to the filing of the IBT's petition for the claimed unit at the Naval Station.

Further, contrary to the Activities' contentions, the Assistant Secretary found that the claimed unit at the Naval Station and a unit of guards, police and detectives at the Naval Amphibious Base constituted functional, homogeneous groupings of employees sharing communities of interest separate and distinct from other employees of the respective Activities. In this regard, the Assistant Secretary noted that the guards, police, and detectives at each Activity are engaged in an integrated function, under common overall supervision, and are charged with a common mission. Further, they are subject to uniform personnel policies, enjoy common working conditions and job benefits, have direct job-related contacts and a basic similarity of job classifications and skills. In addition, the

Assistant Secretary found that the aforementioned units would promote effective dealings and efficiency of agency operations. In this regard, he noted that the Activities addressed themselves primarily to the merits of including the security personnel in existing units of General Schedule employees, rather than adducing countervailing evidence specifically related to the impact of the claimed units on effective dealings and efficiency of agency operations. Further, they failed to adduce specific countervailing evidence as to a lack of effective dealings and efficiency of agency operations experienced with respect to previously existing units of security personnel as well as existing units at the Activities.

Accordingly, the Assistant Secretary directed that elections be conducted in the units found appropriate.

A/SLMR No. 627

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

DEPARTMENT OF THE NAVY,
U. S. NAVAL STATION,
SAN DIEGO, CALIFORNIA

Activity 1/

and

Case No. 72-5346(RO)

CALIFORNIA TEAMSTERS, PUBLIC,
PROFESSIONAL AND MEDICAL
EMPLOYEES UNION, LOCAL 911,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner 2/

DEPARTMENT OF THE NAVY,
NAVAL AMPHIBIOUS BASE,
CORONADO, CALIFORNIA

Activity 3/

and

Case No. 72-5378(RO)

CALIFORNIA TEAMSTERS, PUBLIC,
PROFESSIONAL AND MEDICAL
EMPLOYEES UNION, LOCAL 911,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Thomas R. Wilson. The Hearing Officer's rulings made at the hearing are free from pre-judicial error and are hereby affirmed.

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- 1/ The name of this Activity appears as amended at the hearing.
2/ The name of the Petitioner appears as amended at the hearing.
3/ The name of this Activity appears as amended at the hearing.

Upon the entire record in these cases, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activities. 4/

2. In Case No. 72-5346(RO), the California Teamsters, Public, Professional and Medical Employees Union, Local 911, International Brotherhood of Teamsters, herein called the IBT, seeks an election in a unit of all security police, guards and detectives employed by the U.S. Naval Station, 11th Naval District, San Diego, California, (Naval Station), excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

In Case No. 72-5378(RO), the IBT seeks an election in a unit of all security guards employed by the U.S. Naval Amphibious Base, Coronado, California, (Naval Amphibious Base), excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order. At the hearing in this matter, the IBT indicated that, in the alternative, it would be willing to proceed to an election in a unit which would include all security police and guards at the Naval Amphibious Base.

While the Naval Amphibious Base acknowledges that the petition in Case No. 72-5378(RO) was filed timely, the Naval Station contends that the petition in Case No. 72-5346(RO) was filed untimely because a valid negotiated agreement existed at the time of filing which served to bar such petition. In addition, both Activities assert that the proposed units in Case Nos. 72-5346(RO) and 72-5378(RO) are inappropriate because the claimed employees do not share clear and identifiable communities of interest separate and distinct from other employees of the respective Activities and because the proposed units will not promote effective dealings and efficiency of agency operations. Conversely, the IBT maintains that its petition in Case No. 72-5346(RO) should be considered as having been timely filed because the alleged incumbent labor organization, IFFP, is defunct. In addition, the IBT asserts that the employees in the proposed units share clear and identifiable communities of interest separate and distinct from other employees of the respective Activities.

As noted above, in 1973 the IFFP was certified as the exclusive representative for a unit of guards and policemen at the Naval Station, and a unit of guards at the Naval Amphibious Base. The parties did not enter into

4/ The petitions and Notice of Hearing in this matter were served on the International Federation of Federal Police, herein called IFFP, which was certified in 1973 as the exclusive representative for a unit of civilian guards and policemen at the U.S. Naval Station, San Diego, California, and a unit of guards at the Naval Amphibious Base, Coronado, California. However, because the IFFP declined to appear at the hearing in this matter and disclaimed interest in representing the employees in the aforementioned units, its status as an intervenor herein is hereby denied. See, in this regard, Section 202.5(a) of the Assistant Secretary's Regulations.

a negotiated agreement covering the guards at the Naval Amphibious Base. However, the record reflects that the IFFP and the Naval Station executed a three-year negotiated agreement dated July 13, 1973, covering the latter's guards and policemen. The evidence further establishes, in this regard, that following the appointment of two stewards in 1974 at a meeting convened by the IFFP Area Administrator, no further local union meetings were held with respect to the units at the Naval Station and the Naval Amphibious Base. Nor were elections of officers conducted. The record also reflects that the IFFP National Office took no affirmative action to administer the negotiated agreement with the Naval Station or to represent any of the unit employees in its exclusively recognized units at the latter facility or at the Naval Amphibious Base. Further, all remaining dues paying members of the two IFFP units revoked their dues authorizations in September 1974.

Under all of the above circumstances, I find that the IFFP is defunct with respect to its units at the Naval Station and the Naval Amphibious Base. In this regard, it was noted particularly that the units involved have no dues paying members of the IFFP and no local officers. Moreover, the IFFP declined to appear at the hearing in this matter and affirmatively disclaimed interest in representing the employees in its exclusively recognized units. Accordingly, I find that, the IFFP is, in fact, unwilling to represent the unit employees and, therefore, is defunct. 5/ In view of the defunctness of the exclusive representative, which, in my view, constitutes an "unusual circumstance" within the meaning of Section 202.3(c)(3) of the Assistant Secretary's Regulations, I find additionally that there was no agreement bar to the filing of the IBT's petition in Case No. 72-5346(RO).

Case No. 72-5346(RO)

The record reflects that the mission of the Naval Station, which is under the direction of a commanding officer, is to provide logistics support to the operating forces of the U.S. Navy and to other assigned activities and commands. 6/ A consolidated Civilian Personnel Office provides personnel services to the Naval Station, as well as to 31 other activities, including the Naval Amphibious Base. Comprised of five divisions, the Security Department, under the direction of a security officer, is one of 11 major departments at the Naval Station. Of the employees in the petitioned for unit, some five detectives work in the Investigations Division and some 85 guards and 25 police in

5/ See Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, in which the Assistant Secretary found a labor organization to be defunct "when it is unwilling or unable to represent the employees in its exclusively recognized or certified unit." See also U. S. Naval Air Station, New Orleans, Belle Chasse, Louisiana, A/SLMR No. 520.

6/ The Naval Station employs some 395 civilians, of whom 53 are in Wage Grade classifications and the remainder in General Schedule classifications, including all civilian employees of the Security Department.

the Law Enforcement Division. In addition, the Security Department employs one clerk in the Identification Division, two clerks in the Administrative Support Division and some 45 firefighters in its Fire Protection Division, as well as a complement of enlisted military personnel. 7/

While all Naval Station employees are required to maintain vigilant security practices, particularly in their work areas, the evidence establishes that the primary active responsibility for providing physical security and law enforcement for the entire Naval Station is delegated to the guards, police, and detectives of the Security Department. In this connection, the record reflects that the guards in the Law Enforcement Division are responsible for controlling crowds; for patrolling the Activity for unauthorized entry, vandalism or other security threats; for manning the perimeter gates; for controlling motor and pedestrian traffic; and for investigating traffic accidents. Similarly, the police in the Law Enforcement Division patrol the Activity maintaining law and order; investigate crimes, traffic accidents and personal injuries; interview informants and complainants; and provide written reports on delegated assignments. In the Investigation Division, the detectives are assigned the duties of investigating traffic accidents, personal injury claims and violations of regulations and laws, as well as conducting physical security surveys and background investigations of non-Civil Service personnel.

Although detectives are recruited more selectively than guards and police, the record reflects that the overlapping and complementary responsibilities of the Law Enforcement and Investigations Divisions necessitate close cooperation among the police, detectives and guards of the Security Department. Further, the evidence establishes that they all are required to wear and achieve proficiency with firearms and, in this regard, receive 40 hours of instruction at a police academy in self-defense techniques and security responsibilities.

Under the foregoing circumstances, I find that the employees in the petitioned for unit constitute a functional, homogeneous grouping of employees who share a community of interest separate and distinct from the other employees of the Naval Station. Thus, the record reflects that the employees in the petitioned for unit are engaged in an integrated function, under common overall supervision, and are charged with a common mission. Further, they are subject to uniform personnel policies, enjoy common working conditions and job benefits, have direct job-related contacts and a basic similarity of job classifications and skills. Specifically, the evidence establishes that the guards, police and detectives in the Security Department have a common primary mission of providing law enforcement and physical security at the Activity, that they cooperate closely in performing their security duties, and that they receive special police academy training

7/ The International Association of Federal Firefighters, Local F-33, represents exclusively a unit of firefighters in the Fire Protection Division. In addition, the American Federation of Government Employees, Local 1211, AFL-CIO, herein called AFGE, is the exclusive representative for three units of Naval Station employees and the National Federation of Federal Employees, Local 63, is the exclusive representative for a unit of employees in its Special Services Department.

and carry firearms on duty. Accordingly, and noting that Section 10(b) of the Order specifically provides, in part, that a unit may be established on a functional basis, I find that the employees in the petitioned for unit possess specialized skills and interests different from other employees of the Activity that warrant their inclusion in a separate unit.

Moreover, I find that such a functional unit will promote effective dealings and efficiency of agency operations and that the Naval Station's contentions to the contrary are, at best, speculative and conjectural. In this connection, it was noted that, in considering the question of effective dealings and efficiency of agency operations, the Naval Station addressed itself primarily to the merits of a residual unit of General Schedule employees, rather than adducing evidence specifically related to the impact of the claimed unit on effective dealings and efficiency of agency operations. Further, it did not adduce specific countervailing evidence as to any lack of effective dealings and efficiency of agency operations experienced with respect to the exclusively recognized units currently in existence at the Naval Station. Indeed, it was noted that from 1967 to 1970 a unit of guards and police at the Naval Station had been represented exclusively by the AFGE and, further, that the Naval Station specifically contended in this proceeding that a viable bargaining relationship, including a negotiated agreement, existed between the IFFP and the Naval Station with respect to the latter's guards and police.

Accordingly, under all of the above circumstances, I find that the petitioned for unit is appropriate for the purpose of exclusive recognition and, therefore, I shall direct an election in the following unit:

All security guards, police and detectives of the Security Department of the U.S. Naval Station, San Diego, California, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, and supervisors as defined in the Order.

Case No. 72-5378(RO)

The record reflects that the mission of the Naval Amphibious Base, which is under the direction of a commanding officer, is to provide administrative and logistic support for armed forces trained in special and unconventional warfare. 8/ The employees in the proposed unit are assigned to the Security Department, one of six departments at the Base. Nine guards and one policeman are in the Guard/Police Branch of the Security Division, and one guard/dog handler is located in the Drug Detection Branch. In addition, the Security Division employs two detectives in the Investigations Branch as well as a complement of enlisted military personnel. All of the civilian employees of the Security Division are in General Schedule classifications.

8/ AFGE Local 1716 currently is the exclusive representative for an Activity-wide unit that includes all of the 146 civilian employees of the Naval Amphibious Base, excluding guards.

The record reflects that the guards, police and detectives at the Naval Amphibious Base receive essentially the same training and perform essentially the same functions as their counterparts at the Naval Station. Under these circumstances, and consistent with the rationale set forth above in Case No. 72-5346(RO), I find that a unit that includes all guards, police and detectives in the Security Division of the Naval Amphibious Base contains employees who share a clear and identifiable community of interest.

Moreover, for the reasons outlined above in Case No. 72-5346(RO), I find that such a functional unit will promote effective dealings and efficiency of agency operations and that the Activity's contentions to the contrary are, at best, speculative and conjectural. Thus, as noted above, in considering the question of effective dealings and efficiency of agency operations, the Activity addressed itself primarily to the merits of an Activity-wide unit (currently the only unrepresented employees at the Activity are the claimed security personnel), rather than adducing evidence specifically related to the impact of the claimed unit on effective dealings and efficiency of agency operations. Moreover, it did not adduce specific countervailing evidence as to a lack of effective dealings and efficiency of agency operations experienced with respect to the unit of guards which previously had been represented exclusively at the Activity by the IFFP.

Under all of these circumstances, I find that a unit of guards, police and detectives in Case No. 72-5378(RO) is appropriate for the purpose of exclusive recognition and, therefore, I shall direct an election in the following unit:

All security guards, police and detectives of the Security Department of the Naval Amphibious Base, Coronado, California, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

DIRECTION OF ELECTIONS 9/

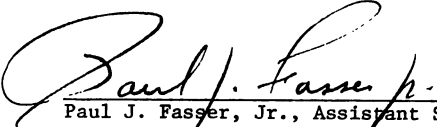
Elections by secret ballot shall be conducted among employees in the units found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because

9/ The record in Case No. 72-5378(RO) is unclear as to whether the inclusion of the detectives of the Investigations Branch in the unit found appropriate renders inadequate the IBT's showing of interest. Accordingly, before proceeding to an election in Case No. 72-5378(RO), the appropriate Area Director is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of the above-named employees, the IBT's showing of interest is inadequate, the petition in this case should be dismissed.

they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the California Teamsters, Public, Professional and Medical Employees Union, Local 911, International Brotherhood of Teamsters.

Because the above Direction of Election in Case No. 72-5378(RO) is in a unit substantially different than that sought by the IBT, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in that case upon notice to the appropriate Area Director within 10 days of the issuance of this Decision. If the IBT desires to proceed to an election, because the unit found appropriate is different than the unit it originally petitioned for, I shall direct that the Activity, as soon as possible, post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Director, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(b) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot in the election among the employees in the unit found appropriate.

Dated, Washington, D.C.
March 23, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

March 26, 1976

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

NAVY PUBLIC WORKS CENTER,
SAN FRANCISCO BAY
A/SLMR No. 628

Following a reorganization which consolidated the public works functions of six Department of Defense facilities within the San Francisco Bay area into a new organizational entity, the Navy Public Works Center, San Francisco Bay (referred to herein as Activity-Petitioner or PWC), the Activity-Petitioner filed an RA petition seeking a determination by the Assistant Secretary that certain existing exclusively recognized units encompassing employees of the former public works departments of the six releasing activities were no longer appropriate, and that an overall unit consisting of all nonsupervisory Wage Grade and General Schedule employees employed by the Navy Public Works Center, San Francisco Bay, is appropriate. In this connection, the Activity-Petitioner requested an election to determine whether any of the 8 exclusive representatives who represented employees in some 12 exclusively recognized units in the 6 releasing activities, represented the employees in the unit now contended to be appropriate.

In addition, the American Federation of Government Employees, Local 1533, AFL-CIO (AFGE Local 1533), one of the eight exclusive representatives, sought, by two petitions for amendment of recognition, to amend two prior recognitions to reflect the Activity-Petitioner as the employer for one of its exclusively recognized units and as a co-employer with respect to certain of the employees in its other exclusively recognized unit.

The Assistant Secretary found that the PWC is, in effect, a new organizational entity which includes all or part of the employee complement of a number of previously recognized units whose scope and character have been changed by the creation of the PWC and that an election pursuant to the Activity-Petitioner's RA petition was appropriate. In this regard, he noted that the establishment of the PWC resulted in, among other things, the replacement of six public works departments, responsible only for servicing their independent activities, by a single entity, the PWC, providing services to a number of facilities and under the direction of one Commanding Officer. The employees of the newly established PWC are subject to its uniform labor relations and personnel authority, including the newly established PWC-wide area of consideration for promotions and

reductions in force. Moreover, the Assistant Secretary noted that the establishment of the PWC resulted in the centralization and integration of certain work functions, and resulted also in the actual physical relocation of a substantial number of employees. Furthermore, subsequent to the establishment of the PWC, many of the former employees of the releasing activities were commingled with employees of other releasing activities so that they now work alongside former employees of other releasing activities and share common supervision with such employees. Accordingly, the Assistant Secretary found that the employees in the unit claimed to be appropriate by the Activity-Petitioner share a clear and identifiable community of interest, and that such a comprehensive unit of all employees of the Activity-Petitioner will promote effective dealings and efficiency of agency operations. In view of the close relationship between the PWC's Wage Grade and General Schedule employees, and as professional and nonprofessional employees previously have been represented jointly in some of the units involved in this proceeding, the Assistant Secretary found that a unit of all professional and nonprofessional employees of the Activity-Petitioner was appropriate for the purpose of exclusive recognition, and he directed an election in the unit found appropriate.

The Assistant Secretary dismissed the petitions for amendment of recognition filed by AFGE Local 1533 as one of the units involved had been transferred entirely to the PWC and no longer exists as a separate viable unit, while the other unit, from which only certain employees had been transferred to the PWC, although diminished in scope, continued to exist as a viable unit whose designation had not changed.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVY PUBLIC WORKS CENTER,
SAN FRANCISCO BAY 1/

Activity-Petitioner

and

Case No. 70-4309(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1113, AFL-CIO

Intervenor

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1157, AFL-CIO

Intervenor

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1533, AFL-CIO

Intervenor

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 2297, AFL-CIO

Intervenor

and

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,
LOCAL 444, AFL-CIO

Intervenor

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL
LODGE 739, AFL-CIO

Intervenor

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R12-69

Intervenor

and

STATIONARY LOCAL 39,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO 2/

Intervenor

NAVY PUBLIC WORKS CENTER,
SAN FRANCISCO BAY

Activity

and

Case Nos. 70-4349(AC) and
70-4350(AC).

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1533, AFL-CIO

Petitioner

2/ The name of this Intervenor, Stationary Local 39, International Union of Operating Engineers, AFL-CIO, herein called IUOE, appears as amended at the hearing.

1/ The name of the Activity-Petitioner appears as amended at the hearing.

DECISION, ORDER AND DIRECTION OF ELECTION

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

Upon the entire record in these cases, including the briefs of the Activity-Petitioner, the IUOE, and the Federal Employees Metal Trades Council, herein called FEMTC 3/, the Assistant Secretary finds:

In Case No. 70-4309(RA), the Navy Public Works Center, San Francisco Bay, hereinafter called PWC or the Activity-Petitioner, filed an RA petition seeking a determination by the Assistant Secretary with respect to the effect of a recent reorganization on certain existing exclusively recognized units. Specifically, the Activity-Petitioner contends that certain exclusively recognized units are inappropriate due to a reorganization which consolidated the public works functions of six Department of Defense facilities within the San Francisco Bay area into a single public works center and that a single overall bargaining unit of "All nonsupervisory Wage Grade and General Schedule employees employed by the Navy Public Works Center, except professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order" is appropriate for the purpose of exclusive recognition under the Order. 4/ In this connection, it requests that an election be ordered to determine whether the American Federation of Government Employees, Local 1113, AFL-CIO, herein called AFGE 1113, the American Federation of Government Employees, Local 1157, AFL-CIO, herein called AFGE 1157, the

3/ At the hearing, counsel for Intervenors International Brotherhood of Electrical Workers, Local 2297, AFL-CIO, herein called IBEW; United Association of Journeyman and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, Local 444, AFL-CIO, herein called Plumbers; and International Association of Machinists and Aerospace Workers, Local Lodge 739, AFL-CIO, herein called IAM, requested that in any election ordered by the Assistant Secretary in this proceeding, the above-named intervenors appear on the ballot designated as the Federal Employees Metal Trades Council.

4/ The unit description reflects an amendment made at the hearing by the Activity-Petitioner which had the effect of excluding professional employees.

American Federation of Government Employees, Local 1533, AFL-CIO, herein called AFGE 1533, 5/ the IBEW, the Plumbers, the IAM, the IUOE, or the National Association of Government Employees, Local R12-69, herein called NAGE, represents the employees in the unit which the Activity-Petitioner contends is appropriate. The AFGE Council, the FEMTC, and the IUOE contend that the formation of the PWC constituted merely a paper reorganization and that the units for which each labor organization was accorded exclusive recognition originally continue to be viable and appropriate. As an alternative, should the RA petition be granted, the AFGE Council and the NAGE allege that the appropriate unit would then consist of all General Schedule (GS) and Wage Grade (WG) employees of the PWC, while the FEMTC and the IUOE contend that there should be separate units for the GS and WG employees. Moreover, the IUOE contends that a separate unit consisting of all Power Plant, Operations and Sewage Plant employees of the Activity-Petitioner, who are located at several of the facilities involved, would constitute an appropriate craft unit.

In Case Nos. 73-4349(AC) and 70-4350(AC), AFGE Local 1533 sought amendments of recognition consistent with its position that there was merely a paper reorganization which left its previously recognized units intact and appropriate. Thus, AFGE Local 1533 contends that the PWC should be designated as the Activity for its unit of all WG employees previously employed by the Public Works Department, Naval Supply Center, Oakland (NSCO) and, further, that the PWC should be designated as the co-employer for its other unit at the NSCO, described more fully below, with respect to those unit employees who were transferred from the NSCO to the PWC.

The mission of a Public Works Center is to provide public works, public utilities, public housing, transportation support, engineering services, etc. for the facilities which it services. The Activity-Petitioner, the Public Works Center, San Francisco Bay, was established in June 1974. It is a subsidiary of the Naval Facilities Engineering Command (NAVFAC) of the Department of Navy and is one of eight such centers worldwide. Prior to its establishment, six Department of Defense facilities in the San Francisco Bay area - the Oakland Army Base; the Naval Supply Center, Oakland; the Naval Air Station, Alameda; the Naval Station, Treasure Island; the Naval Regional Medical Center, Oakland; the Department of Defense Family Housing Site, Hamilton Air Force Base; and their tenants - provided their own public works capabilities. Upon its creation, the PWC consolidated the public works functions of the above-named activities who simultaneously became its primary customers. Although the public works departments of the above-named activities were line departments

5/ At the hearing, counsel for AFGE Locals 1157, 1533 and 1113 requested on their behalf that in any election ordered by the Assistant Secretary in this proceeding, the above-named intervenors appear on the ballot designated as American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco Bay Area, AFL-CIO, which designated labor organization is hereinafter called AFGE Council.

supported out of those facilities' appropriated funds, the PWC is an industrially funded operation within NAVFAC's corporate structure. Thus, it was provided with "startup" funds by NAVFAC and secures the income necessary to sustain its operations by providing services to its customers who now purchase their public works capabilities from the PWC.

Prior to the creation of the PWC, the employees of the public works facilities of the activities set forth above were in 12 separate units represented by 8 exclusive representatives. These public works capabilities were thereafter merged into the PWC. Thus, the record reveals that:

(1) on July 23, 1969, AFGE Local 1157 was granted exclusive recognition for a unit of all the nonsupervisory employees of the Facilities Engineering Division, Base Command, Headquarters, Western Area, Military Traffic Management and Terminal Service, Oakland Army Base;

(2) AFGE Local 1533 was recognized on June 30, 1966, as the exclusive representative for a unit of all nonsupervisory employees of the Naval Supply Center, Oakland, California, except those in Power Plant, Fire Branch and Police Branch units and its unit of the WG employees of the Public Works Department;

(3) AFGE Local 1533 was recognized on October 29, 1965, as the exclusive representative for a unit of all the nonsupervisory WG employees in the Public Works Department, Naval Supply Center, Oakland;

(4) the IUOE was granted exclusive recognition on March 5, 1964, for a unit of all Stationary Engineer employees in the Utilities Operations Section, Maintenance and Utilities Division, Public Works Department, in the ratings of Boiler Plant Operator, Air-Conditioning Equipment Mechanic, or other operator-type ratings, Naval Supply Center, Oakland;

(5) the IAM was recognized on January 13, 1967, as the exclusive representative for a unit consisting of all the nonsupervisory employees holding the rating of Toolmaker, Machinist, Machinist (Maintenance), Toolroom Mechanic, Toolroom Attendant, or Machine Operator, including those employees in Apprentice and Helper levels for any of those ratings at the Naval Air Station, Alameda;

(6) the IAM was certified on February 24, 1971, as the exclusive representative of all the nonsupervisory WG employees of the Naval Air Station, Alameda, not already in units of exclusive recognition;

(7) the Plumbers was certified on February 24, 1971, as the exclusive representative of all the WG employees, including apprentices,

in the classifications of Plumber, Plumber Helper, Pipefitter, Pipefitter Helper, Refrigeration and Air Conditioning Mechanic and Helper, Insulator and Insulator Helper in the Public Works Department, Maintenance Division, Naval Air Station, Alameda;

(8) the IBEW was recognized on September 16, 1968, as the exclusive representative of a unit of all the nonsupervisory WG employees in the Public Works Department, Naval Air Station, Alameda, holding ratings of Electrician, Helper (Electrician), Electrician (Lineman), Electronics Mechanic (Maintenance), Cable Splicer, Electromotive Equipment Mechanic, and Elevator Mechanic, including apprentices and instructors;

(9) the IUOE was granted exclusive recognition on December 5, 1963, for a unit of all nonsupervisory employees in the Operations Units, Maintenance Utilities Division, Public Works Department, Naval Air Station, Alameda;

(10) the IBEW was certified, on May 20, 1971, as the exclusive representative for a unit of all the nonsupervisory WG employees of the Public Works Division, Naval Regional Medical Center, Oakland, California;

(11) AFGE Local 1113 was certified on June 18, 1970, as the exclusive representative of a unit consisting of all GS and WG employees of the Naval Station, Treasure Island, San Francisco, California, excluding firefighters and professionals; and

(12) the NAGE was recognized on August 8, 1969, as the exclusive representative for a unit of all the nonsupervisory employees of Hamilton Air Force Base, California, except employees of the Fire Department of the Base Civil Engineers, and professionals.

Seven of the 12 units affected by the creation of the PWC, ranging in size from the IAM's unit of 8 mechanics at the Naval Air Station, Alameda, to the AFGE Local 1533's unit of 229 WG employees of the Public Works Department, Naval Supply Center, Oakland, were transferred administratively in toto to the PWC. ^{6/} Moreover, only in the case of the IUOE's unit of 24 boiler plant employees at the Naval Air Station, Alameda, did all of the unit employees continue to work at the same facility after their administrative transfer to the PWC. In the 5 units in which only some employees were transferred to the PWC, the magnitude of the transfers

^{6/} The seven units transferred in toto to the PWC included those of: AFGE Local 1157; AFGE Local 1533's unit of WG employees in the Public Works Department, Naval Supply Center, Oakland; both of IUOE Local 39's units; IAM Local 739's unit of machinists at the Naval Air Station, Alameda; and the Plumbers unit and IBEW Local 2297's unit at the Naval Air Station, Alameda.

ranged from 17 employees out of the AFGE Local 1533's unit of 1,775 employees at the Naval Supply Center, Oakland, to a transfer of 152 employees from the AFGE Local 1113's unit of 352 employees at Treasure Island. 7/

The PWC is organized into five basic groups - Planning, Operations, Housing, the Civil Engineer's Office, and the administrative support staff, all of which report to the Commanding Officer. The Housing group provides varied housing services for civilian and military persons while the administrative support staff's responsibilities include safety, equal employment opportunity, and management and fiscal matters. The Civil Engineer's Office maintains a liaison between the PWC and the activities served by the PWC, which activities now maintain only staff personnel who determine, in conjunction with their respective management officials, priorities in terms of purchasing the PWC's services. The Planning group is responsible for the design and estimation of customer work, schedules the work to be performed, and inspects the facilities of the PWC's primary customers, including those services provided by private contractors. The Operations group, which employs some 85 percent of the PWC's approximately 1,130 employees, is responsible for the actual construction and repair activities performed by the PWC, and for providing utilities and transportation support for the PWC's customers. The Operations group is itself subdivided into four major departments - Maintenance, Utilities, Transportation, and Materials.

From a broad perspective, the PWC may be viewed as operating an essentially bi-level operation. Many of the functions formerly performed by the public works departments of the releasing activities are still being performed in the same manner, often by the same employees. However, a number of functions formerly performed by the public works departments of the releasing activities have been centralized in the PWC and other services, which were available to only one of the releasing activities, are now available to any of the PWC's customers. The most cogent example of this dichotomy of operations and its effect on the employees' job locations and assignments is reflected in the Maintenance Department of the Operations group, which employs nearly half of all the PWC's employees, primarily in WG classifications, and covers the full range of functions from machinists and electricians to upholsterers and gardeners. The Maintenance Department is responsible for the maintenance, alteration, repair, upkeep, and minor construction of the buildings and structures maintained by the PWC's primary customers, and it also operates

7/ The five units which maintained their identities despite the transfer of certain of their employees to the PWC included AFGE Local 1533's unit of all employees of the Naval Supply Center, Oakland, except those in the Public Works Department; IAM Local 739's unit of all WG employees of the Naval Air Station, Alameda, not in other exclusive units; IBEW Local 2297's unit of all WG employees of the Public Works Division, Naval Regional Medical Center; and the units of AFGE Local 1113 and NAGE Local R12-69.

the PWC's utilities distribution system and provides pest control services for the PWC customers. One division of the Maintenance Department, which is responsible for the "major" construction work carried on by the Center, works out of a central shop complex at the NSCO, but many of its employees are assigned on a day-to-day basis, as needed, at any of the PWC's customer facilities. However, the other division of the Maintenance Department maintains work centers at five of the six constituent activities serviced by the PWC. The personnel assigned to these work centers are responsible for ongoing maintenance and minor repair services, as well as for grounds maintenance at the particular facility and, generally, perform functions within the physical boundaries of the particular facility to which they are assigned. The Maintenance Department also has its own staff division of GS employees which is responsible primarily for planning the work responsibilities of the two line divisions.

In many respects, the other major departments of the Operations group of the PWC are organized along the same lines as the Maintenance Department, with certain functions being centralized and others being performed by employees limited to certain geographical, as well as functional, boundaries and a centralized staff capability. In this regard, the vast majority of employees in the Operations group, whether they be assigned to a centralized or activity-based function, are in WG classifications, with most of the GS employees performing staff assignments.

With respect to the staffing of the PWC, the evidence discloses that on July 1, 1974, the PWC received 926 employees of its some 1,130 employees from the public works departments of the releasing activities, and that many of these employees were reassigned physically to new work areas as a result of the reorganization. Thus, in certain instances, such as the Planning group with its centralized function, all of the employees reassigned from the releasing activities had to relocate physically, even those who had previously worked at the Oakland Army Base, where the Planning group presently is based. These and other reassignments were made either as a result of the PWC's needs, such as for greater centralization, or as a result of a study of the needs of the releasing activities which became the PWC's customers, or at the request of employees who took advantage of the reorganization to seek positions they desired in terms of work or location. Thus, in the Operations group which, as noted above, includes some 85 percent of the PWC's employees, 238 employees (comprising 31 percent of the 757 employees released to the Operations group by the releasing activities) found it necessary to relocate physically from one facility to another. Further, in addition to the transfer of employees, the PWC found it necessary to hire new employees to meet its ongoing requirements. As a result of these transfers and new hires, only 54 percent of the PWC workforce was employed at the same locations six months after the establishment of the PWC on July 1, 1974.

The evidence also establishes that the organization of the PWC is different from that of any of the public works departments which it supplanted. Thus, in addition to selling its services rather than being financed by appropriated funds, the PWC has one Commanding Officer responsible for implementing the public works capability of the PWC, rather than six public works departments responsible to each of the releasing activities. In addition, many conditions of employment, such as areas of consideration for promotion, reduction in force procedures, hours of work, and appeals procedures, which were established for employees by the individual releasing activities prior to their transfer to the PWC, are now uniformly established and applied for all employees of the PWC, for which personnel and labor relations services are provided by the Civilian Personnel Office of the NSCO.

The record reveals further that employee interchange subsequent to the creation of the PWC is such that, on any given day, some 38 percent of the employees in the Operations group, for example, will be temporarily working somewhere other than at their regular duty station. Although such movement will be found more often in such sections as the Specific Work Division, which is the centralized mobile working force of the Maintenance Department, and the Planning and Estimating Division, which has centralized planning responsibility, the evidence establishes that other employees are rotated among assignments, or are required to fulfill temporarily a need at other than their normal duty station.

Under all of the circumstances outlined above, I find that the employees in the exclusively recognized units which were administratively transferred in toto from the releasing activities into the PWC 8/ do not continue to share a separate and identifiable community of interest and that those exclusively recognized units no longer remain viable or appropriate for the purpose of exclusive recognition within the meaning of the Order. Similarly, I find that the employees transferred to the PWC from those exclusively recognized units which maintained their identities and, therefore, continued to remain viable and appropriate (although diminished in size) 9/ have been thoroughly combined and integrated with the other employees in the functioning and operations of the PWC.

In sum, based on the foregoing, I find the PWC is, in effect, a new organizational entity which includes all or part of the employee complement of a number of previously recognized units whose scope and character have been changed by the creation of PWC, and that an election pursuant to the Activity-Petitioner's RA petition is appropriate. Thus, the record

8/ See footnote 6 above.

9/ See footnote 7 above.

reflects that the establishment of the PWC resulted in, among other things, the replacement of six public works departments, responsible only for servicing their independent activities, by a single entity, the PWC, providing services to a number of facilities and under the direction of one Commanding Officer. The employees of the newly established PWC are subject to its uniform labor relations and personnel authority, including the newly established PWC-wide area of consideration for promotions and reductions in force. Moreover, the establishment of the PWC resulted in the centralization and integration of certain work functions, and resulted also in the actual physical relocation of a substantial number of employees. Further, subsequent to the establishment of the PWC, many of the former employees of releasing activities were commingled with employees of other releasing activities so that they now work alongside former employees of other releasing activities and share common supervision with such employees.

Accordingly, I find that the employees in the unit claimed to be appropriate by the Activity-Petitioner share a clear and identifiable community of interest, and that such a comprehensive unit of all employees of the PWC will promote effective dealings and efficiency of agency operations. Moreover, in view of the close relationship between the PWC's WG and GS employees, and as professional and nonprofessional employees previously have been represented jointly in some of the units involved in this proceeding, I find that a unit of all professional 10/ and nonprofessional employees of the Activity-Petitioner is appropriate for the purpose

10/ At the hearing, the Activity-Petitioner, as noted in footnote 4 above, amended its petition so as to exclude professional employees, asserting that the Assistant Secretary could not certify the petitioned for unit were professionals to be included without a separate election for such employees. In my view, the unit for which an election is directed in an RA proceeding should encompass as nearly as possible all employees from units having prior exclusive recognition, and, in this regard, the extent to which an agency or activity may expand or contract a unit by an RA petition is limited. See U. S. Coast Guard Station, Non-Appropriated Fund Activity, Cape Cod, Massachusetts, A/SLMR No. 561. The labor organizations which intervened in this proceeding indicated their desire to represent professional employees, and, as the record indicates that some professional employees have been represented in the units involved in the RA petition herein, and as the professionals must be afforded a self-determination election under Section 10(b)(4) of the Order, I find professional employees should be included in the unit found appropriate.

of exclusive recognition. 11/

Furthermore, I shall order that the petitions for amendment of recognition filed in Case Nos. 70-4349(AC) and 70-4350(AC) be dismissed as the record reflects that the unit which is the subject of the petition in Case No. 70-4349(AC) has been transferred entirely to the PWC and no longer exists as a separate viable unit, while the unit involved in Case No. 70-4350(AC), although diminished in scope, continues to exist as a viable unit whose designation has not changed.

Based on the foregoing, I find that the following employees of the Activity-Petitioner may constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional employees of the Navy Public Works Center, San Francisco Bay, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

As stated above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following groups:

Voting Group (a): All professional employees of the Navy Public Works Center, San Francisco Bay, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Navy Public Works Center, San Francisco Bay, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

11/ I find also that a unit of all PWC Power Plant, Operations and Sewage Plant employees proposed as an alternative craft unit by the IUOE is not an appropriate unit as the employees involved perform a number of different job functions and are located at several different facilities with other employees of the PWC. Under these circumstances, I find that the claimed employees do not constitute a separate and distinct grouping of employees and that such a unit would not promote effective dealings and efficiency of agency operations.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco Bay Area, AFL-CIO; by the Federal Employees Metal Trades Council; by Stationary Local 39, International Union of Operating Engineers, AFL-CIO; by the National Association of Government Employees, Local R12-69; or by none of these labor organizations. 12/

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco Bay Area, AFL-CIO; by the Federal Employees Metal Trades Council; by Stationary Local 39, International Union of Operating Engineers, AFL-CIO; by the National Association of Government Employees, Local R12-69; or by none of these labor organizations.

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Area Director indicating whether the American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco Bay Area, AFL-CIO; the Federal Employees Metal Trades Council; Stationary Local 39, International Union of Operating Engineers, AFL-CIO; the National Association of Government Employees, Local R12-69; or none of these labor organizations was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the

12/ As indicated in footnote 3 above, certain of the intervenors asked to appear on the ballot as the Federal Employees Metal Trades Council should the RA petition herein be granted and, as indicated in footnote 5 above, AFGE Locals 1157, 1533, and 1113 also sought to appear on the ballot, in any election ordered, as the American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco Bay Area, AFL-CIO. As no party objected to these requests, these intervenors will be so designated for the purpose of the election ordered herein.

following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Navy Public Works Center, San Francisco Bay, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

(b) All nonprofessional employees of the Navy Public Works Center, San Francisco Bay, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

2. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Navy Public Works Center, San Francisco Bay, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, guards, management officials, and supervisors as defined in the Order.

ORDER

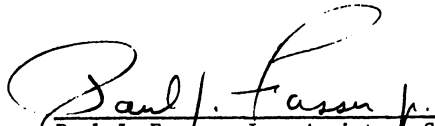
IT IS HEREBY ORDERED that the petitions in Case Nos. 70-4349(AC) and 70-4350(AC) be, and they hereby are, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees Council of Locals, Navy Public Works Center, San Francisco

Bay Area, AFL-CIO; by the Federal Employees Metal Trades Council; by Stationary Local 39, International Union of Operating Engineers, AFL-CIO; by the National Association of Government Employees, Local R12-69; or by none of these labor organizations.

Date, Washington, D. C.
March 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

March 26, 1976

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

DEPARTMENT OF THE NAVY,
NAVAL SUPPORT ACTIVITY,
LONG BEACH, CALIFORNIA
A/SLMR No. 629

In this case, the California Teamsters Public, Professional and Medical Employees Union, Local 911, (Teamsters) filed a petition seeking an election in a unit of police, security guards and detectives employed by the Naval Support Activity, Long Beach, California (Activity). The Teamsters contended that the employees involved share a clear and identifiable community of interest and that the claimed unit represents a functional grouping of employees within the meaning of Section 10(b) of the Order. Thereafter, the International Federation of Professional and Technical Engineers, Local 174, (IFPTE) filed a petition for clarification of unit (CU) seeking to clarify its existing exclusively recognized unit to include the employees claimed by the Teamsters. In this regard, the IFPTE asserted that inasmuch as it is the exclusive bargaining representative for the General Schedule (GS) nonprofessional employees at the Activity, excluding GS firefighters, and that Executive Order 11491, as amended by Executive Order 11838, no longer excludes guards from non-guard units considered otherwise appropriate, the guards at the Activity should be considered as having accreted into its exclusively recognized unit. The Activity agreed with the IFPTE's contention.

Under all the circumstances, the Assistant Secretary found that the CU petition in Case No. 72-5400(CU) should be dismissed. He noted that although under the amended Order the establishment of mixed units of guards and non-guards is no longer prohibited, neither does the amended Order mandate that unrepresented guards be deemed to have accreted into existing exclusively recognized units. The Assistant Secretary found that just as Executive Order 11491, which prohibited the inclusion of guards with non-guard employees in newly established units, did not modify the representational status of employees in existing mixed units of guards and non-guard employees established under Executive Order 10988, Executive Order 11838 did not change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning representation and the issuance of an appropriate certification. As there was no basis for concluding the claimed employees had accreted into the IFPTE's existing unit from which they had been specifically excluded when the unit was certified, the Assistant Secretary dismissed the IFPTE's CU petition.

The Assistant Secretary found also that the unit of guards, police and detectives petitioned for by the Teamsters was appropriate for the purpose of exclusive recognition. In this connection, he noted that the petitioned for unit was, in effect, a residual unit and also constituted a functionally distinct grouping of employees who share a community of interest separate and distinct from other employees of the Activity. Moreover, he concluded that the unit sought would promote effective dealings and efficiency of agency operations and would prevent further fragmentation of units at the Activity.

Accordingly, the Assistant Secretary directed that an election be conducted in the petitioned for unit.

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

DEPARTMENT OF THE NAVY,
NAVAL SUPPORT ACTIVITY,
LONG BEACH, CALIFORNIA

Activity

and

Case No. 72-5345(RO)

CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL AND
MEDICAL EMPLOYEES UNION, LOCAL 911 1/

Petitioner

and

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 174

Intervenor

and

INTERNATIONAL BROTHERHOOD
OF POLICE OFFICERS

Intervenor

DEPARTMENT OF THE NAVY,
NAVAL SUPPORT ACTIVITY,
LONG BEACH, CALIFORNIA

Activity

and

Case No. 72-5400(CU)

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 174

Petitioner

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

Upon the entire record in these cases, including briefs submitted by the Activity and the International Federation of Professional and Technical Engineers, Local 174, herein called IFPTE, the Assistant Secretary finds:

In Case No. 72-5400 (CU), the IFPTE filed a petition for clarification of unit (CU) seeking to clarify its existing exclusively recognized unit. In this connection, the IFPTE took the position that inasmuch as it is the exclusive bargaining representative for the General Schedule (GS) nonprofessional employees at the Activity, excluding GS firefighters, and the Executive Order, as amended, no longer excludes guards from non-guard units considered otherwise appropriate, the guards at the Activity should be considered as having accreted to the unit it represents. The Activity agrees with the IFPTE's contention. Conversely, the Teamsters, which filed the petition in Case No. 72-5345 (RO) seeking a unit of the Activity's guards, and the International Brotherhood of Police Officers, herein called IBPO, which intervened in Case No. 72-5345 (RO), contend that the guards involved herein should be given the right to a self-determination election.

The unit petitioned for by the Teamsters in Case No. 72-5345 (RO) is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity. 2/ Such unit would consist of all police, security guards and detectives employed by the Naval Support Activity, Long Beach, California, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order. 3/ In this connection, the Teamsters and the IBPO contend that the proposed unit is appropriate in that the employees involved share a clear and identifiable community of

2/ The record reveals that the firefighters of the Activity's Fire Protection Division are represented by the National Association of Government Employees (NAGE); the Activity's Wage Grade (WG) employees are represented by the Federal Employees Metal Trades Council; and the American Federation of Technical Engineers, the predecessor of the IFPTE, was certified in 1971 as the exclusive representative of a unit of all GS nonprofessional employees of the Activity, except the GS firefighters represented by the NAGE. At the hearing, the parties agreed that there were no bars to an election in the claimed unit based upon a negotiated agreement, prior election, or certification.

3/ The petitioned for unit appears essentially as amended at the hearing.

1/ The name of the Petitioner in Case No. 72-5345(RO), California Teamsters Public, Professional and Medical Employees Union, Local 911, herein called Teamsters, appears as amended at the hearing.

interest. The Teamsters contend also that the claimed unit represents a functional grouping of employees within the meaning of Section 10(b) of the Order. The IFPTE and the Activity, on the other hand, contend that the proposed unit does not constitute an appropriate unit as defined by criteria under Section 10(b) of the Order in that the claimed employees do not have a clear and identifiable community of interest, and that such a unit would further fragment representation at the Activity and would not promote effective dealings and efficiency of agency operations.

The mission of the Activity is to provide logistics support to the operating forces of the U.S. Navy and to other assigned activities and commands. The Security Department is 1 of 12 departments of the Activity and is comprised of 6 divisions, 1 of which is the Civilian Guard Division. 4/ The GS employees in the claimed unit are located in the three branches of this division. In this regard, the Police/Guard Branch and the Physical Security Branch are comprised of some 60 guards and police and the Detective Branch is comprised of 3 detectives.

Case No. 72-5400 (CU)

The Activity and the IFPTE contend that because Executive Order 11491, as amended by Executive Order 11838, no longer requires that guards may not be included with non-guards in newly established units, the petitioned for employees should be considered to have accreted into the existing unit of nonprofessional GS employees represented by the IFPTE.

Under all the circumstances, I conclude that the CU petition in Case No. 72-5400 (CU) should be dismissed. Although under the amended Order the establishment of mixed units of guards and non-guards is no longer prohibited, neither does the amended Order mandate that unrepresented guards be deemed to have accreted into existing exclusively recognized units. 5/ Just as Executive Order 11491, which prohibited the inclusion of guards with non-guard employees in newly established units, did not modify the representational status of employees in existing mixed units of guards and non-guard employees which had been established under Executive Order 10988, in my view, Executive Order 11838 did not change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning representation and the issuance of an appropriate certification. Accordingly, I find no basis for concluding that the unrepresented guard employees herein

4/ The Activity employs approximately 215 civilians, of whom only 6 are in WG classifications with the remainder being GS employees.

5/ The record does not reflect why the Activity and the IFPTE are of the view that the petitioned for employees have accreted into the IFPTE's unit, which consists mostly of clerical employees, and not into the other exclusively recognized unit of GS employees at the Activity, i.e. the firefighters represented by the NAGE.

should be deemed to have been accreted automatically, by operation of the 1975 amendments to Executive Order 11491, into an existing unit from which they had been specifically excluded when the unit was certified. Therefore, I shall dismiss the IFPTE's petition in Case No. 72-5400 (CU).

Case No. 72-5345 (RO)

The record reveals that it is the primary function of the guards, police and detectives in the Civilian Guard Division to provide internal physical security and law enforcement for the entire Naval Support Activity. In this connection, guards are responsible for safeguarding the Activity against sabotage, espionage, theft, trespass or other unlawful acts committed against the government; physical protection of buildings, materials, equipment and supplies; protection of life and safety of personnel; enforcement of vehicle codes and certain Federal and state laws; and traffic control and general surveillance throughout the entire Activity complex. Similarly, the police are responsible for patrolling the Activity for the maintenance of law and order and the protection of property, life and individual civil rights; apprehending offenders who may be involved in crimes; investigating traffic accidents and personal injury incidents; and interviewing informants, complainants, witnesses and suspects in preliminary investigations of crimes. The detectives in the Detective Branch are assigned the duties of investigating all types of illegal conduct at the Activity; determining criminal involvement in drugs, gambling and theft; surveilling illegal activities; and participating in the security of the Activity's grounds and property, including the lives of employees.

The record reflects that there are certain complementary responsibilities shared by the detectives, guards and police. Thus, the detectives have been assisted by the guards and police on special assignments such as stakeouts, surveillance assignments and preliminary investigations. They also report to the same Supervisory Police Chief as do the guards and police. The record also reflects that detectives, guards and police require special training for the purpose of performing their duties, including the use of firearms. Further, guards and police have attended special Federal Bureau of Investigation training sessions and are subject to special hazardous conditions involving the search for bombs after threats. They also must wear uniforms and rotate on three different working shifts.

Based on all of the foregoing, I find the claimed unit of security guards, police and detectives is appropriate for the purpose of exclusive recognition. In this regard, and as noted above, the petitioned for unit is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity. Furthermore, in my view, it constitutes a functionally distinct group of employees who share a community of interest separate and distinct from the other employees of the Activity. In this

latter regard, the evidence establishes that the security guards, police and detectives in the Civilian Guard Division have the primary responsibility for law enforcement and physical security at the Activity, cooperate in performing their security duties, receive special training, and wear firearms. Thus, and noting that Section 10(b) of the Order specifically provides, in part, that a unit may be established on a functional basis, I find that the employees in the petitioned for unit possess specialized skills different from other employees of the Activity that warrant their inclusion in a separate unit. Moreover, I find that the claimed unit, which is both a residual and functional unit, will promote effective dealings and efficiency of agency operations. In this regard, I do not agree with the Activity's contention that a separate unit would further fragment its labor-management relations and will create an additional hardship on its personnel office. Thus, in my view, under the circumstances of this case, where the petitioned for employees have been found not to have accreted into any existing unit, and where they constitute a residual unit of all unrepresented employees, the establishment of the claimed unit will, in fact, prevent further fragmentation by establishing only one additional unit for all the remaining unrepresented employees of the Activity. Moreover, the Activity did not adduce specific countervailing evidence, specifically within its knowledge, with respect to a lack of effective dealings and efficiency of agency operations experienced with respect to the exclusively recognized units currently in existence at the Activity. 6/

Under all of the above circumstances, I find that a residual and functional unit of security guards, police and detectives is appropriate for the purpose of exclusive recognition and, therefore, I shall direct an election in the following unit:

All police, security guards and detectives at the Naval Support Activity, Long Beach, California, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

In view of the Intervenor IFPTE's clear desire to represent the claimed employees as part of its existing unit, I find that the employees in the Naval Support Activity should be afforded the opportunity to choose whether or not they wish to become part of the existing unit represented by the IFPTE. Accordingly, if a majority of the employees in the residual and functional unit found appropriate votes for the IFPTE, they will be taken to have indicated their desire to be included in the

6/ See Department of the Navy, Naval Air Station, Alameda, California, A/SLMR No. 6, FLRC No. 71A-9.

existing unit represented by the IFPTE and the appropriate Area Director will issue a certification to that effect. If, on the other hand, a majority of the employees votes for the Teamsters or the IBPO, they will be taken to have indicated their desire to be included in the residual and functional unit found appropriate and the appropriate Area Director will issue a certification to that effect.

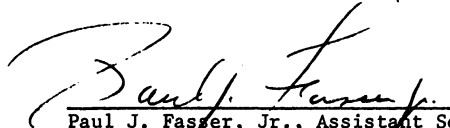
ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-5400 (CU) be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the California Teamsters Public, Professional and Medical Employees Union, Local 911; by the International Brotherhood of Police Officers; by the International Federation of Professional and Technical Engineers, Local 174; or by no labor organization.

Dated, Washington, D. C.
March 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE,
WASHINGTON, D. C.
A/SLMR No. 630

This case involved a petition for clarification of unit (CU) filed by the National Treasury Employees Union (Petitioner) seeking to include in the unit employees in the classifications of Course Developer-Instructors in the Training Division; Analysts in the Management and Resources Branch; Computer Systems Analysts in the Revenue Accounting and Processing Branch; and Analysts in the Taxpayer Accounts and Compliance Branch. In response, the Activity contends that these employees should be excluded from the unit because they are management officials and, in the case of the Course Developer-Instructors, are also performing Federal personnel work in other than a purely clerical capacity.

The Assistant Secretary found that the employees in the disputed classifications are not management officials. With regard to their official duties, he noted that the individuals involved serve as resource persons whose recommendations are subject to extensive review before either acceptance or implementation and that they are not individuals who actively participate in the ultimate determination of what policy, in fact, will be. Moreover, he concluded that there is no evidence that the Course Developer-Instructors are engaged in Federal personnel work within the meaning of Section 10(b)(2) of the Order. Under these circumstances, the Assistant Secretary concluded that all of the employees in the disputed classifications should be included in the exclusively recognized unit.

Accordingly, the Assistant Secretary ordered that the unit be clarified by including in such unit the aforementioned position classifications.

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

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE,
WASHINGTON, D. C.

Activity
and Case No. 22-5814(CU)
NATIONAL TREASURY EMPLOYEES UNION

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

The Petitioner, National Treasury Employees Union, herein called NTEU, is the exclusive representative of certain employees of the Activity. 1/ In this proceeding, the NTEU seeks to clarify the status

1/ On May 1, 1974, the NTEU was certified as the exclusive representative of, "All professional and nonprofessional employees of the National Office, Internal Revenue Service (IRS), Washington, D. C., excluding all professional and nonprofessional employees IRS Data Center, Detroit, Michigan; the National Computer Center, Martinsburg, West Virginia, including employees located in Washington, D. C.; the Office of the Chief Counsel, IRS; all professional and nonprofessional employees of the OIO whose official duty station is an overseas post-of-duty; all professional and nonprofessional employees of the Assistant Commissioner of Inspection and the Intelligence Division of the Assistant Commissioner of Compliance; confidential employees; employees engaged in Federal personnel work in other than a purely clerical capacity; management officials; guards and supervisors as defined in the Order."

of approximately 213 employees who are classified as Course Developer-Instructors, GS-512, 526, 905, 987, and 1169 in the Training Division; Analysts, GS-330 and 334, in the Management and Resources Branch; Computer Systems Analysts, GS-334, in the Revenue Accounting and Processing Branch; and Analysts, GS-343, in the Taxpayer Accounts and Compliance Branch, all of whom are located within the Accounts and Data Processing Division. The NTEU contends that the employees in the disputed classifications should be included in the exclusively recognized unit. The Activity, on the other hand, takes the position that the employees in the disputed classifications should be excluded from the unit because they are management officials. 2/

Organizationally, the Commissioner of Internal Revenue Service (IRS) is the highest management official with control over both the National Office operations and field operations. Reporting to the Office of the Commissioner are Assistant Commissioners with general responsibilities in the areas of inspection, compliance, accounts, collection and taxpayer service, planning and research, technical, administration, employee plans and exempt organizations. Of particular importance herein is the Assistant Commissioner of Accounts, Collection and Taxpayer Service, who is responsible for the entire data processing operation of the IRS, and the Assistant Commissioner of Administration, who is responsible for space and property management, personnel, training, fiscal management and advice to foreign countries in the area of tax administration. Reporting to the Office of the Assistant Commissioner of Accounts, Collection and Taxpayer Service, is the Accounts and Data Processing Division, within which is located the Revenue Accounting and Processing Branch, the Management and Resources Branch and the Taxpayer Accounts and Compliance Branch. Reporting to the Office of the Assistant Commissioner of Administration is the Training Division.

The mission of the Revenue Accounting and Processing Branch and the Taxpayer Accounts and Compliance Branch is to design, develop, analyze and prepare IRS accounting, processing, reporting and other related systems and procedures to be performed by high speed computers and computer peripheral equipment. The Management and Resources Branch is res-

2/ Although the Activity contended in its opening statement that the Course Developer-Instructors also were performing Federal personnel work in other than a purely clerical capacity, this contention was not pursued during the hearing, nor was it argued in the Activity's post-hearing brief. Moreover, there is no record evidence indicating that any of these employees are engaged in Federal personnel work which would necessitate their exclusion from the unit on this basis.

-2-

possible for developing, issuing and interpreting systems requirements and procedures for management control information systems applicable to activities in the Service Centers, District Offices, and National Computer Center and for obtaining data essential to compliance program needs. The Training Division of the Office of the Assistant Commissioner of Administration provides training and guidance to Service officials and personnel. It is particularly responsible for technical training in support of such areas as the Compliance Training Branch and the Accounts, Collection and Taxpayer Service Training Branch.

Eligibility Issues

As stated above, the Activity contends that certain employees should be excluded from the unit because they are management officials. The employees in issue include Course Developer-Instructors, GS-512, 526, 905, 987, and 1169; Analysts, GS-330, 334; Computer Systems Analysts, GS-334, and Analysts, GS-343. 3/

Course Developer-Instructors (CDI), GS-512, 526, 905, 987, 1169, Training Division, Office of the Assistant Commissioner of Administration

The record indicates that the CDI participates in the development of new courses or major revisions of existing courses by determining training needs, developing project proposals, and preparing manuals necessary to implement and administer training programs. In this respect, revisions in course materials and/or the development of new courses is undertaken in response to recommendations for such actions by the field personnel (i.e. teachers, training staff, students) or in response to a change in tax law as a result of Congressional action or judicial decree.

In executing the above-mentioned responsibilities, the CDI, utilizing a management training guide, drafts a project description which outlines the problem and recommends steps to resolve the problem. The project description is reviewed and must be approved by the Section Chief, the Director of the Training Division and the Director of the Audit Division. Upon approval and, depending upon the nature of a given project, a task force is brought to the IRS National Office to analyze the problem further and make recommendations. In this regard, the CDI dispatches a letter, which is approved by the Section Chief and is signed by the Director of the Training Division, to the IRS field offices describing the project and requesting that individuals with appropriate backgrounds be selected to serve on the task force. While the evidence establishes that the CDI designates the type of individuals needed, it is the IRS field offices that actually select the individuals.

3/ The disputed positions appear as amended at the hearing and as noted by the parties in their post-hearing briefs.

-3-

The evidence establishes that the CDI coordinates the efforts of the task force to meet the stated objectives. In this regard, a "needs and determination" task force decides whether there is a need for training and what type of training should be given. As a result, a report is written by the CDI on the basis of the task force recommendations. If these recommendations are approved and accepted by the Director of the Training Division and the Director of the Audit Division, a "writing" task force is then commissioned to write the course, instructor's guide or manual change. This material is then reviewed for grammar, sentence structure and clarity by the Section Chief and the Director of the Training Division; for technical accuracy by the Accounts and Collection technical staff; and, occasionally, for scope and depth by an Employee Development Specialist. Hence, the evidence establishes that the CDI's work is reviewed by the Section Chief and Director of the Training Division, and that guidance is received on operational aspects of certain programs from the Audit Division.

Analysts, GS-334, Management and Resources Branch, and Computer Systems Analysts, GS-334, Revenue Accounting and Processing Branch, Accounts and Data Processing Division

The record discloses that the Analysts in the Management and Resources Branch and the Computer Systems Analysts in the Revenue Accounting and Processing Branch participate in the design, development, analysis and preparation of IRS accounting, processing, and reporting systems and procedures to be performed by high speed computers and similarly related equipment. In this respect, the disputed individuals are assigned projects by a Section Chief and are required to write a project synopsis which defines the problem and makes recommendations to alleviate the problem. The synopsis is reviewed by a Section Chief, Branch Chief and, in some instances, the Director of the Accounts and Data Processing Division. Moreover, the evidence indicates that in some instances the project synopsis is reviewed by a Automatic Data Processing Review Board (ADPRB) which sets priorities for undertaking or implementing major programs that have resource implications on computer systems, program analysts and computer programmers. After being reviewed and approved by the ADPRB, a project synopsis is submitted to the Printing Control Officer for approval. At this point, the Analyst is required to write a Program Requirement Package (PRP) which specifies the change to be implemented by the computer programmers. Like the project synopsis, the PRP is subject to review by the Section Chief and Branch Chief. In addition, the employees in dispute write handbooks which instruct the IRS field personnel on how to utilize the computer information. These handbooks also are reviewed by the Section and Branch Chief. While the record indicates that the project synopsis, PRP, and handbook are accepted and undergo only minor changes the majority of the time, and that these Analysts have wide latitude in the decision-making based on their technical background and experience, the evidence further establishes that they do

not have authority to change procedures without higher level approval. 4/

Analysts, GS-343, Taxpayer Accounts and Compliance Branch, and Analysts, GS-330, Management and Resources Branch, Accounts and Data Processing Division

The position descriptions for the Analysts, GS-343 and GS-330, indicate that the incumbents in these positions review work plans and activity schedules for accuracy of work loads and projected performance standards in order to provide the IRS field offices with accurate information for the development of their work schedules and that they perform significant studies related to the development or revision of analysis systems, prepare briefing materials for management use and conduct objective follow-ups for the Regional Offices to assure correction of deviations and prompt identification of operating problems. The position descriptions further indicate that the incumbents utilize the IRS Manual and Accounting Data Processing Handbook in the performance of these tasks and that they are under the general supervision of a Section Chief. Testimony regarding the Analysts, GS-343 and GS-330, reveals that the duties of these individuals are similar to those of a Computer Systems Analyst, GS-334, in that they involve the preparation of synopses, Program Requirement Packages (PRPs) and handbooks which are reviewed by higher level supervision.

The Assistant Secretary has held that a management official is an employee "having authority to make, or to influence effectively the making of, policy necessary to the agency...with respect to personnel, procedures or programs" and that in determining whether an individual meets these requirements consideration should be given to "whether his role is that of an expert or professional rendering resource information or recommendations...or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy, in fact, will be." 5/ Although it appears that original concepts developed by the employees in the disputed classifications are retained in many instances, the evidence establishes that their recommendations undergo close scrutiny and are not necessarily accepted or acted upon without change. Thus, the record reveals in each instance that the individuals involved serve as resource persons whose recommendations are subject to extensive review before either acceptance or implementation and that they are not

4/ Although an Activity witness, who testified on this particular classification, indicated that he had attended a few negotiation sessions to explain to the union negotiating team the intricacies of a Computer Performance Approval System, the record indicates that he was rendering resource information based on his expertise and was not a member of the Activity's negotiating team. See Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596.

5/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

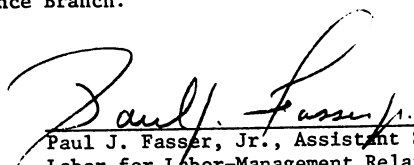
individuals who actively participate in the ultimate determination of what policy, in fact, will be. Based on these considerations, I find that none of the employees in the aforementioned classifications are management officials within the meaning of the Order.

Accordingly, I find that the employees in the above-disputed classifications should be included in the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the National Treasury Employees Union, was certified on May 1, 1974, be, and hereby is, clarified to include in said unit the positions of Course Developer-Instructors, GS-512, 526, 905, 987, and 1169 in the Training Division; Analysts, GS-330 and 334 in the Management and Resources Branch; Computer Systems Analysts, GS-334 in the Revenue Accounting and Processing Branch; and Analysts, GS-343 in the Taxpayer Accounts and Compliance Branch.

Dated, Washington, D. C.
March 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

U.S. SMALL BUSINESS ADMINISTRATION,
CENTRAL OFFICE,
WASHINGTON, D.C.
A/SLMR No. 631

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2532, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by the conduct of its Director of Personnel in physically removing the Complainant's president from a meeting at which he was representing a unit employee.

The Administrative Law Judge, finding that the Respondent's conduct was violative of Section 19(a)(1) of the Order, rejected the Respondent's contention that its action was warranted by the "profanity" and "abusive" language used by the Complainant's president at the subject meeting. In this regard, he noted that profanity in labor disputes in the private sector is generally regarded as an inadequate defense for disciplinary action, and found that the remarks of the Complainant's president were not so egregious as to warrant his summary ejection from the subject meeting. The Assistant Secretary, noting that the U.S. Supreme Court has applied the same latitude of expression found in the private sector to Federal labor-management relations, adopted the Administrative Law Judge's findings, conclusions, and recommendations with certain modifications and additions in the remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. SMALL BUSINESS ADMINISTRATION,
CENTRAL OFFICE,
WASHINGTON, D.C.

Respondent

and

Case No. 22-6314 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2532, AFL-CIO

Complainant

DECISION AND ORDER

On January 22, 1976, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions ^{1/}, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge as modified below.

In agreement with the Administrative Law Judge, I find, under the particular circumstances herein, that the action of the Respondent's Director of Personnel in ejecting the Complainant's president from a meeting, at which he was representing a unit employee, for alleged abusive remarks and profanity was violative of Section 19(a)(1) of the Order. In its exceptions, the Respondent contended that the Administrative Law Judge placed undue reliance on private sector cases in reaching his findings. However, the Administrative Law Judge indicated that he had looked to private sector decisions "for guidance only." Moreover, it was noted that the United States Supreme Court has applied to the Federal sector similar standards in this general area to

^{1/} Because the Complainant's answering brief to the Respondent's exceptions was not filed in accordance with Section 203.25(b) of the Assistant Secretary's Regulations, such answering brief was not considered in reaching the decision in the instant case.

those found in the private sector. Thus, in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et. al. v. Austin, et. al., 481 U.S. 264 (1974), 86 LRRM 2740, the Court held, in part:

In this case, of course, the relevant federal law is Executive Order 11491 rather than the NLRA. Nevertheless, we think that the same federal policies favoring uninhibited, robust and wide-open debate in labor disputes are applicable here....

In light of this basic purpose, we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U. S. Small Business Administration, Central Office, Washington, D.C., shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees by ejecting from meetings or otherwise refusing to treat with any agent of the American Federation of Government Employees, Local 2532, AFL-CIO, or of any other exclusive representative, when such agent is performing representational functions.

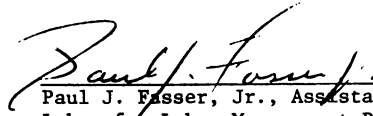
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Post at its facility at the U.S. Small Business Administration, Central Office, 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 Administrator, Small Business Administration, Central Office, Washington, D. C. and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.
March 26, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11494, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees by ejecting from meetings or otherwise refusing to treat with any agent of the American Federation of Government Employees, Local 2532, AFL-CIO, or of any other exclusive representative, when such agent is performing representational functions.

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

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

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

March 26, 1976

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
CENTRAL OFFICE,
WASHINGTON, D. C.
A/SLMR NO. 632

This case involved a petition for amendment of certification and clarification of unit (AC/CU) filed by the American Federation of Government Employees, Local 41, AFL-CIO (Petitioner), seeking to include all professional and nonprofessional employees of the newly established Office of Child Support Enforcement (OCSE), Department of Health, Education and Welfare (DHEW), Washington, D. C., metropolitan area. The Petitioner represents all professional and nonprofessional employees of the Social and Rehabilitation Service (SRS), Central Office, Washington, D. C.

The Petitioner contends that the employees of the newly established OCSE are a part of the certified bargaining unit in the SRS, Central Office. In this respect, it maintains that the work to be performed by the newly established OCSE was performed previously by certain operational units within the SRS. Moreover, it asserts that approximately 4 or 5 individuals are currently detailed to the OCSE from the SRS to develop procedures for implementing this newly established entity's objectives. Hence, it argues that a transfer of functions has occurred and the employees of the OCSE share a clear and identifiable community of interest with those employees of the certified unit. In response, the Activity takes the position that the OCSE is a separate and distinct entity from the SRS, as was intended by Congress. It maintains that inasmuch as no appropriated funds have been made available for this newly established entity (at the time of the hearing) and there are no employees of the OCSE, except the Deputy Director and his secretary, the OCSE is merely a paper organization and any decision regarding employees of that office is speculative.

Under the current circumstances, the Assistant Secretary ordered that the petition be dismissed. In this connection, he noted that only two individuals were employed by the OCSE-i.e. the Deputy Director and his secretary. He noted also that while the evidence indicated that a projected 70 positions would be necessary to staff the OCSE and a selection process was underway to fill four positions which had been

posted, the employment of such employees in the future was speculative. Consequently, the Assistant Secretary found that it would not effectuate the purposes and policies of the Order to amend a certification and clarify a unit where, as here, the employees sought to be added to the certified unit had not, in fact, been hired. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
CENTRAL OFFICE,
WASHINGTON, D. C.

Activity

and

Case No. 22-6380(AC/CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 41, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Earl T. Clark. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

The Petitioner, American Federation of Government Employees, Local 41, AFL-CIO, herein called AFGE Local 41, was certified on June 30, 1972, as the exclusive representative of:

"All professional and nonprofessional employees of the Social and Rehabilitation Service (SRS), Department of Health, Education and Welfare (DHEW), Central Office, Washington, D. C., excluding all supervisors, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, wage grade and guards as defined in Executive Order 11491, and employees working in the Family Benefits Planning Group and in the White House Conference on Aging."

In this proceeding, AFGE Local 41 seeks to amend its certification and clarify the above noted unit to include all professional and nonprofessional employees of the newly established Office of Child Support Enforcement (OCSE) located in the Washington, D. C., metropolitan area. ^{1/} In this respect, AFGE Local 41 contends that the employees of the newly established OCSE are a part of the certified bargaining unit in the Social and Rehabilitation Service (SRS), Central Office. It argues that a transfer of functions has occurred inasmuch as the work to be performed by the newly established OCSE was performed previously by certain operational units within the SRS, and as approximately 4 or 5 individuals are currently detailed to the OCSE from the SRS to develop procedures for implementing the OCSE's objectives. It further contends that inasmuch as the Acting Administrator of the SRS has been designated as the Director of the OCSE, that the OCSE and the SRS have a common geographical location, and that the SRS provides the necessary personnel, budgetary and manpower services for the OCSE, there exists a strong community of interest among the employees of the two organizations and, consequently, the employees of the OCSE should be included in the SRS bargaining unit. The Activity, on the other hand, takes the position that the OCSE is a separate and distinct entity from the SRS and was intended by the Congress to be a separate organizational unit within the Department of Health, Education and Welfare. Moreover, inasmuch as Congress had not (at the time of the hearing) appropriated funds for this newly established entity and there were no employees in the OCSE, except the Deputy Director and his secretary, the Activity contends that the OCSE is merely a paper organization and any unit determination regarding the employees of that office is speculative. Hence, it argues that the petition for amendment of certification and clarification of unit should be dismissed.

The mission of the OCSE is to review and approve State child support plans, evaluate and conduct annual and special audits of the implementation of child support programs in each State, and provide technical assistance to States to help them establish effective systems for collecting child support and establishing paternity. In this latter regard, Congress has mandated that the OCSE establish and conduct a Parent Locator Service for the purpose of obtaining and transmitting information to be used to locate and enforce support obligations against an absent parent.

^{1/} The original petition herein sought only a clarification of the unit. However, it was amended on September 19, 1975, seeking, in addition, an amendment of certification.

The record indicates that the above-mentioned responsibilities of the OCSE were mandated under Public Law 93-647 which amended Title IV of the Social Security Act and became effective on August 1, 1975. Under the provisions of Section 452(a) of Part D of Title IV of the Social Security Act, 42 USC 651, the Secretary of the Department of Health, Education and Welfare is required to establish "a separate organizational unit under the direction of a designee of the Secretary, who shall report directly to the Secretary." The record reveals that a separate program is to be established in order to monitor and evaluate State child support programs and to assist in locating absent parents in order to obtain support payments from them. Prior to the above-mentioned amendment of Title IV, the Assistance Payment Administration (APA) of the SRS was responsible for administering the child support function along with 49 other programs. In this regard, the evidence shows that the child support function was not the primary responsibility of any individual or group of individuals and, in general, only 10-15 percent of the APA work time was devoted to administering child support programs.

The evidence further establishes that although Congress mandated that a separate program be established to administer child support, at the time of the hearing herein no funding had been made available for this purpose. Although it was projected that approximately 70 positions were needed to staff the National Office of the OCSE, only two positions, that of the Deputy Director and his secretary, had been filled and four other position announcements had been posted and a selection process was underway at the time of the hearing in this matter. As a result, approximately 4 or 5 individuals from the SRS, detailed to the OCSE for the purpose of developing regulations, procedures and standards for the new program, are being paid by funds borrowed by the OCSE from the SRS. Additionally, the lack of available funds has made the OCSE dependent upon the SRS for personnel, budgetary and manpower services.

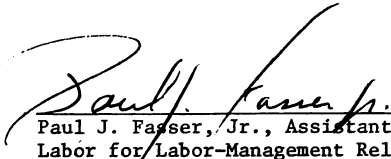
Under the current circumstances, I find that dismissal of the subject petition is warranted. Thus, the record reveals that, at the time of the hearing herein, only two individuals were employed by the OCSE, the Deputy Director and his secretary. Although the evidence indicates that a projected 70 positions will be necessary to staff the OCSE, and a selection process is underway to fill four positions which have been posted, the employment of such employees in the future is speculative. In this context, I find that it would not effectuate the purposes and policies of the Order to amend a certification and clarify a unit where, as here, the employees, sought to be added to the certified unit

had not, in fact, been hired. 2/ Accordingly, the subject petition seeking to amend the certification and clarify the unit is hereby dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-6380(AC/CU) be, and hereby is, dismissed.

Dated, Washington, D. C.
March 26, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

2/ See Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190. This is not to say that if the employees had, in fact, been hired the proposed amendment and clarification necessarily would be approved.

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

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

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES REGION,
LOS ANGELES, CALIFORNIA
A/SLMR NO. 633

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES REGION,
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 72-4668

This case involved an unfair labor practice complaint filed by Thomas F. O'Leary, President, American Federation of Government Employees, Local 2433, AFL-CIO, (AFGE) for Audrey Addison (Complainant) alleging essentially that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by impeding Mrs. Addison's rights to represent employees in her capacity as Chief Steward of AFGE Local 2433 by filing a number of allegedly unjustified adverse actions against her, by failing to approve emergency annual leave for Mrs. Addison, and by offering her a "fake" supervisory position in an attempt to "lure" her away from her union responsibilities.

THOMAS F. O'LEARY, PRESIDENT,
AFGE LOCAL 2433-FOR AUDREY ADDISON

Complainant

DECISION AND ORDER

Finding that in each case of alleged harassment the record revealed that valid grounds existed for Respondent's actions, that the Respondent's treatment of Mrs. Addison's leave request was at least presumptively justified based on Mrs. Addison's past use of emergency leave, and her leave was finally approved, and that the supervisory offer was adequately explained as essentially an administrative mistake, and noting, moreover, that no anti-union motivation or disparate treatment had been established, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

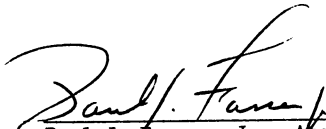
On January 15, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

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

IT IS HEREBY ORDERED that the complaint in Case No. 72-4668
be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 26, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations.

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

ENERGY RESEARCH AND DEVELOPMENT
ADMINISTRATION, HEADQUARTERS
A/SLMR No. 634

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 2195, seeking to include a Chemist (STS-Code 03200), a Senior Physicist (STS Code 03100), and two Senior Technical Assistants (STS-Code 08400), in a unit of professional and nonprofessional employees of the Activity. In this regard, the Activity contends that these employees are management officials within the meaning of the Order and, as such, should be excluded from the unit. The AFGE, on the other hand, asserts that these employees are not management officials and should be included in the unit it represents.

Based on the record evidence, the Assistant Secretary found that none of the employees involved were management officials within the meaning of the Order. Accordingly, he ordered that the unit be clarified by specifically including in such unit these particular employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENERGY RESEARCH AND DEVELOPMENT
ADMINISTRATION, HEADQUARTERS

Activity

and

Case No. 22-6294(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2195

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2195, herein called AFGE, is the exclusive representative of a unit of all professional and nonprofessional employees, Headquarters, Energy Research and Development Administration, whose regular duty station is the Washington, D. C. metropolitan area, excluding, among others, management officials. In this proceeding the AFGE seeks to clarify the status of four employees, Robert Epple, Chemist; George Kolstad, Senior Physicist; Glen W. Wensch, Senior Technical Assistant; and John Yevick, also a Senior Technical Assistant, who the AFGE contends are not management officials within the meaning of the Order and should, therefore, be included within its unit. The Activity asserts that the above-named employees are management officials.

The parties stipulated that the mission of the Energy Research and Development Administration (ERDA) is to develop all energy sources to meet the needs of present and future generations; to increase the productivity of the national economy and make the nation self-sufficient in energy; to restore, protect and enhance the environment; and to assure public health and safety.

The ERDA is headed by an Administrator and a Deputy Administrator. There are a number of Offices and Assistant Administrators located at the Activity which constitute the Headquarters for the ERDA. In this regard, the record reflects that the Assistant Administrators located at the Headquarters include the Assistant Administrators for Laboratory and Field Coordination; Administration; International Affairs; Planning and Analysis; Fossil Energy; Nuclear Energy; Environment and Safety; Solar, Geothermal and Advanced Energy Systems; National Security; and Conservation. Seven of the Assistant Administrators have four or more divisions reporting to them, and the record reveals that these various divisions may be broken down into a number of branches and offices. Thus, reporting to the Assistant Administrator for Solar, Geothermal and Advanced Energy Systems are four divisions, including the Division of Physical Research which is the division in which two of the employees involved in this proceeding are employed - Robert Epple, who works in the Office of Material Sciences in the Solid State Physics and Materials Chemistry Branch; and George Kolstad, who serves as an advisor to an Assistant Director of the Division of Physical Research, and also as a Senior Physicist in the Chemical, Energy and Geosciences Branch of the Division. The other two employees whose eligibility is sought to be clarified herein Glen W. Wensch and John G. Yevick - are employed in the Division of Reactor Research and Development, which is one of the four divisions and three offices under the Assistant Administrator for Nuclear Energy.

The record indicates that the four employees involved in this proceeding are classified as Scientific and Technical Schedule (STS) employees, and, as such, are primarily concerned with research, development, test or evaluation functions.

Robert Epple, Chemist (STS-Code 03200)

Robert Epple is classified as a Chemist (STS-Code 03200) and is employed in the Office of Material Sciences in the Solid State Physics and Materials Chemistry Branch of the Division of Physical Research, which division reports to the Assistant Administrator for Solar, Geothermal and Advanced Energy Systems. The division is concerned with the development, coordination and supervision of programs in the ERDA's installations and other organizations engaged in the physical sciences. Epple is the only chemist employed in the Division of Physical Research, and the record indicates that his immediate supervisor, the Branch Chief of the Solid State Physics and Materials Chemistry Branch, and the Assistant Director of the Office of Material Sciences, rely upon Epple's expertise in the field of chemistry, high temperature chemistry, and surface chemistry. Epple has responsibility in the Branch for programs in the Materials Chemistry technical category. In this regard, he receives proposals from laboratories and universities with regard to certain of the programs which he reviews and on which he makes recommendations concerning their renewal, continuation, or change. These recommendations are subject to review by his immediate supervisor and by the Assistant

Director of the Office of Material Sciences. He participates, with other members of the Branch, in budget justification preparation for the particular programs in the division but, in this connection, the record reveals that Epple's recommendations do not carry any more weight than that of the others involved in budget preparation. In addition, Epple attends, subject to his immediate supervisor's approval, inter and intra-agency meetings involving specific technical subjects in the areas of research in which he is involved. In these meetings, the record discloses that the various participants discuss subjects in which they are expert and compare notes with each other. The record reflects, however, that Epple's participation is subject to established Agency policies and guidelines and that he has no authority to commit the ERDA to new programs or courses of action.

Based on the foregoing, I find that Robert Epple, Chemist (STS-Code 03200), employed in the Office of Material Sciences, Solid State Physics and Materials Chemistry Branch, Division of Physical Research, is not a management official within the meaning of the Order. Thus, the record reveals that Epple is employed in one of the numerous subdivisions of the ERDA and that he serves as an expert who provides resource information and makes recommendations, within established Agency guidelines and policies, only with respect to specific programs in his office, branch and/or division. In this regard, the record reflects that he is a highly trained professional whose work requires discretion and independent judgment but that the authority for the ultimate determination of policy resides in others. 1/ Accordingly, as his role does not extend beyond the point of providing information or recommendations to active participation in the determination of Agency policy with respect to personnel, procedures, or programs, 2/ I find that Epple is not a management official, and I shall clarify the exclusively recognized unit to include him within it.

George Kolstad, Senior Physicist (STS-Code 03100)

George Kolstad is classified as a Senior Physicist (STS-Code 03100) and is employed in the Office of Molecular Sciences in the Chemical Energy and Geosciences Branch of the Division of Physical Research. He acts as scientific advisor to the Assistant Director for Molecular Sciences, Division of Physical Research and, in this regard, serves as an advisor in the broad area of energy as it relates to the program for which the Assistant Director is responsible.

1/ Cf. National Science Foundation, A/SLMR No. 487, FLRC No. 75A-109.

2/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

Kolstad's role in the Chemical Energy and Geosciences Branch of the division relates to the geosciences program of the branch. In this regard, he may recommend certain activities which, in his opinion, should be conducted within that program in order to strengthen it. The record indicates that the ERDA has published guidelines for the public as to the areas in which it may desire to receive proposals in various scientific fields. Those proposals which relate to geoscience will normally come to Kolstad for review while proposals in other disciplines will be referred to other appropriate professionals. Although Kolstad may initiate recommendations with respect to those proposals which, in his view, the Agency should support, the record reveals that approval of such recommendations involves many levels of review. Kolstad is himself also engaged in research to obtain information pertinent to geoscience subjects.

Kolstad also is involved in approximately twelve committees concerning a variety of matters such as seismology, geochemistry and geophysics. His role in attending committee meetings is primarily to exchange technical and scientific information with others selected to attend on the basis of their own expertise. In this connection, he is not authorized to commit the ERDA with regard to policy or funds, and he participates in such meetings within established Agency guidelines.

Based on the foregoing, I find that Kolstad is essentially an expert rendering resource information or recommendations with respect to established Agency policy, as distinguished from an employee who participates in the formulation or ultimate determination as to what Agency or Activity policy will be. Accordingly, I find that he is not a management official within the meaning of the Order and should be included in the exclusively recognized unit.

Glen W. Wensch, Senior Technical Assistant (STS-Code 08400)

Glen W. Wensch is classified as a Senior Technical Assistant (STS-Code 08400). He is employed as the technical assistant to the Assistant Director of Programs in the Office of Programs, Division of Reactor Research and Development, which is one of the divisions under the Assistant Administrator for Nuclear Energy. The division is responsible for the development of nuclear energy applications for the production of electricity and heat and for the various projects involved in developing nuclear power plants, mainly for the generating of electricity.

Wensch is an expert in the field of nuclear energy; specifically, the development of electricity by using heat from the fission of the uranium-plutonium nucleus. His duties, for the most part, involve the assessing of program plans and program summaries. Each line Assistant Director prepares a program plan describing exactly the manner in which he is going to carry on his program to meet the objectives as assigned to him by the Director. Within the plan there are a large number of finer detailed documents known as program summaries. These describe each

discipline or separable part of a discipline to show how its objectives will be executed as a function of time and resource in support of the Assistant Director's program plan. There are some 85 program summaries and approximately eight Assistant Directors' plans. Wensch's responsibility is to check these summaries to ascertain whether they meet the criteria of established guidelines. He then prepares opinions on these assessments for his immediate supervisor. Wensch is also involved at certain times with budget review testimony for the Congress.

The record reveals also that Wensch represents his division in a group called the International Working Group for Fast Reactors (IWGFR) which plans and recommends to the Director of the International Atomic Energy Agency (IAEA) international scientific meetings to be held in certain technical areas. However, it appears that prior to his attendance at meetings of the IWGFR he conducts a full canvass of the ERDA to determine what the ERDA's interests and priorities are, so that he may attend those meetings with a fully coordinated position. As positions are developed within the IWGFR, he normally checks, by telephone, with the ERDA and receives any additional guidance or comments from his Division. The record reveals that Wensch is not delegated any independent authority to commit the ERDA, that formal ERDA approval is required before Wensch can commit the ERDA, and that his participation in the above noted meetings is limited to reflecting established ERDA positions and policies.

Under all of these circumstances, I find that Wensch is not a management official within the meaning of the Order. Thus, in my view, he serves primarily as a resource person providing technical advice and assistance to those formulating policy rather than as a person who formulates or decides policy. Accordingly, I shall include him in the unit.

John G. Yevick, Senior Technical Assistant (STS-Code 08400)

John G. Yevick is classified as Senior Technical Assistant (STS-Code 08400), and is employed in the Program Energy Analysis Office of the Division of Reactor Research and Development. His immediate supervisor is the Assistant Director of the office. This office is responsible for projecting into the future the economic development of nuclear power and energy and the manner in which the various reactor systems programs in the division fit into such development. The major role of the office is to conduct studies that the ERDA or other agencies believe are desirable and necessary. Yevick is a technical authority on fast breeder reactors.

The record reveals that Yevick's principal activity deals with international programs involving the development of fast breeder reactors in which the major industrial countries in Europe are embarked as well as the United States. In this regard, there are international conferences held throughout the world. In connection with his expertise in the field of breeder reactors, the record indicates that Yevick serves with the

U. S. Delegation to the U.S. - U.S.S.R. Coordinating Committee on Fast Breeder Reactors, in which the State Department, and industry and utilities involved in nuclear programs are also represented. ^{3/} The Coordinating Committee on Fast Breeder Reactors, one of three Coordinating Committees reporting to the Joint US-USSR Committee, is responsible for making recommendations and suggestions for a program plan for cooperation or joint programs to the Joint Committee which has the responsibility for deciding which programs should be undertaken. In this regard, Yevick has prepared draft agreements which have been used in subsequent negotiations by the participants. The record discloses that, in connection with his work on the Coordinating Committee, Yevick is chairman of the Steam Generator Working Group which makes recommendations to the Coordinating Committee on the Fast Breeder Reactors which then may recommend programs to the Joint Committee. Within the Working Group are other individuals from the Division and from laboratories and industry. In addition, Yevick serves on a number of other committees concerned with cooperative agreements between the U.S. and the U.S.S.R., and the U.S. and other countries.

The record reveals that Yevick's duties also include, among others, work on various task forces on fast breeder reactors; the handling of some correspondence, subject to review, from Congressmen, Senators, and others relating to inquiries in the area of technical information with respect to civilian nuclear power; the drafting of staff papers on technical matters relating to the construction of nuclear facilities; and the participation in the "on-going" Liquid Metal Fast Breeder Reactor program, which involves technical matters regarding the components of the breeder reactor in facilities being built. The record is clear, however, that Yevick serves in a technical capacity and is not delegated with the authority to commit the ERDA in any respect.

Under all the circumstances, I find that Yevick is not a management official within the meaning of the Order. Thus, Yevick is a highly trained employee required to exercise discretion and independent judgment in the preparation of materials and recommendations. However, he serves primarily in a technical capacity as a resource person providing expert information to those who actually make and change Agency policy. ^{4/}

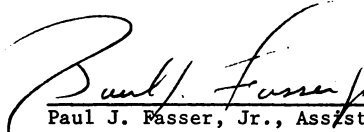
^{3/} The U. S. delegation includes, among others, the Director of the Division; the Associate Director of the ERDA National Laboratory; the General Manager, Advance Reactor Department of General Electric; the President of Atomic International; the Vice-President in charge of the Westinghouse Reactor Division; and two Assistant Directors from the Reactor Research Division of the ERDA.

^{4/} Cf. National Science Foundation, cited above.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, AFL-CIO, Local 2195, on May 26, 1975, be, and it hereby is, clarified by including in said unit Robert Epple, Chemist (STS-Code 03200), Solid State Physics and Materials Chemistry Branch, Division of Physical Research; George Kolstad, Senior Physicist (STS-Code 03100), Office of Molecular Sciences, Chemical Energy and Geosciences Branch, Division of Physical Research; Glen W. Wensch, Senior Technical Assistant (STS-Code 08400), Office of Programs, Division of Reactor Research and Development; and John G. Yevick, Senior Technical Assistant (STS-Code 08400), Program Energy Analysis Office, Division of Reactor Research and Development.

Dated, Washington, D. C.
March 30, 1976



Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA
A/SLMR No. 635

This case involved an Application for Decision on Grievability or Arbitrability filed by Local 1744, American Federation of Government Employees, AFL-CIO, (AFGE). The AFGE contended that under the negotiated agreement the Activity was obligated to "consult", i.e. meet and confer, with the AFGE prior to appointing an employee to serve as the Activity's Deputy Equal Employment Opportunity (EEO) Officer/EEO Coordinator.

The Administrative Law Judge recommended that the Assistant Secretary find that the grievance in the instant proceeding was not grievable under the parties' negotiated agreement. In agreeing with the Administrative Law Judge's recommendation, the Assistant Secretary concluded that the negotiated agreement did not contain a provision or provisions which would grant the AFGE the right to be dealt with prior to selecting an individual to fill the position of Deputy EEO Officer/EEO Coordinator. Accordingly, and noting particularly the absence of exceptions, the Assistant Secretary found that the grievance in this case was not on a matter subject to the parties' negotiated grievance procedure.

5/ The record indicates that subsequent to the hearing in the matter a secretary may have been assigned to Yevick. However, the evidence is insufficient to establish that Yevick is a supervisor within the meaning of Section 2(c) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA

Activity

and

Case No. 50-13012(GR)

LOCAL 1744, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Applicant

DECISION ON GRIEVABILITY

On January 29, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision in the above-entitled proceeding, finding that the grievance involved herein was not on a matter subject to the grievance procedure set forth in the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

The instant Application for Decision on Grievability or Arbitrability sought, in essence, a determination as to whether or not the Activity had an obligation, as contended by the Applicant, Local 1744, American Federation of Government Employees, AFL-CIO, herein called AFGE, to "consult", i.e. meet and confer, with the AFGE concerning the appointment of an employee as the Activity's Deputy Equal Employment Opportunity (EEO) Officer/EEO Coordinator - Director of Industrial Operations.


The Administrative Law Judge found, among other things, that the AFGE had no right to be "consulted" about the selection of an individual

to fill the position of Deputy EEO Officer/EEO Coordinator because there was nothing in the parties' negotiated agreement requiring such "consultation" and that, therefore, the instant grievance concerning such failure to "consult" with the AFGE was not on a matter subject to the negotiated grievance procedure. I agree. Thus, in my view, the parties' negotiated agreement herein does not contain a provision or provisions which, in effect, grant the AFGE the right to be dealt with prior to the Activity's making a selection of an individual to fill the position in question. In this connection, it was noted that the contractual provisions concerning the AFGE's involvement in the implementation of the Activity's equal employment opportunity program do not indicate that the parties intended that the AFGE would have the right to be "consulted" concerning the procedures to be utilized in the selection of an individual to fill the position of Deputy EEO Officer/EEO Coordinator.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 50-13012(GR) is not on a matter subject to the parties' negotiated grievance procedure. 1/

Dated, Washington, D. C.
March 30, 1976


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ In view of this disposition, I find it unnecessary to pass upon the Administrative Law Judge's conclusions that the Deputy EEO Officer/EEO Coordinator - Director of Industrial Operations is a management official, and that the "consultation" sought by the AFGE with respect to the filling of this position was of a nature which would interfere with the Activity's reserved rights under Section 12(b)(2) and (5) of the Order.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



RECOMMENDED DECISION

Preliminary Statement

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In the Matter of

DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA
Activity

CASE NO. 50-13012 (GR)

and

LOCAL 1744, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
Applicant
.....

Edward T. Borda, Esq.
Department of the Navy
Office of Civilian Manpower Management
Labor Disputes and Appeals Section
Washington, D.C. 20390

and

Donald J. Sherfick
Staff Consultant
Civilian Personnel Department
Naval Avionics Facility
Indianapolis, Indiana 46218
on the brief

For the Activity

David D. Smith
International Representative
American Federation of Government
Employees, AFL-CIO
1729 Sanwela Drive
Indianapolis, Indiana 46260

Before: SALVATORE J. ARRIGO
Administrative Law Judge

This matter arose from an Application for Decision on Grievability or Arbitrability under Section 13 of Executive Order 11491, as amended (hereinafter called the Order) filed by Local 1744, American Federation of Government Employees, AFL-CIO (hereinafter called the Union or the Applicant) involving a determination by Naval Avionics Facility, Indianapolis (hereinafter called NAFI or the Activity) that a grievance filed by the Union was not cognizable as a grievance under the parties existing collective bargaining agreement.

Pursuant to a Notice of Hearing issued by the Acting Assistant Regional Director, Chicago Region, on July 22, 1975 a hearing on the application was held in Indianapolis, Indiana on September 11, 1975. At the hearing the parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

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

Background of the Case

At all times material hereto the Union has been the exclusive collective bargaining representative of all graded and ungraded employees of NAFI excluding supervisors as defined in Section 2(c) of the Order, employees in personnel work in other than a purely clerical capacity, professional employees and various cryptographic employees. An initial collective bargaining agreement was signed by the parties in 1968 and renewed in 1970. In the fall of 1973 the parties executed a new two-year agreement the terms of which were in effect at all times material herein.

Late in the afternoon of December 31, 1974, Robert Kelly, the Union's President, received a rumor from an employee that Donald Dennis was retiring from his grade GS-15 position of Deputy EEO Officer/EEO Coordinator - Director of Industrial Operations. 1/ By memorandum to the NAFI Commanding Officer

1/ The Deputy EEO Officers is the Activity's chief administrative officer regarding the NAFI EEO program and [Cont'd on next page]

dated Saturday, January 4, 1975, Kelly suggested that the Activity appoint a minority employee to the Deputy EEO position. It was Kelly's view that employees, especially minority employees, lacked "faith" in the NAFI EEO Program and that employee confidence could be gained by "considering the views of the employees and not just the interest of upper management" in filling the position. Accordingly, Kelly submitted the names of four employees for the Activity's consideration. Thereafter, on January 6, 1975 Kelly was informed by the Activity's Director of Civilian Personnel that Mr. Dennis had retired as of December 31, 1974 and was going to be replaced by John Hall. Kelly advised the Director of his January 4 letter to the Commanding Officer and gave various reasons why the Union contended that the position of Deputy EEO Officer should be a full-time job. The Director stated that he felt sure the Commanding Officer would give some consideration to Kelly's views and the discussion concluded. Immediately after leaving the meeting an employee presented Kelly with an Activity memorandum issued January 2, 1975 which stated, inter alia, that John Hall had been appointed to the dual responsibility position of Deputy EEO Officer and Director of Industrial Operations.

On January 11, 1975 the Union filed a grievance on the Activity's filling Deputy EEO Officer position on January 2, "before the Union had the opportunity to exercise their rights and obligations". The Union alleged that the Activity's actions violated the negotiated agreement as follows:

"a. Article V of the Agreement clearly states the Union has the right and obligation to represent the interest of employees in the implementation of the Equal Employment Opportunity Program.

"b. Article XIII, Section 1: Consultation \ was not provided prior to the official appointment.

1/ [Cont'd] reports to the Commanding Officer who is the Activity's EEO Officer ultimately responsible for the operation of the program. The Deputy EEO Officer is responsible for the formulation, development and implementation of the Activity's EEO program policies.

The Director of Industrial Operations functions as the administrative head of the Activity's Manufacturing Department, Public Works Department and Industrial Engineering Department. In this capacity he directly supervises various department directors and managers.

"c. Article XII, Section 5: The Union was not included in the distribution of the CO's memorandum of 2 January 1975. 2/

"d. Executive Order 11491: Local 1744 was not afforded reasonable notification and ample opportunity to meet and confer before management took action. Such failure constitutes violations of Section 19(a)(1) and (6) of the Order."

With regard to the grievance, the Union sought corrective action which required withdrawal of John Hall's appointment; informing the employees by memorandum that Hall's appointment was made prior to consultation with the Union which constituted a violation of the Union's rights under the Order and the negotiated agreement; and further required that the Activity appoint the Deputy EEO Officer from the list of four named employees submitted by Kelly in his letter of January 4 (above).

The Activity's January 17, 1975 response to the grievance indicated that the right to select or appoint is solely a management prerogative which the Activity considered a non-negotiable matter, undiluted in any fashion by the agreement. The Activity notified the Union that it would not further process the Union's complaint under the grievance procedure nor would it grant the relief requested.

Thereafter on February 13, 1975 the Union filed with the Department of Labor the instant Application for Decision on Grievability or Arbitrability setting out the unresolved question as follows:

"Can management reject a grievance over the interpretation or application of the agreement and unilaterally decide to dismiss it as a complaint?"

2/ At the hearing counsel for the Activity conceded that the matter relating to the distribution of the January 2 memorandum was grievable and therefore the Activity would entertain a Union grievance on that subject. Accordingly no evidence was taken on this issue.

"When the agreement states that the Union has the right and responsibility to represent the interest of all employees in the unit and consult with NAFI on the matter of concern to the unit employees; and,

"When the implementation of the Equal Employment Opportunity program is listed in the agreement as a matter of concern to unit employees; then,

"Does NAFI have the obligation to consult with the Union prior to officially appointing an employee to serve as Deputy Equal Employment Opportunity Officer responsible for developing NAFI's Plan of Affirmative Action, assessing progress and recommending changes or improvements?"

Relevant Provisions of the Agreement

"Article IV RIGHTS AND OBLIGATIONS OF NAFI "

This provision recites that NAFI has the right of sole determination and no obligation to consult with the Union in such areas as those innumarated in Section 11(b) of the Order. The provision also provides that NAFI retains those rights set forth in Section 12(b) of the Order.

"Article V RIGHTS AND OBLIGATIONS OF THE UNION "

"The Union has the right and responsibility to represent the interest of all employees in the unit, including those who are not members of the organization, and consult with NAFI on the matters of concern to the employees in the unit. Consultation with management will be by prearrangement as to time and agenda. Matters of concern to employees in the unit will include subjects such as:

1. safety standards
2. working conditions,
3. work shifts and hours of work,
4. procedures for the disposition of employee grievances,
5. training,
6. leave and vacation schedules,
7. implementation of pay policies,
8. procedures relating to promotions, disciplinary action, appeals, reduction-in-force, and employee appraisals; and
9. implementation of the Equal Opportunity program. (Emphasis supplied)

"Article VIII GRIEVANCE ARBITRATION"

This provision sets forth a four step grievance procedure with regard to the settlement of grievances over the interpretation or application of the agreement. If the grievance is thereafter unresolved the Union may refer the matter to a "third party" for decision. Article XVI provides for submitting unresolved grievances on the application or interpretation of any meaning of the agreement to an arbitrator for final and binding decision.

"Article XIII RELATIONSHIP OF AGREEMENT TO NAVY POLICIES, REGULATIONS AND PRACTICES"

"Section 1. Consultation - NAFI and the Union shall confer with respect to matters concerning personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Personnel Manual, published NAFI and Navy policies and regulations, and Executive Order 11491, as amended.

"Section 2. Changes in policy or regulations initiated by NAFI, having significant effect on working conditions of employees in the unit, will be subjects of consultation with the Union prior to implementation, except in emergency situations. The views of the Union on such changes will be considered."

"Article XV EQUAL EMPLOYMENT OPPORTUNITY"

In this article NAFI states its support for equal employment opportunity objectives and programs designed to achieve those objectives. The provision relates the establishment of an EEO Committee designed to assist in establishing affirmative programs to promote equal employment opportunity. Section 4 further provides that "One member of this Committee will be a Union representative who has been appointed by the Commanding Officer. The Union will be solicited to furnish a list of qualified employees to the Commanding Officer for consideration. The Commanding Officer will give priority consideration to the nominees furnished by the Union."

Under Section 6 of this article, NAFI agrees to appoint and train EEO Counselors as needed. Three candidates for counselors are to be nominated by the Union and NAFI agrees to give priority consideration to one counselor from the list of candidates. Counselors are to serve under the direction of the EEO Officer.

Section 7 of this article states: "Disputes over the interpretation or application of this article shall be processed under the appropriate procedure."

Discussion and Conclusions

The Union argues that while the Activity was free to select whomever it chose to be the Deputy EEO Officer, nevertheless, various provisions of the agreement support its contention that the Activity had the obligation to consult with the Union on the matter prior to making the selection. In essence the Union defines consultation in these circumstances as the Activity notifying the Union prior to making the selection and giving the Union the opportunity to offer meaningful inputs or suggestions in the form of submitting names of their nominees for the job and to have their suggestions receive bonafide consideration.

The Activity contends that nothing in the agreement may be construed to give rise to the alleged right of consultation with regard to the selection; that the particular position in question is outside the bargaining unit, making related considerations non-negotiable; and that the grievance itself, especially in view of the demanded remedy, deals with areas that run afoul of Section 12(b) of the Order. 3/

I find and conclude that the Deputy EEO Officer at the Activity is a management official within the meaning of Section 10(b)(1) of the Order and accordingly outside the scope of the collective bargaining unit. Section 10(b)(1) of the Order precludes the recognition of a collective bargaining unit if it includes "any management official or supervisor...." While the term 'management official' is not defined in the Order, the Assistant Secretary has defined 'management official' as follows: "When used in connection with the Executive Order, the term 'management official' means an employee having authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or programs.

3/ Section 12(b) of the Order provides:

- "(b) management officials of the agency retain the right, in accordance with applicable laws and regulations -
- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency...."

In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of an expert or professional rendering resource information or recommendations with respect to policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be." 4/

The record reveals that the Deputy EEO Officer at the Activity is the Activity's chief administrative officer in the equal employment opportunity program. Indeed the Union's application being considered herein alleges, and the Activity agrees, that the Deputy EEO Officer is responsible for developing NAFL's affirmative action plan, assessing its progress and recommending changes or improvements therein. It follows therefore that the Deputy EEO Officer "actively participates" in determining the Activity's policy in this area within the meaning of the Assistant Secretary's definition of "management official" as set forth above. Moreover, the Activity exercised a management decision to combine this job with that of the unquestioned managerial position of Director of Industrial Operations, a prerogative reserved to it under Section 12(b)(2) and (5) of the Order.

The Federal Labor Relations Council has, on numerous occasions, addressed the question of management's reserved rights under Section 12(b) of the Order. In NFFE Local 943 and Keesler Air Force Base, Mississippi, FLRC No. 74A-66, Report No. 89, the Council held: "With regard to the meaning of this section, the Council has frequently emphasized in its decisions that the language of Section 12(b)(2) manifests an intent to bar from agreements provisions which infringe upon management officials' exercise of their existing authority to take the personnel actions specified therein. The section does not, however, preclude negotiation of the procedures which management will follow in exercising that reserved

4/ Department of the Air Force, etc., A/SLMR No. 135.

authority, so long as such procedures do not have the effect of negating the authority itself. Thus, in its VA Research Hospital decision (citing Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, Report No. 31, and other cases.) concerning a proposal which would have enabled the union to obtain higher level management review of a selection for promotion before the promotion could be effected, the Council stated:

"Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel actions, i.e., to hire, promote, etc. The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority. However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserve."

The VA Research Hospital decision cited above involved a proposal requiring that before effectuating a promotion under the agency's merit promotion plan the first-line selecting official would notify a union steward of a promotion selection and, upon timely request (the end of the steward's second tour of duty following receipt of notice of the proposed selection), the next higher non-participating supervisor would review the decision. The decision of the reviewing supervisor would be final. In finding the proposal was not rendered non-negotiable by Section 12(b)(2) of the Order, the Council found that the proposal did not "require management to negotiate a promotion selection or to secure the union's consent to the decision (n)or...unreasonably delay or impede promotion selections so as to, in effect, deny the right to promote reserved to management by Section 12(b)(2)."

In Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington, FLRC No. 74A-33, Report No. 61, the Council reviewed a provision on rating or ranking disputes under a promotion plan which would prevent the filling of any vacancy on a permanent basis when a formal grievance is filed under the agency grievance procedure until either the grievance is finally resolved or until an employee has exercised any of his statutory or mandatory placement rights. In determining the provision to be non-negotiable the Council held: "...it is clear from the express language employed in 12(b)(2) that management's reserved authority under that section extends to the right to take personnel actions on a permanent basis, viz., to hire, promote, transfer, assign, etc. Further, as emphasized in the VA Research Hospital decision, this authority includes the right of management to accomplish such personnel action promptly, or stated otherwise, without unreasonable delay."

In a case involving an appeal from an arbitration award (National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, FLRC 73A-67, Report No. 61) the Council held that the arbitrator's interpretation of that part of the collective bargaining agreement which incorporated the language of Section 12(b) of the order was inconsistent with the Order and accordingly overruled that portion of the arbitrator's award. The case arose when the agency filled two GS-15 positions in a manner admittedly in violation of the merit promotion procedures set forth in the agreement. The Union requested that the positions be vacated and refilled in a manner consistent with the procedures in the agreement. The agency vacated both positions but refilled only one of them and refused to refill the other. The refusal to refill the position was the matter in controversy before the arbitrator who directed management to fill that position by taking the proper action. The Council found: "In our view, the arbitrator's interpretation and application of Article 4 of the agreement (incorporating, as already indicated, the language of section 12(b) of the Order) is inconsistent with the meaning of the Order in that it fails to recognize that, implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action."

It is clear from the language and history of the Order, as well as from previous Council decisions as already noted, that no interference with management's authority to decide and act with respect to the matters enumerated in section 12(b)(2) may be permitted under the Order.

"The arbitrator's award, in the circumstances presented by this case, would limit management's authority to decide and act under section 12(b)(2) with regard to filling a position by conditioning management's authority to determine not to fill the position in question upon management's ability to justify its decision to the arbitrator's satisfaction. Thus, the portion of the arbitrator's award directing management to fill the position in question interferes with management's reserved authority to decide whether or not to hire, promote, transfer or assign employees under section 12(b)(2) of the Order. However, management's reserved rights under section 12(b) may not be infringed by an arbitrator's award under a negotiated grievance procedure...."

In sum, the Council has concluded that while an agency's authority under Section 12(b) of the Order 5/ to assign or select the individual to fill a vacancy or receive a promotion may not be bargained away, nevertheless, the Activity was free to negotiate and agree to procedures to be followed in reaching the decision or exercising that authority as long as such procedures do not have the effect of "negating" the authority itself or "interfering" with that authority. In the case herein, although the Union avers it does not wish to assign or select the Deputy EEO Officer, I find the role it wishes to play in that selection process constitutes interference with management's reserved rights under Sections 12(b)(2) and (5) of the Order and accordingly renders the matter not grievable or arbitrable. Thus the Union wishes to be notified and "consulted" prior to the Activity selecting the individual for the position in order to afford the Union an opportunity to make "meaningful" suggestions which in turn would be required to receive "bonafide" consideration from management. The Union therefore was not merely seeking an

5/ The Council's reasoning with regard to the interpretation and application of Section 12(b)(2) of the Order is equally applicable to Section 12(b)(5). Veterans Administration Hospital, Canandaigua, New York, FLRC No. 73A-42, Report No. 55.

opportunity to submit names for management's consideration for the selection 6/ but to have "bonafide" consideration given to its "meaningful" suggestions. Presumably, if the Union's suggestions were not followed the question of management's good faith would be open to inquiry as to the nature of the consideration given to the Union's suggestions including what factors were considered in making the selection and the weight given these factors. Indeed, Complainant in its brief claims "the Union does have a right to file a grievance...concerning the manner in which the position is filled and the adverse impact on unit employees." Such participation transcends the areas of procedures which management will follow in reaching its decision. Accordingly, I conclude that "consultation" with the Union according to its definition of "consultation" as described above would interfere with management's reserved rights under Sections 12(b) (2) and (5) of the Order to decide who will be its managers, a right inherent and basic to the right to manage.

Even assuming that the grievance involved procedures not precluded from negotiation under Section 12(b) of the Order, I nevertheless conclude that the terms of the collective bargaining agreement do not support the Union's contention that the matter is grievable or arbitrable. The Union essentially relies on the language of Article XIII, Section 1 of the agreement which recites an obligation on the part of the Activity to confer with the Union on matters concerning personnel policies and practices and matters affecting working conditions. Appointing the Deputy EEO Officer, in the Union's view, is a matter within the meaning of that clause. Further, the Union points to the express language of Article V of the agreement which states that the Union has a right and obligation to consult with the Activity on matters of concern to employees in the unit and a matter of concern specifically includes the "implementation of the Equal Opportunity program". In the Union's view, appointing the Deputy EEO Officer is an intrinsic part of program implementation. The Union also contends that nowhere in the agreement is this matter excluded from being

6/ By Department of the Navy regulation, the Activity head is instructed not to delegate or negotiate limitations on his authority to personally select officials to assist him in carrying out the equal employment opportunity program. However, he may consider recommendations from others for appointment to these roles.

considered a grievance and urges that support can be found for its portion on grievability in Article XV entitled "Equal Employment Opportunity" which, in Section 7, provides: "Disputes over the interpretation or application of this article shall be processed under the appropriate procedure." Accordingly, the Union concludes that its grievance presented a question of interpretation and application of the agreement and therefore should be sent to an arbitrator for decision who would define the extent of the Union's rights to be consulted under the agreement.

In my view the issue to be decided is whether the procedure management uses in filling the Deputy EEO Officer position, a matter which the Union presumably could have negotiated into the agreement, is in fact a matter subject to the negotiated grievance process. 7/ I find nothing in the agreement which expressly refers to the procedures to be used to fill the position of Deputy EEO Officer or any other managerial position. Further, there is no evidence that the negotiations over the agreement were at all concerned with the selection of or the procedures used to select the Deputy EEO Officer. Nor does it appear that the past practice of selecting the Deputy EEO Officer involved consultation with the Union or the procedures to be used in making that selection.

To be sure the terms of the agreement require consultation with the Union on matters concerning personnel policies and practices and matters concerning working conditions, and the implementation of the equal employment opportunity program is such a matter. However, the Union's rights under the agreement must also be viewed in the context of the rights expressly granted the Union 8/ and Activity's reserved rights. Those reserved rights of management inherently encompass the right to establish the procedures to be followed in selecting who will be the Deputy EEO Officer or any other similar managerial position. Nothing in the agreement or this record suggests that this particular right, which is closely akin to the right to select, has been negotiated away. In my view, merely because the implementation of the equal employment opportunity program is specifically mentioned in Section V of the agreement along with other matters concerning working

7/ Cf. Department of the Navy, Naval Ammunition Depot, Crane Indiana, Decision on Appeal from Assistant Secretary Decision (Case No. 50-9667), FLRC No. 74A-19, (February 7, 1975).


8/ See for example the Union's right to recommend EEO Committee members and EEO Counselors as set forth in Article XV, supra.

conditions, this does not establish that the procedures for selecting the Deputy EEO Officer and other managerial employees such as the personnel director, labor relations director, or chief operation's officer can be considered, in the circumstances herein, as a matter which the Activity has committed itself to consult with the Union before acting unilaterally as it has done in the past.

The right to determine the procedures used in selecting the Deputy EEO Officer is closely related to the actual selection itself. It would seem therefore that substantial evidence should be present before concluding that the parties negotiated into the agreement a limitation on that right. No such evidence was presented. Accordingly, since the record discloses that the procedures used in selecting the Deputy EEO Officer were never brought within the terms of the agreement, I conclude that a matter of interpretation or application of the agreement, apart from the underlying Section 12(b) question resolved herein, is not presented on the facts of this case.

Recommendation

I recommend that the Assistant Secretary find that the grievance herein is not on a matter subject to the grievance procedure set forth in the parties existing agreement.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: January 29, 1976
Washington, D.C.

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

DEPARTMENT OF THE ARMY,
U.S. ARMY RESERVES,
425th TRANSPORTATION COMMAND,
FOREST PARK, ILLINOIS
A/SLMR No. 636

This case involves a representation petition filed by the National Federation of Federal Employees, Local 1655, for a unit of all Army Reserve Technicians of the 425th Transportation Command, U.S. Army Reserves, Forest Park, Illinois. The claimed unit would include all Army Reserve Technicians in 4 of the Activity's 17 military units, namely the Activity headquarters, the Personnel Service Company, and the headquarters of both the 336th Transportation Group and the 419th Transportation Battalion, which are located in Forest Park, Illinois. The Activity contends that the unit petitioned for is inappropriate as it excludes certain other employees of the Activity who share a community of interest with those in the claimed unit and that such fragmentation would not promote effective dealings and efficiency of agency operations. The Petitioner, on the other hand, maintains that the unit sought is appropriate, but indicated alternatively that it would participate in an election in any unit the Assistant Secretary found appropriate.

The record revealed that all employees of the Activity enjoy a common mission, common overall supervision, uniform personnel and labor relations policies and practices, a substantial degree of integration, and, essentially, similar working conditions, job classifications, skills and duties. Under these circumstances, the Assistant Secretary found that the sought unit did not embrace employees who share a clear community of interest separate and distinct from other employees of the Activity. Additionally, he found that such a unit would, in effect, divide and fragment the Activity solely on the basis of geographic location and could not reasonably be expected to promote effective dealings and efficiency of agency operations. With regard to the Petitioner's alternative position, the Assistant Secretary found that a residual command-wide unit would be an appropriate unit, but was administratively advised that the Petitioner did not have a sufficient showing of interest in the appropriate unit. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U. S. ARMY RESERVES,
425th TRANSPORTATION COMMAND,
FOREST PARK, ILLINOIS

Activity

and

Case No. 50-13063(R0)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1655

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Richard Dose. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in this case, including briefs submitted by the Activity and the National Federation of Federal Employees, Local 1655, herein called the Petitioner, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner seeks an election in a unit composed of all Army Reserve Technicians of the 425th Transportation Command, U.S. Army Reserves, Forest Park, Illinois, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in Executive Order 11491, as amended. The Activity contends that the proposed unit is inappropriate as it excludes certain employees of the Activity who share a community of interest with those in the claimed unit. It contends further that the resulting fragmentation would not promote effective dealings and efficiency of agency operations. The Petitioner contends that the proposed unit is appropriate, but, in the alternative, indicates that it will participate in an election in any unit found appropriate by the Assistant Secretary.

The Activity, one of 13 such commands encompassed within the Fifth U.S. Army, Ft. Sam Houston, Texas, is headquartered in Forest Park, Illinois, and consists of approximately 17 subordinate military units

located throughout the states of Iowa, Illinois, Indiana, Michigan, Minnesota and Wisconsin. Its civilian mission consists of training, planning and preparing its units for active military duty, and coordinating and controlling the military transportation of personnel or cargo by highway anywhere within or through the geographical area encompassed by the Activity.

Organizationally, the Activity is subdivided into the 457th Transportation Battalion headquartered at Ft. Snelling, Minnesota, and the 336th Transportation Group, headquartered at Forest Park. The 336th Transportation Group is further subdivided into the 791st Transportation Battalion, headquartered in Grand Rapids, Michigan, and the 419th Transportation Battalion, also headquartered at Forest Park. Each of the three Battalions is further subdivided into 3 or 4 company units which are headquartered in various locations within the 6 state geographical area encompassed by the Activity. In addition, the 477th Personnel Service Company is attached to the Activity's headquarters at Forest Park. The unit sought by Petitioner includes all personnel assigned to the Activity headquarters, Personnel Service Company, and the headquarters of both the 366th Transportation Group and the 419th Transportation Battalion, and numbers approximately 19 employees. The Activity employs a total of approximately 43 nonsupervisory employees in all its various organizational components. The record reveals that, although there is no history of bargaining at the Activity, in 1971 the Fifth U.S. Army granted exclusive recognition to the American Federation of Government Employees, AFL-CIO, Local 1330, (AFGE Local 1330) for a unit of all Wage Grade and General Schedule employees of the Fifth U.S. Army serviced by the Civilian Personnel Office (CPO) at Camp McCoy, Winconsin, assigned to duty within the states of Iowa, Minnesota and Nebraska. 1/

The record reveals that the work flow and direction require that all employees of the Activity have substantial and regular communication and interaction with each other, although they remain physically at the separate locations of their individual commands and there is minimal transfer or detailing of employees within the Activity. Each of the employees in the Activity works under the supervision of a Unit or Company Commander who is ultimately responsible to the Activity Commander. 2/ Although geographically dispersed, all employees of the Activity enjoy essentially uniform working conditions, and the job classifications, skills and duties are essentially the same throughout the Activity for employees performing the same functions.

1/ There is no current negotiated agreement between the Fifth U.S. Army and AFGE Local 1330.

2/ In the smaller units, the Commander, a military reservist, is not physically on location daily. The record shows that he leaves instructions for the work to be performed throughout the week and is available for telephone communication, if necessary.

The record further reveals that all the employees of the Activity are serviced by the CPO located at Camp McCoy, Wisconsin, which has been delegated authority to handle personnel and labor relations functions for all commands of the Fifth U.S. Army, including the Activity. Further, the area of consideration for promotions encompasses all commands of the Fifth U.S. Army, and the area of consideration of reduction-in-force procedures encompasses all commands of the Fifth U.S. Army within predetermined geographical commuting areas.

Based on all the foregoing circumstances, I find that the unit sought herein is not appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, all employees of the Activity enjoy a common mission, common overall supervision, uniform personnel and labor relations policies and practices, a substantial degree of integration, and, essentially, similar working conditions, job classifications, skills and duties. Accordingly, I find that the sought unit does not embrace employees who share a clear and identifiable community of interest separate and distinct from other employees of the Activity. ^{3/} Moreover, in my view, such a unit would, in effect, divide and fragment the Activity solely on the basis of geographic location and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

As noted above, the Petitioner took the alternative position that it would participate in an election in any unit found appropriate by the Assistant Secretary. In this regard, based on the foregoing circumstances, and noting particularly that employees of the Activity assigned to duty stations in the states of Iowa and Minnesota ^{4/} currently are represented exclusively by the AFGE Local 1330, I find that the following described residual command-wide unit encompasses employees who share a clear and identifiable community of interest, and that such a comprehensive unit will promote effective dealings and efficiency of agency operations:

All Army Reserve Technicians of the 425th Transportation Command, U.S. Army Reserves, excluding all Army Reserve Technicians assigned to duty stations in the states of Iowa and Minnesota, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

^{3/} See Fifth U.S. Army, Camp McCoy, Wisconsin, 102d Army Reserve Command (ARCOM), Area Maintenance Support Activity, Shop 44, A/SLMR No. 500; Fifth U.S. Army, Camp McCoy, Wisconsin, 86th Army Reserve Command (ARCOM), Area Organizational Maintenance, Shop G-49, A/SLMR No. 244; and First U.S. Army, 83rd Army Reserve Command (ARCOM), U.S. Army Support Facility (Fort Hayes), Columbus, Ohio, A/SLMR No. 35.

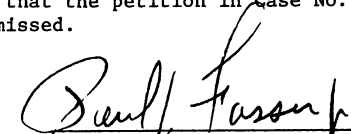
^{4/} The Activity has no employees stationed in the state of Nebraska. The only Activity employees encompassed within the unit currently represented by the AFGE Local 1330 are those stationed in the states of Iowa and Minnesota.

However, I am administratively advised that the Petitioner's showing of interest herein is insufficient in the above unit found appropriate. Accordingly, I shall dismiss the instant petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-13063(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 30, 1976



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

April 30, 1976

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

VETERANS ADMINISTRATION HOSPITAL,
NEW ORLEANS, LOUISIANA
A/SLMR No. 637

This case involves a representation petition filed on July 15, 1974, by the American Federation of Government Employees, AFL-CIO, Local 3553 (AFGE), for a unit of all nonprofessional employees of the Activity. The parties were in essential agreement as to the appropriateness of the claimed unit; however, the Intervenor, the National Federation of Federal Employees, Local 169 (NFFE), which is the current exclusive representative, asserts that the petition was filed untimely as the claimed employees are covered by a new three-year agreement between the NFFE and the Activity which was effective July 12, 1974. The AFGE maintains that the current agreement between the NFFE and the Activity was a premature extension of an existing agreement and that its petition was timely as it was filed during the "open period" of the prior agreement.

The NFFE and the Activity's first negotiated agreement was effective September 17, 1970, for a two-year period and contained an automatic renewal provision "for a like period thereafter," but lacked a negotiated grievance procedure. Thereafter, on August 26, 1971, Executive Order 11491 was amended, in part, to provide in Section 13 that an agreement between an agency and a labor organization shall have a negotiated procedure for the consideration of grievances over the interpretation or application of the agreement. On September 17, 1972, the parties' negotiated agreement was automatically renewed without adding a negotiated grievance procedure. Subsequently, in March 1974, employees of the Activity contacted the AFGE requesting that an AFGE local be formed at the Activity and that the AFGE organize and seek to represent them. In May 1974 and again in June 1974, the AFGE requested and was denied permission to conduct a membership drive at the Activity among its nonprofessional employees on the basis that the NFFE had exclusive recognition and that a negotiated agreement existed between the parties. Shortly thereafter, national representatives from the NFFE encouraged the NFFE local president to negotiate a new agreement with the Activity, and, on June 5, 1974, the Activity and the NFFE executed a new three-year agreement similar to their previously renewed agreement except that it included a grievance procedure in conformity with Section 13 of the Order. The agreement was approved by the Activity and was effective July 12, 1974.

The Assistant Secretary found the petition filed by the AFGE was timely and that neither the agreement renewed on September 17, 1972, nor the three-year agreement executed on June 5, 1974, constituted an agreement bar. With respect to the renewed agreement, the Assistant Secretary found that as the agreement did not comply with the requirements of Section 13 of the Order it could not serve as a bar to a petition but, such agreement, if otherwise valid, would be binding on the parties thereto. Regarding the June 5, 1974 agreement, the Assistant Secretary noted that the parties could have amended their previous agreement in conformity with Section 13 of the Order without extending the duration of the agreement to the detriment of employees or labor organizations desiring to file representation petitions, but chose to do otherwise when they negotiated a new agreement prior to the termination of their previously renewed agreement. Such actions, in the Assistant Secretary's view, constituted, in effect, a premature extension of the original agreement between the NFFE and the Activity and was not in keeping with the requirements of Section 202.3(e) of the Assistant Secretary's Regulations. In this connection, the Assistant Secretary rejected the NFFE's contention that the premature extension rule is applicable only if the original negotiated agreement was a bar to an election at the time the subsequent agreement was negotiated. He noted, in this latter regard, that the purpose of Section 202.3(e) of the Assistant Secretary's Regulations is to insure that employees and labor organizations will be afforded the right to challenge an incumbent labor organization's representative status during a clearly defined open period. The Assistant Secretary also noted that the prior agreement between the parties contained a clearly defined open period and was at all times valid and binding on the parties thereto. In the Assistant Secretary's judgement, it would be inappropriate under the circumstances herein to penalize a third party which has filed a timely petition with respect to an apparently still existing negotiated agreement on the basis that such agreement could, at any time, be renegotiated in toto because it did not contain a negotiated grievance procedure. Accordingly, the Assistant Secretary found that there was no agreement bar to the AFGE's petition, and ordered an election in the appropriate unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
NEW ORLEANS, LOUISIANA

Activity

and

Case No. 64-2438(RO)

LOCAL 3553, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL 169, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, including the briefs filed by the Petitioner and the Intervenor, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, Local 3553, American Federation of Government Employees, AFL-CIO (AFGE) seeks an election in a unit of "all nonsupervisory, nonprofessional employees, including guards, at the Veterans Administration Hospital, New Orleans, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined by Executive Order 11491, as amended." 1/ The AFGE contends that its petition, which was filed on July 15, 1974, is timely in that it was filed during the "open period" of a negotiated agreement covering the claimed employees which had a termination date of September 17, 1974.

The parties are in essential agreement as to the appropriateness of the claimed unit. The NFFE, which is the current exclusive representative of the petitioned for unit, submits that the AFGE's petition in this matter was filed untimely in that the claimed employees are covered by a new agreement between the Activity and the NFFE which was entered into on June 5, 1974. Thus, the NFFE maintains that the parties' current agreement constituted a bar to the AFGE's petition in accordance with Section 202.3(c)(1) of the Assistant Secretary's Regulations. 2/ The AFGE, on the other hand, takes the position that the parties' current agreement was a premature extension of an existing agreement and that its petition was timely filed pursuant to Section 202.3(e) of the Assistant Secretary's Regulations. 3/

1/ The unit appears as amended at the hearing. The record indicates that the unit sought is the same as the unit represented currently by the Intervenor, Local 169, National Federation of Federal Employees (NFFE) except for the inclusion of guards, which inclusion all parties agreed to during the hearing.

2/ Section 202.3(c)(1) provides, in part, that, "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative..."

3/ Section 202.3(e) provides that, "When an extension of an agreement has been signed more than sixty (60) days before its terminal date, such extension shall not serve as a basis for the denial of a petition submitted in accordance with the time limitations provided herein."

The record reflects that on December 11, 1969, the NFFE was granted exclusive recognition for a unit of all nonsupervisory, nonprofessional employees at the Veterans Administration Hospital, New Orleans. The parties' first negotiated agreement was effective September 17, 1970, for a two-year period and contained an automatic renewal provision "for a like period thereafter." Under the agreement, either party could, after giving the other party 60 days notice, terminate the agreement on its anniversary date. The aforementioned agreement did not contain a negotiated grievance procedure. Thereafter, on August 26, 1971, Executive Order 11491 was amended, in part, to provide in Section 13 that: "(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement..." and "(e) No agreement may be established, extended or renewed after the effective date of this Order which does not conform to this section. However, this section is not applicable to agreements entered into before the effective date of this Order."

The record reveals that on September 17, 1972, the negotiated agreement between the Activity and the NFFE was automatically renewed without adding a procedure for the consideration of grievances over the interpretation or application of their agreement. The record also discloses that in approximately March 1974, employees of the Activity contacted the AFGE requesting that an AFGE local be formed at the Activity and that AFGE organize and seek to represent them. Later, in March 1974, a representative from the AFGE contacted the Activity and was informed that the NFFE had exclusive recognition for the employees at the hospital. The AFGE representative also was informed that a negotiated agreement existed between the NFFE and the Activity and he was provided with a copy of the agreement. Thereafter, in May 1974 and again in June 1974, the AFGE requested and was denied permission to conduct a membership drive at the Activity among the nonprofessional employees on the basis that the NFFE had exclusive recognition and a negotiated agreement existed. In May 1974, national representatives from the NFFE encouraged the NFFE local president to negotiate a new agreement with the Activity. Subsequently, on June 5, 1974, the Activity and the NFFE executed a three-year agreement substantially similar to their previously renewed agreement except that it included a negotiated grievance procedure in conformity with Section 13 of the Order. The record shows also that on June 8, 1974, the Personnel Officer of the Activity informed the AFGE's national representative that a new agreement had been entered into. The agreement was approved by the Chief Medical Director for the Activity and became effective July 12, 1974. On July 15, 1974, the AFGE filed the representation petition herein. 4/

4/ The "open period" for the original agreement between the Activity and the NFFE, renewed on September 17, 1972, was from June 19, 1974, to July 19, 1974.

As noted above, the NFFE takes the position that the petition herein should be dismissed as untimely pursuant to Section 202.3(c) (1) of the Assistant Secretary's Regulations. In this regard, it contends that its original agreement with the Activity was renewed in violation of Section 13(e) of the Order, as amended, and that after 1972 the agreement cannot be considered valid. Under these circumstances, the NFFE asserts that, as the renewed agreement cannot be considered valid, it also cannot serve as a bar. It asserts further that in order to protect its interests it was necessary for the NFFE to execute an agreement with the Activity which complied with the provisions of the Order and that it did so on June 5, 1974. Additionally, the NFFE contends that the premature extension rule is applicable only if the original agreement involved was a bar to an election at the time the subsequent agreement was executed, which it asserts is not the case herein.

Under the circumstances outlined above, I find that the subject petition filed by the AFGE on July 15, 1974, was timely and that neither the agreement renewed on September 17, 1972, nor the new agreement executed on June 5, 1974, constituted an agreement bar. With respect to the agreement which was automatically renewed in 1972, as that agreement did not comply with the requirements of Section 13 of the Order, I find that it could not serve as a bar to a petition filed by a third party. Thus, in my view, an agreement "established, extended or renewed" after the effective date of the 1971 revision of Section 13 of the Order which does not contain a negotiated procedure for the consideration of grievances is in direct conflict with policies of the Order 5/ and it would not effectuate the purposes of the Order to permit such an agreement to govern the time when a petition may be filed by a third party. Such agreement, however, if otherwise valid, would be binding on the parties thereto in other respects. 6/

Nor, in my view, did the new agreement on June 5, 1974, bar the AFGE's petition. Thus, clearly, the Activity and the NFFE could have amended their previous agreement to include a grievance procedure consistent with Section 13 of the Order without extending the duration of that agreement to the detriment of employees or labor organizations desiring to file representation petitions. However,

5/ See Report and Recommendations on the Amendment of Executive Order 11491, Federal Labor Relations Council, June 1971.

6/ See Headquarters, Warner Robins Air Materiel Area, Warner Robins Air Force Base, Georgia, FLRC No. 74A-8.

the parties chose prior to the termination of their agreement to negotiate a new agreement for a new three-year period with the addition of the required grievance procedure. In my view, such action constituted, in effect, a premature extension of the original agreement between the Activity and the NFFE and was not in keeping with the requirements of Section 202.3(e) of the Assistant Secretary's Regulations. 7/ Moreover, I find no merit in the NFFE's contention that the premature extension rule is applicable only if the original negotiated agreement was a bar to an election at the time the subsequent agreement was negotiated. The purpose of Section 202.3(e) of the Assistant Secretary's Regulations is to insure that employees and labor organizations will be afforded the right to challenge an incumbent labor organization's representative status during a clearly defined "open period". In the instant case, the prior agreement, which contained such a clearly defined period, was at all times valid and binding on the parties thereto. 8/ In my judgement, it would be inappropriate under the facts herein to penalize a third party which has filed a timely petition with respect to an apparently still existing negotiated agreement on the basis that such agreement could, at any time, be renegotiated in toto because it did not contain a procedure for the consideration of grievances. In these circumstances, I find that the AFGE was reasonable in attempting to file its petition during the "open period" of the September 17, 1972, agreement and that, therefore, its petition herein was not barred by the negotiated agreement signed on June 5, 1974.

Accordingly, and noting the agreement of the parties as to the appropriateness of the claimed unit, I shall direct an election in the following unit which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees employed by the Veterans Administration Hospital, New Orleans, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended. 9/


7/ See Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania, A/SLMR No. 104, at footnote 11.

8/ See Headquarters, Warner Robins Air Materiel Area, Warner Robins Air Force Base, Georgia, cited above.

9/ Inasmuch as current representation policy treats guards the same as other employees, the AFGE and the NFFE indicated on the record that they were prepared to represent guards if they should be included in any unit found appropriate, and the Activity raised no objection to such inclusion, I shall include the guards in the unit found appropriate.

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are all those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on furlough including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by Local 3553, American Federation of Government Employees, AFL-CIO; by Local 169, National Federation of Federal Employees; or by neither.

Dated, Washington, D. C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

April 30, 1976

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

DEPARTMENT OF THE ARMY,
FORT McCOY,
SPARTA, WISCONSIN
A/SLMR No. 638

This case involved a petition for amendment of certification (AC) filed by the Civilian Personnel Officer, Fort McCoy, who was acting in behalf of four U.S. Army Reserve Command Commanders of the Fifth U.S. Army (Activity-Petitioner) seeking to amend the designation of the unit from "all Fifth U.S. Army Civilian employees" located at certain specific posts of duty to "all U.S. Army Reserve Technicians assigned to the 86th United States Army Reserve Command, 416th Engineering Command, 84th Division (Training) and 3rd Transportation Brigade (Railway)" at the same specific posts of duty.

The record indicates that prior to February 1974, the authority to administer the Civilian Personnel Management Program for unit employees represented by Local 2144, American Federation of Government Employees, AFL-CIO (Local 2144) was delegated from the Commander, Fifth U.S. Army to the Civilian Personnel Officer (CPO), Fort McCoy, Wisconsin. On February 1974, the Commander, U.S. Army Forces Command (FORSCOM), Fort McPherson, Georgia, ordered that this authority be redelegated from the Fifth U.S. Army to all United States Army Reserve General Officer Command and the United States Army Reserve (USAR) Command Commanders with further orders to designate a servicing CPO to act for them in carrying out the civilian personnel program. On this basis, the Activity-Petitioner argues that the instant AC petition should be granted to reflect this delegation of authority. In response, Local 2144 contends that to grant the petitioned for amendment would diminish its representative status by precluding it from consulting with higher level authority on matters affecting bargaining unit employees. Moreover, it argues that, conceivably, the unit employees located at the various posts of duty would be subjected to varying personnel policies and procedures.

The Assistant Secretary concluded that an AC petition is not a vehicle to reflect a redelegation of authority regarding civilian personnel management matters to a lower level. In this regard, he noted that an AC petition is appropriate when parties seek to conform a recognition to existing circumstances resulting from such

nominal or technical changes as a change in the name of the exclusive representative or a change in the name or location of the agency or activity. Inasmuch as the designation of the Activity or its location had not changed, he found that the instant petition to be an inappropriate vehicle to accomplish the results sought.

Accordingly, he ordered that the instant AC petition be dismissed.

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

DEPARTMENT OF THE ARMY,
FORT McCOY,
SPARTA, WISCONSIN

Activity-Petitioner

and

Case No. 50-13062(AC)

LOCAL 2144, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

;

Labor Organization

DECISION AND ORDER

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

Upon the entire record in the subject case, the Assistant Secretary finds:

The Department of the Army, Fort McCoy 1/, herein called the Activity-Petitioner, filed the subject petition for amendment of certification seeking to amend the designation of the Activity as

1/ The instant petition was filed by the Civilian Personnel Office, Fort McCoy, which was designated to act for the Commanders of the four U.S. Army Reserve units within the Fifth U.S. Army that are involved herein.

set forth in the certification of representative. 2/ In this regard, the Activity-Petitioner proposes that the certification be amended as follows:

"All U.S. Army Reserve Technicians assigned to the 86th United States Army Reserve Command, 416th Engineering Command, 84th Division (Training), and 3rd Transportation Brigade (Railway) with the following posts of duty: 2372 S. Logan Ave.; 5326 W. Silver Spring Dr.; 5236 W. Silver Spring Dr.; 5130 W. Silver Spring Dr.; 4828 W. Silver Spring Dr.; Milwaukee, Wisconsin, excluding all management officials, supervisors, professionals, guards and confidential employees engaged in Federal personnel work in other than a purely clerical capacity."

The Activity-Petitioner contends that the petitioned for amendment is, in fact, a name change necessary to conform to existing circumstances resulting from a reorganization within the Department of the Army. It maintains that prior to February 1974, the authority to administer the Civilian Personnel Management Program for unit employees represented by Local 2144 was delegated from the Commander, Fifth U.S. Army to the Civilian Personnel Officer (CPO), Fort McCoy, Wisconsin. After February 1974, however, the Commander, U.S. Army Forces Command (FORSCOM), Fort McPherson, Georgia, ordered that this authority be redelegated from the Fifth U.S. Army to all United States Army Reserve General Officer Command and United States Army Reserve (USAR) Command Commanders with further orders to designate a servicing CPO to act for them in carrying out the Civilian Personnel Management Program. 3/ On this basis, the Activity-Petitioner argues that the bargaining unit employees are not employees of the Fifth U.S. Army, but are employees of the individual USAR Unit Commands; that the Fifth U.S. Army no longer has jurisdiction over the civilian personnel program and thus does not have authority to approve or post-audit negotiated agreements; and that the authority to hire, discipline,

2/ On July 28, 1970, Local 2144, American Federation of Government Employees, AFL-CIO, herein called Local 2144, was certified as the exclusive representative in a unit of "all Fifth U.S. Army Civilian employees with the following posts of duty: U.S. Army Reserve Centers at 2372 S. Logan Ave.; 5326 W. Silver Spring Dr.; 5236 W. Silver Spring Dr.; 5130 W. Silver Spring Dr.; 4828 W. Silver Spring Dr.; Milwaukee, Wisconsin, excluding all management officials, supervisors, professionals, guards and employees engaged in Federal personnel work in other than a purely clerical capacity."

3/ The CPO at Fort McCoy was designated to act for the four USAR Commanders involved in the instant matter.

promote, approve negotiated agreements and initiate policies regarding personnel procedures and policies now rests with the USAR Command Commanders. Hence, it asserts that the petition seeking to amend the certification should be granted to reflect this new delegation of authority.

In response, Local 2144 contends that to grant the petitioned for amendment would diminish its representative status by precluding it from consulting with higher level officials of the Fifth U.S. Army on matters affecting the unit employees. In this respect, it maintains that, in matters concerning grievances, Local 2144 would not have recourse to any agency authority at a level higher than the USAR Command Commanders. Moreover, it contends that, conceivably, bargaining unit employees located at different posts of duty could be subject to varying personnel policies and procedures. Nevertheless, Local 2144 argues that if the certification is to be amended, the designation of Fifth U.S. Army should be replaced by the higher level of command of FORSCOM, which has the authority to affect the decisions of the Fifth U.S. Army, as well as all USAR Commands.

Although the Activity-Petitioner maintains that the unit employees are not, and were never, employees of the Fifth U.S. Army, there is no record evidence to support this contention. Indeed, the evidence establishes that an agreement was negotiated on May 30, 1973, by Headquarters, Fifth U.S. Army and Local 2144 covering the unit involved herein, and that the employees were still under the operational direction of the Fifth U.S. Army even though the authority to direct the Civilian Personnel Management Program had been redelegated.

In addition, the record reveals that despite the redelegation of authority from the Commander, Fifth U.S. Army to the USAR Command Commanders regarding all civilian personnel matters, the CPO, Fort McCoy, as before, continued to administer the Civilian Personnel Management Program, including such matters as selection, hiring, discipline, promotions, negotiation of agreements and personnel policies and procedures. Although the ultimate authority to effectuate these matters was delegated from the Commander, Fifth U.S. Army to the appropriate USAR Command Commanders, with further orders to designate again the CPO, Fort McCoy, to act in these matters, there is no evidence that the relationship between the exclusive representative and the CPO, Fort McCoy, was affected, altered or diminished in any way.

Finally, it is not contended, nor does the record indicate, that, as a result of the redelegation of authority, the name of the Activity, its location, or the scope of the certified unit has, in fact, changed. Additionally, it was noted that the Activity seeks a change in certification from an apparent broader unit of all civilian employees

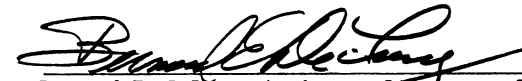
of the Fifth U.S. Army to a conceivably smaller unit of all U.S. Army Reserve Technicians.

Under the particular circumstances herein, I find that the instant petition for amendment of certification is an inappropriate vehicle to obtain the result sought by the Activity-Petitioner. It has been found previously that a petition for amendment of certification is appropriate when parties seek to conform the recognition involved to the existing circumstances resulting from such nominal or technical changes as a change in the name of the exclusive representative or a change in the name or location of the agency or activity. 4/ In the instant case, the evidence establishes that the redelegation of authority herein did not result in a change in the name of the Activity or its location, but merely indicated that the four USAR Command Commanders are now authorized to administer the Civilian Management Personnel Program. 5/ Accordingly, and noting also that the proposed amendment seeking a change in the certification from all civilian employees of the Fifth U.S. Army to all U.S. Army Reserve Technicians assigned to the 86th United States Army Reserve Command, 416th Engineering Command, 84th Division (Training) and 3rd Transportation Brigade (Railway) could conceivably alter the scope of existing unit, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-13062(AC) be, and hereby is, dismissed.

Dated, Washington, D. C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ See Headquarters, U.S. Army Aviation Systems Command, A/SLMR No. 160.

5/ In this regard, it was noted that the Activity would have an obligation to provide a representative with authority to negotiate on negotiable matters at the level of exclusive recognition. See United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15.

April 30, 1976

A/SLMR No. 639

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

U. S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
BORDER PATROL, EL PASO, TEXAS
A/SLMR No. 639

This case involved an Application for Decision on Grievability or Arbitrability filed by Robert T. Hiday and the American Federation of Government Employees, AFL-CIO, Local 1929 (Applicants) involving a grievance over a reprimand. The Activity had rejected a grievance on the ground that it was not grievable under the parties' multi-unit agreement.

The Administrative Law Judge recommended that the Application for Decision on Grievability or Arbitrability be dismissed as moot. In this regard, he noted that, subsequent to the hearing in this case, the Activity had, in fact, entertained the grievance and decided it on the merits. Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Application for Decision on Grievability or Arbitrability be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
BORDER PATROL, EL PASO, TEXAS

Activity

and

Case No. 63-6055(GA)

ROBERT T. HIDAY and AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1929

Applicants

DECISION AND ORDER


On February 12, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that, subsequent to the hearing in this matter, the subject grievance had been entertained by the Activity and decided on the merits. Accordingly, he recommended that the Application for Decision on Grievability or Arbitrability be dismissed as moot. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the Application for Decision on Grievability or Arbitrability in Case No. 63-6055(GA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

April 30, 1976

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

U.S. CIVIL SERVICE COMMISSION,
WASHINGTON, D.C.
A/SLMR No. 640

This case involved an unfair labor practice complaint filed by the International Association of Machinists and Aerospace Workers, Local Lodge 830, (IAM) alleging that the U.S. Civil Service Commission (CSC) violated Section 19(a)(1) and (6) of the Order by denying the IAM the right to be present during formal discussions conducted at the U.S. Naval Ordnance Station, Louisville, Kentucky, (Station) between the CSC and the Station's employees who are represented exclusively by the IAM, and by denying the IAM's subsequent request to be furnished a copy of the Report on Personnel Management at the Naval Ordnance Station which was submitted to the head of the Station by the CSC. The IAM contended, in this regard, that the CSC, while performing its role of evaluating an agency's personnel policies and practices and labor-management relations program, was functioning as "Agency management" within the meaning of Section 2(f) of the Order and as the interviews conducted between the CSC and unit employees were formal discussions within the meaning of Section 10(e) of the Order, it had the right to be present at those interviews. Finally, the IAM asserted that the Report on Personnel Management at the Station, which it was denied, would have enabled it to demonstrate that changes were required with respect to personnel policies, practices and matters affecting the general working conditions of the employees it represents at the Station.

The CSC, on the other hand, contended that while conducting the evaluation pursuant to laws and executive orders it had no obligation to grant the IAM the right to be present as it is not "Agency management" within the meaning of Section 2(f) of the Order. Moreover, even if it had an obligation, the discussions between it and the Station's employees were not formal discussions within the meaning of Section 10(e) of the Order. The CSC also took the position that, as it had no bargaining relationship with the IAM, it had no obligation to provide it with a copy of the Report on Personnel Management and that, additionally, the Report on Personnel Management was exempt from disclosure under applicable provisions of the Freedom of Information Act.

The Assistant Secretary concluded, based on the stipulation of facts, accompanying exhibits, and briefs submitted by the parties, including a copy of the Report on Personnel Management submitted in camera by the CSC, that the CSC was under no obligation under the Order either to afford the IAM the right to be represented at the interviews conducted at the Station or to provide the IAM with a copy of its Report on Personnel Management. Thus, the Assistant Secretary found that, under the

particular circumstances of this case, the CSC was not "Agency management" within the meaning of the Order with respect to the Station's employees as the evidence established that the CSC, in performing its evaluation role, was doing so pursuant to the mandates of various laws and executive orders including Executive Order 11491, as amended, and was not acting as a representative of the Station's management. Accordingly, the Assistant Secretary ordered that the unfair labor practice complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CIVIL SERVICE COMMISSION,
WASHINGTON, D.C.

Respondent

and

Case No. 41-4019(CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL LODGE 830

Complainant

and

U.S. NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Party in Interest

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Lem R. Bridges' Order Transferring Case to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The instant complaint, as amended, alleges that the U.S. Civil Service Commission (CSC) violated Section 19(a)(1) and (6) of the Executive Order by denying the International Association of Machinists and Aerospace Workers, Local Lodge 830, (IAM) the right to be present during formal discussions conducted at the U.S. Naval Ordnance Station, Louisville, Kentucky, (Station) and by denying the IAM's subsequent request to be furnished a copy of the Report on Personnel Management submitted thereafter to the head of the Station by the CSC. The IAM contends that the CSC, while performing its role of evaluating an agency's personnel policies and practices and labor-management relations programs, is functioning as "Agency management" within the meaning of Section 2(f) of the Order. Further, the IAM contends that the employee interviews conducted by the CSC were formal discussions within the meaning of Section 10(e) of the Order and, as the exclusive representative, it had the right to be represented during those interviews. Additionally, the IAM contends

that if it had been given a copy of the CSC Report submitted to the head of the Station, it would have been able to demonstrate that changes were required with respect to personnel policies, practices and matters affecting the general working conditions of the employees in the bargaining unit represented by the IAM. The CSC contends, in essence, that it is not "Agency management" within the meaning of Section 2(f) of the Order while conducting evaluations pursuant to laws and executive orders and, therefore, it had no obligation under Section 10(e) of the Order to afford the IAM the right to be represented at the interviews involved herein. Moreover, it asserts that, even if it had a Section 10(e) obligation, the interviews conducted in conjunction with the evaluation were not formal discussions within the meaning of Section 10(e) of the Order. Further, the CSC takes the position that, as it has no bargaining relationship with the IAM, it was under no obligation to provide it with a copy of the Report on Personnel Management.

The undisputed facts, as stipulated by the parties, are as follows:

The IAM has exclusive recognition for the employees of the Station. It was notified by the head of the Station on or about October 18, 1974, that the CSC planned to conduct an evaluation of personnel management at the Station beginning on or about November 11, 1974, and that the evaluation would include personnel policies, practices and other matters affecting the general working conditions of the Station's employees. On or about November 12, 1974, representatives of the IAM met with representatives of the CSC and were advised by the CSC representatives that interviews with bargaining unit employees would be held as part of the evaluation, which interviews would include discussions of personnel policies, practices and matters affecting the general working conditions of these employees. The CSC denied the request of the IAM that it be allowed to be present during the interviews with the bargaining unit employees. The on-site evaluation of personnel management at the Station was conducted by the CSC November 11 through November 22, 1974, and employee interviews were conducted by the CSC at which the IAM was not afforded the opportunity to be present.

The purpose of the evaluation was to evaluate the total personnel management program at the Station, including labor-management relations. ^{1/} Although the evaluation team was not in a position to take action on individual grievances, any information received through employee interviews was considered by the team in determining the need for possible improvements. The majority of employees interviewed were selected randomly by the CSC and they could refuse to participate upon raising an objection. Other interviews were conducted at the request of the employees involved.

^{1/} The evaluation was conducted in accordance with the mandatory requirements of laws, executive orders, and presidential mandates including: 5 U.S.C. 13; 5 U.S.C. 33; 5 U.S.C. 41; 5 U.S.C. 43; 5 U.S.C. 51; Public Law 92-261, Executive Order 9830; Executive Order 10987; Executive Order 11491; Executive Order 11478; Executive Order 11721; and a Presidential Memorandum dated October 9, 1969.

In addition, the evaluation team interviewed IAM representatives and management officials as part of the overall evaluation. Thereafter, the CSC evaluation team prepared a Report on Personnel Management, a copy of which was forwarded to the Commanding Officer of the Station, indicating necessary corrective action to be taken on matters relating to personnel policies and practices and matters affecting the general working conditions of unit employees to bring about compliance with statute and/or regulations and to improve personnel management. The IAM requested a copy of this Report from the CSC, which request was denied. In addition to denying the Report based on the view that it had no obligation to supply such document to the IAM under the Order, the CSC advised the IAM that the Report was exempt from disclosure under applicable provisions of the Freedom of Information Act. 2/

CONCLUSIONS

In my view, the issues of this case turn on whether the CSC meets the definition of "Agency management" within the meaning of Section 2(f) of the Order when acting in its role of conducting personnel evaluations under the circumstances herein. Thus, Section 10(e) of the Order provides, in part, that, "The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (emphasis added) If the CSC does not meet the Section 2(f) definition of "Agency management" with respect to the employees of the Station, clearly, it would have no obligation under the Order to afford the exclusive representative the right to be represented at the interviews conducted with the bargaining unit employees herein, even assuming that the interviews involved were considered to be formal discussions within the meaning of Section 10(e) of the Order. Moreover, it would have no obligation under the Executive Order to submit its Report on Personnel Management to the IAM upon the latter's request.

Under the particular circumstances of the instant case, I find that the CSC does not meet the definition of "Agency management" with respect to the Station's employees. Thus, the evidence establishes that the CSC, in performing its role of evaluating the Station's personnel management, was doing so pursuant to the mandates of various laws and executive orders, including Executive Order 11491, as amended, 3/ and that it was

2/ The CSC agreed to provide a copy of the Report in camera to the Assistant Secretary upon his request. Such a request was made by the Assistant Secretary and the Report was considered in camera in reaching the determination herein.

3/ Section 25(a) of the Order specifically authorizes the CSC to conduct periodic reviews of the implementation of agency labor-management relations policies.

not acting as a representative of the Station's management. 4/ Therefore, in my view, the CSC was under no obligation either to afford the IAM the right to be represented during the interviews conducted at the Station or to provide the IAM with a copy of its Report on Personnel Management upon the IAM's request. 5/

Accordingly, I shall order that the complaint in the subject case, alleging violations of Section 19(a)(1) and (6) of Executive Order 11491, as amended, be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-4019(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ See Department of the Navy and U.S. Civil Service Commission, A/SLMR No. 529.

5/ The disposition herein was made pursuant to the Assistant Secretary's authority under Section 6(a)(4) of Executive Order 11491, as amended, to decide unfair labor practice complaints. It should not be construed as a determination of the IAM's right to access to the CSC's Report under the Freedom of Information Act.

April 30, 1976

A/SLMR No. 641

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

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
DES MOINES INSURING OFFICE,
A/SLMR No. 641

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3452 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by its termination of a probationary employee, a union steward, based on his union activities.

Based on certain credited testimony, the Administrative Law Judge concluded that the termination of the probationary employee was based on the employee's unsatisfactory work performance and was unrelated to his participation in union activities. Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and, accordingly, dismissed the complaint.

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

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
DES MOINES INSURING OFFICE

Respondent

and

Case No. 62-3945(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3452

Complainant

DECISION AND ORDER


On January 28, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-3945(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

April 30, 1976

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

U.S. CIVIL SERVICE COMMISSION
and
INTERNAL REVENUE SERVICE,
WASHINGTON, D.C.
A/SLMR No. 642

This case involved three separate unfair labor practice complaints filed by the National Treasury Employees Union (NTEU) alleging that the U.S. Civil Service Commission (CSC) violated Section 19(a)(1) and (6) of the Order when it interviewed employees of the Manhattan District Office of the Internal Revenue Service (IRS) in regard to personnel policies and practices, grievances, and other matters affecting working conditions without affording the exclusive representative the opportunity to be present, and that the CSC and the IRS violated Section 19(a)(1) and (6) of the Order for the same reasons at the Albany District Office. In this connection, the NTEU contended, among other things, that the interviews conducted by the CSC evaluation team at the Manhattan and Albany District Offices of the IRS were formal discussions within the meaning of Section 10(e) at which the exclusive representative had the right to be present, and that the participation of an IRS National Office employee on the CSC evaluation team in Albany made the IRS jointly liable for the violations which occurred.

The CSC contended with respect to the unfair labor practice complaint in Case No. 35-3241(CA) that it was filed untimely and, moreover, even if it were considered timely filed, it was procedurally defective in that it was filed in the wrong Area Office. With regard to both unfair labor practice complaints, the CSC contended, further, that it was not "Agency management" within the meaning of Section 2(f) of the Order and, therefore, had no obligation under the Order to afford the exclusive representative the right to be present during personnel evaluation interviews conducted pursuant to statutory and executive order requirements and mandates. Moreover, even if it were found to have an obligation under the Order, it contended that the interviews were not formal discussions within the meaning of Section 10(e) of the Order. The IRS contended that the unfair labor practice complaint in Case No. 35-3232(CA) should be dismissed under Section 19(d) of the Order as a grievance had been filed involving the same issue. With regard to the allegations of the unfair labor practice complaint, the IRS agreed with the CSC that the interviews were not formal discussions within the meaning of Section 10(e) of the Order. Moreover, it contended that it could not be held responsible under any circumstances as the IRS employee serving on the CSC evaluation team was under the direction and supervision of the CSC team leader at all times material.

The Administrative Law Judge recommended that the complaints be dismissed in their entirety. With regard to the procedural allegations of both the CSC and the IRS, the Administrative Law Judge concluded that the complaint in Case No. 35-3241(CA) involving the Albany District Office was timely filed under the Assistant Secretary's Regulations, and also that the NTEU was reasonable in first filing the complaint in the Washington Area Office as the issues of the complaint might reasonably have involved a policy or decision of the National Office of the CSC. With regard to the complaint in Case No. 35-3232(CA), the Administrative Law Judge found that the NTEU did not invoke the grievance procedure with regard to this matter and that, therefore, Section 19(d) did not preclude further processing of the complaint. Finally, the Administrative Law Judge concluded that the interviews conducted by the CSC, in the circumstances herein, were not "formal discussions" within the meaning of Section 10(e) and, as the IRS employee participating in the evaluation was under the direction and control of the CSC, the IRS did not violate the Order as alleged in the complaint.

In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary concluded that the complaints in Case Nos. 30-5669(CA) and 35-3241(CA) should be dismissed on the ground that the CSC, when functioning under the circumstances of these cases, was not "Agency management" within the meaning of Section 2(f) of the Order.

Accordingly, the Assistant Secretary ordered that the complaints be dismissed in their entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CIVIL SERVICE COMMISSION

Respondent

and

Case No. 30-5669(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

U.S. CIVIL SERVICE COMMISSION

Respondent

and

Case No. 35-3241(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

INTERNAL REVENUE SERVICE,
WASHINGTON, D.C.

Respondent

and

Case No. 35-3232(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On December 4, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceedings, finding that the Respondents had not engaged in the alleged unfair labor practices and recommending that the complaints be dismissed in their entirety.

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


record in the subject cases, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations to the extent consistent herewith. 1/

While I agree with the Administrative Law Judge that dismissal of the subject complaints is warranted, I find that the complaints against the U.S. Civil Service Commission (CSC) should be dismissed for a different reason than that relied upon by the Administrative Law Judge. Thus, as found in U.S. Civil Service Commission, A/SLMR No. 640, and for the reasons set forth therein, I find that the CSC, under the circumstances of these cases, is not "Agency management" within the meaning of Section 2(f) of the Order with respect to the employees of the two Internal Revenue Service activities involved herein. 2/ Therefore, the CSC, in the context of these cases, was under no obligation under Section 10(e) of the Order to afford the Complainant representation at the interviews in question. Accordingly, I shall order that the complaints herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 30-5669(CA), 35-3241(CA), and 35-3232(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
April 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ On page 7 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to 30 days, rather than 60 days, as the number of days in which an unfair labor practice complaint must be filed by a complainant after the service of a final written decision with respect to an unfair labor practice charge filed under Section 203.2(a) of the Assistant Secretary's Regulations. This inadvertence is hereby corrected.

2/ See Department of the Navy and U.S. Civil Service Commission, A/SLMR No. 529.

May 11, 1976

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

U. S. DEPARTMENT OF AGRICULTURE
and
OFFICE OF INVESTIGATION
and
OFFICE OF AUDIT
A/SLMR No. 643

This consolidated proceeding arose upon the filing of two unfair labor practice complaints by the National Federation of Federal Employees, Local 1375 (Complainant). One complaint alleges, in substance, that the U. S. Department of Agriculture and the Offices of Investigation and Audit (Respondents) had refused to negotiate with the Complainant concerning a new negotiated agreement in violation of Section 19(a)(1),(2),(5) and (6) of the Order. The second complaint alleges, in substance, that the Respondent, U. S. Department of Agriculture (Agency), violated Section 19(a)(1) and (5) of the Order by invoking Section 3(b)(4) of the Order with respect to its Offices of Investigation and Audit.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the Respondents had not violated Section 19(a)(1),(2), (5), and (6) of the Order by refusing to negotiate a new agreement with the Complainant as there was no obligation to negotiate such an agreement while a representation petition covering certain employees in the unit was pending.

Further, in agreement with the Administrative Law Judge, the Assistant Secretary found that the determination by the Agency's head to invoke Section 3(b)(4) of the Order and his determination to exclude the investigatory employees in the Office of Investigation and the auditors in the Office of Audit from the coverage of the Order was not arbitrary or capricious. Thus, as noted by the Administrative Law Judge, the Federal Labor Relations Council's decision in Audit Division, National Aeronautics and Space Agency, FLRC No. 70A-7, (NASA) establishes two conditions with regard to invoking Section 3(b)(4) of the Order. The first condition is a factual one as to whether the duties and responsibilities engaged in by the employees in question have as a "primary function" investigation or audit of agency employees for the purpose of ensuring their honesty and integrity. The second condition is of a discretionary nature and requires that the head of an agency determine, in his sole judgment, that the Order cannot be applied to such employees "in a manner consistent with the internal security of the agency." The Administrative Law Judge concluded that under the NASA case the first condition is the only one subject to review by the Assistant Secretary

and that such review is limited to whether the determination by the head of the agency is arbitrary or capricious. As in the instant case the record established that the employees involved have as a primary function the responsibility of ensuring that employees of the Agency perform their work with honesty and integrity, the Administrative Law Judge concluded the determination of the agency head to invoke Section 3(b)(4) and to exclude the particular employees from coverage of the Order was not arbitrary or capricious. Accordingly, the Administrative Law Judge found that the Agency did not violate Section 19(a)(1) and (5) of the Order, and he recommended that the complaints be dismissed in their entirety.

Upon consideration of the Administrative Law Judge's Recommended Decision, the entire record in the matter, including the exceptions and supporting brief filed by the Complainant, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and ordered that the complaints be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF AGRICULTURE
and
OFFICE OF INVESTIGATION
and
OFFICE OF AUDIT

Respondents

and

Case Nos. 22-5779(CA) and
22-5821(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1375

Complainant

DECISION AND ORDER

On January 20, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision in the above-entitled consolidated proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

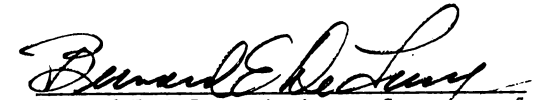
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject cases,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

^{1/} As the Assistant Secretary's authority to review an agency head's determination to exclude employees pursuant to Section 3(b)(4) of the Order is limited to assessing whether the agency head's factual determination—that the organizational unit involved 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

(Continued)

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-5779(CA) and 22-5821(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{1/} honesty and integrity in the discharge of their official duties—is arbitrary or capricious, (see Audit Division, National Aeronautics and Space Agency, FLRC No. 70A-7), I find it unnecessary to pass upon the Administrative Law Judge's conclusion that the determination to apply Section 3(b)(4) in the instant case was not made for discriminatory purposes.

May 11, 1976

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

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF INVESTIGATION,
TEMPLE, TEXAS
A/SLMR No. 644

In this case, the American Federation of Government Employees, AFL-CIO, Local 3542 (AFGE) filed a petition seeking an election in a unit of professional and nonprofessional employees employed in the Department of Agriculture's (Agency) Office of Investigation, Southwest Region, Temple, Texas. Following the determination by the Acting Secretary of Agriculture that the Agency's Office of Investigation and Office of Audit fell within the meaning of Section 3(b)(4) of the Order and that the Order could not be applied to them in a manner consistent with the internal security of the Agency, the AFGE challenged that finding and determination as being arbitrary and capricious. The Acting Regional Administrator, pursuant to Section 202.8(e) of the Assistant Secretary's Regulations, issued a Notice of Hearing on the applicability of Section 3(b)(4) of the Order.

The Administrative Law Judge concluded the AFGE had not established that the acting agency head had acted improperly in invoking Section 3(b)(4) with respect to the petitioned for employees. In this regard, he noted that in Audit Division, National Aeronautics and Space Agency, FLRC No. 70A-7, (NASA) the Federal Labor Relations Council (Council) stated that Section 3(b)(4) established two conditions for the exclusion of a segment of an agency from coverage by the Order; first, that the organization in question must have as "a primary function" the investigation of officials or employees of the agency to ensure their "honesty and integrity" in the performance of their work; and second, that the head of an agency determine "in his sole judgment" that the Order cannot be applied in a manner consistent with the internal security of the agency. The Administrative Law Judge noted also that while the Council, in the NASA case, indicated an agency head's determination that the Order cannot be applied to a segment of an agency in a manner consistent with agency internal security needs was not subject to review, the factual bases on which such a determination was predicated, i.e. that a primary function of the unit was of an investigatory or audit nature, was subject to review by the Assistant Secretary to determine whether the factual findings were arbitrary or capricious. The Administrative Law Judge found that the record in the instant case established that the Agency's Office of Investigation and its Office of Audit have as a primary function the investigation and audit of agency employees and officials to ensure their honesty and integrity and were, therefore,

reasonably related to internal agency security. Accordingly, the Administrative Law Judge concluded that the AFGE had not met its burden of showing that the acting agency head acted arbitrarily or capriciously in invoking Section 3(b)(4) of the Order and thereby excluding the petitioned for employees from coverage under the Order. Therefore, he recommended that the petition be dismissed.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation, and dismissed the petition.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF INVESTIGATION,
TEMPLE, TEXAS

Activity

and

Case No. 63-4992(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3542

Petitioner


DECISION AND ORDER

On January 21, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision in the above-entitled proceeding, finding that it had not been established that the Acting Secretary of the U. S. Department of Agriculture, herein called the Agency, had acted arbitrarily or capriciously in invoking Section 3(b)(4) of Executive Order 11491, as amended, with respect to the employees of the Agency's Office of Investigation and Office of Audit, thereby excluding these employees from coverage of the Order. Accordingly, the Administrative Law Judge recommended that the petition filed by the Petitioner, American Federation of Government Employees, AFL-CIO, Local 3542, herein called AFGE, seeking an election in a unit of all employees of the Southwest Region, Office of Investigation, be dismissed. Thereafter, the AFGE filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

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

IT IS HEREBY ORDERED that the petition in Case No. 63-4992(RO) be,
and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

May 11, 1976

A/SLMR No. 645

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

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, FEDERAL HOUSING ADMINISTRATION,
FARGO INSURING OFFICE,
FARGO, NORTH DAKOTA
A/SLMR No. 645

This case arose when the American Federation of Government Employees, AFL-CIO (AFGE) filed a petition seeking an election in a unit of all General Schedule (GS) and Wage Grade (WG) employees of the Fargo Insuring Office, Federal Housing Administration, Department of Housing and Urban Development (Activity). The AFGE and the Activity generally were in agreement as to the scope and composition of the claimed unit; however, the Regional Administrator issued a Notice of Hearing for the purpose of eliciting evidence on the status of certain employees whom the Activity sought to exclude from the claimed unit.

The Assistant Secretary found that the unit sought by the AFGE was appropriate for the purpose of exclusive recognition and directed an election in that unit. Further, he found that, although the AFGE and the Activity agreed at the close of the hearing to exclude from the unit six employees whose unit eligibility was originally in dispute, the record evidence was, in certain instances, inconsistent with the parties' agreement. Therefore, the Assistant Secretary considered separately the eligibility of these six employees for inclusion in the unit found appropriate. In this regard, the Assistant Secretary found that one employee should be excluded from the unit because she is engaged in Federal personnel work in other than a purely clerical capacity; that one employee should be excluded from the unit because she is a confidential employee; that two employees should be excluded from the unit because they are supervisors within the meaning of Section 2(c) of the Order; and that the two remaining employees should be included in the unit found appropriate because they are not management officials within the meaning of the Order. Because the various eligibility determinations could render the AFGE's showing of interest inadequate, the Assistant Secretary directed that the appropriate Area Administrator reevaluate the showing of interest before proceeding to an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, FEDERAL HOUSING ADMINISTRATION,
FARGO INSURING OFFICE,
FARGO, NORTH DAKOTA 1/

Activity

and

Case No. 60-4406(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in the subject case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all General Schedule (GS) and Wage Grade (WG) employees employed by the Federal Housing Administration, Fargo, North Dakota, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order. 2/ The parties were in agreement generally as to the scope and composition of the claimed unit. However, the Regional Administrator issued a Notice of Hearing for the purpose of eliciting evidence on the status of certain employees whom the Activity seeks to exclude from the claimed unit on the basis that they

1/ The name of the Activity appears as amended at the hearing.

2/ The petitioned for unit appears as amended at the hearing.

are either confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, or supervisors within the meaning of the Order.

The record reveals that the mission of the Activity involves insured loan programs wherein it insures loans for private lenders after examining the credit worthiness of loan applicants and determining whether or not the property to secure the particular loan complies with the Activity's minimum property standards. The Activity is one of six Insuring Offices, each in a different state, in the Denver Region of the Department of Housing and Urban Development. Each Insuring Office has sole jurisdiction to carry out its mission within its particular state. The employees in the claimed unit are under the supervision of a Director who is responsible for the operation of the Activity's program in the state of North Dakota and such unit includes all of the Activity's employees in that state.

Under all of the circumstances, and noting particularly the agreement of the parties as to the scope of the unit sought, I find that the claimed unit of employees employed by the Fargo Insuring Office of the Federal Housing Administration is appropriate for the purpose of exclusive recognition as the employees involved share a clear and identifiable community of interest and such a unit will promote effective dealings and efficiency of agency operations.

Eligibility Issues 3/

Although the record discloses that at the close of the hearing the AFGE and the Activity agreed to exclude from the unit six employees whose eligibility was originally in dispute, I find that the record evidence is, in certain instances, inconsistent with the parties' agreement. Accordingly, I shall consider separately the eligibility of these six employees for inclusion in the unit found appropriate.

Lorraine A. Haas, Administrative Officer (GS-0341-11)

It is contended that Administrative Officer Lorraine A. Haas should be excluded from the unit on the bases that she is engaged in Federal personnel work in other than a purely clerical capacity and also is a management official. The record reveals that Haas advises and assists the Activity's officials regarding their personnel management responsibilities; disseminates all the personnel information at the Activity

3/ Among other things, the parties stipulated that the Director of the Fargo Insuring Office, the Chief of the Underwriting Division, and the Director of the Housing Management Division are supervisors within the meaning of the Order. As there was no contrary evidence in the record in this regard, I find that these employees should be excluded from the unit found appropriate.

and answers all personnel questions; provides material for updating the official personnel records maintained at the Regional Office; maintains duplicate personnel files at the Activity; and originates personnel actions for processing by the Region. Also, she administers the Activity's incentive awards program and has the primary responsibility for recruiting and determining needs for training and employee development. Under these circumstances, I find that Administrative Officer Lorraine A. Haas is engaged in Federal personnel work in other than a purely clerical capacity and, on this basis, I shall exclude her from the unit found appropriate. 4/

Patricia M. McCabe, Clerk-Stenographer (GS-0312-05)

It is asserted that Clerk-Stenographer Patricia M. McCabe is a confidential employee. The evidence establishes that McCabe is the personal secretary of the Director of the Fargo Insuring Office and that the latter is responsible for formulating and effectuating labor relations policy for all employees of the Activity. In this connection, the record reveals that McCabe handles, and will handle in the future, management labor relations reports and the minutes of meetings dealing with management labor relations strategy, and is responsible for the typing of grievance proceedings, and the maintenance of files and records with respect to such proceedings. Under these circumstances, I find that, as Clerk-Stenographer Patricia M. McCabe serves in a confidential capacity to an individual involved in the formulation and effectuation of management policies in the field of labor relations, she should be excluded from the unit found appropriate on the basis that she is a confidential employee. 5/

Wayne W. Schafer, Supervisory Appraiser (GS-1171-12) and Willis D. Syverson, Construction Analyst Supervisor (GS-0828-13)

It is contended that Supervisory Appraiser Wayne W. Schafer and Construction Analyst Supervisor Willis D. Syverson are supervisors and management officials within the meaning of the Order. The record reveals that Schafer, who is Chief of the Valuation Section, has three employees under his direction 6/, one staff appraiser and two clerical

4/ In view of this disposition, I find it unnecessary to pass on whether Administrative Officer Haas is a management official.

5/ See Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69.

6/ Schafer is responsible also for training and assigning fee appraisal work to some 26 to 28 fee appraisers kept on the Activity's fee appraiser roster. The record reflects that these fee appraisers are not Federal employees but, rather, are individual contractors. Fee appraisers are paid a flat fee for each job they are called upon to perform and receive no Federal employee benefits or protections.

(Continued)

employees. He assigns work to the employees in his Section, evaluates their performance, and approves their leave. Also, Schafer can effectively recommend employees for promotions and disciplinary action, and would be the selecting official of new employees for his Section. Under these circumstances, I find that Schafer is a supervisor within the meaning of Section 2(c) of the Order inasmuch as he responsibly directs and assigns work to employees, and has the authority to impose discipline. Accordingly, on this basis, I shall exclude Schafer from the unit found appropriate. 7/

Construction Analyst Supervisor Willis D. Syverson is Chief of the Architectural Section which contains two employees. The record reflects that he has essentially the same supervisory authority over employees as does Supervisory Appraiser Schafer. Accordingly, I find that the Construction Analyst Supervisor is a supervisor within the meaning of Section 2(c) of the Order and, on this basis, should be excluded from the unit found appropriate. 8/

Gordon A. Jones, Construction (Cost) Analyst and Construction Cost Examiner, (GS-828-12)

It is contended that Gordon A. Jones, Construction (Cost) Analyst and Construction Cost Examiner, is a management official within the meaning of the Order. The record reveals that Jones also is the Activity's Equal Opportunity Staff Officer and its Wage Labor Relations Officer and that he has no employees under his direction.

As Construction (Cost) Analyst and Construction Cost Examiner, Jones obtains cost data from contractors, businesses and other sources in order to develop a cost data handbook for the state of North Dakota. In this connection, he obtains labor rates paid by general contractors and subcontractors and the amounts they allocate for profits and overhead. He also attends management meetings regarding budget matters and is responsible for training Activity employees regarding changes in construction cost data and manuals affecting the operations of the Activity.

In his position as the Equal Opportunity Staff Officer, Jones is responsible for assuring that various contractors implement and maintain

6/ In these circumstances, I do not view Schafer's relationship to the fee appraisers as a supervisor-supervisee relationship but, rather, as a relationship between a contract administrator and an independent contractor.

7/ In view of this disposition, I find it unnecessary to pass on whether Supervisory Appraiser Schafer is a management official.

8/ In view of this disposition, I find it unnecessary to pass on whether Construction Analyst Supervisor Syverson is a management official.

compliance with equal employment opportunity requirements under various laws. In this regard, the record reflects that he does not formulate Agency policy but, rather, advises the Insuring Office Director on the Agency's existing policies with regard to equal employment opportunity on Federally assisted construction programs. In addition, he prepares reports on contractor compliance which are forwarded through the Director's Office to the Regional Office. Although Jones was responsible for preparing, in accordance with Agency guidelines, an Affirmative Action Plan and Upward Mobility Plan for the Activity, there is no evidence that he was active in the implementation of these plans.

Jones also is the Activity's Wage Labor Relations Officer and Multi-Family Coordinator. In his position as Wage Labor Relations Officer he is responsible for surveying contractors to assure that their prevailing wage rates conform to the requirements of the Davis-Bacon Act. As Multi-Family Coordinator, he receives applications from those who desire to develop housing projects and he processes and coordinates these applications with each component of the Activity until they are completed.

Based on all of the foregoing circumstances, I find that Jones is not a management official within the meaning of the Order. Thus, in my view, the evidence does not establish that in performing his job functions Jones has the authority to make, or influence effectively, Activity policies with respect to personnel, procedures, or programs. Rather, in all of his various capacities he serves as an expert or resource person rendering recommendations with respect to implementing existing policies, rather than as an individual who participates actively in the ultimate determination of what policy, in fact, should be. 9/ Accordingly, I conclude that Construction (Cost) Analyst and Construction Cost Examiner Jones is not a management official and should be included in the unit found appropriate.

Harold H. Boekhoff, Loan Specialist (Realty) (GS-1165-12)

It is asserted that Loan Specialist Harold H. Boekhoff is a management official. The record reveals that Boekhoff is the only employee in the Mortgage Credit Section. He is involved in the closing process in all multi-family cases wherein he works with the lender, and the lender's legal counsel, and acts as liaison between the developer and his counsel and the Agency's Regional counsel in Denver. Boekhoff is responsible for the travel budget for his section and also interviews developers in order to obtain mortgage credit data. The record reveals also that, in the future, the Activity may use "fee mortgage credit" individuals who would be assigned jobs by Boekhoff in a manner similar

9/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

to the fee appraisers who, as noted above, are assigned jobs by the Supervisory Appraiser in the Valuation Section. 10/ Under these circumstances, I find that Boekhoff is not a management official, but, rather, is an expert or resource person rendering resource information or recommendations with respect to the implementation of existing policies. 11/ Accordingly, I find that he should be included in the unit found appropriate.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Grade employees employed by the Federal Housing Administration, Fargo Insuring Office, North Dakota, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order.

DIRECTION OF ELECTION 12/

An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll


10/ As indicated above, I do not view such a relationship as one between a supervisor and supervisee and, accordingly, would not find Boekhoff to be a supervisor based on such a relationship should "fee mortgage credit" individuals be utilized by the Activity in the future.

11/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, cited above.

12/ The record in the subject case is unclear as to whether the eligibility determinations in this matter have rendered inadequate the AFGE's showing of interest. Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that the AFGE's showing of interest is inadequate, its petition in the subject case should be dismissed.

period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

May 11, 1976

A/SLMR No. 646

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA
A/SLMR No. 646

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA

Respondent

and

Case No. 70-4608

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO
VALLEJO, CALIFORNIA

Complainant

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council (Council), AFL-CIO, Vallejo, California, alleging that the Respondent violated Section 19(a)(1), (5) and (6) of the Order by virtue of a statement made at a meeting by a representative of the Respondent to the President of the Council to the effect that he would not talk to the Council's President.

The record revealed that the Respondent held a meeting to clarify to representatives of a constituent local union of the Council, the United Brotherhood of Carpenters and Joiners of America, Local Union No. 1068, (Carpenters) matters concerning a newly established employee classification. Also present at the meeting were the President and Vice-President of the Council.

The Administrative Law Judge concluded that the Council had failed to establish the Respondent had violated the Order. In this regard, he found that although the Respondent's representative did, on two occasions during the meeting, in response to comments from the President of the Council, indicate to the Council President that he was not talking to him, such comments should be interpreted as merely informing the Council President that the conversation was, at that time, between himself and the Carpenters' representatives. Accordingly, and noting the absence of any evidence that the Respondent was attempting to deal with the Carpenters to the exclusion of the Council, the Administrative Law Judge recommended that the complaint be dismissed.

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

DECISION AND ORDER


On February 26, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the violations of Section 19(a)(1), (5) and (6) of Executive Order 11491, as amended, alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4608 be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

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

FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR 37,
TAMPA, FLORIDA

FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR 37,
TAMPA, FLORIDA
A/SLMR No. 647

Activity

and

Case No. 42-2977(RO)

This case arose as a result of a petition filed by the Federal Aviation Science and Technological Association/National Association of Government Employees (FASTA/NAGE) seeking an election in a unit currently represented by the National Federation of Federal Employees, Local 1518 (NFFE), consisting of all Wage Grade and General Schedule employees of the Activity.

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION/NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Petitioner

The petitioned for unit had been excluded from the nationwide unit found appropriate in Federal Aviation Administration (FAA) and Federal Aviation Administration, Eastern Region, A/SLMR No. 600, based on an agreement bar in effect at the time of that petition. The decision in A/SLMR No. 600 had not been issued by the Assistant Secretary at the time of the hearing in this matter, and the Activity and the FASTA/NAGE took the position that the only appropriate unit for Airway Facilities personnel would be nationwide, including the employees claimed by the instant petition. The Assistant Secretary noted, however, that such an inclusion would be inappropriate under the current circumstances as there has been no certification of representative in the unit found appropriate in A/SLMR No. 600. The Activity and the FASTA/NAGE agreed to accept the currently constituted unit as an alternative, which the NFFE contended was the only appropriate unit.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1518

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in the subject case, the Assistant Secretary finds:

Noting that the parties agreed that the petitioned for unit was appropriate, and the existence of a bargaining history in the claimed unit, the Assistant Secretary found that the petitioned for unit of employees within Sector 37 was appropriate for the purpose of exclusive recognition as such employees share a clear and identifiable community of interest and such a unit will promote effective dealings and efficiency of agency operations. The Assistant Secretary also found that the various Secretaries and Clerk-Secretaries assigned to the Sector Manager and the Field Office Chiefs were confidential employees who should be excluded from the exclusively recognized unit as they act in a confidential capacity with respect to their respective office heads who are involved in the formulation and effectuation of the Activity's labor-management relations policies.

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Federal Aviation Science and Technological Association/National Association of Government Employees, herein called FASTA/NAGE, seeks an election in a unit which currently is represented by

the National Federation of Federal Employees, Local 1518, herein called NFFE. The unit petitioned for consists of all Wage Grade and General Schedule employees of the Federal Aviation Administration (FAA), Airway Facilities Sector 37, Tampa, Florida, including all Field Office personnel, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in Executive Order 11491, as amended. 1/

The record reveals that, prior to the filing of the petition herein, the FASTA/NAGE filed a petition for a nationwide unit of all Wage Grade and General Schedule employees of the FAA's Airway Facilities Division assigned to field facilities. At the time the nationwide petition was filed, the unit claimed herein was covered by a negotiated agreement between the Activity and the NFFE and the parties stipulated to its exclusion from the nationwide unit on that basis. Subsequent to the hearing involving the petition for the nationwide unit, the open period with respect to the negotiated agreement occurred and the FASTA/NAGE timely filed the instant petition. 2/ Thereafter, in Federal Aviation Administration (FAA) and Federal Aviation Administration, Eastern Region, A/SLMR No. 600, issued by the Assistant Secretary on December 18, 1975, it was found that a residual nationwide unit of all Airway Facilities Division employees, including Facilities and Establishment, Field Maintenance Party, and regional headquarters employees, was appropriate for the purpose of exclusive recognition under the Order. The nationwide unit found appropriate expressly excluded Airway Facilities Division employees represented exclusively at certain stipulated locations where agreement or certification bars were present, including the unit which is the subject of the instant petition.

The decision in A/SLMR No. 600 had not been issued at the time of the hearing in this matter. At the hearing, the Activity took the position that the only appropriate unit for Airway Facilities personnel would be a nationwide unit; however, it stated that it would not oppose the sectorwide unit sought in the instant case if it were ruled appropriate. The FASTA/NAGE also argued that the claimed employees should be included in a nationwide unit, if such were found appropriate. The NFFE contended that the unit as currently constituted was appropriate.

The record reveals that the mission of the Activity is to maintain and operate all of the National Airspace System facilities

1/ The unit description appears as amended at the hearing and corresponds to the unit currently represented by the NFFE.

2/ Cf. Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231.

within its geographical boundaries. As noted above, the parties herein agreed that the petitioned for unit is appropriate for the purpose of exclusive recognition. Accordingly, and noting the existence of a bargaining history in the claimed unit, I find that the petitioned for unit of employees within Sector 37 is appropriate for the purpose of exclusive recognition as such employees share a clear and identifiable community of interest and such a unit will promote effective dealings and efficiency of agency operations.

The FASTA/NAGE also contends that the Secretary to the Sector Manager, GS-5; the Clerk-Secretary to the Assistant Sector Manager, GS-4; the Secretary to the Chief, Orlando Field Office, GS-5; the Secretary to the Chief, West Palm Beach Field Office, GS-4; and the Clerk-Secretaries to the Chiefs of the Field Offices in West Palm Beach, MacDill Air Force Base, Daytona Beach and Patrick Air Force Base, GS-4, do not act in a confidential capacity with respect to persons who formulate and effectuate labor relations policies and, thus, are not confidential employees and should be included in the unit found appropriate. The Activity and the NFFE, which apparently contend that these employees have not been included in the currently recognized unit, oppose including them at this time.

The evidence discloses that the Activity consists of a Sector Office, headed by a Sector Manager, and ten Field Offices, headed by either a Supervisory Electronic Technician or a Supervisory Electronic Engineer who serves as the Chief of that facility. Additionally, there is a Field Office at Tampa which shares facilities with the Sector Office. The Sector Manager and the Field Office Chiefs are responsible for the supervision of the employees of the Sector and the Field Offices, respectively, and, in this capacity, the evidence establishes that they are involved in formulating and effectuating labor relations policy with respect to their offices. Thus, the record reveals that the Sector Manager and the Field Office Chiefs are responsible for administering negotiated agreements at the local level and that they are responsible for preparing responses to grievances filed under either the agency or negotiated grievance procedures as well as to unfair labor practice allegations. They also have the authority to initiate adverse action or disciplinary procedures, and have access to higher level internal agency publications intended to give advice to managers with respect to labor-management relations policies.

The record reveals that the Secretaries and Clerk-Secretaries, noted above, perform a variety of administrative and secretarial duties for the Sector Manager or Field Office Chiefs, including acting as their principal secretaries. In this regard, they are

responsible for assisting the management staff in personnel matters, such as initiating personnel actions, for preparing all the personnel records at their respective facilities, and for performing miscellaneous secretarial duties. The evidence also establishes that these employees generally have access to personnel records, including awards, grievances and labor relations files and that they are required to prepare material in connection with grievances and other personnel matters in accordance with the direction of the Sector Manager or the Field Office Chiefs.

Under these circumstances, I find that the above-noted Secretaries and Clerk-Secretaries are confidential employees and, therefore, should be excluded from the exclusively recognized unit because, as the principal secretaries to the Sector Manager and the Field Office Chiefs, who are involved in the formulation and effectuation of the Activity's labor-management relations policies, they perform confidential duties with respect to labor-management relations matters. 3/

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Wage Grade and General Schedule employees of the Federal Aviation Administration, Airway Facilities Sector 37, Tampa, Florida, including all Field Office personnel, excluding confidential employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

DIRECTION OF ELECTION 4/

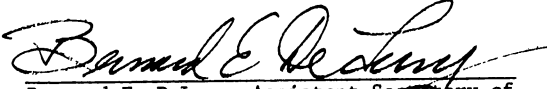
An election by secret ballot shall be conducted, as early as possible, but not later than 60 days from the date below. The

3/ See Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230, in which a similar determination was made with respect to similarly situated employees. Cf. also Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Boston Region, District and Branch Offices, A/SLMR No. 562 and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D. C. A/SLMR No. 538.

4/ With respect to the contention of the FASTA/NAGE that the claimed employees should be included in a nationwide unit, it was noted that such inclusion by an "added-on" election would be inappropriate under the current circumstances as there has been no certification of representative in the unit found appropriate in A/SLMR No. 600.

appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Federal Aviation Science and Technological Association/National Association of Government Employees; by the National Federation of Federal Employees, Local 1518; or by neither.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
 OFFICE OF SECRETARY, HEADQUARTERS,
 WASHINGTON, D. C.

A/SLMR No. 648

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
 OFFICE OF THE SECRETARY,
 HEADQUARTERS,
 WASHINGTON, D. C.

Activity

and

Case No. 22-6338(CU)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFL-CIO, LOCAL 41

Petitioner

DECISION AND ORDER

This case involves a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 41 (AFGE) in which it seeks clarification of an existing unit of all nonprofessional employees at the Department of Health, Education and Welfare, Office of the Secretary, located in the Washington, D. C. metropolitan area. The AFGE contends that, despite a series of "paper reorganizations," the nonprofessional employees of the Office of the Assistant Secretary of Health (OASH) are still part of its exclusively recognized unit. The Activity, on the other hand, claims that OASH is no longer part of AFGE's exclusively recognized unit and that the continued inclusion of OASH's nonprofessional employees in the unit herein would not promote effective dealings and the efficiency of agency operations.

The Assistant Secretary found that, following reorganizations in June 1973 and August 1974, the employees of OASH no longer shared a community of interest with other Office of the Secretary employees in the existing unit. He noted that OASH employees are now part of a new, expanded organizational entity with a separate and distinct mission; for the most part, they are physically separated from the unit employees; they are subject to different personnel policies and practices; they no longer have day-to-day work contacts with unit employees; and they are under separate supervision and authority. Also, he noted that, under the foregoing circumstances, the continued inclusion of the OASH employees in the existing unit would not promote effective dealings and the efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the CU petition be dismissed.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Earl T. Clark. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 41, herein called AFGE, is the exclusive representative of certain employees of the Activity. 1/ In this proceeding, the AFGE seeks to clarify its existing unit to include employees of the Office of the Assistant Secretary for Health (OASH)

1/ On January 24, 1973, the AFGE was certified as the exclusive representative of: "All nonprofessional General Schedule and Wage Grade Employees of the Office of the Secretary, HEW, located in the Washington, D. C. metropolitan area; excluding professional employees, management officials, summer interns and aids, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, supervisors and guards as defined in the Order."

who are located in Washington, D. C. and Parklawn, Maryland. More specifically, the AFGE contends that, despite a series of "paper reorganizations" in July 1973 and August 1974, the nonprofessional employees of the OASH are still part of its exclusively recognized unit. The Activity, on the other hand, contends that the OASH is no longer part of AFGE's exclusively recognized unit and that the continued inclusion of the OASH's nonprofessional employees in such unit would not promote effective dealings and efficiency of agency operations.

The record reveals that the unit involved herein contained approximately 3,000 employees at the time of certification, 265 of whom worked for the Assistant Secretary for Health. 2/ The record also discloses that in January 1973, the Public Health Service (PHS) consisted of the Food and Drug Administration, the Health Services and Mental Health Administration and the National Institutes of Health, and that each of these agencies reported to the Secretary of the Department of Health, Education and Welfare (HEW) in the course of carrying out their respective missions. On June 29, 1973, the PHS was reorganized into five health agencies and placed under the direct control and line authority of the Assistant Secretary for Health who, prior to that date, served essentially as the principal advisor on health matters to the Secretary of HEW. 3/ In addition to gaining direct control and line authority over the PHS, the Assistant Secretary for Health became responsible for various administrative and managerial functions associated with the reorganized PHS. In this connection, the record shows that, following the PHS reorganization, the Assistant Secretary for Health was granted contract, staffing, training, planning and policy authority, which authority he did not have prior to June 29, 1973. Thereafter, on August 12, 1974, the OASH was organizationally removed from the Office of the Secretary of HEW, and was transferred to Parklawn, Maryland.

Following the reorganizations noted above, the OASH expanded from 265 employees to 800 employees. In this regard, the record shows that approximately 100 employees were transferred from the Assistant Secretary for Health's operations in Washington, D. C. to Parklawn, Maryland, and approximately 700 new employees were added to the OASH after its removal from the Office of the Secretary of HEW. The majority of the 700 new employees came to the OASH from unrepresented units in health agencies formerly associated with the PHS prior to its reorganization on June 29, 1973. Further, the record shows that, following the reorganizations, the OASH employees were serviced by a separate personnel office located in Parklawn, Maryland, whereas previously they were under the jurisdiction of the Office of the Secretary of HEW; they ceased to have day-to-day

2/ At the time of the certification, 65 employees of the Assistant Secretary for Health were physically located in Parklawn, Maryland.

3/ The PHS was administratively reorganized into the Office of the Assistant Secretary for Health; the Center for Disease Control; the Food and Drug Administration; the Health Resources Administration; and the National Institutes of Health.


work contacts with employees in the Office of the Secretary of HEW; they were geographically separated from their previous work locations; they were subject to different areas of consideration for transfers, reductions in force, and promotions; they performed different job functions; and they had substantially different supervision. The record shows additionally that subsequent to the above reorganizations, the Office of the Secretary of HEW transferred negotiating and labor relations authority for the OASH employees to the OASH and that the Assistant Secretary for Health now approves changes in work hours and work details for the OASH employees, including those OASH employees who are located in Washington, D. C. 4/

Based on all of the foregoing, I find that the employees of the OASH, after the reorganizations involved herein, ceased to share a community of interest with other employees of the Office of the Secretary of HEW in the existing unit represented by the AFGE. Thus, as outlined above, the evidence establishes that the OASH employees are now part of a new, expanded organizational entity with a separate and distinct mission; for the most part, they are physically located at a separate geographic location from the unit employees; they are subject to different personnel policies and practices; they no longer have day-to-day work contacts with unit employees; and they are under separate supervision and authority. Under all of these circumstances, I find that the OASH employees constitute a functionally distinct group of employees who share a community of interest separate and distinct from the employees in the existing unit and that their continued inclusion in the existing unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the instant petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-6338(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ The record shows that although approximately 40 employees of the OASH continue to work in Washington, D. C., they have been transferred administratively from the Office of the Secretary of HEW to the OASH in Parklawn, Maryland.

May 19, 1976

A/SLMR No. 649

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

INTERNAL REVENUE SERVICE,
DEPARTMENT OF THE TREASURY,
HARTFORD DISTRICT OFFICE
A/SLMR NO. 649

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter No. 18, (Complainant) alleging that the Respondent violated Section 19(a)(6) of the Order by failing to give notice to the Complainant regarding a meeting with an employee on a grievance which she had filed and to afford the Complainant an opportunity to be present at such meeting.

Having concluded that the Complainant had a right, pursuant to Section 10(e) of the Order, to be present during the discussion of the grievance, the Administrative Law Judge determined that the instant matter was bottomed on a resolution of a factual conflict in the record as to whether or not the Complainant was, in fact, afforded an opportunity to be present. In this respect, and noting particularly that the Respondent made every effort to adhere to the terms of the negotiated grievance procedure in discussing the matter with the grievant, the Administrative Law Judge credited the testimony of the Respondent's witness, and concluded that the Complainant's President was afforded an opportunity to be present prior to the discussion with the grievant and that this offer was declined by the Complainant's President. Hence, the Administrative Law Judge recommended that the complaint be dismissed in its entirety finding that the Respondent did not seek to deny the Complainant the right to be represented during the grievance discussion.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
DEPARTMENT OF THE TREASURY,
HARTFORD DISTRICT OFFICE

Respondent
and Case No. 31-8556(CA)

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER NO. 18

Complainant

DECISION AND ORDER

On February 26, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-8556(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
 In the Matter of :
 :
 :
 INTERNAL REVENUE SERVICE, :
 DEPARTMENT OF THE TREASURY, :
 HARTFORD DISTRICT OFFICE :
 Respondent :
 and : Case No. 31-8556 (CA)
 :
 NATIONAL TREASURY EMPLOYEES :
 UNION, CHAPTER No. 18 :
 Complainant :

 David J. Markman, Jr., Esq.
 Washington, D.C.
 For the Respondent
 Peter M. Conroy, Jr., Esq.
 Avon, Connecticut
 For the Complainant
 Before: GORDON J. MYATT
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER
 Statement of the Case

Pursuant to a complaint filed on June 14, 1974, alleging that Internal Revenue Service, Department of the Treasury, Hartford District Office (hereinafter called the Respondent Activity) violated Section 19(a)(6) of Executive Order 11491, as amended, the Regional Administrator for the New York Region issued a Notice of Hearing on Complaint on October 7, 1974. In essence, the complaint alleged that the Respondent Activity failed to give notice to National Treasury Employees Union, Chapter No. 18 (hereinafter called Complainant Union) regarding a meeting with an employee on a grievance which she filed and requested representation by the Complainant Union. The complaint further alleges that the Complainant Union was never informed of or invited to attend the meeting between representatives of the Respondent Activity and the employee regarding the grievance.

A hearing was held on the issues presented in this case on December 19, 1974, in Hartford, Connecticut. All parties were represented by counsel and afforded full opportunity to present relevant evidence and testimony, and to examine and cross-examine witnesses. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at this hearing, I make the following:

Findings of Fact

A. Background Facts

The Complainant Union is the exclusive representative of the unit employees at the Respondent Activity. There was a negotiated agreement in effect between the parties herein at all times material to this case. ^{1/} The agreement was a Multi-District Agreement which was applicable to the Respondent Activity and the Complainant Union. The agreement was executed April 5, 1972, and became operative July 1, 1972. It contained provisions for renewal for yearly periods after the initial two-year period from date of execution.

Article 13 of the negotiated agreement related to position classification. Section 4 of that article provided as follows:

Section 4. An employee who has satisfactorily performed the duties of a higher grade more than fifty percent (50%) of his work during the preceeding twelve (12) month period as a result of circumstances other than a planned

^{1/} The unit set forth in the negotiated agreement consisted essentially of the following:

All professional and non-professional employees, excluding all management officials, supervisors, confidential employees, all employees of the Intelligence Division, all employees engaged in Federal personnel work in other than purely clerical capacity, and guards.

management action will be reclassified to the next higher level if it is reasonably expected that such employee will continue to perform higher level duties for more than fifty percent (50%) of his work time. The Employer further agrees that work will not be reassigned for the purpose of avoiding reclassification. 2/

The negotiated agreement also contained provisions relating to the filing and handling of grievances. Section 1 of the grievance provisions defined the scope of their application between the parties. It provided that the grievance provisions were intended "to provide an orderly method for the disposition and processing of grievances which may arise from time to time as a result of the interpretation and/or application of the terms of this agreement." 3/ The negotiated agreement provided that grievances could be initiated by either the employees in the unit or the Union on their behalf, or by either, jointly or singly. Section 3B of the grievance provisions stated, in pertinent part:

Where an employee has initiated a grievance and does not elect to be represented by the Union, the Union will have a right to be present at all formal discussions between the employee and the Employer concerning the grievance....

B. The Alleged Unlawful Conduct

Shirley Murphy was a GS-4 Group Clerk in the Respondent Activity's office. As such, Mrs. Murphy was assigned secretarial and administrative duties for the Revenue Officers in her particular group. She also performed secretarial duties for the Group Manager, who was the supervisor of the operation. In addition to the foregoing duties, Mrs. Murphy received three days training which enabled her to operate a taxpayer retrieval system for which a terminal was located in the Hartford office. This system was officially called the Integrated Data Retrieval System (IDRS). It provided

2/ Joint Exhibit No. 1

3/ Article 33 of the negotiated agreement, Joint Exhibit No. 1.

taxpayer information for the Revenue Officers in the Hartford group as well as for the office located in New Haven, Connecticut.

After the IDRS terminal became operative at the Respondent Activity, Mrs. Murphy contended that her duties in connection with the system were beyond her job description requirements. She felt she was entitled to consideration for a grade restructure commensurate with the additional responsibilities. In keeping with this contention, Mrs. Murphy sent a memo on January 31, 1974, to Earl Tesch, Chapter President of the Complainant Union. 4/ In the memo, Murphy stated that she was registering a grievance regarding her duties on the IDRS terminal. Mrs. Murphy was of the opinion that the IDRS duties were the responsibility of employees having a higher grade than she held. She stated that if she were to have the assignment, she wanted some adjustment grade-wise. Tesch subsequently indicated to Murphy that she should present the grievance to her Group Manager, Leo Miller, either orally or in writing.

On February 12, 1974, Murphy presented Miller with a copy of her grievance. It was substantially a restatement of the complaint she expressed to Tesch. She requested a meeting with Miller, and expressly requested that a representative of the Union be present at the meeting.

The testimony in the record is in dispute factually as to what occurred after Murphy's grievance was lodged with Miller. According to Murphy, Miller met with her on the date that she gave him the grievance -- February 12, 1974. She stated that Miller went over her job description with her and agreed that her IDRS responsibilities would be eliminated for the time being. This meeting was conducted in Miller's office, and Murphy was alone and without the benefit of Union representation. Murphy further testified that Miller posted a "buck slip" on a file cabinet, for the benefit of the Revenue Officers, stating that Murphy no longer had the IDRS responsibility in the office. Murphy stated that Miller gave her a handwritten rough draft memorandum of the results of their meeting for her to type as the

4/ Tesch was assigned to the Bridgeport, Connecticut Office, which was located 15 to 20 miles from the Respondent Activity.

official document memorializing their discussion. 5/

Murphy testified that on the following day the "buck slip" was removed, and Miller requested she meet with him again in his office. According to Murphy, there was no mention of having a union representative present. Miller informed her that she would still be responsible for the IDRS function, as management considered it to fall within the ambit of her normal duties. Murphy stated that Miller gave her a new draft of the response to her grievance, which consisted of a composite of the prior draft and additional handwritten statements. She was to type this in final form as the official response to her grievance. 6/

Tesch testified that he had never been contacted by Miller regarding the February 12th meeting with Murphy on her grievance. He stated his first communication with Miller regarding the grievance was after Miller's conversations with Mrs. Murphy. He was informed by Miller that a meeting had been held, and that there was "no satisfactory conclusion" reached "as far as Mrs. Murphy was concerned." Tesch acknowledged that he did not express any complaint to management regarding Miller meeting with Murphy without affording the Union an opportunity to be represented. He had a meeting with the District Personnel Officer the following day -- he was uncertain whether the meeting took place February 13 or 14 -- and he did not voice any complaint over the failure to notify and afford the Union an opportunity to be represented at the Murphy grievance discussion.

Miller's testimony, on the other hand, differed in many respects from the version given by Murphy and Tesch.

5/ Both the handwritten document and the typed copy contained the date of February 12, 1974. Murphy acknowledged that she placed that date on the handwritten draft to indicate the date she received it.

6/ It should be noted that according to Murphy's testimony, she did not verbally renew her request for union representation at either meeting, nor did she refuse to participate in the discussions.

According to Miller, there was only one meeting with Mrs. Murphy, and he stated it took place on February 13, 1974. Miller testified that he placed a call to Tesch in Bridgeport in Murphy's presence, and asked if he planned to attend on behalf of the Union. He stated that Tesch told him that it was not necessary for him to be present, and Miller made a notation to that effect on the copy of the grievance given to him by Murphy. He also stated that he asked Murphy if she wished to proceed, and she indicated she did. Miller testified that before he called Mrs. Murphy into his office, he had been in touch with Nisotis, Chief of Personnel for the District. Nisotis told him that Mrs. Murphy's complaint was more in the nature of a classification appeal than a grievance under the negotiated agreement. Nisotis advised him, however, to proceed through the first step of the grievance procedure, including offering the Union an opportunity to be present during the discussion. Pursuant to this advice, Miller stated he informed the employee that management viewed her IDRS responsibilities as being within the ambit of her current job description. He stated that at the conclusion of the meeting, Murphy complained the fact that he had the agency Personnel Office backing him up and she did not have anyone representing her. He testified that he responded by informing her that he had tried to get her assistance through the Union.

Miller stated that he gave Mrs. Murphy a copy of a handwritten rough draft of the memo memorializing the meeting for typing. After he had received the typed copy, he attempted to get the views of Nisotis regarding its content. Nisotis was involved in other matters on February 13th, and did not get back to Miller until the following day. As a result of their discussions, the memo was revised and redrafted. This, according to Miller, accounted for the second draft given to Murphy to type in final form.

After the meeting between Miller and Murphy, the Union representatives elected not to pursue the grievance to the next level set forth in the negotiated agreement. Rather, a classification appeal was filed pursuant to the regulations contained in the Federal Personnel Manual. This resulted in a desk audit of Murphy's responsibilities and job requirements. At all times during the course of this appeal the employee was represented by the Union.

C. The Contention of the Parties

The Complainant Union contends that it had a right to have a representative present on behalf of Mrs. Murphy during the first level discussion on her grievance -- which it asserts occurred at meetings held on February 12 and

February 13, 1974. It argues that the discussions on the Murphy grievance fell within the ambit of Section 10(e) of the Executive Order 7/, and the Complainant Union had an affirmative obligation as the exclusive representative to represent the interests of the unit employee. It is asserted that the failure to notify and afford the union Representative an opportunity to be present during the discussion of the Murphy grievance was in derogation of the Complainant Union's representative status, and precluded it from satisfying the obligation to represent unit employees as imposed by Section 10(e).

The Respondent Activity, on the other hand, contends that the Murphy grievance was in fact a classification appeal and not a grievance under the negotiated grievance procedure. The Respondent Activity further contends that regardless of the nature of the discussion on the Murphy problem, it did not constitute a formal meeting under Section 10(e), as it only related to Murphy's duties and had no impact on other employees in the unit. According to this argument, the Union did not have a right under the Executive Order to be represented at the meetings. Finally, the Respondent Activity argues that the complaint did not allege a violation of Section 19(a)(1) of the Executive Order, and that only Mrs. Murphy's rights under the Order could have been violated by the conduct. It suggests that by participating in the discussions, Murphy "consciously waived her right to have the Union representation during the meetings."

7/ Section 10(e) of the Executive Order provides, in pertinent part:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit.... The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Concluding Findings

Although the factual dispute must be resolved here in order to determine if a violation of the Executive Order has been committed, it is evident that a more basic issue underlies the complaint. In my judgment, the principal issue centers on the right of the Union to be represented during a discussion between a management official and an employee on an employee-initiated grievance relating to her working conditions.

Section 10(e) imposes an affirmative obligation on the Complainant Union, as the exclusive representative, to represent the interest of all unit employees U.S. Department of Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400. It further provides that the exclusive representative "shall be given the opportunity to be present 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." (emphasis supplied). The case law has established that a discussion on a grievance, whether under an agency grievance procedure or under a negotiated grievance procedure, for the purposes of 10(e) constitutes a "formal discussion" at which the exclusive representative is entitled to be represented. Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448; Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania A/SLMR No. 498. Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

The facts here indicate that Mrs. Murphy's written complaint was over the expansion of her job duties to include work on the IDRS terminal without any commensurate adjustment in grade and salary. While she did not specifically spell out contract provisions which she felt were controlling, she did request a meeting on the issue and did specifically request union representation at that meeting. The mere fact that her dissatisfaction over the expansion of her job responsibilities could have also been interpreted as a classification appeal, as well as a grievance, does not alter the nature of the proceeding invoked in February 1974. Indeed, management officials decided to treat the matter as a request under the negotiated grievance procedure and proceeded to handle the situation with that understanding. Therefore, the Respondent Activity cannot be heard to say at this posture that the discussion regarding the Murphy matter was something other than a meeting under the negotiated grievance procedure.

In these circumstances, the Complainant Union was entitled, under the rights conferred by Section 10(e), to be represented at the discussions; this is true whether or not the grievance was of such a nature as to have general impact on unit employees. 8/ U.S. Department of the Treasury, Internal Revenue Services, Pittsburgh District, Pittsburgh, Pennsylvania, supra.

Having determined that the Complainant Union had a right to be present during the discussion on the Murphy grievance, the ultimate question to be determined here is whether, under the circumstances of this case, the Complainant Union was afforded an opportunity to be represented. As noted above, this issue is bottomed on a resolution of the factual conflict in the record.

Murphy testified that she had two meetings with Miller -- the first on February 12, 1974 and the second the following day. The handwritten draft of the memo setting forth the grievance and the results of the meeting between Murphy and Miller was introduced into evidence to establish that the first meeting took place on February 12. However, Murphy acknowledged that she had placed the date on the draft, and of course, on the copy which she typed. All witnesses were in agreement that Miller revised the draft to conform with the advice received from the personnel office, and that a subsequent copy was typed by Murphy. Murphy testified that at no time during her discussion with Miller was a telephone call placed to Tesch to ascertain if he or someone else would be present. Miller's testimony, on the other hand, indicates that a call was placed while Murphy was in his office, and that Tesch stated it was not necessary for him to be present. 9/

8/ It should be noted at this point, that while the subject matter was peculiar to Murphy the principle involved could have unit-wide implications; i.e. expansion of existing job duties to include other requirements without benefit of job reclassification.

9/ Miller put a notation to this effect on the "buck slip" which initiated the grievance.

While Tesch denied having been contacted by Miller prior to the meeting on the grievance, he did admit that Miller reported the results of the discussion to him. Tesch was vague, however, as to whether the report was made to him on February 13 or 14. Moreover, his recollection was vague as to whether the meeting between Murphy and Miller occurred on February 12 or February 13. Further, it is clear that Tesch never complained to management that he was not afforded an opportunity to be present during the grievance discussion with the employee.

As in most cases of this nature, where there has been a considerable time lapse between the event and the testimony regarding the event, the recollection of witnesses, however sincere they may be, tends to differ widely regarding the same occurrence. Nor is there any objective means here for establishing the true order of the events. 10/ In my judgment, having observed all of the witnesses carefully, there was no intention to deliberately mislead but rather an honest difference in recollection on the part of all. Accordingly, the conflict must be resolved in favor of the version which seems most probable under the circumstances.

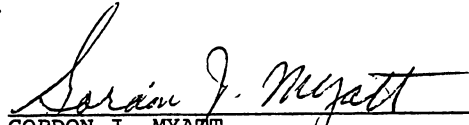
There is no doubt that management was making every effort to adhere to the terms of the negotiated grievance procedure in discussing the matter with Murphy. Indeed, the testimony regarding her subsequent classification appeal demonstrates that management made every effort to afford the employee union representation in that procedure. Moreover, after the final memo was typed regarding the results of the grievance discussion, Murphy was advised to give a copy to her union representative. Because of the scrupulous observance of the rights of the employee by management, I am persuaded that the Miller version of the events is the more accurate version, and I credit his testimony in this regard. On the basis of this determination, I find that the union president was indeed afforded an opportunity to be present prior to the discussion with Mrs. Murphy, and that this offer was declined by Tesch. I find, therefore, that management did not seek to deny the exclusive representative the right to be represented during the grievance discussion, and that the Complainant Union has failed to establish, by a preponderance of the evidence in this record, that a violation of Section 19(a) (6) of the Executive Order has been committed.

10/ The handwritten memo was dated by Murphy, and the notation of the conversation with Tesch was dated by Miller.

May 19, 1976

Recommended Order

On the basis of the foregoing findings of fact and conclusions of law I find that Internal Revenue Service, Department of the Treasury, Hartford District Office did not engage in conduct which violated Section 19(a)(6) of 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: FEB 26 1976
Washington, D.C.

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

ORANGE-CHATHAM COMPREHENSIVE
HEALTH SERVICES, INCORPORATED
A/SLMR No. 650

This case involves a representation petition filed by the North Carolina Nurses Association requesting a unit of all Family Nurse Practitioners at three clinics operated by the Activity. The matter was transferred to the Assistant Secretary by the Regional Administrator pursuant to Section 206.5(a) of the Rules and Regulations, to determine whether the Activity is under the jurisdiction of the Executive Order.

Under all of the circumstances, the Assistant Secretary concluded that the Activity is not an "Agency" as defined in Section 2(a) of the Order and, therefore, does not come within the jurisdiction of the Order. In this regard, the Assistant Secretary noted that the Activity could meet the definition of "Agency" set forth in Section 2(a) of the Order only if it could be found to be a "Government corporation." In concluding that the record does not support such a finding, the Assistant Secretary noted that, while the Department of Health, Education and Welfare (HEW), because it supplies the bulk of the Activity's income in the form of a grant, exercises a substantial degree of control over the Activity's expenditures and requires a report of fiscal responsibility from the Activity, the latter was established and exists under the laws of the state of North Carolina; the HEW does not appoint the members of the Activity's Board of Directors or its Project Manager who directs its day-to-day operations; the HEW does not direct the Activity with regard to its scope of operations, or the numbers, types or identity of its employees; and the HEW does not exercise control over the wages, hours and working conditions of the Activity's employees.

Accordingly, the Assistant Secretary ordered that the petition be dismissed on jurisdictional grounds.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ORANGE-CHATHAM COMPREHENSIVE
HEALTH SERVICES, INCORPORATED

Activity

and

Case No. 40-6704 (RO)

NORTH CAROLINA NURSES ASSOCIATION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, this matter is before the Assistant Secretary pursuant to Regional Administrator Lem R. Bridges' Order Transferring Case to the Assistant Secretary of Labor, dated January 23, 1976, pursuant to Section 206.5(a) of the Rules and Regulations. Upon consideration of the entire stipulated record in this case, 1/ including a brief filed by the Orange-Chatham Comprehensive Health Services, Incorporated (Activity), the Assistant Secretary finds:

The Petitioner filed a petition seeking an election in a unit of all Family Nurse Practitioners at three clinics operated by the Activity. The Activity moved that the petition be dismissed, contending that it does not meet the definition of "Agency" under Executive Order 11491, as amended, and, therefore, is not subject to its jurisdiction. The sole issue before the Assistant Secretary in this matter is whether the Activity is under the jurisdiction of the Order.

The Activity is a nonprofit, county based organization established and existing under the laws of the state of North Carolina. Its objective is to facilitate, promote and provide by contract, or otherwise, comprehensive health care services and education to all segments of Orange and Chatham Counties in North Carolina, as well as certain adjacent areas, with particular emphasis directed to that segment of the population which is receiving inadequate health care.

1/ The Activity and the North Carolina Nurses Association (Petitioner) previously were parties to a representation proceeding before the National Labor Relations Board. The Board dismissed the case, declining jurisdiction in the matter. The record of that proceeding, along with the National Labor Relations Board's Regional Director's Decision and Order, were submitted to the Assistant Secretary and stipulated by the parties as the entire record in this matter.

The Activity is under the direction of a 21 member Board of Directors which sets policy for the organization. Its day-to-day operations are under the control of a Project Director who is appointed by the Board of Directors. Most of the Activity's income is supplied by the Department of Health, Education and Welfare (HEW) in the form of a grant. Paying patients and third-party sources, such as Medicaid, Medicare and private insurance carriers, provide the remaining sources for its income. Annually, the Activity makes an application to the HEW for its grant, which application includes submitting its complete operating budget showing how the money will be used. In its application, the Activity also is required to identify, classify and describe all positions that will utilize grant funds and to identify the employees in such positions, their annual salaries and the percentage of their time spent working on the program. All of the income received by the Activity is treated as grant funds and is subject to HEW control. The record reveals, in this regard, that the Activity must follow the budget which the HEW approves and that any changes in salaries or personnel or any additional equipment purchases during a particular fiscal year must be approved by the HEW. In Fiscal Year 1974, the Activity received a \$2.38 million dollar grant from the HEW, approximately \$40,000 from patients, approximately \$1,500 from private insurance carriers, and an estimated \$30,000 from Medicaid and Medicare. The Activity also distributed \$100,000 under a food supplement program funded by the U.S. Department of Agriculture throughout the state of North Carolina.

The HEW audits the Activity on a regular basis and conducts special investigations to examine its expenditures in relation to the program objectives. All Activity employee personnel policies, including, hiring, firing, salary determinations, annual and sick leave, and appeal rights, after approval by the Board of Directors, must be approved by the HEW.

Based on the foregoing, I find that the Activity herein is not an "Agency" as defined in Section 2(a) of the Order 2/ Thus, clearly it is not, nor is it contended to be, an executive department or an independent establishment as defined in Section 104 of Title 5 of the United States Code. Consequently, the Activity can meet the definition of an "Agency" only if it can be found to be a "Government corporation." within the meaning of Section 2(a) of the Order. In my view, the record does not support such a finding. Thus, as set forth above, the record reveals that the Activity was established and exists under the laws of the state of North Carolina. Further, it is directed by an appointed Board of Directors, and its day-to-day operations are under the control of a Project Director. Because the Activity receives the bulk of its income

2/ Section 2(a) of the Order provides: "'Agency' means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office." In this latter regard, it was noted that Section 104 of Title 5 of the United States Code defines an "independent establishment" as: "(1) an establishment of the executive branch which is not an Executive department, military department, government corporation, or part thereof, or part of an independent establishment; and (2) the General Accounting Office."

from the HEW in the form of a grant, the HEW exercises a substantial degree of control over its expenditures and requires a report of fiscal responsibility from the Activity. However, the HEW does not appoint the members of its Board of Directors or its Project Manager. Moreover, it does not direct the Activity with regard to its scope of operations, or the numbers, types or identity of its employees. Nor does it exercise control over the wages, hours and working conditions of the Activity's employees.

Under these circumstances, I conclude that the Activity is not a "Government corporation" within the meaning of Section 2(a) of the Order, and, therefore, does not come within the definition of Agency under that Section. Accordingly, I shall order that the petition herein be dismissed on jurisdictional grounds.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-6704(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

U.S. ARMY FINANCE AND ACCOUNTING CENTER,
FORT BENJAMIN HARRISON,
INDIANAPOLIS, INDIANA
A/SLMR No. 651

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1411, AFL-CIO, (Complainant) alleging, in substance, that the Respondent had violated Section 19(a)(1) and (6) of the Order by unilaterally changing the terms and conditions of employment of unit employees.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by changing terms and conditions of employment of unit employees without first notifying and, upon request, meeting and conferring with the Complainant concerning changes as to when an employee is considered at his/her work; when employees may engage in personal conversations in the work area during non-break periods; when employees may put on coats and overshoes at the end of the tour of duty; the amount of clean up time permitted; permitting tardy employees to take annual leave or to make up the time by working during break periods; and the penalties required for an employee who is absent without official leave (AWOL). The Administrative Law Judge recommended, in part, that the Respondent be ordered to rescind and revoke its unilateral changes.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations with certain modifications in the remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY FINANCE AND ACCOUNTING CENTER,
FORT BENJAMIN HARRISON,
INDIANAPOLIS, INDIANA

Respondent

and

Case No. 50-13010(CA)

LOCAL 1411, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On February 12, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order. 1/

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

1/ The Respondent made an untimely request for an extension of time in which to file exceptions.

Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, shall:

1. Cease and desist from:

a. Applying the terms and conditions of employment set forth in its memorandum of November 21, 1974, concerning "Poor Work Habits," and any subsequent memoranda issued to effectuate it.

b. Instituting changes with respect to when an employee is considered at his/her work; when employees may engage in personal conversations; the amount of clean up time permitted; when employees may put on coats and overshoes; permitting tardy employees to take annual leave or to make up the time by working during break periods; the penalties required for an employee who is AWOL; and any other terms and conditions of employment, without first notifying and, upon request, meeting and conferring with Local 1411, AFGE, the exclusive representative of its unit employees.

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

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

a. Rescind and revoke the terms and conditions of employment set forth in its memorandum of November 21, 1974, concerning "Poor Work Habits," and any subsequent memoranda issued to effectuate it.

b. Make whole any employee adversely affected by the memorandum of November 21, 1974, which unilaterally changed the terms and conditions of employment of unit employees. 2/

2/ Paragraph 2.b. appears as modified.

c. Upon request, meet and confer with Local 1411, AFGE, with respect to any proposed changes as to when an employee is considered at his/her work; when employees may engage in personal conversations; when employees may put on coats and overshoes; the amount of clean up time permitted; permitting tardy employees to take annual leave or to make up the time by working during break periods; the penalties required for an employee who is AWOL; and any other terms and conditions of employment.

d. Post copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.
May 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

-3-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT apply the terms and conditions of employment set forth in our memorandum of November 21, 1974, concerning "Poor Work Habits," and any subsequent memoranda issued to effectuate it.

WE WILL NOT institute changes with respect to when an employee is considered at his/her work; when employees may engage in personal conversations; the amount of clean up time permitted; when employees may put on coats and overshoes; permitting tardy employees to take annual leave or to make up the time by working during break periods; the penalties required for an employee who is AWOL; and any other terms and conditions of employment, without first notifying and, upon request, meeting and conferring with Local 1411, AFGE, the exclusive representative of our unit employees.

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

WE WILL rescind and revoke the terms and conditions of employment set forth in our memorandum of November 21, 1974, concerning "Poor Work Habits" and any subsequent memoranda issued to effectuate it.

WE WILL make whole any unit employee adversely affected by the memorandum of November 21, 1974, which unilaterally changed the terms and conditions of employment of unit employees.

WE WILL, upon request, meet and confer with Local 1411, AFGE, with respect to any proposed changes as to when an employee is considered at his/her work; when employees may engage in personal conversations; when employees may put on coats and overshoes; the amount of clean up time permitted; permitting tardy employees to take annual leave or to make up the time by working during break periods; the penalties required for an employee who is AWOL; and any other terms and conditions of employment.

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



(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 230 South Dearborn Street, Room 1033B, Chicago, Illinois 60604.

. :
: In the Matter of :
: :
: U. S. ARMY FINANCE AND ACCOUNTING :
: CENTER, FORT BENJAMIN HARRISON, :
: INDIANAPOLIS, INDIANA, :
: Respondent :
: and :
: LOCAL 1411, AMERICAN FEDERATION :
: OF GOVERNMENT EMPLOYEES, AFL-CIO, :
: Complainant :
: :
: Case No. 50-13010 (CA)

Mr. Roger D. Ege
Civilian Personnel Office, USAFAC
Fort Benjamin Harrison
Indianapolis, Indiana 46249
For the Respondent

Mr. David D. Smith
National Representative
American Federation of Government
Employees, AFL-CIO, Local 1411
1729 Sanwela Drive
Indianapolis, Indiana 46260
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
Statement of the Case

This proceeding arose under Executive Order 11491, as amended, (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on July 1, 1975, by the Assistant Regional Director of the United States Department of Labor, Labor-Management Services Administration, Chicago Region:

On February 10, 1975, Local 1411, American Federation of Government Employees, AFL-CIO (herein called the Union a Local 1411 AFGE) filed a complaint against U. S. Army Finance and Accounting Center, Fort Benjamin Harrison (herein called Respondent, Activity or USAFAC). Alleging that Respondent violated Sections 19(a)(1) and (6) of the Order by unilaterally changing terms and conditions of employment and unilaterally changing the collective bargaining agreement without consulting, conferring and negotiating with Local 1411 AFGE.

A hearing was held before the undersigned in Indianapolis, Indiana. Both parties were represented and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter, both parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observations of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein Local 1411 AFGE was the exclusive collective bargaining representative for an Activity wide unit, including all professionals, and excluding the usual supervisory, managerial and personnel employee exclusions.

2. The Activity and Local 1411 AFGE entered into a collective bargaining agreement with an effective date of September 26, 1973, and duration of three years.

3. Article III Section 2 of the agreement provides, in part, "... No management or staff official will issue or implement any local policy statement on a negotiable issue or any matter that is appropriate for consultation unless it has been referred to the Union."

4. Article III Section 6 of the Agreement provides that pending the adjustment of any negotiable matter there will be no change in conditions and that the "determination of any negotiable issue will be accomplished by means of the conference machinery..." Section 7 provides that the Agreement is "living"

document and the parties must meet to discuss and consult on matters not originally covered. Section 8 provides that practices, etc., which have not been specifically covered by the Agreement will not be changed prior to discussion with the Union.

5. Article XVII Section 11 provides, that an employee won't be charged as tardy or with annual leave if he is in his seat or "accounted for in his immediate work area when his tour of duty begins."

6. On November 20, 1974, prior to 10:00 a. m., Mr. Robert Ege, Labor Relations Specialist for the Activity delivered to Union President, Mr. Thomas A. Walton, 1/ a draft of a memorandum entitled "Poor Work Habits." Mr. Ege advised Mr. Walton that this was a "hot item" and that there was a meeting of supervisors scheduled that day at 12 noon for distribution of the documents. Mr. Ege also indicated that the decision had already been made and therefore any Union comments really didn't matter. Mr. Walton protested and advised Mr. Ege that he felt the memorandum violated Article XVII, Section 11 of the contract.

7. Between 10:00 a. m. and 12 noon of November 20, Mr. Ege delivered to Mr. Walton another copy of the draft memorandum on "Poor Work Habits". This was accompanied by a transmittal slip, which advised the Local 1411 AFGE that it was being transmitted for consultation purposes and that Local 1411 AFGE would have to submit comments prior to 10:00 a. m. on November 21, and that failure to do so would result in the memorandum being issued to all first line supervisors during the afternoon of November 21, 1974.

8. Local 1411 AFGE President Walton responded in a timely fashion stating, 2/ in writing, that Paragraph 1(a) of the proposed memorandum violated Article XVII, Section 11

1/ Other Union officers were also present.

2/ This reply was delivered at 9:50 a. m.

of the contract and requested that "proper negotiation procedures be established as outlined in Article XL, Section 2 and 3." President Walton also referred to Article III, Sections 6, 7 and 8 of the Agreement. He also requested that part of paragraph 3 of the draft, including the table of penalties, be deleted and that the release date of the memorandum of November 21, be rescinded and that "Union and Management jointly consult and negotiate on proposed action." Finally, he requested that the Union be notified, in writing of any action taken "prior to implementation."

9. Mr. Ege met with Mr. Walton and briefly discussed the Union's position. Mr. Ege testified that he really only had authority to transmit Local 1411 AFGE's position to the proper decision making authorities. In his recommendation to higher authorities Mr. Ege concluded that the memorandum didn't constitute a change in conditions and therefore "negotiations... are not required." In this regard he noted that previously the Centralized Pay Operations instituted a procedure similar to paragraph 1 of the proposed memorandum and noted that the matter was not "formally grieved by the Union."

10. On November 21, 1974, at 12:00 noon the Activity met with its supervisors and distributed a memorandum concerning "Poor Work Habits." This memorandum, although not identical to the draft shown to the Local 1411 AFGE, was, in all major respects, substantially identical ^{3/} the draft and did not incorporate any of the Union's proposals.

11. The Union was not contacted or communicated with from the time Mr. Ege met with Mr. Walton immediately after receipt of the Union's reply (as described in paragraph 9) and the issuance of the final memorandum.

^{3/} It did delete the last paragraph from the draft which refers to these "... actions required to correct the identified deficiencies in work habits..."

12. The terms of the memorandum of November 21, were then instituted and applied to the employees in the collective bargaining unit.

13. The November 21 memorandum provided in paragraph 1 that first line supervisors must enforce the following requirements:

a. Employees will be at their desks or work station ready to commence work at the beginning of the official tour of duty, after break periods and at the end of their official lunch periods. Except for the approved break periods, employees must be in their designated work areas or under your supervisory control completing their assigned work.

b. Personal conversations during non-break periods will be kept at a minimum. Visiting on personal matters will be done during non-duty periods.

c. Clean up time will be allowed for desk and work area only. A maximum of 35 minutes will be allowed at the end of the employees tour of duty.

d. No coats and/or overshoes will be put on prior to completion of the official tour of duty. There will be no line ups to leave at doorways and in hallways. All employees will remain at their desks until completion of the duty tour.

14. Paragraph 3 of the Memorandum of November 21 stated that non compliance with the requirements of the memorandum would result in disciplinary action and set forth a table of penalties which provided for an oral warning for a first offense; a written reprimand for a second offense; at 1-5 day suspension for a third offense; and a 5-day suspension to removal for a fourth offense.

15. On November 25, the Activity issued a memo to all Operations Directors referring to the November 21 memorandum and stating that employees who come in tardy must be charged with AWOL if he does not have meritorious justification.

16. The Union was neither shown, nor advised of this November 25 memorandum in advance of its being issued.

17. On December 21, 1974, at the monthly Union-Activity meeting, Mr. Walton attempted to raise the "Poor Work Habits" issue with General Currier, the Commanding Officer, but General Currier refused to discuss it because it was apparently not on the agenda.

18. Prior to the issuance of the November 21 memorandum an employee was not considered tardy or AWOL if he was accounted for in his "work area". This is distinguished from "work station", as provided in the November 21 memorandum. The former refers to a more general area in which the employee works, whereas the latter referred to the specific machine to which the employee was assigned.

19. Prior to the issuance of the November 21 memorandum personal conversations in the work area, during non-break periods, were permitted; employees were permitted to discuss personal matters during non-break periods; employees were permitted a rather liberal clean up period and were allowed more than 3 to 5 minutes for clean up time; and they were permitted to put on coats and overshoes prior to the actual end of the tour of duty.

20. Prior to the issuance of the November 21 memorandum and its required penalties supervisors had been quite flexible and had permitted tardy employees to work during breaks or to take annual leave, but they were not normally charged with being AWOL.

Conclusions of Law

1. It is concluded that the time at which an employee is considered to have reported and be ready for work, at his "work station" or in the "work area", is a term and condition of employment, as are whether personal conversations, etc., are permitted during non-break periods, the amount of time permitted for cleanup, and whether employees can put on coats and overshoes prior to the actual end of the tour of duty.

2. It is concluded that generally permitting tardy employees to either take annual leave or to work during breaks to make up the late time are terms and conditions of employment.

3. An activity is not permitted to alter or change such working conditions without first notifying the collective bargaining representative of the employees affected and, upon request, bargaining about such proposed changes before they are put into effect. Cf. IRS, Office of the Regional Commissioner, Western Region, A/SLMR No. 473; NLRB Washington, D. C., A/SLMR No. 246; and VA Hospital, Charleston, SC., A/SLMR No. 87.

4. In the subject case the Activity notified the Union of the proposed changes in working conditions but when advised that the Union was not agreeing to the proposed changes, the Activity gave the Union only 24 hours to make written comments. The Union protested the limited time and requested to meet and negotiate concerning these proposed changes. The Union's request was not granted ^{4/} and the proposed changes were put into effect almost immediately.

5. The Activity was in fact advising the Union of changes it was going to make and did not wish to seriously consider any Union proposals.

6. The Activity's position that, because in the past it had required the Union to respond in writing, often allowing little time for the response, the Union agreed to such a procedure is rejected. In the instant case the Union specifically requested to meet and bargain. There was no showing with respect to the past occurrences that the union didn't agree with the changes or that it requested to meet and bargain.

^{4/} The conversation between Mr. Ege and Union President Walton, did not constitute such a negotiating and bargaining meeting because Mr. Ege had only the authority to relay the Union position to his superiors, he could not make any decisions and the meeting was very informal and brief. It clearly was not the kind of negotiations envisioned by the Order.

7. Similarly, the activity's position that the Union had by contract or practice waived its right to negotiate and bargain about such changes in working conditions and had settled for some limited type of consultation permitting the activity to require the union to respond in 24 hours, in writing, and nothing more is also rejected. The entire thrust of the contract is to have the parties meet, confer and negotiate concerning changes in the agreement or in terms and conditions of employment. The activity relies on NASA, Kennedy Space Center, A/SLMR No. 223 as establishing that Union can waive its rights under the Order. But, in that case, the Assistant Secretary held that such a waiver must be clear and unmistakable and, in fact, he found no such waiver. In the subject case, considering the contract, as a whole, it does not appear that the Union waived its rights to bargain about such a fundamental matter as changes in working conditions. 5/

8. The Activity has not submitted any evidence to justify why the proposed changes had to be made on such short notice and couldn't have been postponed so as to permit negotiation with the Union.

9. Further all of the Activity's references to various manuals and regulations establish that the changes were permitted and proper, but not that they were required, or that the prior practices were improper or violated the various regulations.

10. In light of all of the foregoing it is concluded that the Activity did not negotiate and bargain in good faith with the union about the changes in working conditions, as is required by Section 19(a)(6) of the Order, because it did not give the Union notice in sufficient time to prepare a response, did not meet, confer and negotiate with the union concerning the proposed changes,

5/ Any contention that if this conduct did constitute a violation of the contract it must be handled as a contract dispute is rejected. V. A. Hospital, Charleston, S. C., supra.

and had no intention of considering, in good faith, any Union proposals. Therefore, it is concluded that the Activity violated Section 19(a)(6) of the Order.

11. Such conduct also has a foreseeable effect of interfering with, restraining and coercing employees in exercising their rights as protested by the Order and therefore violated 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 to have engaged in conduct prescribed by Section 19(a)(1) and (6) of Executive Order 11491, as amended, by its unilaterally changing terms and conditions of employment without giving Local 1411 AFGE adequate advance notice and by refusing to meet, confer and negotiate with the Union about the changes, and that the following order, which is designed to effectuate the policies of 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, the Assistant Secretary of Labor for Labor-Management Relations hereby orders the U. S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana shall:

1. Cease and desist from:

a. Applying the terms and conditions of employment set forth in its memorandum of November 21, 1974, concerning "Poor Work Habits", and any subsequent memoranda issued to effectuate it.

b. Instituting changes with respect to when an employee is considered at his/her work; when an employee can engage in personal conversations; the amount of clean up time permitted; when employees can put on coats and overshoes; permitting tardy employees to take annual leave or to make up the time by working during breaks; the penalties required for an employee who is AWOL; and any other terms and conditions of

employment without first notifying, and upon request, meeting, conferring and negotiating with Local 1411, AFGE, the exclusive representative of its unit employees.

c. In any other manner 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. Rescind and revoke the terms and conditions of employment set forth in its memorandum of November 21, 1974, concerning "Poor Work Habits" and any subsequent memoranda issued to effectuate it.

b. Make whole any employee adversely affected by the changed terms and conditions of employment set forth in the Memorandum of November 21, 1974.

c. Upon request meet, confer and negotiate with Local 1411 AFGE with respect to any proposed changes as to when an employee is considered at his/her work; when an employee can engage in personal conversations; when employees can put on coats and overshoes; the amount of clean up time permitted; permitting tardy employees to take annual leave or to makeup time by working during breaks; the penalties required for an employee who is AWOL; and any other terms and conditions of employment.

c. Post on the base copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the U. S. Army Finance and Accounting Center, Fort Benjamin Harrison, 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. The U. S. Army Finance and Accounting Center, Fort Benjamin Harrison, shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

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

N O T I C E T O A L L E M P L O Y E E S

APPENDIX CONT'D

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 apply the terms and conditions of employment set forth in our memorandum of November 21, 1974 concerning "Poor Work Habits", and any subsequent memoranda issued to effectuate it.

WE WILL NOT institute changes, with respect to when an employee is considered at his/her work; when an employee can engage in personal conversations; the amount of clean up time permitted; when employees can put on coats and overshoes; permitting tardy employees to take annual leave or to make up the time by working during breaks; the penalties required for an employee who is AWOL; and any other terms and conditions of employment without first notifying, and upon request, meeting, conferring, and negotiating with Local 1411, AFGE, the exclusive representative of our unit employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by Executive Order 11491.

WE WILL rescind and revoke the terms and conditions of employemnt set forth in our memorandum of November 21, 1974, concerning "Poor Work Habits" and any subsequent memoranda issued to effectuate it.

WE WILL make whole any employee adversely affected by the change of terms and conditions of employment set forth in the memorandum of November 21, 1974.

WE WILL upon request meet, confer and negotiate with Local 1411 AFGE with respect to any proposed changes as to when an employee is considered at his/her work; when an employee can engage in personal conversations; when employees can put on coats and overshoes; the amount of clean up time permitted; permitting tardy employees to take annual leave or to makeup time by working during breaks; the penalties required for an employee who is AWOL; and any other terms and conditions of employment.

(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: 230 South Dearborn Street, Room 1033B, Chicago, Illinois 60604.

May 19, 1976

A/SLMR No. 652

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

UNITED STATES AIR FORCE,
LACKLAND AIR FORCE BASE,
HEADQUARTERS MILITARY TRAINING CENTER (ATC),
LACKLAND AIR FORCE BASE, TEXAS
A/SLMR No. 652

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1367, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by: (1) questioning a second vice-president of the Complainant concerning a complaint that she had written to her Congressman and, thereby, interfering with her rights under Section 1(a) of the Order, and (2) depriving the Complainant of its right under Section 10(e) of the Order to be present at formal discussions between the Respondent and unit employees.

With respect to the first allegation of the complaint, the Administrative Law Judge found, and the Assistant Secretary agreed, that the record did not establish that the Complainant's second vice-president was acting on behalf of the Complainant in writing a letter to her Congressman and, thus, there was no interference with her rights assured under Section 1(a) of the Order. The Assistant Secretary also agreed with the Administrative Law Judge's dismissal of the second allegation, finding that the investigatory interviews involved did not constitute "formal discussions" within the meaning of Section 10(e) of the Order as they did not concern grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Accordingly, the Assistant Secretary concurred in the recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

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

UNITED STATES AIR FORCE,
LACKLAND AIR FORCE BASE,
HEADQUARTERS MILITARY TRAINING CENTER (ATC),
LACKLAND AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-5430(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1367

Complainant

DECISION AND ORDER

On February 4, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

1/ In footnote 5 of his Recommended Decision and Order, the Administrative Law Judge inadvertently cited the Assistant Secretary's decision in U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, as A/SLMR No. 279 instead of A/SLMR No. 278, and his decision in Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, as A/SLMR No. 421 instead of A/SLMR No. 419. These inadvertent errors are hereby corrected.

As noted by the Administrative Law Judge, the gravamen of the second allegation of the complaint herein was that the Respondent violated Section 19(a)(6) of the Order by depriving the Complainant labor organization of its right under Section 10(e) of the Order to be represented at "formal discussions" between the Respondent and unit employees. 2/ In this regard, I find, in agreement with the Administrative Law Judge, that the failure by the Respondent to allow the Complainant to be represented at the investigatory interviews of unit employees by the Respondent's representatives was not violative of Section 19(a)(6) of the Order inasmuch as such meetings were not "formal discussions" within the meaning of Section 10(e) of the Order as they did not concern "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Thus, in my view, these meetings, even if held in a "formal" atmosphere, were not "formal discussions" within the meaning of Section 10(e) of the Order as they did not relate to the above noted matters specified in Section 10(e). Consequently, the failure to permit the Complainant to be represented at such meetings did not contravene any right accorded by the Order to the Complainant as the exclusive representative. See Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11 and Internal Revenue Service, Mid-Atlantic Service Center, A/SLMR No. 421.

As noted above, the complaint in the instant case alleged only the right of the Complainant labor organization to be represented at the particular meetings involved. Under these circumstances, I find it unnecessary to determine whether the individual employees involved had a protected right under the Order to be represented at the investigatory interviews which were held. 3/

2/ There was no allegation that the particular employees involved herein were deprived of any rights which the Order assures to them as individual employees.

3/ As noted by the Administrative Law Judge, on May 9, 1975, the Federal Labor Relations Council (Council) issued an Information Announcement which indicated that the Council would issue a major policy statement on the question whether an employee in a unit of exclusive recognition has 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. In this regard, and as noted by the Administrative Law Judge, the Assistant Secretary has indicated previously his intent to defer action, pending the Council's issuance of a major policy statement, on allegations which raise issues concerning the right of individual unit employees to representation at meetings with agency management.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5430 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

May 25, 1976

A/SLMR No. 653

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

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

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR NO. 653

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 476, Independent (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral conduct regarding the registration of motor vehicles.

On June 24, 1974, the Respondent unilaterally issued a memorandum announcing a vehicle registration program which supplemented the requirements of a prior Army Regulation dealing with vehicle registration. The evidence established that while the Army Regulation merely prescribed that the vehicles of civilian Army employees be affixed with decals bearing a specific numerical code, the June 24, 1974, memorandum required that registration numbers be assigned to civilian employees on the basis of their General Schedule grade. In addition, the extensive publicity given this new registration scheme had the effect of publicly displaying an employee's General Schedule grade.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the June 24, 1974, memorandum effected a unilateral change in unit employee working conditions. In this regard, he noted that as the Respondent did not afford the Complainant notice and an opportunity to meet and confer with respect to the manner in which it would implement and publicize its vehicle registration scheme, which was an appropriate subject for bargaining under Section 11(a) of the Order, the Respondent violated Section 19(a)(1) and (6) of the Order. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from its violative conduct and that it take certain affirmative actions consistent with his decision.

Respondent

and

Case No. 32-3673(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 476, INDEPENDENT

Complainant

DECISION AND ORDER

On January 30, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

In agreement with the Administrative Law Judge, I find that, under the circumstances herein, the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral conduct regarding the registration of motor vehicles. In this regard, it was noted that on September 15, 1973, Army Headquarters issued a Regulation entitled, "Registration of Motor Vehicles" (AR 190-5-1), which, in pertinent part, required that the vehicles of civilian Army employees be affixed with decals bearing a specified numerical code. On June 24, 1974, at the direction of the Post Commander, the Respondent unilaterally issued a memorandum announcing a motor vehicle registration program which supplemented the requirements of the aforementioned Army Regulation. While the Army Regulation merely prescribed that a certain numerical code be employed on the decals of civilian vehicles, the evidence establishes that the June 24, 1974, memorandum required that registration numbers be assigned to

civilian employees on the basis of their General Schedule grade. In addition, the broad distribution of the June 24, 1974, memorandum gave extensive publicity to this new registration scheme. Consequently, the registration system contained in the June 24, 1974, memorandum had the effect of publicly displaying an employee's General Schedule grade. 1/

In my view, by the issuance of the disputed memorandum on June 24, 1974, the Respondent effected a unilateral change in unit employees' working conditions in that it initiated a scheme of assigning decals for their vehicles which reflected their General Schedule grade levels and which required them to begin procuring and filling out registration cards in preparation for the official commencement of vehicle registration on July 9, 1974. As the Respondent did not afford the Complainant notice and an opportunity to meet and confer with respect to the manner in which it would implement and publicize the registration system that allocated vehicle decal numbers to unit employees, which matter I find to be an appropriate subject of bargaining under Section 11(a) of the Order, in agreement with the Administrative Law Judge, I conclude that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the 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 476, 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 such 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 their rights assured by Executive Order 11491, as amended.

1/ The vehicle numbering code in effect from March 1967 until July 1974 at the Respondent's facility distinguished between employees at the GS-16 level and those of a lower grade and, while a matter of public record, the registration system was not distributed publicly. By contrast, the June 24, 1974, memorandum established separate categories for GS-16 employees, GS-15 and GS-14 employees, and employees at the GS-13 level and below and, as noted above, gave extensive publicity to this scheme.

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

(a) Upon request, meet and confer in good faith with the National Federation of Federation Employees, Local 476, Independent, or any other exclusive representative, with respect to the 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 on such 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
May 25, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a motor vehicle registration program affecting employees exclusively represented by the National Federation of Federal Employees, Local 476, 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 such 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 their rights assured by Executive Order 11491, as amended.

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 vehicles and act in accordance with any agreement reached on the matter.

WE WILL 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 on such 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, Labor-Management Services Administration, United States Department of Labor, whose address is Suite 3515, 1515 Broadway, New York, New York 10036.

May 28, 1976

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

DEPARTMENT OF THE NAVY,
NAVY COMMISSARY STORE COMPLEX, OAKLAND
A/SLMR No. 654

This proceeding involved an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 1533 (AFGE), alleging that the Activity violated Section 19(a)(3) of the Executive Order by allowing the National Association of Government Employees (NAGE) access to its restricted premises for the purpose of conducting an organizational campaign. The AFGE also filed timely objections to an election conducted pursuant to a petition for exclusive representation filed by the NAGE, alleging the same conduct of the Activity relied upon in the unfair labor practice complaint. The Activity-Respondent took the position that the facts of the instant case were distinguishable from those in Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, A/SLMR No. 263, as any assistance given in the instant case was minimal. The Activity-Respondent further argued that, even assuming that a violation of Section 19(a)(3) occurred, the objections to the election should be dismissed based on Report on a Ruling No. 58, which states, in part, that, "Conduct occurring prior to the filing of the election petition may not be considered as grounds for setting aside the election." Finally, the Activity-Respondent asserted that by signing the consent election agreement, the AFGE had waived its right to file objections to the election based on such conduct.

The Administrative Law Judge found that the Respondent had violated Section 19(a)(3) of the Order, citing the Natick case. In this regard, he noted the absence of evidence that the NAGE had made a diligent effort to contact employees by other means, or that the Activity had inquired as to efforts made by the NAGE in this connection before granting the NAGE access to its restricted premises. He noted also that there was no showing that the NAGE could not have reached the employees involved through other channels of communication or contact. As to the objection to the conduct of the election, the Administrative Law Judge concluded that Report on a Ruling No. 58 does not preclude the consideration of conduct which occurred prior to the filing of the representation petition where such conduct constituted improper assistance in obtaining a showing of interest. In this regard, the Administrative Law Judge found that the signing of the consent election agreement under protest by the AFGE did not constitute a waiver of its right to object to the election, but merely waived a hearing on such matters as jurisdiction and appropriateness of units, etc. Under all of these circumstances, the Administrative Law Judge recommended that the election be set aside and that any new election be delayed until such time as the NAGE, or any other interested labor organization, filed a new petition, supported by a new, legally acquired showing of interest.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations. In this regard, he noted that the record disclosed that the AFGE had, in effect, challenged the validity of the NAGE's showing of interest in its letter of intervention in the representation proceedings, and that it had never received a ruling by the Regional Administrator pursuant to Section 202.2(f)(2) of the Regulations. Further, noting the Administrative Law Judge's findings, the Assistant Secretary indicated that an investigation of the challenge would have established that improper assistance by the Activity had occurred in connection with the obtaining of the NAGE's showing of interest which would have required dismissal of the representation petition prior to the holding of any election in this matter. Accordingly, in the unfair labor practice proceeding, the Assistant Secretary issued an appropriate cease and desist order and required the Activity to take certain affirmative actions. In the objections case, he ordered that the election be set aside and that the petition be dismissed in view of the Activity's improper conduct. Further, pursuant to the provisions of Section 202.3(d) of the Regulations, he indicated that no new petition for exclusive recognition affecting the bargaining unit involved could be entertained for a period of 90 days from the date of his decision.

- 2 -

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVY COMMISSARY STORE COMPLEX, OAKLAND

Activity

and

Case No. 70-4671(RO)

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1533

Intervenor

DEPARTMENT OF THE NAVY,
NAVY COMMISSARY STORE COMPLEX, OAKLAND

Respondent

and

Case No. 70-4726(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1533

Complainant

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Party In Interest

DECISION AND ORDER

On January 29, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceedings finding in Case No. 70-4726(CA) that the Respondent had engaged in conduct which was violative of Section 19(a)(3) of Executive Order 11491, as amended, and in Case No. 70-4671(RO) that the improper conduct

herein invalidated the election and the Petitioner's showing of interest submitted in support of its petition. Accordingly, he recommended, among other things, that the election in Case No. 70-4671(RO) be set aside, that any new election be delayed until such time as a new election petition is presented predicated upon a new, legally acquired showing of interest, and that the Respondent take certain affirmative action as set forth in his Recommended Order. Thereafter, the Activity-Respondent and the Petitioner-Party in Interest filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the exceptions and supporting briefs filed by the Activity-Respondent and the Petitioner-Party in Interest, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/ In reaching the disposition herein, it was noted that the Intervenor in Case No. 70-4671(RO) timely challenged the validity of the Petitioner's showing of interest in its letter of intervention in this matter and did not receive a ruling by the Regional Administrator pursuant to Section 202.2(f)(2) of the Assistant Secretary's Regulations. 2/ Noting the findings of the Administrative Law Judge in the instant case, it appears that an appropriate investigation of the challenge to validity of showing of interest by the Area Administrator would have established that improper assistance by the Activity had occurred in connection with the obtaining of the Petitioner's showing of interest, and that dismissal of the petition filed in Case No. 70-4671(RO) was warranted prior to the holding of any election in this matter.

1/ The Activity-Respondent noted three inadvertent errors in the Administrative Law Judge's Recommended Decision and Order. It indicated that the first name of the Activity-Respondent's witness, Lary Buckley, was misspelled Larry; that Buckley was referred to as the Activity-Respondent's Employee Relations and Services Division Director, rather than as head of the Employee Relations and Services Branch of the Naval Supply Center's Civilian Personnel Office which services the Activity-Respondent; and that the Naval Air Station, Alameda, California, was incorrectly captioned as the "Naval Air Station in Alemeda" with "Alameda" misspelled. These inadvertent errors are hereby corrected. The Activity-Respondent also contended that the Administrative Law Judge incorrectly used January 20, 1973, rather than January 20, 1972, as the expiration date of the negotiated agreement between it and the Intervenor-Complainant. However, it was noted that Joint Exhibit 2 shows that there were two six-month extensions of the negotiated agreement after the January 20, 1972, expiration date. Therefore, it actually expired on January 20, 1973, as found by the Administrative Law Judge.

2/ Section 202.2(f)(2) of the Assistant Secretary's Regulations provides, in pertinent part, that, "...The Area Administrator shall investigate the challenge. Thereafter the Regional Administrator shall take such action as he deems appropriate"

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Navy Commissary Store Complex, Oakland, California shall:

1. Cease and desist from:

(a) Assisting a labor organization which is not a party to a pending representation proceeding which raises a question concerning representation in the conducting of an organizational 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 employees.


2. Take the following affirmative actions in order to effectuate the purposes and policies 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 Officer in Charge of the Commissary Store Complex, Oakland, California, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Officer in Charge shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the petition in Case No. 70-4671(RO) be, and it hereby is, dismissed. 3/

Dated, Washington, D.C.
May 28, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

3/ As noted above, I agree with the Administrative Law Judge's finding that the showing of interest supporting the petition in Case No. 70-4671(RO) had been improperly obtained and that any new election be delayed until such time as a new petition supported by a newly acquired, untainted showing of interest is filed. In this regard, however, it should be noted that as I have ordered that the petition in Case No. 70-4671(RO) be dismissed, under the provisions of Section 202.3(d) of the Assistant Secretary's Regulations, no new petition for exclusive recognition shall be entertained for a period of 90 days from the date of this decision.

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 an organizational 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 Complex employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States, Department of Labor whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

DEPARTMENT OF THE ARMY,
FORT McPHERSON, GEORGIA
A/SLMR No. 655

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 1759, (AFGE Local 1759) seeking to clarify its exclusively recognized unit at Fort McPherson, Georgia, so as to include all nonsupervisory and non-professional employees who currently are employed by Fort McPherson, but are located physically at Fort Gillem, Georgia (formerly the Atlanta Army Depot). The Activity agreed that the employees assigned to Fort Gillem should be included in AFGE Local 1759's unit.

The record indicates that on December 8, 1964, the American Federation of Government Employees, AFL-CIO, Local 81, (AFGE Local 81) was granted exclusive recognition for a unit of all nonsupervisory and nonprofessional employees at the Atlanta Army Depot (Depot), Forest Park, Georgia. On June 30, 1974, pursuant to a Department of Army reorganization, the Army Materiel Command discontinued operations at the Depot and, thereafter, all real property was transferred to Fort McPherson and placed under the U. S. Army Forces Command. The Depot, after the reorganization, was renamed Fort Gillem.

The Assistant Secretary found that the reorganization which occurred in the instant case was primarily administrative in nature and did not so thoroughly combine and integrate AFGE Local 81's unit, located at Fort Gillem, with the AFGE Local 1759's unit, located at Fort McPherson, so as to require a finding that AFGE Local 81's unit had lost its independent identity. In this respect, he noted that although Fort Gillem is currently under the command of Fort McPherson and other indicia of organizational integration exist, there has not been a blending of employees to the extent that AFGE Local 81's unit has lost its separate identity. Particularly noted was the fact that employees in the unit at Fort Gillem continued, as before, to perform the same work; remained, for the most part, physically in the same locations; and did not substantially interchange with the employees in the Fort McPherson unit performing similar tasks. Under these circumstances, and noting also that AFGE Local 81 had disclaimed interest in representing the unit at Fort Gillem, the Assistant Secretary concluded that the former Depot employees, currently located at Fort Gillem, are unrepresented. Accordingly, he ordered that the petition for clarification of unit be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
FORT McPHERSON, GEORGIA

Activity

and

Case No. 40-6126(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1759

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held in the subject case. Thereafter, on November 26, 1975, the Assistant Secretary issued a Decision and Remand 1/, in which he ordered that the subject case be remanded to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence with regard to, among other things, the number of job classifications and duties of the unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 81, herein called AFGE Local 81, prior to June 30, 1974, the date of a reorganization; the impact of such reorganization on the unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1759, herein called AFGE Local 1759; and the current status of AFGE Local 81. Pursuant to the above-noted Decision and Remand, a hearing was held before Hearing Officer Otis Chennault. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including those facts developed at the initial and reopened hearings, the Assistant Secretary finds:

1/ A/SLMR No. 586

were administratively transferred-in-place to Fort McPherson. At that time, the record reveals at least 27 or 28 of the Depot Commissary employees became members of AFGE Local 1759. 3/ After the transfer, these employees continued, as before, to perform the same duties, in the same location, and under the same immediate supervision. On July 9, 1973, the duty stations of 21 Fort McPherson Supply Division employees were changed from Fort McPherson to the ATAD and on December 10, 1973, 36 Fort McPherson maintenance employees were relocated to the Depot. 4/ As a result of the above-noted reorganization in which the AMC discontinued all operations at the ATAD, 12 firefighters, 28 guards and 70 maintenance engineering employees, all of whom were represented by AFGE Local 81, were administratively transferred-in-place to Fort McPherson with duty stations at the newly named Fort Gillem. 5/ The evidence establishes that these employees continued to perform the same work as they performed prior to the reorganization; remained physically in the same locations; and did not interchange with other employees located at Fort McPherson performing similar duties, with the exception of two individuals in the maintenance engineering unit. The remaining employees were terminated. 6/

The record reveals that several administrative changes affecting the AFGE Local 81's unit employees located at Fort Gillem and the AFGE Local 1759's unit employees at Fort McPherson occurred as a result of the reorganization. Thus, prior to July 1974, the ATAD and Fort McPherson each had its own personnel office. Currently, employees at both Fort Gillem and Fort McPherson are serviced by a single personnel office which is located at Fort McPherson. Furthermore, since the reorganization, there is one area of consideration for merit promotions and reductions-

- 3/ These individuals were employed in such positions as: meat-cutters, sales store workers, warehousemen and warehouse fork-lift operators, Wage Grade 5-8, and sales store checkers, electric-accounting machine operators, purchasing agents, clerk-typists, and accounts maintenance clerks, General Schedule 2-9.
- 4/ In these latter two instances, the evidence indicates that there were no changes in the missions or job classifications of the employees involved, and that no personnel action occurred other than a change in their duty stations.
- 5/ The maintenance engineering employees included, among others, carpenters, sheetmetal workers, welders, electricians, pipe fitters, and boiler plant operators.
- 6/ Some employees eventually were rehired by various Activities serviced by the Civilian Personnel Office (CPO) at Fort McPherson. The record indicates that the CPO services the Fourth U.S. Army Reserve Readiness Group, the 81st U.S. Army Reserve Command, the U.S. Army Reserve Maintenance Shop and the Officers' Clubs located at Fort Gillem.

in-force covering both Fort Gillem and Fort McPherson, whereas, prior to the reorganization, the two installations had separate areas of consideration. 7/

It has been held previously that in attempting to determine whether a reorganization, such as that involved herein, has resulted in an accretion or an addition of one unit to another, the primary consideration is whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. 8/ In my view, the evidence herein establishes that the reorganization which occurred was primarily administrative in nature and did not so thoroughly combine and integrate the unit at Fort Gillem with the unit at Fort McPherson so as to require a finding that the AFGE Local 81 unit had lost its independent identity. Thus, although Fort Gillem is currently under the command of Fort McPherson and other indicia of organizational integration exist, such as a common personnel office and a combined area of consideration for merit promotions and reductions-in-force; I find that there has not been a blending of employees to the extent that the AFGE Local 81's unit, located at Fort Gillem, and the AFGE Local 1759's unit, located at Fort McPherson, have lost their separate identities. In this connection, the record shows that the employees in the unit at Fort Gillem continue, as before, to perform the same work; remain, for the most part, physically in the same locations; and do not substantially interchange with the employees in AFGE Local 1759's unit performing similar tasks. While the number of employees in the Fort Gillem unit has decreased, in my view, such unit continues to remain clearly identifiable. 9/ Consequently, and in view of the clear disclaimer of interest by AFGE Local 81, I find that the former ATAD employees currently located at Fort Gillem are unrepresented and that the sole procedure available to the AFGE Local 1759, or any other labor organization, to enable it to gain exclusive recognition for such employees would be the filing of an appropriate petition for an election. Under these circumstances, I shall dismiss the subject petition for clarification of unit.

- 7/ On July 25, 1975, AFGE Local 81 issued a disclaimer of interest for the former ATAD employees now employed at Fort Gillem.
- 8/ See Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282.
- 9/ Cf. United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106. Cf. also Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558, FLRC No. 75A-12.

The Petitioner, AFGE Local 1759, the exclusive representative of certain employees of the Department of the Army at Fort McPherson, Georgia, seeks to clarify its existing exclusively recognized unit so as to include all nonsupervisory and nonprofessional employees of Fort Gillem, Georgia (formerly the Atlanta Army Depot), who currently are employed by Fort McPherson, Georgia, but are located physically at Fort Gillem. The Activity and AFGE Local 1759 agree that the employees assigned to Fort Gillem should be included in AFGE Local 1759's unit. In this regard, they assert that the Fort McPherson employees physically located at Fort Gillem do not constitute a separate organizational entity but, instead, are merely an extension of Fort McPherson.

The Activity, located at Fort McPherson, Georgia, is part of the U.S. Army Forces Command whose mission is to organize, equip, station, train, and maintain combat readiness of active U.S. Army units and U.S. Army Reserve Forces. Overall direction of the Activity is vested in the Commander, Fort McPherson. The evidence establishes that on December 9, 1963, AFGE Local 1759 was accorded exclusive recognition by the Activity for a unit of all civilian employees of Activities located at Fort McPherson, Georgia, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards.

On December 1, 1964, AFGE Local 81 was granted exclusive recognition for a unit of all nonsupervisory and nonprofessional employees of the Atlanta Army Depot (ATAD), Forest Park, Georgia, including attached Activities physically located at and serviced by the ATAD regardless of pay category, excluding all employees of Warehousing, Shipping, Receiving, and Support Divisions, Directorate for Distribution Transportation as defined in an ATAD letter dated December 8, 1964, all management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors. ^{2/} The ATAD was part of the Army Materiel Command (AMC) whose mission involves the management and procurement of inventories throughout the United States for the Department of the Army. On June 30, 1974, pursuant to Department of Army reorganization, the AMC discontinued operations at the ATAD and, thereafter, all real property was transferred to Fort McPherson and was placed under the U.S. Army Forces Command. The ATAD, after the reorganization, was renamed Fort Gillem.

The record indicates that, prior to the above-noted reorganization, on July 1, 1973, the Commissary operations at the ATAD were transferred to the control of Fort McPherson and that 54 Depot Commissary employees

^{2/}Included in the recognized unit were Depot Commissary employees, fire fighters, guards, and maintenance and engineering employees.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-6126(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 28, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

May 28, 1976

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

SOUTHEAST EXCHANGE REGION OF THE
ARMY AND AIR FORCE EXCHANGE SERVICE,
ROSEWOOD WAREHOUSE,
COLUMBIA, SOUTH CAROLINA
A/SLMR NO. 656

This case arose as a result of an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1613, Independent, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally changed the work hours of certain unit employees.

The Administrative Law Judge rejected the Respondent's argument that, pursuant to Section 11(b) of the Order, it had the right to establish or change the work hours of its employees unilaterally. He concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order when it changed the work hours of certain of its employees without notifying and affording the Complainant the opportunity to bargain on the matter before it made a general announcement to employees of the changed involved. In addition, the Administrative Law Judge found, even assuming arguendo that the Respondent was privileged under the Order to change the work hours unilaterally, it nevertheless violated Section 19(a)(1) and (6) as it failed to meet its obligation to provide the Complainant with timely notice in order to afford it a reasonable opportunity to meet and confer on the procedures involved and the impact. The Administrative Law Judge also rejected the Respondent's contention that, under the terms of the parties' negotiated agreement, it was free to change work hours for employees without affording the Complainant an opportunity to meet and confer on the matter.

The Assistant Secretary, in agreement with the Administrative Law Judge, found that the Respondent violated Section 19(a)(1) and (6) of the Order. He found that the Respondent failed to notify the Complainant prior to making its final determination or decision to change the work hours of certain unit employees, and to afford the Complainant the opportunity to bargain on the proposed change in work hours. In the Assistant Secretary's view, the change in work hours, being a matter affecting working conditions, was a negotiable item within the meaning of Section 11(a) of the Order as, under the circumstances, the change was not integrally related to and consequently determinative of the numbers, types, and grades of employees or staffing patterns of the Respondent Activity and, thus, not within the ambit of 11(b) of the

Order. The Assistant Secretary also found that even if the Respondent's change in work hours was viewed as being within the ambit of Section 11(b), the provisions of the parties' negotiated agreement indicated that the Respondent chose to make "scheduling of work hours" a negotiable matter.

However, with respect to the obligation to bargain on the procedures and impact of the decision, the Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent did not violate Sections 19(a)(1) and (6) of the Order when it failed to give timely and formal notification of the impending change in work hours to the Complainant. In this connection, the Assistant Secretary noted that, under the circumstances, the Complainant did not lack reasonable notice of the impending change in work hours so as to afford it an ample opportunity to request that the Respondent meet and confer on the procedures and impact prior to the date the decision was put into effect.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOUTHEAST EXCHANGE REGION OF THE
ARMY AND AIR FORCE EXCHANGE SERVICE,
ROSEWOOD WAREHOUSE,
COLUMBIA, SOUTH CAROLINA 1/

Respondent

and

Case No. 40-5987(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1613, INDEPENDENT

Complainant

DECISION AND ORDER

On October 10, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

1/ The name of the Respondent appears as amended at the hearing.

exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, to the extent consistent herewith.

The amended complaint herein alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, when it unilaterally changed the work hours of certain employees. In reaching his determination in the subject case, the Administrative Law Judge rejected the Respondent's argument that, pursuant to Section 11(b) of the Order, it had the right to establish or change the work hours of its employees unilaterally as occurred herein. Consequently, he concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order when it changed the work hours of certain of its employees without notifying and affording the Complainant the opportunity to bargain on the matter before it made a general announcement to employees of the change involved. In addition, the Administrative Law Judge found, even assuming arguendo that the Respondent was privileged under the Order to change the work hours unilaterally, it nevertheless violated Section 19(a)(1) and (6) as it failed to meet its obligation to provide the Complainant with timely notice in order to permit meaningful bargaining, to the extent consonant with law and regulations, as to the procedure management intended to observe in effectuating its decision and as to the impact of such decision on those employees adversely affected. The Administrative Law Judge also rejected the Respondent's contention that, under the terms of the parties' negotiated agreement, it was free to change work hours for employees without affording the Complainant an opportunity to meet and confer on the matter.

The essential facts of the case, which are not in dispute, 2/ are set forth in detail in the Administrative Law Judge's Recommended Decision and Order and I shall repeat them only to the extent necessary.

In agreement with the Administrative Law Judge, I find that the change in hours of work of certain employees herein was not excepted as a subject for bargaining by the terms of Section 11(b) of the Order. In cases involving the negotiability of proposals concerning the basic workweek and hours of duty, the Federal Labor Relations Council, herein called the Council, has considered the effect of Section 11(b) of

2/ In its exceptions and supporting brief, the Respondent excepts to certain findings of fact made by the Administrative Law Judge. However, inasmuch as my disposition of the substantive issues herein does not rely on the contested findings of fact, I find it unnecessary to make a determination with respect to those exceptions.

the Order upon an activity's obligation to meet and confer in good faith with an exclusive representative. ^{3/} The Council's earlier rulings in this regard were summarized as follows in its Supplemental Decision in Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36:

...a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under Section 11(b) unless, based on the special circumstances of a particular case..., the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions of employees assigned to an organizational unit, work project or tour of duty of the agency. [Emphasis added]

In my view, under the circumstances of this case, the change in work hours of certain receiving, storage, and related office employees from the scheduled hours of 7:45 a.m. - 4:30 to 7:15 a.m. - 4:00 p.m. was not "integrally related to and consequently determinative of the staffing patterns" of the Respondent Activity. Thus, the record herein discloses merely that the Respondent determined to make the change in work hours in the instant case in order "to improve the flow of work" by providing an additional one-half hour for pre-shipment preparation. Accordingly, applying the principles enunciated in the Council rulings cited above, I conclude, in agreement with the Administrative Law Judge, that the change in work hours of certain unit employees herein, being a matter affecting working conditions, was a negotiable item within the meaning of Section 11(a) of the Order. Therefore, the Respondent was obligated to notify the Complainant prior to making its final determination or decision to change the work hours of those employees, and, upon request, to meet and confer in good faith with the Complainant, the exclusive representative of the employees involved, concerning the proposed change in work hours. Moreover, in my judgment, the Respondent's posting of notice herein concerning the work schedule change and its meeting with warehouse employees to explain the change were, in effect, notifications of a fait accompli and did not provide the Complainant

^{3/} In Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11, the Council found that a proposal concerning the number and duration of tours of duty was integrally related to the numbers and types of workers assigned to those tours and, therefore, was a matter expressly excluded from an agency's bargaining obligation under Section 11(b) of the Order. In U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52, the Council found that a proposal concerning a basic workweek for employees was not integrally related in any manner to the numbers and types of employees involved and, therefore, was not a matter excepted from an agency's bargaining obligation under Section 11(b) of the Order.

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with an opportunity to engage in meaningful negotiations prior to a final decision regarding the change in work hours. Under these circumstances, I find, in agreement with the Administrative Law Judge, that the Respondent's unilateral conduct in this regard was in derogation of its obligation to meet and confer in good faith and that such conduct thereby violated Section 19(a)(1) and (6) of the Order.

Moreover, even if the Respondent's change in work hours herein was viewed as being within the ambit of Section 11(b) of the Order in that it was "integrally related to and consequently determinative of" the numbers and types of employees in question, it was noted that the Council has held that matters within the ambit of Section 11(b) of the Order, although excepted from the obligation to negotiate, may be negotiated if management chooses to do so. ^{4/} In this connection, Article V, Section 1 of the parties' negotiated agreement herein states, in pertinent part:

Section 1. Negotiation. Matters appropriate for negotiation and consultation between the parties are policies and practices relating to the conditions of employment which are within the discretion of the Employer of the employees in the unit. The scope of negotiations includes, but is not limited to, such matters as:

- ...
- f. Shift assignments
- ...
- h. Scheduling of work hours and meal periods
- ...

In my view, the above noted provisions indicate that the Respondent chose to make the scheduling of work hours a negotiable matter, regardless of whether or not, under the circumstances of this case, such matter may be "integrally related to and consequently determinative of" the numbers and types of employees involved and, thus, within the ambit of Section 11(b) of the Order. Accordingly, I find that the Respondent's unilateral conduct in failing to notify and bargain with the Complainant concerning the decision to change work hours was violative of Section 19(a)(1) and (6) of the Order even if the subject matter involved were found to be within the ambit of Section 11(b) of the Order.

However, I do not find, as did the Administrative Law Judge, that assuming arguendo that the Respondent was privileged under Section 11(b) of the Order to change unilaterally the work hours herein, the Respondent

^{4/} See Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48, Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-46, and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30.

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violated Section 19(a)(1) and (6) of the Order when it failed to notify timely "the Union, qua Union", of the impending change in order to permit meaningful bargaining on the procedures management intended to observe in effectuating its decision and on the impact of the change on employees adversely affected. In my view, while it may have been better practice for the Respondent to have given a formal notification of the impending work schedule change to the Complainant in its official capacity as the exclusive representative of the employees affected, given the particular circumstances of the instant case as set forth below, I do not find that the Complainant lacked sufficient notice of the change to be effectuated on November 18, 1974, so as to afford it ample opportunity to request bargaining on procedures and impact. In this regard, the evidence establishes that on November 13, 1974, at a meeting of the Complainant's membership, the Complainant's President was made aware of the impending change in work hours and the matter was discussed. Thus, while the record does not establish formal notification, it does establish actual knowledge by the Complainant on November 13, 1974.

Under these circumstances, I find that the Complainant had reasonable notice of the impending change in work hours and an ample opportunity to request that the Respondent meet and confer regarding the procedures involved and the impact of the decision prior to the date the decision was put into effect on November 18, 1974. 5/ However, despite such notice, the Complainant did not seek to meet and confer in this regard. Moreover, there is no indication in the record that the Respondent had evinced an unwillingness to meet and confer on such matters had the Complainant indicated a desire to do so. Accordingly, I do not adopt the Administrative Law Judge's finding insofar as he concludes that the Respondent violated Sections 19(a)(1) and (6) of the Order when it failed to give timely and formal notification of the impending change in work hours to the Complainant in order to afford the latter the opportunity to request that the Respondent meet and confer, to the extent consonant with law and regulations, on the procedures involved and on the impact of the change in work hours. 6/

5/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 and U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261. Compare Federal Railroad Administration, A/SLMR No. 418 and National Labor Relations Board, A/SLMR No. 246.

6/ As the Respondent, under the circumstances herein, improperly failed to meet and confer prior to making its final decision regarding the change in work hours, I find that it could not absolve itself of its unfair labor practice by, after making its decision unilaterally, affording the Complainant a reasonable opportunity to meet and confer on the procedures involved and the impact of such decision. See, in this regard, Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608, at footnote 7.

REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, shall:

1. Cease and desist from:

(a) Instituting a change in work hours of employees represented exclusively by the National Federation of Federal Employees, Local 1613, Independent, without notifying the National Federation of Federal Employees, Local 1613, Independent, and affording such representative the opportunity to meet and confer on the decision to effectuate such a change.

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

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


(a) Notify the National Federation of Federal Employees, Local 1613, Independent, of any intended change in work hours of unit employees and, upon request, meet and confer in good faith on such intended change.

(b) Post at its facility at the Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the 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. 7/

7/ In requiring a posting of the notice herein, it was noted that, subsequent to the hearing in this matter, there were indications that the Rosewood Warehouse, where the unit employees are located, may have been closed. If such a closing has taken place in fact, then the remedial notice to employees shall be mailed by the Commanding Officer to the former unit employees who were employed as of the time the unfair labor practice herein occurred.

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

Dated, Washington, D. C.
May 28, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a change in work hours of employees exclusively represented by the National Federation of Federal Employees, Local 1613, Independent, without notifying National Federation of Federal Employees, Local 1613, Independent, and affording such representative the opportunity to meet and confer on the decision to effectuate such change.

WE WILL notify the National Federation of Federal Employees, Local 1613, Independent, of any intended change in work hours of unit employees and, upon request, meet and confer in good faith on such intended change.

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

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 303, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
WASHINGTON, D.C. 20210



In the Matter of

SOUTHEAST EXCHANGE REGION OF THE
ARMY AND AIR FORCE EXCHANGE SERVICE,
ROSEWOOD WAREHOUSE, SOUTH CAROLINA
Respondent

CASE NO. 40-5987(CA)

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1613, INDEPENDENT
Complainant

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Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Columbia, South Carolina, on May 20, 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 March 27, 1975 with reference to alleged violations of Sections 19(a)(1) and (6)

of the Order. The amended complaint filed by National Federation of Federal Employees, Local 1613, Independent (hereinafter called the Union or Complainant) alleged that Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, South Carolina (hereinafter called the Activity or Respondent) violated the Order with regard to its changing the hours of work of storage and receiving employees. 1/

At the hearing the parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

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

Findings of Fact

At all times since February 1972 the Union has been the certified exclusive collective bargaining representative for various of the Activity's employees at the Rosewood Warehouse. The parties entered into a collective bargaining agreement in June 1972 which remained in effect thereafter under the agreement's automatic renewal provisions.

In October 1974 the Activity decided to change the work hours of certain receiving, storage and related office employees from the scheduled hours of 7:45 a.m. - 4:30 p.m. to 7:15 a.m. - 4:00 p.m. At that time there were approximately 105 employees in the collective bargaining unit and the change affected approximately 69 employees. Prior to the change, receiving and storage employees came to work one and one-half hours prior to shipping employees. Management observed that, "at times" shipments would be delayed for a period of time since sufficient merchandise was not "pulled" and ready for shipping when the shipping employees reported for work. Accordingly the Activity decided to change the hours of the receiving and storage employees so there would be a two hour work period prior to the time the shipping employees reported for work thereby providing an additional one-half hour for pre-shipment preparation.

On Friday, November 1, 1974 the Activity posted a notice at the facility on the bulletin board customarily used for communications between management and warehouse employees.

1/ The name of the Activity appears as amended at the hearing.

That notice which remained on the bulletin board at all times relevant hereto provided as follows:

"SUBJECT: WORK SCHEDULE CHANGE

IN CONJUNCTION WITH THE NEW WAREHOUSE LOCATOR SYSTEM THE FOLLOWING WORK HOURS WILL BE IN EFFECT ON 18 NOVEMBER 1974.

RECEIVING, STORAGE AND OFFICE OF THE MANAGER, 0715 to 1600 HOURS.

SHIPPING 0915 TO 1800 HOURS.

DRIVERS SCHEDULE TO INCLUDE BACK UP DRIVERS WILL BE AS POSTED IN THE SHIPPING OFFICE.

BREAKS AND LUNCH PERIOD WILL REMAIN THE SAME AS POSTED ON THE BULLETIN BOARD."

Subsequently, on November 4, 1974 at 12:30 p.m. the Activity's warehouse manager Lloyd Woods called a meeting of all warehouse employees who were on duty. At this time Woods informed the employees why the change was being made and explained how the new work hours effective November 18 would enable the warehouse to keep on schedule. No record was made of those employees attending the meeting.

The Union's officers consist of a president, two vice-presidents, a secretary -treasurer and a sergeant-at-arms. The Union also has a chief steward and two other stewards for the unit employees. All the above Union representatives are warehouse employees. Dispatch and time card records offered in evidence by the Activity and received at the hearing reveal that all of the aforementioned Union representatives worked on November 4 except the secretary-treasurer. 2/ However, the Activity's dispatch records indicate that on November 4 the Union's president (Felder Brunson), a driver and chief union officer, was dispatched to drive to another location as was one of the Union's vice-presidents and the chief steward. Brunson credibly testified that he was not at the meeting of November 4 and

2/ No evidence was introduced by the Activity with regard to the secretary-treasurer's attendance on November 4. Accordingly in these circumstances I find that the secretary-treasurer was not present for work on November 4.

Volney Middleton, the Union's first vice-president who assumes the president's duties in his absence testified 3/ that he did not recall the meeting of November 4. However, Middleton testified that sometime prior to November 13 4/ his supervisor told him of the pending change in work hours. In any event, at no time prior to November 18, 1974, the date when the change in work hours was put into effect, did the Activity specifically notify the Union or any of its officers in an official representative capacity of its intentions with regard to changing the workhours of affected warehouse employees.

At a Union meeting on November 13, 1974 various Union members questioned Brunson about the pending change in work-hours. Some employees complained of various personal conflicts occasioned by the change in hours including problems involving sending children to school. Brunson was asked if he had discussed the matter with the Activity and Brunson indicated that this was the first he heard of the change. At the meeting Brunson was told by the employees that the Activity had previously notified them of the change and had discussed the matter with them. Joseph Gene Raymond, a special representative of the National Federation of Federal Employees, was present at the meeting and informed those in attendance that he would meet with the Activity on the matter. However no meeting or contact between the parties occurred with regard to this matter prior to November 18 when the change in work hours took effect.

Discussion and Conclusions

The Activity essentially contends that under Section 11(b) of the Order it had the right to unilaterally establish or change the workhours of its employees as occurred herein and accordingly, was under no obligation to notify meet, confer or negotiate with the Union on the matter; that under the terms of the party's collective bargaining agreement the Activity was privileged to act in the manner it followed; that the agreement reflects that the Union waived any right

3/ Brunson and Middleton were the only unit employees called to testify in this proceeding. Neither could recall having seen the aforementioned notice on the bulletin board at any time.

4/ Middleton's recollection as to specifically when he had this conversation was extremely vague.

to be consulted on the change; and, in any event, under the circumstances herein the Union was put on notice of the pending change but thereafter failed to respond in a timely fashion with regard to any adverse impact problems they wished to discuss.

The Federal Labor Relations Council (hereinafter called the Council) has in a number of cases involving the negotiability of a particular union proposal related to the issue herein treated the effect of Section 11(b) of the Order upon an agency's obligation under Section 11(a) to meet and confer in good faith with a union accorded exclusive recognition. 5/

5/ Sections 11(a) and 11(b) of the Order provide: "Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

"(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organization unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

The first case in which the Council treated the question of changes in tours of duty, including the establishment of new tours, occurred in the matter of AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y. FLRC No. 71A-11, (July 9, 1971), Report No. 11. In Plum Island the agency essentially decided to eliminate one of three shifts of employees and establish two new shifts without affecting the total number of workers employed. The change was intended to result in improved staffing of the two remaining shifts. The union proposed that any changes in tours of duty, which would include the staffing of the two new shifts, be proscribed unless negotiated with the union. On the facts of that case the Council found the union's proposal to be non-negotiable and held that "the number of (the activity's) work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the 'staffing patterns' necessary to perform the work of the agency." The Council stated "the specific right of an agency to determine the 'numbers, types, and grades of positions or employees' assigned to a shift or tour of duty, as provided in section 11(b), obviously subsumes the agency's right to fix or change the number and duration of those shifts or tours".

Thereafter, the Council had the occasion to decide the negotiability of a union proposal concerning the particular days of the week which would constitute the unit employees' basic workweek. In that case, (Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972), Report No. 31) the activity, as in the instant case, relied in part on the Council's holding in Plum Island and the Council took the opportunity to explain and distinguish Plum Island. In Charleston the Council indicated that Plum Island turned on the agency's right to establish "staffing patterns" for its organization to accomplish its work. In finding the agency's determination of non-negotiability under Section 11(b) of the Order was improper, the Council held: "In the instant case, the circumstances in the bargaining unit and the union's proposal are materially different from those in Plum Island. There is no indication that the proposal to affirm Monday through Friday as the basic workweek for unit employees... would require bargaining on 'the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.' For it does not appear that the basic workweek for employees here proposed is integrally related in any manner to the numbers and types of employees involved. Absent this integral relationship to staffing pattern, the proposal does not conflict with section 11(b), and Plum Island is inapposite."

In a subsequent case involving the U.S. Department of Agriculture Inspection Service 6/ the Council had occasion to consider for the purpose of making a negotiability determination, the following language of a union's proposal: "The workweek shall commence at 6:00 a.m. and shall not commence after 6:00 p.m. on each Monday. It shall consist of five(5) consecutive eight(8) hour days, Monday through Friday". In the Agriculture Inspection Service case the agency relied, in part, upon the provisions of Sections 11(b) and 12 of the Order to support its contention that the proposal was non-negotiable. In its initial decision (Report No. 47) the Council found the union's proposal to be negotiable and in its supplemental opinion (Report No. 73) reaffirmed its holding in Charleston Naval Supply Center, supra, and held 7/: "...a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under section 11(b) unless, based on the special circumstances of a particular case..., the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency."

Thus it is clear under the Council's rulings that the matter of the basic workweek and duty hours of employees are bargainable subjects where an activity may not act unilaterally with regard thereto absent "special circumstances" showing the subject to be "integrally related and consequently determinative of the staffing patterns of the agency." I interpret the Council's decisions to place the burden on an agency to affirmatively show the existence of the "special circumstances" and "integral relationship", and, as is the case with a claimed waiver of rights granted by the Order,

6/ American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (December 27, 1973) Report No. 47 and Supplemental Decision of June 10, 1975, Report No. 73.

7/ The Council also noted its decision in American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pa., FLRC No. 72A-41 (December 12, 1973, Report No. 46 where in treating the question of the negotiability of a tour of duty proposal ("the hours of duty will be from 8 a.m. to 4:30 p.m....") the Council found that under the circumstances of that case the proposal was not negotiable due to a conflict of the proposal with higher agency regulations.

(see discussion infra), such should not be lightly inferred and should be "clear and unmistakable."

Applying the Council's standards to the instant case I find the evidence is insufficient to establish that employees' starting and quitting times were integrally related to and consequently determinative of the numbers and types of employees in question. 8/ The numbers or types of employees assigned to the tour of duty does not appear to be the primary or a significant consideration in the Activity's changing the starting and quitting times of the employees involved. What was of concern to the Activity however was, as stated in the Activity's brief, "to improve the flow of work" since, as the testimony disclosed "at times" shipments were delayed. In my opinion this objective is closely related to the Activity's right under Section 12(b)(4) of the Order "to maintain the efficiency of the Government operations entrusted to (it)." In considering the applicability of Section 12(b)(4) to a negotiability question, the Council, in its supplemental decision in the Agriculture Inspection Service case, supra, reaffirmed its holding in prior cases 9/ that: "...where otherwise negotiable proposals are involved the management right in section 12(b)(4) may not properly 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." No such "substantial demonstration" has been presented in the case herein.

Accordingly, in my view and under the circumstances of this case, the Activity was not privileged under Sections 11 or 12 of the Order to act unilaterally when it desired

8/ Compare with Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486 where the facts of the case supported a finding that a re-assignment of workhours was "directly related to the staffing pattern to be employed" and "had a direct bearing on the numbers and types of employees to be assigned to a specific tour of duty or work shift".

9/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., FLRC No. 71A-46 (November 20, 1972), Report No. 30; and Federal Employees Metal Trades Council of Charleston, supra.

to change the daily starting and quitting times of unit employees, a term and condition of employment. Therefore, I find that Respondent had a 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." (Emphasis supplied).

In addition, the preamble to the Order espouses "providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment". Thus it is clear that the Order invisions and requires timely notification being given to the exclusive representative in order to afford it the opportunity to discuss the matter in a meaningful way and perhaps present alternatives for consideration prior to the ultimate decision being reached and announced to employees. The Activity's bulletin board announcement and meeting with warehouse employees to announce a fait accompli falls far short of meeting and conferring in good faith within the meaning of Section 11(a) of the Order. Accordingly, I find the Activity's conduct herein violated Sections 19(a)(1) and (6) of the Order. 10/

In any event, I find that, assuming arguendo, the Activity was privileged under the Order to change the workhours unilaterally, it nevertheless violated Sections 19(a)(1) and (6) of the Order. In numerous decisions it has been held that notwithstanding the fact that there is no obligation to meet and confer on a particular management decision, an exclusive representative should be afforded notice and the opportunity

10/ Cf. National Labor Relations Board, supra; Anaheim Post Office, U.S. Postal Service, Anaheim, California, A/SLMR No. 324; and New York Army and Air National Guard, Albany, New York, A/SLMR No. 441 as to a unilateral change in a past practice relative to wearing uniforms.

to meet and confer, to the extent consistent with law and regulations, as to the procedures management intended to observe in effectuating its decision, and as to the impact of such decision on those employees adversely affected. 11/ Clearly, no opportunity to bargain on the procedures for choosing those employees whose workhours would change was ever given to the Union.

I also find that the Activity failed to meet its obligation to provide the Union with timely notice to permit meaningful bargaining on the impact of the change on the employees adversely affected. Respondent asserts that while none of the Union's officers received official notice, constructive notification of the impending change was given to the Union on November 1, 1974 through posting the notice on the warehouse bulletin board. The Activity reasons that since all the Union officers were warehouse employees and posting on the bulletin board was the normal means of communication to warehouse employees then sufficient notice was given to the Union "to bring forward in a timely manner any adverse impact problems they may have detected". The Activity also relies upon the notice given to the employees (Union officers included) by virtue of the November 4 meeting of warehouse employees which occurred substantially before November 18, the date of the actual change in work schedules.

I reject Respondent's contentions, The Activity had the responsibility to timely notify the Union, qua Union, of the impending change which responsibility carries with it the concomitant burden of proving that the Union received sufficient notice under the circumstances to enable it to intellegently discuss the matter. If, as here, an activity fails to take adequate measures to insure that a union receives the notice due it under the Order, then in resolving the question of whether notice was actually received, in my opinion, substantial evidence that clearly compels a conclusion that timely notice was in fact received should be present. However, that quality of evidence is lacking in the case herein. In any event, I find that the record herein does not show by even a

11/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois A/SLMR No. 289 and Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329. See also Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56.

preponderance of the evidence that timely notice of the change was received by any responsible official of the Union. 12/ Thus, although the bulletin board notice of November 1 was posted for approximately two weeks prior to the effective date of the change in workhours, there is no evidence that any Union officer in fact saw the posted notice. Similarly no Union officer who testified recalled having been informed of the change at the warehouse meeting held on November 4. It is not inconceivable that all of the Union representatives failed to see the notice on the bulletin board and although working on November 4 were not present at the meeting for any number of reasons. While a Union vice-president testified he was personally informed of the change by his supervisor after its announcement on November 1 and sometime prior to November 13, in these circumstances I do not find that such notice can be considered timely notice to the Union. If any Union representative other than the president knew of the pending change on November 1, November 4 or thereafter, they could have presumed that the Activity had fulfilled its obligations under the Order and consulted with the Union's chief officer prior thereto. 13/ The situation herein is distinguishable from that found in the Great Lakes Naval Hospital case, supra. In Great Lakes the Assistant Secretary found in dismissing a 19(a)(6) allegation 14/ that sufficient notice was given to a Union to afford it an opportunity to request bargaining on impact when the union's president was one of the 33 affected employees who received written notice that a RIF would occur. The notice was given approximately 60 days before the effective

12/ In my judgment, the information regarding the change which the Union's president Brunson received at the Union meeting of November 13, 1974 was not received sufficiently in advance of the November 18 date of change to enable the Union to intellegently meet and confer with the Activity on the impact of the change on employees. I note that November 16 and 17 fell on Saturday and Sunday respectively.

13/ I note that the collective bargaining agreement is signed for the Union solely by the Union president.

14/ In Great Lakes the complaint alleged only a 19(a)(6) allegation. Accordingly, the Assistant Secretary did not have the opportunity to decide whether lack of specific notice to the union, qua union, might be violative of Section 19(a)(1) of the Order.

date of the RIF. In the case herein the Activity considers a general notice to all employees posted on a bulletin board and the fortuity of a union official's being present at a general meeting at which time the change is discussed to be sufficient to meet the requirements of the Order. I disagree. Good faith adherence to the dictates of the Order requires respect for each party's rights and a degree of formality which acknowledges that respect. The manner of the Activity's claimed notification of the change to the exclusive collective bargaining representative of its employees, even if received by responsible Union officials, undermines and belies that respect. 15/

Turning now to Respondent's reliance on the terms of its collective bargaining agreement with the Union, I reject Respondent's contention that under the agreement the Activity was free to change the employees workday hours without affording the Union an opportunity to meet and confer on the matter. The Activity relies upon the language of Article XXIV (Duty Hours), Section 2.c. of the agreement. Section 2. provides:

"Section 2. Regular Scheduled Workweek.

- a. The regular scheduled workweek consists of the specific hours during the administrative workweek that the employee is scheduled to work.
- b. The regular scheduled workweek will not exceed 40 hours. Except where inconsistent with operational needs, the hours scheduled will not exceed 8 hours per workday and will not be scheduled for more than 5 days in an administrative workweek. The regular scheduled workweek will not include hours on more than 6 days or include more than 10 hours on any one workday, except during an annual or other directed inventory.
- c. Changes in the regular scheduled workweek will be posted on the bulletin board and otherwise brought to the attention of the employees at least 2 weeks prior to the effective date of the new schedule, except in cases of emergency or extraordinary business needs.
- d. Frequent changes of the regular scheduled workweek will not be made.

15/ See General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, Case No. 22-5570 (CA), Report and Recommendations of Associate Chief Administrative Law Judge John H. Fenton (August 7, 1975).

e. Personnel assigned as over-the-road drivers may be scheduled to work up to a maximum of 15 hours per day, following 8 consecutive hours off-duty, subject to the following conditions.

(1) Driver will not be permitted to drive more than 10 hours.

(2) Driver will not be permitted to drive for any period after having been on duty 15 hours."

Although Section 2.c. clearly does not deal with the Union's right of notification and bargaining as opposed to employees' rights derived from the agreement, Respondent argues that in negotiating Section 2.c. the Union recognized the agency's right to change tours of duty while providing those affected with ample lead time to prepare for the change and raise any appropriate implementation issues. In my opinion such an interpretation of Section 2.c. of the agreement and its effect is too far reaching and is unsupported by the evidence. Thus there was no testimony presented as to any discussion during contract negotiations which might have colored the meaning of Section 2.c. nor do any of the Activity's regulations 16/ compel the conclusion sought by Respondent. Moreover, Article V of the agreement entitled "Matters Appropriate for Negotiation and Consultations" indicates that "shift assignments" and "scheduling of work hours and meal periods" were considered by the parties to be negotiable items along with other subjects typically found to be negotiable. 17/ Indeed, even if

16/ The language of Section 2.c. of the agreement is identical to that found in Department of Army and Air Force Regulations AR 60-21 and AFR 147-15, Chapter 2, Section III, par 2-14c. entitled "Regular Scheduled Workweek". However, the Regulations only refer to the Activity's obligations vis a vis employees and are not concerned with the obligation for notice due an exclusive collective bargaining representative.

17/ "Section 1. Negotiation. Matters appropriate for negotiation and consultation between the parties are policies and practices relating to the conditions of employment which are within the discretion of the Employer of the employees in the unit. The scope of negotiations includes, but is not limited to, such matters as:

- a. Promotion plans including details and repromotions
- b. Pay practices
- c. Leave and vacation schedules
- d. Disciplinary practices and procedures
- e. Training programs, including on the job and off the job

[Continued on next page]

the change in workhours was not negotiable, Article V, Section 2 of the agreement obligates the Activity to a "mutual" exchange of view "...in order to arrive at the best solution in the implementation or change of any (such) policy..." 18/ (Emphasis supplied). Accordingly, I conclude that Section 2.c. of the agreement is only concerned with the timing of the notification given to employees and has no effect upon the Union's right to be notified and be given an opportunity to bargain before the Activity changes a condition or term of employment such as the scheduled workhours being considered herein.

Nor does the agreement support a claim that the Union waived its right to receive prior notification of the change in workhours. The Activity suggests that had the Union not waived its right to be consulted with regard to changes in the scheduled workweek, in agreeing to the language set forth in Section 2.c. it would have negotiated language into the agreement similar to that found in Article XVI entitled "Reductions in Force". Section 1 of that article provides, under the heading "Notice", that "the employer agrees to notify the local of any reduction in force, furnishing the reasons therefor, and defining the extent of reduction". I find the Activity's argument to be without merit. Merely because a collective bargaining agreement spells out notice obligations imposed by the Executive Order or even recites obligations over and above those mandated by the Order, such cannot be used to imply that in all other areas not specifically

17/ Continued.

- f. Shift assignments
- g. Appropriate arrangements for employees affected by the impact of realignment of work forces or technological change
- h. Scheduling of work hours and meal periods
- i. Grievance procedure
- j. Reduction in force practices
- k. Employee services
- l. Dues deductions"

18/ Article V Section 2 of the agreement provides: "Section 2. Consultation. The Employer agrees to consult with the Local before implementing or changing any policy or program pertaining to matters that are regulatory and which the Employer believes non-negotiable. For the purpose of this agreement, consultation is defined as a mutual exchange of views between the Employer and the Union in order to arrive at the best solution in the implementation or change of any policy that is otherwise considered by the Employer as non-negotiable."

mentioned a union waives its rights to receive timely notice and bargain about such matters. The Assistant Secretary has repeatedly held that a waiver of a right granted by the Order must be "clear and unmistakable." 19/ Indeed, in the NASA case, the Assistant Secretary expressly stated that "a waiver will not be found merely from the fact that an agreement omits specific reference to a right granted by the Executive Order, or that a labor organization has failed in negotiations to obtain protection with respect to certain of its rights granted by the Order."

In sum, I conclude that the Activity's unilateral conduct in changing the unit employees' workhours was unprivileged and undermined the status of its exclusive collective bargaining representative and was inconsistent with its obligations as set forth in Section 11(a) of the Order thereby violating Section 19(a)(6) of the Order. Further, such conduct necessarily had a restraining influence upon unit employees and had a concomitant coercive effect on their rights assured by the Order and accordingly violated Section 19(a)(1) of the Order. 20/

Recommendations

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. 21/

19/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223; Internal Revenue Service, Omaha District Office, A/SLMR No. 417; New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362; Anaheim Post Office, U.S. Postal Service, Anaheim, California, supra.

20/ 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, Alabama, A/SLMR No. 42.

21/ Complainant does not seek a return to the workhours in effect prior to the unilateral change found herein. Accordingly I shall not recommend that the Activity recind the change upon request of the Union.

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 Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, South Carolina, shall:

1. Cease and desist from:

(a) Instituting a change in workhours of employees represented exclusively by the National Federation of Federal Employees, Local 1613, Independent, or any other exclusive representative, without notifying the National Federation of Federal Employees, Local 1613, 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.

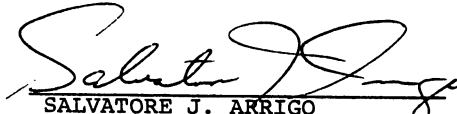
(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Notify the National Federation of Federal Employees, Local 1613, Independent, or any other exclusive representative, of any intended change in workhours of employees 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.

(b) Post at its facility at the Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander 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 Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 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: October 10, 1975
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 SERVICES

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a change in workhours of employees exclusively represented by National Federation of Federal Employees, Local 1613, Independent, or any other exclusive representative, without notifying National Federation of Federal Employees, Local 1613, 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 notify National Federation of Federal Employees, Local 1613, Independent, or any other exclusive representative, of any intended change in workhours of employees 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.

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.

(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 for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 303, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

June 4, 1976

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

DEFENSE CONTRACT AUDIT AGENCY
A/SLMR No. 657

This case arose as the result of an RA petition filed by the Defense Contract Audit Agency (Agency) contending that due to the May 9, 1975, reorganization which disestablished its New York Region, the unit of all professional employees of the New York Region represented by the American Federation of Government Employees, AFL-CIO, Local 3366 (AFGE) was no longer appropriate. The AFGE contended that the reorganization was merely a "paper change" and that the unit as certified was still viable and extant.

The Assistant Secretary found that the May 9, 1975, reorganization, which abolished the New York Region, effected a substantial change in both the scope and character of the exclusively recognized unit in the former New York Region and, in effect, rendered such unit inappropriate. Thus, he concluded that the Agency was under no obligation to recognize the AFGE as the exclusive representative of the employees in such unit. The Assistant Secretary based his finding on the fact that the employees of the disestablished New York Region had been assigned to two separate regions of the Agency where they have different working conditions, personnel policies and practices, separate areas of job rotation, separate areas of competition for promotions and reductions-in-force, and separate overall supervision.

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

A/SLMR No. 657

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

DEFENSE CONTRACT AUDIT AGENCY

Activity-Petitioner

and

Case No. 30-6173(RA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3366

Labor Organization

DECISION AND ORDER

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

Upon the entire record in the subject case, including a brief filed by the American Federation of Government Employees, AFL-CIO, Local 3366, herein called AFGE, the Assistant Secretary finds:

On March 25, 1974, the AFGE was certified as the exclusive representative of a unit of all professional employees of the New York Region, Defense Contract Audit Agency (Agency), including Senior Auditors who do not function as supervisors. The approximately 87 employees in this certified unit were assigned throughout the various offices of the Agency's New York Region. On May 9, 1975, as the result of a reorganization initiated by the Agency, the New York Region was disestablished and 6 offices and 133 of its employees were transferred to the Agency's Boston Region and 8 offices and 193 of its employees were transferred to the Agency's Philadelphia Region.

The Agency filed the subject RA petition contending that, due to the reorganization, the unit represented by the AFGE was no longer appropriate. In this regard, it asserts that the portion of the unit transferred to the Philadelphia Region should be "decertified," and that the portion of the unit transferred to the Boston Region should be considered as having accreted to the existing unit in that Region represented by an AFGE Council. The AFGE, on the other hand, contends that the reorganization which led to the disestablishment of the New York Region and the dividing of its personnel between the Philadelphia and Boston Regions was merely a "paper change," and that the unit as certified is still extant and viable as most of the employees in the bargaining unit remain in the same locations, performing the same jobs, under the same immediate supervision.

The mission of the Agency is to provide all contract auditing for the Department of Defense and various other government agencies, and to provide accounting and financial advisory services regarding contracts and subcontracts to all components of the Department of Defense which are responsible for procurement and contract administration. It is organized into six Regional Offices, each under the supervision of a Regional Manager. 1/ Each of the six regions operates as a separate entity with the Regional Manager responsible for its day-to-day operations. Regional Managers have wide discretion to operate within broad policy guidelines set by the Agency's National Headquarters. In this connection, the record reveals that each Regional Manager has tailored the policies of his region to fit its work load requirements by initiating procedures that facilitate accomplishment of its mission. As a result, many personnel and operational policies differ from region to region. The Regional Manager exercises direct line authority over the field audit offices within his region and is primarily responsible for decisions involving hiring, firing, promotions and grievances of the employees within his region. Each region has its own personnel office where the records of each individual employee is kept and the competitive areas for job vacancies up to and including GS-13 and reductions-in-force are region-wide. The record reveals also that there is substantial interchange among the employees within each region due to fluctuating work load and that there is a requirement within each region that all employees be periodically assigned on a temporary basis to all the offices of that region at the discretion of the Regional Manager, with the frequency of such assignments determined by the grade of the individual involved. 2/

As noted above, on May 9, 1975, the New York Regional Office was closed and its employees were assigned to the Boston 3/ and Philadelphia Regions 4/, with 6 offices and 133 employees becoming part of the Boston Region and 8 offices and 193 employees becoming part of the Philadelphia Region. 5/ As a result, the evidence establishes that the 326 former employees of the New York Region have become employees of their new respective regions, are bound by the personnel practices and working conditions of such regions, and are under the overall supervision of the Regional Manager of their respective regions. While prior to the reorganization there was substantial job contact between the employees

1/ Before the disestablishment of the New York Regional Office there were seven Regional Offices throughout the country.

2/ See also, in this regard, Department of Defense, Defense Contract Audit Agency, Chicago Branch Office, A/SLMR No. 463.

3/ The AFGE Council of Defense Contract Audit Agency Locals is the current exclusive representative of a unit of all professional and nonprofessional employees of the Boston Region.

4/ The employees of the Philadelphia Region are unrepresented.

5/ The record was not clear as to the manner in which the unit employees were divided among the Boston and Philadelphia Regions.

of the various offices of the New York Region, subsequent to the reorganization, the record shows that there is no contact between employees assigned to the Philadelphia Region and those assigned to the Boston Region. Further, as a result of the reorganization, temporary office reassignments for the affected employees have changed, with such reassignments now being made within their respective new regional areas. The record also discloses, however, that the overwhelming majority of the employees of the former New York Region have remained at their same physical locations, under the same immediate supervision, and continue to perform the same functions as prior to the reorganization.


Under these particular circumstances, and noting particularly that the employees of the disestablished New York Region have been assigned to two separate regions of the Agency where they have different working conditions, personnel policies and practices, separate areas of job rotation, separate areas of competition for promotions and reductions-in-force, and separate overall supervision, I find that the May 9, 1975, reorganization which abolished the New York Region effected a substantial change in both the scope and character of the exclusively recognized unit in the former New York Region and, in effect, rendered such unit inappropriate. Consequently, in my view, the Agency is under no obligation to recognize the AFGE as the exclusive representative of the employees in such unit. 6/

Accordingly, and noting that the evidence herein was considered insufficient to establish that the employees who transferred to the Boston Region constituted an accretion to the existing unit in such Region, I shall order the Agency's petition herein be dismissed. 7/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-6173(RA), be and it hereby is, dismissed.

Dated, Washington, D.C.
June 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

6/ See U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482.

7/ It should be noted that while it has been found that the unit herein is no longer in existence, this finding would not preclude the filing of an appropriate petition for clarification of unit seeking a determination as to whether or not any of the disputed employees have accreted to any other grouping of employees within the Agency. Nor would this finding preclude any labor organization from seeking certification as exclusive representative of any appropriate unit of employees resulting from the Agency's reorganization through the filing of an appropriate petition for an election.

June 4, 1976

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

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 034

and

ACTING DIRECTOR,
OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT,
U.S. DEPARTMENT OF LABOR
A/SLMR No. 658

This case involved a complaint filed by the Acting Director, Office of Labor-Management Standards Enforcement (LMSE), U.S. Department of Labor, in which it was contended that the Respondent, the National Treasury Employees Union, Chapter 034 (NTEU), had engaged in certain violations of the standards of conduct for labor organizations set forth in Section 18 of the Order and Part 204 of the Regulations of the Assistant Secretary in the conduct of its election of officers held between July 15 and July 24, 1974, that such violations had affected the outcome of the election with respect to the contested offices, that the election should, therefore, be declared null and void, and that a new election should be ordered under the supervision of the LMSE.

The Respondent conducted an election of officers by mail ballot between July 15 and July 24, 1974. Subsequent to the election, a timely complaint was filed with the Respondent by a member in good standing alleging that the election had not been properly conducted. After exhausting the remedies available to him pursuant to the NTEU's Constitution, the complaining member filed a timely complaint with the Department of Labor pursuant to Section 204.63 of the Regulations. Having investigated the complaint and concluding that there was probable cause to believe that a violation of Section 204.29 of the Regulations had occurred in the conduct of the NTEU's election and that it had not been remedied and may have affected the outcome of the election, the Acting Director, LMSE, filed the instant complaint with the Chief Administrative Law Judge, U.S. Department of Labor.

The Administrative Law Judge concluded that the NTEU had violated the Order and the Assistant Secretary's Regulations in the conduct of the mail ballot election by failing to provide adequate safeguards to insure a fair election by allowing persons other than those named as election tellers pursuant to the NTEU's Constitution and bylaws to retain custody of used and unused ballots and to receive cast ballots,

by failing to establish a system to verify voter eligibility, by failing to establish adequate security for the ballots prior to the time they were tallied, by failing to make an accurate accounting of the ballots at any stage of the election, and by failing to provide a method whereby a member who did not receive a ballot in the mail could receive another ballot. He also concluded that the NTEU violated the Order and the Regulations by using union funds to support the candidacy of the incumbent President, whose signature appeared at the bottom of each ballot beneath a message imploring members to participate in the election.

The Assistant Secretary, in adopting the findings, conclusions and recommendations of the Administrative Law Judge, noted that the NTEU had violated Section 18 of the Order and Part 204 of the Regulations of the Assistant Secretary in the conduct of its election of officers held between July 15 and July 24, 1974, and that such improper conduct may have had an effect on the outcome of the said election. Under these circumstances, the Assistant Secretary ordered that the mail ballot election conducted between July 15 and July 24, 1974, be declared null and void with respect to all contested offices, and that a new election be conducted under the supervision of the Director, LMSE in accordance with Section 204.29 of the Regulations.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 034

Respondent

and

Case No. S-E-6

ACTING DIRECTOR,
OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT,
U.S. DEPARTMENT OF LABOR

Complainant

DECISION AND ORDER

On February 4, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain violations of the standards of conduct for labor organizations in the conduct of its election of officers held between July 15 and July 24, 1974, and recommending that the said election be declared null and void with respect to the offices of President, First Vice President, Second Vice President and Directors of the Audit Division and that a new election for said offices be conducted under the supervision of the Acting Director, Office of Labor-Management Standards Enforcement, United States Department of Labor. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision, and the Complainant filed a reply to the Respondent's exceptions.

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

filed by the Complainant, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge. Thus, under the circumstances herein, I find that the Respondent violated Section 18 of Executive Order 11491, as amended, and Part 204 of the Regulations of the Assistant Secretary in the conduct of its election of officers, held between July 15 and July 24, 1974, that the improper conduct involved may have affected the outcome of said election and that, therefore, the holding of a new election is warranted.

ORDER


Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 204.91(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that:

1. The election for the offices of President, First Vice President, Second Vice President and Directors of the Audit Division conducted by the National Treasury Employees Union, Chapter 034, by mail ballot between July 15 and July 24, 1974, is null and void.

2. A new election for the offices of President, First Vice President, Second Vice President, and Directors of the Audit Division of the National Treasury Employees Union, Chapter 034, shall be conducted under the supervision of the Director, Office of Labor-Management Standards Enforcement, U.S. Department of Labor, in accordance with Section 204.29 of the Regulations.

3. Pursuant to Section 204.92 of the Regulations, the National Treasury Employees Union, Chapter 034, shall notify the Assistant Secretary in writing within 30 days from the date of this decision as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
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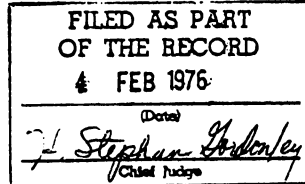


In the Matter of

NATIONAL TREASURY EMPLOYEES
 UNION, CHAPTER 034,

Respondent

Case No. S-E-6



Allen J. Rapoport, Esq.
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 For the Government

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 Pittsburgh, Pennsylvania 15219
 For the Respondent

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This proceeding under Section 18 of Executive Order 11491, as amended, hereinafter referred to as the Order, was initiated by a formal complaint issued by the Acting Director, Office of Labor-Management Standards Enforcement, filed on March 13, 1975.

Pursuant to notice duly given, a formal hearing was held in Pittsburgh, Pennsylvania. All parties were represented and afforded a full opportunity to be heard, and to present witnesses and to introduce other relevant evidence on the relevant issues, and to examine and cross-examine witnesses. Both parties filed briefs which have been duly considered.

On the basis of the entire record, including the pleadings, the testimony of the witnesses, the exhibits, the stipulations, and my observation of the witnesses and their demeanor, I make the following findings of fact and conclusion of law and recommendations.

FINDINGS OF FACT

1. Respondent, National Treasury Employees Union, Chapter 034, hereinafter referred to as respondent, is, and at all times relevant to this matter, has been an unincorporated association maintaining a mailing address at P. O. Box 1464, Pittsburgh, Pennsylvania.

2. Respondent is, and at all times relevant to this matter has been, a labor organization within the meaning of sections 2(e) and 18(c) of the Order.

3. Respondent is, and at all times relevant to this matter has been, chartered by and subordinate to the National Treasury Employees Union, hereinafter referred to as NTEU, a labor organization within the meaning of sections 2(e) and 18(c) of the Executive Order.

4. Respondent, purporting to act pursuant to the NTEU Constitution and By-Laws and its own By-Laws, conducted an election of officers by mail ballot between July 15 and July 24, 1974, hereinafter referred to as the election. This election was subject to the provisions of Sections 18(a)(1), 18(c) and 6(a)(4) of the Executive Order.

5. By letter dated July 26, 1974, John Saladiak, a member in good standing of respondent, protested the election to NTEU President Vincent L. Connery. By letters dated July 30 and 31, 1974, Saladiak supplemented the original complaint to Connery. By letter dated August 16, 1974, addressed to Saladiak, Connery dismissed the protest. By letter dated September 3, 1974, Saladiak and others appealed Connery's decision to the NTEU Executive Board. By letter dated September 30, 1974, the NTEU Executive Board denied the protest. Having obtained a final decision, Saladiak and others filed a timely complaint with the Department of Labor by letter dated October 7, 1974 and received October 9, 1974.

6. The Acting Director, Office of Labor-Management Standards Enforcement, United States Department of Labor,

investigated the complaint of members Saladiak and others and concluded that there was probable cause to believe that violations of the Executive Order had occurred in the conduct of respondent's election and had not been remedied and may have affected the outcome of the election.

7. Respondent was notified of the Acting Director's investigative findings, and a conference was held between respondent's representatives and the Acting Director and his representatives concerning the alleged violations, subsequent to which respondent failed to enter into an agreement providing for appropriate remedial action.

8. Respondent represented approximately 645 members at the time of its election. Said members at that time were all employees of the Internal Revenue Service, Pittsburgh District and were stationed at 20 different posts of duty throughout Western Pennsylvania, the furthest post being 152 miles from Pittsburgh.

9. Under Article VI, Section 1 of respondent's By-Laws, its officers are President, First Vice President, Second Vice President, Secretary-Treasurer, Recording Secretary, Insurance Secretary and Directors from the Divisions of Administration (1), Intelligence (1), Office Audit (1), Field Audit (2), Collection (2) and Appellate and Regional Council (1). These officers serve a two year term of office.

10. Results of the election of officers as published by the respondent were:

| | | | |
|------------------------------|-----|--------------------------------|-----------|
| <u>President</u> | | <u>Directors</u> | |
| Ralph V. Fuehr | 139 | <u>Administration Division</u> | |
| John Mamula | 152 | No nomination | |
| <u>First Vice President</u> | | <u>Intelligence Division</u> | |
| Joseph S. LaCava | 50 | No nomination | |
| Daniel T. McConnell | 87 | <u>Audit Division (Two)</u> | |
| J. Patrick Murphy | 103 | Gloria Ferris | 139 |
| Paul Plakosh | 50 | Frank Kosmal | 122 |
| | | Harry A. Worrall, Jr. | 117 |
| <u>Second Vice President</u> | | <u>Collection Division</u> | |
| Francis W. Klaus | 62 | John C. Finnerty | Unopposed |
| Joseph F. Korda | 99 | Paul W. Holmes | Unopposed |
| Charles Ollio | 121 | | |

Secretary-Treasurer

Appellate Division

Ralph J. Oster, Jr.

Unopposed

Anthony Astorino

Unopposed

Recording Secretary

Victoria W. Benko

Unopposed

11. For use in its election, respondent obtained from NTEU four sets of address labels of its members eligible to vote in said election.

12. Respondent made no attempt to independently verify that all its members' names and addresses were contained on the address labels provided by NTEU.

13. Respondent's Election Chairman, Andrew Stupar, prepared envelopes for mailing the ballots. Stupar affixed address labels to the mailing envelopes and placed inside each mailing envelope one ballot and one return envelope on which was printed only respondent's name and the Post Office Box address that it ordinarily used in the course of its business.

14. Article VI, Section 3 of respondent's By-Laws provides that the President "shall appoint tellers of which there will be at least four (4), ... whose duty it shall be to prepare the ballots and to distribute and collect the ballots from the membership and tally the votes."

15. Respondent's Secretary-Treasurer, Ralph Oster, Jr., performed the following functions which had been exclusively delegated by the above described By-Laws to the Election Tellers:

(a) Prepared the format of the ballot after the nominees' names had been collected.

(b) Took the prepared ballot to Postal Instant Press Company for reproduction.

(c) Picked up the ballots after they had been reproduced.

(d) Delivered the prepared ballots to the United States Post Office to be mailed.

(e) Received, before the election was conducted, all unused election materials including unused ballots some of which he dispensed to certain members for whom special arrangements had been made. Retained custody of the unused ballots.

(f) Made daily collections of the ballots that had been returned by mail to respondent's post office box, and maintained sole custody of the key that permitted access to that box.

16. The last paragraph at the bottom portion of the ballot, prepared by Secretary-Treasurer Oster and used in respondent's election, contained the following message: "Once again an election is upon us. It is time to vote for the officers of your union. The individuals listed have agreed to run and serve you. It is now up to you! Pick those people you feel will do the best job representing you. VOTE!" The signature of respondent's President, John W. Mamula, appeared immediately beneath this message at the bottom of the ballot.

17. Respondent paid all the costs of reproducing and mailing the ballots.

18. Respondent mailed the ballots by third class mail to its members on July 15, 1974 and the deadline for the return of the ballots was July 24, 1974.

19. Some members of Respondent who were eligible to vote did not receive ballots in the mail.

20. Some members of respondent who were eligible to vote, did not receive their ballots within a sufficient amount of time to timely return them.

21. Respondent mailed its ballots for use in its election of officers in 1972 by first class mail and also mailed its notice of election for the subject election by first class mail.

22. Some members of respondent had changed their addresses at or about the time of the election.

23. Some members of respondent normally and frequently attended training sessions which required them to be away from their residences for periods of time and were so occupied at the time of the election.

24. A greater amount of time was apparently required for members of respondent who resided outside the Pittsburgh area than those residing in the Pittsburgh area to receive and return by mail the ballots used in the election.

25. While non-profit third class bulk mailings are given some preferential treatment at the point of origin, there is no assurance or indication that such mailings would be treated as anything but third class at all points in transit.

26. Respondent prior to the completion of the election was aware that at least some of its members claimed that they had not received ballots but took no corrective action.

27. Respondent made no provisions for the identification or verification of the validity of the ballots that were returned.

28. Respondent did not establish a system of ballot accountability in that it neither verified the number of ballots that were printed, that were used, and that remained unused in its election nor maintained adequate control over the ballots.

29. Respondent provided no mechanism whereby a member who did not receive a ballot in the mail, if the ballot had been mailed, could obtain another ballot.

30. Article IV, Section 2(d) of the NTEU By-Laws provides that "the election shall be by secret ballot to be placed in boxes unless the Chapter Executive Board has authorized the use of some standard type of election mechanical device insuring a secret ballot by machine vote."

31. Respondent instructed its members that they could hand deliver their ballots to incumbent officers, some of whom were running for re-election. Members of respondent did hand deliver their ballots to incumbent officers, some of whom were running for re-election.

32. It was possible in certain instances to determine how a particular voter had cast his ballot by holding up a sealed return envelope containing a marked ballot to the light.

33. Respondent's officers and respondent's office are based in Pittsburgh and, therefore, the option of hand delivery was not generally available to members located at the other posts of duty.

34. There was no way to ascertain that ballots hand delivered to respondent's officers were in fact delivered to Respondent and counted in the tally.

35. Some ballots were hand delivered to respondent's officers without being placed inside return envelopes.

36. Respondent stored the cast ballots, from the time they were received until they were tallied, in an office desk which was not always kept locked.

CONCLUSIONS OF LAW

1. Jurisdiction in this matter is conferred by Section 18 of the Executive Order.

2. Respondent is, and at all times relevant to this action has been, a labor organization within the meaning of Sections 2(e) and 18(c) of the Executive Order.

3. While not applying the standards applied with respect to the conduct of representation elections held pursuant to the Order or the National Labor Relations Act, as amended, it is nevertheless concluded that respondent, in the conduct of its election of officers held between July 15 and July 24, 1974, violated Sections 18(a)(1), 19(c) and 6(d) of the Order and Section 204.29 of the Assistant Secretary's Regulations (29 CFR §204.29)^{1/} by:

(a) failing to provide adequate safeguards to insure a fair election in that it:

- (1) allowed incumbent officers, including those who were running for re-election, instead of the election tellers, at various times to retain custody of both used and unused ballots and to receive cast ballots from members;

^{1/} The Assistant Secretary's Regulations (29 CFR §204.29) which set forth that all internal union elections shall be conducted in a fair and democratic manner incorporates, by reference, inter alia, the terms of Sections 401(c)(e) and (g) of Title IV of the Labor-Management Reporting and Disclosures Act of 1959, as amended. Section 401(c) provides that "Adequate safeguards to insure a fair election shall be

(2) failed to establish a system to verify voter eligibility;

(3) failed to establish adequate security for the returned ballots between the time they were received and the time they were tallied;

(4) failed to establish a system of ballot accountability by not verifying and maintaining control of the number of ballots printed, the number of ballots used and the number of ballots that remained unused after the election; and

(5) failed to provide a method whereby a member who did not receive a ballot in the mail, either at all or in sufficient time to cast the ballot, could receive another

(b) using union funds and assets to support the candidacy of incumbent President, John Mamula, whose signature appears at the bottom of each ballot beneath a personal message.

4. The Acting Director has established by a preponderance of the evidence that respondent committed violations of Section 18 of the Order, as set forth above. Each of these violations are of the sort that are very likely to have affected the outcome of the said election for the offices of President, First Vice President, Second Vice President and Directors of the Audit Division (Wirtz v. Hotel, Motel and Club Employees Union, Local 6, 391 U. S. 492, 505-509). Respondent has not presented sufficient evidence to rebut that presumption as to any of the violations.

Wherefore, upon consideration of the entire record and on the basis of the foregoing findings of fact and conclusions of law, it is:

Footnote ^{1/} cont'd

provided..." (29 USC §481(c)). Section 401(e) provides that "... Each member in good standing shall be entitled to one vote..." (29 USC §481(e)). Section 401(g) provides "... No monies received by any labor organization by way of dues, assessments or similar levy shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title.." (29 USC §481(g)).

June 4, 1976

Recommended: That the election held by respondent between July 15 and July 24, 1974, for the offices of President, First Vice President, Second Vice President and Directors of the Audit Division be declared null and void and a new election for said offices be conducted under the supervision of the Acting Director, Labor-Management Standards Enforcement, United States Department of Labor.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: February 4, 1976
Washington, D. C.

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

UNITED STATES TANK AUTOMOTIVE
COMMAND, WARREN, MICHIGAN
A/SLMR No. 659

This case involved an unfair labor practice complaint filed by Local 1, National Government Employees Union (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral decision to establish and implement a second shift among its maintenance employees.

The Administrative Law Judge concluded that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in its entirety. In agreeing with the Administrative Law Judge that dismissal of the instant complaint was warranted, the Assistant Secretary noted that he was advised administratively that, subsequent to the filing of the instant complaint, a representation petition was filed by the American Federation of Government Employees, Local 1658, AFL-CIO, (AFGE) and the Complainant affirmatively disclaimed interest in representing the employees in its units at the Respondent Activity. Following a consent election held on March 28, 1976, the AFGE was certified on April 9, 1976, as the exclusive representative of a unit encompassing the employees involved in the instant case.

Under these circumstances, the Assistant Secretary found that the issues raised by the instant complaint herein had been rendered moot. Accordingly, he ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY TANK AUTOMOTIVE
COMMAND, WARREN, MICHIGAN

Respondent

and

Case No. 52-5928(CA)

LOCAL 1, NATIONAL GOVERNMENT
EMPLOYEES UNION

Complainant

DECISION AND ORDER

On February 17, 1976, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, I hereby adopt the dismissal recommendation of the Administrative Law Judge for the reasons set forth below.

The instant complaint alleged essentially that the Respondent improperly failed to meet and confer with the Complainant in violation of Section 19(a)(1) and (6) of the Order based on the Respondent's unilateral decision to establish and implement a second shift among its maintenance employees. I have been advised administratively that, subsequent to the filing of the unfair labor practice complaint in the subject case, a representation petition was filed by the American Federation of Government Employees, Local 1658, AFL-CIO, (AFGE) and the Complainant affirmatively disclaimed interest in representing the employees in its units at the Respondent Activity. Following a consent election, held on March 28, 1976, the AFGE was certified on April 9, 1976, as the exclusive representative of a unit encompassing the employees involved in the instant case.

Under these circumstances, I find that the issues raised by the instant unfair labor practice complaint concerning the obligation of the Respondent to meet and confer with the Complainant over the former's decision to establish and implement a second shift among its maintenance employees have been rendered moot. Accordingly, I shall order that the complaint in the instant case be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 52-5928(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



In the Matter of :
 :
 UNITED STATES ARMY TANK AUTOMOTIVE :
 COMMAND, Warren, Michigan :
 Respondent :
 and :
 Local 1, National Government :
 Employees Union, :
 Complainant :
 :

Case No.
52-5928 (CA)

Morton H. Barris, Legal Office :
 U.S. Army Tank Automotive Command :
 Warren, Michigan 48090 :
 For the Respondent

Philip J. Simmons, President :
 Local 1, National Government :
 Employees Union :
 25614 Lexington Lane :
 Roseville, Michigan 48066 :
 For the Complainant

Before: RHEA M. BURROW
 Administrative Law Judge

RECOMMENDED DECISION
 Statement of the Case

Pursuant to a Notice of Hearing on complaint dated May 14, 1975 and an Order issued July 8, 1975 by the Acting Assistant Regional Administrator for Labor Management Services Administration, U.S. Department of Labor, Chicago Region, a hearing in the above captioned matter was held before the undersigned on October 29 and 30, 1975 in Detroit, Michigan.

The proceeding herein was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on January 30, 1975 by Philip S. Simmons, President, on behalf of Local No. 1, National Government Employees Union (hereafter referred to as

Complainant and/or Union) against the U.S. Army Tank Automotive Command, Warren, Michigan, (herein called the Respondent). It was alleged that the Respondent violated Section 19(a)(1) and (5) of the Order. Subsequently on February 7, 1975 a supplement to its Unfair Labor Practice Complaint was served on Complainant alleging a violation of Section 19(a)(6) for failure to consult, confer and negotiate with the Union. A letter from Complainant dated April 9, 1975 was accepted as authorization to withdraw the alleged Section 19(a)(5) violation and the Notice of Hearing referenced only the 19(a)(1) and (6) alleged violations of the Order for consideration at the hearing.

The complaint in general relates to a decision by the Respondent to establish and implement a two shift maintenance team operation to support functions of preventive maintenance of installation equipment and provide emergency repair support when needed. The Complaint in effect, alleges that:

1. the attempt to change or have in effect a second shift in the Trades Section is a reprisal against the Union for insisting that Respondents abide by the Order and the negotiated contract. The Respondents conduct and action in making and implementing the decision are alleged to have interfered with, restrained, and coerced employees exercising their rights under the Order in violation of Section 19(a)(1). Illustrative of Respondents alleged action and conduct was a statement at a regular Union meeting on August 9, 1974, attributed to Donald E. Atkinson, Director, Headquarters Installation and Support Activity, (hereafter referred to as HISA), in reply to a statement by Complainant Union's President, that the Facilities Engineering Division was not abiding by Article XVI, Section D, of the negotiated contract by providing four hours advanced notice to employees required to work on weekends and two days advanced notice when required to work on legal holidays, 1/ that, Respondent Atkinson stated, "If you make me live up to the contract, I will abolish overtime."

2. The HISA Disposition Form of August 28, 1974 sent to the Chief, Facilities Engineer Division directing a shift coverage and procedural plan encompassing a two shift operation seven days a week composed of mechanics, electricians and plumbers and to be operational by September 23, 1974 acknowledges that in so implementing Facilities Engineering will drop all in-house facilities projects, alterations or minor construction exceeding

1/ Emergency situation in both cases excepted.

50 man hours and such will be planned and scheduled for contract accomplishment. Such action it is alleged would involve change in the tours of duty of employees in violation of Sections 19(a)(1) and (6) of the Order. Also, the Disposition Form directed job descriptions to be revised to reflect the requirements for each tradesman to provide mutual team support that may be needed in other areas and it is alleged that this action changing the job descriptions would destroy the Union's exclusive recognition based on the Recognition and Unit Designation in Article 1 of the Negotiated Contract and a violation of Section 19(a)(1) of the Order.

3. That on October 24, 1974, Paul Henning, Deputy Facilities Engineer held a meeting with all trades employees to discuss shifts and changes in tours of duty and "The Union was not notified of the meeting by management." Such was alleged to constitute a violation of Section 19(a)(6) of the Order.

4. Other reported alleged violations and incidents are:

(a) That the Respondent did not discuss a letter dated December 27, 1974 which had been given to Colonel Atkinson, Commanding Officer, HISA, at a meeting on January 6, 1975;

(b) That the Union had been advised on September 24, 1974 and December 23, 1974 that a solicitation for a new custodial contract would be issued in about 30 to 40 days to include Building 200-C Area;

(c) That the Union sent Colonel Atkinson a letter on October 10, 1974, requesting information and no response had been received as of December 27, 1974;

(d) The Union cannot understand the practice of Command "wanting to contract everything out."

The Respondent was represented by counsel at the hearing and the Complainant by its President Philip S. Simmons. The parties were afforded full opportunity to be heard, to adduce evidence bearing on the issues, and, to present oral argument and file briefs in support of their positions. Only the Respondent filed a brief for consideration of the undersigned.

Based on the entire record, including my observation of the witnesses and their demeanor and the relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendation.

I

The Complainant Union is and has been at all times material herein the recognized exclusive representative of the Firefighters, Climatic and Custodial Units at Respondents U.S. Army Tank Automotive Command Installation, Warren, Michigan. A collective bargaining agreement between the Union and the Respondent was executed on November 3, 1972 effective for two years. Pursuant to an option clause the Respondent extended the term of the contract to October 31, 1974 and then to March 31, 1975.

II

The HISA installation is an activity that supports the Army Tank Command. It involves the facility engineer which encompasses all the maintenance of the industrial complex as well as the transportation division, supply division, military personnel division, and clubs and restaurants. Between April and early August 1974 there were discussions within the Command between the Commanding Officer, HISA and Facilities Engineer Personnel concerning the work force in the trades area. It seemed that the program was devoted to long range projects requiring the expenditure of excessive man hours for accomplishment and that the normal preventive maintenance and minor repair of things that took only a few hours to accomplish at the installation were being neglected. Consequently, installation was not being properly maintained, and a considerable amount of overtime was being expended in emergency type situations, on weekends, and at night. The situation underwent study and consideration until August 1974 when a decision to correct the deficiencies by reorganization was reached. Notice of the decision containing details of proposed shift coverage arrangements and procedure was dispatched to the Unions 2/ on a Disposition Form dated

2/ The Complainant Union and American Federation of Government Employees (AFGE) which represented other units at the installation; the latter Union is not involved in this proceeding.

August 28, 1974. 3/ It is undisputed that the decision to reorganize and establish a two shift maintenance team concept was a unilateral one made by Management.

III

After the decision relating to establishment of a two shift maintenance team was announced on August 28, 1974 the Commanding Officer of HISA held a special meeting with representatives of Complainant's Local Union No. 1 on September 10, 1974 to discuss plans for the new shift change operation. At this meeting the Union recommended that a standby emergency crew be utilized but the suggestion was not considered feasible because it only applied to emergencies and afforded no means for accomplishment of preventive maintenance and repair work. Thereafter, numerous meetings were held by management with representatives of the Complainant Union regarding establishment of the multishift operation and in addition there were meetings with affected employees with labor representatives in attendance. 4/ Throughout the period between August 28, 1974 when Notice was first given to the Complainant Union and February 2, 1975 when the multishift operation

3/ The President of Local Union No. 1 referred to the Notice that he received as being an unsigned onion skin copy which he refused to recognize. The copy was subsequently substituted by a signed letter. Further, in the supplement to Complainant's Unfair Labor Practice it was stated that the Disposition Form directed the Facilities Engineer to: (1) develop a shift coverage arrangement and procedure to be operational by September 23, 1974 covering a two shift day operation seven days a week; (2) composition of the shifts include air condition mechanics, electricians and plumbers as a minimum; (3) job descriptions must be revised to reflect the requirements for each tradesman to provide mutual support in other areas as may be needed in support of its support mission; (4) this direct action acknowledges that in so implementing this multi-shift arrangement, Facilities Engineering will by necessity drop all in-house facility projects, alterations or minor construction exceeding 50 man hours; work in excess of this amount will not be planned or programed for in-house undertaking but will be planned and scheduled for contract accomplishment.

4/ It was stated that the Complainant Union represented 17 persons involved in the operation and AFGE Local 1658 represented the other 38.

plan was implemented, comments and viewpoints of the Local Union President were solicited. The initial multi-shift operational plan was changed in several respects before final implementation on February 2, 1975, to accommodate suggestions and proposals of the President of Local Union No. 1. 5/

IV

It is undisputed that Respondent's August 28, 1974 decision to reorganize and establish a two or multi-shift maintenance team concept was a unilateral one made by management. Section 11(a) of the Executive Order imposes upon management the obligation to meet and confer in good faith with respect to personnel policies and practices and matters affecting working conditions. Section 11(b) of the Order states that the obligation to meet and confer "does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices." Further, under the negotiated agreement and Section 12(b) of the Order management retains certain specified rights including the right "(1) to direct employees of the agency; (4) the right to maintain the efficiency of Government operations entrusted to them; (5) to determine the methods, means, and personnel by which such operations are to be conducted; and (6) to take whatever action may be necessary to carry out the mission of the agency in situations of emergency."

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

I find that the August 28, 1974 decision to reorganize and establish a two or multi-shift maintenance team was one that was reserved to management under Section 12(b)(5) of the Order and there was no requirement by management to consult, confer or negotiate with the Complainant as to the reorganizational plan prior to August 28, 1974.

5/ Among the significant changes were elimination of the split shift that had been proposed; and change in a proposed rotation shift system which had been the subject of an objection because of apparent conflict with Article 14 Section E of the parties negotiated agreement.

With respect to the rights retained by management under Section 12(b), failure to consult as to the impact of changes made in the area of management prerogative is violation of Section 19(a)(6). Army Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange A/SLMR No. 451; Federal Railroad Administration, A/SLMR No. 418.

In the instant case, it is clear that the Respondent effected a number of changes by reason of contributions offered by Complainant at various meetings and discussions between August 28, 1974 when the decision to reorganize and establish a two shift maintenance team was made and February 2, 1975 when the plan was implemented and became effective. I find that the record establishes that the Complainant was given ample opportunity, and in fact, did contribute and provide substantive changes that were adopted in the plan before its implementation on February 2, 1975; further, the record clearly establishes that between August 28, 1974 and February 2, 1975, the Complainant on various occasions was afforded the opportunity to consult, confer and negotiate with the Respondent as to any adverse effect of the plan on unit employees. Immediately before implementation of the contract Complainant's President was invited in written communication to make any additional comment or suggestions that he desired for Respondents to consider and declined to do so.

The question of changes in tours of duty, including establishment of new tours, was the subject of consideration by the Federal Labor Relations Council, hereafter called the Council, in the matter of AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11, (July 9, 1971), Report No. 11. In Plum Island the agency essentially decided to eliminate one of three shifts of employees and establish the new shifts without affecting the total number of workers employed. The change was intended to result in improved staffing of the two remaining shifts. The Union proposed that any changes in tours of duty, which would include the staffing of new shifts, be proscribed unless negotiated with the Union. Based on the factual situation in that case, the Council found that the Union's proposal to be non-negotiable and held that "the number of (the activity's) work shifts or tours of duty, and the duration of the shifts, comprise an

essential and integral part of the staffing pattern's necessary to perform the work of the agency." The Council stated "the specific right of an Agency to determine the 'numbers, types, and grades of position of employees' assigned to a shift or tour of duty, as provided in Section 11(b), obviously subsumes the Agency's right to fix or change the number and duration of those shifts or tours."

Later, the Council had occasion to decide the negotiability of a Union proposal concerning the particular days of the week which would constitute the unit employees' basic workweek. In that case, (Federal Employees, Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston South Carolina, FLRC No. 71A-52 (November 24, 1972), Report No. 31), the activity relied in part on the Council's holding in Plum Island. The Council differentiated between the two indicating that Plum Island turned on the agency's right to establish "staffing patterns" for its organization to accomplish its work. In finding the Agency's determination of non-negotiability under Section 11(b) of the Order was improper in the Charleston case, the Council held: "In the instant case, the circumstances in the bargaining unit and the Union's proposal are materially different from those in Plum Island. There is no indication that the proposal to affirm Monday through Friday as the basic workweek for unit employees...would require bargaining on 'the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.' For it does not appear that the basic workweek for employees here proposed is integrally related in any manner to the numbers and types of employees involved. Absent this integral relationship to staffing pattern, the proposal does not conflict with Section 11(b) and Plum Island is inapposite."

It now appears to be clear that the Council's rulings that the matter of the basic workweek and duty hours of employees are bargainable subjects and an activity may not act unilaterally with regard thereto absent "special circumstances" showing the subject to be "integrally related and consequently determinative of the staffing patterns of the agency." 6/

6/ For example, see, American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73 A-36 (December 27, 1973) Report No. 47 and Supplemental Decision of June 10, 1975, Report No. 73. Also, see, Federal Employees Metal Trade Council and Naval Public Works Center, FLRC No. 71 A-56, June 29, 1973 (GERR 21:7093).

In this case, the number of the activity's work shifts or tours of duty, and the duration of the shifts comprised an integral part of the staffing patterns necessary to perform the work of the agency. I conclude that there was no violation of Section 19(a)(6) of the Order by reason of Respondents alleged failure to confer, consult and negotiate with Complainant Union prior to announcement of the multi-shift maintenance team plan on August 28, 1974.

IV

The change or establishment of a second team shift, in the Trades Section is alleged by Complainant to have been a reprisal against the Union for insisting that management abide by the Order and the negotiated contract, otherwise, overtime would be abolished. The specific alleged statement attributed to Respondents Commanding Officer, Atkinson as a Section 19(a)(1) violation was "...if you make me live up to the contract I will abolish overtime."

The evidence established that the dispute as to this issue arose concerning a discussion at a meeting on or about August 9, 1974 relative to the notice requirement for weekend overtime work. The President of the Union urged that two days advanced notice was required for work performed on Saturday, Sunday or weekends.

Article XVI, Section D of the negotiated Agreement 7/ provides:

"Any employee designated to work overtime will be notified at least four (4) hours in advance, except in emergency cases. When overtime is to be performed on a holiday, two days advance notice will be given to employees affected, except in emergency cases."

Holidays are not defined in the Agreement but are set forth in Title 5, Section 6103(a) of the United States Code and do not include Saturday, Sunday or weekends. 8/

The testimony of Complainants own witnesses refute its position that Saturday and Sunday are considered legal holidays. Further, the testimony establishes that Respondents

7/ Respondents Exhibit No. 1.

8/ See Title 5, Section 6103(b) U.S. Code as to days off when a legal holiday occurs on Saturday or Sunday.

were affording the required advance four hour notice to employees working Saturday and Sunday. It appears obvious that Respondent Atkinson's remark that if you make me live up to the contract, I will abolish overtime was in answer to an erroneous position by Complainant as to what constituted legal holidays. I find that the record does not substantiate the Complainant's allegation that establishment of a second team shift in the trades section was a reprisal against the Union and conclude that there was no violation of Section 19(a)(1) by reason thereof.

V

The Respondent making the change and establishment of a multi-team shift operation in the trades section is alleged to have acknowledged that such would require the contracting out of facility projects, alterations and minor construction in excess of 50 hours. The contracting out of such work without consultation of the Union involved a change in the tours of duty of unit employees in violation of Section 19(a)(1) and (6) of the Order.

I have previously concluded that the tours of duty of Respondents employees were an integral part of the staffing patterns necessitated by the decision to establish a multi-shift maintenance team to accomplish Respondents work at the activity and the purpose of its mission. As such, the decision was a prerogative of management that did not require consultation by the Respondent.

The negotiated agreement (Article IV, Section G) provides that the employer agrees to give the Union advance notice (whenever possible a minimum of 30 days) of its intention to solicit bids for "contract work". Such advance notice will be presented in writing, giving a full explanation of the reasons for desiring the contract services. The Union will be afforded the opportunity to express its views before the solicitation is issued."

The record clearly shows that as to the solicitations made by the Respondent for contract work, it gave ample notice of more than 30 days, pursuant to the agreement, thus affording the Complainant opportunity to confer, consult and negotiate if it had so desired.

Under the circumstances, I conclude that there was no contracting out of work without consultation and Complainant failed to establish a violation by the Respondent of Section 19(a)(1) and (6) of the Order was committed.

VI

The testimony at the hearing regarding the meeting held by Paul H. Hennind, Deputy Facilities Engineer with the trade employees on October 24, 1974, related to discussion of job performance, work shifts and changes in tours of duty. Local No. 1 Union President Simmons attended and participated in discussions at the meeting. There was no testimony from witnesses elicited reflecting that the Union had not been notified of the meeting as alleged in the complaint. I therefore find that the Union has not sustained its burden of proof of establishing a violation of Section 19(a)(6) of the Order, particularly since the Union President is shown to have actively participated in the discussion of subjects brought up at the meeting. I conclude that the Respondent and its agents are not shown to have refused to consult, confer, or negotiate with the Union and a violation of Section 19(a)(6) of the Order by reason of having allegedly failed to give notice of the October 24, 1974 meeting is not established.

Lastly, with respect to the alleged incidents set forth in paragraph 4, Sections (a) through (d) of the complaint as herein above set forth, I find that they were either satisfactorily explained by testimony at the hearing or heretofore answered in dealing with specific violations alleged. ^{9/} In any event, the incidents are not shown to constitute Section 19(a)(1) and (6) violations of the Order on the basis of the present record.


Conclusion

In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (6) of the Order.

^{9/} The contracting out of work is an issue in a separate unfair labor practice complaint, based on a complaint filed against the Respondent in February 1975.

Recommendation

Upon the basis of the above findings, conclusions and the entire record, I recommend to the Assistant Secretary that the complaint in Case No. 52-5928(CA) be dismissed.


 RHEA M. BURROW
 Administrative Law Judge

Dated: FEB 17 1976
 Washington, D.C.

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

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

ALABAMA NATIONAL GUARD
A/SLMR No. 660

ALABAMA NATIONAL GUARD

Respondent

and

Case No. 40-5783(CA)

LOCAL 1730, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

This case involved a unfair labor practice complaint filed by Local 1730, National Federation of Federal Employees (Complainant) alleging that the Respondent violated Section 19(a)(1), (5) and (6) and Section 10(e) of the Order by its action in unilaterally changing the tour of duty of employees for the last two weeks of June 1974, during summer camp training, and, on July 10, 1974, again unilaterally changing the tour of duty of employees.

The Respondent contended that the decision to establish tours of duty is a reserved management right and that it was not required to negotiate with the Complainant on the decisions to change the working hours of the employees. The Respondent further contended that the Complainant was notified of the decisions and had ample opportunity to request negotiations on the impact and implementation of such decisions.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that the decision to establish a new tour of duty for certain employees in the bargaining unit during the last two weeks in June 1974 was a management right within the meaning of Section 11(b) of the Order, and that the Respondent was not obligated to bargain about such decision. He further found that the Complainant had ample notice and opportunity to request negotiations concerning the impact and implementation of such decision, but had failed to do so. The Administrative Law Judge also found that the decision to establish a new tour of duty in July 1974 for certain employees of the bargaining unit was a reserved management right under Section 11(b) and 12 of the Order, and that the Respondent was not obligated to bargain about such decision. He further found that the Complainant had ample notice and opportunity to request bargaining on the impact and implementation of such decision, but failed to do so until subsequent to the implementation of the decision when the Respondent met and bargained about the impact of the decision on two separate occasions.

In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary noted that it was unnecessary to pass upon the Administrative Law Judge's finding that the Respondent's decision in July 1974 to establish a new tour of duty was a matter encompassed by Section 12 of the Order. Accordingly, he ordered that the complaint be dismissed.

DECISION AND ORDER

On January 28, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision in the above entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-5783(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ In view of my adoption of the Administrative Law Judge's conclusion that the Respondent's decision herein to establish a new tour of duty in July 1974 was a matter within the ambit of Section 11(b) of the Order, I find it unnecessary to pass upon his finding that such matter also is encompassed by Section 12 of the Order.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



.....
In the Matter of :
ALABAMA NATIONAL GUARD :
Respondent :
and :
LOCAL 1730, NATIONAL FEDERATION :
OF FEDERAL EMPLOYEES :
Complainant :
.....

CASE NO. 40-5783(CA)

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Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This case arises under Executive Order 11491, as amended. It was initiated by a Complaint dated October 29, 1974, and filed on October 31, 1974. The Complaint alleged violations of Sections 19(a)(1),(5) and (6) and of Section 10(e) of the Executive Order as a result of a change in hours during dummer camp at Camp Shelby during the last two weeks of June, 1974, and as a result

of a change of hours, beginning July 10, 1974, to continue the support of night flying until 10:00 p.m. on Wednesday and Friday nights but without overtime liability under the Fair Labor Standards Act. A hearing was held in Montgomery, Alabama, on March 27 and 28, 1975. 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 recommendations:

I. Findings and Conclusions With Respect to the Change in Hours During Summer Camp

A. Facts. About May 1, 1974, General Speigner, Deputy Adjutant General for the State of Alabama, advised Major Caylor, Facility Commander, AASF 1/ #1, that he wanted his shop open from 0600 until 2000 from June 15 through June 30, 1974, to support summer camp training at Shelby, Mississippi. In order to provide aircraft maintenance for the hours required, Major Caylor requested permission of the Technician Personnel Office, by memorandum dated 14 May 1974, to change the work schedule to two shifts during the period 15 June through 30 June, 1974, as follows:

| | |
|---------------|--------------------|
| 1st Shift | 0600 to 1400 Hours |
| 2nd Shift | 1200 to 2000 Hours |
| (Res. Exh. 1) | |

General Speigner (then Colonel) approved the request on May 20, 1974, and instructed Colonel Roberts to coordinate with local union and personnel at AASF #1 (Res. Exh. 1). Colonel Roberts, Technician Personnel Officer, formally advised Lt. Col. Egerton, State Aviation Officer by memorandum dated May 22, 1974, that the change in duty hours requested had been approved; and that Sgt. Henry Rushing, President of Local 1730, NFFE, had been advised of this impending change in duty hours on May 22, 1974 (Res. Exh. 1).

Major Caylor testified that he advised Sgt. Burton, a Local 1730 steward, of the impending change to a two shift operation for the last two weeks of June during "the big camp" just as

1/ Army Aviation Support Facility #1, for which Local 1730, National Federation of Federal Employees, is the exclusive representative.

had been done the year before (1973) except that they would operate only until 2000, rather than 2200, and that there would be an overlap in the shift from 1200 to 1400. Sgt. Burton acknowledged the call from Major Caylor and stated that he called Sgt. Rushing, then absent on disability, and told him of the impending change. Sgt. Burton stated that,

"I didn't object to it at all." (Tr. 90)

Sgt. Rushing acknowledged that he was called by Lt. Col. McLaran and advised that a change of hours had been approved for the period June 15 to 30 to a two shift operation. Sgt. Rushing stated that Lt. Col. McLaran opened the conversation with the statement,

"I want to run something by you." (Tr. 35)

Sgt. Rushing further testified,

"That I would be calling them back on it, and they did implement it without it." (Tr. 17, 36-37)

On cross-examination Sgt. Rushing admitted he never called Lt. Col. Laran. He stated,

"I don't think that I did." (Tr. 37)

Sgt. Rushing's position to Col. McLaran was that duty hours could not be changed without negotiation. Col. McLaran had responded to Sgt. Rushing that this was a management retained right; that the purpose of his call was to advise him of the impending change and to obtain his views; and Sgt. Rushing said he would research the contract and "call us back". (Comp. Exh. 5)

B. Conclusions. Respondent contends that it had the right unilaterally to change to a two shift operation for the two week period of the summer camp pursuant to Section 11(b) of the Executive Order. Section 11(b), in relevant part, provides:

"... However, the obligation to meet and confer does not include matters with respect to the mission of an agency; ... and the number, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty ..."

The decision of General Speigner that AASF #1 should provide aircraft maintenance support during the hours 0600 to 2000 for the two week period from June 15 thorough June 30, 1974, of the summer camp directly concerned the mission of the agency within the meaning of Section 11(b). Although not all changes in tours of duty are non-negotiable, the Federal Labor Relations Council (hereinafter "Council") has held non-negotiable, i.e., a reserved right, the determination of the number of work shifts or tours of duty, and the duration of the shifts when an essential and integral part of "the 'staffing patterns' necessary to perform the work of the agency." AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (1971). In AFGE, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Dept. of Agriculture, FLRC No. 73A-36 (Supplemental Decision (1975) (Report No. 73) the Council stated,

"... a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under section 11(b) unless, based on the special circumstances of a particular case ..., the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency." 2/

In the present case, the mission of the agency dictated the necessity for providing aircraft support facilities during the hours of 0600 and 2000 of the summer camp and the decision to go to a two shift operation for this two week period was integrally related to and determinative of the staffing pattern required, that is, the numbers, types, and grades of positions or employees assigned to the organizational unit, work project, or tour of duty of the agency. Accordingly, the decision to establish a two shift operation was a management right within the meaning of Section 11(b).

2/ For a further excellent analysis see, Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, South Carolina and NFFE, Local 1613 Independent, Case No. 40-5987(CA) (Administrative Law Judge Salvatore J. Arrigo) (1975).

Respondent did give the exclusive representative reasonable opportunity to meet and confer concerning the impact and implementation of its decision to establish a two shift operation for the two week period, cf., United States Air Force Electronics System Division (AFSC), Hansom Air Force Base and Local 975, NFFE, A/SLMR No. 571 (1975), but Complainant did not request consultation or bargaining concerning the impact or implementation of the decision. As there was ample opportunity for Complainant to request bargaining or consultation concerning the impact of the decision prior to its implementation and Complainant never requested bargaining or consultation on the impact of the decision, Respondent did not refuse to consult, confer, or negotiate with respect to the impact of its decision. Department of Air Force, Vandenberg Air Force Base, A/SLMR No. 350 (1974); Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1973).

II. Findings and Conclusions With Respect to Establishment of Shifts to Support Night Flying on Wednesday and Friday Nights

A. Facts. AASF #1 had customarily provided aircraft maintenance support for night flying until 2200 on Wednesday and Friday nights. Employees who worked beyond the normal 1630 work day on Wednesdays and Fridays were given compensatory time. That is, they were allowed an hour off for every extra hour worked beyond their regular work hours. On May 1, 1974, an amendment to the Fair Labor Standards Act became effective which raised a question whether the FLSA then applied to the Alabama National Guard. Because there was no money available in the budget to pay overtime compensation a decision was made to eliminate all overtime in the entire Alabama National Guard technician work force (Comp. Exh. 6). In accordance with this decision, Major Dawson, Personnel Management Specialist, called a meeting of the presidents of three NFFE Locals (Henry O. Rushing, Local 1730; Carl Slattery, Local 1706; and Jerry Daily, Local 1445) (Res. Exh. 7), to discuss the impact of the decision to eliminate overtime work. Sgt. Slattery, President of Local 1706, credibly testified that the necessity for split shifts was discussed; that Respondent would "run a duty roster" (Tr. 267)

Sgt. Rushing stated that at the meeting of June 13, 1974, Major Dawson informed the three presidents that as of July 1, 1974, there would be strict adherence to a 40 hour work week. After the meeting of June 13, 1974, the Adjutant General disapproved the July 1, 1974, effective date for the elimination

of overtime and ordered the notification (Comp. Exh. 6) to be issued June 14, 1974, effective June 17, 1974. Pursuant to the notification given at the meeting of June 13, 1974, a roster was placed on the bulletin board of AASF #1 on July 8, 1974, for assignment of employees to work Wednesdays and Fridays from 1400 to 2230 beginning Wednesday, June 10, 1974. The roster initially was prepared as a duty roster with all employees being scheduled on a rotation basis. About two weeks later, Sgt. Burton came to Major Caylor and requested that only WG-11s be assigned to night duty. Major Caylor agreed and on July 22, 1974, a second roster was prepared on which only WG-11 employees were assigned. Still later, Sgt. Burton asked Major Caylor if "Broadway volunteers ... to operate the fuel do you have any objections?" and Major Caylor said he did not and Mr. Broadway thereafter volunteered to work every Wednesday and Friday night (Tr. 210).

B. Conclusions. the decision of the Adjutant General to preclude all technicians from working more than forty (40) hours during any one workweek was a decision by Agency Headquarters, applicable uniformly to more than one subordinate activity, and was not subject to negotiation at the local level. 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. 3/ A meeting of the Local Union President to discuss the impact of the decision of the Adjutant General was held on June 13, 1974, prior to formal issuance of the decision, at which time the necessity for split shifts to cover night flying was discussed. The decision to establish split shifts, even if it is assumed that actual implementation by AASF #1 made it a decision of AASF #1, was, nevertheless, a reserved right of management within the meaning of Section 11(b) and 12 of the Executive Order and Respondent was not obligated to bargain about the decision itself. As noted, Complainant was advised on June 13, 1974, of the intent to establish split shifts. Complainant requested no further meeting to confer concerning either the impact of the Adjutant General's

3/ Under the circumstances, it is neither necessary nor proper to pass upon the authority of the Adjutant General; but, see, 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).

decision or the announced intent to establish split shifts and, in accordance with the discussion of June 13, 1974, Respondent posted the first duty roster on July 8, 1974, for split shifts beginning July 10, 1974. Following the posting of this duty roster, Complainant requested no meeting to confer until about July 22, 1974, when a representative of Complainant requested that WG-10 employees be excluded, to which request Respondent agreed. Later, Complainant requested a further change to permit a WG-10 employee to volunteer for the late shift, to which Respondent again agreed. Complainant was given prior notice of the decision of the Adjutant General, the necessity for establishment of split shifts, and the intention to assign employees to the late shift by duty roster. Complainant, with ample opportunity to request further bargaining or consultation with respect to the impact and implementation of the decision, failed to do so and Respondent did not refuse to consult, confer, or negotiate in violation of Section 19(a)(6) of the Executive Order by posting, pursuant to the notice and discussion of June 13, 1974, the duty roster on July 8, 1974. Department of Air Force, Vandenberg Air Force Base, A/SLMR No. 350 (1974); Department of Air Force, Norton Air Force, A/SLMR No. 261 (1973). Complainant, with notice of the posting of duty roster on July 8, 1974, requested no bargaining or consultation with respect thereto prior to the effective date of assignment thereunder, July 10, 1974. Thereafter, Respondent did meet and confer, upon request, with Complainant concerning the assignment of employees to the late shift on Wednesdays and Fridays. Accordingly, Respondent did not at any time engage in conduct in violation of Section 10(e), or of 19(a)(1), (5) or (6) of the Executive Order.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1), (5) and (6) and Section 10(e) 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: January 28, 1976
 Washington, D.C.

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

GENERAL SERVICES ADMINISTRATION,
 REGION 4
 A/SLMR No. 661

This case involves an amended petition filed by Laborers International Union of North America, Local 700, AFL-CIO (Petitioner) seeking an election in a unit of all nonprofessional employees of General Services Administration, Region 4 (Activity) on duty at Raleigh, North Carolina. The incumbent labor organization, the National Alliance of Postal and Federal Employees, Local 324 (Intervenor) and the Activity challenged the timeliness of the petition as amended at the hearing. In this regard, they contend that the amended petition significantly altered the scope of the unit sought and so changed the issues involved as to make it, in effect, a totally new petition which was untimely with regard to the "open period" in the parties' negotiated agreement. In addition, the Activity asserts that the proposed unit is inappropriate, arguing that anything less than a residual, region-wide unit would result in fragmentation and would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary concluded that the petition, as amended at the hearing, was timely filed, and that the unit sought is appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that the amendment to the petition did not significantly alter the character or scope of the unit originally sought, but constituted a minor addition to conform the petitioned for unit to the certified unit already in existence. Further, noting particularly the bargaining history in the petitioned for unit, the Assistant Secretary found that such unit encompasses employees who share a clear and identifiable community of interest separate and distinct from other employees of the Region, and will promote effective dealings and efficiency of agency operations. In this latter regard, he noted that the Activity addressed itself primarily to the merits of a residual, region-wide unit, rather than adducing evidence specifically related to the impact of the proposed unit on effective dealings and efficiency of agency operations. Nor did the Activity adduce specific countervailing evidence as to any lack of effective dealings and efficiency of agency operations experienced with respect to the existing exclusively recognized unit which has been covered by a series of negotiated agreements.

Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 4

Activity

and

Case No. 40-6705(RO)

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 700, AFL-CIO

Petitioner

and

NATIONAL ALLIANCE OF POSTAL AND
FEDERAL EMPLOYEES, LOCAL 324

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert F. Woodland. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ At the hearing, the Hearing Officer denied the request of the Activity and the Intervenor to adjourn the hearing in order to allow them time prepare their position that the unit sought by Petitioner, as amended at the hearing, was inappropriate. As a result of the Hearing Officer's ruling, the Intervenor informed the Hearing Officer that, while it desired to remain in the hearing room, it would not participate in the proceedings. The Hearing Officer thereupon ruled that the Intervenor could not remain in the hearing room unless it participated in the proceedings. The Intervenor then left the hearing room. While I find that this latter ruling of the Hearing Officer to be in error, under the circumstances, I do not find such error to have been prejudicial to the Intervenor. Thus, prior to the Hearing Officer's ruling the Intervenor had clearly indicated its unwillingness or inability to contribute further to the proceedings in any meaningful manner. Moreover, it would appear to be inappropriate for an incumbent intervenor to argue that the unit it currently represents is not appropriate for the purpose of exclusive representation under the Order. I do not find, however, that the Intervenor's withdrawal from the hearing under the above circumstances could reasonably be construed to indicate that the Intervenor had clearly and unequivocally disclaimed interest in representing the employees in its unit or that it intended to withdraw its intervenor status in this matter.

Upon the entire record in this case, including the Petitioner's brief, 2/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, the Laborers International Union of North America, Local 700, AFL-CIO, seeks an election in a unit of all employees of the Activity on duty in Raleigh, North Carolina, excluding management officials, supervisors, professional employees, employees engaged in Federal Personnel work in other than a purely clerical capacity and guards. 3/ The Activity, General Services Administration (GSA), Region 4, contends that the proposed unit is inappropriate, arguing that anything less than a residual, region-wide unit would result in fragmentation and would not promote effective dealings and efficiency of agency operations. Additionally, the Activity and the incumbent Intervenor, the National Alliance of Postal and Federal Employees, Local 324, challenge the timeliness of the subject petition. In this regard, they contend that the amended petition significantly altered the scope of the unit sought and so changed the issues involved as to make it, in effect, a totally new petition which was untimely with regard to the "open period" in the parties' negotiated agreement.

The record discloses that the Activity, which encompasses eight southeastern states, is headquartered in Atlanta, Georgia, and is administered by a Regional Administrator. It is composed of four divisions, the Public Buildings Service, the Automated Data and Telecommunications Service, the National Archives and Records Service, and the Federal Supply Service, each of which is headed by a Regional Commissioner. The Region is administratively subdivided into approximately 100 field locations, one of which is the administrative component involved herein. Authority runs directly from the Regional Administrator, through the Regional Commissioner, to the individual field locations. The Activity has approximately 17 bargaining units throughout the Region, most of which encompass a single field location. In 1970, the Intervenor was certified to represent the unit sought, and on February 12, 1971, the parties entered into a one-year negotiated agreement containing an automatic yearly renewal clause.

The record reveals that the Petitioner herein intended to petition for the same unit that is currently represented by the Intervenor and that it inadvertently failed to include six employees who work at a location separate from where the majority of the unit employees are located. 4/ The amended petition merely added the six employees to the

2/ The Activity's brief was received untimely by the Assistant Secretary and, therefore, was not considered. The Intervenor did not file a brief.

3/ The claimed unit appears as amended at the hearing.

4/ The Petitioner's original petition sought a unit of all employees working for the GSA in the Federal Building in Raleigh, North Carolina at 310 Newborn Avenue, excluding management officials, supervisors, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity and guards.

unit sought. 5/ The record shows further that the Region has a centralized personnel function which provides common personnel policies and regulations for its employees, including labor relations, equal employment opportunity programs, employee benefits, and training programs.

Based on all the foregoing, I find that the subject petition, as amended, was timely filed. Thus, in my view, the amended petition did not significantly alter the character or scope of the originally petitioned for unit. Rather, the evidence establishes that the amendment constituted a minor addition to the scope of the unit and was made to conform the petitioned for unit to the certified unit already in existence. Further, noting particularly the bargaining history in the petitioned for unit, I find that such unit encompasses employees who share a clear and identifiable community of interest separate and distinct from other employees of the Region, and that it will promote effective dealings and efficiency of agency operations. In this latter regard, it was noted that the Activity addressed itself primarily to the merits of a residual, region-wide unit, 6/ rather than adducing evidence specifically related to the impact of the proposed unit on effective dealings and efficiency of agency operations. Further, it did not adduce specific countervailing evidence as to any lack of effective dealings and efficiency of agency operations with respect to the exclusively recognized unit currently in existence which has been covered by a series of negotiated agreements.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Services Administration employees located in Raleigh, North Carolina, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

DIRECTION OF ELECTION

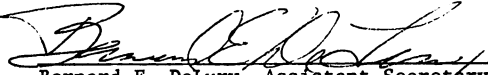
An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military service who appear

5/ These six employees are GSA Motor Pool personnel, all of whom are located in another building a short distance from the Federal Building.

6/ It should be noted, however, that generally residual units are those which encompass groups of employees omitted from previously established bargaining units, provided that they include all unrepresented employees of the type covered by the petition.

in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by the Laborers International Union of North America, Local 700, AFL-CIO; by the National Alliance of Postal and Federal Employees, Local 324; or by neither.

Dated, Washington, D.C.
June 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

June 11, 1976

A/SLMR No. 662

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

UNITED STATES ARMY TANK
AUTOMOTIVE COMMAND,
WARREN, MICHIGAN
A/SLMR No. 662

This case involved an unfair labor practice complaint filed by Local 1, National Government Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to meet and confer with the Complainant regarding the impact on unit employees of the contracting out of certain custodial services. In this regard, the Complainant contended that it was not notified of the contracting out of certain custodial services which were being performed by unit employees, and was not afforded an opportunity to meet with the Respondent to discuss the impact of this decision. The Respondent contended that the decision to contract out work is privileged under Section 12(b) of the Order and that the duty to meet and confer on the impact of this decision extends only to circumstances where the employees are adversely affected. It further contended that, although the employees involved herein were not adversely affected, the Complainant was given ample notification of the solicitation of bids for the contracting out of custodial services and had an opportunity to request bargaining on the impact of this decision, but never attempted to do so.

The Administrative Law Judge found that the Respondent's conduct herein was violative of Section 19(a)(1) and (6) of the Order. The Assistant Secretary noted that he had been advised that, subsequent to the filing of the complaint in the subject case, a representation petition was filed by the American Federation of Government Employees, Local 1658, AFL-CIO (AFGE), and the Complainant affirmatively disclaimed interest in representing the employees in its units at the Respondent Activity. Following a consent election, held on March 28, 1976, the AFGE was certified on April 9, 1976, as the exclusive representative of a unit encompassing the employees in the instant case.

Under these circumstances, the Assistant Secretary concluded that the issues raised in the instant complaint had been rendered moot. Accordingly, he ordered that the complaint be dismissed.

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

UNITED STATES ARMY TANK
AUTOMOTIVE COMMAND,
WARREN, MICHIGAN

Respondent

and

Case No. 52-5931(CA)

LOCAL 1, NATIONAL GOVERNMENT
EMPLOYEES UNION

Complainant

DECISION AND ORDER

On February 26, 1976, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, the entire record in the subject case, and for the reasons set forth below, I find that dismissal of the instant complaint is warranted.

The instant complaint alleged essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to meet and confer with the Complainant regarding the impact on unit employees of the contracting out of certain custodial services.

I have been advised administratively that, subsequent to the filing of the unfair labor practice complaint in the subject case, a representation petition was filed by the American Federation of Government Employees, Local 1658, AFL-CIO (AFGE), and the Complainant affirmatively disclaimed interest in representing the employees in its units at the Respondent Activity. Following a consent election, held on March 28, 1976, the AFGE was certified on April 9, 1976, as the exclusive representative of a unit encompassing the employees in the instant case.

Under these circumstances, I find that the issues raised by the instant unfair labor practice complaint concerning the obligation of the Respondent to meet and confer with the Complainant with respect to the impact on unit employees of the Respondent's decision to contract out certain custodial services have been rendered moot. Accordingly, I shall order that the complaint in the instant case be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 52-5931(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



..... :
In the Matter of :
 :
United States Army Tank Automotive :
Command, Warren, Michigan :
Respondent :
and : Case No. 52-5931
Local 1, National Government :
Employees Union, :
Complainant :
..... :

Morton H. Barris, Legal Officer
U.S. Army Tank Automotive Command
Warren, Michigan 48090
For the Respondent

Philip J. Simmons, President
Local 1, National Government Employees
Union
25614 Lexington Lane
Roseville, Michigan 48066
For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

Recommended Decision and Order

Pursuant to a Notice of Hearing on complaint dated May 14, 1975, and an Order issued July 8, 1975, by the Acting Assistant Regional Administrator for Labor Management Services Administration, U.S. Department of Labor, Chicago Region, a hearing in the above captioned matter was held before the undersigned on October 30, 1975 in Detroit, Michigan.

This proceeding under Executive Order 11491, as amended, (herein called the Order) emanated from a complaint filed on February 2, 1975, and a supplement thereto dated February 11, 1975, by Philip J. Simmons, President, on behalf of Local No. 1, National Government Employees Union (hereafter referred to as Complainant and/or Union) against the Department of the Army,

U.S. Army Tank Automotive Command, Warren, Michigan, (herein called the Respondent). It was alleged that the Respondent violated Sections 19(a)(1)(4)(5) and (6) of the Order. A letter from the Complainant dated April 9, 1975 was accepted as authorization to withdraw the alleged 19(a)(4)(5) violations and the Notice of Hearing referenced only the 19(a)(1) and (6) alleged violations of the Order for consideration at the hearing.

The position of the Complainant as alleged in the complaint and subsequently clarified in part by its President is in effect as follows 1/:

The Respondent by contracting the custodial service out at TACOM 2/ is destroying one of our units where we have exclusive recognition; employees are being weeded out by not filling vacancies and management has failed and refused to consult and notify us and has no intention of living up to its negotiated agreement with the Union. 3/ During the month of May 1974, the Respondent allowed the Civilian Contractor to take over the custodial services in Building 200-D without notifying the Union and on December 23, 1974, the Union was advised the contract work would be extended to include the work in Building 200-C area which was currently being done by Civil Service employees. Violations of Section 19(a)(1) and (6) of the Order are alleged to have resulted from the Respondents actions.

The Respondent was represented by counsel at the hearing and the Complainant by its President, Philip J. Simmons. The parties were afforded full opportunity to be heard, to adduce evidence bearing on the issues, and, to present oral argument and file briefs in support of their positions. Only the Respondent filed a timely brief for consideration of the undersigned.

1/ See Transcript pp. 7 and 8.

2/ U.S. Army Tank Command, Warren, Michigan.

3/ Transcript pp. 7 and 8.

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

I

The Complainant Union is and has been at all times material herein the recognized exclusive representative of the custodial unit at Respondents U.S. Army Tank Installation, Warren, Michigan. 4/ Pursuant to an option clause in the negotiated agreement executed in 1972, the Respondent extended the term of the contract to October 31, 1974 and then to March 31, 1975. The current contract in effect covers the period April 1, 1975 through March 31, 1976.

II

In 1972, the Respondent after competitive bids were received, awarded Daelyte Services a contract for supplemental custodial services from July 1, 1972 through June 30, 1973. In May 1973 labor organization representatives including the President of Complainant Union were informed that as vacancies occurred within the custodial section, the spaces would be utilized in other sections of the Facilities Engineering Division or deleted as dictated by the budget and measuring constraints, at its installation. Again, after competitive bidding, the same company was awarded the custodial contract for the period July 1, 1973 through June 30, 1974. By way of the exercise of options provided in the contract extensions were approved for the periods July 1, 1974 through October 31, 1974 and November 1, 1974 through March 31, 1975. The current contract approved after competitive bidding and Notice to Complainant was the period from April 1, 1975 through March 31, 1975.

With the option beginning on July 1, 1974 the custodial services previously performed by Civil Service employees in Building 200-D were assumed by the Daelyte Services Company. Respondent management official, Robert J. Lang, testified that he did not notify the Complainant of the change regarding

4/ Complainant also represents Firefighter and Climatic Units at the installation but these are not involved in this proceeding.

withdrawal of custodial services performed by Civil Service employees in Building 200-D and transfer of same to Daelyte Services. The record does not reveal that Complainant President or a representative of the Union was notified in writing of the change but according to Colonel Atkinson, Respondent official, the matter was discussed at monthly meetings during the summer of 1974. Written inquiry in October 1974 was made to ascertain or verify the circumstances as to the matter and that services in Building 200-D had been contracted out.

I find that the decision in May 1974 to contract and transfer the custodial services performed by Civil Service employees in Respondents' Building 200-D to the private contractor, Daelyte Services, effective July 1, 1974, was a unilateral one made by Management without advance Notice to the Union.

III

Invitations for bids on the custodial contract at Respondents aforementioned installation were issued on February 11, 1975. Pursuant to the bids solicited and received the current contract, DAAE 07-75-C-0527 was awarded on March 13, 1975, to cover the period April 1, 1975 through March 31, 1976. The contract provided for custodial services in Building 200-C as well as other areas that were previously under contract.

The evidence clearly establishes that Complainant was advised by letter on December 23, 1974, that solicitation for bids on a custodial contract to include Building 200-C would issue shortly. Prior to issuance of the invitation for bids a review is made by the Service Contract Review Committee. A member of the Complainant Union was on the Service Contract Review Board and was entitled to express opinions at the Committee sessions and ask questions. The proposed custodial contract was reviewed and discussed at the January 28 and February 6, 1975 Committee meetings. It was noted at the January 28, 1975 meeting that Building 200-D had been added for contract custodial service in the middle of the then current contract and Building 200-C would also be added or incorporated in the new contract. A representative of Complainant Union was present at each meeting and copies of the minutes of the meeting were distributed to Local Union President. The record does not disclose any request by the Complainant Union to confer or consult with the Respondent as to the proposed solicitation that subsequently issued on February 11, 1975 or with regard to the contract awarded on March 13, 1975.

Article V, Section G, of the negotiated agreement between the parties provides:

"The Employer agrees to give the Union advance Notice (whenever possible a minimum of 30 working days) of its intention to solicit bids for 'contract work' in which members of these exclusive units are performing the same type of work. Such advance Notice will be presented in writing, giving a full explanation of the reasons for desiring the contract services. The Union will be afforded the opportunity to express its views before the solicitation is issued."

I find that the decision made in December 1974 to contract and transfer the custodial services performed by Unit employees in Building 200-C effective April 1, 1975 was a unilateral one made by management after timely advanced written notice was given to the Union pursuant to the negotiated agreement.

IV

It is apparent that the elimination of a building from a unit workshift operation is a matter "affecting working conditions" within the meaning of Section 11(a) of the Order. However, Section 11(b) of the Order relieves an agency from the obligation to "meet and confer" in 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 of employees assigned to an organization or unit work project or tour of duty..." I find that the elimination of Buildings 200-D and C from the unit workshift operation was privileged under Section 11(b) of the Order and therefore, the Respondent was under no obligation to meet and confer or otherwise bargain with the Union on its decisions to eliminate the two aforesaid buildings from the unit workshift operations and to contract such work out. However, the language of Section 11(b) of the Order provides that the duty to confer, consult, or negotiate enforced by Section 19(a) (6) may be imposed on an activity regarding the impact of an action which is otherwise non bargainable. 5/ This principle

5/ Section 11 a and b of the Order provides:
(continued on next page)

has been recognized by the Assistant Secretary and the Federal Labor Relations Council in several cases, see for example, Immigration and Naturalization Service, FLRC No. 70A-10. (April 15, 1971), Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971), Griffiss Air Force Base, FLRC No. 71A-30 (April 9, 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).

5/ Continued.

"(a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

Counsel for Respondent in his brief states that Section 12(b) "of the Order reserves to Management on a continuing basis the right to decide what method, means and personnel will be used to accomplish its work. Any Union proposal that would negate this right with respect to the work of the unit involved violates Section 12(b)(5) of the Order (Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, FLRC No. 56, June 29, 1973; GERR 21:7093. The Federal Labor Relations Council in the Tidewater decision examined the precise scope of rights reserved to Management under Section 12(b)(5) of the Order. The Order and Union Agreement having reserved to Management the expressed right to determine the method, means and personnel by which operations are to be conducted, the Union's contention of failure to consult/confer could only apply to the impact on the work force resulting from Management's decision. It has been testified by Mr. Lang "...that contracting out for custodial services did not adversely affect the custodial personnel."

Contra to Respondents position, I do not find that the negotiated contractual provision requiring the Respondent to give advance Notice to the Union of work to be contracted precluded it from determining the methods, means, and personnel by which its operations were to be conducted, or, was otherwise violative of Section 12(b)(5) of the Order as alleged. 6/ The contractual provision required that the Union be informed in advance of unit work that would be contracted out. Obviously the contracting out of unit work in Building 200-D necessitated realignment of work schedule and time to other buildings and this constitutes impact affecting working conditions. While the decision to eliminate Building 200-D from the unit workshift operation was privileged and the Respondent was under no obligation to meet and confer or otherwise bargain with the Union, I conclude that the Respondent had by agreement an obligation to bargain on the impact of its decision on those employees adversely affected and refusal to do so was a violation of the Order.

6/ Section 12(b) of the Order provides that "Management officials of the agency retain the right, in accordance with applicable laws and regulations ... (5) to determine the methods, means, and personnel by which operations are to be conducted."

In considering Multi-Issue Negotiability Questions, the Council in (FLRC No. 74A-48, June 26, 1975) set forth the principle that: "While there is no requirement to negotiate on matters within the scope of 11(b), the Council states, these matters may be negotiated if management so chooses. And once they have been, it cannot later be claimed that the resulting agreement does not conform to the Order." 7/ The negotiated agreement in this case provided for 30 days advanced written notice to Complainant of management's intention to solicit bids for contract work to enable it to express its views before solicitation was issued. Having so agreed, I conclude that the solicitation of bids made in connection with the transfer of the Activity's Unit custodial services in Building 200-D to the Daelyte Corporation effective July 1, 1974 without notification to the Complainant Union constituted a breach of the negotiated agreement and a violation of Section 19(a)(6) of the Order. I further find that such action by the Respondent tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order, and therefore, is also violative of Section 19(a)(1) of the Order.

With respect to the transfer of custodial services in Building 200-C to a private contractor effective in April 1975, the Union was afforded timely Notice of the solicitation bids in accordance with the negotiated agreement and I conclude there was no violation of the agreement or Section 19(a)(6) and Section 19(a)(1) of the Order by reason of Respondents actions.

Recommendations

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 203.23(a) of the Rules and Regulations, 29 C.F.R. 203.23(a), I recommend that: (1) the motion to dismiss made at the close of Complainants proof and renewed at the end of the hearing be denied; (2) the unfair labor practice complaint relating to transfer of custodial services in Building 200-C to a private contractor be dismissed; and (3) that the Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.25(b) of the Rules and Regulations, 29 C.F.R. 203.25(b), the Assistant Secretary of Labor for Labor Management Relations hereby orders that United States Army Tank Automotive Command, Warren, Michigan, shall:

7/ 4 FLMC 75-17, August 29, 1975.

1. Cease and desist from:

Failing to notify Local 1, National Government Employees Union, or any other exclusive representative, with respect to the contracting out of custodial services or other operations in buildings and areas at the Respondent installation, and to afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

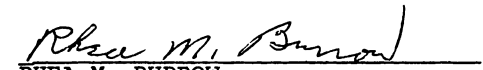
2. Take the following affirmative action in order to effectuate the purpose and provisions of Executive Order 11491, as amended

(a) Notify Local No. 1, National Government Employees Union, or any other exclusive representative, of any intended contracting out of custodial services or other operations and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on unit employees adversely affected by such actions.

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

(c) Pursuant to Section 203.26 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:

26 FEB 1976


RHEA M. BURROW
Administrative Law Judge

Dated:
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 fail to notify Local No 1, National Government Employees Union, or any other exclusive representatives, with respect to the contracting out of custodial services or other operations, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

WE WILL notify Local 1, National Government Employees Union, or any other exclusive representative, of any intended contracting out of custodial services or other operations and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 1906 Washington Boulevard Building, 234 State Street, Detroit Michigan 48226

June 15, 1976

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

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION DATA
PROCESSING CENTER,
AUSTIN, TEXAS
A/SLMR No. 663

On January 8, 1976, the Federal Labor Relations Council (Council) requested that the Assistant Secretary further consider and clarify two of the findings in A/SLMR No. 523 in light of the Council's decision in Vandenberg AFB 4392d Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435, FLRC No. 74A-77 (August 8, 1975), and two other findings in A/SLMR No. 523 in light of the Council's decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80 (October 24, 1975).

With respect to the two findings of the Assistant Secretary in which the Council requested reconsideration and clarification in light of its Vandenberg decision, the Assistant Secretary found that the principles enunciated in Vandenberg did not require a change in the previous unfair labor practice findings. Thus, the conduct involved herein was not, upon reconsideration, determined to be isolated, de minimis, or fully remedied. Accordingly the Assistant Secretary reaffirmed the previous unfair labor practice findings with respect to these two matters.

With respect to the two findings of the Assistant Secretary in which the Council requested further consideration and clarification in light of its Fallon decision, the Assistant Secretary concluded that the principles enunciated in Fallon did not require a change in one of the unfair labor practice findings made in A/SLMR No. 523. Thus, the Assistant Secretary noted that this finding was consistent with the principles enunciated by the Council in Fallon—that direct communication by agency management with employees be judged independently and a determination made as to whether a particular communication constitutes an attempt by agency management to negotiate or deal directly with unit employees or to threaten or promise benefits to employees. As it was found that the Respondent's conduct tended to improperly undermine the exclusive representative, the Assistant Secretary reaffirmed the earlier finding of a violation of Section 19(a)(1) made in A/SLMR No. 523. However, with respect to the second finding in which the Council requested reconsideration and clarification in light of its Fallon decision, the Assistant Secretary concluded that the principles enunciated by the

Council in Fallon required a change in the earlier unfair labor practice finding. Thus, the evidence did not establish that the communication involved constituted an attempt by the Respondent to deal or negotiate directly with unit employees to threaten or promise benefits to employees, or to undermine the Complainant in any other respect. Accordingly, the Assistant Secretary ordered that the previous unfair labor practice finding in this regard be reversed and that the unfair labor practice complaint with respect to this matter be dismissed.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION DATA
PROCESSING CENTER,
AUSTIN, TEXAS

Respondent

and

Case Nos. 63-4716(CA)
63-4717(CA) and
63-4815(CA),
A/SLMR No. 523,
FLRC No. 75A-80

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, IND., LOCAL 1745

Complainant

SUPPLEMENTAL DECISION AND ORDER

On June 24, 1975, the Assistant Secretary issued his Decision and Order in A/SLMR No. 523, in which, among other things, he adopted Administrative Law Judge Salvatore J. Arrigo's findings that: (1) the requirement placed on the Complainant's steward by a supervisor that she report to the supervisor each time she left the work area constituted a violation of Section 19(a)(1) of the Order in Case No. 63-4716(CA); (2) by failing to take adequate measures to disassociate itself from the implication that it was lending support to a decertification effort by allowing the use of its mail service for the return of signed decertification leaflets, the Respondent violated Section 19(a)(1) of the Order in Case No. 63-4717(CA); (3) by a supervisor's reading of a letter to employees (the letter had previously been sent by the Complainant to the Respondent), which action indicated to employees that their confidential dealings with their exclusive representative might not be kept confidential, the Respondent violated Section 19(a)(1) of the Order in Case No. 63-4716(CA); and (4) by a supervisor's circulating among certain employees a memorandum entitled, "Status of Agreement with NFFE Local 1745", the Respondent improperly communicated directly with employees regarding a matter related to the collective bargaining relationship and, therefore, violated Section 19(a)(1) and (6) of the Order in Case No. 63-4815(CA).

On January 8, 1976, the Federal Labor Relations Council (Council) requested that the Assistant Secretary further consider and clarify the first two above-noted findings in light of the Council's decision in Vandenberg AFB, 4392d Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435, FLRC No. 74A-77 (August 8, 1975), and the latter two above-noted findings in light of the Council's decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80 (October 24, 1975). The Council noted, in this regard, that it would hold in abeyance its decision on acceptance or denial of the present appeal as well as its decision on the agency's request for a stay of the Assistant Secretary's order pending the issuance of the Assistant Secretary's decision as clarified. 1/

In the Vandenberg decision, cited above, the Council found that the Respondent Activity therein had not violated Section 19(a)(1) and (6) of the Order by unilaterally terminating a negotiation session with the exclusive representative because the Respondent had ceased to engage in the allegedly improper conduct immediately after it occurred and thereafter sought to meet its obligations under the Order. In this regard, the Council indicated that isolated conduct which briefly interrupted negotiations and which had a de minimis effect on negotiations should not warrant a finding of a violation especially where no benefit would accrue from that finding or the resultant remedial order.

Under all of the circumstances, and after careful reconsideration of the decision in A/SLMR No. 523 and the Council's decision in Vandenberg, I reaffirm the previous finding that the Respondent's conduct as set forth in item (1) above was violative of Section 19(a)(1) of the Order. In my view, the matter involved herein is clearly distinguishable from the incident involved in the bargaining negotiations in the Vandenberg case. Thus, in A/SLMR No. 523, the Assistant Secretary adopted the Administrative Law Judge's finding that the "Respondent's overall conduct in the matters litigated before me were [sic] not isolated, de minimus [sic] or fully remedied and accordingly the violation found herein requires a remedial order." Further, with respect to the finding that the Respondent's conduct was not isolated, it was noted particularly that the supervisor who placed the discriminatory reporting requirement on the union steward was involved in a number of the other unfair labor practice complaints and findings of violation involved in this proceeding. Nor, under the circumstances herein, do I view a clear violation of a Section 1(a) right, such as a discriminatory reporting requirement placed upon a union representative, to be de minimis in nature. Indeed, I consider a remedial order to be necessary herein, regardless of any

1/ Both the Complainant and the Respondent filed supplemental briefs with the Assistant Secretary in connection with the further consideration and clarification requested by the Council of the subject cases.

subsequent informal settlement between the parties, because, in my view, to effectuate the purposes of the Order other unit employees should be clearly informed that the Respondent will not engage in such discriminatory conduct and such acknowledgement by the Respondent hopefully will act as a deterrent to any future similar occurrences.

As to the second finding in A/SLMR No. 523 with respect to which the Council requested reconsideration and clarification in light of its decision in Vandenberg, I find that the application of the principles therein does not require a change in the previous unfair labor practice finding. Thus, it was noted that the unfair labor practice finding in A/SLMR No. 523 was not that the Respondent violated the Order by its failure to prevent the use of its internal mail system for the return of signed decertification leaflets, but, rather, that the Respondent violated the Order by failing to promulgate a disavowal of the impression to other employees that it was lending support to the decertification effort through the use of its internal mail system for the return of signed decertification leaflets. In clarifying this finding, as requested by the Council, it was noted particularly that each decertification leaflet had an internal mail routing number alongside each employee's name appearing on the leaflets; that one of the employees whose name appeared on the leaflet as a sponsor was found to be a supervisor; ^{2/} that at least some of the original leaflets were returned through the internal mail system if only for one day; and that, while some of those whose names appeared on the leaflet were admonished, none of those who used the internal mail system to return a signed leaflet were so admonished. Under all of these circumstances, I reaffirm the previous unfair labor practice finding in A/SLMR No. 523, that the Respondent's failure to take timely and adequate measures to disassociate itself from the implication that it was lending support to the decertification effort violated Section 19(a)(1) and warranted an appropriate remedial order.

As noted above, the Council requested reconsideration and clarification of the Assistant Secretary's findings in items (3) and (4) above in light of its decision in the Fallon case. In this regard, the Council, in its letter requesting reconsideration and clarification of these two findings, noted that in sustaining the Assistant Secretary's decision in Fallon,—i.e., that the particular communications by agency management with unit employees in that proceeding were violative of Section 19(a)(1) and (6) of the Order,—it had enunciated general principles for judging whether specific communications are permissible or improper under the Order. In the Council's view, these general principles are relevant to the above-noted findings in items (3) and (4) above.

^{2/} The involvement of this supervisor was the subject of a related issue in the same unfair labor practice complaint which was not resubmitted by the Council to the Assistant Secretary for reconsideration and clarification.

With respect to the finding in item (3) above, which involved a supervisor's reading to unit employees a letter containing an Equal Employment Opportunity complaint filed by the Complainant with the Respondent, I find, as did the Assistant Secretary in A/SLMR No. 523, that the conduct by the supervisor was improper and, therefore, violative of Section 19(a)(1) of the Order under the principles enunciated in Fallon. Thus, the Council held in Fallon that each communication must be "... judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees." In the instant situation, the Administrative Law Judge's conclusion, and the Assistant Secretary concurred, that under the circumstances involved, the supervisor's reading of the Complainant's letter to his employees, which revealed to all present the names of those who had filed an Equal Employment Opportunity complaint through the exclusive representative, inherently was a breach of confidentiality which, "...tended to engender apprehension and indeed hostility to the Union as well as dissuade employees from seeking Union assistance or consulting with the Union with regard to employment related matters in fear that the matter would become public or fall into the Activity's hands without their consent." (footnote omitted). In my view, the Administrative Law Judge's theory of violation in the instant case, adopted by the Assistant Secretary, is consistent with the principles enunciated by the Council in the Fallon decision. Accordingly, I conclude, in agreement with the Assistant Secretary's finding in A/SLMR No. 523, that the Respondent's conduct tended to improperly undermine the Complainant in violation of Section 19(a)(1) of the Order.

Finally, with respect to item (4) noted above, in which the Council requested reconsideration and clarification in light of its Fallon decision, I find, consistent with the principles enunciated by the Council in Fallon, that the communications involved were permissible under the Order, and, therefore, I shall reverse the finding of violation in this regard made in A/SLMR No. 523. Prior to the Council's decision in Fallon, the Assistant Secretary had indicated that direct communications with employees by agency management regarding the collective bargaining relationship, absent evidence of waiver, were violative of Section 19(a)(1) and (6) of the Order. Under this standard, the circulation of the Status of Agreement memorandum to its employees by a supervisor was viewed as being violative of the Order. However, as there was no evidence presented herein that the circulation of the memorandum constituted an attempt by the Respondent to deal or negotiate directly with unit employees, to threaten or promise benefits to employees or to undermine the Complainant in any other regard, I conclude that such a finding is not consistent with the principles enunciated by the Council in Fallon. In this regard, it was noted particularly that the memorandum involved, which was addressed to the Respondent's Division Chiefs, was characterized by the testimony of an official of the Complainant as an accurate statement of the parties' positions with respect to the negotiated

agreement. Accordingly, under these circumstances, I shall order that the unfair labor practice complaint in Case No. 63-4815(CA), alleging violation of Section 19(a)(1) and (6) of the Order, be dismissed.

Based on the Assistant Secretary's findings in A/SLMR No. 523 and my findings herein, I hereby modify the remedial order and notice to all employees issued in A/SLMR No. 523, as follows:

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing union steward Martha Boehm, or any other union steward, in the exercise of their right to assist a labor organization.

(b) Revealing to unit employees confidential or personal information received in the course of labor-management dealings with the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the Union's assistance.

(c) Partaking in, or lending support to, an effort to decertify the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative.

(d) Failing to take timely and adequate measures to disassociate the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, from the implication that it supports the decertification of the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of a decertification effort.

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

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

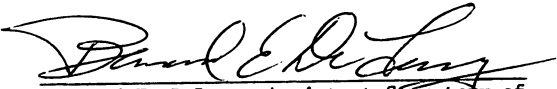
(a) Post at its facility at the Veterans Administration Data Processing Center, Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall

be signed by the Director, Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaints in Case Nos. 63-4718(CA), 63-4719(CA), 63-4720(CA), 63-4722(CA), 63-4760(CA) and 63-4815(CA) be, and they hereby are, dismissed in their entirety, and that the complaint in Case No. 63-4716(CA), insofar as it alleges a violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 15, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce union steward Martha Boehm, or any other union steward, in the exercise of their right to assist a labor organization.

WE WILL NOT reveal to unit employees confidential or personal information received in the course of labor-management dealings with the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the Union's assistance.

WE WILL NOT partake in, or lend support to, an effort to decertify the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative.

WE WILL NOT fail to take timely and adequate measures to disassociate the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, from the implication that it supports the decertification of the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of a decertification effort.

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

(Agency or Activity)

Dated _____ By _____
(Signature)

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

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



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 8, 1976

Honorable Paul J. Fasser, Jr.
Assistant Secretary of Labor for
Labor-Management Relations
Department of Labor, Room S-2307
200 Constitution Ave., NW.
Washington, D.C. 20210

Re: Veterans Administration, Veterans
Administration Data Processing Center,
Austin, Texas, A/SLMR No. 523, FLRC
No. 75A-80

Dear Mr. Fasser:

Your attention is called to the petition for review filed with the Council by the agency and the opposition thereto filed by the union in the above-entitled case. Copies of these case papers are enclosed herewith.

On August 8, 1975, the Council issued its decision in Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77 (August 8, 1975), Report No. 79, setting aside and remanding your decision in that case. In its decision therein, the Council concluded that in the circumstances presented, where the activity had ceased to engage in the allegedly improper conduct immediately after it occurred and thereafter sought to meet its obligations under the Order, a finding that an unfair labor practice had been committed was not warranted. In our opinion, the principles enunciated by the Council in its Vandenberg decision, and the rationale contained therein, are relevant to that part of Assistant Secretary Case No. 63-4716 (CA) wherein it was found that a supervisor violated section 19(a)(1) of the Order by requiring a union steward to report to him each time she left the work area, and to that part of Assistant Secretary Case No. 63-4717 (CA) wherein it was found that the activity, subsequent to the use of its internal mail system by employees seeking to decertify the union, violated section 19(a)(1) of the Order by failing to take adequate measures to disassociate itself from the implication that it had given its support to the decertification effort.

Further, on October 24, 1975, the Council issued its decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80 (October 24, 1975), Report No. 87, sustaining your decision that certain communications by agency management with unit employees concerning the collective bargaining relationship were violative of the Order, while enunciating general principles for judging whether specific communications are permissible or improper under the Order. In our opinion, the

-2-

general principles enunciated in the Council's Fallon decision are relevant to the instant case, in particular to that part of Assistant Secretary Case No. 63-4716 (CA) wherein it was found that a supervisor violated section 19(a)(1) of the Order by reading to employees under his supervision a letter sent by the union to the activity, and to Assistant Secretary Case No. 63-4815 (CA) wherein it was found that a supervisor, in violation of section 19(a)(1) and (6) of the Order, circulated to employees under his supervision a copy of a memorandum he had received which stated the respective positions of the union and the activity regarding the status of negotiations and the current effect of the recently expired agreement between the parties.

Accordingly, further consideration and clarification of your decision in the instant case is requested in light of the Council's decisions in the Vandenberg and Fallon cases. Following the issuance of your decision as clarified herein, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from the dates of service of such supplemental submissions to file respective responses thereto.

Pending the issuance of your decision as clarified and further submissions by the parties, the Council shall hold in abeyance its decision on acceptance or denial of the present appeal. Likewise, a decision on the agency's request for a stay of your order in this case is held in abeyance, and, in accordance with section 2411.47(d) of the Council's rules, such order shall continue to be temporarily stayed.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

Enclosures

cc: S. L. Shochet
VA

J. Cooper
NFFE

June 21, 1976

A/SLMR No. 664

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

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

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR RELATIONS BOARD
A/SLMR No. 664

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD

Respondents

and

Case No. 60-3035(CA),
A/SLMR No. 295,
FLRC No. 73A-53

DAVID A. NIXON

Complainant

SUPPLEMENTAL DECISION AND ORDER

In this Supplemental Report and Recommendation issued subsequent to the Assistant Secretary's Decision and Remand in A/SLMR No. 295 and the Federal Labor Relations Council's Decision on Referral of Major Policy Issues from the Assistant Secretary in FLRC No. 73A-53, the Administrative Law Judge concluded that the Complainant failed to prove by a preponderance of the evidence that the Respondents had violated Section 19(a)(1) and (4) of the Order. In this connection, the Administrative Law Judge found that the Complainant's engaging in protected activities played no part in the Respondents' June 1972, professional appraisal, which concluded that the Complainant was not well-qualified for promotion to the supervisory register.

On January 23, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, recommending dismissal of, among other things, the Complainant's allegations that the Respondents violated Section 19(a)(1) and (4) of the Order by virtue of alleged interference with the Complainant's exercise of his protected, "concerted" right to file exceptions and grievances under the negotiated agreement between the General Counsel of the National Labor Relations Board and the National Labor Relations Board Union, and to file charges under the Executive Order.

The Assistant Secretary agreed with the Administrative Law Judge that the Complainant did not prove violations of Section 19(a)(1) and (4) in that he failed to establish that he was discriminated against for engaging in protected activity under the Order. In this regard, the Assistant Secretary noted that, even if it were found that disparate and discriminatory treatment was visited upon Complainant, standing alone, this would not be violative of the Order. Thus, in order to find a violation of the Order, it must be shown that such disparate or discriminatory treatment was visited upon the aggrieved party because he had engaged in conduct protected by the Order. In the instant case, the Administrative Law Judge concluded that the Complainant had not established that he had been treated disparately or discriminatorily by the Respondents. Moreover, even assuming the treatment was deemed to be disparate or discriminatory, the Administrative Law Judge concluded that the evidence did not establish that it was meted out because the Complainant had engaged in protected activities.

In his Decision and Remand of August 6, 1973, ^{1/} the Assistant Secretary affirmed the Administrative Law Judge's findings that the Respondents had not violated the Order with respect to certain of the allegations set forth in the complaint. However, he noted that, in connection with the Administrative Law Judge's finding that the Complainant had not met his burden of proof in support of certain other allegations in the complaint, the record reflected that the Complainant had not been permitted to introduce into evidence the annual appraisal of a similarly situated employee, or any testimony as to the contents of such appraisal because of the document's alleged "confidential" nature. In this regard, the Assistant Secretary found that by denying the Complainant the opportunity to introduce evidence which might have shown alone, or in conjunction with other evidence, that the Complainant was treated in

Concurring with the Administrative Law Judge's conclusion that the Complainant had failed to prove that Respondents had engaged in conduct violative of the Order, the Assistant Secretary ordered that the complaint be dismissed.

^{1/} National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 295.

a disparate and discriminatory manner with respect to his June 1972 professional appraisal, the Administrative Law Judge committed prejudicial error. As, in the Assistant Secretary's view, the Complainant was improperly precluded from presenting evidence in support of certain of his allegations, the subject case was remanded to the Administrative Law Judge for further hearing.

Thereafter, as a result of certain motions filed by the Respondents, the Assistant Secretary issued an Order Denying Motion, Referring Cross-Motion and Response and Staying Remand in which, among other things, he referred to the Federal Labor Relations Council (Council) for decision certain major policy issues concerning the availability of an employee appraisal to another employee or to others in an unfair labor practice proceeding held pursuant to the Order. Upon receipt of the Civil Service Commission's interpretation of its directives concerning the major policy issues involved, the Council issued its Decision on the Referral of Major Policy Issues from the Assistant Secretary, 2/ wherein it was found that the Federal Personnel Manual: (1) prohibits an employee or his representative from seeing the appraisal of another employee, or adducing evidence thereon, in an unfair labor practice proceeding, but (2) permits the Assistant Secretary, his representative, and/or the Administrative Law Judge, in a proceeding under the Order, to review such an appraisal if it were necessary for the execution of official responsibility, and if done in a manner that maintains that appraisal's confidentiality.

In these circumstances, the Assistant Secretary vacated his Order Staying Remand and directed the Administrative Law Judge to reconsider his decision in the subject case in accordance with the Decision and Remand in A/SLMR No. 295, and with the Council's decision in FLRC No. 73A-53. A further hearing was held, and on November 10, 1975, the Administrative Law Judge issued his Supplemental Report and Recommendation finding that the Respondents had not engaged in conduct prohibited by Section 19(a)(1) and (4) of Executive Order 11491, as amended, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Supplemental Report and Recommendation and a supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the reopened hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Supplemental Report and Recommendation, and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge, as indicated herein.

2/ FLRC No. 73A-53.


Under all of the circumstances, I agree with the Administrative Law Judge's conclusion that the Complainant has failed to prove by a preponderance of the evidence that he was discriminated against for engaging in activities protected by the Order. As previously indicated in A/SLMR No. 295, not all disparate or discriminatory treatment of employees constitutes a violation of the Order. Thus, to find a violation of the Order, not only must the evidence reveal that an employee has been the victim of disparate or discriminatory treatment, but also that such treatment was visited upon him because he had engaged in conduct protected by the Order. 3/ In the instant case, the Administrative Law Judge found not only that the Complainant did not receive disparate or discriminatory treatment at the hands of the Respondent, but that, even assuming there was discriminatory or disparate treatment, the evidence did not establish that it was meted out because the Complainant had engaged in protected activities.

As the Administrative Law Judge found, and I concur, that the Complainant did not receive discriminatory or disparate treatment because he had engaged in protected activities under the Order, I shall dismiss the instant complaint.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No 60-3035(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 21, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

3/ On page 9 of his Supplemental Report and Recommendation, the Administrative Law Judge indicated that discrimination inflicted upon an individual because he has filed a grievance under a grievance procedure is violative of Section 19(a)(1) and (4) of the Executive Order. Although the grievances in the instant proceeding were filed pursuant to a negotiated procedure, it should be noted that in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, it was found that, absent evidence of anti-union animus, interference with rights established under an agency grievance procedure is not violative of Section 19(a)(1) of the Order. Moreover, it should be noted that Section 19(a)(4) of the Order is applicable only to discrimination against an employee because he has filed a complaint or given testimony under the Order and is not applicable to matters of discrimination in connection with the filing of grievances.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



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In the Matter of :
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:
NATIONAL LABOR RELATIONS BOARD :
REGION 17, and NATIONAL LABOR :
RELATIONS BOARD :
:
Respondents. :
and :
:
DAVID A. NIXON, :
Complainant. :
.

Case No. 60-3035 (CA)

George Norman, Esquire
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

For the Respondents

David A. Nixon, Esquire
National Labor Relations Board
Gateway Center
Fourth at State Street
Kansas City, Kansas 66101

Ralph Tremain, Grievance Chairman
National Labor Relations Board Union
Region 25, National Labor Relations Board
Federal Office Building
525 North Pennsylvania Street
Indianapolis, Indiana 46204

Before: RHEA M. BURROW
Administrative Law Judge

SUPPLEMENTAL REPORT AND RECOMMENDATION

Preliminary Statement

The initial Report and Recommendation for dismissal of the complaint in this proceeding was issued by the Administrative Law Judge on January 23, 1973. It was held that on the basis of the Record as it then existed, the complainant, David A. Nixon, had not sustained the

burden of showing that the June 14, 1972 professional appraisal evaluating him as not well qualified for promotion to the GS-14 (attorney) supervisory register was disparate or discriminatory against him in violation of §19(a)(1) and (4) of Order as alleged in the complaint and amendments thereto.

The case was later the subject of a Decision and Remand by the Assistant Secretary for Labor Management Relations (A/SLMR No. 295) on August 6, 1973; an Order Staying Remand by the Assistant Secretary on September 28, 1973; a Federal Labor Relations Council Decision (FLRC No. 73A-53) issued October 31, 1974; and, the Assistant Secretary's Order Vacating Stay on Remand issued December 4, 1974. In general, the Assistant Secretary on those issues and matters not finally disposed of in the August 6, 1973 determination directed the undersigned to hold a further hearing and reconsider his decision in accordance with the Decision and Remand in A/SLMR No. 295 and the decision in FLRC No. 73A-53; and, to submit a Supplemental Report and Recommendation.

Pursuant to the foregoing a further hearing was held in the captioned matter on March 18, 19, 20, and 21, 1975, in Kansas City, Missouri. 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. Each of the parties requested additional time within which to file briefs but only the Respondents filed a brief for consideration of the undersigned. 1/

From a review of the entire record including the prior decision which is incorporated herein by reference, the observation of witnesses and their demeanor, and from all testimony adduced at the hearings, the undersigned makes the following findings, conclusions and recommendations.

1/ Despite Complainant Nixon's protest of June 11, 1975 that the respondents request for extension of time to file briefs was untimely, a copy of the request dated June 5, 1975 was delivered and received by me on June 6, 1975 and under the circumstances is considered to have been timely. I had previously granted Mr. Nixon's request for additional time. The respondents brief dated June 25, 1975 was timely recieved within the requested period. The request for extension of time is for good cause shown hereby granted.

I

Basically, the complaint alleged that the Respondent violated Sections 19(a)(1) and (4) of the Order in connection with the Complainant's exercise of his protected, "concerted" right to file exceptions and grievances under the negotiated agreement between the General Counsel of the National Labor Relations Board and the National Labor Relations Board Union and to file charges under the Executive Order.

In the Assistant Secretary's Decision and Remand of August 6, 1973, it was held that the complainant was improperly precluded at the hearing from presenting evidence in support of certain of his allegations, to wit, the rejection of the appraisal of another employee similarly situated and certain exhibits that could provide background information in relation to the complaint. By denying the complainant the opportunity to introduce evidence which might have shown, alone or in conjunction with other evidence that he was treated in a disparate discriminatory manner, the Administrative Law Judge committed prejudicial error. Later, on referral by the Assistant Secretary of certain issues to the Federal Labor Relations Council 2/ the Council concluded that "the Federal Personnel Manual: (1) prohibits an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding, but (2) permits the Assistant Secretary, his representative and/or the Administrative Law Judge, acting pursuant to their responsibilities in a proceeding under the Order, to see the appraisal of another employee if review of such appraisal is necessary for the execution of official responsibility, but only if done in a manner that contains the confidentiality of that appraisal, while accommodating the need for establishment of a formal file in open proceeding by adhering to the guidelines set forth in the Civil Service Commission response."

In complying with the Assistant Secretary's directive and the Order Vacating Stay on Remand issued December 4, 1974, an in camera study of the appraisals accorded by Region 17, NLRB to the similarly situated employee

2/FLRC 73A-53.

Gerald A. Wacknow, was made. A copy of my Report 3/ as to the appraisals was furnished the complainant on January 27, 1975. There was no exception taken to the appraisal report either before or at the subsequent hearing which began March 18, 1975. At said hearing all pertinent exhibits that had previously been rejected at the first hearing were received into the record.

II

In my original Report and Recommendation of January 23, 1973, it was concluded that the complainant had not been discriminated against or treated disparately because he engaged in conduct protected by the Order.

The professional appraisal of complainant in June 1972 by Regional Attorney, Harry Irwig and Regional Director, Thomas Hendrix covered the period June 1, 1971 to June 2, 1972. In the appraisal there was a recommendation that Mr. Nixon be rated as not well qualified for promotion to the GS-14 attorney supervisory register. There were numerous instances set forth in the appraisal wherein Mr. Nixon had been deficient in case handling and personality. In taking issue with the appraisal Mr. Nixon filed an unfair labor practice under the Executive Order instead of proceeding via grievance procedure as he had done in 1971. During the period covered by the appraisal Nixon had been promoted on February 14, 1972 to the GS-14 non-supervisory Field Attorney position following a supplemental appraisal by Regional Director, Thomas Hendrix pursuant to a decision on November 15, 1971 by John S. Irving, Associate General Counsel on a step two grievance filed by Local 17, NLRBU and Complainant. 4/

In the Associate General Counsel's decision it was specifically pointed out that the ratings for GS-13 or GS-14 supervisory attorney positions had not been placed in issue by the grievance. Since there is considerable overlapping of duties with respect to work performance of GS-14 non-supervisory and supervisory attorneys my decision

3/ The report covered appraisals of Gerald Wacknow in November 1971 and December 1972.

4/ Complainant Exhibit No. 18.

in January 1973 emphasized those attributes expected and required of a supervisor above those for adequate work performance which is basic in both supervisory and non-supervisory capacities.

III

Supplementing and summarizing the employment history, Mr. Nixon, the complainant herein, began his employment with the National Labor Relations Board as a GS-9 Attorney at its sub regional office in Peoria, Illinois in 1965. He was promoted to GS-11 in August 1966 and was given a sustained superior performance award in January 1967. The professional appraisal accorded him about the time of his transfer to Region 17, Kansas City, Missouri on June 16, 1967 was a complimentary one with the exception of "personal relations, both within and outside the agency." According to his supervisor, S. Richard Pincus, Mr. Nixon was "quick to take offense in situations where none is intended." He commented that Nixon's zeal to do an outstanding job is sometimes misinterpreted by the parties and occasionally results in unnecessary frictions being created. 5/ Nixon was promoted to a GS-12 attorney in September 1967. On July 31 and August 8, 1968 interim professional appraisals were accorded him by his supervisor, Robert Uhlig and Regional Attorney, Thomas Hendrix. 6/ Both appraisals were complimentary of Mr. Nixon's professional ability as to trial and case handling but were critical as to his ability to deal with both the public and staff members without creating offense and irritation. After reviewing the evaluation, Robert Allen, Regional Director submitted a memorandum dated August 8, 1968 wherein he found Nixon well qualified for promotion to a non-supervisory GS-13 position and that he intended to recommend him for promotion when he attained 18 months in grade. He further commented that any offense caused by Nixon's attitude toward the public was attributable to the fact that outside practitioners could not "pull wool over his eyes." He was promoted to GS-13 in February 1969 on the basis of recommendations from Uhlig, Hendrix and Allen, it was reported that he had performed in a most competent manner.

Complainant's next appraisal covered a period from November 1969 to November 28, 1970. Assistant Regional Attorney DeProspero gave Mr. Nixon a most favorable appraisal

5/ Respondent's Exhibit No. 11.

6/ Respondent's Exhibit No. 12.

and recommended him for promotion. Regional Director Hendrix and Regional Attorney Irwig submitted their comments in November 1970 and recommended that Mr. Nixon be rated as not well qualified for GS-14. Their adverse appraisals were based on alleged inability to get along with the public and fellow employees; otherwise, he was considered a competent and able attorney. Supplemental memoranda to the appraisal were furnished by Irwig and Hendrix in December 1970. The complainant thereafter tried unsuccessfully to gain a reversal of the adverse professional appraisal of Hendrix and Irwig. The appraisal review panel in March 1971 concluded that Nixon should be rated "not well Qualified" for GS-13 and GS-14 supervisory positions. 7/

7/ In remarks made in connection with the Panel Review of Mr. Nixon's appraisal it was noted that their only function was to rate him in connection for promotion to GS-13 and 14 supervisory positions since no action by the panel was required to effect a promotion to GS-14 Non-Supervisory Attorney. The following was also stated:

"As to the merits of Field Attorney Nixon's professional appraisal, the comments of Regional Director Hendrix, Regional Attorney Irwig, and Assistant Regional Attorney DeProspero all confirm that Nixon was a competent, conscientious, and dedicated Field Attorney, who is capable of handling any type of assignment with only minimum supervision. All of Nixon's superiors expressed high regard for the quality of his legal work in particular, and his case-handling performance in general. With respect to the latter, however, Regional Director Hendrix and Regional Attorney Irwig noted that Nixon occasionally has been inattentive to time-targets and Regional Office procedures, and that, at times, he has concentrated so much on one case that other cases assigned to him have been temporarily neglected.

"Nixon takes the position that the professional appraisal should only deal with his 'work' and not with his 'social characteristics.' We must reject this position. The objective of the career development program is to provide for the development, identification, and selection of employees for supervisory and executive positions. The keystone of the program is the periodic professional appraisal which includes an evaluation of the employee's work, an assessment of his professional progress and a determination of his readiness for promotion and potential for advancement to positions of greater authority and responsibility. In making a determination of an employee's readiness for promotion and potential for advancement to managerial positions, it must be (continued on next page)

The complainant in commenting on the memoranda by Irwig and Hendrix as to his appraisals in November 1970 asserted that their conclusions were of a vague sweeping nature unsupported by documentary evidence. 8/ The Assistant General Counsel directed Mr. Irwig to attach supporting documents to all of his future appraisals when indicated.

7/ (continued) kept in mind that such positions entail the exercise of supervisory authority and responsibility and are more sensitive in terms of Regional Office operations and our relations with the public. These positions require, inter alia, an ability to effectively supervise and direct subordinates, to maintain close, harmonious and effective working relationships with superiors, and to effectively deal with the many segments of the public which we serve. Thus, contrary to Nixon's position, an employee's personal qualities, attributes and characteristics, as revealed by his actions in the many different circumstances and situations in which he has been involved during the course of his employment, are highly relevant to an employee's suitability for advancement to managerial positions.

"The Appraisal Review Panel has not attempted to resolve the differences between the Regional Director, the Regional Attorney, and Nixon, and no effort has been made to credit or discredit the conflicting versions and arguments concerning the various cases and incidents referred to in the above-mentioned memorandums. However, the Appraisal Review Panel views Nixon's conduct in the incident involving the secretary to the Regional Attorney, the May 1970 incident involving Regional Attorney Irwig, and the incident involving another field attorney and Supervisory Attorney Herzog as casting substantial doubt on his readiness at this time to assume a supervisory position."

8/ Transcript pp. 1740-1752 and Complainant's Exhibit 9, page 3.

Mr. Nixon's June 1971 professional appraisal pursuant to Section 3 of the Collective Bargaining Agreement covered the period from October 1970 to June 1971. 9/ It consisted of an evaluation by Mr. DeProspero covering the period from October to January 1971 and an evaluation by Mr. Irwig covering the period January to June 1971. Regional Director Hendrix expressed general agreement with Mr. Irwig's evaluation which was supported by a five page narrative summary. The appraisal recommended that Mr. Nixon be rated as not well qualified for GS-14 non supervisory-attorney. Mr. Nixon's legal and technical ability was acknowledged but it was stated his activities in certain respects left a lot to be desired. Irwig cited an altercation between Nixon and various attorneys in the office; occasional failure to submit drafts in a timely fashion; failure to properly fill out blanks on a particular form; and being remiss in promptly returning phone calls or answering letters. Mr. Irwig stated in his comment that some of the matters relied upon were of limited or little importance. In adopting the appraisal Regional Director Hendrix stated "I see no reason to change his placement on the promotion register from not well qualified for the position of grade GS 13 or GS 14 supervisory attorney."

In July and August 1971 Local 17 NLRBU and Nixon filed grievances under the contract procedures alleging that Irwig and Hendrix had not followed the rating procedure set forth in the contract. The appraisals were subsequently reviewed by John Irving, Associate General Counsel, pursuant to step 2 of the grievance procedure and on November 15, 1971 he issued his decision that he found merit in the grievances and ordered the Regional Representatives to issue a supplemental appraisal. Following submission of a generally complimentary appraisal Nixon was promoted to a GS-14 non-supervisory attorney in February 1972. In his favorable decision on the grievances Irving commented that certain examples of alleged misconduct relied upon by Regional Attorney Irwig and Regional Director Hendrix were of relative little consequence when viewing the whole picture and should not, therefore, have been accorded the weight the evaluation places upon them.

The June 1972 professional appraisal of Mr. Nixon by Irwig and Hendrix covered the period from June 1, 1971 to June 2, 1972 and rated him as not qualified for the

9/ Complainant Exhibit NO. 14.

GS-14 supervisory register. The appraisal was supplemented by an eight page narrative comment by Mr. Irwig and set forth numerous instances wherein Mr. Nixon had been deficient in case handling and personality. 10/ It is from the June 1972 appraisal that Mr. Nixon elected to file the unfair labor practice complaint now in issue.

IV

DISCUSSION AND CONCLUSIONS

Section 19(a) (1) and (4) of the Order provides that "Agency management shall not -

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

. . . .

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order.

An adverse appraisal per se is not subject to review in a complaint proceeding and review will be limited to ascertain whether the causes for such appraisal were pretextual in nature; further, discriminatory motivation is actionable only if agency management has interfered with, restrained, or coerced the complainant in the exercise of rights assured by the Order. 11/ The filing of grievances and/or unfair labor practice complaints are activities protected by the Order and discrimination because of such activities is violative of Section 19(a) (1) and (4) of the Order.

10/ For more detailed account of the appraisal see Complainant Exhibit No. 4; also see pages 9-10 of the Report and Recommendations of the Administrative Law Judges dated January 23, 1973.

11/ Basically, the rights set forth in Section 1 of the Order are the right to freely and without fear of penalty or reprisal, to form, join and assist a labor organization or to refrain from any such activity.

The June 14, 1972 appraisal in issue covered the period June 1, 1971 to June 2, 1972. The appraisal does not refer to any grievances having been filed by Mr. Nixon but deals with his work performance, personality, supervisory qualifications and comment regarding the subject matter of cases handled by him. There were appendices and/or memoranda relating to cases handled by Mr. Nixon to support the conclusions in the appraisal. Some of the cases cited were later pointed out by Nixon as being those that had been the subject of prior grievances filed by him and he contends the appraisal accorded him was therefore disparate. Also the appraisal was stated to be in violation of the Order because of Respondent's reliance on the afore-said protected activities as a basis for the adverse appraisal.

Contrary to Mr. Nixon's contention that his protected activities played a part in the June 1972 adverse appraisal, I see no showing that any grievance or grievances authored and filed by him had any connection in Mr. Irwig's adverse appraisal of him. There was no attempt in the appraisal to go beyond the subject matter as applied to case handling and such is subject to fair comment or criticism as the facts may warrant. On further review of the record I find that the bases leading to the June 1972 appraisal are not pretextual in nature and no discriminatory motivation by reason of Nixon's protected activities has been established.

I thus conclude as did Judge Sternburg in Case No. 60-3449(CA) 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. Further, conduct which is made the subject of a grievance is not immunized from fair comment in a professional appraisal but such should be limited to comment and evaluation of professional performance. The comment in Nixon's June 1972 appraisal did not transcend the aforementioned criteria.

Another contention projected by Nixon is that the background information leading to his June 1972 adverse appraisal supports his allegation of discriminatory motivation on the part of the respondents and the disparate treatment that he has received.

In the first place, his ability to deal with the public and staff members without creating offense and irritation has been the subject of periodic comment since his appraisal in June 1967, and the appraisals since November 1970 have evaluated him as not well qualified for supervisory attorney at his grade level. The Panel Review Board in March 1970 stated that contrary to Mr. Nixon's position that his professional appraisal should deal only with his "work" and not "social characteristics," ... "an employee's personal qualities, attributes and characteristics, as revealed by his actions in the many different circumstances and situations in which he has been involved during the course of employment, are highly relevant to an employee's suitability for advancement to managerial positions." The background information has heretofore been outlined. I do not find that it supports Nixon's allegation of discriminatory motivation on the part of respondents or that there was disparate treatment of him by reason of his protected activities.

One argument advanced by Mr. Nixon in connection with the June 1972 appraisal was that Mr. Irwig spent considerable time preparing it and it was lengthy because of the supporting documents that were attached to it and this constitutes disparate treatment and/or discriminatory motivation. This argument is particularly unimpressive when compared with assertions made in connection with the relatively short 1970 appraisal that it contained sweeping conclusions unsupported by documentary evidence. 12/ Too, the Agency now requires supporting documents when adverse appraisals are involved. A supervisor has the responsibility to defend an adverse appraisal or action made by him. If documentary supportive evidence is available it is expected that such will be utilized. A favorable appraisal does not generally require extensive documentation. The physical composition of appraisals is therefore, not regarded as too important. I find that length per se is not an essentially important element of comparison between favorable and adverse appraisals of professional personnel in the same grade aspiring for rating of advancement to the supervisory level. In the circumstances of this case, the length of the appraisal was not indicative of disparate treatment or discriminatory motivation.

12/ Transcript 1740-1752.

Mr. Nixon further argues that exhibits 32 through 37 support his allegation concerning daily reprisal activities to which he was subjected commencing about September 1971 and continuing thereafter. 13/ I have examined the exhibits in connection with the allegation and conclude that they do not substantiate his claim. 14/

13/ Transcript P. 1795.

14/ The exhibits relate to the case of Hy-VEC Food Stores (C.A. 8) Board Case No. 17-CA-4648. Complainant's Exhibit No. 32 was a memorandum dated October 20, 1971 from Marcel Mallet-Provost, Assistant General Counsel addressed to Mr. Hendrix stating: "On the basis of the attached memorandum to me from Elkind and Semler dated today, it has been concluded that contempt proceedings are warranted only with respect to the refusal to furnish information issues. Please advise us whether you wish us to proceed thereon or prefer to retain it to bolster a complaint, should you decide to issue one embodying the other 8(a)(5) issues: Mr. Hendrix sent the memorandum and attachment from Elkind and Semler on a routine routing slip to Hendrix and Nixon asking "which way do you recommend going?" Mr. Irwig stated on the slip to Nixon "Please let me know immediately" Nixon's reply dated October 21, 1971, (Complainant Exhibit NO. 33) concluded "... I do not think that all of the issues raised in the instant case, as administratively found by the Region, could be set at rest and resolved through the limited contempt litigation, it is my recommendation that the Region advise Washington that we prefer to litigate the entire case in Board proceedings, and that we thereafter proceed to apprise the Respondents of our administrative determination and the requisite terms of settlement, and absent settlement, proceed with issuance of complaint." Mr. Irwig's memorandum of October 22, 1973 (Complainant's Exhibit No. 34), stated: "I would go the contempt route even though it appears to be limited at this point to the one item mentioned above since I think that this action would have a rather wholesome effect upon Respondent's general attitude." On the same day, October 22, 1972, Nixon suggested an agenda conference (Complainant Exhibit No. 25) which was held on October 28, 1972 (Complainant Exhibit No. 36). On the same day Mr. Hendrix answered the October 20 memorandum (Complainant Exhibit No. 37) stating: "Please be advised that I have received your October 20, 1971 memorandum and the attached memorandum of the same date from Attorneys Elkind and Semler. As a result thereof, the Region has reconsidered the subject Board cases. On the basis of our reconsideration, I have concluded that the cases present issues which warrant submission to the Board and that a consolidated complaint alleging violations of 8(a)(1) and (5), should issue. We, therefore, do hereby withdraw our previous request for authorization, to seek a contempt citation."

Rather, the exhibits indicate that Nixon resented Regional Attorney Irwig's expression of an opinion different from his own even though his (Nixon's) position was the one adopted by Regional Director Hendrix. I conclude that the respondents did not engage in daily reprisal activities against Nixon by reason of his exercise of concerted, protected rights by falsely and spuriously attributing the mishandling of work to him as alleged in the complaint. Moreover, the record does not substantiate that there is comment in Mr. Nixon's June 1972 appraisal or acts by the respondents which interfered with, restrained, or coerced complainant in the exercise of any right assured by the Executive Order.

Mr. Nixon has also sought to establish disparate treatment based on his protected activities under the Order by comparison of his work with Gerald Wacknov, a GS-14 supervisory attorney who received favorable consideration for placement or continuation on the supervisory register for the June 1971-1972 appraisal period. Apart from the fact that certain Exhibits 13 of Mr. Wacknov's work product did not represent the mishandling or errors Mr. Nixon sought to establish, others did reveal some imperfections without affecting his favorable appraisal; the errors or imperfections in case handling by Wacknov were not shown to be as numerous and extensive as those of Nixon and testimony revealed that Wacknov rarely repeated the same mistake whereas Nixon's repetition of the same mistake in almost identical situations was not unusual. As to supervision, Wacknov behaved and demeaned himself properly and discussed matters in a strictly business like and professional manner sometimes convincing the Regional Attorney that his (Wacknov's) opinion was correct; Nixon on the other hand was unwilling to accept corrections and even after a determination had been made would argue and reargue the same point; Nixon would not follow instructions and orders and on occasion required repeated repetition of the same instruction. Further, Wacknov had no personality conflict problems or adverse relationships with staff members and outside counsel and there was no showing that he resented supervision, corrections to case handling procedures or draftsmanship of documents. Nixon on the other hand had difficulty and considerable problems in this respect.

The record further shows that union officers who filed numerous grievances on behalf of union employees were promoted or accorded favorable appraisals without incident.

13/ For example see Complainant Exhibit 172-A and Transcript pp. 1475-1482.

Mr. Nixon's early adverse appraisals had preceded any significant protected activities on his part. In view of the foregoing, I find that the record in its entirety does not show a sufficient basis to permit a finding of disparate treatment. Further, even assuming there was disparate treatment the evidence does not establish that such alleged disparity was predicated on Mr. Nixon's protected activities.

I thus conclude that the complainant failed to prove by a preponderance of the evidence violations of Sections 19(a)(1) and (4) by the Executive Order as alleged in the complaint, as amended.

Recommendation

Having found on supplemental review and further consideration of the record pursuant to the Assistant Secretary's Remand Decision that the Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (4) of Executive Order 11491, as amended, I recommend that the complaint be dismissed in its entirety.


RHEA M. BURROW
Administrative Law Judge

Dated: November 10, 1975
Washington, D.C.

June 21, 1976

A/SLMR No. 665

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

UNITED STATES DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS,
DATA PREPARATION DIVISION,
JEFFERSONVILLE, INDIANA
A/SLMR No. 665

This consolidated proceeding involved two Applications for Decision on Grievability or Arbitrability filed by Local 1438, National Federation of Federal Employees (NFFE). The NFFE contended that under the negotiated agreement the Activity was obligated to process through the negotiated grievance procedure grievances involving its failure to adhere to the principle and the spirit of the merit promotion system, as expressed in the Division Merit Promotion Plan, in filling a vacant position at the Activity and in filling another position by a lateral transfer.

The Administrative Law Judge concluded, and the Assistant Secretary agreed, that the grievances in the instant proceeding were not grievable under the parties' negotiated agreement as they did not involve matters which were subject to the parties' negotiated grievance procedure.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS,
DATA PREPARATION DIVISION,
JEFFERSONVILLE, INDIANA 1/

Activity

and

Case Nos. 50-13033(GR) and
50-13046(GR)

LOCAL 1438, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Applicant

DECISION ON GRIEVABILITY

On February 17, 1976, Administrative Law Judge William B. Devaney issued his Recommended Determination of Grievability or Arbitrability in the above-entitled proceeding, finding that the grievances involved in this consolidated proceeding were not on matters subject to the grievance procedure set forth in the parties' negotiated agreement. The Applicant filed exceptions to the Administrative Law Judge's Recommended Determination of Grievability or Arbitrability and the Activity filed an answering brief to the Applicant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Determination of Grievability or Arbitrability and the entire record in the subject cases, including the Applicant's exceptions and the Activity's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation as indicated herein. 2/


1/ The name of the Activity appears as amended at the hearing.

2/ I do not agree with the indications by the Administrative Law Judge on pages 6, 7, 9, and 10 of his Recommended Determination of Grievability or Arbitrability that the Agency's determination of whether its merit promotion plan is subject to a negotiated grievance procedure is binding and may not be challenged. Thus, the very issue
(Continued)

FINDING

IT IS HEREBY FOUND that the grievances in Case Nos. 50-13033(GR) and 50-13046(GR) are not on matters subject to the parties' negotiated grievance procedure.

Dated, Washington, D. C.
June 21, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

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



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In the Matter of :
 :
 :
 UNITED STATES DEPARTMENT OF :
 COMMERCE, BUREAU OF THE CENSUS 1/ :
 DATA PREPARATION DIVISION :
 JEFFERSONVILLE, INDIANA : CASE NOS. 50-13033 (GR)
 Agency and Activity : 50-13046 (GR)
 :
 and :
 :
 LOCAL 1438, NATIONAL FEDERATION :
 OF FEDERAL EMPLOYEES :
 Applicant :
 :

George J. Sabo
Labor-Management Specialist
United States Department of Commerce
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Washington, D.C. 20233
For Agency and Activity

Janet Cooper, Esquire
Staff Attorney
National Federation of Federal Employees
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For Applicant

Before: WILLIAM B. DEVANEY
Administrative Law Judge

2/ which the Assistant Secretary is required to resolve pursuant to Section 6(a) 5 and 13(d) of the Order is whether a matter is subject to the particular negotiated grievance procedure. Accordingly, while an agency's or activity's contention that a matter is not subject to the grievance procedure of the negotiated agreement may be correct, as I find it to be in the instant case, nevertheless such contention is but an advocated position and is not a determination which is binding on the Assistant Secretary.

1/ Designated in formal documents as "Social and Economic Statistics Administration". By Stipulation, the parties stated, "... the Social and Economic Statistics Administration (SESA) as an entity of the Department of Commerce was abolished on July 16, 1975 by order of the Secretary of Commerce. The parties agree that SESA has been replaced by the Bureau of the Census as a party to the contract." (Stipulations accompanying Joint Exhibits 1-3). The caption has been changed to reflect the proper designation of the Activity.

RECOMMENDED DETERMINATION OF
GRIEVABILITY OR ARBITRABILITY

This is a proceeding pursuant to Sections 6(a)(5) and 13(d) of Executive Order 11491, as amended, to determine whether or not the grievances involved herein are subject to the grievance procedure of the parties' existing agreement (Jt. Exh. 1). 2/ There were two separate applications for decision on grievability or arbitrability, each involving a separate grievance, which applications were consolidated for hearing. The first application, Case No. 50-13033(GR), was filed April 23, 1975, and involves the grievance of Lois Morris. The second application, Case No. 50-13046(GR), was filed June 4, 1975, by Local 1438, National Federation of Federal Employees (hereinafter "Local 1438"), and involves the filling of a vacancy by lateral reassignment without posting the vacancy. The cases were consolidated by Order dated July 22, 1975 (Ass't. Sec. Exh. 1-A), a notice of hearing issued July 22, 1975 (Ass't. Sec. Exh. 1-B) and pursuant thereto a hearing was held before the undersigned on September 4, 1975, in Jeffersonville, Indiana.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issue involved, and briefs were timely filed by the parties which 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 recommended determination of grievability:

Findings of Fact

The same sections of the agreement are involved in each case, as follows:

"ARTICLE 8 - GRIEVANCE PROCEDURE

* * * *

"8.2 Purpose and Application of Article.

The purpose of this article is to provide a mutually satisfactory method for the

2/ The parties have not questioned that the grievances, if subject to the negotiated grievance procedure, are subject to all provisions of the negotiated grievance procedure including arbitration thereunder. (Jt. Exh. 1, Art. 8).

adjustment of employee grievances when the interpretation or application of this Agreement, or the alleged violation of this Agreement, is the sole concern. It is understood that the procedure contained in this article, including the arbitration procedure, shall not extend to changes or proposed changes in agreements (including this Agreement), such changes being subject to negotiation under the terms of this Agreement; or to changes in SESA [Bureau of the Census] policies, such changes being subject to consultation. Questions involving the interpretation of published policies, provisions of law, controlling agreements, regulations of the Department of Commerce or of other authorities shall not be made subject to the procedure contained in this article regardless of whether such policies, provisions, agreements, or regulations are quoted, paraphrased, cited, or otherwise incorporated in this Agreement. The procedure contained in this article shall not apply to any grievance or complaint which has been previously accepted for processing under any nonnegotiated grievance system of the Employer."

ARTICLE 9 - PROMOTIONS, REASSIGNMENTS,
AND DETAILS

"9.1 Promotions and Reassignments. The Employer agrees to assign work without favoritism and in consideration of the specific needs to be met by the assignment. It is further agreed that the Employer will adhere to the principle and the spirit of the merit promotion system, as expressed in the Division Merit Promotion Plan and supplements and agreements stated herein, and will make every reasonable effort to utilize to the maximum the

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skills and the talents of its employees. In filling vacant positions within the unit, primary consideration will be given to employees of the unit; however, consideration may also be given to well-qualified candidates from outside the unit whose qualifications are clearly superior to those of the unit employees.

"9.2 Vacancy Announcements. The Employer agrees that vacant positions ... will be announced by posting vacancy announcements at appropriate places throughout DPD so that qualified employees may have an opportunity to apply for the vacancies. ... The Union will be furnished with a copy of such vacancy announcements concurrently with posting.

"9.3. Review of Merit Promotion Plan It is agreed that the Employer shall establish a Merit Promotion Program Review Committee to review the Division's Merit Promotion Plan as it affects positions of the unit and to recommend to the Employer such changes as it believes would improve the effectiveness of the Plan in the unit ... It is agreed that the Committee's review will not extend to individual promotion actions."

Local 1438 had proposed that a grievance include:

"(b) Merit promotions, repromotions, details, policies, and their application." (Jt. Exh. 3, §7.3(b)).

The language agreed upon was as set forth in Article 9, Section 9.1, above, and as further limited by Article 8, Section 8.2, above.

Case No. 13033(GR) involved the grievance of Lois Morris. Ms. Morris was an applicant for Vacancy Announcement No. 169 whose name appeared on the promotion certification as highly qualified. As part of the selection process, an interview was conducted in which Ms. Morris was asked 21 questions

(Union Exh. 4), the same questions having been asked of each applicant. The grievance charged a violation of Article 9, Section 9.1 because, it was asserted, many of the questions were not job-related, permitted a selection to be made for reasons other than merit, and, therefore, did not "adhere to the principle and the spirit of the merit promotion system". The grievance was initially denied but SESA (Bureau of the Census) Headquarters determined that, while the complaint could not be considered under the negotiated procedure by virtue of Article 8.2 of the Agreement, there was some question as to the propriety of the questions used and that the relief sought by the grievant would be granted. Grievant and her representative indicated that priority consideration would be an acceptable solution but requested a written statement from the Division Chief. On March 28, 1975, the Division Chief, Mr. Benton, confirmed the grant of the relief sought to the grievant. Because the memorandum of March 28, 1975, was designated "Resolution of Complaint" grievant advised that the relief was not acceptable, insisting that any decision letter state that the complaint had been considered under the negotiated grievance procedure, and the above application for determination of grievability or arbitrability followed.

Case No. 50-13046(GR) involved a grievance by Local 1438 as the result of a lateral, non-competitive reassignment of Ms. Powell, whose position in the Office of the Division Chief was to be abolished, to a vacant position in the Geography Operation Branch of Budget Assistant. The grievance asserted a violation of Articles 9.1 and 9.2 of the negotiated Agreement. The Division Chief, Mr. Benton, on April 25, 1975, issued a decision memorandum in which he concluded that the grievance was not grievable under 9.1, but, while no violation of 9.2 was found, the grievance was cognizable under 9.2. Local 1439 refused to process further the grievance under 9.2. The sole issue here is whether the grievance was subject to the negotiated grievance procedure pursuant to Article 9, Section 9.1.

Conclusions

The instant case presents a contract with a very broad exclusion of subjects from the negotiated grievance procedure. Specifically, the Agreement removes from the negotiated grievance procedure, inter alia, the following:

"Questions involving the interpretation of published policies ... regulations

of the Department of Commerce or of other authorities ..." (Jt. Exh. 1, Article 8, Section 8.2 2/)

That the Merit Promotion Plan (Jt. Exh. 2) is a published policy is clear. That it constitutes policy is apparent from its terms which govern promotions, assignments to positions with known promotion potential and other personnel actions involving advancement in competitive service positions; and that it is published is equally apparent from Joint Exhibit 2 as is its dissemination to employees. The Plan, itself, further provides for semi-annual publication of a statistical summary of promotions made. Section 9.3 of the Agreement not only gives specific acknowledgement of management's Merit Promotion Plan, but, in addition, provides for the establishment of a Merit Promotion Program Review Committee to review the Division's Merit Promotion Plan and to recommend changes.

Indeed, Applicant (Local 1438), in effect, concedes that the Merit Promotion Plan is a published policy but argues that "published policies" in Section 8.2 must mean only those policies originating at SESA (now Bureau of the Census) headquarters or higher because of language used in other Sections such as: 1.6, 2.3, second sentence of 8.2, 13.1 and 15.4. This argument is not persuasive and merely serves to emphasize the breadth and scope of the exclusionary language agreed upon by the parties in the penultimate sentence of Section 8.2 of the Agreement. 3/

Agency has interpreted its Merit Promotion Plan as not subject to the negotiated grievance procedure pursuant to the Section 9.1 of the Agreement and such interpretation of a published policy is specifically excluded from the negotiated grievance procedure by Section 8.2. As the parties agreed upon this limitation on the scope of the grievance procedure in their collective bargaining agreement there is no choice but

2/ Herein sections of applicable Articles of the Agreement are also referred to by section number, the first number being the Article, e.g., "Section 8.2".

3/ In view of the conclusion that the Merit Promotion Plan is a published policy, it is unnecessary to reach the further contention of the Agency and Activity (hereinafter "Agency") that Section 8.2 also excludes from the negotiated grievance procedure "... regulations ... of other authorities [than of the Department of Commerce];" and that the Merit Promotion Plan, as a regulation, is excluded from the negotiated grievance procedure even if it were not excluded as a "published policy."

to accept the agreement of the parties. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma, FLRC No. 74A-38(1975).

The specific exclusion of "Questions concerning the interpretation of published policies" from the negotiated grievance procedure by Section 8.2 of the Agreement precludes consideration of Agency's interpretation of its published policy under the negotiated grievance procedure. Stated otherwise, Agency has interpreted its published policy and its interpretation, that the Merit Promotion Plan is not subject to the negotiated grievance procedure, may not, because of the specific exclusion of "Questions concerning the interpretation of published policy" by Section 8.2 of the Agreement, be challenged under the negotiated grievance procedure. Enforcement of the provision of section 9.1 that "... Employer will adhere to the principle and spirit of the merit promotion system ..." simply is removed from the negotiated grievance procedure by the exclusion of Section 8.2 4/

4/ Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (1974), and Applicant's contentions based thereon, are inapplicable to the facts of this case. A Merit Promotion Plan (Mgmt. Exh. 2; see, also, Mgmt. Exh. 1) was in effect (Management Exhibit 2 was effective May 4, 1973) at the time the Agreement was signed on July 20, 1973 (Jt. Exh. 1); the Agreement acknowledged the Merit Promotion Plan and provided for the establishment of a Merit Promotion Program Review Committee to review the Plan and to recommend changes. Pursuant to the Agreement, changes recommended were considered and the present version of the Plan was issued, dated November 26, 1973. Unlike Pascagoula, supra, the present version of the Merit Promotion Plan, although issued after execution of the Agreement, did not modify the terms of the Agreement; modification of the Plan was contemplated by the Agreement; and the modification was in accordance with procedures of the Agreement. But more important, this case simply does not involve any assertion that any provision of the Agreement has been altered or modified. Rather, this case involves solely the interpretation and application of the terms of the negotiated Agreement.

Employee complaints under the Merit Promotion Plan are, however, subject to adjudication under the Agency Grievance Procedure as provided in Section L.2 of the Plan (Jt. Exh. 2, p. 17).

The fact that a prior grievance asserting a violation of Section 9.1 was processed and adjusted at the local level under the negotiated procedure is not sufficient to constitute a waiver of the exclusionary language of Section 8.2. This occurred on a single occasion in 1975; the Agreement was executed July 20, 1973; and there was no evidence or testimony of reliance on such "waiver" to the detriment of Applicant or of any member of Local 1438. The testimony of Mr. Donald L. Fay, Assistant Chief of the Personnel Division, Bureau of the Census and Agency's chief negotiator, shows that Section 8.2 was discussed; that Agency explained that this was designed to limit and clarify what was grievable and what was not grievable; and that merit promotions would be one of those items that would not be grievable unless the provisions were in the contract. In Section 9.2 provision was made for Vacancy Announcements, in Section 9.4 provision was made for Details, and in Section 9.6 provision was made for Repromotion, matters which related to, affected, and/or for which some provision was made in the Merit Promotion Plan; but particular provision for the matter in question was made by the Agreement and any dispute thereunder would be based on the terms of the Agreement, not upon the Merit Promotion Plan. Local 1438 had sought to make merit promotions subject to the grievance procedure but this demand was rejected by Agency. Finally, Section 9.7, entitled "Nonselection" simply provides that an employee whose name appears on a promotion certificate will be furnished notice of his consideration and that non-selected employees may request and receive certain information; but, significantly, no provision was made in Section 9.7 to make any action under the Merit Promotion Plan, i.e., non-selection, subject to the negotiated grievance procedure. Accordingly, I find no basis whatever in the testimony that Agency misinformed Local 1438 as to the effect of the limitation in Section 8.2. Nor can sight be lost of the broad, direct, and specific exclusionary language adopted, namely "Questions involving the interpretation of published policies ... shall not be made subject to the procedure contained in the article regardless of whether such policies, provision, agreement, or regulations are quoted, paraphrased, cited, or otherwise incorporated in this Agreement", the inclusion of which would be controlling as to the exclusion of matters from the negotiated grievance procedure without regard to what was or was not discussed in negotiations short of the most

convincing evidence of misrepresentation by Agency and reliance thereon by Local 1438 which specifically was neither shown nor asserted in this case.

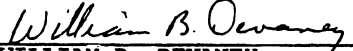
In Case No. 50-13033(GR) Agency's proposed resolution was rejected with full knowledge of Agency's interpretation of its policy; and in Case No. 50-13046(GR) Local 1438 was fully advised of Agency's interpretation prior to Mr. Benton's decision, dated April 25, 1975, and with full knowledge that the dispute under Section 9.2 was subject to the negotiated grievance procedure, Local 1438 failed to pursue its right to appeal the decision of April 25, 1975. In neither instance is there any possible basis from which it could be concluded that Applicant, or any member of Local 1438, relied to its, his or her, detriment on the prior adjustment of January 17, 1975.

Agency very correctly points out that the Data Preparation Division, Jeffersonville, Indiana, is an organizational subdivision of the Bureau of the Census, which together with the Bureau of Economic Analysis fell under the organizational structure of the Social and Economic Statistics Administration (SESA); and that while Jeffersonville has day-to-day authority in the administration of the Agreement, the actual parties to the contract were SESA (now Bureau of the Census) and Local 1438. In March, 1975, SESA issued the interpretation of its published policy in issue here, namely, that grievances under the Merit Promotion Plan are not subject to the negotiated grievance procedure. Section 8.2 places no limitation on the time Agency may issue interpretations of its published policies and, under the circumstances of this case, there had been no waiver and no established practice to the contrary from which a limitation on the unqualified right to so interpret its published policy could properly be inferred.

Therefore, Agency's interpretation of its published policy was lawful and proper and its interpretation, that the Merit Promotion Plan is not subject to the negotiated grievance procedure, being specifically excluded, may not be challenged under the negotiated grievance procedure.

RECOMMENDATION

The grievances in Case Nos. 13033(GR) and 13046(GR) are not subject to the provisions of the negotiated grievance procedure under Article 9, Section 9.1 of the Agreement inasmuch as Agency has issued an interpretation that its Merit Promotion Plan is not made subject to the negotiated grievance procedure by Section 9.1 of the Agreement and questions involving the interpretation of such published policies are specifically excluded from the negotiated grievance procedure by Article 8, Section 8.2 thereof.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 17, 1976
Washington, D.C.

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

U.S. DEPARTMENT OF AGRICULTURE,
GRAIN DIVISION FIELD OFFICE,
NEW ORLEANS, LOUISIANA
A/SLMR No. 666

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3157, Metairie, Louisiana, (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by notifying the Complainant that it would implement a tour of duty which is allegedly contrary to the parties' negotiated agreement and by its refusal to negotiate the tour of duty.

The Administrative Law Judge concluded that while the Respondent had announced its intentions to effect a change in the tours of duty by March 1, 1975, the change was never, in fact, made and the parties were still in dispute as to the negotiability of this subject. He also found that under Section 11(d) of the Order the authority of the Assistant Secretary to decide negotiability disputes can be exercised only if the negotiability issue arises as a result of action taken by management which gives rise to an alleged unfair labor practice. Otherwise, where the position of an agency raised a negotiability issue-- a refusal to negotiate a matter by virtue of a contrary agency policy-- the Administrative Law Judge noted that the Assistant Secretary has concluded that the proper resolution of the negotiability issue is through the Section 11(c)(2)-11(c)(4) procedures of the Order. In view of his conclusions with respect to the jurisdiction of the Assistant Secretary in this matter, the Administrative Law Judge did not pass upon the interpretation of the parties' negotiated agreement or any other issues. Accordingly, having found that Respondent's announced intention to impose duty hours could not be equated with an actual implementation thereof within the meaning of Section 11(d) of the Order, the Administrative Law Judge concluded that the Assistant Secretary was without jurisdiction in the instant case and recommended that the complaint be dismissed in its entirety.

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

UNITED STATES DEPARTMENT OF LABOR

IT IS HEREBY ORDERED that the complaint in Case No. 64-2665(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 22, 1976

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
GRAIN DIVISION FIELD OFFICE,
NEW ORLEANS, LOUISIANA


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

Respondent

and

Case No. 64-2665(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3157
METAIRIE, LOUISIANA

Complainant

DECISION AND ORDER

On February 27, 1976, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Assistant Secretary is without jurisdiction to decide the negotiability issue herein and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

1/ At page 6, item number 16, of his Recommended Decision, the Administrative Law Judge inadvertently noted the incorrect date. The date "March 14, 1975" should read "March 4, 1975". At page 8, footnote 2, the Recommended Decision inadvertently noted the incorrect case number-- Case No. "40-3783" should read "40-5783". These inadvertent errors are hereby corrected.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
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In the Matter of

U.S. DEPARTMENT OF AGRICULTURE
GRAIN DIVISION FIELD OFFICE
NEW ORLEANS, LOUISIANA
Respondent

Case No. 64-2665 (CA)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3157
METAIRIE, LOUISIANA
Complainant

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For Respondent

Glen Peterson

National Representative
American Federation of Government
Employees, AFL-CIO
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For Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on July 31, 1975 by the Regional Administrator for Labor-Management Services Administration of the U.S. Department of Labor, Kansas City Region, a hearing was held in the above captioned case before the undersigned on October 22, 1975 at New Orleans, Louisiana.

The proceeding herein was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on February 5, 1975 by American Federation of Government Employees, AFL-CIO, Local 3157 (herein called Complainant) against U.S. Department of Agriculture, Grain Division Field Office, New Orleans, Louisiana (herein called Respondent). It was alleged that Respondent violated 19(a) (1) and (6) of the Order by notifying the union in a letter dated January 28, 1975 that management would implement a tour of duty which Complainant avers is contrary to the current agreement between the parties. Further, it is alleged Respondent refused to negotiate this tour of duty with Complainant.

Respondent filed a response to these allegations denying the commission of unfair labor practices. Moreover, Respondent contended (a) the dispute involves interpretation or application of the contract and thus is not, under the decisions, a proper subject for consideration by the Assistant Secretary, (b) management was not obliged to discuss the proposed tour of duty with Complainant; however, it offered to negotiate on its implementation, i.e. method of selection, duration of assignment, rotation schedules, etc. but the union refused to negotiate same and has waived its rights, (c) Complainant appealed the non-negotiability determination of management to the Federal Council, and thus under 19(d) of the Order, the union may not raise the same issue under the complaint procedure, (d) assuming that tour of duty is a bargainable matter, it was bargained to impasse, and Respondent may properly put it into effect thereafter.

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

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

Findings of Fact

1. At all times material herein, and since November 27, 1970, Complainant has been recognized by Respondent as the exclusive bargaining representation of its agricultural commodity graders and clerks, GS-1 through GS-9 of the New Orleans, Louisiana Field Office engaged in grain, rice and related commodity inspection functions.

2. The most recent written collective bargaining agreement between the Complainant and Respondent was effective by its terms on December 4, 1972. By mutual consent of the parties the said agreement continues in effect, and will remain in effect, until a new agreement is reached.

3. (a) The said current agreement provides under Section 13.2 - "Weekday Overtime", in substance, that weekday overtime shall be time worked outside the regular tour of duty which is ordered and approved between 0600 hours on Monday and 1900 hours on Friday; that overtime, if required will be normally worked by the employee covering the assignment during the normal duty tour; that if this results in excessive hours of work, or a request to be relieved is made, a replacement will be obtained from alphabetical listings of employees by grade level. Provision is made for contacting other employees when overtime is declined, and the assignment of overtime when the list is depleted. Unless an employee is sick, or in the event of an emergency, employees assigned overtime between 0001 hours and 0800 hours are responsible for obtaining an acceptable replacement.

(b) The said current agreement provides under Section 13.3 - "Weekend Overtime", in substance, that weekend overtime shall be that ordered and approved between 1900 hours on Friday and 0600 hours on Monday; that 50 percent of said employees shall be free of overtime assignment on weekends; that lists, which are alternated weekly, shall be made of employees who are available for weekend overtime (List A), and those unavailable for weekend overtime (List B); and that employees may mutually agree to change from one list to another by proper notification to the supervisor beforehand.

4. The agreement between the parties contains a grievance procedure (Section 6) which is applicable only to the interpretation or application of the negotiated agreement and is the sole method for resolving such grievances. It sets forth, under Section 6.4, the procedures for informal and formal procedures in resolving the grievances. Section 7 of the contract provides for arbitration of grievances not resolved by the parties, and this arbitral process extends only to the interpretation or application of the agreement.

5. Prior to 1974 the employees of Respondent worked a regular 3 shift day (Monday through Friday) from 8 a.m. to 5 p.m. and from 5 p.m. to 1 a.m.

6. During 1973, due to extensive overtime hours worked by employees, and an inability to provide required supervision of grain inspection services, management considered the idea of changing from regular tours of duty to indefinite ones. In August, 1973 Respondent proposed to the union an 8 hour indefinite tour of duty, establishing the basic work week as five consecutive 8 hours days from Monday thru Friday - any 8 consecutive hours of duty with one meal break of no more than one hour. On September 2, 1973 the union objected on the ground that irregular hours would destroy morale and reduce overtime work for employees.

7. The first 8 hour indefinite tour of duty was implemented and became effective on January 6, 1974. Respondent instituted a midnight shift starting at 0100 hours on Monday morning. Management averred it was done to allow flexibility in assigning inspection personnel to shifts and tours of duty consistent with the workload demand.

8. Subsequent to the implementation of the new indefinite tour of duty, several employees worked at regular pay during weekdays in January, 1974 from 001 hours to 0830 hours while others worked after 1900 hours on Friday at regular pay during that month.

9. On January 22, 1974 Complainant filed a grievance with the employer herein under section 6 of the contract, contending that management violated Sections 13.2 and 13.3 thereof by the implementation of the new 8 hour indefinite tour of duty. The union contended that those employees who began working on weekdays at 1 a.m. should have been paid at the overtime rate for hours worked from 1 a.m. to 8:30 a.m; and that those who worked on Friday past 7 p.m. at the regular rate should receive overtime for such hours. Two additional grievances relating to the same issue were filed by the union on February 8 and 20, 1974. The grievances were denied by management at the appropriate levels by supervisory personnel.

10. Thereafter, the parties submitted the denied grievances to arbitration. A hearing was held before arbitrator Donald R. Moore on June 27, 1974 at which both parties were represented. On September 28, 1974 the arbitrator issued his opinion and award in which he denied the grievance and held that the employer did not violate sections 13.2 or 13.3 of the agreement between the parties. Further, he held the employer properly instituted the new tour of duty and could refuse overtime for hours worked less than eight hours in a day or 40 hours in a week. The arbitrator stated he did not pass judgment on whether the tour of duty was negotiable

between the parties. He concluded that contract did not preclude promulgation of a new tour of duty from a higher management level, and that it did not control establishment of a tour of duty or define when overtime will be paid - that sections 13.2 and 13.3 were intended to identify periods of time when employees would be free from overtime.

11. Complainant and Respondent engaged in negotiations during the week of November 18-22 and on December 4, 1974 leading to a new contract. At one of the first bargaining sessions management gave the union a copy of three planned tours of duty: Sunday thru Thursday, Monday thru Friday, and Tuesday thru Saturday. This would involve a 7 day week and 24 hours in each day. Management told the union that tours of duty were not subject to negotiation and could not be negotiated. However, the employer stated it would agree to negotiate methods of (a) assigning employees to the tours of duty and shifts; (b) rotating employees for such assignments; (c) length of time employees should be assigned to the tours of duty or shifts. However, the union took the position that the decision to adopt three tours of duty was itself negotiable, and refused to discuss the procedures of implementation. It did propose a tour of duty Monday thru Friday running from 8 a.m. to 4:30 p.m. -- possibly 7 a.m. to 3:30 p.m. for all employees. The union also insisted that weekday overtime be paid for all hours worked outside 0700 hours on Monday and 1530 hours on Friday; that weekend overtime be paid for approved hours worked between 1530 hours on Friday and 0700 hours on Monday. Management declared this was non-negotiable.

12. By letter dated January 9, 1975 Harlan Ryan, Field Office Supervisor of Respondent advised Alfred Bjorkgren, President of Complainant, that the three planned tours of duty would be implemented on March 1, 1975. The planned tours would call for 12 men on Sunday thru Thursday (four on each three shifts); 12 men on Monday thru Friday (ten on 1st shift, two on 2nd shift, and none on 3rd shift); 16 men on Tuesday thru Saturday (eight on first shift, four on 2nd shift, and four on 3rd shift). Ryan reiterated that the need for the planned tours of duty and workshift was a management decision not subject to negotiation. Further, he repeated that management was willing to discuss and consult re the method and procedures of implementation.

13. Bjorkgren replied to Ryan by a letter dated January 20, 1975 in which the union official stated the new tours would extend the basic workweek and require employees to work either Saturday or Sunday as regular time. Accordingly, the union declared this extension would violate the contract. Moreover, Bjorkgren states the subject of tours of duty was negotiable.

14. By letter dated January 21, 1975 the Complainant filed with the Federal Labor Relations Council a petition to review management's refusal to negotiate the union's proposal re negotiations of tours of duty, hours of work and occasional overtime. It requested the Council to find the union's proposal negotiable. In accordance with a stipulation signed by both parties herein, it was agreed that a negotiability dispute existed over "tours of duty, occasional overtime and related matters"; that the central issue in the negotiability dispute is a union proposal for a tour of duty entailing a Monday-Friday workweek and a single workshift from 7:30 a.m. to 3:30 p.m.

15. Ryan wrote Bjorkgren again in a letter dated January 28, 1975 and refused to accede to the union's request for a regular single tour of duty from Monday thru Friday. Management repeated its assertions that the staffing pattern and workload at New Orleans resulted in long hours of overtime and an inability to provide required supervisors of inspection services. The letter recited again that Respondent intended to implement the tours on March 1, 1975 as scheduled but with no change in shifts.

16. On March 14, 1975 Ryan wrote the union president herein stating that due to lack of sufficient personnel the implementation of the planned tours was temporarily delayed; that when the staff was increased to provide necessary manpower the planned tours of duty would be implemented. The planned tours were not put into effect. The three shifts under which employees operate Monday through Friday, remain the same and overtime is earned for work performed on Saturday and Sunday.

17. On October 8, 1975 the Federal Labor Relations Council notified Complainant that a review of its appeal was denied on procedural grounds. It concluded that since the union submitted revised proposals to the Council which were not advanced in negotiations, and were not referred to the agency head for a negotiability determination under 11(c) of the Order, the appeal failed to meet prescribed conditions for review.

18. Record testimony reflects that under the proposed three tours system employees would work five days and then, depending on the tour of duty, be off for two days. Employees working Sunday-Thursday would be off Tuesday and Saturday; employees working Monday-Friday would be off Saturday and Sunday; and those who worked Tuesday-Saturday would be off Sunday and Monday. Management anticipates carrying forward the A&B lists referred to in section 13.3 of the contract for use on the weekends; that it will not change the said listings; and that effect will be given to the contractual provision calling

for one-half the workers to be available for overtime while the remaining 50 percent would be free from overtime assignment.

Conclusions

Apart from contending that it has no obligation to bargain about a decision to implement tours of duty, as reflected in Sections 11(b) and 12(b) of the Order, Respondent further maintains that the Assistant Secretary has no jurisdiction to entertain this proceeding. 1/ It argues that since this dispute arose during negotiations with Complainant, rather than from an unfair labor practice proceeding, the Council retains jurisdiction to the exclusion of the Assistant Secretary.

Under Executive Order 11491, as amended, the Federal Labor Relations Council was authorized, under Section 4(c) (2) to consider appeals on negotiability issues as provided in Section 11(c) of said Order. The latter section provides that a union may appeal to the Council a question regarding negotiability if, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order. Where a union disagrees with an agency head's determination in this regard, or believes the agency's interpretation of regulations violates applicable law, regulation of authority outside the agency, or the Order, it may appeal to the council for a decision re negotiability.

In accordance therewith the Assistant Secretary has held that the unfair labor practice provisions in the Order may not be utilized to resolve negotiability disputes which arise in connection with negotiations. Where the position of an agency raised a negotiability issue - a refusal to negotiate a matter by virtue of a contrary agency policy - the Assistant Secretary has concluded the proper resolution of the issue is through the Section 11(c) (2) -- 11(c) (4) procedures of the Order. U.S. Department of Defense, Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, A/SLMR No. 211

1/ The Respondent also takes the position that (a) assuming arguendo the implementation of tours of duty is bargainable, the matter was bargained to impasse and thus the tours of duty may be properly implemented in accord with Respondent's proposal; (b) the issue involved an interpretation of the parties' agreement, which has been litigated in arbitration and a decision rendered adverse to the Complainant. In view of my conclusions in respect to the jurisdictional issue, I have not passed upon these additional contentions.

Executive Order 11838, which amended Executive Order 11491, became effective on May 6, 1975. It provided, under Section 11(d), that "if, as the result of an alleged unilateral change in, or addition to personnel policies and practices, or matter affecting working conditions, the acting party is charged with a refusal to consult, confer or negotiate as required under this Order, the Assistant Secretary may, in the exercise of his authority under Section 6(a) (4) of the Order, make those determinations of negotiability as may be necessary to resolve the merit of the unfair labor practice." 2/ (underscoring supplied). Thus, in certain instances it is no longer necessary to obtain a ruling from the Council that an issue is negotiable before filing a complaint alleging a refusal to negotiate in respect to such matter. Where the negotiability dispute does not arise in connection with negotiations between the parties, but rather as a result of refusal to negotiate by unilaterally changing working conditions, the negotiability issue is presented to the Assistant Secretary in the context of an unfair labor practice. Under such circumstances, he may resolve such issue. Nevertheless, the amendment as set forth in Section 11(d) of the Order does not affect the existing authority of the Council to decide negotiability disputes arising in connection with negotiations. Disputes which so arise are still resolved by the Council rather than the Assistant Secretary.


In considering the applicability of Section 11(d) of the Order to the case at bar, I am persuaded that the change in the authority of the Assistant Secretary contemplates that the negotiability issue arise as a result of action taken by management which gives rise to an alleged unfair labor practice. Both the amendment, and the Report and Recommendations of the Federal Labor Council thereon, bespeak of resultant unilateral changes in personnel policy or practice, or matters affecting working conditions. In the instant matter Respondent announced its intentions to effect a change in the tours of duty and implement three tours of duty by March 1, 1975. However, the unilateral change was never in fact made by the employer. Conceivably, no unilateral change will be made by Respondent, and the contemplated three tours of duty may never be implemented. In the present posture both parties are still in dispute as to the negotiability of this subject. The stipulations between the parties focuses attention on the

2/ Although the amendment was not in effect at the time when Respondent is charged with a violation of 19(a) (6), this would not, in itself, preclude a finding that the Assistant Secretary could determine the negotiability issue. In this respect, I would agree with Administrative Law Judge William B. Devancy that the change is procedural. See Alabama National Guard Case No. 40-3783 (January 28, 1976)

fact that the central issue in the negotiability dispute is the union's proposal for a regular Monday-Friday tour of duty. If the employer herein had instituted the new tours of duty, the negotiability issue would have been presented within the framework of an alleged unfair labor practice, i.e. the unilateral change in tours of duty. But such action was not taken and I would not equate Respondent's announcement of an intention to impose new duty tours with an actual implementation thereof. Accordingly, and since there was no resultant change in the tours of duty since the negotiations between the parties in November and December, 1974, I conclude the Assistant Secretary is without jurisdiction to decide the negotiability issue herein.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusion. I hereby recommend that the complaint against Respondent be dismissed in its entirety.


 WILLIAM NAIMARK
 Administrative Law Judge

DATED: February 27, 1976
 Washington, D.C.

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

DEPARTMENT OF DEFENSE,
 AIR NATIONAL GUARD, 147TH FIGHTER GROUP,
 TEXAS AIR NATIONAL GUARD,
 AUSTIN, TEXAS
 A/SLMR No. 667

This case involved an unfair labor practice complaint filed by the Council of Locals for the Texas Air National Guard, American Federation of Government Employees, AFL-CIO (Complainant/AFGE) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by giving Bobby D. Crabb, Vice-President of AFGE Local 3097, a low retention rating because of his union position and activities, and that this resulted in Crabb being separated from employment at the Respondent in a reduction-in-force. The complaint also alleged that the Respondent refused Crabb re-employment in a number of positions for which he was qualified for the same improper reasons.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Complainant had failed to sustain the burden of proof in support of its allegations that Crabb was discriminated against because of union considerations. Accordingly, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and ordered that the complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
AIR NATIONAL GUARD, 147TH FIGHTER GROUP,
TEXAS AIR NATIONAL GUARD,
AUSTIN, TEXAS

Respondent

and

Case No. 63-5580(CA)

COUNCIL OF LOCALS FOR THE TEXAS
AIR NATIONAL GUARD,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On April 7, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5580(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 22, 1976

Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ The Complainant's exceptions to the Administrative Law Judge's Recommended Decision and Order were filed untimely and have not been considered.

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In the Matter of

DEPARTMENT OF DEFENSE
AIR NATIONAL GUARD
147th FIGHTER GROUP
TEXAS AIR NATIONAL GUARD

Respondent

and

COUNCIL OF LOCALS FOR THE TEXAS
AIR NATIONAL GUARD
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

Case No. 63-5580 (CA)

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For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint 1/ dated April 6, 1975 and filed April 7, 1975 alleging violations of Section 19(a)(1), (2), and (4) of the Executive Order. By letter to the Area Director the Complainant requested that the complaint be withdrawn insofar as it alleged a violation of Section 19(a)(4) and on August 21 the Area Director granted the request on behalf of the Regional Administrator. On April 18, 1975 the Respondent submitted to the Regional Administrator a Motion to Dismiss which on September 3, 1975 was referred by the Regional Administrator to the Administrative Law Judge.

The complaint alleged that Bobby D. Crabb, Vice-President of Local 3097, was given a low retention rating and included in a reduction in force because of his union positions and activities and was refused re-employment in a number of positions, for which he was qualified, for the same reason.

On September 3, 1975 the Regional Administrator issued a Notice of Hearing on the complaint to be held on November 18, 1975 in Houston, Texas. Hearings were held in Houston on November 18 and 19, 1975. The Complainant was represented by an Area Representative, the President of Local 3097, and an attorney. The Respondent was represented by an Assistant Attorney General of Texas. The Motion to Dismiss was denied. 2/ The parties presented numerous witnesses who were examined and cross-examined, and presented exhibits which were received in evidence. At the close of the hearing both parties made closing arguments. Pursuant to extension of time, both parties filed timely briefs on or before January 13, 1976.

Facts

The Council of Locals for the Texas Air National Guard, AFGE, AFL-CIO, is the certified collective bargaining representative of the civilian technicians of the Texas Air National Guard. Local Union 3097 acts for the Council with respect to the civilian technicians employed by T.A.N.G. in the 147th Fighter Group at Ellington Air Force Base near Houston, Texas. Local 3097 has represented those employees since 1969.

1/ The Complaint was filed by Local Union 3097, American Federation of Government Employees, AFL-CIO. Pursuant to oral motion made at the hearing, and without objection, the name of the Complainant was changed as shown in the caption

2/ Tr. 30.

Bobby D. Crabb was a civilian technician employed by the Respondent in the unit represented by the Complainant and Local Union 3097. He became Vice-President of the Local on August 1, 1973. Prior thereto he had been a union steward. Clay Milligan was President of the Local.

The 147th Fighter group first had F-102 aircraft on which Crabb worked as a radar technician. It then acquired F-101 aircraft and Crabb worked on both types of aircraft. All his employment was as a radar technician. To be eligible for employment as a civilian technician in the National Guard one must be a member of the National Guard. 3/ Crabb was a staff Sergeant in the Air National Guard.

On June 28, 1974 the Respondent received from the Adjutant General of Texas an order from the National Guard Bureau changing the mission of the 147th Fighter Group. F-102's were no longer to be part of the aircraft of the 147th. This change necessitated a substantial reduction in force of the civilian technicians at the Ellington Air Force Base.

The Federal Personnel Manual, Part 351, does not apply to reduction in force of National Guard technicians. 4/ The National Guard Bureau and the Texas Air National Guard had their own regulations on the procedure to be followed in a RIF. Special ratings were given each of the employees affected to rate them for retention. One of the ratings was in each of several aspects of his performance in his civilian functions, and the other rating was in each of several aspects of his performance of his military duties as a member of the National Guard. The civilian and military ratings were each given equal weight for retention purposes in a RIF. The regulations provided that the technician's ratings in his civilian and military capacities were each to be made by his immediate supervisor in each capacity. Seniority was not a factor in either rating; the ratings were based solely on performance. Crabb had seven years service as a civilian technician and eight years military service.

Sergeant Paul H. Woods was Crabb's immediate supervisor as a civilian technician, and rated Crabb for retention purposes in his civilian capacity. He gave Crabb a low rating, based principally on his view that Crabb was poor in cooperation in working with others. Woods had had no dealings with Crabb as a union official. Crabb commonly disagreed with Woods concerning Woods'

3/ 32 U.S.C.A. §709(b).
4/ Exh. R 2, Sec. 2-3(b)(3).

instructions on how a particular assignment was to be performed, but always finally complied with the instructions. Several employees who worked with Crabb under Woods' supervision asked for realignment of the crews so they would no longer work with Crabb. It was part of Woods' function to check on Crabb's work, but Crabb showed resentment of Woods checking his work. Crabb's work as a radar technician was competent but average in quality. Nobody suggested to Woods that he give Crabb a low rating because he was a union official nor did he give him a low rating for that reason.

Crabb was rated on the military aspect of his performance in the Air National Guard by Sergeant E.W. Erickson. The military rating was made by Erickson although he was Crabb's second tier supervisor in the military, not his immediate supervisor as provided in the regulations. Crabb's immediate supervisor in the military was in competition with Crabb for retention as a civilian technician. Before Crabb's military rating for retention purposes it had been discovered with respect to another technician that his military rating was going to be made by one who was in competition with him for retention as a civilian technician and upon advice from the Adjutant General's office the regulations were departed from and the military appraisal was made by the first higher ranking military officer who was not in competition with the technician who was being rated. The same policy, a departure from the regulations, was followed in Crabb's military rating. Crabb appealed his military rating on the ground that it had not been made in accordance with the regulations. The appeal was denied.

Erickson, like Woods, gave Crabb a low retention rating, principally on cooperation. He believed Crabb was poor in cooperating with his fellow workers, did not volunteer for work when volunteers were needed, did not always wear the clothing called for, and several times had to be reminded to comply with National Guard requirements concerning the length of his hair and the length and tidiness of his moustache. Nobody suggested he give Crabb a low rating because he was a union officer, nor did he do so.

Both Woods and Erickson rated Crabb high on knowledge of his job and the quality of his work, low on cooperation, with intermediate grades, tending toward the low, on the other four aspects of his performance that were appraised. 5/

5/ Exhs. R 4, 5.

Senior Master Sergeant Jimmy L. Jackson was the head of the radar shop and a higher supervisor than Woods and Erickson. He had been an upper level supervisor of Crabb for over five years. He thought both Woods' and Erickson's retention ratings were fair, with Crabb's principal problem getting along with co-workers.

Colonel Bobby W. Hodges, Base Detachment Commander, issued a memorandum concerning the filling of vacancies in the unit with technicians who had received their final RIF notice and who had not been offered another equivalent job in the commuting area. 6/ This memorandum was prepared by Lt. Col. Leroy Thompson who was the Administrative Officer at Ellington Air Force Base. He discussed it with Mulligan, President of the Local, before it was issued, and Mulligan agreed with its contents. Among other provisions, it provided for filling unit vacancies with rified technicians who could be trained to perform their new duties "in a short period of time without adversely affecting the unit mission."

Sixty technicians, including Crabb, received notices of separation. Forty of them were placed in other positions and the other twenty, including Crabb, were separated with severance pay. Some who were retained had less seniority than Crabb but had received higher appraisals in their retention ratings.

Crabb received his notice of termination in October 1974 effective in December 1974. He left his employment with the Respondent before the effective date of his termination because he obtained other seemingly permanent employment. At the time of the hearing in this case he no longer had that employment and was unemployed.

Between the time of his final notice of termination and the termination of his employment with the Respondent, Crabb applied for six positions as other than a radar technician. Five of such applications were with the Respondent and the sixth was with another unit of the Air National Guard in Colorado. The Respondent furnished him with transportation for an interview for the position in Colorado but the unit in Colorado did not employ him.

Two of the positions with the Respondent for which Crabb applied were positions for which he was admittedly not qualified and for which the applicants selected were admittedly better qualified. One was in health services and the other in procurement. Some of the five positions remained vacant after Crabb's application

6/ Exh. R. 3.

was rejected, but all had been filled at the time of the hearing in this case.

The three other positions for which Crabb applied, and was rejected, had three different "selecting supervisors" who had "final determination" on the selections. 7/

One of the "selecting supervisors" who rejected Crabb's application was Sgt. Alton Curry, the Maintenance Superintendent. Curry had several vacancies for maintenance mechanics. He did not employ Crabb because Crabb gave him the impression he was not really interested in becoming a maintenance mechanic (for which position he would have to be trained), would look upon the job as only a temporary fill-in, and was flippant in his interview in which he made some snide remarks about the position for which he had applied and was being interviewed. Curry already had some people he supervised who were being trained as maintenance mechanics, did not want to add another trainee, especially one with Crabb's attitude toward the position, and later did employ others who had some preliminary training in maintenance mechanic's work. Curry was unaware of any of Crabb's union activities.

Another "selecting supervisor" who rejected Crabb was Sgt. Robert B. Thedford. Thedford was a supervisor in the electrical shop who worked principally on heating and air conditioning equipment. Thedford was a good friend of Crabb but thought Crabb would present a problem when it came to performing work not strictly within his job description. Thedford selected another applicant for the job who he thought was distinctly better qualified for the job both in his previous experience and education, and who has proven entirely satisfactory.

The last "selecting supervisor" who rejected Crabb was Sgt. Joseph Yerkes, the foreman of a small shop. He and others under his supervision were already working overtime at the time of Crabb's interview, and he had already employed two rified radar technicians who were being trained. Yerkes thought taking on a third trainee would be more than he could handle and would require his working more overtime. He wanted an additional employee who was already qualified for the position and later found one.

Crabb's activities as Vice-President of Local Union 3097, other than at meetings of the Local, were limited. The only specific matters shown by the record that he took up with management pertained, with one exception, to himself. Yet he believed

7/ See Exh. R 3.

the supervisors who rejected his applications for other positions and who gave him low retention ratings did so because of pressure from "above" because of his union office although he conceded he could not prove it. Indeed he testified :

"I feel like they're entitled to their opinions. I'm not going to tell you that they are wrong. It's an opinion is all it was." 8/

The only evidence that could be considered even to indicate management's anti-union animus pertained to Clay Milligan, the President of the Local. Like Crabb, he "felt" that he was given a low retention rating to set him up to be rified because he was a union officer, but in fact his retention rating was not so low as to cause his being rified.

Milligan was employed by the Respondent for twenty years. Before he became President of the Local he had not been formally criticized for his work. After he became President there were four memoranda written to or about Milligan criticizing his performance of his assignments. On December 20, 1973, Master Sergeant Robert S. Nouis, an experienced supervisor, wrote a memorandum to Milligan the subject of which was "Notice of Below Standard Work Performance." 9/ On April 9, 1974, Curry wrote a memorandum to Nouis the subject of which was "Unsatisfactory Performance of Alert Duties (Mr. Clay W. Milligan)". 10/ On May 2, 1974, Curry wrote another memorandum to Nouis on the same subject. 11/ And on May 14, 1974, Nouis wrote a memorandum to Milligan entitled "Reprimand" because of two additional incidents that Nouis considered defective work by Milligan. 12/

These four memoranda became the subject of an unfair-labor-practice charge. The charge was settled by agreement of the parties that all copies of the memoranda were to be destroyed without inferences of the validity of the criticisms. 13/

Since the union came on the scene in 1969 no union officer has been formally disciplined or had his employment terminated other than in the RIF involved in this case. Forty-four percent of technicians who held union office received promotions as technicians while they held such office.

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- 8/ Tr. 142.
 - 9/ Exh. C 2.
 - 10/ Exh. C 3.
 - 11/ Exh. C 5.
 - 12/ Exh. C 6.
 - 13/ Exh. C 7, par. 2b.

Discussion and Conclusion

The Complainant has failed to sustain its burden of proof that Crabb was discriminated against in the RIF and in the rejections of his applications for other employment because of his position as Vice-President of Local Union 3097. 14/

The only evidence that could conceivably be considered to show a management animus against union officers was the four memoranda critical of Milligan's work 15/ when no such memoranda were written before Milligan became President. Perhaps those memoranda show that Sgts. Curry and Nouis did not like Milligan and conceivably they did not like him because of his activities as President of the Local although there is nothing in the record even to indicate that.

But hostility to Milligan, if there was any, is not the issue in this case. The issue is whether Crabb was discriminated against because of his union position. There was no evidence that Crabb was discriminated against at all and certainly none that he was discriminated against because of his union office. To be sure, employees junior to Crabb were retained or accepted for other positions. But it was the announced policy that seniority would not be a factor in rating employees for retention in the RIF and there is nothing in the record to indicate that that policy was not uniformly applied. All that there is in the record to indicate discrimination is the testimony of Crabb and Milligan that they felt that Crabb had been discriminated against because of his union office, that they were sure of it. Such testimony is not evidence that their feelings were based on fact. 16/ Crabb testified that he "felt" that those who participated in his retention rating and rejection of his applications for other jobs were pressured from "higher up" to give him poor ratings and not to employ him in other positions. There is no evidence of any such pressure, and all who participated in such actions testified there was no such pressure.

14/ Regulations, 29 C.F.R. §203.15.


15/ Exhs. C 2, 3, 5, 6.

16/ 2024th Communications Squadron, Air Force Communications Service, Moody Air Force Base and Mildred H. Spradley, A/SLMR No. 248.

There was thus a failure to prove the material allegations of the complaint, and the compliant should be dismissed.

RECOMMENDATION

I recommend that the compliant be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: April 7, 1976
Washington, D.C.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY,
REGION VII,
KANSAS CITY, MISSOURI
A/SLMR No. 668

ENVIRONMENTAL PROTECTION AGENCY,
REGION VII,
KANSAS CITY, MISSOURI

Respondent

and

Case No. 60-4069(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1205,
KANSAS CITY, MISSOURI

Complainant

DECISION AND ORDER

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local 1205, (NFFE) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain with the Complainant before promulgating "Attachment 10" of the Respondent's Regional Affirmative Action Plan. In this regard, the Complainant contended that "Attachment 10" constituted the impact of, and procedures to be used in implementing, the Agency Upward Mobility Program. On the other hand, the Respondent contended that, under Section 11(b) of the Order, it was not obligated to negotiate over the contents of "Attachment 10." Pursuant to a stipulation of facts by the parties, the Administrative Law Judge transferred the case to the Assistant Secretary without the issuance of a recommended decision and order. While such action by the Administrative Law Judge was considered to be inappropriate under the Regulations, under the particular circumstances herein, the Assistant Secretary considered the case to be properly before him for decision.

This matter is before the Assistant Secretary pursuant to Administrative Law Judge Gordon J. Myatt's December 3, 1975, Order forwarding the record in this matter to the Assistant Secretary for decision. ^{1/} Upon consideration of the entire record in the subject case, including the parties' stipulation of facts and accompanying exhibits and briefs filed by both parties, I find as follows:

With respect to the merits, the Assistant Secretary noted that it had been held previously in an analogous situation involving an alleged violation of an agency grievance procedure which did not result from any right accorded to individual employees or to labor organizations under the Order, that the policing and enforcing of such an agency established procedure are the responsibility of the U.S. Civil Service Commission. Finding that the Complainant herein was, in effect, seeking to modify in certain respects an upward mobility program promulgated by the Agency, the Assistant Secretary concluded that the policing and enforcing of the Agency's Upward Mobility program were not matters for review under Section 19(a) of the Order.

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by failing to confer, consult or negotiate with the Complainant before promulgating "Attachment 10" of the Respondent's "Affirmative Action Plan for Region VII" (herein called the Regional Affirmative Action Plan). In this regard, the Complainant contends that the targeted positions, selection procedures, and training specified in "Attachment 10," in effect, constitute the impact of, and the procedures to be utilized in implementing,

Additionally, the Assistant Secretary found that, as the parties were in essential agreement that the disputed upward mobility positions in "Attachment 10" were not the product of the Agency Upward Mobility Program but were identified and filled prior to the promulgation of this Program, "Attachment 10" did not encompass matters involving the impact of, and the procedures to be used in implementing, the Agency Upward Mobility Program.

^{1/} It should be noted that the Assistant Secretary's Regulations make no provision for the transfer by an Administrative Law Judge of a case to the Assistant Secretary without the issuance of a recommended decision and order. In this regard, Section 206.5(a) of the Assistant Secretary's Regulations provides, in part, that "...after the filing of a petition, complaint, or application in which the Regional Administrator determines that no material issue of fact exists, he may transfer the case to the Assistant Secretary." (Emphasis added) Notwithstanding the above noted procedural error of the Administrative Law Judge in directly transferring this matter to the Assistant Secretary, because of the delay that would ensue from a rigid adherence to the Regulations, and in view of the agreement of the parties herein, the instant case was considered to be properly before the Assistant Secretary for decision.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

the Environmental Protection Agency's "Upward Mobility Training Agreement" (herein called the Agency Upward Mobility Program). Thus, the Complainant maintains that "Attachment 10" specifies the job opportunities, education and training that will assist nonprofessional employees in attaining professional, administrative and technical positions. Additionally, the Complainant contends that the Respondent failed to follow the "proper procedures" of the Agency Upward Mobility Program with regard to the selection of the incumbents in five upward mobility positions listed in "Attachment 10." 2/

On the other hand, the Respondent maintains that, under Section 11(b) of the Order, it was not obligated to meet and confer over the contents of "Attachment 10" as this document deals with mission and organization, as well as the numbers, types and grades of positions or employees assigned to an organizational unit. 3/ Further, the Respondent contends that the five incumbents occupying the disputed positions identified in "Attachment 10" were selected for these positions prior to the implementation of either the Regional Affirmative Action Plan or the Agency Upward Mobility Program. 4/

The undisputed facts, as stipulated by the parties, are as follows:

The Complainant is the exclusive representative of all nonprofessional employees employed by the Respondent. On August 9, 1974, the Respondent provided the Complainant with a copy of the Agency Upward Mobility Program which had been issued previously by Agency headquarters on July 18, 1974. Differing substantially from a July 2, 1974, draft previously provided the Complainant, 5/ the new Agency Upward Mobility

2/ The instant complaint acknowledged that the U.S. Civil Service Commission declined to investigate the Respondent's conduct with regard to the selection of upward mobility positions.

3/ Section 11(b) of the Order provides:

In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

4/ The Respondent conceded that the five employees were not selected in accordance with the provisions of the Agency Upward Mobility Program.

5/ On July 2, 1974, the Respondent provided the Complainant's president with draft proposals of a Regional Upward Mobility Plan and a Regional Affirmative Action Plan for his comments and suggestions,

Program superseded the earlier document, outlining the procedures for selection, training and administration. In reply to concerns expressed by the Complainant's president over the differences between the new Agency Upward Mobility Program and the provisions of the July 2, 1974, draft provided the Complainant, the Respondent asserted that the program was in its final form and that no changes would be made.

On November 18, 1974, the U.S. Civil Service Commission approved the Respondent's Regional Affirmative Action Plan. As a condition of approval, however, the Commission required that the Respondent supplement the Regional Affirmative Action Plan with sections dealing with upward mobility, subsequently known as "Attachments 9 and 10." The Regional Affirmative Action Plan enumerated the goals and achievements of various programs dealing with employment opportunities for women and minorities employees of the Respondent; "Attachment 9," entitled "Upward Mobility Report," summarized the Agency's Upward Mobility Program; and "Attachment 10," entitled "Region VII Upward Mobility Program," reported the series and grade of five upward mobility positions previously established, the process utilized to select the incumbent in each position, and the nature of the training and education already provided to the incumbents. In addition, the latter Attachment provided for two additional upward mobility positions to be identified after establishment of a position ceiling for Fiscal Year 1975. 6/

On November 21, 1974, the Respondent distributed to its employees copies of the recently approved Regional Affirmative Action Plan. Upon obtaining a copy of the Plan, the Complainant's president informed the Respondent of its objection to the differences between the draft proposal provided on July 2, 1974, and the newly implemented plan, with particular emphasis on "Attachment 10." The Respondent informed the Complainant that the plan was in its final form and that no changes would be made.

CONCLUSIONS

As noted above, the Complainant contends that the Respondent was obligated to meet and confer over the contents of "Attachment 10" as it constituted the impact of, and procedures to be utilized in implementing, the Agency's Upward Mobility Program. In this connection, the Complainant asserts that the five disputed upward mobility positions listed in "Attachment 10" were not a result of the provisions of the Agency's Upward Mobility Program in that the "proper procedures" specified in this document were not employed in the selection of these positions. The Respondent, on the other hand, maintains that the matters contained in "Attachment 10" were not negotiable and that the five disputed upward mobility positions were identified and filled before the promulgation of the Agency Upward Mobility Program.

6/ The Agency Upward Mobility Program retains the administration of the program within its Office of Civil Rights and Urban Affairs and its Personnel Management Division and makes no provision for the participation of exclusive representatives in the designation of upward mobility positions, the selection of trainees, or the establishment of education and training.

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

In my view, the Complainant herein is, in effect, seeking to modify in certain respects an upward mobility program promulgated by the Agency. It has been held previously in an analogous situation involving an alleged violation of an agency grievance procedure which did not result from any right accorded to individual employees or to labor organizations under the Order, that the policing and enforcing of such an agency established procedure are the responsibility of the U.S. Civil Service Commission. ^{7/} Similarly, I find that, under the circumstances herein, the policing and enforcing of the Agency's Upward Mobility Program were not matters for review under the procedures of Section 19(a) of the Order.

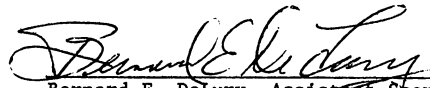
Moreover, it was noted that the parties herein were in essential agreement that the disputed upward mobility positions enumerated in "Attachment 10" are not a product of the Agency Upward Mobility Program, but were identified and filled prior to the promulgation of such Program. Consequently, the evidence was considered insufficient to support the Complainant's contention that "Attachment 10" encompassed matters involving the impact of, and the procedures to be utilized in implementing, the Agency Upward Mobility Program. Rather, it appears from the evidence herein that "Attachment 10" was formulated in reply to a request of the U.S. Civil Service Commission and reflected merely actions which already had been taken and procedures which were in existence prior to the formulation of the Agency Upward Mobility Program and the Regional Affirmative Action Plan.

Based on all of the foregoing, I find that the Respondent did not violate Section 19(a)(1) and (6) of the Order by failing to meet and confer with regard to "Attachment 10" of the Regional Affirmative Action Plan.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-4069(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
 June 22, 1976


 Bernard E. DeLury, Assistant Secretary of
 Labor for Labor-Management Relations

^{7/} See Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334. As noted above, the U.S. Civil Service Commission approved the Respondent's Regional Affirmative Action Plan and declined to investigate the Respondent's conduct with regard to the selection of certain upward mobility positions.

ARMY AND AIR FORCE EXCHANGE SERVICE,
 SOUTH TEXAS AREA EXCHANGE,
 LACKLAND AIR FORCE BASE, TEXAS
 A/SLMR No. 669

On July 31, 1975, the Assistant Secretary issued his Decision and Order in A/SLMR No. 542, in which he found that the Respondent violated Section 19 (a)(1) and (5) of the Order by improperly withdrawing recognition from the American Federation of Government Employees, Local 3202, AFL-CIO (Complainant) with regard to maintenance employees at the Fort Sam Houston Exchange. In this regard, he found that, as a co-employer with the Fort Sam Houston Exchange, the Respondent had an obligation to continue to accord such recognition and responsibility for maintaining the present terms and conditions of employment for all employees in the unit, including those contained in any existing negotiated agreement.

On March 19, 1976, the Federal Labor Relations Council (Council) requested that the Assistant Secretary further consider and clarify his Decision and Order in light of the principles set forth in its Decision on Appeal in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 74A-22. In rejecting the co-employer doctrine, the Council, in a subsequent clarification of its decision in FLRC No. 74A-22, posited alternately that it might be determined that the disputed employees remained in the existing unit, that they are no longer a part of the existing unit and are therefore unrepresented, or that a "successorship" had been created.

The Assistant Secretary found, consistent with the Council's rationale, that as the reorganization herein involved the transfer to the gaining employer of only a small segment of those employees of the existing exclusively recognized unit, the Respondent was not a "successor" employer. However, the Assistant Secretary found that the disputed maintenance employees at the Fort Sam Houston Exchange remained in the existing unit, and that the reorganization amounted to no more than an administrative transfer of these employees. In this regard, it was noted that, subsequent to the reorganization, the maintenance employees at the Fort Sam Houston Exchange continued to share a community of interest with other unit employees in that they continued to report to work at the same place, received assignments from, and were responsible to, the same immediate supervisor, and performed the same duties and maintained the same work contacts with other employees who undisputedly remained in the Fort Sam Houston Exchange unit. Moreover, the Assistant Secretary found that the retention of the disputed maintenance employees in the unit would promote effective dealings and efficiency of agency operations. In this regard, he noted that, subsequent to the reorganization, the South Texas Area Exchange (STAE) performed contract administration and personnel functions for all employees at the Fort Sam Houston

Exchange, including maintenance employees, and, additionally, that the organizational entities within the Army and Air Force Exchange Service (AAFES), Fort Sam Houston and the STAE, share the same mission, common overall supervision, and are subject to uniform AAFES personnel and labor relations policies and practices. While noting that the Respondent accepted the risk of an unfair labor practice finding because of its failure to file an appropriate representation petition in this matter, the Assistant Secretary found that, as the Respondent was neither a co-employer nor a successor employer, it was under no obligation to accord the Complainant recognition with respect to the Fort Sam Houston employees. Therefore, he found that the Respondent's conduct was not violative of Section 19(a)(5) of the Order.

However, the Assistant Secretary further found that, by discontinuing dues deductions for maintenance employees and later withholding dues payments from the Complainant, the STAE interfered with the obligation of the Fort Sam Houston Exchange to honor the terms and conditions of the existing agreement and accord appropriate recognition to the Complainant. Such conduct by the Respondent was deemed to interfere with, restrain, or coerce unit employees in violation of Section 19(a)(1) of the Order.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order, and that it take certain affirmative actions consistent with his decision.

A/SLMR No. 669

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
SOUTH TEXAS AREA EXCHANGE,
LACKLAND AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-5019(CA),
A/SLMR No. 542,
FLRC No. 75A-93

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3202, AFL-CIO

Complainant

SUPPLEMENTAL DECISION AND ORDER

On March 13, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices. In essence, the complaint herein alleged that the Respondent violated Section 19(a)(1), (5) and (6) of the Order when, after a reorganization, it ceased recognizing the Complainant as the exclusive representative of certain maintenance employees located at the Fort Sam Houston Exchange. 1/

On July 31, 1975, in A/SLMR No. 542, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (5) of the Order by improperly withdrawing recognition with regard to the maintenance employees at the Fort Sam Houston Exchange. In this regard and consistent with his finding in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, the Assistant Secretary concluded that, under the circumstances of this case, the Respondent was a co-employer with the Fort Sam Houston Exchange and, as such, was obligated to continue to accord recognition to the Complainant, including the obligation to continue to honor any existing negotiated agreement between the Complainant and the Fort Sam Houston Exchange, as it pertained to the maintenance employees working at the Fort Sam Houston Exchange.

1/ The Complainant was certified on September 3, 1971, as the exclusive representative of all regular full-time and regular part-time hourly paid employees and certain temporary personnel employed by the Fort Sam Houston Exchange. The record reveals that the parties' most recent negotiated agreement was executed in April 1972 and remained effective through April 1975.

On December 9, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the Defense Supply Agency case, FLRC No. 74A-22, in which it set aside the Assistant Secretary's Decision and Order in A/SLMR No. 360, and rejected the co-employer doctrine as it was fashioned and applied in the circumstances of that case. 2/ Thereafter, on December 31, 1975, the Council remanded the subject case to the Assistant Secretary requesting that he further consider and clarify his decision in light of the principles set forth in the Defense Supply Agency decision. On January 14, 1976, in response to the Council's remand of December 31, 1975, the Assistant Secretary requested that the Council specify whether the Council's decision in Defense Supply Agency rendered the co-employer doctrine inapplicable in toto or merely with regard to the circumstances of the Defense Supply Agency case. On March 19, 1976, the Council replied stating, in part, that:

while there may be 'clear factual distinctions' between the Defense Supply Agency case and the instant case (such as the fact that 'the reorganization involved in the instant case took place within a single agency as distinguished from a reorganization across agency lines'), the Council did not mean to imply in its Defense Supply Agency decision that such factual distinctions would in any manner render the co-employer doctrine a viable alternative. Instead, as appears from the Council's decision, only the following alternatives would be potentially applicable, depending on the present record or the record which might be developed, namely: it might be determined that the disputed employees

2/ In addition to rejecting the co-employer doctrine, the Council raised questions concerning the applicability to the Defense Supply Agency case of its decision in Headquarters, United States Army Aviation Systems Command (AVSCOM), FLRC No. 72A-30. In this regard, it questioned whether the Assistant Secretary's procedures available to the Respondent Activity at the critical times involved in that case clearly provided the latter with access to representation procedures which would have resolved its legitimate doubts. Further, the Council enunciated certain criteria under which "successorship" might be determined. On February 17, 1976, the Assistant Secretary issued his Supplemental Decision and Order in A/SLMR No. 615 concluding that there existed prior to April 1973, as there exists today, a representation procedure under the Executive Order which was available to the Respondent Activity to resolve any unit questions resulting from the reorganization. Accordingly, he found that, by failing to file an appropriate representation petition, the Respondent Activity was deemed to have accepted the risk of an unfair labor practice finding. However, as the Respondent Activity was not a "successor" employer under the criteria enunciated by the Council, the Assistant Secretary concluded that under the circumstances it was not obligated to accord recognition to the Complainant labor organization and, accordingly, was not in violation of the Order.

remain in the existing unit; that they are no longer a part of the existing unit and are therefore unrepresented; or that a 'successorship' has been created by the reorganization within the criteria established in the Defense Supply Agency decision.

In reexamining the decision herein pursuant to the Council's request in light of all of the principles enumerated in its Defense Supply Agency decision, it was noted that the essential facts are not in dispute and, therefore, I shall repeat them only to the extent deemed necessary to reach a determination herein.

At all times material herein, the Alamo Exchange Region was 1 of 5 exchange regions in the Army and Air Force Exchange Service (AAFES). Prior to January 1974, the Fort Sam Houston Exchange was an autonomous exchange responsible directly to the Alamo Exchange Region. Effective January 26, 1974, a reorganization was instituted whereby the Fort Sam Houston Exchange, along with Randolph Air Force Base, was added to the South Texas Area Exchange, (hereinafter called STAE), headquartered at Lackland Air Force Base, a distance of some 13 miles from the Fort Sam Houston Exchange. Operating as a new managerial level, the STAE centralized various administrative "overhead" functions for all exchanges within its jurisdiction, including the Fort Sam Houston Exchange, such as accounting, personnel, contract administration and certain management operations. As a result of the reorganization, numerous employees working in "overhead" operations were transferred to other exchanges, and some managerial employees were subject to reduction-in-force procedures.

In early April 1974, the Complainant received notice that, as a result of the January 26, 1974, reorganization, four of the Fort Sam Houston Exchange maintenance employees were being transferred to the STAE and the remaining four maintenance employees, one maintenance secretary, and the section supervisor would remain at the Fort Sam Houston Exchange. The Complainant agreed that the maintenance employees physically transferred to the STAE would no longer be a part of its bargaining unit and, in this regard, four maintenance employees were transferred physically from the Fort Sam Houston Exchange to the STAE and the Fort Sam Houston Exchange ceased deducting union dues from their pay. However, on or about April 19, 1974, the Complainant was informed that dues deductions also had been terminated for the maintenance employees remaining at the Fort Sam Houston Exchange. This action was justified by the Respondent on the grounds that while some maintenance employees retained the Fort Sam Houston Exchange as their assigned duty station, the entire maintenance crew had been "transferred" to the STAE. As to the effect of the reorganization on the maintenance employees remaining at Fort Sam Houston, the record reflects that, subsequent to the reorganization, bookkeeping matters relative to these employees were reassigned from the Fort Sam Houston Exchange Personnel Office to the

STAE, and they were covered on different payrolls. However, these maintenance employees, as before, were located at the Fort Sam Houston Exchange, reported to work at the same place, received assignments from, and were responsible to, the same immediate supervisor, and performed the same duties and maintained the same work contacts with other employees who undisputedly remained in the Fort Sam Houston Exchange unit.

As noted above, in requesting that the Assistant Secretary reexamine his decision in the instant case, the Council found that only the following alternatives to the co-employer doctrine would be potentially applicable: (1) the disputed employees remain in the existing unit; (2) the disputed employees are no longer a part of the existing unit and are therefore unrepresented; or (3) a "successorship" has been created by the reorganization within the criteria established by the Council in its Defense Supply Agency decision.

Under the particular circumstances herein, and noting particularly that the evidence establishes that the reorganization herein involved the administrative transfer to the gaining employer of only a small segment of those employees of the existing exclusively recognized unit, I find that a "successorship" has not been created within the criteria established by the Council in its Defense Supply Agency decision. ^{3/} However, I conclude that, based on the circumstances herein, the disputed maintenance employees remain in the existing exclusively recognized unit. Thus, in my view, the reorganization involved herein amounted to no more than an administrative transfer with respect to those maintenance employees remaining at the Fort Sam Houston Exchange. In this connection, the evidence establishes that the maintenance employees who were not physically transferred to the Lackland Air Force Base, but were administratively transferred to the STAE, continued to report to work at the same place and receive assignments from, and are responsible to, the same immediate supervisor at the same building as was the case prior to the reorganization. Further, they continue to perform the same duties involving general maintenance, repair, and renovation at the same location. ^{4/} Since they perform the same functions as prior to the reorganization, contacts with other employees who undisputedly remain in the Fort Sam Houston unit continue to be the same. Under these circumstances, I find that the community of interest shared by the maintenance employees at the Fort Sam Houston Exchange with other unit employees was undisturbed by the reorganization.

^{3/} See the Assistant Secretary's Supplemental Decision and Order in the Defense Supply Agency case, A/SLMR No. 615.

^{4/} The record reflects that before and after the reorganization the maintenance employees stationed at Fort Sam Houston spend 55 percent of their time working at Fort Sam Houston and the remainder of their time at other locations, such as Camp Bullis, Canyon Lake, Randolph Air Force Base, and the Alamo Exchange Regional Office located at Fort Sam Houston.

Moreover, noting that in any appropriate unit determination the necessary equal weight must be accorded to each of the criteria set forth in Section 10(b) of the Order, I find that the retention of the disputed maintenance employees in the Fort Sam Houston unit will promote effective dealings and efficiency of agency operations. As to effective dealings, it was noted that, while before the reorganization the Fort Sam Houston Exchange performed its own personnel functions, after the reorganization the STAE assumed these responsibilities. In this regard, however, the evidence further establishes that the STAE now performs contract administration and personnel functions for all employees at the Fort Sam Houston Exchange, and not merely for the maintenance employees "assigned" to the STAE. Further, there was an absence of any countervailing evidence that the retention of the maintenance employees in the Fort Sam Houston unit would not promote efficiency of agency operations. In this regard, the record reflects that the Fort Sam Houston Exchange and the STAE are organizational entities within the Alamo Exchange Region of the AAFES and, consequently, employees assigned to the AAFES components share in a common mission, common overall supervision, and are subject to uniform AAFES personnel and labor relations policies and practices. ^{5/} Nor do I view the fact that the disputed maintenance employees were covered on a different payroll or experienced minor procedural changes regarding their work orders as a consequence of the reorganization to be of sufficient weight to warrant removing these employees from their existing exclusively recognized unit in light of the circumstances outlined above concerning their continued close working relationship with the other unit employees at the Fort Sam Houston Exchange and the fact that they are covered by common personnel and labor relations policies and practices. Thus, I find that the maintenance employees at the Fort Sam Houston Exchange continue to remain in the existing exclusively recognized unit. ^{6/}

Moreover, consistent with the Supplemental Decision and Order in Defense Supply Agency, A/SLMR No. 615, I find that at all times material in the subject case there existed a representation procedure which would have led to a resolution by the Assistant Secretary of the Complainant's representative status - i.e., the filing of an RA petition. Therefore, by failing to file an RA petition in this matter, the Respondent was considered to have accepted the risk of an unfair labor practice finding based upon its conduct in unilaterally terminating dues deductions for the disputed maintenance employees.

To find that the Respondent's conduct herein constituted an improper failure to accord the Complainant exclusive recognition it must first be ascertained whether, subsequent to the reorganization, it owed an obligation to accord appropriate recognition to the Complainant with respect to maintenance employees at the Fort Sam Houston Exchange. It has

^{5/} Compare the Defense Supply Agency case where the Council noted, among other things, that the Defense Supply Agency and the Army had separate missions, functions, regulations, administrations and commands.

^{6/} See Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida, A/SLMR No. 514, FLRC No. 75A-61.

been found previously that the obligation to accord recognition under the Order applies only in the context of an exclusive bargaining relationship between the exclusive representative and the activity or agency involved. ^{7/} As the Council has rejected the co-employer doctrine as originally applied in the instant case by the Assistant Secretary, and as I have found that Respondent herein is not a "successor" employer under the criteria established by the Council, I find that, at all times relevant herein, the Respondent was under no obligation to accord the Complainant recognition with respect to the Fort Sam Houston employees. Consequently, the Respondent's conduct herein cannot be deemed violative of Section 19(a)(5) of the Order.

However, in my view, such a finding does not 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 and the Complainant. An integral part of the obligation to accord appropriate recognition to a labor organization qualified for such recognition is the obligation to continue to accord such recognition as long as the labor organization involved remains qualified under the provisions of the Order. In view of the finding above that the maintenance employees at the Fort Sam Houston Exchange continued to remain in the exclusively recognized unit, clearly the Fort Sam Houston Exchange was obligated to continue to accord recognition to the Complainant with respect to such employees, including the obligation to continue to honor any existing negotiated agreement with the Complainant. The evidence herein establishes that, following the reorganization, the STAE assumed control of "overhead" functions, contract administration and personnel, including the deducting of union dues for all unit employees at Fort Sam Houston. Exercising its control over these functions, the STAE discontinued dues deductions for the maintenance employees at the Fort Sam Houston Exchange, and withheld the transmittal of dues payments to the Complainant. By thus interfering with the obligation of the Fort Sam Houston Exchange to honor the terms and conditions of its existing negotiated agreement with the Complainant, I find that the STAE interfered with the obligation of the Fort Sam Houston Exchange to accord appropriate recognition to the Complainant. ^{8/} In my view, such improper conduct by the Respondent had the concomitant effect of interfering with, restraining, or coercing the maintenance employees in the unit at the Fort Sam Houston Exchange in the exercise of their right assured by the Order to assist a labor organization. Under these circumstances, I find that the Respondent violated Section 19(a)(1) of the Order.

^{7/} Cf. National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457, set aside on other grounds in FLRC No. 74A-95.

^{8/} Cf. Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608.

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 ^{9/} that the Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing unit employees at the Fort Sam Houston Exchange by interfering with the Fort Sam Houston Exchange's obligation to accord appropriate recognition to its employees' exclusive bargaining representative, the American Federation of Government Employees, Local 3202, AFL-CIO, and to honor its existing negotiated agreement with that labor organization.

b. In any like or related manner interfering with, restraining, or coercing employees at the Fort Sam Houston Exchange represented exclusively by the American Federation of Government Employees, Local 3202, AFL-CIO, in the exercise of their rights assured by Executive Order 11491, as amended.

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

a. Remit to the American Federation of Government Employees, Local 3202, AFL-CIO, all money deducted from unit employees' pay which was withheld from the American Federation of Government Employees, Local 3202, AFL-CIO, but is retained in escrow.

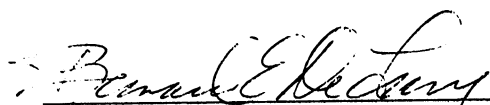
b. Post at the Fort Sam Houston Exchange, Fort Sam Houston, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the General Manager, South Texas Area Exchange, Lackland Air Force Base, Texas, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

^{9/} In its exceptions, the Respondent maintained that shortly after the hearing in this matter all dues money held in escrow was refunded to the employees involved and that remedial provisions regarding the payment of this dues money to the Complainant were no longer applicable. In my view, such matters may best be raised in the compliance phase of this matter.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(5) and (6) and additional violations of Section 19(a)(1) of Executive Order 11491, as amended, be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 22, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce unit employees at the Fort Sam Houston Exchange by interfering with the Fort Sam Houston Exchange's obligation to accord appropriate recognition to the American Federation of Government Employees, Local 3202, AFL-CIO, and to honor its existing negotiated agreement with that labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees at the Fort Sam Houston Exchange represented exclusively by the American Federation of Government Employees, Local 3202, AFL-CIO, in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL remit to the American Federation of Government Employees, Local 3202, AFL-CIO, all money deducted from unit employees' pay which was withheld from the American Federation of Government Employees, Local 3202, AFL-CIO, but is retained in escrow.

(Agency or Activity)

Dated _____ By _____
(Signature)

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

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



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 19, 1976

Honorable Paul J. Fasser, Jr.
Assistant Secretary of Labor for
Labor-Management Relations
Department of Labor, Room S-2307
200 Constitution Avenue, NW.
Washington, D.C. 20210

Re: Army and Air Force Exchange Service,
South Texas Area Exchange, Lackland
Air Force Base, Texas, A/SLMR No. 542,
FLRC No. 75A-93

Dear Mr. Fasser:

This is in reply to your letter of January 14, 1976, in which you state that the Council's letter of December 31, 1975, requesting that you further consider and clarify your decision in the above-entitled case in light of the principles enunciated in the Council's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (December 9, 1975), Report No. 88, "raises an ambiguity which it appears must be resolved before the subject decision can be clarified." You suggest that the Council's letter is ambiguous in that the word "reversed" contained therein may be read to imply either that the Council's decision in Defense Supply Agency reversed the co-employer doctrine in toto or that it reversed the co-employer doctrine only insofar as it was applied in the circumstances of the Defense Supply Agency case. Therefore, you ask that the Council resolve this "ambiguity" prior to your reconsideration of the above-entitled case.

With respect to the co-employer doctrine the Council stated, in part, in the Defense Supply Agency decision:

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. [Footnote omitted.]

. . . 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, 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.

Accordingly the Council, without indicating any circumstances under which the co-employer doctrine might be viable, held "the co-employer doctrine, as fashioned and applied by the Assistant Secretary in the circumstances of this case, was improper. . . ."

The Council's conclusion in the above respect was fully consistent with its assigned adjudicatory role in resolving cases appealed to it under section 4(c)(1) of the Order, i.e., the Council decided the particular case before it. Thus, in the circumstances of the particular case which was then before the Council for review, the Council concluded that the

co-employer doctrine, as fashioned and applied therein, was improper. Furthermore, in so concluding, the Council followed the approach which it had outlined at some length in its report accompanying E.O. 11838, Labor-Management Relations in the Federal Service (1975), at 50-51 (and adverted to in its decision in Defense Supply Agency at 19-20):

Each reorganization presents distinct labor-management relations problems 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 Council therefore concluded that the case-by-case approach, whereby each reorganization problem is dealt with as it arises from the facts of a particular case, will better facilitate the appropriate resolution of such problems

While the Council (with Presidential approval) has indicated its intention to deal on a case-by-case basis with questions arising as a result of agency reorganizations, and while the Council therefore rendered a decision in the Defense Supply Agency case which dealt with the issues as they arose from the particular facts of that case, the reasoning of the decision therein should not be construed as in any manner limited solely to that case, nor should the principles enunciated therein be construed as applicable only to other cases which present the identical factual situation presented in Defense Supply Agency. In other words, while the Council has concluded that reorganization problems should be resolved on a case-by-case basis, clearly they will not be resolved on an ad hoc basis; further, consistent with the recognized practice in administrative tribunals, the principles enunciated in the Defense Supply Agency decision constitute valid guidelines and precedent for the resolution of similar questions in future cases.

Thus, while there may be "clear factual distinctions" between the Defense Supply Agency case and the instant case (such as the fact that "the reorganization involved in the instant case took place within a single agency as distinguished from a reorganization across agency lines"), the Council did not mean to imply in its Defense Supply Agency decision that such factual distinctions would in any manner render the co-employer doctrine



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 31, 1975

Honorable Paul J. Fasser, Jr.
Assistant Secretary of Labor for
Labor Management Relations
Department of Labor, Room S-2307
200 Constitution Ave., NW.
Washington, D.C. 20210

Re: Army and Air Force Exchange Service,
South Texas Area Exchange, Lackland
Air Force Base, Texas, A/SLMR No.
542, FLRC No. 75A-93

a viable alternative. Instead, as appears from the Council's decision, only the following alternatives would be potentially applicable, depending on the present record or the record which might be developed, namely: it might be determined that the disputed employees remain in the existing unit; that they are no longer a part of the existing unit and are therefore unrepresented; or that a "successorship" has been created by the reorganization within the criteria established in the Defense Supply Agency decision. (Of course, as we stated in Defense Supply Agency, in any appropriate unit determination the necessary equal weight must be accorded to each of the criteria in section 10(b) of the Order.)

Consistent with this approach, the Council has requested that you re-examine your decision herein in light of all of the principles enunciated in its Defense Supply Agency decision, including those relating to the co-employer doctrine, in order to determine in what manner those principles are applicable to the facts herein. It is also recognized that further factual findings may be necessary in order for you to make such a determination, and that additional hearings to supplement the record in this case therefore may be required.

As previously indicated, the parties may file supplemental submissions with the Council following the issuance of your decision as clarified.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. E. Edwards
AAFES

R. S. Malloy
AFGE

Dear Mr. Fasser:

Your attention is called to the petition for review filed with the Council by the agency and the opposition thereto filed by the union in the above-entitled case. Copies of these case papers are enclosed herewith.

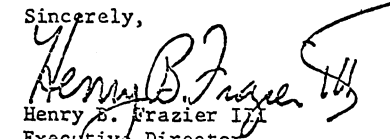
On December 9, 1975, the Council issued its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (December 9, 1975), Report No. 88, setting aside and remanding your decision in that case. In your decision in the instant case, you appear to have relied upon certain of the principles, such as the co-employer doctrine, which were reversed in the Defense Supply Agency decision.

Accordingly, further consideration and clarification of your decision in the instant case is requested in light of the Council's decision in the Defense Supply Agency case. Following the issuance of your decision as clarified herein, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from the date of service of such submissions to file a response thereto.

Pending the issuance of your decision as clarified and further submissions by the parties, the Council shall hold in abeyance its decision on acceptance or denial of the present appeal. Likewise, a decision on the agency's request for a stay of the Assistant Secretary's order in this case is held in abeyance, and, in accordance with section 2411.47(d) of the Council's rules, that order shall continue to be temporarily stayed.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. E. Edwards
AAFES

R. S. Malloy
AFGE

June 22, 1976

A/SLMR No. 670

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

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD
A/SLMR No. 670

This proceeding arose upon the filing of an unfair labor practice complaint by David A. Nixon (Complainant) against the National Labor Relations Board, Region 17, and the National Labor Relations Board (Respondents). The complaint alleged, in substance, that the Respondents violated Section 19(a)(1) and (4) of the Executive Order by virtue of their actions in according Complainant an adverse "professional appraisal" on June 22, 1973, because he utilized and/or exercised the rights provided to him under the Executive Order, namely, the filing of grievances and unfair labor practice complaints.

The Administrative Law Judge found that the Complainant's exercise of his protected rights was not the basis for the adverse appraisal accorded the Complainant and he therefore recommended that the complaint be dismissed in its entirety.

The Assistant Secretary agreed with the Administrative Law Judge's finding that, under all of the circumstances, the record failed to reflect that the Respondents had violated the Order in connection with the adverse professional appraisal. In so finding, however, the Assistant Secretary did not adopt in its entirety the Administrative Law Judge's statement that "...the filing of grievances and/or unfair labor practice complaints are activities protected by the Executive Order" and "...discrimination because of such activities is violative of Section 19(a)(1) and (4) of the Order." In this connection, the Assistant Secretary stated that interference with the filing or processing of grievances is not violative of Section 19(a)(4), although such action may be violative of Section 19(a)(1) and (6) of the Order. Moreover, in this latter respect, the Assistant Secretary further noted that while interference with the filing or processing of grievances under a negotiated agreement is violative of the Order, interference with grievances being processed under an agency grievance procedure, absent anti-union motivation, is not violative of the Order as an agency grievance procedure is not established as a result of any rights accorded to employees or labor organizations by the Order.

As the Assistant Secretary concurred in the findings and recommendation of the Administrative Law Judge, he ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD

Respondents

and

Case No. 60-3449(CA)

DAVID A. NIXON

Complainant

DECISION AND ORDER

On April 4, 1975, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision, and the Respondents filed an answering brief with respect to the Complainant's exceptions and supporting brief.

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

1/ On page 8 of his Recommended Decision, the Administrative Law Judge inadvertently stated that the Complainant engaged in a verbal dispute with counsel for an employer concerning the fact that such counsel had discussed a proposed settlement agreement with Respondent's Regional Attorney, Irwig, who was the Complainant's supervisor, without prior consultation with the Complainant. The record indicates, however, that the attorney with whom the Complainant had the verbal dispute was a junior partner of the law firm, while the discussion with Irwig was conducted by a senior partner of such firm, a different individual. This inadvertent error is hereby corrected and is not deemed material to my ultimate decision herein.

The instant complaint alleged, essentially, that the Respondents violated Section 19(a)(1) and (4) of the Order by according the Complainant an adverse "professional appraisal" on June 22, 1973, because he utilized and/or exercised rights provided to him under the Order, namely the filing of grievances and unfair labor practice complaints.

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

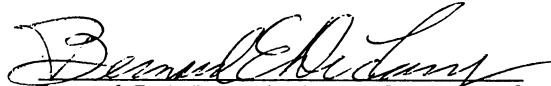


While I agree with the Administrative Law Judge that dismissal of the complaint in this matter is warranted, it should be noted that I do not adopt in toto his statement, on page 10 of his Recommended Decision that, "It is well established that the filing of grievances and/or unfair labor practice complaints are activities protected by the Executive Order " and "...that discrimination because of such activities is violative of Section 19(a)(1) and (4) of the Order." In my view, interference with the filing or processing of grievances is not violative of Section 19(a)(4) 2/, but may be violative of Section 19(a) (1) and (6) of the Order. In this regard, while interference with the filing or processing of grievances under a negotiated agreement has been found to be violative of the Order, interference with grievances being processed under an agency grievance procedure, absent evidence of anti-union motivation, is not deemed violative of the Order, as an agency grievance procedure is not established as a result of any rights accorded to individual employees or labor organizations by the Order. 3/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-3449(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 22, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

2/ See National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 664, at footnote 3.

3/ See Office of Economic Opportunity, Region V, Chicago, Illinois A/SLMR No. 334, and National Labor Relations Board, Region 17, and National Labor Relations Board, cited above.

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In the Matter of :
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NATIONAL LABOR RELATIONS BOARD, :
REGION 17, AND NATIONAL LABOR :
RELATIONS BOARD :
 :
Respondents :
 :
and : Case No. 60-3449 (CA)
 :
DAVID A. NIXON :
 :
Complainant :
 :
..... :

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National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C.

For the Respondent

David A. Nixon, Esq.
National Labor Relations Board, Region 17
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John L. Johnson, Esq.
Vice President, District IV, National
Labor Relations Board Union
746 Clifford Davis Federal Building
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Memphis, Tennessee 38103

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

I. Statement of the Case

Pursuant to an amended complaint first filed on July 26, 1973, under Executive Order 11491, as amended, by David A. Nixon, an individual, against National Labor Relations Board, Region 17, and the National Labor Relations Board, a Notice of Hearing on Complaint was issued by the Regional Director for the Kansas City, Missouri Region on October 17, 1973.

The complaint alleges, in substance, that Respondents violated Sections 19(a)(1) and (4) of the Executive Order by virtue of their actions in according David A. Nixon an adverse "Professional Appraisal" on June 22, 1973, because he utilized and/or exercised the rights provided to him under the Executive Order, namely, the filing of grievances and unfair labor practice complaints.

A hearing was held in the captioned matter on January 15, 16, 17 and 18, 1974, and February 4, 5, 6 and 7, 1974, in Kansas City Missouri. 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/

1/ During the course of the hearing, Complainant Nixon moved for the production of the 1972 and 1973 appraisals accorded by Region 17 to employee Gerald A. Wacknov in order to enable Mr. Nixon to compare the method utilized and the contents to the appraisal rendered Mr. Nixon on June 22, 1973. Inasmuch as the motion involved the identical issue then before the Federal Labor Relations Council in another case under the Executive Order, decision on Mr. Nixon's motion was reserved pending a resolution of the matter by the Council. Subsequently, on October 31, 1974, the Council issued its decision. (FLRC No. 73A-53) wherein it authorized an in camera study by the Administrative Law Judge involved and issuance of a short narrative statement of such study. Thereupon, in accordance with the decision of the Council, the undersigned Administrative Law Judge made an in camera study of the appraisals accorded Mr. Wacknov for the years 1972 and 1973 and duly issued a short narrative statement of the results of the study. Thereafter, following no objections to a Notice to Show Cause, the record in the instant proceeding was formerly closed and the parties afforded an opportunity to file post-hearing briefs and comments by March 21, 1975.

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

Background

Nixon, the complainant herein, was first hired by the National Labor Relations Board as a GS-9 Attorney on July 23, 1965, and assigned to the Peoria, Illinois sub-region. He was promoted to a GS-11 on August 28, 1966 and later received a sustained superior performance award on January 24, 1967.

On or about June 16, 1967, Mr. Nixon transferred to Region 17, Kansas City, Missouri. At the time of his transfer, in accordance with existing practice, Mr. Nixon was accorded a professional appraisal by his then immediate supervisor, S. Richard Pincus. The appraisal, which bore a date of June 14, 1967, was complimentary with the exception of "personal relations, both within and outside the Agency". According to Pincus, Mr. Nixon was "quick to take offense in situations where none is intended". Pincus further noted that Nixon's "zeal to do an outstanding job is sometimes misinterpreted by the parties and occasionally results in unnecessary frictions being created".

2/ During the course of the hearing the parties, in order to simplify the issues and resultant proof, stipulated that any and all references or inferences in the 1973 appraisals to any conduct occurring outside the period June 22, 1972 - June 22, 1973, would not be utilized and/or relied upon as a ground for, or in support of, the adverse June 22, 1973 appraisal accorded Mr. Nixon. The parties did agree however, that conduct occurring prior to June 22, 1972, could, of course, be utilized solely for background purposes and to shed light upon any particular event occurring within the appraisal year.

On September 10, 1967, approximately three months after transferring to Region 17, Mr. Nixon was promoted to a GS-12 attorney. On July 31, 1968 and August 8, 1968, interim professional appraisals were accorded to Mr. Nixon by supervisor Robert Uhlig and then Regional Attorney Thomas Hendrix, respectively. Although both appraisals spoke highly of Mr. Nixon's professional ability with respect to trial and case handling, they were critical of Mr. Nixon's ability to deal with both the public and staff members without creating both offense and irritation. After reviewing Uhlig and Hendrix's evaluation, then Regional Director Robert Allen, under date of August 8, 1968, submitted a memorandum to the Deputy Associate General Counsel wherein he found Nixon well qualified for promotion to a non-supervisory GS-13 attorney and noted that he intended to recommend him for same at the end of Nixon's 18 months in grade. Allen further noted that any offense caused by Nixon's attitude towards the public sector was attributable to the fact that the outside practitioners could not "pull the wool over his eyes". Subsequently, on the basis of recommendations from Uhlig, Hendrix and Allen dated November 27 and December 6, 1968, Nixon was promoted to a GS-13 attorney in February 1969. The aforementioned memoranda noted that Mr. Nixon has carried out his assignment in a "most competent manner".

Sometime in the spring of 1970, Nixon filed under his own signature his first grievance in Region 17 wherein he complained about the scheduling of the clerical staff as it related to the covering of telephones during the secretaries' work breaks for various reasons. Although he had participated in the filing of another grievance in March 1970, concerning "suggestions on complaints and trail dates", such grievance and/or memorandum was attributable to "The Field Attorneys". Nixon's name did not appear on this latter grievance and there is no evidence that Regional Director Hendrix, the addressee, was aware at the time of receipt of Nixon's part therein.

On September 28, 1970, Nixon was accorded a professional appraisal covering the period November 1969 to November 28, 1970, by Assistant Regional Attorney DeProspero. DeProspero gave Mr. Nixon a glowing appraisal in all respects and wholeheartedly recommended him for promotion to a GS-14 attorney. On November 4, 1970, Regional Director Hendrix and Regional Attorney Irwig submitted their comments and recommended that Mr. Nixon be rated "not well qualified to GS-14". Both Hendrix and Irwig's adverse appraisals were based, in the main on Mr. Nixon's alleged inability to get along with both the public and his fellow employees. Both conceded, however, in their respective appraisals that Mr. Nixon otherwise was a competent and able attorney. Thereafter, Nixon filed

various memoranda with Assistant General Counsel Ness in an unsuccessful attempt to gain reversal of the adverse professional appraisals of Hendrix and Irwig. 3/

On June 24 and 25, 1971, Irwig and Hendrix, respectively, prepared and forwarded to Washington a professional appraisal of Mr. Nixon covering the period October 1970-January 1971. Mr. Irwig's appraisal, which was adopted by Director Hendrix, was in the main confined to the period January 1971, to June 24, 1971, when Mr. Nixon came under his immediate supervision. Irwig's appraisal recommended that Mr. Nixon be rated not qualified for a GS-14 non-supervisory attorney. While again acknowledging Mr. Nixon's legal and technical ability with respect to labor law, writing ability and argument, Mr. Irwig, nevertheless concluded that Mr. Nixon's activities in certain named respects left a lot to be desired. Thus, Irwig cited an altercation between Nixon and various attorneys in the office, the fact that on occasion Nixon had failed to submit drafts in a timely fashion, had failed to fill out all blanks on a particular form in a proper manner and was remiss in promptly returning telephone calls or answering letters. Irwig acknowledged in the last paragraph of his written "Narrative Comment" that some of the matters he had relied upon were of "limited or little importance".

3/ In a memorandum dated December 17, 1970, to Ness, Mr. Nixon attributed his "problem" with Hendrix and Irwig to "Feelings of antagonism on their part because they feel that I do not act toward them with sufficient deference, which is to say, diffidence".

Thereafter, on July 14 and August 3, 1971, Local 17 NLRBU and Nixon, respectively, filed grievances under the contract grievance procedure alleging that Irwig and Hendrix had not conformed to the rating procedure set forth in the existing contract. Subsequently, John Irving, Associate General Counsel, pursuant to step 2 of the grievance procedure, reviewed the appraisals and on November 15, 1971 issued his decision wherein he found merit in the grievances and ordered the Regional Representatives to issue a supplemental appraisal. Thereafter, following the submission of a generally complimentary (pro forma) appraisal, Nixon was promoted to a GS-14 non-supervisory attorney in February 1972. In reaching a favorable decision on the grievances, Irving noted:

... certain examples of alleged misconduct relied upon by Regional Attorney Irwig and Regional Director Hendrix were of relatively little consequence when viewing the whole picture and should not, therefore, have been accorded the weight which the evaluation places upon them.

On June 13 and 14, 1972, Irwig and Hendrix, respectively, accorded Mr. Nixon a professional appraisal for the period June 1, 1971-June 2, 1972. The appraisal which consisted of a recommendation that Mr. Nixon be rated not-qualified to be a supervisory GS-14 attorney set forth numerous instances wherein Mr. Nixon had been deficient in both case handling and personality. Mr. Nixon took issue with the appraisal and elected to file an unfair labor practice under the Executive Order instead of proceeding via the grievance machinery as was the case in 1971. 4/

4/ Inasmuch as the 1972 appraisal was then currently under litigation before another Administrative Law Judge, whose decision thereon had been appealed through the Assistant Secretary and submitted to the Federal Labor Relations Council, no testimony was elicited during the hearing with respect to the 1972 appraisal, except to the extent that it conformed with the stipulation set forth in footnote 2 supra.

The 1973 appraisal:

On June 20, 1973, Irwig and Hendrix issued a professional appraisal for Mr. Nixon covering the period June 14, 1972 - June 14, 1973. Mr. Irwig's appraisal, which was adopted by Regional Director Hendrix in an eleven line paragraph, recommended that Mr. Nixon be rated as "not-qualified" for supervisory GS-14 positions. This 1973 appraisal (identified in the record as Complainant's Exhibit Nol 2.), which is the subject of the instant proceeding, consisted of NLRB form 4539, seven pages of narrative comment citing Nixon's work on various cases and 32 appendices in support of the narrative comment and as examples of Mr. Nixon's work.

In reaching his conclusion that Mr. Nixon was "not-qualified" for a supervisory GS-14 position, Mr. Irwig relied upon Mr. Nixon's attitude with regard to routine instruction, particularly his resentment of same, his failure to meet time deadlines in handling cases, failure to follow generally accepted Board procedures and/or Manual procedures, inability to get along with the public, lack of diplomacy in case handling and/or writing, and generally poor draftsmanship. Mr. Irwig further noted that while some of the matters relied upon by him in reaching his adverse recommendation as to Mr. Nixon's qualifications were the subject of grievances filed by Mr. Nixon under the applicable grievance procedure, he, Irwig, did not feel foreclosed from relying on same. According to Mr. Irwig, "if it were otherwise, any staff member could effectively prevent the consideration by the supervisor appraising him and by the reviewing authorities of any fact or other matter regardless of its impact on work performance".

Among the many cases, actions or examples of Mr. Nixon's indiscretions or errors cited by Mr. Irwig in support of the adverse 1973 appraisal were the following:

1. Recommendation of a settlement agreement wherein provision was made for the preferential rehire of an employee whom Mr. Nixon had determined in an earlier presentation of the case to the appropriate Regional Staff was not entitled to such relief. Upon receiving a corrective memorandum from Mr. Irwig citing both the remedial nature of the National Labor Relations Act and the contrary Regional practice, Mr. Nixon, rather than acknowledge the oversight, issued a reply memorandum wherein he attempted to justify his actions on a new theory of the case and proceeded to accuse Irwig of interfering with the rights accorded employees under the Executive Order.

2. Engaging in a verbal dispute with counsel for a respondent employer concerning that fact that such counsel had discussed a proposed settlement agreement with Mr. Irwig without further prior consultation with Mr. Nixon. When Respondent's counsel appeared to be annoyed at Mr. Nixon's action in the above respect, Mr. Irwig, who had followed regional practice in reducing the subject matter of the telephone call from respondent's counsel to writing, sent a copy of the memorandum concerning the telephone call to Nixon and advised Mr. Nixon in the same memorandum to cease any further action on the case pending further Regional consideration of the matter. Upon receiving Irwig's above cited memorandum to the file, Nixon immediately responded with a memorandum of his own wherein he attempted to refute the statements of Respondent's counsel, accused Irwig of "reprisal activity" and threatened to file a complaint under the Executive Order. Nixon's memorandum indicates that a copy of same had been sent to the Area Administrator for the United States Department of Labor.

3. Failure to follow the Instruction and Guideline Manual and Regional practice with respect to the application of income tax and social security deductions to lump sum payments included in settlement agreements.

4. Failure to include appropriate citations to the Field Manual when submitting cases to the Regional Director for further action.

5. Changing the theory of a case and impugning the integrity of a respondent despite the absence of any substantive evidence to support such an allegation or theory.

6. Volunteering for case assignments against unions at a time when Mr. Nixon's unfinished pending case load was not up to date and precluded prompt investigation of the current charges contained in the requested assignment; and then filing a grievance several weeks thereafter predicated upon his alleged assignment of a disproportionate small number of cases against Employers vis a vis Unions. 5/

5/ As documentary proof of Mr. Nixon's actions in the aforementioned respect, Irwig included in the appraisal as an appendix the grievances and/or memoranda concerning same.

Mr. Nixon, whose testimony, in the main, acknowledged the above cited events, offered both justification and explanation thereof. Additionally, Mr. Nixon presented testimony indicating that some of the errors or indiscretions attributed to him were not unique but common to other attorneys in Region 17. In this latter respect he particularly relied upon the case handling record of employee Gerald Wacknov, a GS-14, attorney, similarly situated, who during the period in question was rated well qualified in his professional appraisal for a GS-14 supervisory position. Thus, the record indicates that Mr. Wacknov:

1. Failed to adequately plead the unit description in a complaint.
2. Failed to cite the specific Field Manual provision relative to joining an attorney as a party respondent. Wacknov did however raise or flag the issue in his memorandum to the Regional Director.
3. Included a provision in a settlement agreement for a particular individual that he (Wacknov) had initially noted in a preliminary Regional discussion would be a difficult case and/or violation to establish.
4. Allowed, contrary to Regional procedure, witnesses to sign a short statement subscribing to the testimony of another witness rather than making separate affidavits for each employee.
5. Prepared drafts necessitating considerable revision.

Despite the above alleged errors or indiscretions Mr. Wacknov was accorded a well qualified rating in the area of a supervisory GS-14. Also, unlike the appraisal of Mr. Nixon, which consisted of seven pages of narrative comment and some 32 appendices, Mr. Wacknov's appraisals for the years 1972 and 1973 contain only short paragraphs from Irwig and Hendrix confined solely to Mr. Wacknov's abilities and make no mention or references to the manner in which Mr. Wacknov handled any particular case.

The record is barren of any independent evidence of union animus and indicates that other attorneys in Region 17 who held or formerly held offices in the Local Union and in such capacity processed many grievances on behalf of unit personnel were regularly and/or continually promoted to vacant positions without incident.

The record further indicates that it is the usual practice of Mr. Irwig, who appears to be a rather rigid individual, to communicate with personnel under his supervision by way of written memoranda rather than personal oral contact. Likewise, Mr. Nixon utilizes the practices of responding to memoranda by the use of memoranda, and, as indicated by the exhibits contained in the record, utilizes such memoranda as vehicles for the airing of his views apart from the particular merits of the cases initially involved in such memoranda.

Discussion and Conclusions

It is well established that the filing of grievances and/or unfair labor practice complaints are activities protected by the Executive Order. It is further well established that discrimination because of such activities is violative of Section 19(a)(1) and (4) of the Order.

In the instant case, Mr. Nixon contends that he was accorded disparate treatment in the matter of his 1973 appraisal because of his activities in filing grievances and unfair labor practices. As an alternate theory, he attacks the 1973 appraisal as being a per se violation of the Order in that it (the appraisal) relies on the aforementioned protected activities of Mr. Nixon as a basis for such adverse appraisal.

With respect to the latter theory, Mr. Nixon relies on Mr. Irwig's actions in including references to various grievances filed by Mr. Nixon in both the narrative comments and appendices comprising the 1973 appraisal. According to Mr. Nixon such references make it clear that his protected activities played a part in the adverse appraisal. While I understand Mr. Nixon's theory, I can not and do not subscribe to the inference drawn by him with respect to the inclusion of grievance memoranda authored by him. Thus, it appears that any or all citations and/or comments made by Mr. Irwig with respect to grievances filed by Mr. Nixon deal only with the subject matter thereof as applied to case handling matters. Contrary to Mr. Nixon's contention, I see no showing that the fact a grievance was filed by Mr. Nixon played any part in Mr. Irwig's adverse 1973 appraisal. Moreover, a careful review of the grievance memoranda so cited indicates that such grievances were injected into the daily case handling memoranda procedures by Mr. Nixon himself. 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. To hold otherwise would result in the establishment of a procedure whereby an affected employee could insulate himself from any adverse criticism by simply making all case

handling or other errors the subject of a frivolous grievance. While the foregoing analysis and conclusions might not be entirely applicable to Mr. Nixon's grievance in the area of work assignments, I again cannot find that the filing of such grievance was either cited or relied upon as a ground for the adverse 1973 appraisal. Rather, such citation was utilized in the appraisal only to show that Mr. Nixon is a contradiction in terms and appears to be seeking bases for complaint and/or grievances. Thus, on the one hand he requests assignments of unfair labor practice charges against unions despite his case backlog and on the other files grievances over the alleged disproportionate small number of cases against employers assigned to him.

As to Mr. Nixon's second or alternate theory, i.e., disparate treatment predicated upon his participation in activities protected by the Order, I am constrained to find that Mr. Nixon has failed to sustain the burden of proof imposed by Section 203.14 of the Regulations.

While the record establishes that other employees, particularly Mr. Wacknov, committed various indiscretions and/or errors during the course of their work without receiving an adverse appraisal for supervisory positions, the evidence thereon falls short of establishing that such errors were equal to those of Mr. Nixon in both kind and numbers. In this latter respect the record discloses, among other things, that Mr. Wacknov, who is similarly situated and who received a well qualified rating for a GS-14 supervisory position, did commit a number of errors or indiscretions in case handling. However, such errors or indiscretions were not of the "same ilk" as those committed by Mr. Nixon. Thus, while Mr. Wacknov did not include a specific Field Manual citation in a memorandum to the Regional Director, he did flag the particular issue and procedure involved. In the matter of settlements, Mr. Wacknov did not include a particular individual who had been determined to have a non-meritorious case. Rather, the individual involved in the Wacknov case was one whom the Region had intended to include in a complaint despite trial problems in the area of proof.

With respect to types of indiscretions or errors, the record further reveals that Mr. Wacknov had no problems with respect to personality conflicts or relationships

with both staff members and outside counsel. Further, there was no showing whatsoever that Mr. Wacknov resented supervision and/or corrections to his case handling procedures or draftsmanship. While Mr. Nixon, on the other hand, was shown to have a considerable problem in this respect.

In view of the foregoing considerations, I find insufficient basis for a finding of "disparate treatment". In reaching this conclusion I am not unmindful of the fact that the appraisals accorded Mr. Nixon and Mr. Wacknov are dissimilar in both content and length. However, logic and experience dictates that one must always be prepared to defend his adverse actions from attack and accept thanks for his complimentary ones. Accordingly, I attach no particular significance to the physical composition of the appraisals.

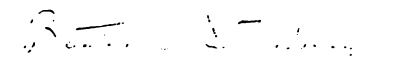
Moreover, and even assuming the establishment of "disparate treatment", I find the evidence, as a whole, insufficient to support a finding that any possible disparate treatment or the adverse 1973 appraisal itself was predicated upon Mr. Nixon's protected activities. In reaching this conclusion I note, among other things, absence of any union animus, the fact that other union officers who filed numerous grievances on behalf of unit employees were promoted and/or accorded favorable appraisals without incident, and that Mr. Nixon's adverse appraisals preceded any significant protected activities on his part. In this latter context, the record indicates that adverse appraisals were accorded Mr. Nixon in 1970 and 1971, at a time when the only protected activity attributable to Mr. Nixon consisted of a grievance concerning the proper assignment of clericals to prevent unattended telephones. Although Mr. Nixon was shown to have been a participant in another grievance around the same time (spring of 1970) there was no showing of management knowledge of such activity. Additionally I note, that Mr. Nixon himself, attributed his adverse 1970 appraisal to a personality conflict with Mr. Hendrix and Mr. Irwig motivated by Mr. Nixon's lack of deference. That such "lack of deference" continues to exist is manifest in the numerous memoranda contained in the record of exchanges between Mr. Irwig and Mr. Nixon. Additionally, the record further reveals that as far back as 1969 and continuing through the date of the 1973 appraisal, each and every appraisal of Mr. Nixon made some mention of his inability to get along with his fellow staff

members and also members of the outside bar. The lack of such ability is certainly a significant consideration in the area of appointment to a supervisory position.

Lastly, while I agree that certain of the alleged deficiencies attributed to Mr. Nixon in his 1973 appraisal are of little import, I cannot substitute my judgment for the reviewing authority. My sole function in this proceeding is to determine whether or not Mr. Nixon's protected activity played any part in his adverse 1973 appraisal. As noted above, I cannot so find, and accordingly I shall recommend dismissal of the complaint in its entirety.

Recommendation

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (4) of the Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated: APR 4 1975
Washington, D.C.

June 23, 1976

A/SLMR No. 671

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD
A/SLMR No. 671

Respondents

and

Case No. 60-3721(CA)

DAVID A. NIXON

Complainant

DECISION AND ORDER

This proceeding arose upon the filing of an amended unfair labor practice complaint by David A. Nixon (Complainant) against the National Labor Relations Board, Region 17, and the National Labor Relations Board (Respondents). The complaint alleged that the Respondents violated Section 19(a)(1) and (4) of the Order in rendering a professional appraisal of the Complainant dated June 1974, which entailed a discriminatory disparate test applied to the Complainant, pretextual in nature and more onerous than that applied to other employees in Region 17. It also alleged that protected conduct of the Complainant, including the filing of complaints under the Executive Order, and the filing of grievances under a negotiated agreement, had been relied upon by the Respondents in said appraisal and was the basis for Complainant's adverse appraisal.

The Administrative Law Judge found that Respondents violated Section 19(a)(1) and (4) of the Order by adversely criticizing the Complainant in his professional appraisal because he gave notice of his intention to file a complaint under the Executive Order before his supervisor deemed it to be appropriate; and violated Section 19(a)(1) of the Order by adversely criticizing the Complainant in his professional appraisal because he filed a grievance under the negotiated procedure with respect to comments about his handling of one case, and because he filed a grievance with respect to the assignment of compliance responsibilities to him in another proceeding. The Administrative Law Judge recommended that the particular professional appraisal of the Complainant which, in part, relied on improper matters, be withdrawn, and that a reappraisal be made with respect to the particular time period involved.

The Assistant Secretary agreed with the Administrative Law Judge's finding with respect to the above and his recommended order. In addition, the Assistant Secretary found, contrary to the Administrative Law Judge, that to permit derogatory comments in the appraisal which were directed at the Complainant's handling of his own unfair labor practice case against the Respondents, and which case had no connection with the Complainant's work related duties as an attorney, could inhibit the Complainant in the exercise of his right to file and process unfair labor practice complaints and, therefore, could not properly be included in the professional appraisal. Accordingly, the Assistant Secretary found that such conduct violated Section 19(a)(1) and (4) of the Order and ordered that it not be considered in the reappraisal of the Complainant's performance.

On September 15, 1975, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices and recommending that they take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, both the Complainant and the Respondents filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendation, the Complainant filed a Motion requesting the Assistant Secretary to issue an Order to Show Cause, and the Respondents filed an opposition to the Complainant's Motion. 1/

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

1/ The Complainant's Motion is hereby denied. Thus, contrary to the Complainant's contention, I find that the record does not reflect that he was misled or denied the opportunity to present evidence pertinent to the matters raised by his Motion at the hearing. Rather, the record indicates that the Complainant fully litigated such matters at the hearing. Accordingly, I shall not issue an Order to Show Cause why the documentary material attached to the Complainant's Motion should not be incorporated into the record herein. Nor will I, as requested by the Complainant in the alternative, direct the hearing to be reopened for the purpose of adducing evidence on the matters referred to in the Complainant's Motion.

entire record in the subject case, including the exceptions and supporting briefs filed by the Complainant and the Respondents, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge to the extent consistent herewith.

I agree with the conclusion of the Administrative Law Judge that the Respondents violated Section 19(a)(1) and (4) of the Order by basing the Complainant's adverse professional appraisal, in part, upon the Complainant's notification of May 23, 1974, of his intention to file an unfair labor practice complaint under the Executive Order and that the Respondents violated Section 19(a)(1) of the Order by adversely criticizing the 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" case. In these instances, the Administrative Law Judge found, and I concur, that the appraisal reflected animus to the Complainant based on his engaging in what was protected activity under the Order.

The Administrative Law Judge found also that the adverse comments in the Complainant's appraisal by his supervisor, regarding the Complainant's request to his Congressman for assistance in the removal of a certain Administrative Law Judge from the Complainant's earlier unfair labor practice case against the Respondents, which was then in litigation, were not violative of Section 19(a)(1) of the Order. In reaching this conclusion, the Administrative Law Judge found that the requested extralegal intervention justified the comment by the Respondent's Regional Attorney that such conduct by the Complainant was improper and unprofessional when engaged in by an attorney for the National Labor Relations Board, and that, accordingly, these appraisal comments were neither pretextual nor discriminatory. In this regard, the Administrative Law Judge noted that the Executive Order neither protects nor immunizes the professional conduct of an attorney from fair comment in the preparation of a professional appraisal.

Contrary to the Administrative Law Judge, I find that the inclusion of such comments in the Complainant's appraisal concerning his above-noted request to his Congressman was violative of Section 19(a)(1) and (4) of the Order, and that reliance on such matter in determining the fitness of the Complainant would be improper. In this regard, it was noted that the derogatory comments directed at the Complainant concerned his handling of the Complainant's case against the Respondents, rather than his handling of work as an employee of the Respondents. In my judgment, to permit the Respondents to evaluate the Complainant's capacities on the basis of litigation brought by the Complainant against them would result in improper interference in the exercise of the Complainant's protected right to freely file and process an unfair labor practice complaint under the Executive Order. To hold otherwise would permit agencies to utilize an employee evaluation system to inhibit the filing and processing of unfair labor practice complaints under the Order.

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Accordingly, I find the Respondents' comments in the Complainant's appraisal concerning his handling of his own unfair labor practice case, to be violative of Section 19(a)(1) and (4) of the Order. As I have found that the Respondents' appraisal of the Complainant included improper material, I shall order them to reappraise the Complainant without any reliance on the improper material which I shall order expunged from the appraisal.

ORDER

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

A. The National Labor Relations Board, Region 17, Kansas City, Kansas, shall:

1. Cease and desist from:

(a) Disciplining or otherwise discriminating against David A. Nixon, or any other employee, by including adverse criticism or rating in any professional appraisal because such employee has filed a complaint or has given testimony under the Executive Order.

(b) Adversely criticizing or rating David A. Nixon, or any other employee, in any professional appraisal, in reprisal for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

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

(a) Rescind, withdraw and expunge from all personnel files the professional appraisal of David A. Nixon, dated June 14, 1974.

(b) As promptly as possible, after rescinding, withdrawing and expunging the professional appraisal of David A. Nixon, dated June 14, 1974, reappraise David A. Nixon for the period of June 15, 1973, through May 31, 1974, without (1) reference to, consideration of, or reliance upon any complaint filed or testimony given by David A. Nixon under the Executive Order, and (2) without reference to, consideration of, in reliance upon, or in reprisal for the filing or processing of grievances by David A. Nixon pursuant to the terms of a negotiated agreement.

(c) Post in the Office of Region 17, Kansas City, Kansas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management

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Relations. Upon receipt of such forms, they shall be signed by the General Counsel of the National Labor Relations Board and by the Regional Director of Region 17 and shall be posted and maintained by the Regional Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to Field Attorneys of Region 17 are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

B. The General Counsel, National Labor Relations Board, Washington, D. C., shall:

1. Cease and desist from:

(a) Disciplining or otherwise discriminating against David A. Nixon, or any other employee, by approving any adverse professional appraisal which was based, in whole or part, on the employee involved having filed a complaint or given testimony under the Executive Order.

(b) Approving an adverse rating or criticizing David A. Nixon, or any other employee, in any professional appraisal, in reprisal for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

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

(a) Rescind, withdraw and expunge from all personnel files the professional appraisal of David A. Nixon, dated June 14, 1974.

(b) As promptly as possible, consider the reappraisal of David A. Nixon for the period of June 15, 1973, through May 31, 1974, issued pursuant to Paragraph A.2.(b), above, 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 negotiated agreement.

(c) Sign the notice marked "Appendix" described in Paragraph A.2.(c), above.

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

Dated, Washington, D. C.
June 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

THE NATIONAL LABOR RELATIONS BOARD, REGION 17, WILL NOT discipline or otherwise discriminate against David A. Nixon, or any other employee, by including adverse criticism or rating in any professional appraisal because such employee has filed a complaint or has given testimony under the Executive Order.

THE NATIONAL LABOR RELATIONS BOARD, REGION 17, WILL NOT adversely criticize or rate David A. Nixon, or any other employee, in any professional appraisal, in reprisal for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

THE NATIONAL LABOR RELATIONS BOARD, REGION 17, WILL 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 the 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 by David A. Nixon pursuant to the terms of a negotiated agreement.

THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, D. C., WILL NOT discipline or otherwise discriminate against David A. Nixon, or any other employee, by approving any adverse professional appraisal, which was based, in whole or in part, on the employee involved having filed a complaint or given testimony under the Executive Order.

THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, D. C., WILL NOT approve an adverse rating or criticize David A. Nixon, or any other employee, in any professional appraisal, in reprisal for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, D. C., WILL rescind, withdraw and expunge from all personnel files the professional appraisal of David A. Nixon, dated June 14, 1974, and will promptly thereafter review the reappraisal of David A. Nixon for the period of 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 negotiated agreement.

Dated

Regional Director, National Labor Relations
Board, Region 17, Kansas City, Kansas

Dated

General Counsel, National Labor Relations
Board, Washington, D. C.

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

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

June 23, 1976

A/SLMR No. 672

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

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

DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE SECRETARY OF TRANSPORTATION
A/SLMR No. 672

DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE SECRETARY OF TRANSPORTATION

This proceeding involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3313 (AFGE), alleging that the Respondent violated Section 19(a)(1) of the Order by its unilateral cancellation of a meeting room which previously had been approved for the purpose of mutually agreed upon informational discussions between the AFGE and unit employees. The AFGE alleged further that the Respondent engaged in other conduct which constituted harassment of an AFGE official.

The Administrative Law Judge found that the meeting, which was for the purpose of eliciting employee concerns with respect to a proposed reorganization, was specifically approved by an official of the Respondent. Moreover, he found that the approved meeting was not intended for the purpose of internal union business and, therefore, was not encompassed by Section 20 of the Order. Under these circumstances, he concluded that the Respondent's conduct in unilaterally cancelling the meeting room necessarily had the effect of discrediting the AFGE and thereby interfered with the employees' rights assured by the Order in violation of Section 19(a)(1). The Administrative Law Judge recommended dismissal of the other allegation concerning the alleged harassment of an AFGE official.

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

Respondent

and

Case No. 22-5891(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3313

Complainant

DECISION AND ORDER

On March 4, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in an unfair labor practice and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

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

1/ In reaching his determination that the Respondent's conduct in unilaterally cancelling a meeting room was violative of the Order, the Administrative Law Judge noted that even if the meeting in question had been intended to be held for the purpose of conducting internal union business and, thus, was covered by Section 20 of the

(Continued)

1. Cease and desist from:

a. Unilaterally cancelling meeting rooms which previously have been approved for use by the American Federation of Government Employees, AFL-CIO, Local 3313, the employees' exclusive bargaining representative.

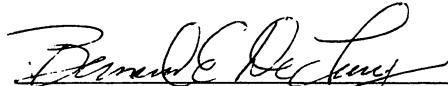
b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

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

a. Post at 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 Secretary of Transportation ^{2/} and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Secretary of Transportation shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.
June 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{1/} Order, the Respondent's conduct in cancelling the meeting room without first communicating with the Complainant still would be violative of the Order. In view of my adoption herein of the Administrative Law Judge's conclusion that the meeting in question was not for the purpose of conducting internal union business, I find it unnecessary to pass upon the above noted dicta of the Administrative Law Judge.

^{2/} By letter dated April 23, 1976, the Respondent, noting that the Administrative Law Judge had proposed that the Department of Transportation's Assistant Secretary of Transportation for Policy, Plans and International Affairs sign the remedial notice, suggested that it would be more appropriate to have the Agency's Assistant Secretary for Administration sign such notice. However, in view of the fact that the units involved herein encompass employees in the Office of the Secretary of Transportation, located in Washington, D.C., I find it appropriate that the Secretary of Transportation should sign the remedial notice to employees in this matter.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally cancel meeting rooms which previously have been approved for use by the American Federation of Government Employees, AFL-CIO, Local 3313, our employees' 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 Executive Order 11491, as amended.

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

June 23, 1976

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

U.S. ARMY CORPS OF ENGINEERS,
PHILADELPHIA DISTRICT
A/SLMR No. 673

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 902, AFL-CIO (Complainant) alleging, in substance, that the Respondent had violated Section 19(a)(1) and (6) of the Order by unilaterally changing the terms and conditions of employment for certain unit employees without providing adequate notice to the Complainant. In this regard, the Complainant contended that such a unilateral change was in derogation of the Complainant's bargaining rights as the subject matter involved in the changes was at the time a matter of negotiations between the parties.

The Administrative Law Judge found that a practice of transporting certain of the Respondent's employees from their reporting site at Pedricktown, New Jersey, to their various job sites had been initiated in 1970, and remained in effect until changed by the Respondent in May 1974. The issue of transportation for certain unit employees, which involved questions of where these employees were to report for work and how long they were to remain at their job site, had been a subject of collective bargaining between the parties at least since February 1, 1972, as part of negotiations to replace an agreement which had expired on December 31, 1971. The negotiations reached an impasse on March 4, 1974, as the parties were unable to reach agreement with respect to the issue of reporting site for certain employees as well as one other issue which is not relevant to this case. In May 1974, without notifying the Complainant, the Respondent instituted a change in the reporting practice for the affected employees. Subsequently, on June 10, 1974, the Complainant sought the services of the Federal Service Impasses Panel (Panel) with respect to the impasse in negotiations existing since March 4, 1974. Under these circumstances, the Administrative Law Judge concluded that the Respondent's unilateral conduct violated Section 19(a)(6) and (1) of the Order. He found additionally that the Respondent violated Section 19(a)(6) and (1) by engaging in such unilateral conduct without first utilizing the Panel pursuant to Section 17 of the Order.

The Assistant Secretary noted that it has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms and conditions of employment which are included within the ambit of Section 11(a) of the Order. However, it was his judgment that, after bargaining to an impasse, that is after good faith negotiations have exhausted the prospects of concluding

an agreement, agency management does not violate the Order by unilaterally imposing changes in terms and conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are intended to be put into effect in order to afford the exclusive representative ample opportunity to invoke the services of the Panel at a time prior to the implementation of the changes. The Assistant Secretary concluded that the framers of Executive Order 11491, as amended, intended to give the parties discretion with respect to seeking the Panel's services pursuant to Section 17. He noted his belief that should one of the parties involved in an impasse exercise the option available under Section 17 of the Order and request the services of the Panel, it would effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before the unilateral change in terms and conditions of employment can be effectuated.

In the instant case, the Assistant Secretary found that neither party had invoked the Panel's procedures at the time the Respondent implemented the changes in the working conditions of certain of its employees in May 1974. Consequently, he concluded that the Respondent's conduct in this matter would be considered privileged if the evidence established that the Complainant was afforded appropriate notice of when the intended change was to be put into effect so as to provide the latter with an opportunity to invoke the services of the Panel. It is undisputed that such notice was not provided the Complainant in this matter. Under such circumstances, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally instituting the change noted above without providing the Complainant reasonable notice of its intended action.

Accordingly, the Assistant Secretary issued an appropriate remedial order.

June 23, 1976

A/SLMR No. 673

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY CORPS OF ENGINEERS,
PHILADELPHIA DISTRICT

Respondent

and

Case No. 20-4753(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 902, AFL-CIO

Complainant

DECISION AND ORDER

On November 7, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge found that, while the official policy of the Respondent during the time material herein was that the affected employees had to report to their job sites at 8:00 a.m. and remain working at such job sites until 4:30 p.m., a practice had been initiated in

early 1970 whereby certain employees assigned to the Respondent's Pedricktown, New Jersey, facility reported to their official duty stations at Pedricktown by 8:00 a.m. to be transported to their job sites and, at the end of their work day, were transported from their job sites in sufficient time to allow the employees to return to Pedricktown by 4:30 p.m. Normally, transportation between the various job sites and Pedricktown would take from 20 to 45 minutes each way. This practice existed from early 1970 until changed by the Respondent in May 1974. The issue of where employees were to report and how long they were to remain at their job sites had been a subject of collective bargaining between the Respondent and the Complainant at least since February 1, 1972, when the parties commenced their negotiations to replace an agreement which had expired on December 31, 1971. 1/

On March 4, 1974, the parties held their final negotiating session prior to the May 1974 incidents which gave rise to the instant complaint. While the parties had taken various positions respecting the matter of reporting site, they agreed on March 4, 1974, that an impasse existed with respect to this issue (as well as one other issue which is not relevant herein.) In May 1974, the Respondent became aware of some employees arriving at their job sites after 8:00 a.m. and leaving before 4:30 p.m., and notified its supervisors at Pedricktown that the policy of beginning and ending the workday at job sites was to be strictly enforced. Thereafter, the affected employees were given the alternatives of reporting to Pedricktown sufficiently early to be transported by van so as to arrive at the job sites by 8:00 a.m., or of transporting themselves to the job sites so as to report at 8:00 a.m. Similarly, at the end of the work day, at 4:30 p.m., they were given the choice of transporting themselves from the job sites or taking the van back to Pedricktown. The Complainant was not notified prior to the institution of this change in reporting and quitting practice.

Subsequently, on June 10, 1974, the Complainant filed a request with the Federal Service Impasses Panel, herein called the Panel, to consider the impasse noted above. The Complainant thereafter filed the instant unfair labor practice complaint on November 26, 1974. On January 13, 1975, the Panel issued its Report and Recommendations for Settlement regarding the above-noted impasse. 2/ The Panel made no finding in regard to the Complainant's contention that a practice formerly existed whereby certain employees began their work day at Pedricktown at 8:00 a.m. and returned there by 4:30 p.m. based on the view that such issue was before the Assistant Secretary. Further, the Panel recommended,

1/ During the course of the negotiations, the Deputy Assistant Secretary of Defense for Civilian Personnel Policy issued a negotiability determination on August 11, 1972, pursuant to Section 11(c) of the Executive Order, finding, in effect, that transportation of certain employees to their work sites on duty time was a negotiable matter.

2/ Department of the Army, Philadelphia District Corps of Engineers, Philadelphia, Pennsylvania and Local 902, American Federation of Government Employees, AFL-CIO, 74 FSIP 12.

among other things, that the Complainant withdraw its proposal, the objective of which was to have the workday commence and terminate at the official duty station, rather than at the worksite. Subsequently, the parties executed an agreement incorporating, in effect, the Respondent's official policy, which required the affected employees to report to Pedricktown in sufficient time to be transported to their work sites by 8:00 a.m. or to transport themselves to the work sites so as to be there by 8:00 a.m., and to remain working until 4:30 p.m.

The Administrative Law Judge's initial finding of violation of Section 19(a)(1) and (6) of the Order was predicated on the Respondent's unilateral change in the established reporting practice which permitted employees to report to Pedricktown at 8:00 a.m. and to leave work from Pedricktown by 4:30 p.m. He also concluded that the Respondent violated Section 19(a)(1) and (6) of the Order "by its unilateral institution of its proposed terms concerning places and times for reporting for work, after impasse had been reached, without resorting to the Federal [Service] Impasses Panel." I disagree with these conclusions of the Administrative Law Judge.

It has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms or conditions of employment which are included within the ambit of Section 11(a) of the Order. ^{3/} However, in my judgment, after bargaining to an impasse, that is after good faith negotiations have exhausted the prospects of concluding an agreement, agency management does not violate the Order by unilaterally imposing changes in terms or conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are intended to be put into effect in order to afford the exclusive representative ample opportunity to invoke the services of the Panel at a time prior to the implementation of the changes.

The record herein discloses that the parties were engaged in bona fide negotiations concerning, among other things, the matter involved in the May 1974 change and that they had reached an impasse in those negotiations on March 4, 1974, some two months prior to the change. There also is no dispute that the Respondent's change in reporting time was consistent with its pre-impasse proposals which had been rejected by the Complainant. Having reached an impasse on March 4, 1974, either of the parties herein was free to seek the services of the Panel pursuant to Section 17 of the Order. In my view, Section 17 of the Order must be read literally when it states that "either party may request" [emphasis added] the services of the Panel when an impasse in negotiations has been reached. Nothing in the Order or its "legislative history" supports the conclusion that the services of the Panel must be requested to consider an impasse under the circumstances outlined by the Administrative

3/ Cf. e.g. General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, A/SLMR No. 583.

Law Judge. In the absence of specific countervailing evidence, I can only conclude that the framers of the Order intended to give the parties discretion with respect to seeking the Panel's services. However, should one of the parties involved in an impasse exercise the option available under Section 17 of the Order and request the services of the Panel, I believe that it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms or conditions of employment can be effectuated. In the instant case, the evidence establishes that neither party had invoked the Panel's procedures at the time the Respondent implemented the changes in the working conditions of certain of its Pedricktown employees in May 1974. Consequently, the Respondent's conduct herein would be considered privileged if the evidence established that the Complainant was afforded appropriate notice of when the intended change was to be put into effect so as to provide the latter with an opportunity to invoke the services of the Panel. In the instant case, however, it is undisputed that the Complainant was not notified prior to the institution of the change in the reporting and quitting practice and was not given the opportunity to invoke the procedures of the Panel prior to the Respondent's instituting a change in existing terms or conditions of employment. Under these circumstances, I find that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally instituting the change herein without providing the Complainant with reasonable notice of its intended action.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Corps of Engineers, Philadelphia District, shall:

1. Cease and desist from:

(a) Changing the reporting requirements for certain employees at its Pedricktown facility, or any other term or condition of employment which is the subject of collective bargaining negotiations, when an impasse in such negotiations has been reached, without notifying the American Federation of Government Employees, Local 902, AFL-CIO, or any other exclusive representative, so as to afford the exclusive representative ample opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

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

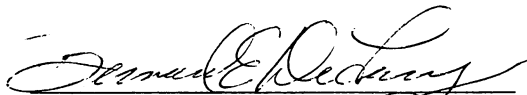
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Provide reasonable notice to the American Federation of Government Employees, Local 902, AFL-CIO, or any other exclusive representative, of any intended change in the reporting requirements for certain employees at its Pedricktown facility, or any other term or condition of employment which is the subject of collective bargaining negotiations, when an impasse in such negotiations has been reached, so as to provide the exclusive representative ample opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes. 4/

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

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

Dated, Washington, D. C.
June 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ As noted above, the parties herein, subsequent to the Panel's recommendation, executed a negotiated agreement including a provision covering reporting and quitting practice. Under these circumstances, a status quo ante remedy was not considered appropriate.

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the reporting requirements for certain employees at our Pedricktown facility, or any other term or condition of employment which is the subject of collective bargaining negotiations, when an impasse in such negotiations has been reached, without notifying the American Federation of Government Employees, Local 902, AFL-CIO, or any other exclusive representative, so as to afford such representative an ample opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

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

WE WILL provide reasonable notice to the American Federation of Government Employees, Local 902, AFL-CIO, or any other exclusive representative, of any intended change in the reporting requirements for certain employees at our Pedricktown facility, or any other term or condition of employment which is the subject of collective bargaining negotiations, when an impasse in such negotiations has been reached, so as to provide the exclusive representative an ample opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

Dated: _____ By: _____
(Agency or Activity)
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Bldg., 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 :
 :
 U. S. ARMY CORPS OF ENGINEERS :
 PHILADELPHIA DISTRICT, :
 :
 Respondent :
 :
 and : Case No. 20-4753 (CA)
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES AFL-CIO, LOCAL 902 :
 :
 Complainant :
 :

H. Ronald Freh
 Michael J. Adams, Esq.
 Charles T. Flachbarth, Esq.
 Construction-Operations Division
 Department of the Army
 Philadelphia District, Corps of Engineers
 Custom House - 2D & Chestnut Streets
 Philadelphia, Pennsylvania 19106
 For the Respondent

James Rosa, Esquire
 Staff Counsel AFGE
 1325 Massachusetts Avenue, N. W.
 Washington, D. C. 20005
 For the Complainant

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

Recommended Decision and Order

Statement of Case

Pursuant to a complaint filed on November 26, 1974 under Executive Order 11491, as amended, (hereinafter called the Order) by Local 902, American Federation of Government Employees, AFL-CIO (hereinafter called the Union) against U. S. Army Corps of Engineers, Philadelphia District (hereinafter called the Respondent or Agency), a Notice of Hearing

on Complaint was issued by the Acting Assistant Regional Director for Labor Management Services for the Philadelphia Region on February 14, 1975.

The complaint alleges, in substance, that Respondent unilaterally and without notice changed an existing working condition in derogation of the Union's right to consult, confer or negotiate about this change and its implementation and impact and thereby violated Sections 19(a)(1) and (6) of the Order.

A hearing was held in this matter before the undersigned in Philadelphia, Pennsylvania. Both parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

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

Findings of Fact

I. Practice and Policy

The Union has been the collective bargaining representative for a unit composed of all non-supervisory employees of the Fort Mifflin Project Engineer's Office for a substantial period of time. 1/ This unit that was apparently composed of somewhat less than 100 employees 2/ located in two duty stations, Fort Mifflin and Pedricktown. It appears that between 15-24 employees are assigned to Pedricktown duty station. Of these assigned to Pedricktown between 10 and 18 are pipelinesmen, welders and motor vehicle operators and the remainder are crane operators and crane groundsmen. These

1/ At least since 1968 when negotiations for the first collective bargaining agreement commenced.

2/ Some of the documentary evidence indicates the number to be about 50 such employees. The only testimony on this point was by Lewis Caccese, Chief of Construction Operations Division, who testified that it was about 100 or a little less.

employees, although their duty station is Pedricktown, usually worked on job sites that were often a considerable distance from their Pedricktown duty station.

The weight of the credited evidence in the record herein establishes that since early 1970 when the pipelinesmen, welders and motor vehicle operators were assigned to job sites off the Pedricktown property the practice was for the employees to report to their Pedricktown duty station by 8:00 a. m. and to be driven in a van to the job site. Similarly these employees, and the van would leave the job site in sufficient time to allow employees to return to Pedricktown by 4:30 p. m., the close of the workday. 3/ The one pipelinesmen, who was on watch each day had to report to the job site at 8:00 a. m. and remain until 4:30 p. m. The crane operators and crane groundsmen had to report to their job sites at 8:00 a. m. and remain there until 4:30 p. m. Their equipment remained at the job site whereas the pipelinesmen's and welders' equipment was bought back and forth each day in the van.

This practice of pipelinesmen, welders, and motor vehicle operators reporting to Pedricktown at 8:00 a. m. and being transported to the job site and then being returned to Pedricktown by 4:30 p. m. was initiated in early 1970 pursuant to a discussion and arrangement between Supervisor Lee Trader and Union President John M. Fears.

The official policy of Respondent during this entire time was that, at least with respect to the employees in the collective bargaining unit, employees had to report to their job sites at 8:00 a. m. and remain working at the job site until 4:30 a. m. 4/

3/ These trips could take anywhere from 20 minutes to 45 minutes each way depending on the distance, traffic, etc. Also, some employees could choose to either be picked up and dropped off by the van en route or to go directly to the job site, so long as they were there when the van arrived and left when the van left.

4/ Respondent's instructions to new employees in the unit did not clearly set out this policy but it did state that "... Employees will report for duty as indicated by the work schedule or as directed by the supervisor and will be required to work 8 hours."

The record establishes that during May 1974, because Respondent had become aware of a number of instances of employees arriving at their job sites after 8:00 a. m. and leaving before 4:30 p. m., 5/ it instructed its supervisors that they were to enforce the policy of 8:00 a. m. reporting to job sites and not leaving the job sites before 4:30 p. m. This policy was enforced and the prior practice of reporting to Pedricktown at 8:00 a. m. and returning by 4:30 p. m. was discontinued. Now if a pipelinesman or a welder wished to ride the van to the job site, he had to report to Pedricktown sufficiently before 8:00 a. m. so that he could get on the van which left Pedricktown enough before 8:00 a. m. so that it would arrive at the job site by 8:00 a. m. Similarly the van didn't leave the job site prior to 4:30 p. m. for its return to Pedricktown, therefore arriving at Pedricktown sometime after 4:30 p. m. 6/ The Union was neither advised nor consulted prior to the institution of this change in this reporting and quitting practice with respect to the pipelinesmen, welders and motor vehicle operators.

II. Negotiations

In preparation for negotiating a third collective bargaining agreement, the Union submitted a proposed contract in December 1971. This proposal contained language stating that Pedricktown is designated as a permanent duty station for the Construction and Labor Force and that "employees will be on duty from 8:00 a. m. to 4:30 p. m....".

The parties commenced their negotiations meetings on February 1, 1972 at which meeting the Respondent proposed that the above language be changed to state that "These employees will be at their assigned job sites from 8:00 a. m. to 4:30 p. m..." At the February 9 meeting the parties agreed to the language proposed by the Union, with Respondent's representative stating that this did not change the existing

5/ Presumably these employees were merely following the practice described above.

6/ Employees were not paid a compensated for the time they rode on the van before 8:00 a. m. or after 4:30 p. m.

policy concerning reporting of Construction and Labor Force employees to their assigned job sites. The Union recognized this as a problem and the Union had "to find a way to correct it, whether it be by a grievance to the District... the union has yet to decide."

The Union membership rejected the agreed upon language and on May 25, 1972 the Union proposed that to the agreed upon language should be added "... All employees' duty day will begin and end at the official duty station...". During later negotiation meetings the Union pointed out that "there are members of the unit who incur a daily cost of three dollars... in reporting for work at the work sites."

In June 1974, the Union filed a request before the Federal Impasses Panel (hereinafter called the Panel) to consider a negotiation impasse under Section 17 of the Order. One of the issues presented was the Union proposal concerning where and the time employees are to report. The Panel issued its Panel Report and Recommendation for Settlement on January 13, 1975.

The Panel Report stated, in part:

"The Union has sought to obtain a contract provision requiring the workday to start and end at Pedricktown since at least 1968. The Employer has consistently rejected all such Union demands. One reason for the Union's current proposal is its contention that a practice formerly existed which allowed a certain group of employees to enjoy the benefit which the Union now seeks to incorporate in the contract. Because the question of whether such a practice did, in fact, exist is before the Assistant Secretary of Labor for Labor-Management Relations in the context of an unfair labor practice complaint, we make no findings in regard to this matter." (emphasis added)

In its Report the Panel recommended that the Union's proposal, which applied to all unit employees in Pedricktown, be withdrawn. The reasoning relied upon was that there was no need for employees such as crane operators and crane groundsmen to leave for work from Pedricktown and it noted that they had always gone directly to the site where their cranes are located. The Panel noted that the Union's proposal would have required such employees i. e. (crane operators and crane groundsmen) numbering almost 50% of the Construction and Labor Force to report first to Pedricktown, although there was no showing of any reason for having these employees do so.

The parties then reached agreement on a contract whose article dealing with Basic Workweek and Hours of Work, states, in part "...Pedricktown, New Jersey is designated as the permanent duty station for the Construction and Labor Force. These employees will be on duty from 8:00 a. m. to 4:30 p. m...."

III. Grievance.

In 1973 a Mr. Booker T. Thomas, a crane operator and Harry S. Lively, a crane groundsman, filed a grievance because they too wanted transportation from Pedricktown, their duty station, to the job sites. They were grieving because they, in effect, wanted the same travel benefits enjoyed by the pipelinesmen and welders. Mr. Thomas was Vice-President of the Union. 7/ The grievance, however, was individually filed by Mr. Thomas and Mr. Lively on their own behalf. They designated the Union to represent them in the grievance. The grievance was denied by Respondent and the grievants did not pursue it further under the Department of the Army Grievance Appellate Review Procedure.

Conclusions

(a) The Alleged Unilateral Change:

It is well established that a unilateral change in terms and conditions of employment constitutes a violation of Section 19(a)(6) of the Order. e. g. VA Hospital, Charleston, S. C., A/SLMR No. 87; and NLRB, Wash., D. C. A/SLMR No. 246. In the instant case it is concluded that, at least since 1970, there was a practice approved by the first line supervisors, of permitting the pipelinesmen, welders, etc. to report to Pedricktown at 8:00 a. m. and then being transported by van to their job sites, and then to leave the job sites by van, in sufficient time to be able to leave work from Pedricktown at 4:30 p. m. 8/

7/ Mr. Lively was not an official of the Union.

8/ Such a practice or term is a matter "affecting working conditions" within the meaning of Section 11(a) of the Order. There is no dispute it is a negotiable matter.

It is concluded that such a practice was a working condition, even though there was an official policy by Respondent that all employees in the unit were to report to their job sites, rather than duty stations, at the start of the work day and remain there 8 hours. The "policy" in the instant case was specifically modified by Supervisor Trader and by the other first line supervisor 9/ when they permitted the subject employees to continue to report to Pedricktown at 8:00 a. m. to be transported to the job sites. This practice then became a working condition that existed for about 4-1/2 years before the change in May of 1974.

It is concluded that the unilateral change of this working condition in this case, with no prior notification to the Union and affording it no opportunity to negotiate, consult or confer about this change, constituted a violation of Section 19(a)(6) of the Order. In this regard the New Mexico Air National Guard Case 10/ is in point. In that case the Respondent had an existing policy concerning grooming (hair length) which it had been lax in enforcing. It was found that the Respondent by a memorandum announced a sharp and significant shift with respect to the matter of enforcement of the existing grooming standards. 11/ The Assistant Secretary found that this matter of grooming was non-negotiable and therefore the change did not constitute a violation of Section 19(a)(6) of the Order. 12/

9/ Respondent's own communications to new employees advised them to report for duty "as directed by the supervisor." This, at least impliedly, stated that supervisors could tell employees when and where to report for work.

10/ New Mexico Air National Guard, Santa Fe, New Mexico, A/SLMR No. 362.

11/ Respondent's defense that this was merely a reiteration of existing policy was rejected.

12/ Presumably if negotiable the unilateral change would have violated Section 19(a)(6) of the Order.

However, it was held that the failure to notify the union concerning this change in grooming standards did not give the union an opportunity to meet and confer concerning the procedures to be utilized in effectuating the change and on the impact of the change and thus in these respects the activity did violate Section 19(a)(6) of the Order.

Thus, in the instant case, whether the decision in affect was one to change the existing practice or to enforce strictly the old "policy, absent a privilege against negotiating about it, the Respondent was obliged to notify the Union in advance of its decision and give the Union an opportunity to bargain about it. The failure to afford the Union this notice and opportunity to bargain about the decision violated Section 19(a)(6) of the Order.

In light of the forgoing discussion, it necessarily follows that, "Respondent was in derogation of its bargaining obligation under the Order because it is clear that by its actions the Respondent did not afford the Complainant a reasonable opportunity to meet and confer on the procedures to be utilized in effectuating the Respondent's new policy... and on the impact of such policy or adversely affected employees.." New Mexico Air National Guard, Santa Fe, New Mexico, Supra. It is concluded, therefore, that this also constituted a violation of Section 19(a)(6) of the Order.

(b) The Grievance and Section 19(d) of the Order.

The grievance in question was filed by a crane operator and crane groundsman involving whether they were entitled to transportation from Pedricktown to then job sites. It did not raise nor deal with whether there was a unilateral change in the reporting practice of pipelinsmen and welders or whether the practice existed as to the pipelinsmen and welders of reporting to Pedricktown at 8:00 a. m. and being transported to the job site and being transported back to Pedricktown by 4:30 p. m. To the extent this latter issue might have been considered, it was merely a collateral issue, was apparently not clearly decided in the decision and was not an issue that was really the subject of the grievance. Also, the aggrieved parties in this case, Mr. Thomas and Mr. Lively, were individuals grieving on their own behalf as a crane operator and crane groundsman respectively.

Section 19(d) of the Order states that the aggrieved party must decide whether he wishes to pursue the unfair Labor practice procedure provided by the Order or the grievance procedure. The Union, the complaining party in the subject case, although representing the grievants, was not the grievant. In light of the foregoing it is concluded

that Section 19(d) of the Order does not bar the processing of the subject unfair labor practice complaint filed by the Union.

(c) Negotiations

The final issue presented is whether, when during contract negotiations impasse is reached on a particular term of employment, a party is privileged to unilaterally institute its desired working condition without resorting to the Federal Impasses Panel pursuant to Section 17 of the Order and awaiting its decision.

Although the record does not clearly establish that by May 1974, when the unilateral change in reporting practice of pipelinesmen and welders was made, the parties had reached impasse concerning that issue, the length of negotiations, the number of meetings and the bargaining history of Article VII, Basic Work Week and Hours of Work, seem to justify the inference that impasse had in fact been reached and such an inference is hereby drawn. ^{13/} On June 10, 1974, the Union filed its request with the Federal Impasse Panel to consider a negotiation impasse under Section 17 of the Order. The Panel, after determining that the impasse required fact finding and receiving a report from the Fact Finder, issued its Report and Recommendations for Settlement on January 13, 1975. This resulted in the parties entering into a collective bargaining agreement.

Section 17 of the Order provides that when an impasse in negotiations has been reached, either party may resort to the Panel to seek settlement of the impasse. Although the legislative history of Section 17 is not clear on this point, ^{14/} the entire purpose of the Order would seem to indicate that, although neither party is required to utilize

^{13/} If no impasse had been reached, it would seem that Respondent's unilateral institution of this working condition during negotiations would clearly violate Section 19(a)(6) of the Act.

^{14/} Report and Recommendations on Labor-Management Relations in the Federal Service and Executive Order 11491 of October 29, 1969, U. S. Government Printing Office (1969), No. 368-816, Pages 40-41.

the Panel during contract negotiations, neither party should be permitted to make the change over which impasse has been reached, without first utilizing the services of the Panel. This resort to the services of the Panel would be far more consistent with effectuating the of general objectives of the Order of encouraging peaceful resolutions of collective bargaining disputes in the federal sector and discouraging resort to unilateral action. ^{15/}

Section 11 of the Order states that the parties may determine negotiation techniques consistent with Section 17 of the Order. Such unilateral changes after impasse, but without resort to the Panel is hardly consistent with Section 17 of the Order.

It is concluded that Respondent, therefore, failed to negotiate pursuant to the requirements of Sections 11 and 17 of the Order by its unilateral institution of its proposed terms concerning places and times for reporting for work, after impasse had been reached, without resorting to the Federal Impasses Panel, and thus violated Section 19(a)(6) of the Order.

(d) Section 19(a)(1) of the Order.

It is concluded that Respondent's conduct described above which constituted violations of Section 19(a)(6) of the Order would also foreseeably have the effect of interfering with, restraining or coercing employees in the exercise of their rights assured by the Order and therefore also violated Section 19(a)(1) of the Order.

Recommendations

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

^{15/} In the subject case the anomalous situation was presented to the Union, although having sought the assistance of the Panel, being preempted by the unilateral change by Respondent of the very matter the Union was taking to the Panel.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the U. S. Army Corps of Engineers, Philadelphia District, shall:

1. Cease and desist from:

(a) Unilaterally changing the practice concerning the time and place of reporting for work of pipelnesmen, welders, and motor vehicle operators assigned to the Pedricktown duty station and the duration of time they spend at the job site without notifying and negotiating with Local 902, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, concerning the proposed change, the procedures which management will observe in effectivating any such change and on the impact such change will have on the employees adversely effected.

(b) Unilaterally instituting contract terms during negotiations and after impasse has been reached concerning such contract terms without first utilizing the Federal Impasse Panel pursuant to Section 17 of Executive Order 11491, as amended.

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

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

(a) Rescind its practice and policy of requiring that pipelnesmen, welders and motor vehicle operators assigned to Pedricktown report to the job sites by 8:00 a. m. and work at the job sites until 4:30 p. m. or requiring them to report to the Pedricktown duty station sufficiently prior to 8:00 a. m. so that they can be transported by van to arrive at the job sites by 8:00 a. m. and remain at the job site until 4:30 p. m. and then be transported back by van to the Pedricktown duty station.

(b) Reinstitute its practice of permitting pipelnesmen, welders an motor vehicle operators to report to their Pedricktown duty station at 8:00 a. m., being

transported by van to their job and then leaving their job sites by the van in suffiecient time to arrive at Pedricktown by 4:30 p. m.

(c) Notify Local 902, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, of any proposed changes in matters affecting working conditions, including the time and place of reporting of employees assigned to Pedricktown, and upon request meet and confer concerning proposed changes, the procedures to be utilized to effectuate the changes and the impact such changes will have on employees adversely affected by any such changes.

(d) Utilize the Federal Impasse Panel pursuant to Section 17 of the Executive Order when impasse has been reached during contract negotiations before unilaterally instituting its own propsoed contract term or condition.

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

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: November 7, 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:

We will not unilaterally change the practice concerning the time and place of reporting of pipelinsmen, welders, and motor vehicle operators assigned to the Pedricktown duty station and the duration of time they spend at the job site without notifying and negotiating with Local 902, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, concerning the proposed change, the procedures which management will observe in effectuating any such change with respect to reporting times and places and on the impact such policy will have on the employees adversely effected.

We will not unilaterally institute contract terms during negotiations and after impasse has been reached concerning such contract terms without first utilizing the Federal Impasse Panel pursuant to Section 17 of Executive Order 11491, as amended.

We will not in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights assured by the Executive Order.

We will rescind our practice and policy of requiring that pipelinsmen, welders and motor vehicle operators assigned to Pedricktown report to the job sites by 8:00 a. m. and work at the job sites until 4:30 p. m. or requiring them to report to the Pedricktown duty station sufficiently prior to 8:00 a. m. so that they can be transported by van to arrive at the job sites by 8:00 a. m. and remain at the job site until 4:30 p. m. and then be transported back by van to the Pedricktown duty station.

We will reinstitute our practice of permitting pipelinsmen, welders and motor vehicle operators to report to their Pedricktown duty station at 8:00 a. m., being transported by van to their job site and the leave their job sites by the van in sufficient time to arrive at Pedricktown by 4:30 p. m.

We will notify Local 902, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, of any proposed changes in matters affecting working conditions, including the time and place of reporting of employees assigned to Pedricktown, and upon request meet and confer concerning proposed changes, the procedures to be utilized to effectuate the changes and the impact such changes will have on employees adversely affected by any such change.

We will utilize the Federal Impasse Panel pursuant to Section 17 of the Executive Order when impasse has been reached during contract negotiations before unilaterally instituting our own proposed contract term or condition.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

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

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

SMALL BUSINESS ADMINISTRATION,
 RICHMOND, VIRGINIA,
 DISTRICT OFFICE
 A/SLMR No. 674

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3146, AFL-CIO (Complainant) against the Small Business Administration, Richmond, Virginia, District Office (Respondent). The complaint alleged, in substance, that the Respondent violated Section 19(a)(6) of the Order by implementing an Agency (Small Business Administration) regulation changing personnel policies and practices without consulting, conferring, or negotiating with the Complainant as the exclusive representative of the employees in the District Office, and that the Respondent Activity's implementation of the Agency regulation violated the terms of the negotiated agreement in effect between the Complainant and the Respondent.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the Respondent Activity's implementation of the Agency regulation without meeting and conferring with the Complainant constituted a modification of the terms of the negotiated agreement between the parties and was, therefore, violative of Section 19(a)(6) of the Order. In this regard, it was noted that the implementation of the Agency regulation constituted a modification of the merit staffing and promotion provisions of the negotiated agreement; that the Agency was not an "appropriate authority" within the meaning of Section 12(a) of the Order; and that the regulation was not issued pursuant to the direction of such an "appropriate authority" and, therefore, could not serve to modify the terms of the existing negotiated agreement without the mutual consent of the parties. He further found that under these circumstances, where the Respondent was obligated to meet, confer, and reach mutual agreement before instituting such a change, it could not absolve itself of a finding of violation by affording the Complainant an opportunity to meet and confer subsequent to the change.

Having found that the Respondent's implementation of the Agency regulation was improper during the term of the negotiated agreement, the Assistant Secretary ordered the Respondent to cease and desist from the actions found violative of the Order. The Assistant Secretary ordered also that the Respondent post all job vacancies which had occurred from the date of the Respondent's implementation of the Agency regulation to the expiration of the negotiated agreement, and if, upon evaluation of eligible applicants under appropriate criteria, it was established that the original promotion involved was improper, he ordered that such improperly filled position be vacated, and the employee entitled to such position be promoted and reimbursed for such loss of monies as he may have suffered.

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

SMALL BUSINESS ADMINISTRATION,
 RICHMOND, VIRGINIA, DISTRICT OFFICE

Respondent

and

Case No. 22-5625(CA)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 3146, AFL-CIO

Complainant

DECISION AND ORDER

On February 17, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with the respect to the Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge found, and I concur, that the Respondent Activity's implementation of the Agency's (Small Business Administration) Standard Operating Procedure (SOP)33-90 without meeting and conferring with the Complainant constituted a modification of the terms of the parties' negotiated agreement and was violative of Section 19(a)(6) of the Order. In this regard, the Administrative Law Judge noted, among other things, that SOP 33-90 constituted a modification of the merit staffing and promotion provisions contained in the parties' negotiated agreement; that the Small Business Administration was not an "appropriate

authority" within the meaning of Section 12(a) of the Order; and that the regulation was not issued pursuant to the direction of such an "appropriate authority" and, therefore, could not serve to modify the terms of the existing negotiated agreement without the mutual agreement of the parties. 1/ Further, I agree with the Administrative Law Judge that, under these circumstances, where the Respondent was obligated to meet and confer and reach mutual agreement before instituting such change, it could not absolve itself of a finding of violation by affording the Complainant the opportunity to meet and confer subsequent to the change. 2/

Although the subject complaint did not specifically allege a violation of Section 19(a)(1) of the Order, I find that the Respondent's conduct herein necessarily interfered with, restrained, or coerced employees in the exercise of their rights assured by the Order. In this regard, it was noted that the Assistant Secretary held in Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454, that a violation of any subsection of Section 19(a), other than Section 19(a)(1), necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, therefore, also is violative of Section 19(a)(1) of the Order.

In his proposed remedy, the Administrative Law Judge recommended, in effect, a return to the status quo ante. In my view, an appropriate remedy in this matter should include the revocation of any promotions made pursuant to the procedures established by SOP 33-90, only if, upon an evaluation of eligible applicants under appropriate criteria, it is established that the original promotion involved was improper. 3/ In the latter event, I shall order that the position which was improperly filled be vacated and that, consistent with the procedures contained in the negotiated agreement and Agency policies and regulations in existence at the time said agreement was approved, the employee entitled to such

1/ See Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390.

2/ See Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, at footnote 6 and Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608, at footnote 7.

3/ Cf. Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees, Local 3407, FLRC No. 75A-33.

position be promoted with reimbursement for the loss of monies such employee may have suffered but for the Respondent's improper conduct. 4/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the 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 its negotiated agreement with American Federation of Government Employees, Local 3146, AFL-CIO, executed March 19, 1973.

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

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

(a) Abide by the terms and conditions of its negotiated agreement of March 19, 1973, with American Federation of Government Employees, Local 3146, AFL-CIO, during the term of such negotiated agreement unless modifications are mutually agreed to by the parties to the agreement.

(b) Post all job vacancies which occurred in the Richmond, Virginia, District Office from May 15, 1974, to the expiration of the negotiated agreement of March 19, 1973, in accordance with the terms and conditions of said negotiated agreement, and evaluate all candidates for such vacancies 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.

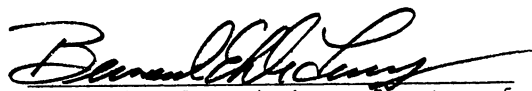
(c) If, following the action taken in accordance with paragraph 2(b) above, it should develop that there was an improper failure to promote an employee, the position to which such employee would have been entitled shall be vacated, and the employee shall be promoted and reimbursed for any loss of monies occasioned by the improper failure to promote.

4/ I shall also clarify the remedial order to limit its applicability only to those promotions which occurred during the term of the parties' negotiated agreement.

(d) Post at its 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 District Director or other appropriate official in charge of the Richmond, Virginia, District Office, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

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

Dated, Washington, D. C.
July 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally implement Standard Operating Procedure 33-90 during the term 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 interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL abide by the terms and conditions of the negotiated agreement of March 19, 1973, with American Federation of Government Employees, Local 3146, AFL-CIO, during the term of such negotiated agreement unless modifications thereto are mutually agreed to by the parties to the agreement.

WE WILL post all job vacancies which occurred in the Richmond, Virginia, District Office from May 15, 1974, to the expiration of the negotiated agreement of March 19, 1973, in accordance with the terms and conditions of said negotiated agreement, and evaluate all candidates for such vacancies under the terms and conditions of the negotiated agreement of March 19, 1973, and the published policies and regulations of the Small Business Administration in existence at the time the negotiated agreement was approved.

WE WILL vacate any position which was improperly filled during the term of the negotiated agreement of March 19, 1973, promote any employee improperly denied promotion and reimburse such employee for any loss of monies occasioned by the improper failure to promote.

July 23, 1976

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

INTERNAL REVENUE SERVICE,
AUSTIN SERVICE CENTER,
AUSTIN, TEXAS
A/SLMR No. 675

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter 72 (NTEU-Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to furnish copies of all unsanitized "Furlough and Recall" rosters for "When Actually Employed" (WAE) employees, such information being essential to the administration and policing of the parties' negotiated agreement.

In agreement with the Administrative Law Judge, the Assistant Secretary found that, under the circumstances, the Respondent's offer to provide either a "sanitized" Furlough and Recall roster consisting of all WAE employees' names in rank order without evaluative scores, or a "sanitized" list consisting of all WAE employees' scores in rank order without the WAE employees' names, fulfilled its obligation to provide the Complainant with the relevant and necessary information it was entitled to receive in order to properly administer and police the parties' negotiated agreement.

Accordingly, the Assistant Secretary concurred in the recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

(Agency or Activity)

Dated _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material. If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
AUSTIN SERVICE CENTER,
AUSTIN, TEXAS

Respondent

and

Case No. 63-5065(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER 72, NTEU

Complainant

DECISION AND ORDER

On February 19, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed a response to the Complainant's exceptions.

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

Under all of the circumstances, I agree with the Administrative Law Judge that the Respondent's offer to supply certain "sanitized" information to the Complainant concerning the Respondent's "Furlough and Recall"

roster for "When Actually Employed" (WAE) employees 1/, fulfilled the latter's obligation to provide the Complainant with the relevant and necessary information it was entitled to receive in order to properly administer and police the parties' negotiated agreement.

Accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5065(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ The roster provided, in order of rank, the furlough and recall status of the WAE employees based on a special "merit evaluation" score composed of three factors. The Administrative Law Judge found that the Respondent had offered to supply the complete roster with either the names or scores blocked out.

July 23, 1976

A/SLMR No. 676

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

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

AGENCY FOR INTERNATIONAL DEVELOPMENT,
DEPARTMENT OF STATE
A/SLMR No. 676

AGENCY FOR INTERNATIONAL DEVELOPMENT,
DEPARTMENT OF STATE

Respondent

and

Case No. 22-5853(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1534

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1534 (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to furnish the AFGE, upon its request, copies of the "Thomas Report," the "Wild Report," and the "Foreign Service Skills Review," all of which were allegedly relevant and necessary to the AFGE's duty to properly represent unit employees regarding the implementation and impact of a reduction in force (RIF) which was in process at the time of the request.

On March 31, 1976, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

The Administrative Law Judge noted that there was no evidence that a "Foreign Service Skills Review" existed and, therefore, he confined his decision to the other reports. In this connection, he concluded with respect to the "Thomas Report" and the "Wild Report," which were submitted to him for his in camera inspection at the hearing, that neither was relevant nor necessary to the AFGE for it to intelligently negotiate the impact and implementation of the RIF. He noted, in this regard, that the "Thomas Report" was a developing tool in undertaking an ongoing skills forecast for the Respondent and, used as such, it contained no information or data bearing on the RIF itself. Further, he noted that while the "Wild Report" dealt with the specifics of the RIF, it was merely a draft report and was never finalized to the point where it formed the basis for any action on the part of the Respondent with respect to the decision of who to RIF. Accordingly, as the AFGE apparently was supplied with the relevant and necessary information with respect to meeting and conferring over the impact and implementation of the RIF, and the "Thomas" and "Wild Reports" were not, upon inspection, relevant and necessary to such bargaining, the Administrative Law Judge concluded that the instant unfair labor practice complaint should be dismissed.

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


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

1/ The Administrative Law Judge indicated that he found it difficult to characterize the reports involved herein as relevant and necessary to discuss the impact of a reduction in force "where management has not relied upon such information ab initio or considered the content in their effect upon employees." In my view, the fact that a report, such as the Wild Report in the instant case, was not relied upon by management in its decision to effect a reduction in force should not, standing alone, automatically require the conclusion that such report is not relevant or necessary to the exclusive representative to enable it to bargain intelligently with respect to the impact and implementation of a reduction in force. However, under the particular circumstances of the instant case, I find, in agreement with the Administrative Law Judge, that the evidence establishes that the information contained in the Wild Report was neither relevant nor necessary to the Complainant in order for it to bargain intelligently over the impact and implementation of the reduction in force involved herein.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 22-5853(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
In the Matter of
AGENCY FOR INTERNATIONAL DEVELOPMENT,
DEPARTMENT OF STATE
Respondent
CASE NO. 22-5853 (CA)
and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1534
Complainant

MS. PAULINE JOHNSON, ESQ.
Agency for International Development
Department of State
Room 6892
Washington, D.C. 20523
For Respondent

JAMES ROSA, ESQ.
American Federation of Government
Employees, Local 1534
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION
Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 15, 1975 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, Philadelphia Region, a hearing was held in the above entitled case before the undersigned on January 28, 1976 at Washington, D.C.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on February 27, 1975 by American Federation of Government Employees, Local 1534 (herein called Complainant) against Agency for International Development, Department of State (herein called Respondent). It was alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by failing and refusing to furnish Complainant with copies of certain documents known as "The Thomas Report", "The Wild Report", and "Foreign Service Skills Review" - all of which were allegedly relevant and necessary to the union's exercise of its duty to properly represent unit employees. Complainant alleged that, as a result of the failure and refusal to furnish these documents, Respondent did not consult, confer and negotiate as required by the Order.

Respondent filed a response denying the commission of any unfair labor practices. It alleged that these documents relate to matters deemed to be management rights under Sections 11(b) and 12(b) of the Order; that since there is no obligation to negotiate as to these rights, there is no obligation to furnish the requested data; and that the reports may be withheld under Sections (b)(2) and (5) of the Freedom of Information Act.

A hearing was held before the undersigned on January 28, 1976. Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered. ^{1/}

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

Findings

1. At all times material herein complainant has been, and still is, the collective bargaining representative of Respondent's professional and non-professional general schedule and wage grade employees, administratively determined employees, and student aides, agency-wide.

^{1/} Respondent submitted with its brief certain proposed corrections to be made in the transcript. This submission is treated herein as a motion to correct the transcript. The said motion is hereby granted and the corrections are attached hereto as Appendix A.

2. Both Complainant and Respondent are parties to a collective bargaining agreement which is effective by its terms from April 23, 1973 for a period of two years, and said agreement is automatically renewable for successive one year periods.

3. Article XIII of the agreement between the parties pertains to Reduction In Force (RIF). Under this provision Respondent agrees to (a) consider employees affected by a RIF for vacant positions; (b) to inform employees at least 30 days in advance of the RIF; (c) to explain the RIF to affected employees and help them understand its process; (d) to counsel employees affected by the RIF re alternative actions they may wish to consider, and assist them in re-locating or finding other positions; (e) to inform the union in advance of implementing the RIF and provide detailed information on the numbers of employees affected.

4. In late September or early October 1974, ^{2/} Gerald Pagano, Respondent's Labor-Management Relations Specialist, spoke to Clarence Snyder, Complainant's unit chairman. Pagano informed the union representative that the agency was in the process of making a decision to conduct a RIF, and that it would be announced in two weeks. The first RIF notices were not sent until April 15, 1975 to the affected employees.

5. On October 8 a meeting was held between officials of the agency and the Union. The impending RIF was discussed thereat, and the union representatives were given a copy of the announcement to be made to employees. This announcement, though intended to be distributed on October 9, was actually distributed, in part, in the afternoon of the meeting.

6. On October 18 Daniel Parker, Administrator, addressed the employees to discuss the RIF. He informed the union beforehand of the planned announcement and address. At this meeting Parker explained the necessity for the expected RIF; that 300-400 individuals might be leaving the agency; and he enumerated some of the measures which he intended to invoke so as to lessen the impact on the employees affected.

^{2/} All dates hereinafter mentioned occurred in 1974 unless otherwise indicated.

7. At a briefing session with the union on October 28 management gave a chart presentation of the Civil Service Commission's rules and regulations applicable in the event of a RIF, as well as the regulation of the agency which pertained during such action. The union representatives asked questions during this session re the geographic competitive area applicable in a RIF, as well as the permissibility of bumping in particular tenure groups. Respondent replied thereto in writing on October 31, and it enclosed a copy of the Manual Order - the agency directive system.

8. In order to discuss settlement of a previous unfair labor practice complaint filed by Complainant against Respondent, the parties met on November 20 and 21. Prior to this meeting the union submitted in writing a list of 28 questions to management concerning the RIF, the basis therefor, its impact upon employees affected, plans and procedures to be followed in assignments and reassignments, and other details including the numbers of positions occupied. Complainant also requested copies of lists of surplus positions.

The agenda of the said meetings in November dealt with all the questions submitted by the union prior thereto. Management answered each of the said questions and comments were made by both parties. The said remarks, together with the questions to which they were addressed, were reduced to writing in a memorandum dated December 27.

9. At the meeting on November 20 and 21, Michael McCann, Deputy Director of the Office of Personnel Manpower, made mention of the Thomas Report, which involved manpower projections for the agency; and the Wild Report, which was conducted to identify the magnitude of staffing problems at the agency. Complainant requested copies of both reports during the meeting and management agreed to consider the request.

10. Subsequent to the November meetings with the union, Respondent briefed the latter as to the RIF procedures and as to information to be sent to employees re salary retention rights, retirement provisions set forth in Civil Service Commission regulations, and outplacement service utilized by the agency. In addition, management furnished the union with: retention register; information re positions to be abolished; action being taken by the employer to mitigate the effect of the RIF on employees; details re reassignment to vacant positions; information re early retirement and retirement procedures; documents identifying some employees

who would be affected by the RIF; and personnel service provided by the agency for employees affected (after RIF the union was given listing by number of different offices and numbers of employees who lost their rights and grades). Further, the union was given, from time to time, staffing patterns showing agency positions which were vacant or filled.

11. By letter dated December 12, Complainant repeated its request to Respondent for the Thomas Report, Wild Report and the Foreign Service Skills Review 3/, and alleged that the agency had committed an unfair labor practice by failing to furnish the union these documents. In a reply letter to the union dated January 6, 1975, Respondent refused to furnish Complainant with either the Thomas or the Wild Reports. It was stated therein that both were internal reviews or studies; that just as management's right to decide on a RIF was reserved, the studies made in the course of such decision are also reserved and not required to be made public. The letter further commented that the basis for the RIF decision was a result of a congressional view that AID was overstaffed, together with the agency's internal review of its work force in the U.S. and overseas in relation to its program.

12. Record testimony reveals that the basis for the RIF was the manpower review, ceilings being issued to offices which gave them certain manning levels. Managers were then required to submit specific personnel needs within these ceilings either by creating new jobs or abolishing old ones. This resulted in a need for a reduction in force.

13. In respect to both the Thomas Report and the Wild Report 4/, record testimony reveals, and I find, that neither report was used by management in connection with the decision to conduct the RIF or its implementation.

3/ The record reflects, and I find, that a Foreign Service Skills Review, requested by the union, does not exist. Complainant's allegation that Respondent has violated the Order is now confined to the agency's refusal to provide the union with copies of the other two named reports. It is admitted, and I find, that the agency furnished the union with everything else it requested.

4/ Both reports were produced at the hearing for an in camera inspection by the undersigned, and they were identified on the record. Respondent objected to their being offered in evidence, or shown to Complainant for the same reasons it refused to furnish them originally. These reports are being forwarded by the undersigned under sealed cover to the Assistant Secretary, and Respondent requests they be returned to it after a decision is rendered.

14. The Thomas Report

In 1973 management prepared a paper leading to the development of a forecast of the agency's long-run manpower skill requirements for technical and program management personnel. It is entitled "Manpower Study/Skills Forecast - AID Skills Required for the Late Seventies." It sets forth certain assumptions regarding the ultimate operation of AID programs as well as the role and style of AID in the development thereof. The paper discusses the categories of technical generalist and technical specialists, the skills required for each, and the need for such technicians in either Washington or the field in the future. It also sets forth proposed personnel categories for technical and managerial personnel.

15. The Wild Report

In May 1974, Deputy Administrator Murphy asked William C. Weed, Jr., Director of Management Planning, to prepare a report as a preliminary assessment of alleged surplus at the agency. Wild and two other management representatives finished the report in June 1974, after having interviewed all senior officers.

This report, entitled "Current AID/W Personnel Requirements", recites that a review was conducted of current positions requirements in every AID/w Bureau and Office as well as the status of every employee on the personnel Complement. The Wild Report sets forth the number of full and part time positions deemed to be Washington's surplus (vacant or filled) in AID/w Bureau and Office and in the Complement; the number of people considered surplus, including the number of less than adequate; the numerical requirements for full as well as part time positions and people; 12 named employees with reemployment rights who could be placement problems; and recommendations for providing position ceilings (full and part time), eliminating a stated number of full and part time positions and initiating a further study of AID/W personnel requirements. The record reveals this was a draft report and no further work thereon or subsequent revision was ever made. Each page of the Wild Report bears the phrase "Limited Official Use".

Conclusions

It is contended by Complainant that Respondent violated 19(a)(1) and (6) of the Order by failing and refusing to furnish the union copies of the Thomas and Wild Reports. The union concedes that management did furnish it with all other requested information necessary to negotiate on the impact and implementation of the reduction in force. Moreover, it does not challenge the employer's right to conduct, on its own, the RIF based on personnel needs. It insists, however, that in order to deal intelligently with Congress re the RIF, answer questions posed by unit employees, and negotiate the impact of Respondent's action, it needed copies of said reports. Complainant maintains further, that in order to negotiate RIF procedures it must know the overall goals of management, why the reduction was established, and what was to be accomplished - all in order to counsel employees and advise them properly as to what choices they should make for their future.

Both the private and public sectors have recognized that an employer is obliged to furnish the union, upon request, information and data relevant and necessary to allow the latter to fulfill its duty as bargaining representative. The National Labor Relations Board has long held that this obligation extends to information the union may require to police and administer agreements, including the handling of grievances on behalf of employees. Such information has consisted, inter alia, of data concerning wage studies, cost items, and reports regarding proposed transfer or consolidation of unit work. American Carpet Mills, 170 NLRB 1715, 1725; Fafnir Bearing Co., 146 NLRB 1582 enfd. 302F 2d 716(C.A. 2); West Penn Power Publishing Co., 143 NLRB 1316, B20-21.

In the public sector employees have been required to provide the bargaining agent with assessments by an evaluation panel where the union processed a grievance on behalf of an employee not selected for a vacancy. Department of Defense, State of New Jersey, A/SLMR No. 323. Further, in order to enable a union to determine whether a grievance should be filed on behalf of an employee, management was obliged to furnish reports reflecting production records of other employees. The particular employee's performance was deemed substantial, and it was held that the information sought was relevant and necessary to enable the union to make a determination in report to filing a grievance. Department of Health, Education and Welfare, Social Security Administration, et. al., A/SLMR No. 411.

In the case at bar Complainant was furnished with considerable data bearing on the proposed reduction in force. Management supplied data re the procedures to be followed, the staffing patterns showing positions vacant and filled, positions to be abolished and employees affected, reassignment of employees affected by the RIF, timetables for implementation, and procedures re promotion or filling vacancies. The union admits that all information it requested - except for the reports involved herein - was supplied by the agency and that the latter met and conferred with it re the impact and implementation of the RIF. Nevertheless, it argues that the reports it requested were relevant and necessary to undertake its duty as the bargaining representative.

As analysis of the record herein convinces me that the information contained in the Thomas and Wild Reports was not required to enable the unions to negotiate on the impact of the proposed force reduction. These were management studies which, though undertaken to gather data regarding the skills and surplus of positions, were never utilized in either the decision to effect a RIF or its implementation. In respect to the Wild Report, the record indicates it was a draft which had not necessarily been adopted by management or viewed as a predicate for action taken by Respondent in reducing and reassigning its complement. Despite Complainant's argument to the contrary, I find it difficult to characterize these reports as relevant and necessary to discuss the RIF impact where management has not relied upon such information ab initio, or considered the content in their effect upon employees. See Kroger Co. v. NLRB, 68 LRRM 2731 (C.A. 6).

In respect to the Thomas Report, the paper, as developing tool to undertake a forecast of skills requirements, is clearly as analysis of matter to be considered by management so that skill categories may be obtained of technical and program personnel for 3-5 years later. In treating with the role and style of AID for the seventies, the report is a projection study of skills required in the field and Washington.


As such, it contains no information on data bearing on the RIF, or affecting the employees involved in the reduction. The document does not purport to deal with present working conditions or data pertaining to the present employment of unit employees, and I am constrained to conclude it has no relevancy in enabling the Complainant to fulfill its obligation as the bargaining representative.

The Wild Report is composed of numerical details, for the most part, concerning surplus positions and required personnel. While it was undertaken to determine the extent of such surplus, the survey was a draft report which was never finalized to the point where it formed the basis for any action on the part of Respondent. The record reflects that the annual manning reviews with attendant ceilings was utilized in effecting the RIF and that this surplus report was not a determinant factor in that regard. A somewhat analogous situation existed in General Aniline and Film Corp., 124 NLRB 1217 where, in the private sector, a union requested certain reports or surveys from an employer which it felt might affect contract negotiations or complaints received from employees. The employer had used "applicator" reports to compare cost of work done in certain departments with national norms, but which were not used to determine wage rates. Also a survey was conducted of operations to devise a better system of performing work and effect savings by proper scheduling of operations. As the Board concluded, the "applicator" report had no bearing on wage rates, and the survey was solely for the convenience of supervisors in scheduling work. Further, management never sought to justify its position by referring to those documents, and the Board held they were, under the circumstances, neither relevant nor necessary to enable the union to fulfill its function.

The cited case, it is true, did not involve a reduction in force. Nevertheless, the illustrative principle is well taken that an employer is not required to furnish a union with all information which the latter conceives may be helpful in bargaining or processing grievances. In the case at bar, the Complainant was supplied with the relevant and necessary data re the retention register, reassignment, and positions to be abolished. The union urges, however, that it was concerned with the future plans for employees as well as motivation. In neither instance do I view such information as bearing on the impact of the reduction in force. Nor do I deem it requisite that these reports be furnished so that the union may answer queries posed by the employees. The obligation of an employer to supply data to a bargaining representative does not turn on the ability of the representative to effectively reply to employees' questions any more than it does on the union's intelligent dealings with Congress. In sum, I conclude that neither the Thomas nor the Wild Report was necessary or relevant to enable Complainant to bargain re the impact and implementation of the RIF herein, that Respondent was under no obligation to furnish said reports; and that the refusal and failure of Respondent to furnish such data did not constitute a violation of 19(a)(1) and (6) of the Act.

RECOMMENDATION

On the basis of the foregoing findings and conclusion, the undersigned recommends that the complaint herein be dismissed in its entirety.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 31 MAR 1976
Washington, D.C.

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

AEROSPACE GUIDANCE AND METROLOGY CENTER,
NEWARK AIR FORCE STATION,
NEWARK, OHIO
A/SLMR No. 677

This case involved an unfair labor practice complaint filed by Local Union 2221, American Federation of Government Employees, AFL-CIO (Complainant) alleging essentially that the Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio (Respondent) violated Section 19(a)(1) and (6) of the Order by implementing a change in the scheduling of annual leave and refusing to meet and confer in good faith with the Complainant about the change.

The Administrative Law Judge concluded that the complaint should be dismissed. Thus, he concluded that, under the circumstances present in this case, the Respondent was not obligated to meet and confer concerning the change in leave policy, and that the policy implemented by the Respondent did not modify or change the terms of the negotiated agreement between the Respondent and the Complainant. Further, he found that the Respondent had fulfilled any obligation it had to meet and confer on the impact and implementation of the leave policy determination.

Although the Assistant Secretary concurred in the Administrative Law Judge's recommendation that the complaint should be dismissed, he did so for different reasons than those relied on by the Administrative Law Judge. Thus, he found that the gravamen of the complaint was the contention that the Respondent breached the parties' negotiated agreement by, in effect, modifying the terms of the leave article of such agreement. The Assistant Secretary noted that it had been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order and that, under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. Accordingly, as the issues in the instant case involved essentially different interpretations of the parties' negotiated agreement, the Assistant Secretary ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AEROSPACE GUIDANCE AND METROLOGY CENTER,
NEWARK AIR FORCE STATION,
NEWARK, OHIO

Respondent

and

Case No. 53-7988(CA)

LOCAL UNION 2221, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO,
NEWARK, OHIO

Complainant

DECISION AND ORDER

On February 9, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge concluded, in essence, that, under the circumstances herein, the Respondent was not obligated to meet and confer concerning a change in leave policy and that the policy promulgated in the instant case and its implementation by the Respondent "did not modify or change the terms of the negotiated agreement". Further, he found that the Respondent had met its obligation to meet and confer on the impact and implementation of the disputed leave policy.

^{1/} In footnote 2 of his Recommended Decision and Order the Administrative Law Judge discussed the Respondent's contention that the Assistant Secretary was not empowered to make an initial determination of negotiability in the instant proceeding inasmuch as the events giving

(Continued)

Although I concur in the Administrative Law Judge's recommendation that dismissal of the instant complaint is warranted, I do so for different reasons than those relied on by the Administrative Law Judge. In my view, the gravamen of the instant complaint is the contention that the Respondent breached the parties' negotiated agreement by, in effect, modifying the terms of Article 22, Leave, of such agreement. Thus, the complaint alleged, among other things, that the leave policy implemented by the Respondent "...amended a negotiated agreement between AFGE Local 2221 and AGMC." Further, the Complainant's pre-complaint charge stated, among other things, that "...On or about, 23 January 1975, it was contended by AFGE Local 2221, and acknowledged by AGMC's Acting Chief Negotiator, Mr. Donald A. Larson, that the Air Force Logistics Command Policy Letter, dated 13 January 1975, changed and amended, if not violated, Section A, Article 22 of both the continuing, and pending Agreements between AFGE Local 2221 and AGMC." In this regard, the Assistant Secretary has held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral

^{1/} rise to the unfair labor practice complaint arose prior to the effective date of Executive Order 11838, amending Executive Order 11491. In this connection, Executive Order 11838 added Section 11(d) to Executive Order 11491. In addition, Section 6(a)(4) of the Order, which concerns the authority of the Assistant Secretary to decide unfair labor practice complaints, was modified by adding the following parenthetical language: "(including those [unfair labor practice complaints] where an alleged unilateral act by one of the parties requires an initial negotiability determination)." In my view, the above noted language constituted a clarification of, rather than an addition to, the authority of the Assistant Secretary. Thus, prior to the amendments, the Assistant Secretary had made initial negotiability determinations, under certain circumstances, in the context of unfair labor practice proceedings. See National Labor Relations Board, A/SLMR No. 246. Moreover, in its discussion of the amendments, the Federal Labor Relations Council (Council) in Section VIII. 1. of its 1975 Report and Recommendations stated: "...The amendments which we propose would affirm the authority of the Assistant Secretary, in the context of certain unfair labor practice cases, to resolve negotiability issues, even though there is no existing Council precedent to guide him, 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." (Emphasis added). Accordingly, I agree with the Administrative Law Judge's conclusion that the Assistant Secretary has the authority to determine the negotiability issues which arose in the context of the instant unfair labor practice proceeding.


July 23, 1976

breaches of the agreement, are not deemed to be violative of the Order. In those circumstances, it has been found that the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. ^{2/} Accordingly, and as the issues in the instant proceeding involve essentially a differing interpretation of the parties' rights and obligations under their negotiated agreement, and as, in my view, the Respondent's conduct did not constitute a clear, unilateral breach of that agreement, I concur in the recommendation of the Administrative Law Judge and shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-7988(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION, LEWIS RESEARCH
CENTER, CLEVELAND, OHIO
A/SLMR No. 678

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 2182, AFL-CIO (Petitioner) seeking to clarify the status of 19 Wage Grade (WG) employees of the U.S. Army Air Mobility Research and Development Laboratory (Army) working at the Activity pursuant to a host-tenant agreement between the Activity and the Army. The Petitioner maintained that the 19 WG employees accreted to its current exclusively recognized unit, but alternatively indicated that it would represent a unit of all Army WG employees at the Activity. The Army, on the other hand, contended that its WG employees at the Activity should not be included in the existing unit because the Activity and the Army constitute separate employing entities having different personnel policies and regulations. The Activity questioned the appropriateness of either a combined unit or separate units.

The Assistant Secretary found insufficient evidence to establish that the Army employees at the Activity constitute an accretion to the existing unit represented exclusively by the Petitioner. In this regard, he noted that the Army employees at the Activity enjoy separate overall supervision and separate personnel policies and practices administered by an Army Civilian Personnel Office, including separate areas of consideration for reduction-in-force and promotion procedures, and separate grievance procedures. With regard to the Petitioner's alternative position, the Assistant Secretary found that such contention raised a question concerning representation which was inappropriately raised in this clarification of unit proceeding.

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

^{2/} See Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624; Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534; and General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION, LEWIS RESEARCH
CENTER, CLEVELAND, OHIO

Activity

and

Case No. 53-8494(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2182, AFL-CIO

Petitioner

and

UNITED STATES ARMY
AIR MOBILITY RESEARCH LABORATORY,
U.S. ARMY AVIATION SYSTEMS COMMAND

Party-in-Interest

DECISION AND ORDER

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

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner filed a petition for clarification of its exclusively recognized unit which consists of all Wage Grade (WG) and Wage-Leader personnel of the Activity, excluding all management officials, supervisors, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. ^{1/} Specifically, the Petitioner seeks to clarify the status of 19 WG employees of the United States Army Air Mobility Research Laboratory (Army) working at the Activity pursuant to a host-tenant agreement between the Army and the Activity. In this regard, the Petitioner asserts that the 19 Army WG employees have accreted to its current exclusively recognized unit. In the alternative, it states that it is willing to represent a unit of all Army WG employees at the Activity separately. The Army, on the other hand, takes the position that its WG employees at the facility involved herein should

^{1/} The Petitioner was first granted recognition for this unit in 1964 and there has been a negotiated agreement covering such unit since April 21, 1965.

not be included in the existing unit because the Activity and the Army constitute separate employing entities having different personnel policies and regulations. ^{2/} The Activity questions the appropriateness of either a combined unit or separate units.

Both the Army and the Activity are engaged in planning, managing, and executing programs in the research and development of aeronautical technology. The Army is a part of the U.S. Army Aviation Systems Command (AVSCOM). Under the command of a Major General, the AVSCOM is subdivided organizationally into the Development and Readiness Command and the Materiel Acquisition Command, each of which is headed by a Deputy Commanding General. One of several subordinate Commands that reports to the Development and Readiness Command, the Army is headquartered at Moffett Field, California, and is composed of four directorates as well as the Policy Plans and Program Office, the Advanced Systems Research Office, and the Systems Research Integration Office. The four directorates are: the Lewis Directorate, Lewis Research Center, Cleveland, Ohio; the Langley Directorate, Langley Research Center, Hampton, Virginia; the Ames Directorate, Ames Research Center, Moffett Field, California; and the Eustis Directorate, Fort Eustis, Virginia. The Lewis, Langley, and Ames Directorates are located in National Aeronautics and Space Administration research centers and take the name of the particular research center in which they are located. Each Directorate is composed of three sections: the Army Aeronautical Research Group, the Technical Support Group and the Joint Aeronautical Research Group. In the Lewis Directorate involved herein the Army has 55 civilian employees of whom 19 are WG employees with the remainder in General Schedule classifications.

The record reveals that by virtue of a host-tenant agreement executed in January 1970, the Army and the Activity are engaged in common research and development in areas of mutual interest involving aeronautical technology. The agreement provides that the Army may, among other things, appoint a mutually acceptable director to administer and direct the Army aspect of the program and operate and maintain Activity facilities which are made available. The Army is required, however, to adhere to the Activity's work regulations and procedures. All Army employees work side-by-side with Activity employees, have similar job classifications, descriptions and functions, receive the same training and must meet the same qualifications as Activity employees. Both Army and Activity employees are under the supervision of Activity supervisors who approve leave, prepare performance evaluations, initiate disciplinary actions, adjust complaints, cite outstanding individuals for awards and assign overtime. However, in this latter regard, the record shows that the Army provides each supervisor with a guide of allowable overtime for Army employees.

The record reveals further that the Army Civilian Personnel Office in St. Louis establishes all personnel policies and practices for Army employees at the Activity and that all Army employees are hired and paid by the Army. Any problems concerning applicable Army personnel

^{2/} The Army appeared at the hearing as an interested party.

policies or practices are referred to the Army Director at the Activity. In addition, the Army and the Activity have separate grievance procedures and separate areas of consideration for reduction-in-force and promotion procedures. There is no evidence of any instances of transfer or interchange involving employees of the Army and the Activity.

Based on the foregoing, I find insufficient evidence to establish that the Army employees at the Activity constitute an accretion to the existing unit represented exclusively by the Petitioner. Thus, as noted above, the Army employees at the Activity enjoy separate overall supervision and separate personnel policies and practices administered by an Army Civilian Personnel Office, including separate areas of consideration for reduction-in-force and promotion procedures, and separate grievance procedures. Under these circumstances, I find that the Army employees have not been effectively merged into the existing exclusively recognized bargaining unit, and that their inclusion in the existing unit would not promote effective dealings or efficiency of agency operations. 3/

With regard to the Petitioner's alternative position that it would represent a separate unit of all Army WG employees at the Activity, as such an alternative, in effect, raises a question concerning representation, I find that it is inappropriately raised in this clarification of unit proceeding. 4/ Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 53-8494(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

3/ Cf. Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558, FLRC No. 75A-122.

4/ Cf. Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

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

DEPARTMENT OF THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 679

This case arose as a result of an unfair labor practice complaint filed by Local 476, National Federation of Federal Employees, (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it changed competitive areas for reduction-in-force (RIF) purposes without first meeting and conferring with the Complainant, the exclusive representative of two units of employees in the affected Headquarters and Installation Support Activity (HISA) competitive area.

The Administrative Law Judge found that the decision to alter the competitive areas and, in particular, the HISA competitive area was reserved to the Respondent under Section 11(b) and 12(b) of the Order. Nevertheless, the Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to afford the Complainant an opportunity to meet and confer regarding the impact of the Respondent's decision to alter the HISA competitive area.

The Assistant Secretary did not adopt the Administrative Law Judge's finding that the decision to alter the HISA competitive area was reserved to the Respondent under Section 11(b) and 12(b) of the Order. While the Assistant Secretary noted that the decision to effectuate a RIF action is a matter upon which there is no obligation under the Order to meet and confer, such reservation of decision making and action authority does not bar negotiations, to the extent consonant with law and regulations, concerning the procedures involved and the impact of the decision on the employees adversely affected. In this connection, the Assistant Secretary found that the establishment of competitive areas for the purpose of a RIF is itself a procedure utilized in the effectuation of a RIF decision.

Accordingly, the Assistant Secretary found that the Respondent was obligated to afford the Complainant the opportunity to meet and confer, to the extent consonant with law regulations, concerning the decision to alter the HISA competitive area and its failure to do so was violative of Section 19(a)(1) and (6) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-3666(CA)

LOCAL 476, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On January 30, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

The complaint herein alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it changed competitive

areas for reduction-in-force (RIF) purposes without first "consulting"^{1/} with the Complainant, the exclusive representative of certain employees assigned to the affected competitive area.

The Complainant is the exclusive representative of two units of employees in the Headquarters and Installation Support Activity (HISA) of the Respondent Activity. The HISA competitive area— also denoted as Competitive Area No. 4 — was altered when the Respondent unilaterally removed an operational element and placed it in a separate competitive area.

I do not adopt the Administrative Law Judge's finding herein that the decision to alter the HISA competitive area was reserved to the Respondent under Sections 11(b) and 12(b) of the Order. Thus, it has been held previously that while the decision to effectuate a RIF action is a matter upon which there is no obligation under the Order to meet and confer, such reservation of decision making and action authority does not bar negotiations, to the extent consonant with law and regulations, concerning the procedures involved and the impact of the RIF decision on the employees adversely affected by such decision.^{2/} In my view, the establishment of competitive areas for the purpose of a RIF is itself a procedure utilized in the effectuation of the RIF decision.^{3/} Accordingly, I find that the Respondent was obligated to afford the Complainant, the exclusive representative of certain employees in the

^{1/} In its 1975 Report and Recommendations the Federal Labor Relations Council recognized that confusion had developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate". In this regard, the Council stated:

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."

Under the circumstances of the instant case, and noting the lack of record evidence showing a clear and unmistakable waiver of the obligation to negotiate, I find that the term "consulting" in the instant complaint was used as a synonym for "negotiating." Likewise, the Administrative Law Judge's use of the term "consult" will be construed herein to mean either "negotiate" or "meet and confer."

^{2/} United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289.

^{3/} Cf. Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401.

HISA competitive area, the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the decision to alter the HISA competitive area and its failure to do so was violative of Section 19(a)(1) and (6) of the Order.

As indicated by the Administrative Law Judge, the remedy herein should be consistent with the scope of the violation found. Therefore, in view of the finding of violation herein, I find that a status quo ante remedy is necessary in order to provide the Complainant with the opportunity to negotiate with the Respondent on any proposed changes in the HISA competitive area.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

(a) Changing the composition of the HISA competitive area — also denoted as Competitive Area No. 4 — without notifying Local 476, National Federation of Federal Employees, the exclusive representative of two units of employees in the HISA competitive area, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

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

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

(a) Rescind its command letter of June 7, 1974, modifying the competitive areas for RIF purposes at Fort Monmouth, New Jersey, insofar as the HISA competitive area is affected.

(b) Notify Local 476, National Federation of Federal Employees, of any intended changes in the composition of the HISA competitive area and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such changes.

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

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the composition of the HISA competitive area — also denoted as Competitive Area No. 4 — without notifying Local 476, National Federation of Federal Employees, the exclusive representative of two units of employees in the HISA competitive area, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

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

WE WILL rescind the command letter of June 7, 1974, modifying the competitive areas for reduction-in-force purposes at Fort Monmouth, New Jersey, insofar as the HISA competitive area is affected.

WE WILL notify Local 476, National Federation of Federal Employees, of any intended changes in the composition of the HISA competitive area and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such changes.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



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In the Matter of :

Department of the Army, :
U.S. Army Electronics Command :
Ft. Monmouth, New Jersey :

Respondent :

and :

Local 476, National Federation :
of Federal Employees :

Complainant :

.....

Captain James Cheslock, Esq. :
Ft. Monmouth, New Jersey :
For the Respondent :

Michael Sussman, 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 July 24, 1974, alleging that the Department of the Army, U.S. Army Electronics Command, Ft. Monmouth, New Jersey (hereinafter called the Respondent Activity) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Assistant Regional Director for the New York Region issued a Notice of Hearing on Complaint on October 9, 1974. The gravamen of the complaint was that the Respondent Activity made changes in competitive areas for operational elements under its command on June 7, 1974, without first consulting and conferring with Local 476, National Federation of Federal Employees (hereinafter called the Complainant Union) as the exclusive representative of certain units of employees assigned to the affected competitive area.

A hearing was held on the issues presented by this case on December 3, 1974, at Ft. Monmouth, New Jersey. All parties were represented by counsel and afforded full

opportunity to present relevant evidence and testimony and to examine and cross examine witnesses. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following:

Findings of Fact

A. Background Facts

The U.S. Army Electronics Command (Respondent herein) at Ft. Monmouth, New Jersey, is a subordinate command of the U.S. Army Materiel Command (AMC). This latter Command is a major command of the Department of the Army, and is headquartered in Washington, D.C. Structurally the Respondent Activity consist of a number of organizational units; each of which constitutes a competitive area 1/ for its civilian employees. The organizational unit involved in this case is the Headquarters and Installation Support Activity (HISA) of the Respondent Activity. HISA was demoninated in the Respondent's table of organization as Competitive Area No. 4.

Prior to June 7, 1974, there were thirteen separate subdivisions or units in the HISA competitive area. 2/ The Complainant Union was the exclusive representative of the employees in two of the subdivisions in the HISA competitive area, and there was a collective bargaining agreement in effect for each of these units with the Respondent Activity. The units involved were the Guard Force employees of the Internal Security Division and the employees of the Pictorial and Audio-Visual Branch of the Administrative Services Division. Employees in the Stations Supply and Stock Control Division, Equipment Management Division, Facilities Engineer Division, and Communications Electronics Division were represented by other unions. 3/

1/ Competitive areas take on special significance when a reduction-in-force (RIF) occurs in a given organization. When such a situtation arises, the civilian employees may compete for other jobs in their competitive area based on seniority job performance rating, veterans preference, and specialized skills.

2/ Respondent's Exhibit No. 1.

3/ Principally, the employees in these Divisions were represented by American Federation of Government Employees with the exception of a unit of employees in the Facilities Engineer Division, who were represented by the International Association of Firefighters.

B. The Alleged Unlawful Conduct

During the latter part of July and the first part of August 1972, AMC entered into an agreement with the U.S. Army Strategic Communications Command (STRATCOM) whereby AMC would provide, upon request, civilian personnel services to STRATCOM for the latter's activities at the base level. 4/ STRATCOM is also a major command of the Department of the Army, and is headquartered in Ft. Huachuca, Arizona. The agreement was to become effective September 1, 1972, and contained the following provision:

Employees of the Service Activity [STRATCOM] will be in a separate competitive area from employees of the servicing activity [AMC] unless a variation is justified and approved in advance by HQ, USASTRATCOM and HQ, USAMC and the variation is specified in individual supplements to this agreement.

On August 8, 1973, the Commanding General of the Respondent Activity entered into a supplement to the Master Civilian Personnel Servicing Agreement with STRATCOM at Ft. Monmouth to provide civilian personnel service to the activities there. This supplemental agreement contained the following provision relating to reduction-in-force:

For Reduction-in-Force purposes, Serviced Activity Employees located at Ft. Monmouth, New Jersey and Philadelphia, Pennsylvania will be considered under the same competitive area as the Headquarters and Installation Support Activity (ECOM) through 24 March 1974. Effective 25 March 1974, Serviced Activity employees will be considered under a separate competitive area, to be established, apart from other activities serviced by the Servicing Activity.

On June 7, 1974, the Commanding General of the Respondent Activity issued a command letter modifying the competitive areas for reduction-in-force purposes at the installation. This modification was brought about by a consolidation of the various elements of the Respondent Activity, the elimination of the Philadelphia office competitive areas, and organization designation changes which had occurred subsequent to the establishment of the existing competitive areas. The change

4/ Joint Exhibit No. 1, Master Civilian Personnel Servicing Agreement.

in contention here was the removal from Competitive Area No. 4 (HISA) of the Communications Command Agency (the STRATCOM activity at Ft. Monmouth). This element was removed from the HISA competitive area and placed in a separate competitive area designated Competitive Area No. 11.

There was no consultation with any of the labor organizations representing the employees in the various organizational units in Competitive Area No. 4. On June 17, 1974, the Civilian Personnel Officer directed a copy of the command letter to Herbert Cahn, President of the Complainant Union. Cahn forwarded a written protest to the Commanding General stating that the Respondent Activity had made a unilateral change in the competitive area. He further protested the failure to communicate with the union officials before the issuance of the change, and asked that the command letter of June 7, 1974, be rescinded until the union was accorded "full consultation rights". 5/ A meeting between Cahn and representatives of the Civilian Personnel Office was held on July 9, 1974. At that time Cahn was informed of the basis for the modification of the HISA competitive area and he opposed the action. Cahn had consistently made known to management over a period of years his opposition to increasing the number of competitive areas at the Respondent Activity. In his view, the fragmentation of existing competitive areas into more competitive areas lessened the opportunity of the members of his union, affected thereby, to successfully compete for available positions in the event of reductions-in-force. 6/ Cahn had long advocated the establishment of a single Competitive area for the entire installation.

5/ Complainant's Exhibit No. 1.

6/ It should be noted at this point, that the STRATCOM activities which were removed from Competitive Area No. 4 and made a separate competitive area involved unit employees who were not represented by the Complainant Union. These employees were represented by AFGE. The employees represented by the Complainant Union remained in the HISA competitive area.

Contention of the Parties

The Complainant Union contends that the removal of any element from the competitive area in which it represents units of employees, without consulting and conferring in advance with the Union on the impact of such a change, is a unilateral modification in violation of the bargaining requirement of the Executive Order, and disparages the Union in the eyes of the employees it represents. The Union further contends that while the job skills for the organizations removed from the competitive area differed from the job skills of the employees it represented in the guard and audio-visual units, the employees it represented should have been able to compete for the STRATCOM jobs in the event of a reduction-in-force. 7/

The Union also contends that the collective bargaining agreements for the guard and pictorial and audio-visual units contained provisions which specifically required the Respondents Activity to consult and confer with the Union prior to modifying the competitive areas in any manner. In support of this contention the Complainant Union points to Article 4 of the collective bargaining agreement between the Pictorial and Audio-Visual Branch and the Respondent Activity. Section B of that agreement provides:

"Unit employees are in the HISA competitive area. The Unit Chief will advise the Union, in writing, of any changes in the HISA competitive area affecting unit employees."

Similarly, Article 6, Section 3 of the collective bargaining agreement for the guard unit provides as follows:

"All employees in the unit will be assigned to the competitive area with all other employees at the Headquarters and Installation support activity (Ft. Monmouth)."

It is contended that the failure of the Respondent Activity to consult with Union representatives prior to modifying the competitive area violated the terms of the collective

7/ The civilian employees in the Communications Command Agency (STRATCOM) operate the telephone system for the Respondent Activity. They maintain and install telephones and operate switchboards and the long lines branch which connects the Respondent Activity to other parts of the Army. The occupations involved were primarily telephone installers, telephone repairmen, central office equipment men, and test desk operators. There were also clerical support positions involved as well as administrative type personnel.

bargaining agreement; which the Union contends, could not be abrogated by the personnel servicing agreement between AMC and STRATCOM.

The Respondent Activity asserts there was no real, substantial or immediate impact on the employees represented by the Union in the HISA competitive area. Thus, the Respondent was under no obligation to consult with the Union prior to modifying the competitive area. The Respondent Activity further asserts its action in this regard did not breach the provisions of the collective bargaining agreements. Respondent argues that the units represented by the Complainant Union were not transferred out of the HISA competitive area, and that the provision in the guard unit collective bargaining agreement was solely to assure that the unit remain in the HISA competitive area. Further, that the notification requirement in the pictorial and audio-visual unit agreement did not specify that the Union had to be notified before a change occurred. Moreover, that the language related only to changes involving unit personnel. Since this had not occurred, the Union could not be heard to complain about the removal of an element, which it did not represent, from the competitive area.

Concluding Findings

There is no serious contention here over the facts but rather as to the legal conclusions to be drawn from them. In my judgment, the record does support a finding of a violation of the Respondent Activity's bargaining obligation under the Executive Order.

The HISA competitive area was altered when the Communications Command Agency was removed and placed in a separate competitive area. It is conceded by all that none of the unions representing units of employees in the HISA competitive area were notified of this change in advance, nor were they provided an opportunity, prior to the change, to discuss the impact of the modification on the employees remaining in that competitive area. 8/

8/ The issues here, however, relate solely to the failure to give prior notification and to consult and confer with the Complainant Union, as exclusive representative of employees in two of the units remaining in the HISA competitive area.

It is evident that the newly established competitive area did not consist of units represented by the Complainant Union. Equally clear is the fact that the units which were represented by the Complainant Union remained in the HISA competitive area, as required by the collective bargaining agreements. These facts lend some support to the argument of the Respondent Activity that any possible adverse impact on the units represented by the Union is remote and speculative. Especially since no reduction-in-force was contemplated or had occurred since the change. While this argument is plausible on its face, it overlooks the basic concept for which competitive areas were established.

Contractually, the parties had provisions in their collective bargaining agreements relating to competitive areas to enable them to deal with the possibility of a reduction in civilian personnel in the future. The competitive areas were established to delineate the boundaries within which there could be competition for jobs in the event that the work force had to be reduced, for whatever reason. On the basis of this reasoning, the logic of the argument of the Union becomes persuasive. That is, any reduction of the number of job slots which would be available for competition, should the work force have to be reduced, is a change in the working conditions of the unit employees in that it diminishes the area in which they would be able to compete.

There is no evidence in this record of the comparative skills of the job positions of the organization removed from the HISA competitive area and the skills of the employees in the two units represented by the Complainant Union. There is evidence, however, that some of the jobs consisted of clerical positions and administrative positions. It is not inconceivable, therefore, that in the event of a reduction-in-force some of the employees in the units represented by the Complainant Union would have been eligible to compete for positions in the Communications Command Agency; provided, of course, that it remained in their competitive area. By removing that element, the Respondent Activity removed all possibility of such competition from the unit employees represented by the Complainant Union. 9/

9/ There is no question but that the Respondent Activity had every right to make a decision to alter the competitive area. Clearly this was a decision reserved to management under Section 11(b) and 12(b) of the Executive Order. However, the case law which has developed in this area requires consulting and conferring with exclusive (continued on next page)

Thus, it is clear that the Complainant Union had a legitimate interest, on behalf of its members in the two affected units, regarding the resultant impact of the removal of the Communications Command Agency from the HISA competitive area. By failing to afford the Complainant Union with an opportunity to consult and confer on the impact of the reduction of the number of job positions available for competition in these circumstances, the Respondent Activity violated its obligation set forth in Section 19(a)(6) of the Executive Order. U.S. Department of the Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341; Federal Railroad Administration, supra.

In addition, the failure of the Respondent Activity to give prior notice and meet and confer with the Complainant Union regarding the impact of its decision to alter the HISA competitive area must be considered as having a restraining influence upon the employees in the two units, and as having concomitant adverse effect upon their rights assured by the Executive Order. Federal Railroad Administration, supra. In these circumstances, I find that the Respondent Activity's conduct also violates Section 19(a)(1) of the Executive Order.

Having found that the Respondent's conduct, described above, violated Section 19(a)(1) and (6) of the Executive Order, the remedy must be consistent with the scope of the violation found. Since the Respondent Activity was under no obligation to bargain with the Union regarding the decision to take the Communications Command Agency out of the HISA competitive area, I do not find that any useful purpose would be served in recommending that the action be rescinded. Instead, the only adequate remedy, in my judgement, would be to require the Respondent Activity to cease and desist from engaging in such conduct in the future.

9/ Continued.

representative about (1) the procedures to be used in implementing such a decision, and (2) the impact of the decision on the adversely affected unit employees. Great Lake Naval Hospital A/SLMR No. 281; Federal Aviation Administration, National Aviation Facilities Experimental Center, A/SLMR No. 329; Federal Railroad Administration, A/SLMR No. 418.

Recommendations

Having found that the Respondent Activity is engaged in conduct which violates Section 19(a)(1) and 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.

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 the Department of the Army, U.S. Army Electronics Command, Ft. Monmouth, New Jersey, shall:

1. Cease and desist from:

(a) changing the composition of the HISA competitive area (Competitive Area No. 4) by removing elements from that competitive area and establishing them as a separate competitive area without notifying local 476, National Federation of Federal Employees, as the exclusive representative of two units of employees in the HISA competitive area, or any other exclusive representative of units of employees in the HISA competitive area, and affording such representative or representatives the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the decision to modify the competitive areas, and on the impact the modification of the HISA competitive area will have on the employees adversely affected by such action.


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

(a) Notify Local 476, National Federation of Federal Employees, or any other exclusive representative, of any intended modification of the HISA competitive area and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a decision, and on the impact the change in the

competitive area will have on the units of employees remaining in the HISA competitive area who are adversely affected by such action.

(b) Post at its facility at Ft. Monmouth, New Jersey copies of the attached notice marked "Appendix" on forms furnished by the Assistant Secretary of Labor for Labor Management Relations. Upon receipt of such forms, they shall be signed by the Officer in charge of the Respondent Activity and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous 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.

(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: 30 JAN 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 change the composition of the HISA competitive area (Competitive Area No. 4) by removing elements from that competitive area without first notifying Local 476, National Federation of Federal employees, or any other exclusive representative, and affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, upon the procedures management will observe, and as to the impact such removal will have on units of employees remaining in the HISA competitive area who are adversely affected by such action.

WE WILL notify Local 476, National Federation of Federal Employees, or any other exclusive representative, of any intended change in the composition of the HISA competitive area, and upon request, meet and confer in good faith, to the extent consonant with law and regulations, upon the procedures to be observed and as to the impact that such intended change will have upon the units of employees remaining in the HISA competitive area who will be adversely effected by such action.

July 26, 1976

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

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

(Agency or Activity)

DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
WASHINGTON, D. C.
A/SLMR No. 680

Dated _____ by _____
(Signature)

This notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor Management Services, Labor Management Services Administration, United States Department of Labor, whose address is Room 1751 - 26 Federal Plaza, New York, New York 10007.

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to direct correspondence and communications in the Respondent's Midwest Region to the Complainant's Chapter President as requested and, instead, communicating with the Complainant's Chief Representative. The Respondent contended that the negotiated agreement designated the Chief Representative as the point of management contact for all labor-management matters and moved to dismiss the complaint on the basis that the matter was cognizable under the negotiated grievance procedure and, therefore, the Assistant Secretary was without jurisdiction. The Complainant contended that the Chief Representative was to be contacted only with regard to matters concerning grievances, adverse actions, and disciplinary actions. It further contended that it had a guaranteed right under the Order to designate an individual as a point of contact for all other labor-management matters.

The Associate Chief Administrative Law Judge rejected the Respondent's jurisdictional argument noting that it is well settled that the Assistant Secretary will not relinquish jurisdiction when the question presented is whether rights assured by the Order have been waived. Further, he concluded that, absent a clear and unmistakable waiver in the parties' negotiated agreement, the Complainant had a right, granted by the Order, to designate the individual it desired to act as its representative or agent in each of the Respondent's Regions. In this respect, he found that the Respondent had failed to show a clear and unmistakable waiver under the negotiated agreement of the Complainant's right to name its own representative in the Respondent's regions and, at best, had shown only an ambiguity in the disputed negotiated agreement provisions.

The Assistant Secretary adopted the Associate Chief Administrative Law Judge's conclusion that the Respondent's conduct herein is violative of Section 19(a)(1) and (6) of the Order. In this regard, he noted that the un rebutted record testimony of the Complainant's National Vice President, who participated in negotiating the agreement involved herein, indicated that the disputed negotiated provisions were intended to limit the responsibilities of the Chief Representative to matters involving grievances and other matters where remedial relief could be sought under the negotiated agreement. Hence, he concluded that the negotiated agreement

did not contain a clear and unmistakable waiver of the Complainant's right to designate its own representative in other circumstances. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

A/SLMR No. 680

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS,
WASHINGTON, D. C.

Respondent

and

Case No. 22-6298(CA)

NATIONAL TREASURY EMPLOYEES
UNION

Complainant

DECISION AND ORDER

On January 15, 1976, Associate Chief Administrative Law Judge Francis E. Dowd issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take affirmative action as set forth in the attached Associate Chief Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions with respect to the Associate Chief Administrative Law Judge's Report and Recommendation and the Complainant filed an answering brief with respect to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Associate Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Associate Chief Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Respondent's exceptions and the Complainant's answering brief to the exceptions, I hereby adopt the Associate Chief Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

On November 14, 1974, the Complainant's Chapter President notified the Regional Director of the Respondent's Midwest Region that all correspondence and communications relating to the Union in the Midwest Region

be directed to him. Additionally, it was alleged that "incidents have occurred to bypass and circumvent" his authority. Responding by letter, the Regional Director contended that the Respondent had never attempted to circumvent the authority of the Chapter President but that management had determined that pursuant to Article VI, Section 2 of the parties' negotiated agreement, 1/ the Chief Representative was the person with whom management was obligated to correspond, communicate and consult, and not the Chapter President.

By letter dated December 27, 1974, the Complainant's National President informed the Respondent's Personnel Division Director that each Chapter President was to serve as the "point of contact" for management in each Region except in matters relating to a pending grievance in which case the "Chief Representative" or "additional representative" should be contacted in accordance to Article VI, Section 2 of the negotiated agreement. Thereafter, the Respondent reiterated its original position that only the Chief Representative would serve as the point of contact for labor-management communications.

The Associate Chief Administrative Law Judge denied the Respondent's motion to dismiss the complaint in which the Respondent contended that the issue presented herein is cognizable under the negotiated grievance procedure and that, consequently, the Assistant Secretary does not have jurisdiction in this matter. In this regard, the Associate Chief Administrative Law Judge found, among other things, that it is well settled that the Assistant Secretary will not relinquish jurisdiction when the question presented is whether rights assured by the Order have been waived. 2/ Further, he concluded that, absent a clear and unmistakable waiver in the parties' negotiated agreement, the Complainant had a right, granted by the Order, to designate the individual it desired to act as its representative or agent in each of the Respondent's regions. 3/ In considering whether or not such a waiver was contained in the negotiated

1/ Article VI, Section 2 states, in pertinent part, that,

- A. The Employer and the Union agree that a Chief Representative should be designated for each AWF region. Twenty-seven (27) additional representatives may also be designated as deemed necessary by the Union. However, no more than one (1) Union representative of any kind may be designated as representative for any city where Area Supervisors are assigned.
- B. The representatives will be employed in the organizational segment of the region each represents. The Union will supply the Employer with the names of the representatives which will be posted on appropriate bulletin boards. It will be the duty of the Union to notify the Employer of any change in the roster.

2/ See NASA, Kennedy Space Center, A/SLMR No. 223.

3/ Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson, South Carolina, A/SLMR No. 242 and Internal Revenue Service, Omaha District Office, A/SLMR No. 417.

agreement, the Associate Chief Administrative Law Judge found that when read in conjunction, Article 6, Section 1 and Article 34, Section 2 of such agreement, limit the Complainant's authority to designate representatives only in situations involving grievances, or matters of remedial relief, and do not foreclose the Complainant's right to designate its own representative in others matters. 4/ Based on this interpretation of the negotiated agreement, he concluded that a clear and unmistakable waiver of the Complainant's right to designate its representatives did not exist and, at best, the Respondent had shown only an ambiguity in the disputed negotiated agreement provisions. Hence, he found that the Respondent's refusal to recognize the Complainant's Chapter President as its "point of contact" for labor-management matters, other than those involving grievances or other remedial relief, to be violative of the Order.

I concur in the Associate Chief Administrative Law Judge's conclusion that the Respondent's conduct herein was violative of Section 19(a)(1) and (6) of the Order because there was no clear and unmistakable waiver in the parties' negotiated agreement of the Complainant's right to designate its own representatives under the circumstances involved herein. In this latter regard, the record indicates that during the negotiations of the agreement herein, the Complainant proposed that "Article 6 Representatives" be given administrative time to "confer with respect to any matters for which remedial relief may be sought pursuant to the terms and conditions of the agreement." Thus, in effect, the Complainant sought to limit the duties of the Chief Representative to handling grievances, and other matters for which remedial relief could be sought under the agreement. On the other hand, the agreement provisions proposed by the Respondent, and ultimately adopted by the parties, granted administrative time to the Chief Representative to "administer the terms and conditions" of the agreement. The Respondent argues that, by agreeing to this latter proposal, the Complainant acquiesced in the expansion of the scope of the representative duties of the Chief Representative to include all labor-management matters covered by the agreement. However, the un rebutted record testimony of the Complainant's National Vice President, who participated in the

4/ Article 6, Section 1 of the negotiated agreement provides that "the Employer will not impose any restraint, interference, coercion, or discrimination against any employee in the exercise of his right to designate a union representative for the purpose of representing to the Employer any matter of concern over the interpretation or application of this Agreement."

Article 34, Section 2 of the negotiated agreement provides that "a grievance is a request for personal relief in any matter or concern or dissatisfaction to an employee, a group of employees or the Union, which is subject to the control of the Employer limited to those matters covered by Section 1 of this Article."

negotiations of the agreement involved herein, indicates that the management negotiating team never informed the Complainant's negotiating team that the adopted language proposal was intended to expand the responsibility of the Chief Representative beyond that of handling grievances and other matters for which remedial relief could be sought under the agreement. Instead, the testimony reveals that management informed the Complainant that its proposal was merely a language change which would have the same effect as the Complainant's proposal.

Under these circumstances, while it could reasonably be argued that the Complainant had clearly and unmistakably waived its right under the parties' negotiated agreement to designate a representative other than the Chief Representative as its point of contact for grievances and other matters where remedial relief could be sought under the negotiated agreement, I find, in agreement with the Associate Chief Administrative Law Judge, that a clear and unmistakable waiver of the Complainant's right to designate its own representatives in other circumstances does not exist under the parties' negotiated agreement. 5/ Accordingly, I adopt the Associate Chief Administrative Law Judge's conclusion that the Respondent's conduct herein violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D. C. shall:

1. Cease and desist from:

(a) Refusing to recognize the President of National Treasury Employees Union (NTEU), Chapter 094 as the representative designated by

5/ It has been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not violative of the Order. See General Services Administration, Region 5, Public Building Service, Chicago Office, A/SLMR No. 528; Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534; and Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624. In those circumstances, it has been found that the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. While the instant case concerns differing and arguable interpretations of a negotiated agreement, the basic issue herein involves an alleged contractual waiver of a right guaranteed by the Order and, therefore, may be pursued through the unfair labor practice procedures. See NASA, Kennedy Space Center, cited above.

the NTEU to receive correspondence and communications relating to the NTEU in the Midwest Region on all matters except grievances and other matters for which remedial relief may be sought under the negotiated agreement.


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

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

(a) Post at its facilities throughout the Midwest Region copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL recognize the President of National Treasury Employees Union (NTEU), Chapter 094 as the representative designated by the NTEU to receive correspondence and communications relating to the NTEU in the Midwest Region on all matters except grievances and other matters for which remedial relief may be sought under the negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured them 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 Regional Administrator, 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



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In the Matter of
DEPARTMENT OF TREASURY
BUREAU OF ALCOHOL, TOBACCO AND
FIREARMS Respondent Case No. 22-6298 (CA)
and
NATIONAL TREASURY EMPLOYEES UNION
Complainant
.....

Michael E. Goldman, Esq., Assistant Counsel, and
Joseph R. Colton, Esq., Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W.
Suite 1101
Washington, D. C.
For the Complainant

Carl R. Nolte, Esq., and
John A. Chevrier, Esq.
Office of Chief Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D. C. For the Respondent

Before: FRANCIS E. DOWD
Associate Chief
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding, heard in Washington, D.C. on September 18, 1975, arises under Executive Order 11491 (hereinafter referred to as the Order) pursuant to a notice of hearing dated August 13, 1975 issued by the Acting Assistant Regional Director for Labor-Management Services Administration, Philadelphia Region. The proceeding was initiated by the filing of a complaint by the National Treasury Employees Union (hereafter referred to as the Union, NTEU or Complainant) against the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms (hereafter referred to as the Activity, ATF or

Respondent) on May 8, 1975.

The complaint alleged that the Respondent violated Sections 19(a)(1) and (6) of the Order by circumventing and bypassing the Union; more specifically, by refusing to direct correspondence and communications in the ATF Midwest Region to the Union Chapter President as requested by NTEU in its letters of November 14 and December 27, 1974. At the hearing, both parties were represented by counsel and 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 Complainant and Respondent.

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:

Issues

Essentially, there are three issues that must be resolved in this matter: They are as follows:

1. Does the Assistant Secretary have jurisdiction to hear and decide this case?
2. Does the union have the right to designate representatives of its choice to correspond, communicate and consult with management?
3. Assuming the Union has this right, has it been waived in the collective bargaining agreement existing between the parties?

Findings of Fact

On March 5, 1974, the National Treasury Employees Union and the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, entered into the collective bargaining agreement 1/ that is in dispute in this case. All non-professional General Schedule and Wage grade employees employed in ATF's seven regional offices comprise the unit covered by the agreement. This agreement was in effect at all times relevant to this proceeding.

1/ See Joint Exhibit No. 1.

In a letter dated November 14, 1974, 2/ Mr. Hymen Abrams, President, NTEU Chapter 094, notified Mr. Stephen Higgins, Regional Director, Midwest Region, Bureau of Alcohol, Tobacco and Firearms, that all correspondence and communications relating to the union in the Midwest Region be directed to him. Mr. Abrams further alleged in the letter that "[i]ncidents have occurred to bypass and circumvent" his authority. In a reply letter dated November 14, 1974, 3/ Mr. Higgins informed Mr. Abrams that ATF had never attempted to circumvent the authority of the Chapter President but that management had determined that, pursuant to Article VI, Section 2 of the ATF-NTEU negotiated agreement, the Chief Representative was the person with whom management was obligated to correspond, communicate and consult, and not the Chapter President.

In a letter dated December 27, 1974, 4/ Mr. Vincent L. Connery, National President of NTEU, informed Mr. James Panagis, Director, Personnel Division of ATF, of NTEU's internal procedure for receiving official communications from management. Under this procedure, each Chapter President of NTEU was to serve as the "point of contact" for management in each Region. The only exception to this arrangement was to be in matters relating to a pending grievance in which case the "Chief Representative" or "additional representative" should be contacted pursuant to Article VI, Section 2 of the agreement. Thereafter, by letter to Mr. Connery dated January 14, 1975 5/ Mr. Panagis reaffirmed ATF's position that only the Chief Representative "will serve as the point of contact for management-union communications".

By letter dated January 20, 1975, and pursuant to Section 203.2(a) of the Rules and Regulations of the Office of the Assistant Secretary for Labor-Management Relations, 29 CFR, Part 201 et seq., Mr. Connery issued to ATF a notice of intent to file an unfair labor practice complaint. Mr. Panagis responded by letter dated March 19, 1975, restating ATF's

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- 2/ Attachment 1 to A/S Exhibit.
 - 3/ Attachment 2 to A/S Exhibit.
 - 4/ Attachment 3 to A/S Exhibit.
 - 5/ Attachment 4 to A/S Exhibit.

reliance on Article IV, Section 2(A) of the negotiated agreement. Mr. Panagis further argued that settlement of the controversy should be pursued via the negotiated grievance procedure as set forth in Article 34, Section 1(B) of the Agreement.

Discussion and Analysis

I. Assistant Secretary's Jurisdiction

In its motion to dismiss the complaint which Respondent filed with the Assistant Regional Director for Labor and Management Relations, Respondent maintained that the issue presented herein is cognizable under the negotiated grievance procedure 6/ and that consequently the Assistant Secretary does not have jurisdiction to hear this case.

It is now well settled that the Assistant Secretary will not relinquish jurisdiction when the question presented is whether rights assured by the Order have been given up. In NASA, Kennedy Space Center, A/SLMR No. 223 (1972), the Assistant Secretary stated:

"I have stated previously that where a complaint involves essentially a disagreement over the interpretation of an existing collective-bargaining agreement, the parties should pursue their contractual rather than their unfair labor practice remedies. By this policy statement, however, no withdrawal of jurisdiction was intended in those situations where at issue is the question whether a party to an agreement has given up rights granted under the Order". (Footnote omitted)

Thus, the Assistant Secretary will clearly retain jurisdiction if the issues presented in this case involve rights assured by the Executive Order.

The issue before me is whether Complainant has the right

6/ Article 34, Section 1(B): "The Union agrees to submit virtually all contract related matters to the negotiated grievance procedure for final disposition and to use sparingly unfair labor practice procedures concerning contract related issues which may occur in the day-to-day administration of this Agreement".

to designate the individual it wishes to act as its representative or agent in each ATF Region.

Among the functions of the exclusive representative and its agents will be that of carrying out the rights and obligations of Section 10(e): to "act for and negotiate agreements covering all employees in the unit", and to represent union members "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 union". The Assistant Secretary has held, in Fort Jackson, A/SLMR No. 242 (1973) that the union has the right under the Order to unilaterally choose its representative to fulfill the union's 10(e) obligations, and exercise the unions' 10(e) rights.

Respondent's challenge of this right clearly meets the jurisdictional requirement set forth in NASA, supra: a situation where "at issue is the question whether a party to an agreement has given up rights granted under the Order". Under these circumstances, I conclude that the Complainant's allegations are properly before me and that the Assistant Secretary has jurisdiction over this matter. Respondent's motion to dismiss for lack of jurisdiction is therefore denied.

II. NTEU's Right to Designate It's Representatives to Consult and Communicate with Management

There is considerable legal precedent in the private sector which establishes that a union has a right to choose its own representatives. In Prudential Insurance Company, 124 NLRB 187, the National Labor Relations Board held that the employer had violated his obligation to bargain with the exclusive representative by refusing to deal with the union's designated representative. Over objections that the representative had not been chosen in accordance with the union's constitution, the Board held that an employer may not probe a union's internal arrangements in the selection of its representative.

In Lufkin Telephone Exchange, 191 NLRB 151, 77 LRRM 1488 (1971), the NLRB found a violation of the employer's obligation to bargain with the union when the employer refused to meet with the representative chosen by the union. The Board stated as follows:

"The Board and Courts have repeatedly held that an employer has no voice in the selection by its employees of their collective bargaining representative and that absent exceptional circumstances, an employer's refusal to bargain collectively with the agents duly appointed to represent its employees at the negotiating table constitutes a violation of Section 8(a)(5) and (1) of the Act". (77 LRRM at 1489)

The Assistant Secretary has decided, on at least two occasions, to follow this precedent. As stated above, in Fort Jackson, supra., the Assistant Secretary held that the union has a right to unilaterally designate its representative to carry out Section 10(e) functions. The employer in that case refused to allow the Union President to attend at 10(e) "formal meeting" arguing that the union was adequately represented by a union steward then in attendance. The Assistant Secretary rejected this argument, declaring that

"It is not within the purview of management to decide who fulfills that aspect of Section 10(e) which requires that labor organization(s) shall be given the opportunity to be represented at formal discussions of this nature. The right to choose its representative at such discussions must be left to the discretion of the exclusive bargaining representative and not to the whim of management".

In another case, Internal Revenue Service, Omaha District, A/SLMR No. 417 (1974), the Activity refused to recognize the union's designated representative, who was a retired employee, on the grounds that the collective bargaining agreement between the parties limited this selection to only active employees of the IRS. The Assistant Secretary ruled in favor of the union and held:

"... I find that the Complainant did not clearly and unmistakably waive its right to choose a retired employee as a Chief Representative. And, as noted above, absent such a waiver, the Complainant had the right to select such an individual as its own representative". Omaha, at 4. (emphasis supplied)

Finally, aside from ample case law that protects a union's right, absent a waiver, to choose its representative for dealings with management, such a union right is clearly consistent with the spirit and purpose of the Executive Order. The Order is predicated, as set forth in the Preamble, on the right of employees "to participate in the formulation and implementation of personnel policies and parties affecting the conditions of their employment". Such a right would be hollow indeed if employees could not designate, through their union, someone of their own choosing to represent them.

III. Waiver

Having concluded that Complainant has a right to choose its representatives, the question whether Complainant has waived that right must now be considered. It is now firmly established that a waiver of Executive Order rights in a collective bargaining agreement must be clear and unambiguous. In NASA, supra, the Assistant Secretary formulated the following criteria for an effective waiver:

"In my view, in order to establish a waiver of a right granted under the Executive Order, such waiver must be clear and unmistakable. Thus, a waiver will not be found merely from the fact that an agreement omits specific reference to a right granted by the Executive Order, or that a labor organization has failed in negotiations to obtain protection with respect to certain of its rights granted by the Order". NASA, at 4 (emphasis supplied)

It is necessary to look closely at the contract language, and the bargaining history between the parties, to determine whether such a clear and unmistakable waiver has been made.

Respondent argues that the change in the language between NTEU's original proposal for Article 6 and Article 6 as finally adopted signifies an adequate waiver. Complainant originally proposed that the Representatives in Article 6 were to be given official time to confer with an employee "with respect to any matters for which remedial relief may be sought pursuant to the terms and conditions of this agreement ..." 7/. The language ultimately adopted, however,

7/ Respondent Exhibit 1.

provided leave for duties much broader in scope than merely tending to remedial relief matters. The final agreement granted official time "to administer the terms and conditions of this Agreement". Respondent argues that NTEU has thereby agreed to expand the authority and responsibility of Article 6 Representatives to expressly include "serving as management's point of contact" (Attachment 7 to A/S Exhibit) and to impliedly include the handling of all matters arising in each Region.

In order to determine the scope of the duties of Article 6 Representatives, Section 3(A) must not be read in isolation but rather in conjunction with other sections of Article 6 and with other Articles of the Agreement. Article 6, Section 1 sheds light on the scope of Article 6, Section 3(A). Section 1 limits the duty of Article 6 Representatives to "representing to the Employer any matter of concern over the interpretation or application of this Agreement (emphasis supplied)". The same language, i.e. "any matter of concern", which limits the authority of Section 6 Representatives, is also used in Article 34, Section 2 to define a grievance. Article 6, therefore, when read in conjunction with Article 34, Section 2, limits NTEU's authority to designate representatives only in grievances, or matters of remedial relief, and does not foreclose the Union's right to designate its own representative in other matters. 8/

I conclude that Respondent has manifestly failed to show the "clear and unmistakable waiver" required by Omaha, supra to overcome Complainant's right to name its own representatives to the ATF Regions. As noted by the Union in its brief, Respondent has, at best, shown only an ambiguity in the language of Article 6. It is a familiar rule of contract construction that any ambiguity must be resolved against the

8/ In a letter dated November 14, 1974, Mr. Vincent L. Connery, National President, NTEU, informed management that the Chapter President should be contacted for all matters except grievances (Attachments 5 to A/S Exhibit). In addition to grievances, Mr. J. Russell Borden, National Executive Vice President of NTEU also excepted adverse and disciplinary actions. I conclude that all of these three exceptions fall within the ambit of "remedial relief" and do not confer upon the Article 6 Representatives the responsibility to represent the union in all matters.

party who proposed the language. While I do not believe that reliance on this rule is essential to the disposition of this case, I note that Respondent proposed the disputed language in Article 6, and I adopt Complainant's interpretation.

Conclusions of Law

In finding a violation of Sections 19(a)(1) and (6) of the Executive Order the Assistant Secretary held in Omaha, supra:

"... I view the attempt by the Respondent to dictate the selection of the Complainant's Chief Representative as, in effect, an attempt to interfere improperly in the internal affairs of the Complainant, which, in turn, resulted in an interference with employee rights assured under Section 1(a) of the Order, and as an improper refusal to meet and confer with appropriate representatives of Complainant, which is the exclusive bargaining representative of Respondent's employees". Omaha, at 4.

Similarly, in this case, by refusing to recognize NTEU's chosen representative in the Midwest ATF Region, Respondent has interfered in NTEU's internal affairs. This in turn constitutes an interference with employee rights assured under the Order and improper refusal to meet and confer with NTEU. Thus, I find that Respondent has violated Sections 19(a)(1) and (6) of the Order.

Recommendations

In view of the findings and conclusions above, I make the following recommendations to the Assistant Secretary:

That Respondent be found to have engaged in conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, and accordingly, that Respondent be ordered to cease and desist therefrom and take specified affirmative action as set forth in the following order which is designed to effectuate the policies of Executive Order 11491.

Recommended Order

Pursuant to 6(b) of Executive Order 11491, as amended,

and Section 203.25(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. shall:

1. Cease and desist from


(a) Refusing to recognize the President of NTEU Chapter 094 as the representative designated by NTEU to receive correspondence and communications relating to the union in the Midwest Region on all matters except grievances.

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

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order.

(a) Post at its facilities throughout the Midwest Region copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director, ATF Midwest Region, 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 Postmaster 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 ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


FRANCIS E. DOWD
Associate Chief
Administrative Law Judge

Dated: January 15, 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 SHALL recognize the President of NTEU Chapter 094 as the representative designated by NTEU to receive correspondence and communications relating to the union in the Midwest Region on all matters except grievances.

WE SHALL NOT in any like or related manner interfere with, restrain, or coerce employees of the National Treasury Employees Union Chapter 094 in the exercise of rights assured them 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.

July 26, 1976

A/SLMR No. 681

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

DEPARTMENT OF THE ARMY,
U.S. ARMY TRANSPORTATION CENTER
AND FORT EUSTIS, VIRGINIA

DEPARTMENT OF THE ARMY,
U.S. ARMY TRANSPORTATION CENTER
AND FORT EUSTIS, VIRGINIA
A/SLMR No. 681

Respondent

and

Case No. 22-5924(CA)

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R4-6, (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by asking an applicant for promotion how much time he spent on Union duties and by failing to promote the applicant because of Union activities.

Finding that the issues raised in the instant unfair labor practice complaint had been raised previously under a negotiated grievance procedure, the Administrative Law Judge concluded that Section 19(d) of the Order precluded the Complainant from raising the issues herein and, accordingly, he recommended that the instant complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary ordered that the instant complaint be dismissed.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-6

Complainant

DECISION AND ORDER


On March 11, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

1/ The Administrative Law Judge determined that the issues in the instant unfair labor practice complaint had been raised previously under a negotiated grievance procedure and, therefore, Section 19(d) of the Order precluded the Complainant from raising the issues herein. Under these circumstances, it was considered unnecessary to pass upon the Administrative Law Judge's findings at footnote 5 of his Recommended Decision and Order with respect to the merits of the instant case.

IT IS HEREBY ORDERED that the complaint in Case No. 22-5924(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE
A/SLMR No. 682

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO (AFGE) alleging that the Respondent improperly refused to provide the AFGE with copies of promotion rosters for the Officer Corps of the Immigration and Naturalization Service (INS) developed under a negotiated Merit Promotion and Reassignment Plan (Plan).

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to supply the AFGE with the promotion rosters in a sanitized form capable of allowing the AFGE to investigate or trace the success of the existing Plan. In this connection, the Administrative Law Judge found that it was incumbent upon the Respondent to sanitize the rosters by deleting the names of employees and substituting in place thereof some numerical or alphabetical symbols. In his judgment, submission of the rosters with the names deleted and with no symbols substituted in place thereof, as originally offered by the Respondent, would not fulfill the obligations imposed by the Order.

The Assistant Secretary concluded that the evidence did not establish that at the time the unfair labor practice charge herein was filed by the AFGE the Respondent had refused to supply the AFGE with the requested information. Thus, he noted that on May 16, 1975, when the AFGE's charge was filed with the Respondent, there was no clear refusal by the latter to provide the subject promotion rosters. Rather, the Chief Negotiator for the INS had merely informed the AFGE that the INS would look into the request as the furnishing of the rosters herein could be violative of the Privacy Act of 1974 and that they probably would not be available under the Freedom of Information Act. He promised to research the request and respond as quickly as possible. In this latter regard, the evidence established that the Respondent took the AFGE's request under advisement and sought legal counsel. In the Assistant Secretary's judgment, such action by the Respondent did not constitute a refusal to supply the requested information, nor did it constitute a failure to meet and confer in good faith. Accordingly, in the absence of an improper refusal to bargain by the Respondent prior to the filing of the pre-complaint charge in this matter, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE

Respondent

and

Case No. 22-6282(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On February 2, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The complaint herein alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, when on May 17, 1975, it refused to provide the American Federation of Government Employees, AFL-CIO (AFGE) with copies of promotion rosters

for the Officer Corps of the Immigration and Naturalization Service (INS) which are relevant and necessary for intelligent collective bargaining on a new promotion plan. 1/

The essential facts of the case, which are not in dispute, are set forth in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary as indicated below.

On May 16, 1975, during negotiations between the Respondent and the AFGE for a merit promotion and reassignment plan, the Chief Negotiator for the AFGE requested copies of promotion rosters for the Officer Corps of the INS which were developed pursuant to the current negotiated Merit Promotion and Reassignment Plan which had been in effect since October 1970. In response to this request, the record discloses that the Chief Negotiator for the INS informed the AFGE that the INS would look into the aforementioned request as the furnishing of the promotion rosters could be violative of the Privacy Act of 1974 (Privacy Act) and they probably would not be available under the Freedom of Information Act (FOIA). However, he promised to research the demand and respond as quickly as possible. Immediately thereafter, the AFGE's Chief Negotiator served the Respondent with the pre-complaint charge in this matter. The record shows that the INS' Chief Negotiator took the AFGE's request under advisement and that, subsequent to the negotiations on May 16, 1975, sought legal counsel as to the applicability of the Privacy Act and the FOIA with regard to providing the AFGE copies of the rosters.


Based upon the subsequent advice of counsel regarding the Privacy Act, the FOIA and Department of Justice Order 1335.1A, the Respondent, on June 18, 1975, offered to give the AFGE copies of the promotion rosters on the condition that the names of individual employees be deleted. The AFGE's Chief Negotiator rejected the Respondent's offer. Shortly thereafter, on June 20, 1975, the INS' Chief Negotiator spoke to a staff counsel for the AFGE concerning the rosters and the latter suggested that the AFGE needed a means to trace individual employees and their promotions over a period of time, though not necessarily by name and, as an alternative, a code could replace employee names on any promotion rosters offered. The evidence shows that the INS' Chief Negotiator responded to the aforementioned suggestion by noting that such a request would take several months to effectuate and require the services of several employees to code several thousand names. No further word was received from the AFGE's staff counsel until the AFGE filed its unfair labor practice complaint in the instant case on July 21, 1975.

1/ The AFGE's pre-complaint charge was dated May 22, 1975. However, the record discloses that the charge was, in fact, delivered to the Respondent at the May 16, 1975 meeting involved herein, approximately 20 minutes after the initial demand for the subject rosters was made by the AFGE.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6282(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to supply the AFGE with the promotion rosters in a sanitized form capable of allowing the AFGE to investigate or trace the success of the existing Merit Promotion and Reassignment Plan. In this regard, he found that it was incumbent upon the Respondent to sanitize the promotion rosters by deleting the names of individual employees and by substituting in place thereof some numerical or alphabetical symbols. In his judgment, submission of the rosters with the names deleted and with no symbols substituted in place thereof, as originally offered by the Respondent, would not fulfill the obligations imposed by the Order.

Under the particular circumstances of this case, I reject the finding of violation herein by the Administrative Law Judge. In my view, the evidence does not establish that at the time the unfair labor practice charge herein was filed by the AFGE the Respondent had, in fact, refused to supply the AFGE with copies of promotion rosters for the Officer Corps of the INS. Thus, on May 16, 1975, when the AFGE's unfair labor practice charge was filed with the Respondent, there was no clear refusal by the latter to provide copies of the rosters herein. Rather, the Chief Negotiator for the INS merely informed the AFGE that the INS would look into its request noting that the furnishing of the subject rosters could be violative of the Privacy Act and they would probably not be available under the FOIA. In this latter regard, it was noted that the Respondent took the AFGE's request under advisement and sought legal counsel as to the effect of these statutes upon the aforementioned request. In my judgment, such action by the Respondent did not constitute a refusal to supply the requested information herein, nor did it constitute a failure to meet and confer in good faith. 2/ Accordingly, in the absence of an improper refusal to bargain by the Respondent prior to the filing of the pre-complaint charge in this matter, I find that the Respondent did not violate Section 19(a)(1) and (6) of the Order.

Having found that the Respondent did not violate Section 19(a)(1) and (6) of the Order by refusing to supply copies of Officer Corps promotion rosters on or before May 16, 1975, and that the Respondent did not fail to meet and confer in good faith in any other respect, I shall order that the complaint herein be dismissed in its entirety.

2/ While not necessary to my determination herein, it was noted that the record indicates that, subsequent to the filing of the pre-complaint charge, the parties agreed that the requested copies of the promotion rosters were relevant and necessary documents to enable the AFGE to bargain intelligently and that a 20 percent coded sampling of the subject rosters would be appropriate as suggested by the Administrative Law Judge.

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



..... :
 In the Matter of :
 :
 UNITED STATES DEPARTMENT OF JUSTICE :
 IMMIGRATION AND NATURALIZATION SERVICE :
 Respondent :
 and : Case No. 22-6282 (CA)
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, AFL-CIO :
 Complainant :
 :

Maralyn G. Blatch, Esquire
 Staff Counsel
 American Federation of Government Employees
 1325 Massachusetts Avenue, N. W.
 Washington, DC 20005
 For the Complainant

Walter K. Hill
 U. S. Department of Justice
 Immigration and Naturalization Service
 425 I Street, N. W.
 Washington, DC 20001
 For the Respondent

Before: BURTON S. STERNBURG
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER
Statement of the Case

Pursuant to a complaint filed on July 21, 1975, under Executive Order 11491, as amended, by the American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Complainant), against the Department of Justice, Immigration and Naturalization Service, (hereinafter called

the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Acting Assistant Regional Director for the Philadelphia, Pennsylvania Region on October 15, 1975.

The Complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by refusing to provide the Union with certain information i. e. promotion rosters, which is necessary and relevant for intelligent bargaining on a new promotion plan.

A hearing was held in the captioned matter on December 9, 1975, in Washington, D. C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

Findings of Fact

The Union is the recognized collective bargaining representative of a number of the Respondent's employees. The most recent multi-unit collective bargaining agreement between the parties was effective April 29, 1975. In addition to the foregoing collective bargaining contract the Union and the Respondent are also parties to a separately negotiated Merit Promotion and Reassignment Plan dated October 1970.

On or about May 16, 1975, while the parties were involved in negotiations concerning a possible change in the existing Merit and Promotion and Reassignment Plan, the Union requested the Respondent to supply copies of all promotion rosters that were developed under the current Merit and Promotion and Reassignment Plan which had been in effect since October 1970. The Union's request followed a proposal or statement from the Respondent indicating that a change in the appraisal procedure was contemplated. According to the uncontroverted testimony of John W. Mulholland, the chief negotiator for the Union, the information requested, i. e. promotion rosters, was necessary for purposes of determining whether or not the existing appraisal system was working. Without such information, the Union was unable to make a decision concerning any proposed changes

by the Respondent. All the promotion rosters in the Respondent's possession, which were utilized for purposes of filling vacancies by either promotion or reassignment, bore the names of every employee next to the respect appraisals appearing thereon.

Because of the fact that the promotion rosters bore the names of the employees together with their respective basic appraisal and promotional scores, the Respondent, citing the Privacy Act of 1974 and various Regulations of the Department of Justice dealing with confidentiality, refused to make the promotion rosters available to the Union.

According to the Union, a name or some other identifying number or letter is necessary on the promotion rosters so that the Union could trace an employee through four years of experience under the plan and determine whether there is a relationship between the appraisals and job production and/or advancement. In the absence of a name or identifying symbol, it is impossible to trace any particular appraisal through the four year period.

During the hearing before the undersigned Administrative Law Judge, the Union, in response to testimony by Respondent's agents concerning the magnitude of the task and the costs involved in sanitizing the rosters of the 8000 employees included, made it clear that it did not seek the promotion rosters for the entire unit of some 8000 employees. Thus, the Union would be content with a twenty percent sampling, i.e. every fifth name, from the "officer corps" totalling only some four thousand employees. Additionally, the Union requests that any such sampling, which would then consist of some 800 names be verified by a union official or some other union designee. The Respondent, was amenable to supplying the information but refused to make such tabulations or sampling subject to verification by a union representative.

Discussion and Conclusions

Section 10(e) imposes upon a labor organization the responsibility for representing the interests of all employees in the unit. Clearly, such responsibility can not be met if the labor organization is deprived of information solely within an agency's possession, which is necessary to make intelligent and meaningful decisions on conditions and proposals affecting the

employees in the unit. Cf. Department of Defense, State of New Jersey, A/SLMR No. 323; Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411. 1/ The Assistant Secretary, citing the Federal Labor Relations Council, has further held that applicable laws and regulations, including the Federal Personnel Manual, do not specifically preclude disclosure of appraisals such as involved herein as long as the relevant materials have been "sanitized" to protect the anonymity of the employees involved and/or listed. Department of Defense, State of New Jersey, A/SLMR No. 323, FLRC No. 73A-59, A/SLMR No. 539; United States Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California. A/SLMR No. 573.

In the instant case, the parties were involved in discussions and/or negotiations concerning possible changes in the existing Merit Promotion and Reassignment Plan. In order to evaluate whether or not the current plan was working and/or whether a change was in order, the Union obviously needed information of past practice or experience under the existing plan. Without such information it would be impossible for the union to intelligently formulate a position on any proposal from the Respondent

1/ Although the foregoing cited cases dealt with information necessary to process a grievance, I find that the principle set forth therein is equally applicable to information necessary to intelligently discuss contract proposals and modifications. Although not controlling, the National Labor Relations Board, with court approval, has reached a similar conclusion. N.L.R.B. v. Acme Industrial Co., 385 U. S. 432; Timken Roller Bearing Company v. NLRB, 325 F2d 746; J. I. Case Company, 118 N.L.R.B. 520, enfd. 253 F2d 149.

or submit a new proposal of its own. Inasmuch as the promotion rosters developed during the past years under the existing plan were the only documents containing the basic information needed by the Union for purposes of intelligently bargaining with respect to the Merit Promotion and Reassignment Plan, the Union was entitled to such information, albeit in a sanitized form.

The sanitized version of the promotion rosters should be in a form which would allow the Union to trace unnamed individuals through the period of their respective employment during the period when the Merit Promotion and Reassignment Plan was in effect. To this end, I find that it is incumbent upon the Respondent to sanitize the rosters by deleting names and substituting in place thereof some numerical or alphabetical symbol, which would allow the Union to then trace such identifying symbol through the periodically assembled rosters. Submission of the rosters with names deleted and no symbols substituted in place thereof, as originally offered by the Respondent, would not fulfill the obligations imposed by the Executive Order.

Inasmuch as the Respondent has refused to supply the Union with the promotion rosters in a sanitized form capable of allowing the Union to investigate or trace the success of the existing Merit Promotion and Reassignment Plan, I find that by such action, the Respondent has violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended. 2/

2/ In view of the large number of employees and the expense involved in sanitizing the rosters applicable to 8000 employees over a four year period, I find that a twenty percent sampling of the officers corps, as suggested during the hearing by the Union, would provide the Union with adequate information to intelligently assess and bargain over the Merit Promotion Plan. Accordingly, I shall only order the Respondent to supply such twenty percent sampling.

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of Executive Order 11491, as amended, by virtue of its action in refusing to supply the promotion rosters compiled pursuant to the Merit Promotion and Reassignment Plan, I recommend that the Assistant Secretary of Labor for Labor-Management Relations 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 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of Justice, Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Refusing to provide, upon request by the American Federation of Government Employees, AFL-CIO, the promotion rosters compiled pursuant to the Merit Promotion and Reassignment Plan.


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

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended.

(a) Upon request, and after appropriate measures are taken to protect the privacy of the employees involved, permit the American Federation of Government Employees, AFL-CIO, access to a twenty percent sampling of the promotion rosters for the officers corps. Such sampling shall include numerical or alphabetical symbols in place of any employee name deleted.

(b) Post at its regional facilities located throughout the United States, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commissioner, U. S. Department of Justice, Immigration and Naturalization Service and shall be posted and maintained by him or his authorized agents for 60 consecutive days thereafter, in conspicuous places,

including all bulletin boards and other places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.


BURTON S. STERNBURG
Administrative Law Judge

Dated: February 2, 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 refuse to permit the American Federation of Government Employees, AFL-CIO, access to the promotion rosters compiled pursuant to the Merit Promotion and Reassignment Plan.

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

WE WILL, upon request, and after appropriate measure are taken to protect the privacy of the employees involved, permit the American Federation of Government Employees, AFL-CIO, access to a twenty percent sampling of the promotion rosters for the officers corps which were compiled pursuant to the Merit Promotion and Reassignment Program.

(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

APPENDIX CONT'D

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

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

DEPARTMENT OF TRANSPORTATION,
OFFICE OF ADMINISTRATIVE OPERATIONS
A/SLMR No. 683

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3313, (Complainant) asserting that the Respondent violated Section 19(a)(1) of the Order by virtue of statements made by two of the Respondent's supervisors allegedly to the effect that they did not have to deal with the Complainant.

Based upon his credibility resolutions, the Associate Chief Administrative Law Judge concluded that the statements made by the two supervisors did not reflect a refusal to deal with or negotiate with the Complainant. Accordingly, he recommended that the complaint be dismissed.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
OFFICE OF ADMINISTRATIVE OPERATIONS

Respondent

and

Case No. 22-5952(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3313

Complainant

DECISION AND ORDER


On March 30, 1976, Associate Chief Administrative Law Judge Francis E. Dowd issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Associate Chief Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5952(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON GRIEVABILITY
OF THE ASSISTANT SECRETARY

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL AMMUNITION DEPOT,
CRANE, INDIANA
A/SLMR No. 684

This case involved the reconsideration of an Application for Decision on Grievability or Arbitrability filed by Local 1415, American Federation of Government Employees, AFL-CIO, (AFGE). The AFGE contended essentially that a terminated Wage Grade probationary employee could grieve concerning the alleged failure of the Activity to comply with Article XX of the parties' negotiated agreement, "Acceptable Level of Competence", in connection with his termination. The Activity contended the matter was not grievable under the negotiated agreement.

In its Decision on Grievability, in FLRC No. 74A-19, the Federal Labor Relations Council (Council) set aside the Assistant Secretary's prior decision in the case, in which the Assistant Secretary had concluded that the matters in dispute, including the issue of grievability, should be decided under the negotiated grievance procedure. The Council remanded the case to the Assistant Secretary for further investigation of whether the grievance was subject to the negotiated grievance procedure. Thereafter, a hearing was held and in his Recommended Decision on Grievability the Administrative Law Judge recommended that the Assistant Secretary find that the grievance involved in the instant proceeding was not grievable under the parties' negotiated agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and found that the grievance in this case was not on a matter subject to the parties' negotiated grievance procedure.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AMMUNITION DEPOT,
CRANE, INDIANA

Activity

and

Case No. 50-9667(GR),
FLRC No. 74A-19

LOCAL 1415, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Applicant

DECISION ON GRIEVABILITY

On February 7, 1975, the Federal Labor Relations Council issued its Decision on Appeal from the Assistant Secretary's decision in the subject case, 1/ in which it set aside the Assistant Secretary's decision on request for review and remanded the case to him for appropriate action consistent with its decision. Thereafter, a Notice of Hearing was issued by the Acting Assistant Regional Director.

On February 27, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision on Grievability in the above-entitled proceeding, finding that the grievance involved herein was not on a matter subject to the grievance procedure set forth in the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision on Grievability.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision on Grievability and the entire record in the subject case, and noting particularly the absence


1/ FLRC No. 74A-19

of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 50-9667(GR) is not on a matter subject to the parties' negotiated grievance procedure.

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

July 26, 1976

A/SLMR No. 685

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

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
EASTERN REGION
A/SLMR No. 685

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R2-73 (Complainant), alleging that the Respondent violated Section 19(a)(1),(2), and (6) of the Order by: (1) denying promotions to certain union members because they filed grievances under the negotiated grievance procedure or otherwise raised a complaint with management, and (2) failing to meet and confer with the Complainant with respect to plans and proposals affecting working conditions and reassignments of bargaining unit personnel.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. With respect to the first allegation, he concluded that there was insufficient basis in the record to find that the Respondent had discriminated against the particular individuals involved because of their participation in the filing of grievances or complaints. With respect to the second allegation, he recommended it be dismissed for lack of prosecution.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
EASTERN REGION

Respondent

and

Case No. 30-6161(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R2-73

Complainant

DECISION AND ORDER

On March 30, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above entitled proceeding, finding the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-6161(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

July 28, 1976

A/SLMR No. 686

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

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

LOCAL 1841, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

LOCAL 1841, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and

and

Case No. S-E-5

DIRECTOR,
OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT,
U.S. DEPARTMENT OF LABOR
A/SLMR No. 686

DIRECTOR, OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT, U.S. DEPARTMENT
OF LABOR

Complainant

DECISION AND ORDER

This case involved a complaint filed by the Director, Office of Labor-Management Standards Enforcement (LMSE), U.S. Department of Labor, in which it was contended that the Respondent, Local 1841, American Federation of Government Employees, AFL-CIO (AFGE), had violated Section 18(a)(1), 18(c) and 6(d) of Executive Order 11491, as amended, in the conduct of its election for the office of Chief Steward held on April 9, 1974; that such violations had affected the outcome of the election with respect to that office; that the election should, therefore, be declared null and void; and that a new election should be ordered under the supervision of the LMSE.

On March 24, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain violations of the standards of conduct for labor organizations in the conduct of its election for the office of Chief Steward held on April 9, 1974, and recommending that said election be declared null and void with respect to the office of Chief Steward and that a new election for said office be conducted under the supervision of the Director, Office of Labor-Management Standards Enforcement, United States Department of Labor. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge concluded that the AFGE had violated the Order and the Assistant Secretary's Regulations in the conduct of the April 9, 1974, election of its Chief Steward by its President's failure to recognize the provision of the AFGE's Constitution which required that officers be elected by a majority of the members, in good standing, who are present and voting. He found that the AFGE's President improperly invalidated 14 votes that were cast for write-in candidates who she deemed ineligible and erroneously refused to consider them as part of the total votes cast. The Administrative Law Judge further found that the failure to consider the 14 votes in the sum of the total votes cast resulted in the Chief Steward being elected by a plurality and not a majority as required by the AFGE's Constitution.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of any exceptions to the Administrative Law Judge's interpretation of the Respondent's Constitution and By-Laws, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge. 1/

In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary noted particularly that the AFGE had not filed exceptions challenging the Administrative Law Judge's interpretation of the AFGE's Constitution and By-Laws upon which he based his findings. Under these circumstances, the Assistant Secretary ordered that the election for Chief Steward conducted on April 9, 1974, be declared null and void and that a new election be conducted under the supervision of the Director, LMSE, in accordance with Section 204.29 of the Regulations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 204.91(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that:

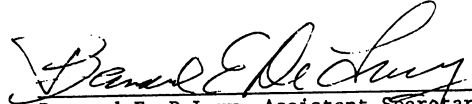
1/ In his Recommended Order, the Administrative Law Judge included a provision which required the Respondent to mail a "Notice to All Members" notifying them of the "cease and desist" provision of the remedial order and indicating the affirmative corrective action to be taken. As, in my view, the mailing of such a notice is inappropriate in the instant proceeding, I will modify the Administrative Law Judge's Recommended Order by deleting Section 3(b) and the "Appendix."

1. The election for the office of Chief Steward conducted by Local 1841, American Federation of Government Employees, AFL-CIO, on April 9, 1974, is null and void.

2. A new election for the office of Chief Steward of Local 1841, American Federation of Government Employees, AFL-CIO, shall be conducted under the supervision of the Director, Office of Labor-Management Standards Enforcement, U.S. Department of Labor, in accordance with Section 204.29 of the Regulations.

3. Pursuant to Section 204.92 of the Regulations, Local 1841, American Federation of Government Employees, AFL-CIO, shall notify the Assistant Secretary in writing within 30 days from the date of this decision as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 28, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
In the Matter of :
: Local 1841, American Federation :
of Government Employees, AFL-CIO : Case No. S-E-5
Respondent :
.....

Mildred L. Wheeler, Esq.
U.S. Department of Labor
Office of the Solicitor
San Francisco, California 94102
For the Government

Richard Taylor
National Representative
American Federation of Government
Employees, AFL-CIO
Sacramento, California

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

A complaint was issued in this proceeding under Section 18 of Executive Order 11491, as amended, by the Director, Office of Labor-Management and Welfare-Pension Reports on November 14, 1974. The complaint alleged that Local 1841, American Federation of Government Employees, AFL-CIO (hereinafter called Respondent Union) violated Sections 18(a)(1), 18(c) and 6(d) of the Executive Order by failing to conduct an internal union election in accordance with the requirements of its constitution and by-laws. A hearing was held in this matter on March 12

and 13, 1975, in Reno, Nevada. 1/ The Government was represented by counsel and the Respondent Union by a national representative. All parties to this proceeding were afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted 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

A. Background Facts

The Respondent Union is a local chartered by and subordinate to the American Federation of Government Employees, AFL-CIO, and is a labor organization within the meaning of Section 2(e) of the Executive Order. 2/ The Respondent Union's membership consists of approximately 100 members; all of whom are current or retired civilian employees at the Fallon U.S. Naval Air Station, Fallon, Nevada. At the time material herein, the officers of the Respondent Union consisted of president, vice-president, secretary, treasurer, chief steward, and sargeant-at-arms.

On February 1, 1972, the Respondent Union was advised in writing by the president of the National Union that revised local constitution and by-laws of the Local Union had been approved. 3/ The letter of approval contained the following statement.

1/ Service of the complaint was not accomplished until December 22, 1974. Thereafter, the Respondent Union was granted an extension of time within which to file an Answer.

2/ The pertinent portion of Section 2(e) provides as follows:

"Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting working conditions of their employees;

3/ Joint Exhibit No. 1.

"All applicable portions of the National Constitution not incorporated therein automatically become a part of the local Constitution and By-Laws and the members bound thereby."

According to the provisions of the local constitution, the officers were to be elected by ballot and by a majority vote of members in good standing who were present and voting, provided a quorum was present at the time of the election. In the event that a quorum was not present, the election would be held at the next regular meeting where a quorum existed. 4/ The by-laws required that nomination of officers shall be held in October and elections and installation of officers shall be held in November of each year. 5/

B. The Disputed Election

Sometime prior to the regular membership meeting in October 1973, a notice was sent to the members of the Respondent Union advising them that nominations for officers for the coming year would be received at the October meeting. The notice was issued in conformity with the requirements of the local by-laws. Nominations for officers were made by the members attending the October meeting. Three names were nominated for the office of chief steward -- Guy Hall, Lonnie Long, and James Wilson. An election committee was appointed by the president to act as tellers for the balloting at the November meeting.

The membership meeting was held on November 13, 1973, and ballots were distributed for the annual election of officers. The ballots were blank ballots which had been printed for use in electing officers for the preceeding year. As such, they did not contain any provision for the office of chief steward. The membership and the president

4/ Joint Exhibit No. 1. Constitution, Article IV, Section 2.

5/ Joint Exhibit No. 1. By-Laws, Section VII.

decided to proceed with the balloting for all of the officers, with the exception of the chief steward. It was agreed that the election for the latter office would be held at the December membership meeting. After the conclusion of the balloting, all of the officers duly elected were sworn in and assumed their respective duties.

In keeping with the decision made at the November meeting, a 15-day notice of election for the office of chief steward was sent to the membership prior to the December meeting. 6/ The president of the Respondent Union was unable to attend the meeting and the vice-president presided in her absence. In the course of dealing with the matters brought up at the meeting, the election was overlooked. A motion was made and carried, postponing the election until the January meeting.

The next regular membership meeting was held on January 8, 1974. However, the 15-day notice of the election was not sent to the members, as the president was under the mistaken belief that the election had been held during the December meeting. When the matter was brought to her attention, she appointed Guy Hall -- one of the original nominees -- as temporary chief steward.

The February membership meeting was marked with acrimonious dissension between the union president and a group of the members. The dispute reached such a level of intensity that some of the members called for the resignation of the president. One of the items of dissension was over the authority of the president to appoint a temporary chief steward, since that was an elected office. It was suggested by some of the members that she had exceeded her authority in this regard, and that the prior incumbent retained the office under the constitution and by-laws, until a successor was duly elected. 7/

6/ This notice was required by the local constitution. Joint Exhibit No. 1. Constitution, Article IV, Section 4.

7/ It should be noted at this point that a notice of election was not sent to the membership prior to the February meeting.

The next membership meeting was held on March 12, 1974. Curtis Ristesund, a vice-president of the National Union, attended the meeting. One of the matters considered was the need to hold an election for a delegate to the District Caucus of the parent union to elect a national vice-president. It was decided that a notice should be sent to the membership announcing the election for the April meeting. In addition, the notice was to announce that the election of the chief steward would also be held at the same meeting. 8/

On March 13, 1974, a special meeting of the executive committee of the Respondent Union was called by the president. At this meeting the president mentioned for the first time the eligibility requirements for candidates for elected office in the Union. These requirements were set forth in Chapter XX of the Finance Officer's Manual and referred to in the National constitution. 9/

Article VIII, Section 4 of the National constitution provided:

Sec. 4. All AFGE Local officers will be elected by secret ballot in accordance with the rules and regulations of Executive Order 11491 as interpreted by the Labor Department and spelled out in Chapter XX of the AFGE Financial Officer's Manual.

8/ Ristesund informed the local membership that prior incumbent of the office of chief steward still retained that position because of the failure to hold an election. According to Ristesund, under the National and Local constitution and by-laws all officers remained in office until a new election was held.

9/ The Finance Officer's Manual was in the custody of the treasurer. However the testimony of the treasurer indicated that she was not aware of the provisions of this particular Chapter until she came to the executive committee meeting. The union president testified, on the other hand, that she received the document from the treasurer. It is not necessary for the purposes of this decision to resolve this conflict in the testimony. It is sufficient to note that Chapter XX was a part of the Manual and had been in existence since the summer of 1971. (Respondent's Exhibit No. 1).

Chapter XX of the Financial Officer's Manual set forth the rules governing elections as prescribed by the National Union. Section 4 of these rules provided for the nominating procedures, and Sub-Section E of that provision related to the eligibility requirements necessary for one to be a candidate for union office. The sections pertinent to this proceeding provided as follows:

- E. Any member in good standing is eligible to be a candidate and hold office, subject to reasonable qualifications uniformly imposed by the local, such as:
 1. Belong to the local for at least one year before running for office.
 2. Attend at least four or more meetings during the preceding year or 1/2 which ever is fewer.

* * * * *

NOTE: 1 and 2 under Section E are Constitutional requirements.

* * * * *

The testimony indicates that notification of the eligibility requirements was given to the local unions by the National Union in June 1971. (Respondent Union Exhibit No. 1). It is not clear, however, when the actual copies of Chapter XX were forwarded to the local unions. In addition, the eligibility requirements were published from time to time in the newspaper issued by the parent union, and sent to the local membership on a periodic basis. 10/

10/ It is also clear that very few of the members of the Respondent Union ever read the publication, and in some instances, many did not receive the union newspaper.

The next membership meeting was held on April 9, 1974. The president announced that nominations for chief steward had been made at the October meeting, and no further nominations would be received. However, there was provision for write-in candidates on the ballots distributed to the members. Since the other two nominees had withdrawn subsequent to the October nomination, Guy Hall was the only name on the ballot. 11/ Prior to the balloting, the union president read the eligibility requirements from Chapter XX of the Financial Officer's Manual. According to the testimony, this was the first time during an election conducted by the Respondent Union that the eligibility requirements were read to the membership prior to voting.

The official count after the balloting was as follows:

| | |
|------------------------------|----|
| Guy Hall | 14 |
| Bob Whitney (Write-in) | 5 |
| Robert England (Write-in) | 9 |
| Paul Shamlan (Write-in) | 2 |
| Art Houston (Write-in) | 1 |
| One vote invalid | |
| Total | 32 |

After the tally by the election committee, the union president declared Hall the winner. She based her decision on her personal determination that Whitney had not been a member of the Union for a period of a year, and England had not attended four union meetings during the year. Therefore, she disqualified them as eligible candidates, and the votes they received were not counted in the total number of votes

11/ One nominee had been transferred to Alaska, and the other withdrew his name from consideration.

cast. 12/ A number of the members protested that Hall had not received a majority of the votes but only a plurality, and therefore he was not elected in accordance with the requirements of the constitution and by-laws. In spite of these protests, the president swore Hall in as chief steward. The election was appealed to the president of the National Union and subsequently to the Department of Labor.

In October 1974, nominations were made for the election of new officers of the Respondent Union, and on November 12, 1974, the election for the new officers was conducted. Although this election took place after the investigation was commenced by the Department of Labor on the complaint regarding the April 1974 election, the subsequent election on November 12 was not supervised in any manner by the Department of Labor Personnel. 13/

The Contention of the Parties

The Government contends that the Respondent Union violated the terms of its own constitution and by-laws in that Hall did not receive a majority of the votes cast by the members "present and voting". According to the Government's theory, the votes for Whitney and England should have been counted in the total number of votes cast; even though the two individuals may not have satisfied the eligibility requirements. This being the case, the total number of votes cast should have been 32, and the winner would have to receive 17 votes in order to achieve a majority.

12/ The union president testified that the election committee declared Hall the winner, but the testimony of the other witnesses clearly indicated that she made the announcement.

13/ Guy Hall, who was the focus of controversy in the chief steward election in April, was elected sergeant-at-arms in the regular election in November 1974.

Since Hall only received 14 votes, he was short of the necessary majority and was not validly elected. In addition, the Government argues that the local constitution and by-laws require the election of officers to be held in November of each year. As the election of the chief steward was not held until April of the following year, the Respondent Union is asserted to have violated the requirements mandated by the local constitution and by-laws.

The Government further asserts that the eligibility requirements set forth in Chapter XX of the Finance Officer's Manual were not part of the Respondent Union's constitution and by-laws, or other duly enacted rules. Hence, they could not be the basis for disqualifying England and Whitney as write-in candidates. Moreover, it is asserted that the eligibility requirements must be considered as unreasonable in this instance, because they were not made known to the members of the local union sufficiently in advance of the nominations, to enable any member wishing to run for office to determine whether or not he was qualified. In addition, it is argued that the eligibility requirements were not uniformly applied by the Respondent Union.

The Respondent Union contends that the eligibility requirements were (a) reasonable in all respects, (b) part of the constitution and by-laws governing its election procedures, and (c) uniformly applied to its elections and known to its members. The Respondent Union further contends that on the basis of the eligibility requirements, the ballots cast for Whitney and England were invalid, and Hall received a majority of the votes which could be validly counted. 14/

14/ The Respondent Union also makes a procedural argument that under Section 482(b) of the Labor-Management Reporting and Disclosure Act [29 U.S.C. §483(d)] the Secretary of Labor is required to bring a civil action against the Labor organization within 60 days after the filing of the complaint if he finds probable cause to believe that a violation has occurred. While it is true that certain Sections of that Act (LMRDA) are incorporated in the procedures under the Executive Order, all sections of the LMRDA are not applicable to nor intended to be a part of the Order, or the Rules and Regulations implementing the provisions of the Order (29 C.F.R. Part 204). The Section of the LMRDA referred (continued on next page)

Concluding Findings

The Government argues that the election held in April 1974, violated provisions of the constitution and by-laws governing the election procedures of the Respondent Union. I find this argument to have little merit.

The by-laws of the Respondent Union provide that nomination of officers "shall be held in October" and the "elections shall be held in November of each year." While the language here is indeed mandatory, it must be considered with other relevant revisions of the local constitution relating to the election of officers. Article IV, Section 2 of the constitution provides that "officers shall be elected by ballot, and by majority vote of members in good standing, present and voting, provided a quorum of members in good standing is present." (Emphasis supplied). That section further provides that in the event a quorum is not present at the meeting where the election is to be conducted, the election shall be held at the next regular meeting when a quorum is present. (Emphasis supplied). Thus, it is clear that the local constitution contemplated circumstances which would preclude an election being held in the month mandated by the by-laws. In my judgment, the Government's argument that the election of officers is immutably fixed in the month of November, regardless of circumstances which may prevent this event from taking place, is unrealistic and not in accordance with the provisions of the local constitution and by-laws. This is not to suggest, that union officials can or are free to deliberately frustrate the holding of elections at the time fixed in its governing rules. But where circumstances clearly free of unlawful intent or design prevent the holding of the election of officers in the stated month, an election held subsequently

14/ Continued.

to by the Respondent Union is clearly related to civil proceedings in the Federal District Courts and applies to Unions in the private sector. Otherwise, there would be little need for the provisions in the Rules and Regulations providing for administrative hearings initiated by the Director. (29 C.F.R. §204.66 et seq.) Accordingly, the Respondent Union's contention in this regard is without merit.

for this purpose is valid and lawful. To hold otherwise would mean that if the Respondent Union failed, for the most innocent and excusable reasons, to hold an election of officers in November of a given year, the incumbents would remain in office for another full year. This obviously would be contrary to the democratic procedures mandated by the Executive Order and the LMRDA.

The Government also argues that the eligibility requirements set forth in Chapter XX of the Financial Officer's Manual are not a part of the Respondent Union's constitution and by-laws. Hence, they do not govern the election process of the Respondent Union. I do not agree with this argument and find that the provisions of Chapter XX are indeed a part of the local constitution and by-laws.

Article VIII, Section 4 of the constitution of the National Union specifically refers to the requirements spelled out in Chapter XX of the Financial Officer's Manual. That section states that local officers will be elected "in accordance with the Rules and Regulations of the Executive Order as interpreted by the Labor Department and spelled out in Chapter XX." Thus, the provisions of Chapter XX of the Financial Officer's Manual relating to the election of local officers are incorporated by reference in the constitution of the parent union. It is clear under the terms of the governing rules of the National Union that all portions of the national constitution, not specifically incorporated in local constitutions and by-laws, are automatically a part thereof, and govern the Local Unions (Joint Exhibit Nos. 1 and 2). Therefore, it cannot be seriously contended that the eligibility requirements were not a part of the Respondent Union's constitution and by-laws and applicable its election procedures.

Nor can it be seriously contended, in my judgment, that these requirements were not made known to the membership of the Respondent Union. The evidence indicates that in 1971, the then president of the Respondent Union was advised of the applicability of the eligibility requirements to candidates for local union office. In addition, the testimony indicates that these requirements were published periodically in the newspaper distributed by the parent union to the membership at large. Although a number of members testified they did not receive or if received, did not read the publication does not excuse them from having knowledge of these requirements. There is no evidence whatsoever in this record to indicate that the requirements were withheld from the members and were

not available for their advance inspection. I do not conceive of the democratic procedures set forth in the Executive Order and the LMRDA as relieving union members from the responsibility to be aware of union rules and regulations, which are readily accessible and made available to them by officials of the National or Local Union.

Having determined the above, the crucial issue in this case centers on the question of whether the election held in April 1974, was conducted in accordance with the requirements of the Respondent Union's constitution and by-laws. On the basis of all of the record evidence and testimony, I find that it was not.

The provisions of the local constitution require officers to be elected by a majority of the members, in good standing, who are present and voting (Emphasis supplied). At the meeting in April, there were 32 such members casting votes. 15/ Hall received 14 votes out of the 32 votes cast. The president of the Respondent Union, without explaining the basis for her decision, determined that 14 other votes were invalid and should not be counted because the write-ins were ineligible. I find that her decision ignored the constitutional provision that a successful candidate must be elected by a majority of the members, in good standing, present and voting. The mere fact that at least 14 votes were cast for write-in candidates who were ineligible -- if indeed this were the case -- does not invalidate the vote of the members who cast ballots for them. It simply means that under the provisions of the local constitution, the person receiving such votes would not be able to assume office, in the event he received a majority. Thus the votes discarded by the union president, in determining the majority, should have been counted in the total of the number of votes cast by the members. Had the president of the Respondent Union acted in conformity with the requirements of the local constitution, Hall would have only received a plurality of the votes. Her failure to follow the requirements of the local constitution clearly violated the standards imposed by Sections 18(a)(1), 18(c) and 6(d) of the Executive Order. As a result of these violations, the election of the chief steward in April 1974, was unlawful and invalid.

15/ One ballot was declared invalid by the election committee for reasons which are not important to this decision.

The Respondent Union cites the fact that a regular election for officers was held in November 1974, and a whole new slate of officers was duly elected pursuant to the provisions of its constitution and by-laws. In essence, it is urged that this election vitiated the effects of any misconduct which occurred in the election held in April. The purpose of the LMRDA, which undergirds the Executive Order, is to insure that free and democratic elections are held by unions. To achieve this objective the remedy for violations of the standards of conduct required of unions is an election conducted under the supervision of the Department of Labor. The purpose of such supervision by Governmental authority is not only to vindicate the rights of union members which have been abused, but also to vindicate the strong public interest in making certain that internal union elections are fair and democratic. Wirtz v. Local 153, Glass Bottle Blowers Association, 389 U.S. 463, 88 S. Ct. 643(1968). An intervening unsupervised election 16/ does not give any assurance these rights would be so protected, or that the effects of the misconduct would not continue to impact upon or taint future elections.

Accordingly, I find that the April 9, 1974, election for chief steward is null and void and, that a new election for this office must be held under the supervision of the Director, Office of Labor-Management and Welfare-Pension Reports, Labor-Management Services Administration, U.S. Department of Labor, in order to cure the abuses found herein, and to remedy the violations of the Executive Order and Section 401 of the Labor-Management Reporting and Disclosure Act, as amended.

Having found that the Respondent Union engaged in conduct which violated Sections 18(a)(1), 18(c) and 6(d) of the Executive Order and Section 401(e) of the Labor-Management Reporting and Disclosure Act, as amended, I shall recommend that the Assistant Secretary adopt the following recommended order designed to effectuate the policies of Executive Order 11491, as amended.

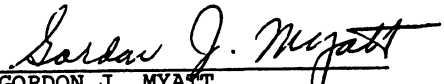
16/ In this case, two intervening elections have been held prior to the issuance of this decision. This does not, however, dispell the need for a supervised election to cure the abuse which occurred in the election of chief steward in April 1974.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 204.91(a) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders:

1. That the election held by Local 1841, American Federation of Government Employees, AFL-CIO, on April 9, 1974, for the office of Chief Steward be, and the same hereby is, declared null and void.
2. That Local 1841, American Federation of Government Employees, AFL-CIO, shall cease and desist from:
 - (a) conducting an election for union office, and more particularly for the office of Chief Steward, in a manner which violates the standards of conduct required by Executive Order 11491, as amended, the Rules and Regulations promulgated thereunder, and Section 401 of the Labor-Management Reporting and Disclosure Act, as applicable to the Executive Order.
3. That Local 1841, American Federation of Government Employees, AFL-CIO, take the following affirmative corrective action in order to effectuate the policies and purposes of the Executive Order:
 - (a) Hold a new election for the office of Chief Steward, under the supervision of the Director, Office of Labor-Management and Welfare-Pension Reports, Labor-Management Services Administration, U.S. Department of Labor.
 - (b) Send to all members of the Respondent Union, prior to the holding of the new election, 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 president of Respondent Union and mailed to all members of the Respondent Union with proper certification of such action to the Assistant Secretary. The president of the Respondent Union shall take reasonable steps to insure that such notices are not altered or defaced prior to mailing.

(c) Pursuant to Section 204.92 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: MAR 24 1976
Washington, D.C.

Appendix

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT conduct elections for union officers, and more particularly for the office of Chief Steward, in a manner which is contrary to the standards of conduct required by Executive Order 11491, as amended, the Rules and Regulations implementing the Executive Order, and Section 401 of the Labor-Management Reporting and Disclosure Act applicable to the Order.

In order to correct this violation, WE WILL hold a new election for the office of Chief Steward, conducted under the supervision of the Director, Office of Labor-Management and Welfare-Pension Reports, Labor-Management Services Administration, U.S. Department of Labor.

(Union)

Dated _____ By _____
(Signature)

This Notice must not be altered or defaced in any manner.

If members have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), COLUMBUS, OHIO

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), AKRON, OHIO
A/SLMR No. 687

On March 25, 1974, the Assistant Secretary issued a Decision and Direction of Elections in A/SLMR No. 372 in which he found that the separate, petitioned for units in these cases encompassed employees who shared a clear and identifiable community of interest separate and distinct from all other employees of the Region and that such units would promote effective dealings and efficiency of agency operations.

On August 13, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject cases in FLRC No. 74A-41 remanding the matter to the Assistant Secretary for reconsideration and disposition in the light of its Decision. Thereafter the Assistant Secretary remanded the subject cases to the appropriate Area Administrator for the purpose of reopening the record and taking additional evidence. Based on the record developed at both hearings, the Assistant Secretary found, consistent with the earlier determination herein, that the units sought were appropriate for the purpose of exclusive recognition under the Order. Thus, it was noted that within each of the claimed units the employees enjoy common supervision, are subject to similar personnel policies and job benefits, have similar working conditions, and perform their duties within an assigned geographical locality. Also noted was the lack of interchange between employees of one DCASO and the employees of the other DCASO's and the fact that generally transfers occur only in situations involving promotions or reduction in force procedures. Under these circumstances, the Assistant Secretary found that employees of each of the petitioned for units herein share a clear and identifiable community of interest separate and distinct from other employees of the DCASR, Cleveland.

Further, the Assistant Secretary found that the petitioned for units would promote effective dealings and efficiency of agency operations, and that the contentions of the Activities to the contrary were, at best, conjectural and speculative and not supported by the record

herein. With regard to efficiency of agency operations, he found that the Activities' argument related more to the appropriateness of the broader unit, rather than to the potential adverse impact resulting from the establishment of the claimed units upon the efficiency of agency operations. In the absence of any countervailing evidence that the already existing less than region-wide units in the DCASR, Cleveland, have failed to promote the efficiency of the Agency's operations, the Assistant Secretary concluded that the units herein will promote efficiency of agency operations. Moreover, he noted that the Activities' contentions in this regard were based on speculative assessments regarding the manpower and economic cost of a less than region-wide unit, rather than on a balanced consideration of all factors, including the effect of such units on the morale and well-being of the affected employees.

With regard to effective dealings, the Assistant Secretary noted that the evidence established that the Chiefs of the respective DCASO's involved herein have been delegated substantial authority and discretion within certain policy guidelines established by the Region and Defense Supply Agency Regulations in the areas of personnel and labor relations matters, as well as administrative and programmatic matters, exemplified by the fact that the Chief of the DCASO in Akron, Ohio, has negotiated a complete negotiated agreement which was approved by the Regional Commander, and the Chief of the DCASO in Columbus, Ohio, has negotiated a dues withholding agreement and is in the process of negotiating a complete negotiated agreement.

Accordingly, having given equal weight to the three criteria set forth in Section 10(b) of the Order, the Assistant Secretary found the units petitioned for in the subject cases were appropriate for the purpose of exclusive recognition and, therefore, he left undisturbed the certifications already issued in the subject cases.

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A/SLMR No. 687

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), COLUMBUS, OHIO

Activity

and

Case No. 53-6652(RO)

LOCAL 73, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Petitioner

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), AKRON, OHIO

Activity

and

Case No. 53-6733(RO)

LOCAL 3426, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION

On March 25, 1974, the Assistant Secretary issued his Decision and Direction of Elections in the above-captioned cases in A/SLMR No. 372, 1/ finding, in essence, that the separate, petitioned for units in these cases encompassed employees who share a clear and identifiable community of interest separate and distinct from all other employees of the Region, and that such units would promote effective dealings and efficiency of agency operations. In reaching this determination, the Assistant Secretary rejected the contention of the Activities that certification of a less

1/ Pursuant to this Decision, elections were conducted in the units found appropriate, and certifications of representative were issued by the Area Administrator to the respective labor organizations involved.

than region-wide unit would limit the scope of negotiations solely to those matters within the delegated authority of the chief of the subordinate unit at the level of recognition. In this latter regard, he cited the Federal Labor Relations Council's (Council) decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15, and concluded, based on such decision, that it was "the obligation of the DCASR to provide representatives with respect to the units found appropriate herein 'who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit.'"

Thereafter, on August 13, 1975, the Council issued its Decision on Appeal in the subject cases in FLRC No. 74A-41, remanding the matter to the Assistant Secretary for reconsideration and disposition in the light of its decision. Thereafter, the Assistant Secretary remanded the subject cases to the appropriate Area Administrator for the purpose of reopening the record and taking additional evidence. On January 27, 1976, a hearing was held before Hearing Officer William C. Spellacy. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, including the facts developed at both hearings in this matter, the briefs filed by the Activities, Local 73, National Federation of Federal Employees, herein called NFFE, and Local 3426, American Federation of Government Employees, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activities.
2. In Case No. 53-6652(RO), the NFFE sought an election in a unit of all regular full-time General Schedule and Wage Grade employees of the Defense Contract Administration Services Office (DCASO), Columbus, Ohio, excluding all military employees, management officials, supervisors employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees and security guards. In Case No. 53-6733(RO), the AFGE sought an election in a unit of all regular full-time General Schedule employees assigned and reporting to DCASO, Akron, Ohio, excluding all management officials, supervisors, professional employees, military employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and security guards.

The Activities contended that the only appropriate unit would be a unit made up of all eligible employees of the Defense Contract Administration Services Region (DCASR), Cleveland, Ohio. In the Activities' view, such a region-wide unit would include all of the employees in the four exclusively recognized units currently in existence within the Region, in addition to all eligible employees who currently are unrepresented. In the alternative, the Activities suggested that the appropriate unit should consist of all eligible employees included in units which are not covered by negotiated agreements, together with all eligible employees

who currently are unrepresented. As a second alternative, the Activities indicated that they would accept a unit consisting of all eligible unrepresented employees of the Region, including the employees sought by the two petitions herein. With respect to the units petitioned for in the subject cases, the Activities asserted that they are not appropriate because they exclude employees who share a community of interest with the employees in the claimed units and, further, the proposed units will not promote effect dealings and efficiency of agency operations.

The DCASR, Cleveland, is 1 of 9 such regions of the Defense Supply Agency and is a primary level activity of that agency. It provides contract administration services in support of the Department of Defense as well as other Federal agencies and it encompasses a geographic area which includes the states of Ohio, Kentucky, Michigan, the three western-most counties of the state of Pennsylvania, and the Commonwealth of Canada. Currently, there are five Defense Contract Administration Service Districts (DCASD's) within DCASR, Cleveland; namely, DCASD, Detroit, DCASD, Cincinnati, DCASD, Grand Rapids, DCASD, Dayton, and DCASD, Cleveland. In addition, DCASR, Cleveland, includes 9 DCASO's located in Toledo, Akron, and Columbus, Ohio, Ottawa, Canada and 5 privately owned manufacturing plants. Approximately 2,000 civilian employees are employed throughout DCASR, Cleveland.

DCASR, Cleveland, is headed by a Regional Commander, a military officer, whose office is located at the DCASR headquarters in Cleveland. Directly under the Commander, and located at the headquarters, are a number of offices and directorates which are responsible for planning and monitoring all facets of the DCASR's operations. The offices are concerned primarily with matters regarding planning, administration, contract compliance problems and security problems at defense plants; the directorates are concerned with matters regarding contract administration, production, and quality assurance. While personnel management is centralized at DCASR, Cleveland, headquarters, the record reveals that there are personnel management specialists located at a number of the DCASD's who perform various personnel functions and are responsible for promotions as well as the evaluation of clerical positions within their districts.

At present, there are seven separate exclusive bargaining units within DCASR, Cleveland, including the units at DCASO, Akron and DCASO, Columbus. The NFFE is the exclusive representative for a unit of all nonsupervisory, nonprofessional employees assigned to DCASR, Cleveland, headquarters, which unit includes employees assigned to the DCASO at the Gould manufacturing plant, which is located in the Cleveland metropolitan area. The NFFE also represents a unit of all General Schedule and Wage Grade DCASR, Cleveland, employees assigned to Elyria, Jefferson, and Ashtabula counties in the states of Ohio and Pennsylvania. These foregoing two units are covered by a single negotiated agreement which was in effect at the time of the second hearing herein. NFFE Local 75 is the exclusive representative for a unit of all nonsupervisory employees, including professional employees, assigned to the DCASD, Cincinnati, and the record reveals that there is a negotiated agreement currently in effect for this unit. NFFE Local 142 is the exclusive representative

for a unit of all nonsupervisory General Schedule employees assigned to DCASD, Toledo; however, there is no negotiated agreement covering this unit. AFGE Local 2795 holds exclusive recognition for a unit that encompasses all the former employees of DCASR, Detroit, including all employees assigned to the present DCASD, Detroit, DCASD, Grand Rapids and DCASO, Ottawa, Canada, which are now part of DCASR, Cleveland. At the time of the second hearing in this matter, a negotiated agreement was in effect covering the foregoing unit. There is no history of collective bargaining concerning the employees assigned to the DCASD, Dayton.

As noted above, pursuant to the Decision and Direction of Elections previously issued in the subject cases, elections were held in the respective units found appropriate. Thereafter, the NFFE was certified as the exclusive representative for the unit at the DCASO, Columbus, and the AFGE was certified as the exclusive representative of the unit at the DCASO, Akron. Subsequently, the record reveals that, notwithstanding the petitions for review filed with the Council by the Defense Supply Agency and the Department of Defense, the chiefs of each DCASO involved entered into negotiations with the certified labor organizations. As a result of such negotiations, the evidence establishes that the Chief of the DCASO, Columbus, negotiated a dues withholding agreement with the NFFE and that, at the time of the second hearing in this matter, the parties were preparing to negotiate a full agreement. Further, the evidence establishes that the Chief of the DCASO, Akron, negotiated a complete agreement with the AFGE covering the employees at that facility which agreement has been approved by the Commander, DCASR, Cleveland. ^{2/}

The record reveals that DCASD's and DCASO's perform essentially the same functions within a given geographic area; i.e., performance of the day-to-day operations of the DCASR within their assigned geographic areas. However, as a result of the reorganization and consolidation of the former DCASR, Detroit, with the DCASR, Cleveland, which resulted in a substantial increase in personnel and geographic area of responsibility, the DCASD's within the DCASR, Cleveland, have been assigned administrative responsibility for the activities of the DCASO's. ^{3/} The DCASO's are under the supervision of a chief, and are organizationally subdivided to correspond with the directorates of the Regional headquarters. Thus, in each DCASO there is a Division of Contract Administration, a Division of Production, a Division of Quality Assurance, and an Office Administrative Services. Depending upon the number of personnel assigned to each DCASO, it may be further subdivided organizationally with each

^{2/} The record reveals that during the negotiations with the AFGE, a representative of Regional headquarters was present. However, the record is clear that the Chief of the DCASO, Akron, was the principal negotiator for the Activity, and the Regional representative was acting only in an advisory and resource capacity.

^{3/} Thus, each of the DCASD's has at least one DCASO reporting to it, with the exception of DCASO, Cincinnati.

division having two or more branches. In addition, the record reveals that there are a number of Resident Offices attached to each of the DCASO's. These Resident Offices either are assigned to one particular manufacturing facility or to a specific sub-geographical area encompassed by the larger geographical area of the DCASO. Although the employees assigned to these Resident Offices do not report on a daily basis to the DCASO to which they are assigned, they perform their duties in exactly the same manner in which employees assigned to and working out of the DCASO's perform their duties. Thus, all employees submit daily reports of their activities to their first line supervisors, who then transmit these reports to the branch or division chief of the DCASO and, thereafter, to the Chief of the DCASO.

The Chief of the DCASO is responsible for the day-to-day operations of his office and, in meeting these responsibilities, he is authorized to exercise wide discretion within policy guidelines established by DCASR, Cleveland, and the Defense Supply Agency. Thus, under the provisions of Defense Supply Agency Regulations, he has the authority to hire, subject to technical approval from DCASR, Cleveland, discipline employees, handle grievances, make temporary changes in the hours of work, grant overtime subject to the availability of funds, institute merit awards and negotiate agreements.

The record reveals that all of the employees of the DCASO's perform their duties pursuant to policies and procedures established by the Regional headquarters staff and that employees in the region are subject to uniform personnel policies and job benefits. There is no evidence of any degree of interchange of employees from office to office, from district to district, or between the headquarters staff and the offices within the DCASR, Cleveland. While the evidence establishes that there is some degree of transfer of employees among the various geographical organizational components within the DCASR, Cleveland, generally such transfers occur within the context of promotion or reduction in force procedures. The record discloses that the area of consideration for promotions and reductions in force for all employees classified GS-8 and above is region-wide, whereas the area of consideration for promotions and reduction in force for employees classified GS-7 and below is within the geographical area of the location of the employees involved. A significant number of employees assigned to the DCASO's perform their duties at the sites where the contracts for particular products or services are being performed and, to this extent, the working conditions of the employees may vary from one assignment to the other. Employees assigned to a particular DCASO perform their duties only within the geographical area assigned to that DCASO and work under the supervision of the Chief of the DCASO and the subordinate supervisors. The record reveals that employees assigned to a particular division within a DCASO share common job classifications with other employees in the same division and that employees so classified utilize basically similar skills and perform substantially similar duties.

Based on all of the foregoing circumstances, I find, consistent with the earlier determination herein, that the units sought are appropriate for the purpose of exclusive recognition under the Order. Thus,

the evidence establishes that within each of the claimed units the employees enjoy common supervision, are subject to similar personnel policies and job benefits, similar working conditions, and perform their duties within an assigned geographical locality. Further, employees assigned to a particular DCASO do not interchange with other employees of other DCASO's and, generally, transfers occur only in situations involving promotions or reduction in force procedures. Under these circumstances, I find that the employees in each of the petitioned for units herein share a clear and identifiable community of interest separate and distinct from other employees of the DCASR, Cleveland.

Further, under all of the foregoing circumstances, and noting the Council's decision in the subject cases, 4/ I find that the petitioned for units will promote effective dealings and efficiency of agency operations, and that the contentions of the Activities to the contrary are, at best, conjectural and speculative and are not supported by the record herein. Thus, the Activities contend that the sought units will not promote efficiency of agency operations because of the resulting fragmentation of the Region. In this regard, the Activities argue that, because the administration of personnel and labor relations policies and practices have been centralized in the Regional headquarters, the proliferation of units within the Region to be serviced by headquarters personnel would result in increased costs and inconvenience, as opposed to the single, region-wide unit favored by the Activities. However, the Activities' evidence herein related more to the appropriateness of the broader unit, rather than to the potential adverse impact resulting from the establishment of the claimed units upon the efficiency of agency operations. 5/ Moreover, there was an absence of any countervailing evidence that the already existing less than region-wide units in the DCASR, Cleveland, have failed to promote the efficiency of the Agency's operations. It has been found previously by the Assistant Secretary that a determination of efficiency of agency operations is dependent upon a complex of factors and that the tangible and intangible benefits to employees and agencies resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite certain increased cost factors. 6/ Further, the Council has indicated that in unit determinations the parties are obligated to come

4/ Also noted was the Council's decision in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28.

5/ It was noted that Section 10(a) of the Order provides, in part, that, "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." (Emphasis added) There is no provision in the Order that to be appropriate a unit must constitute the "most" appropriate unit, or a "more" appropriate unit than some less comprehensive grouping of employees.

6/ See Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559.

forward with all relevant information for the use of the Assistant Secretary, including any contrary evidence with respect to efficiency of agency operations, and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances. 7/ Based on these considerations, I find that the units sought herein will promote efficiency of agency operations. Thus, they encompass homogeneous groupings of all employees within two organizational components of the Region. Moreover, the Activities' contentions regarding efficiency of agency operations were based primarily on their speculative assessments on the manpower and economic costs of a less than region-wide unit rather than on a balanced consideration of all the factors, including their experience with respect to other less than region-wide units which previously were established in the DCASR, Cleveland, as well as the effect of the establishment of such units on employee morale and well-being. 8/ I find that, standing alone, such speculation by the Activities as to what might be helpful or desirable to be insufficient to establish that the proposed units will not promote efficiency of agency operations.

In addition, as noted above, I find that the claimed units herein will promote effective dealings. Thus, the evidence establishes that the Chiefs of the respective DCASO's involved herein have, in fact, been delegated substantial authority and discretion, within certain policy guidelines established by the Region and the Defense Supply Agency Regulations, in the areas of personnel and labor relations matters, as well as administrative and programmatic matters. Indeed, such authority and discretion has already been exercised by the Chiefs of the respective DCASO's involved herein, leading to a complete negotiated agreement, 9/ approved by the Regional Commander, covering employees in the unit at DCASO, Akron, as well as a dues withholding agreement and substantial progress toward a complete negotiated agreement covering employees in the unit at DCASO, Columbus. Further, as noted above, there was an

7/ See Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, cited above.

8/ It was noted that the Preamble to the Executive Order recognizes, among other things, that "...efficient administration of the Government is ... benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment."

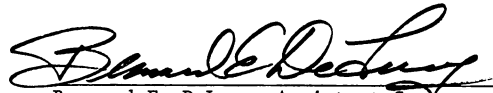
9/ This agreement includes sections covering such subjects as: "Consultation and Negotiation" (Article V); "Informal Grievance Procedure" (Article VI); "Rights of Union Representatives and Negotiators" (Article VIII); "Deduction of Union Dues" (Article IX); "Use of Official Time" (Article XI); "Grievances" (Article XIII); "Equal Employment Opportunity" (Article VII); and "Use of Official Facilities and Services" (Article XII).

absence of countervailing evidence regarding any lack of effective dealings experienced in the other, less than region-wide units already in existence in DCASR, Cleveland. 10/

Nor do I view my determination herein to be inconsistent with the expressed policy of the Report accompanying Executive Order 11838, Labor Management Relations in the Federal Service (1975). Thus, as found previously by the Assistant Secretary 11/ a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. When Section 11(a) of the Order is considered in conjunction with the principle set forth above in the Preamble to the Order that efficient administration of the Government is benefited by employee participation in the formulation and implementation of personnel policies and practices affecting conditions of employment, it is evident that the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to these matters, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

Accordingly, having given equal weight to the three criteria set forth in Section 10(b) of the Order, I find that the units petitioned for in the subject cases are appropriate for the purpose of exclusive recognition in that the employees in each of such units share a clear and identifiable community of interest separate and distinct from other employees of DCASR, Cleveland, and such units will promote effective dealings and efficiency of agency operations. I, therefore, will leave undisturbed the certifications already issued to the NFFE and the AFGE in the subject cases.

Dated, Washington, D.C.
July 29, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

10/ See Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region, A/SLMR No. 331, FLRC No. 74A-16.

11/ Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, cited above.

Defense Supply Agency, Defense
Contract Administration Services
Region (DCASR), Cleveland, Ohio,
Defense Contract Administration
Services Offices (DCASO's),
Akron, Ohio, and Columbus, Ohio

and

Local 3426, American Federation
of Government Employees, AFL-CIO

and

Local 73, National Federation
of Federal Employees

A/SLMR No. 372
FLRC No. 74A-41

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and direction of elections of the Assistant Secretary finding appropriate, and directing elections in, two units in the Cleveland, Ohio, Defense Contract Administration Services Region (DCASR).

The Cleveland DCASR, a primary level field activity of the Defense Supply Agency, consists, in part, of several subordinate Defense Contract Administration Services Offices (DCASO's) throughout Ohio. In two of the DCASO's the unions here involved filed separate petitions for recognition: Local 3426, American Federation of Government Employees (AFGE), seeking an officewide unit in the Akron DCASO, and Local 73, National Federation of Federal Employees (NFFE), seeking a similar unit in the Columbus DCASO. Both the Akron and Columbus DCASO's contended, in opposition to the petitions, that only a single, DCASR-wide unit would be appropriate.

The Assistant Secretary determined that each of the two units sought by the unions was appropriate for the purposes of exclusive recognition under the Order. In reaching this determination, the Assistant Secretary concluded that the employees in each unit shared a clear and identifiable community of interest separate and distinct from other employees of the DCASR, Cleveland, and that the units sought would promote effective dealings and efficiency of agency operations.

With special regard to effective dealings and efficiency of agency operations, the Assistant Secretary noted that there were currently four exclusive units within DCASR, Cleveland, two of which were then covered by a negotiated agreement. Further, he rejected an agency argument that certification of less than a regionwide unit would limit the scope of negotiation solely to those matters within the delegated discretionary authority of the particular chief of the particular individual subordinate unit involved. In the latter connection, the Assistant Secretary reasoned:

As stated by the Federal Labor Relations Council (Council) in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 [(November 20, 1972), Report No. 30], "Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and to enter into agreements on all matters within the scope of negotiations in the bargaining unit." Applying the Council's rationale to the instant situation, where certain labor relations and personnel policies are established by the DCASR headquarters, in my view, it is the obligation of the DCASR to provide representatives with respect to the units found appropriate herein "who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."

Following the Assistant Secretary's decision, elections were conducted and certifications issued. Thereafter, the Assistant Secretary's decision was appealed to the Council by the Defense Supply Agency (DSA) and the Department of Defense. Upon consideration of the petition for review, and the opposition for review filed by NFFE, the Council determined that a major policy issue was presented by the decision of the Assistant Secretary, namely: Whether the Assistant Secretary correctly interpreted the Council's decision in Merchant Marine to require that "where certain labor relations and personnel policies are established by the DCASR Headquarters . . . it is the obligation of the DCASR to provide representatives with respect to the units found appropriate [in this case] 'who are empowered to negotiate and enter into an agreement on all matters within the scope of negotiations in the bargaining unit.'"

Briefs were filed by DSA, NFFE, and AFGE. Additionally, the Department of Treasury and the Department of Health, Education, and Welfare were permitted to file briefs as amicus curiae.

Opinion

As previously indicated, the Assistant Secretary in concluding that separate DCASO units would promote effective dealings and efficiency of agency operations, relied in part on his interpretation of the Council's decision

in the Merchant Marine case. More particularly, the Assistant Secretary interpreted Merchant Marine as, in effect, requiring that even where labor relations and personnel policies are properly established on matters at the higher agency level of DCASR headquarters, DCASR must nevertheless provide representatives at the local level to negotiate and enter into agreements on those matters, provided they are not otherwise excluded from the scope of bargaining at the local level. The question accepted for review is whether such interpretation of Merchant Marine was proper.

In the Merchant Marine case, the agency contended that the union's proposals on faculty salary at the Merchant Marine Academy were nonnegotiable because they were outside the scope of bargaining by reason of various laws, outside regulations, and substantive agency directives, and because they were "outside the delegated bargaining authority of the Superintendent of the Academy" under cited higher level agency issuances. The Council ruled first that the proposals were within the scope of bargaining at the Academy level and then rejected the agency's claim that limitations on the delegated bargaining authority rendered the proposals nonnegotiable. The Council stated in the latter regard (at p. 7 of Council decision):

There remains for consideration the agency's determination that the union's proposals are non-negotiable by virtue of Department of Commerce Administrative Orders 202-250 and 202-711. According to the agency, Commerce's A.O. 202-711 assigns to the Superintendent of the Academy, as the official who accorded recognition to the union, the responsibility for fulfilling the bargaining obligation of the Order in the Academy unit. However, authority to alter the faculty salary plan or schedule is reserved by Commerce's A.O. 202-250 to the Director of Personnel (or appropriate member of his staff). The agency reasons that the effect of these two regulations is to bar negotiations on the salary plan or schedule for Academy faculty since these matters are not within the Superintendent's delegated authority.

We do not agree. The obligation in section 11(a) of the Order reads:

An agency and a labor organization . . . through appropriate representatives, shall meet . . . and confer [Emphasis added.]

Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit. Since we have held that the union's proposals in this case are within the scope of negotiations, then to the extent Commerce's A.O. 202-711 bars such negotiations in the Academy unit, it is inconsistent with the Order and may not stand as a bar. Agency regulations, such as A.O. 202-711, which are issued to implement the Order must be consistent therewith, as required by section 23 of the Order.

Further, since the authority to take action on the matters covered by the union's proposals is reserved by Commerce's A.O. 202-250 to the Director of Personnel, it is apparent that he becomes the "appropriate" official responsible for fulfilling the agency's section 11(a) obligation on those matters. [Emphasis in original, footnote omitted.]

In essence, the Council thus decided in the Merchant Marine case that, where a matter is found to be negotiable at the local level of exclusive recognition, then the agency must provide representatives who are empowered to negotiate on that matter at the local level, so as to fulfill its bargaining obligation under section 11(a) of the Order.

Turning to the instant case, it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order.^{1/} Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.

Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.

We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need,"^{2/} DCASR directives as such would not thereafter serve to limit the scope of bargaining at

^{1/} Section 11(a) of the Order, as presently effective, provides:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. . . .

^{2/} Under E.O. 11838, section 11(a) is amended to read, in pertinent part, as follows (underscoring supplied):

(Continued)

the DCASO level -- because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision."^{3/} However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.

In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units.^{4/} The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. In more detail, as stated in section IV. of the Report accompanying E.O. 11838:^{5/}

Almost all agencies and labor organizations which participated in the general review expressed strong support for a policy which would facilitate the consolidation of existing exclusive recognitions. Moreover, we are convinced from our experience and analysis that the Federal labor-management relations program will be improved by a reduction in the unit fragmentation which has developed over the 12 years of labor-management relations under Executive orders.

The consolidation of units will substantially expand the scope of negotiations as exclusive representatives negotiate at higher authority levels in Federal agencies. The impact of Council decisions holding

(Continued)

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . .

These amendments to section 11(a) are to become effective 90 days after issuance by the Council of the criteria for determining compelling need.

^{3/} See section V.1.(b). of Report accompanying E.O. 11838, Labor-Management Relations in the Federal Service (1975), at p. 39.

^{4/} Labor-Management Relations in the Federal Service (1975), at p. 38.

^{5/} Id. at pp. 35-37.

proposals negotiable will be considered. In our view, the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest.

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

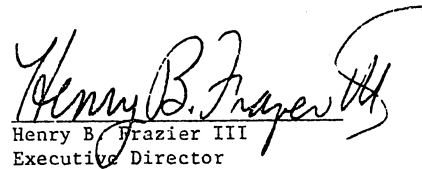
We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. We believe that the proposed modifications of the Order and subsequent actions of the Assistant Secretary will facilitate the consolidation of existing units, which will do much to accomplish the policy of creating more comprehensive units. We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units. [Emphasis supplied.]

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
BOULDER CANYON PROJECT,
BOULDER CITY, NEVADA
A/SLMR No. 688

Accordingly, pursuant to section 2411.17(b) of the Council's rules and regulations, we hereby set aside the Assistant Secretary's decision and remand the case to him for reconsideration and disposition consistent with the principles discussed herein.

In this case, the American Federation of Government Employees, Local 1978, AFL-CIO, (AFGE) filed a petition seeking an election in a unit of all Special Policemen employed by the Bureau of Reclamation, Boulder Canyon Project. The AFGE contended that the claimed unit of Special Policemen was appropriate in that the Special Policemen share a community of interest separate and distinct from other employees at the Activity. The Activity, on the other hand, asserted that the unit in question was inappropriate and would not promote effective dealings or efficiency of agency operations. The Activity contended also that three employees classified as Supervisory Security Policemen, GS-7, who the AFGE would include in the claimed unit, were supervisors within the meaning of Section 2(c) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Under all of the circumstances, the Assistant Secretary found that the unit of Special Policemen petitioned for by the AFGE was appropriate for the purpose of exclusive recognition. In this connection, he concluded that the petitioned for unit was a functionally distinct group of employees who shared a community of interest separate and distinct from the other employees of the Activity. The Assistant Secretary noted, in this regard, that the Special Policemen were the only employees of the Activity having the primary responsibility for law enforcement and physical security at the Activity and, as such, were the only employees of the Activity subject to the particular rules and policies concerning law enforcement set forth in the Agency's Department Manual. Moreover, in connection with their work, they receive special training and are the only employees of the Activity who wear firearms. The Assistant Secretary also found that the claimed unit of functionally distinct employees who work under special rules and policies which are different from those covering other employees of the Activity would promote effective dealings and efficiency of agency operations.

Issued: August 13, 1975

With respect to the eligibility question, the Assistant Secretary found that, as contended by the Activity, Supervisory Security Policemen, GS-7, were supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit found appropriate.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
BOULDER CANYON PROJECT,
BOULDER CITY, NEVADA

Activity

and

Case No. 72-5737(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1978, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

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

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

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 1978, AFL-CIO, herein called AFGE, seeks an election in a unit of all Special Policemen 1/ employed by the Bureau of Reclamation, Boulder Canyon Project, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order. 2/

1/ The record reveals that Special Policemen are also referred to as Security Policemen.

2/ The petitioned for unit appears essentially as amended at the hearing.

In this regard, the AFGE takes the position that the claimed unit of Special Policemen is appropriate in that such employees have a clear and identifiable community of interest because they are charged with a mission different than any other group of Activity employees. Thus, the AFGE contends that the Special Policemen are the only employees at the Activity who have the primary duty of law enforcement protection of Government property and enforcement of Activity regulations and, further, that they are subject to different regulations and codes of conduct than other employees of the Activity. The Activity, on the other hand, claims that a unit of Special Policemen is inappropriate because such a unit would lead to fragmentation of units at the Activity and would not promote effective dealings or efficiency of agency operations. The Activity contends that the only appropriate unit would be an Activity-wide unit of all General Schedule (GS) employees, including temporary and intermittent seasonal guides. 3/

The Activity's mission is to operate and maintain the Boulder Canyon Project's Hoover Dam. The claimed unit of some 13 Special Policemen is located in the Security and Safety Branch of the Activity's Administrative Division. The Security and Safety Branch is responsible for, among other things, formulating, implementing, and administering a comprehensive security program by providing around-the-clock coverage for the protection of Activity property, regulating vehicular traffic on the dam, and controlling access to the dam.

The record reveals that Special Policemen report to Supervisory Policemen and the Security Operations Officer of the Security and Safety Branch and are the only employees at the Activity charged with the primary function of physical security and enforcement of Federal regulations within the Activity, including traffic control investigations. These functions are interrelated with their additional duties of maintaining personnel security and safety of the general public visiting the Activity. The evidence establishes that Special Policemen must wear uniforms, are subject to grooming standards, are the only employees of the Activity who are required to carry firearms, have the authority to detain and arrest suspects, work with other police authorities from other states, receive special police training, and are required to work on three different rotating shifts. Further, Special Policemen are the only employees of the Activity who are subject to the particular rules and policies, including a code of conduct, outlined in the Agency's Department Manual Part 446 1 and 2, entitled "Law Enforcement-Policies, Responsibilities, Standards, Procedures."

Based on the foregoing circumstances, I find the claimed unit of Special Policemen is appropriate for the purpose of exclusive recognition.

3/ The Wage Grade employees of the Activity are represented exclusively by the AFGE pursuant to a certification issued in 1971.

Thus, in my view, such unit constitutes a functionally distinct group of employees who share a community of interest separate and distinct from the other employees of the Activity. As noted above, the evidence establishes that the Special Policemen in the Security and Safety Branch are the only employees of the Activity having the primary responsibility for law enforcement and physical security at the Activity and, as such, they are the only employees of the Activity subject to the particular rules and policies concerning law enforcement set forth in the Agency's Department Manual. The record reveals also that, in connection with their work, they receive special training and are the only employees who wear firearms. Thus, and noting that Section 10(b) of the Order specifically provides, in part, that a unit may be established on a functional basis, I find that the employees in the petitioned for unit who possess specialized skills different from other employees of the Activity share a separate and distinct community of interest which warrants their inclusion in a separate unit. 4/ Moreover, I find that the claimed unit of functionally distinct employees who work under special rules and policies which are different from those covering other employees of the Activity will promote effective dealings and efficiency of agency operations. 5/ Therefore, I shall direct an election in the unit sought.

Eligibility Issue
Supervisory Security Policemen GS-7

The AFGE contends that three employees classified as Supervisory Security Policemen, GS-7, are not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit. The Activity takes the position that these employees are supervisors and should be excluded from any unit found appropriate.

The record reveals that the three Supervisory Security Policemen, GS-7, are shift supervisors who report to the Security and Safety Branch's Security Operations Officer, GS-9. They each are responsible for assigning and directing the work of the Special Policemen on one of the three shifts, including assigning them to fight fires in an emergency. Also, they rate the performance of the policemen on their shift on a quarterly basis and have the authority to adjust grievances at the first step of the Activity's grievance procedure. The record reveals also that Supervisory Policemen have made recommendations that were followed by the

4/ Cf. Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629 and Department of the Navy, U.S. Naval Station and Naval Amphibious Base, San Diego, California, and Coronado, California, A/SLMR No. 627.

5/ See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Office (DCASO) Columbus, Ohio, A/SLMR No. 687.

Activity with regard to disciplinary actions, promotions, incentive awards, and commendations.

Under these circumstances, I find that the three Supervisory Security Policemen, GS-7, are supervisors within the meaning of Section 2(c) of the Order inasmuch as they have the authority to responsibly direct and assign work to employees and effectively make recommendations regarding disciplinary actions, promotions, and incentive awards and have the authority to adjust grievances at the first level of the grievance procedure. Accordingly, I find that the Supervisory Security Policemen, GS-7, should be excluded from the unit found appropriate. 6/

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Special Policemen employed by the Bureau of Reclamation, Boulder Canyon Project, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1978, AFL-CIO.

Dated, Washington, D. C.
July 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

6/ Cf. U. S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 481.

August 4, 1976

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

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD,
A/SLMR No. 689

This case involved a petition for clarification of unit (CU) filed by the International Federation of Professional and Technical Engineers, Local 174, AFL-CIO (IFPTE) seeking a determination that approximately 30 employees classified as Production Controllers, GS-1152, employed in the Planning and Estimating Division of the Activity's Planning Department are included within its exclusively recognized unit. The Activity and the Intervenor, American Federation of Government Employees, Local 2237, AFL-CIO (AFGE), which is the exclusive representative of certain other employees of the Activity, maintained that the Production Controllers are included in the AFGE's exclusively recognized unit.

The record revealed that in 1963 the IFPTE's predecessor, the American Federation of Technical Engineers, Local 174 (AFTE), pursuant to an advisory arbitration award and subsequent election was granted recognition for a unit of "All nonprofessional technical employees, including [various positions in different divisions] ..." of the Activity. In 1964, the AFTE and the Activity entered into a negotiated agreement which unit description included "...all eligible employees in the Technical Unit...". In 1967 the parties changed the language in a successor agreement to define the unit as including "all... technical employees in the engineering sciences and related fields...". This language has remained unchanged in subsequent agreements.

In 1970, the AFGE was certified as the exclusive representative of a unit of the Activity's unrepresented General Schedule employees excluding, among others, "employees covered by existing grants of exclusive recognition". In the instant proceeding, the IFPTE contended that the Production Controllers are technical employees who it has represented in its unit, and the Activity and the AFGE took the position that the Production Controllers were unrepresented prior to 1970 and, hence, became part of the AFGE's unit.

The Assistant Secretary found that the Production Controllers were within the scope of the IFPTE's unit and that the parties had considered them to be within that unit rather than within the AFGE's subsequently recognized unit. In this regard, he noted that the Production Controllers are technical employees, and that the 1963 arbitration award and the unit descriptions in the subsequent negotiated agreements defined the scope of the unit as including "all" technical employees. Further, the Assistant Secretary noted that there was no evidence that the Production

Controllers participated in the election leading to the AFGE's certification; that the IFPTE, rather than the AFGE, had represented these employees in grievances and other representational matters since 1970 when the AFGE received its certification; and that the Activity had accepted dues withholding cards from a number of Production Controllers to permit payroll dues deductions on behalf of the IFPTE. Accordingly, he clarified the IFPTE's unit to include the Production Controllers.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD

Activity

and

Case No. 72-5607

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS,
LOCAL 174, AFL-CIO

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2237, AFL-CIO

Intervenor

DECISION AND ORDER CLARIFYING UNIT

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

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, International Federation of Professional and Technical Engineers, Local 174, AFL-CIO, herein called IFPTE, the Assistant Secretary finds:

The IFPTE is the exclusive representative of certain employees of the Activity. By its petition for clarification of unit herein it is seeking a determination that approximately 30 employees classified as Production Controllers, GS-1152, employed in the Planning and Estimating Division of the Activity's Planning Department are included within its exclusively recognized unit. The Activity and the Intervenor, the American Federation of Government Employees, Local 2237, AFL-CIO, herein

called AFGE, which is the exclusive representative of certain other employees of the Activity, maintain that the Production Controllers in the Planning and Estimating Division of the Planning Department are within the AFGE's exclusively recognized unit.

The record reveals that in 1962, the predecessor of the IFPTE, the American Federation of Technical Engineers, Local 174, petitioned the Commander of the Long Beach Naval Shipyard, requesting recognition as the exclusive representative of a unit of all of the Shipyard's professional and nonprofessional technical employees. The petition was rejected by the Shipyard Commander on the basis that the appropriate unit should consist of all employees of the Shipyard. The Commander's determination was appealed to the Secretary of the Navy who upheld his decision. Pursuant to Executive Order 10988, the Petitioner then requested the appointment of an arbitrator to render an advisory opinion on the appropriateness of the unit sought. Thereafter, an arbitrator was selected and in 1963 an arbitration hearing was conducted. The Petitioner's brief to the arbitrator, which set forth categories and organizational locations of the employees included in the unit it was seeking, did not specifically name the Production Controllers in the Planning and Estimating Division. 1/

On May 31, 1963, the arbitrator issued an advisory award setting forth the following unit as appropriate:

All nonprofessional technical employees, including technicians, draftsmen, equipment specialists, quality control specialists, the contract specialists, the illustrator and student trainees employed in the Design Division and the Combat Systems Division of the Planning Department, the Quality Assurance Division and the Production Engineering Division of the Production Department, the Engineering Division of the Public Works Department, and the Technical Division of the Supply Department at the Long Beach, California, Naval Shipyard may, if they so desire, constitute a separate appropriate unit for the purposes of exclusive recognition under Executive Order 10988. Professional employees including architects, engineers, chemists, mathematicians, and metallurgists in the same Divisions and Departments may, if they so desire, be represented in the same unit as nonprofessional technical employees.

The Activity accepted the award and an election was conducted with a majority of the nonprofessional employees voting in favor of

1/ The evidence establishes that, at the time of the arbitration hearing, there were employees classified as Production Controllers in the Planning and Estimating Division of the Activity's Planning Department.

representation by the IFPTE's predecessor and a majority of the professional employees voting against representation.

The parties executed their first negotiated agreement in 1964. The agreement contained the following unit description:

The Unit to which the agreement is applicable is composed of all eligible employees in the Technical Unit. This includes all technical employees such as technicians, draftsmen, equipment specialists, quality control specialists, contract specialists, illustrators, and student trainees employed in the Design Division and the Combat Systems Division of the Planning Department, the Quality Assurance Division and the Production Engineering Division of the Production Department, the Engineering Division of the Public Works Department, and the Control Division of the Supply Department. Also included are the technical employees in the Offices of the Industrial Managers and the Supervisor of Shipbuilding.

In 1966 the parties commenced negotiations on a second agreement, executing an agreement in 1967. The unit description was changed in this agreement to read as follows:

The Unit to which this AGREEMENT shall apply is composed of all graded and nonprofessional technical employees in the engineering sciences and related fields in the Unit but excluding supervisors and managerial executives.

The record indicates that a listing of individuals who were to receive copies of the 1967 negotiated agreement, which was prepared the day after the agreement was entered into, did not include any individual Production Controllers. The unit description has remained unchanged in subsequent agreements.

In 1970, pursuant to an election conducted under Executive Order 11491, the AFGE was certified as the representative of a unit consisting of:

All general schedule employees of the Long Beach Naval Shipyard, Department of the Navy, Long Beach, California, excluding management officials, supervisors, professional employees, guards, employees performing general personnel work other than in a purely clerical capacity, secretaries to the Shipyard Commander, Director of Industrial Relations and Employee Relations Superintendent, employees of the Naval Communications Systems elements whose positions require cryptographic authorization, employees who operate, repair, or maintain any kind of cryptographic equipment, and employees covered by existing grants of exclusive recognition.

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As noted above, both the Activity and the AFGE contend that the Production Controllers were not included in the IFPTE's unit, were unrepresented prior to the AFGE's certification in the above noted unit and, thus, were included in the AFGE's certified unit.

The record evidence reflects that the Production Controllers are "technical employees". Thus, they are involved in the technical aspects of the repair and maintenance of naval vessels and are responsible for the project management of all phases of shipyard work on a particular ship or project. Production Controllers are required to have a background in planning, scheduling or controlling production. In the performance of their duties, the evidence establishes that they have frequent work contacts with other technical employees and perform duties that are similar to those performed by other employees represented by the IFPTE.

The record reveals that the IFPTE has represented Production Controllers in a number of instances since the AFGE's certification in 1970. Thus, the IFPTE has represented Production Controllers in matters involving a reduction-in-force, a grievance, an alleged pay disparity and a possible disciplinary action. In all these instances, the Activity dealt with the IFPTE as the representative of the Production Controllers and correspondence and communications were directed to the IFPTE as the representative of the employees involved. Moreover, the evidence indicates that the Activity has accepted dues withholding cards from a number of Production Controllers to permit payroll dues deductions on behalf of the IFPTE. On the other hand, there is no evidence that these employees have been considered as members of the AFGE's unit or treated as such. Thus, there is no evidence that any of the Production Controllers participated in the election leading to the certification of the AFGE in 1970. Nor is there any evidence that the AFGE has negotiated on behalf of the Production Controllers or has undertaken any other representational activities on their behalf.

Under all of the circumstances, I find that the Production Controllers are within the scope of the IFPTE's exclusively recognized unit and that the parties have considered them to be within that unit rather than within the AFGE's subsequently recognized unit. As noted above, the unit as originally set forth in the arbitrator's advisory award in 1963 included "All nonprofessional technical employees, including [various positions in different divisions]"; the first negotiated agreement executed in 1964 described the unit as "...composed of all eligible employees in the Technical Unit. This includes all technical employees such as technicians, draftsmen, ..."; and the unit description in the negotiated agreement of 1967 and subsequent negotiated agreements has been "...all...nonprofessional technical employees in the engineering sciences and related fields... ." Thus, each of the unit descriptions encompasses "all" technical employees, which would include the disputed Production Controllers who are technicians. Further, in view of this broad unit description, I consider the various listings of individual classifications in particular divisions of the Activity which

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August 4, 1976

were set forth originally in the unit descriptions (but not in the described unit since 1967) as merely descriptive of the types of positions included within the unit and not as restricting its coverage to the specifically named positions. Moreover, as indicated above with respect to grievance processing and other representational matters and dues withholding, a finding that employees are within the IFPTE's unit is consistent with the treatment of these employees by the parties. Accordingly, I shall clarify the IFPTE's unit to include the Production Controllers.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the International Federation of Professional and Technical Engineers, Local 174, AFL-CIO, previously designated as the American Federation of Technical Engineers, Local 174, was granted exclusive recognition in 1963 at the Long Beach Naval Shipyard, Long Beach, California, be, and it hereby is, clarified by including in said unit Production Controllers, GS-1152, employed in the Planning and Estimating Division of the Planning Department of the Long Beach Naval Shipyard.

Dated, Washington, D. C.
August 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF THE NAVY,
NAVAL INACTIVE SHIP MAINTENANCE FACILITY,
VALLEJO, CALIFORNIA
A/SLMR No. 690

This case involves a representation petition filed by the Laborers International Union of North America, Local 326, (Petitioner) seeking a unit of all Wage Grade (WG) employees of the Activity. The Activity contended that the petitioned for unit is not appropriate because the WG employees do not have a clear and identifiable community of interest apart from other civilian employees of the Activity, and that to separate the WG employees would serve to artificially divide the Activity and create a fragmented unit which would not promote effective dealings or efficiency of agency operations.

The Assistant Secretary found that a unit limited to the WG employees of the Activity, as proposed by the Petitioner, was not appropriate for the purpose of exclusive recognition. In this regard, he noted that while WG employees were primarily engaged in the actual physical maintenance of inactive ships as opposed to the administrative support functions assigned to General Schedule (GS) employees, employees of both groups have a close working relationship by virtue of the highly integrated nature of the Activity's operation. He also noted the existence of regular and frequent contacts between numerous WG and GS employees; the existence of common supervision by each department head of the Activity; and the existence of common fringe benefits and uniform personnel policies and practices. Accordingly, the Assistant Secretary ordered that the petitioned be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL INACTIVE SHIP MAINTENANCE FACILITY,
VALLEJO, CALIFORNIA 1/

Activity

and

Case No. 70-5094

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 326

Petitioner

DECISION AND ORDER

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

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

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Laborers International Union of North America, Local 326, seeks an election in a unit of all Wage Grade (WG) employees of the Naval Inactive Ship Maintenance Facility, Vallejo, California, excluding General Schedule (GS) employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

1/ The name of the Activity appears as amended at the hearing.

The Activity contends that the petitioned for unit is not appropriate because the claimed WG employees do not have a clear and identifiable community of interest apart from other civilian employees of the Activity, and that to separate the WG employees will artificially divide the Activity and create a fragmented unit which will not promote effective dealings or efficiency of agency operations. 2/

The Naval Inactive Ship Maintenance Facility is an independent command located within the confines of the Mare Island Naval Shipyard, Vallejo, California. The mission of the facility is to be custodian of, and provide for the inactivation, security, maintenance, cannibalization, disposal, as well as for the readiness and preparation for activation of, Naval ships and craft as assigned. It consists of an Administrative Department, a Supply Department and a Maintenance Department, each under military supervision and directly under the Activity's Commanding Officer. At the time of the filing of the petition in the instant case, the Activity was authorized a ceiling of approximately 40 civilian employees of whom approximately 29 were WG and the remainder GS employees. No labor organization has ever represented a unit of any of the civilian employees at the Activity.

The record discloses that the civilian employees of the Administrative Department perform their duties aboard the vessel Markab. The department's civilian complement is comprised of four GS employees and two WG employees who are classified a WG-3 Laborers. These WG employees perform typical janitorial duties throughout the Markab and, in doing so, have direct contact with all employees on the vessel, including the GS employees. The evidence also establishes that one of the GS employees is a GS-6 Office Services Supervisor 3/ whose responsibilities include preparing, maintaining, and routing correspondence, assigning and supervising office work, and coordinating the work of secretaries throughout the Activity. As coordinator of personnel records, the GS-6 Office Services Supervisor has contact with all employees of the Activity, including the WG employees.

2/ In view of the disposition herein, I find it unnecessary to consider the Activity's further contention that, because it will cease to function and "go out of business" on December 31, 1976, and all of its civilian personnel will be terminated or transferred to the rolls of the Naval Inactive Ship Maintenance Facility, Bremerton, Washington, as of June 30, 1976, the establishing of the petitioned for unit will not promote effective dealings or efficiency of agency operations under any circumstances.

3/ There is no contention by either party that the GS-6 Office Services Supervisor is a supervisor within the meaning of the Order. Under these circumstances, I make no finding in this regard.

The Supply Department also is located on board the vessel Markab and includes two GS employees and one WG employee. One of the GS employees is a GS-9 Budget Analyst whose primary function is the maintenance of financial records and who works in close association and has daily contact with the department's single WG employee, a WG-5 Warehouseman. The other GS employee is a GS-4 Supply Clerk-Typist who maintains files, types requisitions and, as the Imprest Fund Cashier for the purchase of items on the open market, has regular and daily contact with WG employees when it is necessary for them to obtain supplies. The WG-5 Warehouseman performs a variety of duties with regard to the receipt and distribution of stock which is located in warehouses in close proximity to the pier where the Markab is berthed. The record discloses that the present WG-5 Warehouseman also is the Equal Employment Opportunity representative for all employees of the Activity, including the GS employees.

The Maintenance Department is the largest department of the Activity. It includes 2 GS employees who work aboard the Markab and 26 WG employees who work on the pier and on board the inactive ships berthed near the Markab. ^{4/} The record shows that there is a GS-5 Secretary who, besides serving as the departmental secretary, reviews and authenticates requisitions and access chits brought to the departmental office by WG employees. Also, there is a GS-3 Clerk-Typist who also has considerable contact with the department's WG employees in accounting for man-hours spent and for requisitions in the supply system.

The WG employees of the Maintenance Department are supervised by a WS-7 Foreman Ship Maintenance Mechanic who the parties have stipulated should be excluded from the proposed unit. The Foreman makes work assignments for all WG employees who work on the pier and on board the inactive ships berthed there. Under the Foreman are three WL-7 Ship Maintenance Mechanic Leaders who are each responsible for approximately one third of the maintenance work force. The remaining WG employees of the Maintenance Department include 4 WG-7 Ship Maintenance Mechanics and approximately 18 WG-3 Laborers. The Mechanics are responsible for the repair and issuance of the proper tools, insuring that the proper consumables -- paint, sealants, preservatives, etc.-- are available, and operating the fork-lift trucks and the dock mules to move equipment and material along the pier. The Laborers perform a variety of duties on the pier and on board the inactive ships including janitorial work aboard ship; chipping off old paint and rust; application of sealants, preservatives, paints, etc.; helping to moor and unmoor ships; sweeping down the pier; and sand blasting the pier to remove spilled paint.

As noted above, the mission of the Activity includes the maintenance of Naval ships and craft as assigned. The record reflects that the GS

^{4/} The record shows that a small building on the pier serves the WG employees of the Maintenance Department as an office, lounge, lunch room, locker room, tool room, supply room and store room.

employees are engaged in administrative support functions for the WG employees who are engaged in the actual physical maintenance of inactive ships berthed at the facility's pier. Thus, the record shows that employees of both groups have a close working relationship by virtue of the highly integrated nature of the Activity's operation. Although WG employees are paid on the basis of an hourly rate and GS employees are salaried, the record discloses that both groups of employees have the same fringe benefits; paid holidays; insurance benefits; retirement plan; appeal and disciplinary rights; hours of work; parking facilities; overtime benefits; access to the credit union; access to the beneficial suggestion program; and are subject to the same merit promotion plan and Civil Service Commission and Navy Department Regulations.

While the existence of variances in work performed is a factor to be considered in the determination of "community of interest," in my view, this factor in the instant case is offset by the substantial evidence of the close working relationship between the WG and GS employees at the facility involved. As seen above, all three major subdivisions of the Activity include both WG and GS employees. Moreover, the evidence shows the highly integrated nature of the Activity's operation; the regular and frequent contacts between numerous WG and GS employees; the existence of common supervision by each department head; the same fringe benefits; and uniform personnel policies and practices. Under these circumstances, I find that the WG employees in the petitioned for unit do not share a clear and identifiable community of interest separate from the GS employees at the Activity. Further, I find that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the instant petition be dismissed. ^{5/}

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-5094 be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{5/} See Department of the Army, Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 77. See also ACTION, A/SLMR No. 207, where it was noted, among other things, that the variances between GS employees and Foreign Service employees were offset by the substantial evidence of their close working relationship.

August 5, 1976

A/SLMR No. 691

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

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 691

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1498 (AFGE) alleging essentially that the Respondent violated Section 19(a)(1) of the Order by failing to file a petition for clarification of unit (CU) prior to its refusal to deal with the Union President, who allegedly had assumed a supervisory position.

Noting that when the Complainant's President became a supervisory supply technician he had the authority to evaluate employees' performance, to direct them, and to effectively recommend hiring, awards and promotions, the Administrative Law Judge concluded that he was a supervisor within the meaning of Section 2(c) of the Order. Accordingly, he concluded that the Respondent had not violated Section 19(a)(1) by refusing to deal with the Complainant's President.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-3938(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1498

Complainant

DECISION AND ORDER

On March 31, 1976, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision on the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

1/ With respect to the Complainant's contention that the Respondent was required to file a petition for clarification of unit in order to resolve the question of the employee's supervisory status prior to discontinuing to deal with such employee as president of the Complainant Local, it was noted that in U.S. Marine Corps Air Station, El Toro, FLRC No. 75A-115, the Federal Labor Relations Council indicated that while an agency must be permitted to protect itself against an unfair labor practice by filing an appropriate representation petition, it is not required to do so. Thus, an agency acts at its peril when it unilaterally determines supervisory status since an erroneous determination could support a violation of the Order. The evidence in the instant case, however, establishes that Thomas Daniels, in fact, was a supervisor within the meaning of Section 2(c) of the Order.

ORDER

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



IT IS HEREBY ORDERED that the complaint in Case No. 32-3938(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 5, 1976

Bernard E. DeLury
Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

.....
 In the Matter of :
 U.S. ARMY ELECTRONICS COMMAND :
 FORT MONMOUTH, NEW JERSEY :
 Respondent :
 v. : Case No. 32-3938 (CA)
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, AFL-CIO, LOCAL 1498 :
 Complainant :

 Captain Patrick V. Terranova
 Office of Staff Judge Advocate
 Fort Monmouth, New Jersey
 For the Respondent
 Joseph Girlando
 National Representative
 America Federation of Government
 Employees, AFL-CIO
 300 Main Street
 Orange, New Jersey 07050
 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 1498 ("the Union") against U.S. Army Electronics Command, Fort Monmouth, New Jersey ("the Activity") on January 28, 1975.

The complaint alleges that the Activity violated Sections 19(a)(1), (2) and (5) of Executive Order 11491, as amended ("the Executive Order"), by not filing a unit clarification petition with the Department of Labor before discontinuing to deal with Mr. Thomas Daniels as president of

-2-

Local 1498. The Activity contended that when Mr. Daniels accepted a supervisory position, the Activity had no alternative but to refuse to deal with Mr. Daniels as president of the local.

In a decision dated August 18, 1975, the Acting Assistant Regional Director dismissed the portion of the complaint with regard to Sections 19(a)(2) and (5) and limited the complaint to Section 19(a)(1) of the Executive Order. By a decision dated September 30, 1975, Assistant Secretary of Labor Paul J. Fasser, Jr. denied as untimely the Union's application for reversal of the dismissal.

A hearing was held at Fort Monmouth, New Jersey on November 20, 1975. Both parties were present and were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to adduce relevant evidence. Briefs were filed by both parties and have been carefully considered.

Upon the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation.

FINDINGS OF FACT

The Union is the recognized exclusive bargaining representative of certain employees at the Activity.

During 1972 and 1973, the Activity accomplished an overall reorganization and reduction in force by which its Philadelphia unit ceased to exist and was absorbed into the Activity at Fort Monmouth. Approximately 1200 of 2500 employees transferred from Philadelphia to Fort Monmouth.

Mr. Thomas Daniels was employed as a GS-8 non-supervisory equipment specialist by the Activity at Philadelphia. There was no comparable vacancy at Fort Monmouth. There were only twenty-one GS-8 vacancies. Of these only two were supply-type positions. Both bore the title; "Supervisory Supply Technician, GS-2005-08." On June 11, 1973, Mr. Daniels accepted one of these positions. 1/

1/ In accepting, Mr. Daniels added to the form, "Pending appeal to Civil Service Commission and Review of Non-Career Offer."

In November 1972, Mr. Daniels was elected president of the Union. His two year term expired in November, 1974.

Mr. Daniels assumed his present position as Supervisory Supply Technician effective March 24, 1974, although he had been previously detailed to the position while at Philadelphia.

By letter of March 20, 1974, the Activity's Civilian Personnel Officer, Mr. MacKenzie informed Mr. Daniels that because Section 1(b) of the Executive Order prohibits supervisors from participating in the management of a labor organization it would be necessary for Mr. Daniels to relinquish his position as president of the Union. By letter of April 5, 1974 Mr. Daniels replied that he would not comply with this request.

Following this reply, a meeting was held in May 1974 between the Executive Committee of Local 1498 and Mr. Paul Coleman of the Activity's Civilian Personnel Office. The Union requested Mr. Coleman to explore the availability of other non-supervisory positions at Fort Monmouth to which Mr. Daniels could be assigned. Mr. Coleman personally compiled a roster of GS-8 positions throughout the Activity and forwarded it to the Union. It was again determined that there were no vacant non-supervisory GS-8 positions for which Mr. Daniels qualified.

The Activity referred the problem to its higher headquarters, the Army Materiel Command, (AMC). The guidance received from AMC was that because Mr. Daniels is a supervisor he can no longer be recognized as president of the Union.

Pursuant to AMC's guidance, by letter of September 4, 1974 the Activity's commander, Major General Foster advised Mr. Daniels that he will no longer be recognized "as President, a management official or as a representative of AFGE Local 1498."

The Union then filed the complaint herein.

At the hearing, Mr. Daniels and William L. Washington, a co-worker, testified for the Union while Donald L. Fink, Mr. Daniels' supervisor, and Mr. Paul T. Coleman and Ms. Muriel Marloff of the Activities Civilian Personnel Office testified for the Activity. The testimony was not contradictory, spelling out the facts set forth above as well as the following further facts.

The witnesses and exhibits confirmed that as Supervisory Supply Technician, GS-8, Mr. Daniels was Chief of the Customer

Expediting Unit which included 12 employees. In this position he recommended personnel in his unit for awards; signed time slips; approved leave applications; signed a referral and selection register as supervisor; recommended Mr. Washington for a merit promotion by completing a 4 page form and signing as Mr. Washington's supervisor; signed a form in the supervisor block recommending Mr. Washington for a course of instruction; signed a form in the supervisor block indicating that he had given an orientation to a new member of the unit; and signed disposition forms as supervisor.

Mr. Daniels' job description indicated that his duties included assigning work, evaluating the performance, and taking required minor disciplinary action with respect to employees in the unit.

Mr. Daniels confirmed the foregoing but contended that he was performing these functions and serving in this position as the "leader" of the unit rather than as its supervisor, and that even though he was called a supervisor he was a "figure-head."

Mr. Washington, who was also active in the union, testified that he too regarded Mr. Daniels as "leader" of the unit who was merely "physically sitting in the position of supervisor."

CONCLUSIONS OF LAW

Section 1(b) of the Executive Order prohibits a supervisor from serving as an Union president. That section reads in pertinent part:

"...this section does not authorize participation in the management of a labor organization or acting as a representative of such organization..."

It is not disputed that between November, 1972 and November, 1974, Mr. Daniels was president of Local 1498.

Thus if Mr. Daniels was in fact a supervisor during that period of time, the Activity was correct in concluding that it could not deal with him as an officer of the Union.

Section 2(c) of the Executive Order defines the term, "supervisor." Between March and November, 1974, the critical period herein, that section read as follows:

"Supervisor" means an employee having authority in the interest of the agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In interpreting this provision, the Federal Labor Relations Council and the Assistant Secretary of Labor have held that Section 2(c) is written in the disjunctive and therefore the exercise by an employee of any one of the functions set forth in Section 2(c) would make that employee a supervisor within the meaning of the Executive Order. Furthermore an employee need not have unqualified or unreviewed authority over the functions set forth to be deemed a supervisor. United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11.

Mr. Daniels had the authority to effectively recommend hiring; to effectively recommend awards; to effectively recommend promotions; to evaluate employees' performance; and the responsibility to direct them, among other things.

I therefore conclude that Mr. Daniels was a supervisor within the meaning of Section 2(c). Therefore, the Activity was correct in refusing to deal with him as president of the Union. 2/

During the hearing and in its brief the Union attempted to focus attention on the further issue of, "whether or not management as the moving party with regard to Mr. Daniels' situation, was required to file a unit clarification petition with the Department of Labor prior to taking action to exclude anyone."

However, by decision dated August 18, 1975, Acting Assistant Regional Director William O'Laughlin removed that

2/ There is no evidence that the Activity acted in bad faith in this matter. On the contrary, pursuant to Mr. Daniels' and the Union's request, the Activity attempted to locate a non-supervisory GS-8 position but there was no vacant non-supervisory GS-8 position for which Mr. Daniels qualified.

issue from the case. Mr. O'Laughlin therein stated:

You also contend that Respondent has refused to recognize you as the President of Local 1498 and thus has refused to accord appropriate recognition to Local 1498 in violation of Section 19(a)(5) of the Order. No evidence has been adduced which would form a basis to conclude that Respondent has failed to accord appropriate recognition to Local 1498. Rather, the evidence discloses that subsequent to your promotion to an alleged supervisory position, Respondent dealt with an continued to recognize Local 1498 as the exclusive representative of certain employees of the U.S. Army Electronics Command.

In that decision, Mr. O'Laughlin dismissed the portion of the complaint pertaining to alleged violations of Sections 19(a)(2) and (5) of the Executive Order.

In a decision dated September 30, 1975, Assistant Secretary of Labor Paul J. Fasser denied as untimely the Union's application for reversal of the dismissal.

As a consequence of the foregoing, the only issue before me is whether or not the Activity violated Section 19(a)(1) of the Executive Order. As I have stated, I find that the Activity acted properly and did not violate Section 19(a)(1).

RECOMMENDATION

Having found that Respondent has not engaged in conduct violative of Section 19(a)(1) of the Executive Order, I recommend that the complaint be dismissed in its entirety.


EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: March 31, 1976
Washington, D.C.

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

DEPARTMENT OF THE NAVY,
MARINE CORPS SUPPLY CENTER,
BARSTOW, CALIFORNIA
A/SLMR No. 692

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1482, AFL-CIO (Complainant), alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain about the implementation of a decision to shut down the Activity during Thanksgiving and Christmas and that such action changed the existing negotiated agreement.

The Administrative Law Judge concluded that the record failed to establish that the Respondent violated Section 19(a)(1) and (6) of the Order. In this connection, he noted that there was no dispute that the Respondent's decision to shut down operations was privileged under Section 12(b) of the Order and, in the instant case, the Respondent notified the Complainant of the contemplated close down and solicited suggestions from the Complainant, even though by virtue of Section 11 and 12 of the Order it need not have done so. Moreover, he noted that the February 26, 1975, notice of the shutdown, which provided for the monitoring of leave usage to assure that unit employees maintained a leave balance of 48 hours to cover leave during the close down periods, was merely a statement of the procedures that were followed during previous close downs. Additionally, he found that the Complainant did not, at any time, request to bargain about the procedures involved and the impact of the decision. With respect to the allegation that the leave monitoring procedures herein violated Article 9 of the negotiated agreement between the parties, the Administrative Law Judge concluded that as the terms of the negotiated agreement were not so clear that it could be said that the procedures clearly violated the Order, such a matter is better left to arbitration. He noted that although a breach of contract can also be a violation of the Order, in the instant case, as the agreement terms were not clear and the Respondent was following procedures used during prior shutdowns, if there were a violation of the agreement it was not of the flagrant and persistent type to justify a conclusion that the Respondent violated Section 19(a)(6) of the Order.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
MARINE CORPS SUPPLY CENTER,
BARSTOW, CALIFORNIA

Respondent

and

Case No. 72-5329(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1482, AFL-CIO

Complainant

DECISION AND ORDER


On March 31, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

1/ At page 2 of his Recommended Decision and Order, the Administrative Law Judge inadvertently noted that the instant complaint was filed on April 21, 1972. The date April 21, 1972 should read April 21, 1975. This inadvertent error is hereby corrected.

IT IS HEREBY ORDERED that the complaint in Case No. 72-5329(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 5, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



..... :
 In the Matter of :
 :
 DEPARTMENT OF THE NAVY :
 MARINE CORPS SUPPLY CENTER :
 BARSTOW, CALIFORNIA :
 :
 Respondent :
 :
 and : Case No. 72-5329
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 1482 :
 :
 Complainant :
 :

RONALD FUHRMEISTER, President
 AFGE, Local 1482
 Post Office Box 1030
 Barstow, California 92311
 For the Complainant

JOHN J. CONNERTON, Labor Relations Advisor
 Labor Disputes & Appeals Section
 Department of the Navy
 Office of Manpower Management
 Washington, DC 20390
 For the Respondent

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

Recommended Decision and Order

Statement of the Case

This proceeding arises under Executive Order 11491, as amended (hereinafter called the Order). A Notice of Hearing on Complaint was issued by the Assistant Regional Director, San Francisco Region, on September 26, 1975,

based on a Complaint filed on April 21, 1972 and an Amended Complaint filed subsequently by Local 1482, American Federation of Government Employees, AFL-CIO, (hereinafter called Local 1482 AFGE or the Union) against the Department of the Navy, Marine Corps Supply Center, Barstow, California (hereinafter called the Activity or the Respondent). The Notice of Hearing on Complaint was issued with respect to the alleged violations of Sections 19(a)(1) and (6) of the Order as set forth in the Complaint and Amended Complaint. The Union basically contends that the Activity implemented a decision to shut down the Activity during Thanksgiving and Christmas and in doing so changed the existing collective bargaining agreement and failed to bargain about the implementation of the decision.

A hearing was held before the undersigned in Barstow, California. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. The parties were afforded an opportunity to argue orally and to file briefs. The parties filed briefs, which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations.

FINDINGS OF FACT

1. The Marine Corps Supply Center is located in Barstow, California. The Activity is composed of a number of Offices and Divisions including inter alia, the Repair Division.

2. In performing its mission, the Activity employs approximately 1700 employees in the bargaining unit. The Repair Division is the largest Division within the bargaining unit, with some 701 employees.

3. AFGE Local 1482 has been the exclusive bargaining representative since 1964. The Complainant and Respondent are parties to a negotiated agreement which was accepted by the parties on February 14, 1975 and approved by the Office of Civilian Manpower Management on April 29, 1975. There were four (4) prior labor agreements, and amendments to one, entered into by the parties.

4. The agreement in effect at the time of the incident giving rise to the Complaint was the prior negotiated agreement executed on October 17, 1972 and approved by the Office of Civilian Manpower Management on November 10, 1972.

5. The Complainant is the exclusive representative a unit composed of "All graded and ungraded employees of the U. S. Marine Corps Supply Center, Barstow, California," with the usual supervisory, management, etc. exceptions.

6. On February 20, 1975, a Joint-Labor Management Consultation meeting was held between representatives of AFGE Local 1482 and the Activity. At this meeting, one of the topics of discussion was that consideration was being given to observing a period of reduced operations the day following Thanksgiving and the period from December 20, 1975 through January 4, 1976. AFGE Local 1482 was advised that if the proposed action was taken, it would require the use of annual leave by employees except those who were required to maintain essential operations. AFGE Local 1482 indicated that its comments would be submitted in writing within the next week.

7. On February 24, 1975, the Union submitted its response by letter. The response discussed a Union proposal that annual leave for this "close down period" be proportionate with respect to annual leave used the rest of the year and stated that if it is more economical to close for two weeks, Administrative Leave should be granted to compensate for the economic gain derived by the savings of the Center's utility costs. However, the Union pointed out that a two week shut down would adversely affect the Activity's performance of its duties.

8. On February 26, 1975, the Respondent notified AFGE Local 1482 of its intent to reduce operations for the day after Thanksgiving and the period from December 25, 1975 through January 4, 1976.

9. Also on February 26, 1975, the notice of the reduced operations was issued by the Commanding General to Civilian Employees. The notice set forth the reason for the reduced operation, i.e. greater efficiency because of a great amount of leave normally taken during this time. It also stated that non essential employees, who had annual leave to their credit would be required to take annual leave and those who have none or who do not wish to use accrued annual leave may request leave without pay. Supervisors were instructed to monitor annual leave of employees to insure the employees will have 48 hours of annual leave accrued to cover the periods of reduced operations.

10. Subsequently, during 1975, various employees had leave requests disallowed, in whole or in part, by their supervisors so that these employees would have accrued sufficient hours of annual leave to be used during the close downs.

11. The annual leave provision contained in Article 9 of the negotiated agreement in force at the time stated, in pertinent part:

ANNUAL LEAVE

"Section 1. Employees shall earn and be granted Annual Leave in accordance with applicable laws, regulations and Center Policy. The Center agrees to maintain a liberal leave policy and to grant Annual Leave to employees for the purpose of rest, relaxation, recreation, rehabilitation, etc., consistent with workload requirements. Employees are encouraged to schedule Annual Leave in advance to minimize work interruption caused by large numbers of employees taking leave at the same time.

"Section 2. The granting of Annual Leave, when requested by the employees, shall not be restricted to the extent that such employees forfeit excess leave because of the restriction on accumulation of Annual Leave. The non-use of Annual Leave should not in itself be considered desirable or commendable.

"Section 3. The immediate supervisor is responsible for the scheduling and granting of Annual Leave on an equitable basis with due regard for the needs of the Center and the welfare of the employee. Employees are encouraged to schedule excess Annual Leave prior to 1st November of each year.

"Section 7. When the Center schedules a shutdown of a shop or activity, every reasonable effort will be made to provide work for employees not having annual leave to their credit."

12. The leave administration for Civilian employee is contained in Center Order 12630.SF, dated June 21, 1974. It incorporates by reference the Agreement between Complainant and Respondent. It delegates the leave granting authority to employee's immediate supervisor and asserts

the right of management to fix the time at which leave may be taken in accordance with operational needs.

13. Subchapter 3 of the Federal Personnel Manual (FPM) 630.7 discusses annual leave and the requirements with regard to granting annual leave. In relevant part it states:

"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 employee."

14. Subchapter 3 of Navy's Civilian Manpower Management Instructions (CMMI) 630.3 sets forth the Navy's authority in the granting of annual leave. In relevant part it states:

"Management has the primary responsibility for determining when and the extent to which annual leave is to be granted, as well as the responsibility of requiring annual leave to be taken when circumstances require such action."

15. There have been temporary shutdowns in the past which were confined to the Repair Division. In the prior close downs leave was apparently handled in the same manner as in the instant case. For example, in a close down in the Repair Division involving eight (8) work days, December 21, 1970 through January 4, 1971, employees were directed to request annual leave for the periods of the close down if they were not included in the skeletal work force. Those employees who had not accrued sufficient leave were to be included in the skeletal work force whenever possible and employees not working, who did not have sufficient annual leave could request leave without pay.

16. In a 1973 proposed close down within the Repair Division, a memorandum was issued, the subject of which was "Monitoring of Annual Leave." In relevant part, the memorandum states:

"in order to minimize advancement of leave to cover the close down period, all supervisors should be reminded to closely monitor the leave of all personnel who are not scheduled to remain aboard during the close down period."

17. Supervisors have the responsibility for planning and effectively scheduling annual leave throughout the year. Also, with respect to the prior close downs in the Repair Division, etc., Supervisors were to make sure employees had saved sufficient annual leave to cover the period of the shut down.

18. There is absolutely no evidence nor is it alleged that there is any anti-union animus on behalf of the Respondent.

Conclusions of Law

First there is no dispute that the Activity's decision to shut down the base during the Christmas and Thanksgiving periods was privileged under Sections 12(b) of the Order.

Rather the Union contends that the Activity violated Sections 19(a)(6) and (1) of the Order by issuing the Notice on February 26, 1975 which in effect set forth the methods for implementing the decision to close the base at Christmas. More specifically, Local 1482 AFGE refers to that portion of the notice that required supervisors to make sure employees accrued 48 hours of annual leave to be used during the close downs. 1/ In effect the Union was protesting this close monitoring of leave and the disallowing of leave which the supervisors did in order to insure that the employees accrued the required 48 hours of annual leave.

The Order is clear that, even when an Activity is privileged to make certain changes without bargaining with the Union, it must, nevertheless, upon request, bargain about the method or procedures it intends to use to implement the change, cf. Federal Railroad Adm. A/SLMR No. 418 and FAA, Nat'l Aviation Facilities Experimental Center, Atlantic City, N.J. A/SLMR No. 438, and concerning the impact of such change on any adversely affected employees. cf. Pa. Army Nat'l. Guard, A/SLMR No. 475. In the instant case, the Activity notified the Union of the contemplated, close down and

1/ The Union's allegations do not raise the issue that employees who did not work during the christmas close down would have to take annual leave, but rather that employees were to be made to accrue the annual leave to be used during the close down.

solicited Union suggestions, even though the Activity, by virtue of Sections 11 and 12 of the Order, did not have to. When the Activity issued the February 26 Notice providing for the monitoring of leave and the requiring that employees, except those designated to work during the close down, in effect save 48 hours of annual leave to be used during the close down, it was merely stating the procedures that were followed during the previous close downs of the Repair Division. 2/ The Union did not, at any time, request to bargain about these implementation procedures, even though the the Activity was still in a position to reconsider and change them and had taken no step that would have made such a review or reconsideration difficult or a meaningless gesture. Therefore, although it might have been preferable had the Activity advised the Union of the implementation procedures before issuing the February 26 notice. nevertheless the Union did not request to bargain about the procedures and the Activity at no time refused to bargain about these procedures. Therefore, it is concluded that the Activity did not violate Section 19(a) (6) of the Order by refusing to bargain with Local 1482 AFGE about the procedures to implement the Christmas and Thanksgiving close downs.

Further there is no evidence that the Union at anytime requested to bargain about the adverse impact concerning the decision to close the base during Christmas and Thanksgiving. Thus it is concluded that the Activity did not refuse to bargain about the impact of its decision.

With respect to the allegation that the afore described procedures with respect to leave violated Article 9 of the contract, it is concluded that the terms of the contract are not so clear that it can be said the procedures clearly violated the contract. This is a matter better left to an Arbitrator to determine the precise meaning of Article 9 and whether the procedures violated it. Finally, although a breach of contract can also be a violation of the Order of

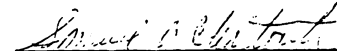
2/ It is noted that apparently some supervisors had not, during the previous close downs, followed their instructions.

flagrant and persistent and a serious unilateral change of working conditions, 3/ it is concluded, in the instant case, that the contract terms are not clear and the Activity was following procedures it had previously used during close downs. Thus, this alleged violation of the contract, if it indeed be a violation of the contract, is not of the flagrant and persistent type to justify a conclusion that the Activity violated Section 19(a) (6) of the Order.

In light of all of the above it is concluded that the record fails to establish that the Activity violated Sections 19(a) (6) and (1) of the Order.

Recommendation

Based upon all of the foregoing, it is recommended that the subject complaint be dismissed in its entirety.



 SAMUEL A. CHATOVITZ
 Administrative Law Judge

Dated: March 31, 1976
 Washington, D. C.

3/ See V. A. Hospital, Charleston, S. C. A/SLMR 87; NASA, Kennedy Space Center A/SLMR 223; V.A. Center, A/SLMR No. 335; and Dept. of the Air Force, Vanderberg AF Base A/SLMR No. 485.

August 5, 1976

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

GENERAL SERVICES ADMINISTRATION,
CENTRAL OFFICE, WASHINGTON, D.C.
A/SLMR No. 693

This case involved a petition filed by the Activity seeking to clarify the status of the employees of the newly created Federal Preparedness Agency (FPA) of the General Services Administration (GSA). The FPA consists of two organizational elements, formerly part of the U. S. Army Corps of Army Engineers, who were transferred to the GSA and combined with the former Office of Preparedness employees of the GSA to form the new agency. The Activity took the position, in agreement with the Intervenor, the National Federation of Federal Employees, Local 1705, Independent (NFFE), that the employees of the new agency, including those former Army employees, should be accreted to the NFFE's exclusive unit of all the Activity's Central Office employees located in the metropolitan Washington, D. C. area. The American Federation of Government Employees, Local 1754, AFL-CIO (AFGE), which represented both former Army groups of employees exclusively prior to the transfer, took the position that the record did not support an accretion as both groups of employees were transferred substantially intact to the FPA from the Army and remain distinct and identifiable after the transfer. In effect, the AFGE contends that the FPA became the "successor" employer to its units.

Under all of the circumstances, the Assistant Secretary concluded that the record did not support an accretion and that the GSA became the "successor" employer with respect to the two units in question. In reaching this determination, the Assistant Secretary considered the three successorship criteria established by the Federal Labor Relations Council in its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 74A-22: (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. With respect to (1), the Assistant Secretary noted that the two units were transferred essentially intact to the FPA where they now constitute identifiable organizational components of the FPA. With respect to (2), the Assistant Secretary noted that the units were transferred essentially intact with the unit employees remaining at the same location performing the same work under the same immediate supervision, and, therefore, they continued to enjoy a clear and identifiable community of interest. Moreover, the Assistant Secretary noted that accreting the employees of the two units in question to the NFFE's unit, as suggested by the Activity and the NFFE, would have led to fragmentation. Therefore, he concluded that the finding of successorship herein would promote effective dealings and efficiency of agency operations. Accordingly, and noting with respect to (3) above, that no

question concerning representation had been raised, the Assistant Secretary found the GSA to be the "successor" employer with respect to the employees in the two units involved, obligated to accord the AFGE recognition as the exclusive representative.

With respect to a question raised at the hearing regarding the status of certain former Office of Preparedness employees located at a classified facility operated by the FPA some 50 to 65 miles from Washington, D. C., the Assistant Secretary concluded, based on the evidence adduced at the hearing, that they were never intended to be covered under the NFFE's unit definition, i.e. all Central Office employees in the metropolitan Washington, D. C. area. However, he found that there was insufficient information to make a determination as to whether those employees had accreted to the AFGE's unit located at the classified facility.

Accordingly, the Assistant Secretary ordered that the NFFE's unit be clarified to reflect the exclusion of the former Office of Preparedness employees located at the classified facility, and that the AFGE's units be changed to reflect the successorship of the Federal Preparedness Agency.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
CENTRAL OFFICE, WASHINGTON, D.C.

Activity-Petitioner

and

Case No. 22-6382(CU)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1705, INDEPENDENT

Labor Organization

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1754, AFL-CIO

Intervenor

DECISION AND ORDER CLARIFYING UNIT

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

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

The Activity-Petitioner filed the subject petition to clarify the status of certain employees of the newly created Federal Preparedness Agency (FPA), an organizational component of the Activity-Petitioner. In this regard, the Activity-Petitioner takes the position, in agreement with the National Federation of Federal Employees, Local 1705, Independent (NFFE), that those employees of the FPA who were transferred from the Army Corps of Engineers had accreted to a unit exclusively represented by the NFFE. On the other hand, the Intervenor, American Federation of Federal Employees, Local 1754, AFL-CIO (AFGE) takes the position that the record does not support the contentions of the Activity-Petitioner and the NFFE, and contends that the units of employees of the Army Corps of Engineers for which it holds exclusive representation rights were transferred substantially intact to the FPA and remain distinct and identifiable. Without expressly so stating, the AFGE, in effect, contends that the FPA became the "successor" employer of its units of employees.

The record discloses that on April 18, 1974, the NFFE was certified as the exclusive representative of all nonprofessional employees of the General Services Administration (GSA), Central Office, metropolitan Washington, D. C. area, excluding those employees already covered by exclusive recognition. This residual unit included, among others, the employees of the Office of Preparedness of the Activity-Petitioner located in the metropolitan Washington, D. C. area. On September 11, 1969, the AFGE was granted exclusive recognition for a unit described as all employees of the Western Virginia Area Office of the Army Corps of Engineers and on July 29, 1971, the AFGE was certified as the exclusive representative of all professional and nonprofessional employees of the U. S. Army Engineer Mathematical Computation Agency.

Prior to July 29, 1975, the Office of Preparedness of the Activity-Petitioner was responsible for coordinating the emergency preparedness functions of the Federal government. It was subdivided organizationally into two offices: the Civil Crisis Preparedness Office and the Conflict Preparedness Office. In carrying out its functions, the Office of Preparedness had the assistance and cooperation of the Western Virginia Area Office of the Army Corps of Engineers and the U. S. Army Engineer Mathematical Computation Agency. In this connection, under the policy direction of the Office of Preparedness, the Western Virginia Area Office was responsible for the maintenance of a classified facility which serves as the site of operations for the Federal government in the event of a national emergency, and the U. S. Army Engineer Mathematical Computation Agency provided the analytical and technical capability for the development and implementation of programs and policy designed by the Office of Preparedness.

On July 29, 1975, the FPA was created as an organizational component of the Activity-Petitioner. Under the direction of the former head of the Office of Preparedness, the new agency combined all of the functions of the former Office of Preparedness, the former Western Virginia Area Office and the former U.S. Army Engineer Mathematical Computation Agency. The staffing of the new agency was accomplished by the transfer of all the employees of the three organizations into the FPA. Thus, under the Director, the new agency is organizationally subdivided into the following three offices, each headed by an Assistant Director: the Civil Crisis Preparedness Office, the Conflict Preparedness Office and the Research, Development and Program Coordination Office. The Civil Crisis Preparedness Office assumed the functions of the organizational subdivision of the same name under the Office of Preparedness, and the employees of that subdivision of the Office of Preparedness were transferred intact to the new agency. The Research, Development and Program Coordination Office is composed of the five divisions of the former U.S. Army Engineer Mathematical Computation Agency, which is now known as the Mathematics and Computation Laboratory (MCL), and is supervised by the same individual as prior to the transfer. 1/

1/ At the time of the hearing herein, it was not clear as to whether this office would include functions in addition to those of the MCL, or whether the head of the MCL would become the assistant director of the office.

With regard to the Conflict Preparedness Office, the record reveals that, except for its Special Operations Division, this office also was transferred essentially intact from the Office of Preparedness to the FPA. However, a new division entitled the Western Virginia Operations Office was added which included the functions of the former Western Virginia Area Office and the Special Operations Division. The Western Virginia Operations Office includes the approximately 280 employees of the former Western Virginia Area Office together with approximately 15 former Office of Preparedness employees who were located at the classified facility prior to July 29, 1975, and who had made up the Special Operations Division. As a result of the transfers and reorganization attendant to the creation of the FPA, certain changes in responsibilities and authority have occurred at the classified facility. The Western Virginia Operations Office is now under the direction of a Site Director, a former Office of Preparedness employee. Under the Site Director is the Chief of Engineering and Services, the former Area Engineer of the Western Virginia Area Office who continues to supervise the majority of the employees of the former Western Virginia Area Office. Thus, the Site Director has the administrative and supervisory authority over the Western Virginia Operations Office and the Chief of Engineering and Services no longer has the administrative authority he previously exercised prior to the transfer.

The record reflects that all of the employees involved, including those formerly under the Army, have remained at essentially the same locations, performing the same work, under the same first line supervision as prior to the creation of the new agency. While contacts among the higher level employees have increased somewhat since the FPA's creation, the record reflects that such contacts occurred frequently prior to the creation of the FPA. In addition, no transfers or interchange between former GSA employees and former Army employees have occurred because of the creation of the FPA. However, the area of consideration for promotions and reductions in force has changed significantly for those FPA employees who transferred to the GSA from the Army. In this connection, the area of consideration for promotions has been expanded from within their previous Army organizational entity to GSA-wide in the local commuting area and, for reductions in force, the area of consideration has been expanded from within their former Army organizational entity to FPA-wide in the local commuting area. ^{2/}

Personnel policies and practices also have changed for the former Army employees as a result of the transfer and the fact that the GSA was in the process of recentralizing its personnel functions at the time of the hearing in the matter. Because the recentralization of personnel was occurring at the time of the hearing, the record is unclear as to

^{2/} For area of consideration purposes, the record discloses that the FPA considers the classified facility part of the local commuting area of Washington, D. C., even though it is located 50-65 miles from Washington, D. C.

some aspects of the administration of personnel policies, such as where personnel folders for the employees involved were to be kept and the level of delegation of authority for certain significant personnel matters. However, it appears from the record that the FPA Director has been delegated the authority for most personnel matters, and that he will be assisted in carrying out his responsibilities in this area by the FPA Division of the Central Personnel Office which will provide personnel services for him, but will not be under his line authority.

With respect to geographical proximity, the record reflects that prior to and after the creation of the FPA all of the former Office of Preparedness employees were located in the GSA Building in Washington, D. C., with the exception of the 15 employees located at the classified facility. All of the Western Virginia Area Office employees were located at the classified facility where they are presently located. The former U. S. Army Engineer Mathematical Computation Agency employees were assigned to three separate locations prior to the transfer which also did not change after the transfer. Of the 128 MCL employees, 18 are located in Charlottesville, Virginia, 55 are located at the GSA Building in Washington, D. C., ^{3/} and the rest are located at the classified facility. However, those located at the classified facility are not under the direction of the Site Director and do not have daily work contacts with the Western Virginia Operations Office employees.

With respect to these various locations, the parties took conflicting positions regarding the inclusion or exclusion of the employees involved. The Activity and the NFFE took the position that the definition of the NFFE's unit, i.e., all nonprofessional employees in the metropolitan Washington, D. C. area, included the employees located at the classified facility which, as noted above, is located some 50-65 miles from Washington, D. C. In this connection, they note the fact that the names of the eligible former Office of Preparedness employees located at the classified facility, who are now part of the Western Virginia Operations Office, appeared on the eligibility list in the election in which the NFFE was certified as the exclusive representative. In addition, they note that the Wage Grade employees at the classified facility were included in the metropolitan Washington, D. C. survey with respect to the determination of their wages.

Another issue raised at the hearing was the status of the Charlottesville, Virginia, employees of the MCL. Both the Activity and the NFFE agreed that these employees did not come within the NFFE's unit definition of metropolitan Washington, D. C. and, therefore, would not be included in the NFFE's unit if an accretion were found. The AFGE contends, however, that it has successfully represented the employees in the MCL in the three separate locations and that to find an accretion as argued by the Activity and the NFFE would leave the Charlottesville employees

^{3/} The record reflects that these employees moved from another location in the Washington, D. C. area some four months prior to the creation of the FPA, but there was no evidence that the move was a result of the creation of the FPA.

unrepresented and would fragment the MCL. The AFGE also notes that the professional employees among the MCL employees would lose their representation if the MCL employees were accreted to the NFFE's unit of nonprofessional employees. Moreover, it contends that, while the NFFE's unit as defined includes both General Schedule and Wage Grade employees, there are no Wage Grade employees among the over 1600 employees it represents. Therefore, the AFGE argues that its predominantly Wage Grade unit of Western Virginia Operations Office employees should not be accreted into a unit which is composed of General Schedule employees because General Schedule and Wage Grade employees have different representational needs.

Under the circumstances outlined above, I find that no accretion to the unit represented by the NFFE occurred as a consequence of the creation of the FPA and the transfer of employees from the Army to the Activity-Petitioner. Rather, I find that the GSA is the "successor" employer with respect to the two units in question represented by the AFGE. See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 74A-22. In its Aberdeen decision, the Federal Labor Relations Council established the following three criteria that must be met in order to find that a gaining employer is a successor obligated to recognize an exclusive representative of a predecessor agency or activity: (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. As noted above, the record herein reflects that the bargaining unit exclusively represented by the AFGE at the former Western Virginia Area Office was transferred intact to the FPA, where it presently constitutes a complete organizational component of the Western Virginia Operations Office. Further, the bargaining unit represented exclusively by the AFGE at the former U.S. Army Engineer Mathematical Computation Agency was transferred intact to the FPA, where it presently constitutes a complete organizational component of the FPA. Under these circumstances, and noting that each unit is presently separate and identifiable and encompasses a homogeneous grouping of employees within the FPA, I find that each of the units was transferred to the FPA "substantially intact."

Further, having applied the three criteria established in Section 10(b) of Executive Order 11491, as amended, I find that the appropriateness of the AFGE units remains unimpaired subsequent to their transfer to the Activity-Petitioner. ^{4/} Thus, as noted above, each of the units was transferred intact with the unit employees remaining at the same locations, performing the same tasks, under the same immediate supervision as prior to the transfer. Under these circumstances, I find that employees in each of the units continue to enjoy a clear and identifiable community of interest separate and distinct from all other employees of the Activity-Petitioner. Further, I find that such units will promote

^{4/} See Defense Supply Agency, Defense Contract Administration Services Region, Cleveland, Ohio, Defense Contract Administration Services Office, Akron, Ohio and Columbus, Ohio, A/SLMR No. 687

effective dealings and efficiency of agency operations. Thus, as indicated above, each of the units involved encompasses a homogeneous grouping of employees within two organizational components of the FPA. Moreover, in my view, the arguments of the Activity-Petitioner and the NFFE that the continued existence of such units would not promote effective dealings and efficiency of operations are, at best, speculative and conjectural and are not supported by the record herein. Thus, in arguing for the accretion of the two AFGE units into the NFFE's unit, the Activity-Petitioner and the NFFE emphasized the desirability of avoiding fragmentation of the new organization into several bargaining units. However, they did not refer to the fact that if an accretion were to be found, a portion of the MCL located at Charlottesville, Virginia, as well as the professional employees of the MCL, would be excluded from the NFFE's unit, leading to the artificial fragmentation of that organizational component. Nor did the NFFE and the Activity-Petitioner address themselves to the inherent problems in effective dealings where a portion of the unit would be located at the Western Virginia Operations Office, a distance of some 50-65 miles from the location of the bulk of the employees in the unit. Accordingly, and noting that no question concerning representation has been raised as to the representative status of the AFGE, I find the Activity-Petitioner to be a "successor" employer of the employees in the AFGE's units, obligated to accord the AFGE recognition as the exclusive representative of the employees in such units.

Finally, I find insufficient basis to support the assertions of the Activity-Petitioner and the NFFE that the residual unit currently represented exclusively by the NFFE includes the employees formerly employed by the Office of Preparedness located at the classified facility in Western Virginia. The unit as certified included all employees of the GSA Central Office in metropolitan Washington, D. C., excluding, in addition to the normal exclusions, those employees otherwise represented exclusively in other units. The Activity-Petitioner and the NFFE argue that the definition of "metropolitan Washington, D.C." is broad enough to encompass the classified facility which, as noted above, is some 50-65 miles from Washington, D.C. In support of this argument, they note that Wage Grade employees at the classified facility are included in the metropolitan Washington, D.C. survey for purposes of determining their wages and the fact that the names of eligible former employees of the Office of Preparedness located at the classified facility appeared on the eligibility list used in the election which resulted in the certification of the NFFE. However, there is unrefuted testimony in the record herein to the effect that the parties never intended to include such employees in the unit at the time of the signing of the consent election agreement; that the inclusion of the names of employees located at the classified facility on the eligibility list was in error; that the employees at the classified facility were never considered during the negotiation of the current negotiated agreement covering the NFFE's unit; and that representing employees located such a distance away would present serious problems to the NFFE. Under these circumstances, I find insufficient basis to conclude that the unit represented by the NFFE encompasses the employees located at the classified facility. ^{5/}

^{5/} Moreover, I find that the record is insufficient to make a determination whether or not the employees at the classified facility accreted into the AFGE's unit located at the Western Virginia Operations Office. Accordingly, I make no finding in this regard.

Based on all the foregoing considerations, and in order to reflect the many changes brought about by the creation of the FPA and the resulting transfers, I shall order that the NFFE's unit be clarified to exclude the employees located at the classified facility, and that the AFGE's units be amended to reflect the successorship of the Federal Preparedness Agency, General Services Administration.

August 6, 1976

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


ORDER

IT IS HEREBY ORDERED that the unit of all nonprofessional employees of the GSA Central Office, metropolitan Washington, D.C. for which the National Federation of Federal Employees, Local 1705, Independent, was certified as exclusive representative on April 18, 1974, be, and it hereby is, clarified to exclude all eligible employees of the GSA located at the classified facility of the Federal Preparedness Agency.

IT IS FURTHER ORDERED that the designation of the Activity, Western Virginia Area Office of the Corps of Army Engineers, described under the exclusive recognition granted to the American Federation of Government Employees, Local 1754, AFL-CIO, under Executive Order 10988 on September 11, 1969, be changed to the Western Virginia Operations Office, Federal Preparedness Agency, General Services Administration.

IT IS FURTHER ORDERED that the designation of the Activity, U.S. Army Engineer Mathematical Computation Agency, described under the certification of representative accorded to the American Federation of Government Employees, Local 1754, AFL-CIO, on July 29, 1971, be changed to Mathematics and Computation Laboratory, Federal Preparedness Agency, General Services Administration.

Dated, Washington, D.C.
August 5, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION REGIONAL OFFICE,
NEW YORK REGION
A/SLMR No. 694

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local Union 1151, AFL-CIO (Complainant) alleging that Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally removing the telephone from the desk of the Complainant's president and refusing to restore it after granting and providing the Complainant with this service for at least two and a half years. The Respondent argued that the telephone was removed only after an impasse was reached during consultation with the Complainant concerning the telephone and thereafter it was placed in the union office, six floors below the president's work site. It contended that such conduct was not violative of the Order.

The Administrative Law Judge found that Respondent had violated Section 19(a)(1) and (6) of the Order by unilaterally removing the telephone from the desk of the Complainant's president. In this regard, he noted that the Respondent had established a term and condition of employment which could not be unilaterally changed when it granted the Complainant's president the use of a telephone to be located on his desk. He also noted that Respondent considered the removal of the telephone from the Complainant's president's desk to be an irreversible fait accompli and that it limited its subsequent discussions with the Complainant to finding alternative locations for the telephone.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION REGIONAL OFFICE,
NEW YORK REGION

Respondent

and

Case No. 30-6116(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 1151, AFL-CIO

Complainant

DECISION AND ORDER

On March 24, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Regional Office, New York Region, shall:

1. Cease and desist from:

(a) Changing existing personnel policies and practices, or other matters affecting the working conditions of unit employees, without first meeting and conferring with the American Federation of Government Employees, Local Union 1151, AFL-CIO.

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

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

(a) Restore telephone service on the desk of the president of American Federation of Government Employees, Local Union 1151, AFL-CIO.

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

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

Dated, Washington, D. C.
August 6, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ In reaching the disposition herein, it should be noted that I consider inappropriate the Administrative Law Judge's gratuitous comments concerning the issues involved in the instant case.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change existing personnel policies and practices, or other matters affecting the working conditions of unit employees, without first meeting and conferring with the American Federation of Government Employees, Local Union 1151, AFL-CIO.

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

WE WILL restore telephone service on the desk of the president of American Federation of Government Employees, Local Union 1151, AFL-CIO.

(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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Suite 3515, 1515 Broadway, New York, New York 10036.



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In the Matter of :

VETERANS ADMINISTRATION
VETERANS ADMINISTRATION REGIONAL
OFFICE, NEW YORK REGION :

Respondent :

CASE NO. 30-6116(CA)

and :

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 1151
Complainant :

.....
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Daniel T. McCarthy, Esq.
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For the Respondent

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Harry Zucker
President of Local 1151
341 West 24th Street
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For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The Complainant, American Federation of Government Employees, AFL-CIO, Local Union 1151, charges the Respondent, Veterans Administration, New York Regional Office, with an unfair labor

practice based on multiple violations of Executive Order 11491 (hereinafter referred to as the Order).

Statement of the case

This momentous controversy stems from the alleged pre-meditated removal of a telephone from the desk of the president of the Local and the purported wilful refusal to restore that invaluable instrument, or a reasonable facsimile thereof, to the newly-located desk of that official.

Such heinous misconduct, according to the complaint herein, was in violation of every known proscription against acts of agency management contemplated by Section 19 of the Order, except disciplining an employee because he has filed a complaint or given testimony under the Order. It is said to contravene the provisions of 19(a)(1) by interfering with, restraining, or coercing an employee in the exercise of assured rights; 19(a)(2) by encouraging or discouraging membership in a labor organization by discrimination in conditions of employment; 19(a)(3) by sponsoring, controlling, or otherwise assisting a labor organization, except the furnishing of customary and routine services and facilities; 19(a)(5) by refusing to accord appropriate recognition to a qualified labor organization; and 19(a)(6) by refusing to consult, confer or negotiate with a labor organization as required. In addition, it is averred in the complaint that the deliberate withdrawal of telephone service violates Section 23 of the Order, which provides that each agency shall issue appropriate policies and regulations.

Respondent admits the termination of the use of a telephone on the desk of the president of the Local, but it contends that its conduct did not violate any provisions of the Order for the following alleged reasons: the telephone in question disrupted the work of employees in close proximity to it; there were at all times other telephones in the general vicinity of the president's desk; and Respondent met and conferred with Complainant about providing a telephone at some place other than on that desk, and in fact, had one installed in the Union office, conveniently situated six floors below the president's place of work.

Under date of August 14, 1975, the Acting Assistant Regional Director (Department of Labor) dismissed that portion of the complaint which alleged violations of Sections 19(a)(2), (3) and (5) of the Order, inasmuch as a reasonable basis therefor had not been established. Since only violations of Section 19 constitute unfair labor practices under the Order, Section 23 was not considered, and the Notice of Hearing herein was issued for alleged violations of Sections 19(a)(1) and (6) only.

Pursuant to the Notice above referred to, a hearing was held herein on October 23, 1975, in New York City. Both parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence relevant to the grave and complex issues involved herein. Thereafter, the time for filing briefs was extended at the request of counsel until December 12, 1975, and such briefs have been duly submitted and considered.

Prefatory Observations

Although Respondent does not suggest it, a question arises at the outset as to whether or not the case should be dismissed under the doctrine of de minimus. 1/ Such a disposition, however, would be tragically disappointing, even offensive, to both parties; for it is evident that they share with equal avidity the view that the incident from which this proceeding arose transcends in importance any single event in the history of labor relations since the passage of the Wagner Act.

Consider first the chief protagonists in this stirring drama. Aside from their monumental intransigence, both the Assistant Director of the Regional Office of Respondent and the President of Local 1151 appear to be intelligent, well-educated and reasonably mature. Yet the problem they face here seems too vast and too intricate for them to resolve without recourse to formal adjudication. 2/ They are locked in a relentless struggle for dominance, and in accord with a viewpoint currently in vogue, they find detente unacceptable.

Consider also the enormous investment of manpower, time, energy, and public funds in the cause celebre spawned by Respondent's cataclysmic curtailing of intra-union communications. At the hearing in New York (which occupied a full day and produced nearly 200 pages of testimony), Respondent was represented

1/ From the Latin, de minimus non curat lex; freely translatable as "Courts don't welcome trivial cases".

2/ Before opening the hearing, I inquired of counsel if two grown men could not possibly reach an adjustment of the matter in issue with the help of Ma Bell and perhaps the divisional comptroller. I was informed that this prolonged dispute had become much too serious to be ended by compromise.

by two lawyers and a labor relations specialist, all transported from Washington for the occasion. Complainant appeared by a national representative of the parent union. In addition to the principals, both of whom remained in attendance throughout the day, four witnesses were brought in to testify, and at least eight other persons attended the hearing for varying periods as interested observers. Inclusive of the court reporter and the undersigned, it is roughly calculated that twenty people (most of them Government employees) spent an aggregate of 122 man-hours for the hearing alone. Taking into account the ordinary ratio of a lawyer's time in pre-trial preparation and post-trial briefing to his time in actual trial, and bearing in mind the hours necessarily occupied in administrative processing of the case and in the consideration and preparation of the recommended decision and order herein, as well as the time and attention that will have to be devoted to the review thereof by the Assistant Secretary and his staff, it is conservatively estimated that in excess of 350 man-hours will be dedicated to the resolution of this quarrel over the location of a telephone.

One must be mindful, too, of the possible socio-economic repercussions of this titanic conflict. There are nearly 150 million telephones in use in the United States today, 3/ Since each of them is capable of engendering a similar conflict under given circumstances, the problem takes on gigantic proportions.

Finally, the institution of this proceeding reflects a marked trend among union leaders in the public sector to demonstrate that they are ready, willing and able to protect and promote the interests of their fellow workers by inordinate exploitation of the limited avenues available to them under the Order. The dramatic increase in unfair labor practice complaints (attributable in no small measure to such exploitation) has been noted in Congressional hearings on bills to provide for improved labor-management relations in the Federal service. 4/

Consequently, despite the Lilliputian character of the gravamen of the complaint, it is only fitting and proper to proceed to consideration of the merits of the case. On the

3/ At the end of 1975, there were 118.5 million Bell System telephones in service. They comprise about 80 percent of the total telephones in the nation. American Telephone and Telegraph Company, 1975 Annual Report, p. 9.

4/ See, for example, statement of Kenneth A. Meiklejohn, legislative representative, AFL-CIO, Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills Before the Subcomm. on Manpower and Civil Service of the House Comm. on Post Office and Civil Service, 93rd Cong., ser. 93-51, at 209-10 (1974).

basis of the entire record, together with my observation of the witnesses and their demeanor, I make the findings of fact, reach the conclusions of law, and submit the recommendation set forth below.

Findings of Fact

1. The Complainant, Local Union 1151, is the exclusive bargaining representative of all employees in the unit at Respondent's New York Regional Office.

2. Since 1961, and continuing up until January, 1975, Respondent has provided a telephone for the use of the president of the Local to facilitate the transaction of union business.

3. By letter dated May 1, 1972, from Joseph D. Barone, then Assistant Director of Respondent's New York Regional Office to Harry Zucker, then president of the Local, Respondent agreed, pending any negotiated agreement, to furnish a telephone to be located at the president's desk. A telephone was so provided and so located, continuing without incident until January, 1975.

4. During Barone's tenure as Assistant Director, the parties found it unnecessary to enter into a formal collective bargaining agreement. Sometime after his successor took over in February, 1975, negotiations for such an agreement were initiated, and at the time of the hearing herein, were still in progress.

5. Zucker was employed by Respondent as a legal rating specialist, and on January 13, 1975, his rating board was moved from the north end of the fifteenth floor to the south end of the twelfth floor. His telephone was not moved to the new location of his desk nor was it replaced by another instrument. He did have access to a telephone on the twelfth floor, some distance from his desk.

6. On February 3, 1975, Norman B. Alverson succeeded Barone as Assistant Director of the Regional Office.

7. On February 24, 1975, Zucker's rating board was moved again, this time to a new location to the east side of the fifteenth floor. No telephone was placed on his newly situated desk, and as of the time of the hearing, none has since been provided. For a short time, a telephone assigned to the section chief was placed on an inverted trash can about six feet from his desk, but that was later moved behind a partition and into the section chief's office.

8. On February 28, 1975, Alverson met with Zucker and a national representative of the Complainant Union and they discussed the absence of a telephone from Zucker's desk. Claiming that the instrument formerly provided had disrupted the deliberations of the rating board, Alverson made it clear that the telephone would not be restored to Zucker's desk, and suggested making a telephone available at some other part of the fifteenth floor away from the rating board, or installing one in the Union office on the ninth floor.

9. On or about March 7, 1975, Alverson and Zucker again conferred with respect to the availability of a telephone for Zucker's use as president of the Local. Alverson advised Zucker that a telephone would be put into the Union office unless Zucker could come up with a better alternative, other than on his desk.

10. On March 18, 1975, a telephone was installed in the Union office on the ninth floor.

11. The complaint herein was filed on April 2, 1975.

12. Under date of May 14, 1975, a memorandum was sent to the Director of the Regional Office through the adjudication officer signed by eight rating specialists (including Zucker) complaining that since the rating board was situated in the center of the general working area, they had been exposed to excessive noise from all sides. They requested that their work place be relocated and enclosed.

Conclusions of Law

It is not disputed that the telephone for the Union president was a term and condition of employment. The granting of the use of space or equipment in an agency facility for union purposes is a privilege, not a right; once granted, however, such a privilege becomes, in effect, an established term and condition of employment which may not thereafter be unilaterally changed. Internal Revenue Service, Office of the Regional Commissioner, Western Region, A/SLMR No. 473.

I am satisfied from the evidence that the privilege granted here was not simply the use of any telephone that the Respondent might make available at any location it might arbitrarily select. What became an established term and condition of employment was the use of a telephone on the desk of the president of the Local. Consequently, the issue to be determined is whether in refusing to restore or replace the telephone on Zucker's desk, Respondent

changed that term and condition without meeting and conferring in good faith with Complainant prior thereto.

At no time before or after January 13, 1975, did Respondent sit down and discuss, or even indicate any willingness to discuss, the question of restoring the telephone to Zucker's desk. Removal of the telephone from his desk was considered by the Assistant Director to be an irreversible fait accompli, and his discussion on February 28, 1975, and thereafter was confined solely to alternative locations. It has been expressly held that an agency fails to fulfill its obligation to meet and confer in good faith when it establishes unilateral criteria for the discussion; and that while an agency may ultimately refuse to accede to the union's position, it may not unilaterally limit the discussion to its own criteria. New York Army and Air National Guard, Albany, N. Y., A/SLMR No. 441. I therefore conclude that Respondent did not confer with Complainant in good faith prior to terminating the use of the telephone on the desk of the president of the Local.

With respect to the burden of proof, I am satisfied that the Complainant has established the material allegations of the complaint by a fair preponderance of the credible evidence. That the telephone was not technically "removed" on January 13, 1975, is of no consequence. The fact remains that Respondent was committed to maintaining a telephone on the president's desk, wherever that desk might be situated. As soon as it failed to meet that commitment, it changed the term and condition of employment.

It should be observed, on the other hand, that Respondent failed to prove its purported justification for its action. Assuming, without deciding, that disruption of the work of a rating board would justify a change without consultation, the evidence on that score is wholly unpersuasive. Although there is some hearsay testimony to the effect that one sensitive employee apparently complained to the adjudication officer about Zucker's use of the telephone, neither the complainor nor the complainee were called to the stand to throw any light on the subject. An objection of one person does not necessitate removal of the telephone: From the evidence as to the periodic rotation of rating specialists it appears that the complaining individual and Zucker could have been easily assigned to different boards. Moreover, it is apparent that for at least two and a half years during Barone's tenure it was not claimed that Zucker's telephone was disruptive, and the subsequent complaint of the rating specialists about noise had nothing to do with the telephone at all. It is not unreasonable to infer from the sequence of events that the adamant refusal to even discuss putting a telephone back on Zucker's desk was not motivated by the need to prevent interference

with the work of others, but more likely emanated from the need of the new Assistant Director to demonstrate his independence in dealing with problems inherited from his predecessor. In any event, the plea of justification on the ground of disrupting the work of the agency was not established

In my view, the termination of telephone service on the desk of the president of the Local without prior consultation in good faith was a unilateral change in the terms and conditions of employment in violation of Section 19(a) (6) of the Order; and I also conclude that such unilateral conduct necessarily had a restraining influence upon unit employees and a concomitant coercive effect upon their rights assured by the Order in violation of Section 19(a) (1). I therefore recommend adoption of the Order set forth below. 5/

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 Veterans Administration, V.A. Regional Office, New York Region shall:

1. Cease and desist from:

(a) Changing existing personnel policies and practices or other matters affecting the working conditions of unit employees without first meeting and conferring with American Federation of Government Employees, AFL-CIO, Local Union 1151.

(b) Interfering with, restraining, or coercing employees by refusing the utilization of a telephone on the desk of the president of American Federation of Government Employees, AFL-CIO, Local Union 1151, wherever his desk may be located.

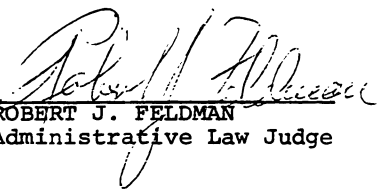
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected by Executive Order 11491, as amended.

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

5/ To preserve any conceivable additional or other rights of the respective parties, the recommended decision and order herein is without prejudice to any proceeding that either party may see fit to bring before the Federal Communications Commission or the Small Claims Court of the City of New York.

(a) Post at all its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director, New York Region, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Director, New York Region, 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 herewith.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: March 24, 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 change existing personnel policies and practices or other matters affecting the working conditions of unit employees without first meeting and conferring with American Federation of Government Employees, AFL-CIO, Local Union 1151.

WE WILL NOT interfere with, restrain, or coerce employees by refusing the utilization of a telephone on the desk of the president of American Federation of Government Employees, AFL-CIO, Local Union 1151, wherever his desk may be located.

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

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Suite 3515, No. 1515 Broadway, New York, New York 10036.

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

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, FIREARMS
AND TOBACCO, BOSTON, MASSACHUSETTS
A/SLMR No. 695

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (3) of the Order by virtue of its actions in denying an employee the right to hold the position of vice-president of the NTEU Local which represents exclusively the Respondent's employees. The NTEU contended that the above-noted action improperly interfered with the internal process of choosing its officers. The Respondent, however, took the position that as the employee was excluded from coverage of the Order under Section 3(b)(3) to allow him to hold office would make a nullity of Section 3(b)(3). The Respondent also argued that a conflict of interest was present as the employee involved performed internal investigations with respect to other unit employees as part of his duties.

The Administrative Law Judge found, in agreement with the position taken by the Respondent, that to allow the employee involved to hold office would make a nullity out of Section 3(b)(3) of the Order and, therefore, causing him to resign from his elected office was not violative of the Order. While the Assistant Secretary agreed with the Administrative Law Judge's recommended dismissal of the unfair labor practice complaint, he reached this conclusion for different reasons. Thus, the Assistant Secretary found that while normally the right of a labor organization to select its officers is a protected right, whether or not the officer selected is covered by the Order, this right is not absolute. He noted the decision in Department of Defense, Army Materiel Command, Tooele Army Depot, Tooele, Utah, A/SLMR No. 406, as an example in which such right was not absolute because the employee involved was prohibited by Section 1(b) of the Order from holding elected office in a labor organization. The Assistant Secretary concluded that the same principle applied in the instant case as, in his view, employees excluded from coverage under Section 3(b)(3) also are precluded from participation in the management of a labor organization because such participation "would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee" within the meaning of Section 1(b) of the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, FIREARMS
AND TOBACCO, BOSTON, MASSACHUSETTS

Respondent

and

Case No. 31-9067(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On March 18, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The instant complaint alleges that the Respondent violated Section 19(a)(1) and (3) of the Order by improperly interfering in the Complainant's internal process of choosing its officers. Because the employee involved herein had been excluded by the head of the agency from the coverage of the Order under the provisions of Section 3(b)(3), 1/ the

1/ Section 3(b)(3) reads: "This Order (except section 22) does not apply to -- (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations."

theory of violation asserted by the Complainant in this matter was not premised upon any rights of the employee involved, but rather upon an alleged interference with the Complainant's rights, and the right of the employees in the bargaining unit, for which it is the exclusive representative, to select their own representatives.

In recommending that the instant complaint be dismissed, the Administrative Law Judge reasoned that to find a violation of the Order as alleged by the Complainant would make a nullity of Section 3(b)(3) as such action would accord Section 1(a) rights to an employee exempted from coverage of the Order. While I agree with the Administrative Law Judge's conclusion that dismissal of the instant complaint is warranted, I reach this conclusion for different reasons.

As noted by the Administrative Law Judge, it has previously been held that agency management's interference with an exclusive representative's right to select its own representative has the improper effect of interfering with employee rights assured under Section 1(a) of the Order. 2/ Further, it has been held that the right of a labor organization holding exclusive representation to select its own representatives when dealing with agency management extends to the selection of nonemployees as well as employees. 3/

However, the right of an exclusive representative to select its own representative when dealing with agency management is not absolute. Thus Section 1(b) of the Order prohibits certain individuals from participation in the management of a labor organization or acting as a representative of such an organization. 4/ In Department of Defense, Army Materiel Command, Tooele Army Depot, Tooele, Utah, A/SLMR No. 406, it was held that the Activity had not violated the Order when it refused to deal with, and sought the resignation of, a guard who was the president of the exclusively recognized representative, where it was concluded

2/ Cf. U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 and Internal Revenue Service, Omaha District Office, A/SLMR No. 417.

3/ Cf. Internal Revenue Service, Omaha District Office, cited above. Clearly, the selection by an exclusive representative of a person not covered by the Executive Order to serve as its representative would not accord to such person rights under the Order which he or she did not otherwise possess.

4/ Section 1(b) of the Order reads: "Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee." (emphasis added)

August 11, 1976

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

that the guard's participation in the management of the labor organization involved gave rise to a conflict or apparent conflict of interest and was incompatible with his official duties within the meaning of Section 1(b) of the Order. In the instant case, the employee involved was excluded from coverage of the Order under the provisions of Section 3(b)(3). In view of the basis for such exclusion, I find that the excluded employee is precluded from participation in the management of, or acting as the representative of, the Complainant organization, because, in my judgment, such participation "would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee" within the meaning of Section 1(b) of the Order. Under these circumstances, I conclude that the Respondent's conduct in this matter was not violative of the Order.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 31-9067(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 6, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

HEADQUARTERS, UNITED STATES
ARMY FIELD ARTILLERY CENTER,
DIRECTORATE OF FACILITIES ENGINEERS,
FT. SILL, OKLAHOMA
A/SLMR No. 696

This case arose as the result of petitions filed by Local 886, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) and Local F-200, International Association of Fire Fighters, (Fire Fighters). The Teamsters sought an election in a unit of all Wage Grade and General Schedule employees assigned to the Directorate of Facilities Engineers employed at Fort Sill, Oklahoma, excluding firefighters and the Fire Fighters sought an election in a unit of all GS firefighters, crew chiefs, captains, and fire inspectors employed at Fort Sill, Oklahoma. By their petitions herein, the Fire Fighters seek to sever firefighting employees from a broader unit currently represented on an exclusive basis by Local 2390, American Federation of Government Employees, AFL-CIO (AFGE) and the Teamsters seek to represent the remaining employees in the AFGE's unit. The Activity and the AFGE contend that the units sought are inappropriate because they would fragment an already existing unit and the resulting units would not promote effective dealings and efficiency of agency operations. In this regard, they assert that the AFGE has fairly and effectively represented the employees in its existing exclusively recognized unit.

The Assistant Secretary found that the petitioned for units were not appropriate for the purpose of exclusive recognition. In this regard, he found that there was no evidence that the AFGE had failed or improperly refused to represent any employee in the existing bargaining unit, and that the record established that a harmonious and effective bargaining relationship between the Activity and the AFGE existed since 1967. Accordingly, and noting the absence of any unusual circumstances which would justify the carving out a separate unit from the existing unit where the evidence showed that an established, effective and fair collective bargaining relationship was in existence, the Assistant Secretary found that the separate units sought herein were inappropriate for the purpose of exclusive recognition, and he ordered dismissal of both petitions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS, UNITED STATES
ARMY FIELD ARTILLERY CENTER,
DIRECTORATE OF FACILITIES ENGINEERS,
FT. SILL, OKLAHOMA 1/

Activity

and

LOCAL 886, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Petitioner

and

Case No. 63-6141(RO)

LOCAL 2390, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

HEADQUARTERS, UNITED STATES
ARMY FIELD ARTILLERY CENTER,
DIRECTORATE OF FACILITIES ENGINEERS,
FT. SILL, OKLAHOMA

Activity

and

LOCAL F-200, INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO

Petitioner

and

Case No. 63-6158(RO)

LOCAL 2390, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491,
as amended, a consolidated hearing was held before Hearing Officer A.

1/ The name of the Activity appears as amended at the hearing.

Jack Lewis. The Hearing Officer's rulings made at the hearing are free
from prejudicial error and are hereby affirmed. 2/

Upon the entire record in the subject cases, including briefs filed
by the Activity and the Intervenor, Local 2390, American Federation of
Government Employees, AFL-CIO (AFGE), the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain
employees of the Activities.

2. In Case No. 63-6141(RO), the Teamsters seek an election in a
unit of all Wage Grade (WG) and General Schedule (GS) employees assigned
to the Directorate of Facilities Engineers employed at Fort Sill, Oklahoma,
excluding management officials, professional employees, firefighters,
employees engaged in Federal personnel work in other than a purely
clerical capacity, and supervisors as defined in Executive Order 11491,
as amended. 3/ In Case No. 63-6158(RO), the Fire Fighters seek an elec-
tion in a unit of all GS firefighters, crew chiefs, captains, and fire
inspectors employed at Fort Sill, Oklahoma, excluding management offi-
cials, professional employees, employees engaged in Federal personnel
work in other than a purely clerical capacity, guards and supervisors as
defined in Executive Order 11491, as amended. By their petitions herein,
the Fire Fighters seek to sever firefighting employees from a broader
unit currently represented on an exclusive basis by the AFGE, and the
Teamsters seek to represent the remaining employees in the AFGE's unit.

The Activity and the AFGE contend that the units sought are inappro-
priate because they would fragment an already existing unit and the re-
sulting units would not promote effective dealings and efficiency of
agency operations. In this regard, they assert that the AFGE has fairly
and effectively represented the employees in its existing exclusively
recognized unit.

The Directorate of Facilities Engineers (DFAE) is one of several
directorates reporting to the Commanding General, Fort Sill, Oklahoma.
It is responsible for the management, maintenance, and minor construc-
tion of all facilities and property at Fort Sill. In addition, the
Directorate is charged with responsibility for providing firefighting
activities and, in this regard, it operates two fire houses within the
confines of Fort Sill. The record discloses that there are approximately
3,500 civilian employees at Fort Sill and approximately 425 employees
assigned to the Directorate of Facilities Engineers of whom 35 are
firefighters.

2/ The Hearing Officer properly ruled that the challenge by Local F-200,
International Association of Fire Fighters, AFL-CIO (Fire Fighters)
to the adequacy of the showing of interest submitted by Local 886,
International Brotherhood of Teamsters, Chauffeurs, Warehousemen
and Helpers (Teamsters) was untimely. In this regard, however, he
inadvertently cited Section 204.04(b), rather than Section 202.2(f)(1),
of the Assistant Secretary's Regulations. This inadvertent error
is hereby corrected.

3/ The claimed unit appears as amended at the hearing.

ORDER

The AFGE was granted exclusive recognition on April 21, 1967, for a unit described as: "all non-supervisory non-professional employees of the Installation Section, excluding those whose permanent duty station is other than Fort Sill, Oklahoma. Excluded from the bargaining unit are all supervisors and professional employees employed within the Installation Section." 4/ A negotiated agreement was executed by the parties and approved on December 22, 1967. 5/ The evidence establishes that while AFGE Local 2390 was recently placed in trusteeship, it has actively administered the negotiated agreement as well as the affairs of the bargaining unit employees. Further, in the six month period prior to the hearing herein, the AFGE held several meetings with the Activity in connection with the processing of grievances. There is no evidence that the AFGE has, at any time, refused to handle a grievance of a unit employee, or has improperly refused in any manner to represent a unit employee.

Under the foregoing circumstances, I find that the petitioned for units are not appropriate for the purpose of exclusive recognition. It has been held previously that the policies of the Order will be effectuated by finding inappropriate a separate unit carved out of an existing unit where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, absent unusual circumstances. 6/ As noted above, there is no evidence that the AFGE has failed or improperly refused to represent any employee in the existing bargaining unit. Further, the record reveals in this regard that a harmonious and effective bargaining relationship has been maintained since 1967 between the Activity and the AFGE. Accordingly, in the absence of any unusual circumstance which would warrant severance of certain employees from the existing exclusively recognized unit, I find that the separate units sought by the Teamsters and Fire Fighters herein are inappropriate for the purpose of exclusive recognition, and I shall dismiss their petitions.

IT IS HEREBY ORDERED that the petitions in Case No. 63-6141(RO) and Case No. 63-6158(RO) be, and they hereby are, dismissed.

Dated, Washington, D.C.
August 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ The record reflects that the "Installation Section" referred to in the unit description is now known as the Directorate of Facilities Engineers.

5/ The agreement has an initial term of two years with provision for automatic renewal for additional two year terms absent timely notice by either party. While the agreement presently is in effect, the petitions herein were timely filed during the "open period."

6/ See United States Naval Construction Battalion Center, A/SLMR No. 8; Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24; and General Services Administration, Region 5, Quality Control Division, Federal Supply Service, A/SLMR No. 526.

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

DEPARTMENT OF STATE,
 PASSPORT OFFICE,
 CHICAGO PASSPORT AGENCY,
 CHICAGO, ILLINOIS
 A/SLMR No. 697

This case involved a petition filed by the American Federation of Government Employees, Local 3671, AFL-CIO (AFGE) seeking a unit of all employees, including temporary and seasonal personnel, in the Chicago field agency of the Passport Office in Chicago, Illinois. The Activity contended that the petitioned for unit was not appropriate as it excludes other employees of the Agency who share a community of interest with those in the claimed unit and such unit would not promote effective dealings and efficiency of agency operations.

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In this regard, he noted that the claimed employees share a clear and identifiable community of interest separate and distinct from all other employees of the Agency. Thus, the claimed employees share a common mission, common supervision, common working conditions, uniform personnel and labor relations policies, essentially similar job classifications, and generally do not experience significant interchange or transfer among other organizational components of the Agency. Further, the Assistant Secretary concluded that the claimed unit would promote effective dealings and efficiency of agency operations. In this connection, he noted that the arguments of the Activity to the contrary were, at best, speculative and conjectural and were not supported by the record herein. In this regard, it was noted that the Agent-In-Charge had been delegated significant discretionary authority in personnel and labor relations matters and that the Activity's contentions with regard to efficiency of agency operations were based upon its speculative assessments of the manpower and economic costs of a less than agency-wide unit, rather than on a balanced consideration of all the factors involved. The Assistant Secretary concluded that, standing alone, such speculation by the Activity was not sufficient to establish that the proposed unit will not promote efficiency of agency operations.

Finally, the Assistant Secretary found that certain employees were supervisors within the meaning of Section 2(c) of the Order and he excluded them from the unit found appropriate herein.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

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

DEPARTMENT OF STATE,
 PASSPORT OFFICE,
 CHICAGO PASSPORT AGENCY,
 CHICAGO, ILLINOIS 1/

Activity

and

Case No. 50-13100(RO)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 3671, AFL-CIO 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 3671, AFL-CIO, herein called AFGE, seeks an election in a unit of all employees, including temporary and seasonal personnel, of the Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, excluding management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in Executive Order 11491, as amended. 3/ The Activity contends that the proposed unit is inappropriate because it excludes other employees of the Agency who share a community of interest with those in the claimed unit and such fragmentation would not promote effective dealings and efficiency of agency operations.

The overall mission of the Passport Office is to administer laws relating to nationality and to conduct all passport activities. The specific mission of its field agencies is to provide passport services

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

3/ The claimed unit appears as amended at the hearing.

to persons within their assigned geographical areas. The Passport Office is part of the Bureau of Security and Counselor Affairs in the Department of State. It has a national office in Washington, D.C. and ten field agencies located throughout the United States. Each field agency is under the direction of an Agent-In-Charge who reports directly to the Director of the Passport Office.

The claimed unit in the Chicago field agency consists of approximately 45 employees. 4/ The Passport Office field agencies and its national office are linked together by a teletype network and contact each other on an as needed basis. The record indicates that contact between the Chicago field agency and the other field agencies occurs infrequently. In this connection, there is no evidence of regular temporary interchange of personnel between the various field agencies, with the transfer of personnel occurring mainly at the supervisory levels of the field agencies. During the past nine years, approximately two persons from the Chicago field agency were promoted to other field agencies, while lateral transfers into the Chicago field agency occurred more frequently. Members of the petitioned for unit share a common environment since they are under the same general supervision, and have the same working conditions and physical proximity.

The record reveals that approximately 70 percent of the personnel in the Chicago field agency are at the GS-7 level and below. 5/ Most of the jobs in the Chicago field agency carry the titles of passport examiner (16 positions) and passport clerk typist (19 positions). The skills required and the duties performed are essentially the same among the field agencies with common personnel policies and practices applicable to all the field agencies. The Bureau of Personnel for the Department of State has final administrative authority over labor relations matters and establishes personnel policies for the Passport Office with the Agent-In-Charge at the field agency level executing such policies.

Of the staffing ceiling of 55 personnel, there are 24 seasonal and 2 temporary positions in the Chicago field agency. As defined in the record, a seasonal employee has a permanent job for part year work and a temporary employee has an appointment which is not to exceed a certain period of time less than a year. According to standards established by the Washington, D.C. headquarters, seasonal and temporary personnel may not work more than 11 months in any year. When a temporary employee's appointment expires, the Activity attempts to convert such an employee to the seasonal classification, if his work performance has been satisfactory, so that he can return automatically each year during the peak workload period. The record reveals that, except where there has been unsatisfactory performance, temporary employees are converted to seasonal employees and that an overwhelming majority of seasonal employees return to work at the Activity year after year.

4/ The parties stipulated that no previous bargaining history in the Activity exists and that there is no election, certification or agreement bar to an election in this matter.

5/ The position descriptions found in the field agencies are similar with only 5 of 26 descriptions being peculiar to the Chicago field agency.

While employed, temporary and seasonal employees enjoy the same pay scales, supervision, work assignments, and working conditions as permanent employees.

The record indicates that the Agent-In-Charge of the Chicago field agency is responsible for the implementation of personnel policies and labor relations matters which have been determined by the Washington, D.C. headquarters. In this regard, he exercises local initiative in such areas as training of field agency personnel, parking arrangements, and hiring and promoting at the GS-7 level and below. Although final approval for personnel actions is placed within the Bureau of Personnel in Washington, D.C., the record reveals that in the past nine years only four percent of the recommendations for personnel actions forwarded by the Chicago Agent-In-Charge have not been adopted.

The Activity contends that the petitioned for unit would not promote effective dealings because all authority to establish personnel policies and procedures rests in Washington, D.C., and uniform policies have been established by the Bureau of Personnel on all matters subject to negotiation. Moreover, it cannot envisage how effective dealings could occur in a field agency when no personnel or labor relations employees are assigned to any field agency. Regarding the impact of the claimed unit on the efficiency of agency operations, the Activity argues that if the claimed unit were found to be appropriate, an incongruous situation would develop where the Department of State would have a centralized personnel function for its Foreign Service employees and a decentralized one for its Civil Service employees. 6/ It reasons that such a condition would result in high travel expenses and constitute an inefficient use of manpower because labor relations personnel would be required to shuttle to the field agencies in order to service them. In addition, the Activity contends that a unit limited to a single field agency would impair agency operations and such a structure could lead to the establishment of different personnel policies among the field agencies and, therefore, could be harmful to the inherently integrated nature of the field agency system.

Under all the foregoing circumstances, and having considered and given equal weight to the three criteria set forth in Section 10(b) of the Order, I find the petitioned for unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. 7/ Thus, as noted above, the employees in the unit sought share a common mission, common supervision, common working conditions, uniform personnel and labor relations policies, essentially similar job classifications and, generally, do not experience significant interchange or

6/ In the Department of State there is an agency-wide unit of Foreign Service Officers. Also, there are two units of Civil Service employees each consisting of approximately 200 employees. There are approximately 3,400 Civil Service employees in the Department of State.

7/ Cf. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Offices (DSASO), Columbus and Akron, Ohio, A/SLMR No. 687.

transfer among other organizational components of the Agency. Based on these considerations, I find that the petitioned for employees share a clear and identifiable community of interest separate and distinct from all other employees of the Agency. Moreover, I find that such unit will promote effective dealings and efficiency of agency operations and that the arguments of the Activity to the contrary are, at best, speculative and conjectural and are not supported by the record herein. Thus, the record discloses that the Agent-In-Charge has been delegated significant discretionary authority in matters concerning personnel and labor relations policies and practices. Further, the Activity's contentions with regard to efficiency of agency operations related more to the appropriateness of a broader unit rather than to the potential adverse impact resulting from the establishment of the claimed unit, and were based primarily upon its speculative assessments on the manpower and economic costs of a less than agency-wide unit, rather than on a balanced consideration of all of the factors involved. I find that, standing alone, such speculation by the Activity as to what might be helpful or desirable to be insufficient to establish that the proposed unit will not promote efficiency of agency operations. 8/

In addition, I find that the unit found appropriate should include "temporary" and "seasonal" employees. Thus, as noted above, the record reveals that temporary employees, who enjoy the same pay scales, supervision, work assignments and working conditions are converted, upon satisfactory performance, to seasonal employees, and that a majority of seasonal employees return to work at the Activity year after year. Under these circumstances, I find that such employees have a reasonable expectancy of continued employment at the Activity and that their inclusion in the unit found appropriate is warranted.

The parties stipulated as to the eligibility of certain employees, 9/ and disputed the eligibility of employees Annette Madden and Shirley Watkins. The record reveals that employees Madden and Watkins are employed in the Processing Section of the Activity and that in the performance of their duties they utilize independent judgment in assigning work and transferring employees within the Section and in adjusting

8/ The Activity presented no evidence that the two existing less than agency-wide units in the Department of State have failed to promote effective dealings and efficiency of agency operations.

9/ The parties stipulated that employees in the following classifications possess and exercise supervisory authority and on this basis should be excluded from any unit found appropriate: Agent-In-Charge, Assistant Agent-In-Charge, Adjudication Section Supervisor, Processing Section Supervisor, Assistant Processing Section Supervisor and Communications Supervisor. In addition, the parties stipulated the employee classified as Staff Aide should be excluded from any unit found appropriate herein as such employee enjoys a confidential relationship with the Agent-In-Charge with regard to labor relations matters. In the absence of any contrary evidence, I find that the employees in the foregoing classifications should be excluded from the unit found appropriate.

- 4 -

grievances on an informal basis. Further, these employees make effective recommendations with regard to the retention of temporary and seasonal employees and with regard to promotions and within grade salary increases for other employees under their jurisdiction. Under these circumstances, I find that employees Madden and Watkins are supervisors within the meaning of Section 2(c) of the Order, and I shall exclude them from the unit found appropriate herein.

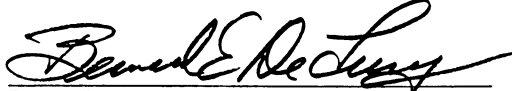
Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees, including "temporary" and "seasonal" personnel, of the Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit, or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they wish to be represented by American Federation of Government Employees, Local 3671, AFL-CIO.

Dated, Washington, D.C.
August 11, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

- 5 -

August 12, 1976

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

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 698

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 81, San Francisco, California, (NTEU) alleging that the Respondent violated Section 19(a)(1) of the Order by virtue of a statement made by a representative of the Respondent to a grievant at the conclusion of the second step meeting of the negotiated grievance procedure.

The record revealed that the first step of the negotiated grievance procedure was mutually waived by the parties. At the second step meeting, the Respondent took the position that the grievance concerned a matter not covered by the negotiated agreement and, therefore, could not be processed under the negotiated grievance procedure. The Respondent then proceeded to consider the grievance as though it had been filed under the agency grievance procedure and concluded by denying said grievance. At the conclusion of the second step meeting, the Respondent's representative stated to the grievant and her union representative, "I don't want anymore of this in the future. If you have anymore problems, take it up with your Area Supervisor informally."

The Administrative Law Judge concluded that the Respondent had not engaged in any conduct prohibited by Section 19(a)(1) of the Order. In this regard, he found that the statement made by the Respondent was no more than the Respondent's insistence on adherence to the first step of the negotiated grievance procedure. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

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

A/SLMR No. 698

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

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
SAN FRANCISCO, CALIFORNIA

Respondent

and

Case No. 70-4708(CA)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, SAN FRANCISCO, CALIFORNIA

Complainant

DECISION AND ORDER

On April 12, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in violative conduct as alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

1/ The original complaint alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by making a coercive statement, harassing an employee for filing a grievance, and refusing to process a grievance under the negotiated grievance procedure. Thereafter, on or about July 30, 1975, an amended complaint was drafted alleging violation of Section 19(a)(1) based solely on the alleged coercive statement by a supervisor. However, the Complainant did not sign the amended complaint and it was not docketed. I have been administratively advised that a partial dismissal of the original complaint was issued by the Regional Administrator on September 5, 1975, from which no appeal was taken. In this action, the Regional Administrator dismissed the Section 19(a)(6) allegation and Section 19(a)(1) harassment allegation. The Regional Administrator's partial dismissal letter was not included in the formal papers sent to the Chief Administrative Law Judge. Consequently, at the time of the hearing, the Administrative Law Judge was unaware of this partial dismissal by the Regional

(Continued)

IT IS HEREBY ORDERED that the complaint in Case No. 70-4708(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 12, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

GENERAL SERVICES ADMINISTRATION,
FEDERAL SUPPLY SERVICE
A/SLMR No. 699

This case involved a petition for clarification of unit (CU) filed by the General Services Administration, Federal Supply Services (FSS) seeking to include in an existing unit of Central Office professional and nonprofessional employees located in the metropolitan Washington, D.C., area certain transportation audit employees transferred to the FSS from the General Accounting Office (GAO) by virtue of an Act of Congress. The existing unit at the FSS is represented by the National Federation of Federal Employees, Local 1642 (NFFE) which intervened in the instant proceeding. Also granted intervenor status in this proceeding, over the objections of the NFFE, was the American Federation of Government Employees, AFL-CIO, Local 8 (AFGE) which asserted it "informally" represented certain transportation audit employees at the GAO prior to their transfer to the FSS. However, in his decision the Assistant Secretary revoked the AFGE's status as an intervenor in this proceeding. In this connection, he noted that the GAO is not within the coverage of Executive Order 11491, as amended, and that Section 202.5(e) of the Assistant Secretary's Regulations was intended to permit intervention in a CU proceeding only to those labor organizations accorded exclusive recognition pursuant to the procedures of Executive Orders 10988 and 11491, as amended. Therefore, in the Assistant Secretary's view, any recognition granted the AFGE by the GAO was not of a nature which would validate its intervention in this CU proceeding.

The Assistant Secretary found further that the transportation audit employees who had been transferred from the GAO to the FSS had been functionally and administratively integrated into the FSS and, thus, did not have a clear and identifiable community of interest that was separate and distinct from other employees of the FSS. In this respect, he noted that all the FSS employees, including the transportation audit employees, were under the direction and supervision of the Commissioner of FSS and were subject to virtually the same personnel policies, practices, and procedures, including promotion plans, upward mobility programs, and areas of consideration for promotions and reductions-in-force. He noted also that there had been transfers and details between the transportation audit employees and other divisions of the FSS and that other positions existed within the FSS which were functionally related to the transportation audit positions and which required similar skills and knowledge to those possessed by the

1/ Administrator and he conducted the proceedings based on the unsigned amended complaint which he received into evidence. In my view, the receipt of the unsigned amended complaint into evidence by the Administrative Law Judge did not prejudice the rights of either party since the amended complaint was based on 1 of the 3 original allegations contained in the original complaint which allegation was fully litigated at the hearing in this matter.

transportation audit employees. Moreover, the Assistant Secretary found that, as the transportation audit employees constituted but 3 divisions in 1 of 9 Offices in the FSS, their exclusion from the recognized unit represented by the NFFE would result in unit fragmentation and, thus, would inhibit effective dealings and efficiency of agency operations. Accordingly, he clarified the unit represented by the NFFE to include the transportation audit employees transferred to the FSS from the GAO.

A/SLMR No. 699

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
FEDERAL SUPPLY SERVICE 1/

Activity-Petitioner

and

Case No. 22-6448(CU)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1642, INDEPENDENT

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

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

Upon the entire record in this case, including briefs filed by the parties, the Assistant Secretary finds: 2/

1/ The name of the Activity-Petitioner appears as amended at the hearing.

2/ The American Federation of Government Employees, AFL-CIO, Local 8, herein called AFGE, was granted intervenor status in this proceeding "based on a showing that it had been recognized by the Comptroller General and represented [certain affected] employees when they were a part of the General Accounting Office." However, prior to, during, and subsequent to the instant hearing, the National Federation of Federal Employees, Local 1642, Independent, herein called NFFE, which represents certain employees of the Activity-Petitioner, objected to the granting of such status to the AFGE. Section 202.5(e) of the Assistant Secretary's Regulations provides that intervention may be granted to a labor organization in a proceeding involving a petition for clarification of unit (CU) "based on a showing that the proposed clarification ...affects that labor organization's existing exclusively recognized unit(s) in that it would cover one or more employees who are included in its unit(s)." [emphasis added] The parties stipulated that the General Accounting Office, hereinafter called GAO, is a part of the Legislative

(Continued)

The Activity-Petitioner, the Federal Supply Service of the General Services Administration, herein called FSS, filed a CU petition seeking to clarify an existing exclusively recognized unit. In this connection, the FSS maintains that the approximately 417 transportation audit employees transferred to the FSS Central Office staff from the GAO by an Act of Congress are part of the existing exclusively recognized unit of some 1500 professional and nonprofessional FSS Central Office employees located within the metropolitan Washington, D. C. area, represented by the NFFE. Thus, in the view of the FSS, the transferred employees constitute an accretion to the NFFE's exclusively recognized unit. The NFFE concurred with the position of the FSS.

The mission of the FSS, 1 of 4 services of the General Services Administration, herein called GSA, is to procure, store, and issue supplies for all government agencies, develop specifications for supplies to be purchased by other agencies, operate interagency motor pools, and provide other transportation services. In addition to providing various transportation services, the employees of the FSS perform such diverse functions as procuring goods and services for the Federal government, managing the government's strategic stockpiles and surplus, and disposing of unwanted government property and materials. Organizationally, the FSS is composed of nine "offices", each directed by an Assistant Commissioner and containing several divisions. Overall direction of the FSS is vested in the Commissioner of the FSS.

On April 3, 1970, the NFFE was certified as the exclusive representative for a unit of all (GS) GSA Central Office FSS employees, including professionals, located in the metropolitan area of Washington, D.C. An initial negotiated agreement between the parties was entered into on March 11, 1971.

2/ Branch of the Government and, therefore, its employees are not covered by Executive Order 11491, as amended. In my view, the reference in Section 202.5(e) to exclusively recognized units means those labor organizations which have been accorded such recognition pursuant to the procedures of Executive Orders 10988 and 11491, as amended. Inasmuch as the GAO is not within the coverage of the Order, it follows that any recognition granted the AFGE by the GAO is not of a nature which would validate an intervention under Section 202.5(e) of the Regulations in a CU proceeding before the Assistant Secretary. Accordingly, I find that the AFGE was incorrectly granted intervention in the instant proceeding. Therefore, I revoke the AFGE's status as Intervenor in the instant proceeding and its brief to the Assistant Secretary has not been considered. However, noting that this proceeding is not of an adversary nature, I do not find that the AFGE's participation in this proceeding constituted prejudicial error.

-2-

As a result of the "General Accounting Office Act of 1974" (Public Law 93-604), some 417 transportation audit employees who had comprised 3 sections of 1 of 10 operating divisions (the Transportation and Claims Division) at the GAO, 3/ were transferred to the Office of Transportation and Public Utilities of the FSS, effective October 12, 1975. 4/ The Office of Transportation and Public Utilities of the FSS consists of ten divisions, and its mission includes the development and execution for all Federal agencies of programs covering transportation services and traffic management, the operation and maintenance of motor equipment, and the procurement of public utilities services. Within that Office, the transferred employees, as before the transfer, are responsible for auditing payments for transportation services, after payment, for all agencies of the government (with certain minor exceptions) and for issuing regulations for transportation procurement by government agencies. The transferred employees, who include freight rate specialists, transportation clerks, transportation specialists and certain secretarial, clerical and computer-related employees, have been assigned to three divisions of the Office of Transportation and Public Utilities at the FSS Central Office which were formed after the transfer. In this connection, the record reveals that, prior to the transfer of the transportation audit employees from the GAO, there existed within the various divisions of the Office of Transportation and Public Utilities (particularly in the Transportation Services and Federal Traffic Management Divisions) job classifications which required similar skills and knowledge to those possessed by the transferred employees, including the ability to properly apply transportation tariffs, Federal and State transportation regulations, and past precedents in loss and damage claims.

Subsequent to the transfer, most of the transportation audit employees were physically relocated from the GAO Building in Washington, D. C., 5/ to the Chester A. Arthur Building, one block away. 6/ Although most other FSS Central Office employees are located in Crystal City,

3/ The record indicates that NFFE Local 1822 and the AFGE both "informally" represented certain GAO employees, including the transferred transportation audit employees.

4/ It appears from the record that the GAO Transportation and Claims Division and the GSA Office of Transportation and Public Utilities are essentially within the same organizational levels in their respective agencies.

5/ The computer used by certain Transportation Audit support employees continues to be located in the GAO Building.

6/ Section 501(b) of the "General Accounting Office Act of 1974" requires that the transportation audit employees must be housed within the geographical boundaries of Washington, DC for a period of one year from the effective date of their transfer to the FSS.

-3-

Virginia, approximately five miles from the Chester A. Arthur Building, the record discloses that two other FSS functions included in the existing unit are also located several miles from the Crystal City site.

The record reveals that all employees in the Office of Transportation and Public Utilities of the FSS are under the overall supervision of the same FSS Assistant Commissioner and that all FSS Central Office employees in the nine Offices of the FSS, including the transportation audit employees in the Office of Transportation and Public Utilities, share substantially the same FSS centrally administered personnel policies, practices, and procedures ^{7/}, including the FSS Merit Promotion Plan, two Upward Mobility programs, and the same areas of consideration for promotions and reductions-in-force. Moreover, the record indicates that during the five months between the effective date of the transfer and the hearing in this matter, four transportation audit employees have been transferred or detailed to other divisions within the Office of Transportation and Public Utilities, while two employees from other divisions within that Office have been reassigned to divisions employing the transferred employees. Also, approximately 45 of the transferred employees have received training from the FSS in a broad range of subjects involving other functions within the FSS.

Under all of these circumstances, I find that the transportation audit employees transferred from the GAO to the FSS do not have a clear and identifiable community of interest that is separate and distinct from other employees of the FSS in that they have been functionally and administratively integrated into the FSS. Thus, all FSS employees, including the transportation audit employees, are under the direction and supervision of the Commissioner of the FSS and are subject to virtually the same personnel policies, practices and procedures as other FSS employees, including promotion plans, upward mobility programs, and areas of consideration for promotion and reductions-in-force. Moreover, there are other positions which exist within the FSS which are functionally related to transportation audit positions and which require similar skills and knowledge to those possessed by the transportation audit employees, and there have been transfers and details between the transportation audit employees and other divisions of the FSS. Additionally, as the transportation audit employees constitute but 3 divisions in 1 of the 9 Offices in the FSS, I find that their exclusion from the exclusively recognized unit represented by the NFFE would result in unit fragmentation and, thus, would inhibit effective dealings and

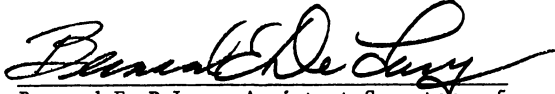
^{7/} Section 202(b) of the "General Accounting Office Act of 1974" provides a "save pay clause" for the transportation audit employees under which they may not be reduced in classification or compensation for two years after the effective date of the transfer from the GAO, except for cause. Thereafter, they are subject to the same "general pay clause" as the remainder of the FSS employees; if an employee is reduced in classification or compensation through no fault of his own, his pay will be "saved" for two years.

efficiency of agency operations. ^{8/} Accordingly, I find that the existing unit of all (GS) GSA Central Office FSS employees, including professionals, in the metropolitan area of Washington, D. C., should be clarified to include the transportation audit employees previously employed by the GAO.

ORDER

IT IS HEREBY ORDERED that the unit of all (GS) General Services Administration Central Office Federal Supply Service employees, including professionals, in the metropolitan area of Washington, D. C., for which Local 1642, National Federation of Federal Employees was granted exclusive recognition on April 3, 1970, be, and it hereby is, clarified to include in said unit all eligible transportation audit employees previously employed by the General Accounting Office and transferred to the Federal Supply Service by virtue of Public Law 93-604.

Dated, Washington, D. C.
August 12, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{8/} See Department of the Navy, Philadelphia Naval Regional Medical Center, FLRC No. 75A-122.

August 13, 1976

A/SLMR No. 700

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
DIX-McGUIRE CONSOLIDATED EXCHANGE,
FORT DIX, NEW JERSEY
A/SLMR No. 700

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1999, (Complainant) alleging that Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally refusing to refer a grievance to arbitration in accordance with provisions of a negotiated agreement.

The Administrative Law Judge found that the Respondent's unilateral refusal to proceed to arbitration of the grievance filed by the Complainant violated Section 19(a)(1) and (6) of the Order. In this connection, the Administrative Law Judge determined that the Complainant had complied fully with the requirements of the parties' negotiated agreement with respect to providing due and timely notice of its desire to invoke arbitration.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered the Respondent to proceed to arbitration on the grievance, upon request.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
DIX-McGUIRE CONSOLIDATED EXCHANGE,
FORT DIX, NEW JERSEY

Respondent

and

Case No. 32-4017(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1999

Complainant

DECISION AND ORDER

On April 21, 1976, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, shall:

1. Cease and desist from:

a. Unilaterally refusing to proceed to arbitration regarding a grievance filed on April 15, 1974, alleging a violation of Article XXIII

of its February 12, 1974, negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1999, after receiving timely notice of said labor organization's desire to invoke arbitration.

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

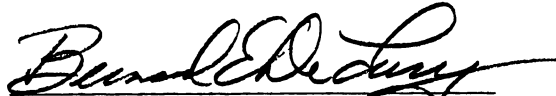
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

a. Upon request, proceed to arbitration regarding a grievance filed on April 15, 1974, alleging a violation of Article XXIII of its February 12, 1974, negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1999.

b. Post at the Dix-McGuire Consolidated Exchange, Fort Dix, 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 General Manager of the Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards 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.

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

Dated, Washington, D. C.
August 13, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally refuse to proceed to arbitration regarding a grievance filed on April 15, 1974, alleging a violation of Article XXIII of our February 12, 1974, negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1999, after receiving timely notice of said labor organization's desire to invoke arbitration.

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

WE WILL, upon request, proceed to arbitration regarding a grievance filed on April 15, 1974, alleging a violation of Article XXIII of our February 12, 1974, negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1999.

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 its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

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

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

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 41
A/SLMR No. 701

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 41

Respondent

and

Case No. 22-5968(CO)

This case involved an unfair labor practice complaint filed by the Department of Health, Education and Welfare, Office of the Secretary, Headquarters (Complainant) alleging that the Respondent labor organization violated Section 19(b)(6) of the Order by refusing to continue to negotiate because a unit employee was present on the management negotiating team. The Complainant contended that the individual involved herein was a management official and that the Respondent should have filed a petition for clarification of unit to ascertain the individual's status, rather than refusing to continue with negotiations. The Respondent maintained that the individual was a bargaining unit employee and that her presence on the management negotiating team undermined the representational status of the Respondent.

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, OFFICE OF THE
SECRETARY, HEADQUARTERS

Complainant

DECISION AND ORDER

The Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent violated Section 19(b)(6) of the Order by refusing to continue negotiations. In this regard, he noted particularly that there was no evidence indicating that the presence of this unit employee, who was serving as a resource person on the management negotiating team, gave the Complainant any special or unfair advantage or worked to the Respondent's disadvantage. Moreover, he noted that there was no evidence that the employee involved was actively engaged in the negotiating process or was involved in the development or implementation of management policies in connection therewith. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions to remedy such conduct.

On April 7, 1976, Administrative Law Judge Joyce Capps issued her Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take affirmative action, as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(b)(6) of the Order by refusing to negotiate because a bargaining unit employee was serving as a member of the management negotiating team. In this regard, it was noted that there is no

evidence that Mrs. Easton's presence on the management's negotiating team gave the Complainant any specific or unfair advantage or worked to the Respondent's disadvantage. Moreover, there is no evidence that Mrs. Easton was actively engaged in the negotiating process or was involved in the development or implementation of management policies in connection therewith. 1/ Rather, the evidence establishes that Mrs. Easton served only as a resource person rendering budget information 2/ and that the Respondent voiced no objection to her role on the management negotiating team during 56 negotiating sessions. Under these circumstances, I find that Mrs. Easton's presence on the management negotiating team did not justify the Respondent's refusal to negotiate in this matter.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that American Federation of Government Employees, AFL-CIO, Local 41, shall:

1. Cease and desist from refusing to meet and confer with the Department of Health, Education and Welfare, Office of the Secretary, Headquarters, by refusing to engage in further negotiations of a basic agreement until such time as a bargaining unit employee, serving as a resource person, is removed as a member of the Agency's negotiating team.
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:
 - a. Upon request of the Chief Negotiator of the Agency's negotiating team, resume and continue to engage in further negotiations of a basic agreement.
 - b. Post on bulletin boards and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations which shall be signed by the President of American Federation of Government Employees, AFL-CIO, Local 41. These notices shall remain posted for a period of 60 days, and Local 41 shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

1/ See Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596.

2/ Ibid.

- c. Submit signed copies of said notice to the Department of Health, Education and Welfare, Office of the Secretary, Headquarters, Washington, D. C. for posting in conspicuous places, where unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.
- d. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
August 13, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT refuse to engage in negotiations of a basic agreement on the basis that a bargaining unit employee, serving as a resource person, is present on the management negotiating team.

Dated: _____ By: _____
President, American
Federation of Government
Employees, AFL-CIO, Local 41

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

If members have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pa. 19104.

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



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In the Matter of
DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE,
OFFICE OF THE SECRETARY,
HEADQUARTERS
Complainant
and
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 41, AFL-CIO
Respondent
.....

Case No. 22-5968 (CO)

Mr. Edwin M. Sullivan
Collective Bargaining Official
Department of Health, Education
and Welfare, Office of the Secretary
Washington, D.C. 20201

For the Complainant

Benjamin H. Winslow, Jr., President
American Federation of Government
Employees, AFL-CIO, Local 41
P. O. Box 8247 Southwest Station
Washington, D.C. 20024

For the Respondent

Before: JOYCE CAPPS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order), a complaint was filed on June 9, 1975, by the Department of Health, Education and Welfare, Office of the Secretary, Headquarters (hereinafter referred to as the Agency or Complainant) against the American Federation of Government Employees, Local 41, AFL-CIO (hereinafter referred to as the Union or Respondent), alleging that on April 21, 1975, Respondent violated Sec. 19(b)(6) of the Order by its refusal to continue the negotiation of a basic agreement in which the parties had been engaged since November 18, 1974.

In accordance with the notice of hearing issued on July 30, 1975, by the Assistant Regional Director for Labor-Management Services, Philadelphia Region, a hearing in this matter was held before me on September 9, 1975, in Washington, D.C. At said hearing Respondent was represented by Frank E. G. Weil, Esquire, and Complainant was represented by Maurice B. Jones, Labor Management Relations Specialist. The post-hearing briefs filed by the the parties in support of their respective positions have been duly considered and are hereby made a part of the record.

The issue to be determined is whether the fact that a unit employee is a member of the management negotiating team justifies refusal of the union to engage in further negotiations.

Based upon the entire record herein, including the stipulations of fact by the parties, the evidence adduced, and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The facts in this case are virtually undisputed. On January 24, 1973, Respondent was certified by the Department of Labor as the exclusive representative of a unit of nonprofessional employees of the Complainant in the D.C.

metropolitan area. On February 20, 1973, discussions commenced with respect to ground rules for negotiations of a basic agreement, and a ground rules agreement was signed on May 25, 1973. Negotiations of a basic agreement began on November 18, 1974, each negotiating team consisting of 7 members.

Joseph E. Cook is the Union's Chief Negotiator and has been a member of the negotiating team since the commencement of ground rules discussions. After having been one of several persons recommended to Complainant's Chief Negotiator by the Comptroller as a possible member of the management negotiating team, Mrs. Jane Easton volunteered to serve and has served as a member of the management negotiating team since March, 1973. Although she performs several functions for the team her primary role was to watch the cost involved with each contract proposal from both sides of the table. Mr. Cook and Mrs. Easton are budget analysts in the Assistant Secretary, Comptroller's Office -- he in the Division of Budget Review and she in the Division of Financial Planning and Analysis.

Prior to the election in January, 1973, an eligibility list of employees in the bargaining unit was prepared by Complainant and furnished to the Union. A second eligibility list was furnished to the Union in May or June, 1974, at the request of the Union vice president prior to the submission of formal contract proposals by the Union. Mrs. Easton's name appeared on both lists as an eligible employee of the bargaining unit as did Mr. Cook's.

In the period from November 18, 1974 to April 21, 1975, it was the practice of the teams to negotiate on Mondays, Wednesdays and Thursdays from approximately 1:30 p.m. to 6:30 p.m. During this period there were 56 negotiating sessions, of which Mrs. Easton attended all but three for a total of 161 hours. Agreement had been reached on approximately half of the articles.

At the regular scheduled negotiating session on April 21, 1975, four members of the management team were present, including Mrs. Easton and Maurice Jones who was serving as Alternate Chief Negotiator. Mr. Cook was the only member of the Union team in attendance. The session began at the usual time. Several articles were discussed and things

proceeded without incident for the first hour and a half at which time the article on career development and employee training came up for consideration. In the course of discussion on this subject Mr. Cook made a statement to the effect that the Assistant Secretary, Comptroller's Office was not preparing career development plans as they are mandated to do in Chapter 4-10 of the Federal Personnel Manual -- that he had not seen any such plans in the office of the Comptroller. Mrs. Easton took exception and stated that she had personally assisted the Office of Deputy Assistant Secretary for Finance in completing their plan. Mr. Cook suddenly became quite agitated and asked if she was calling him a liar to which Mrs. Easton replied that she was just trying to make a clarification of fact. What had been a mere factual dispute abruptly changed to the gravamen of the controversy in this case because at this point Mr. Cook stated that Mrs. Easton was a member of the bargaining unit and was representing the views of employees at the table. Mr. Jones interjected that management considered Mrs. Easton to be a management official and even considered that Mr. Cook may also be a management official. Mr. Cook testified that he was quite upset about the comment concerning his own status as well as Mrs. Easton's status and wanted to know the basis and rationale for Mr. Jones' statement. Mr. Jones declined to discuss the matter further, saying that the matter of an employee's status was not properly a subject for consideration by the negotiating teams and urged that they return to the article then under discussion. Mr. Cook stated that before they could return to negotiations the issue of whether or not Mrs. Easton was a management official would first have to be resolved. Mr. Jones explained that a determination of that issue could only be made upon the filing of a clarification of unit petition and again urged resumption of negotiations. 1/ Mr. Cook refused, saying that he could

1/ Complainant filed a Clarification of Unit Petition on the status of Joseph E. Cook on July 14, 1975 (Case No. 22-6269(CU)), and on July 25, 1975, such a petition was filed by the Union on the status of Jane Easton (Case No. 22-6291(CU)). These cases were consolidated and on December 10, 1975, it was determined by the Assistant Secretary of Labor for Labor-Management Relations that neither Mr. Cook nor Mrs. Easton are management officials. I wish to stress that such determination was in no way a factor in my deliberations of the case sub judice, because the conclusions reached by me in this case did not turn on the question of employee status of either of these individuals. The unsolicited copy of the Decision and Order sent to me by the Assistant Secretary's office is hereby made a part of the record as the last item of Assistant Secretary's Exh. No. 1.

not continue to negotiate until such time as Mrs. Easton was removed from Claimant's negotiating team whereupon he gathered his papers and left the room at approximately 4:55 p.m.

When asked at the hearing why he walked out, Mr. Cook replied, "I walked out because they refused to confer, to talk about it with either myself or Jane on why they determined either me or her to be inappropriate or appropriate representatives at the table, that they refused to talk about that." (TR.106).

At no time during any of the 56 negotiating sessions in the five months prior to April 21, 1975, was any remark or comment made by any member of the Union team which could have been construed as an objection to Mrs. Easton's presence on the management side of the table despite the fact that she was always considered by the Union to be a bargaining unit employee. When asked why the union had never questioned the propriety of her membership on the management team in view of her status, Mr. Cook responded that "there was nothing to question until [Maurice Jones] said she was not a bargaining unit employee on April 21st." (TR.123). On another occasion he stated that although he assumed from the very beginning that Mrs. Easton was a unit employee he did not make an issue of it any earlier than April 21, 1975, because "it was only through the course of negotiations and the representation at the table that it appeared that something is wrong here." (TR.105). He elucidated that he thought it was wrong for Mrs. Easton to sit with management because "it is a conflict of interest for her to be both somebody we represent and somebody we bargain against." (TR.105). In the course of his testimony, Mr. Cook maintained that the presence of a bargaining unit member on the management side of negotiations "undermines our position as exclusive representatives of employees." (TR.102).

Mr. Cook admitted that at no time during the course of negotiations did Mrs. Easton purport to speak for the Union on any issue. However, he testified that on one occasion she did claim "to represent the points of views of employees"

when "she said, 'I know that employees don't agree with your position on your proposal on the combined charts campaign'***." (TR.89). Mrs. Easton testified that she had never had any discussions with employees of the bargaining unit relative to issues being negotiated.

Several attempts were made by the Complainant subsequent to April 21, 1975, to have the parties resume contract negotiations, but each time the union refused to do so until Mrs. Easton was removed from the management team.

The only evidence in this case as to Mrs. Easton's status was that she was a member of the bargaining unit. It is not within my authority to make a finding as to her status and I make no such finding. However, I do find that she was designated by management to be a unit employee on the two eligibility lists furnished to the Union, that the Union had every right to assume that she was a unit employee, and that there was no reason for them to ever assume otherwise.

Conclusions of Law

1. One of the reasons given by the Union's Chief Negotiator for not engaging in further negotiations on April 21, 1975, was management's refusal to discuss Mrs. Easton's status. Section 11 of the Order requires that management and labor organizations confer with respect to personnel policies and practices and matters affecting working conditions. The status of an employee sitting as a member of a negotiating team is not a subject requiring conference and the Union had no right to insist on a discussion of employee status as a condition precedent before contract negotiations could continue. Management's refusal to discuss that subject did not justify the Unions's refusal to return to contract negotiations on April 21, 1975. It is concluded, therefore, that the Union's unjustified walk-out on negotiations constituted a refusal to negotiate in good faith in violation of Section 19(b)(6) of the Order.

2. The Union has steadfastly refused to engage in further negotiations because one of the members of the management negotiating team is a unit employee. The Union contends that the mere presence of a bargaining unit employee on management's

team adversely affects negotiations because it undermines the Union's status as the exclusive representative of unit employees. There being no evidence in the record to support this assertion, I find and conclude that Mrs. Easton's presence on the management team in no way interfered with or undermined the Union's status as the exclusive representative of the employees in the bargaining unit.

3. Another question to be determined is whether a unit employee is an appropriate representative of management in the negotiation of agreements. Section 11(a) of the Order requires that "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions,***." (Emphasis furnished). The term "appropriate representatives" is not defined in the Order. However, Section 1(b) of the Order specifically precludes a management official or supervisor from representing a labor organization. Despite the fact that there is no specific converse preclusion in the Order as to a unit employee representing an agency, the Union contends that (1) since appropriate representatives for the Union are other than management officials or supervisors then it logically follows that appropriate representatives for management must be other than unit employees, and (2) since a management employee cannot sit on Union's negotiating team it is impermissible for a bargaining unit employee to sit on management's team. Respondent's contention is rejected for the reasons hereinafter set forth.

I construe the phrase "through appropriate representatives" in Section 11(a) to refer back only to "a labor organization that has been accorded exclusive recognition" because by virtue of Section 1(b) it is only with respect to a labor organization that the Order precludes certain categories of employees from acting as a representative. Therefore, those employees not excluded are "appropriate representatives." The exclusion of supervisors and management officials serving as representatives of a labor organization has long been held not to be an arbitrary exclusion. It is, therefore, constitutionally permissible to exclude these categories of employees in order to insure the employer of their undivided loyalty. International Brotherhood of Electrical Workers v. NLRB, 487 F.2d 1143 (D.C. Cir. 1973)

and cases cited therein. The undivided loyalty of supervisors and management officials is essential to the employer in order to assure that the employer's interests are protected in the event of a dispute with the rank-and-file. This reason for excluding a management employee from representing a labor organization does not exist in the converse situation of a unit employee representing management, except in very rare instances which do not exist in the case sub judice.

Furthermore, to uphold Respondent's contention would necessitate reading into the Order an exclusion which simply does not exist therein, and thereby deny the Agency of its fundamental right (i.e., a right not granted by statute but a basic right that has always existed) to choose its own representatives. A labor organization has always had this same fundamental right. Freedom of choice in the selection of representatives on each side of the negotiations table is the essential foundation of the collective bargaining process. For this reason the fundamental right of labor unions and management to bargain collectively through representatives of their own choosing has long been recognized by the courts and consistently safeguarded and protected in the statutes. E.g., Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), 57 S.Ct. 615, 108 A.L.R. 1352; Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 50 S.Ct. 427 (1930); Labor Management Relations Act, 29 U.S.C. §158(b) (1) (B) (1970).

With respect to each party in the collective bargaining process having the right to choose its representatives, there is a correlative duty upon each party to negotiate with the appointed representatives of the other party. This rule is not absolute, however, and in NLRB v. International Ladies' Garment Workers' Union, 274 F.2d 376 (3d Cir. 1960) it was held that the union was justified in its refusal to meet and negotiate with a designated agent of the employers' association. His name was Mickus and he had previously held responsible and highly confidential positions with the respondent union for 10 years immediately preceding his resignation from the union. One year later Mickus was hired by the employers' association to deal with the officials and agents of the respondent labor organizations concerning labor-relation matters of the association and its member-employers. In essence, he

was hired by the association to perform the same functions for it as he performed for the union previously. There was undisputed testimony that Mickus "had been employed because of his years of familiarity from the inside of the union with its strategy, thinking, working, and operations." No such situation exists in the instant case which would justify the Union's refusal to negotiate simply because of Mrs. Easton's presence on the other side of the table. Although by the nature of her job Mrs. Easton is a bargaining unit employee she has never joined the Union, has never participated in the management of its affairs, and has never been privy to its internal workings and strategy.

There is no evidence in this case that Mrs. Easton's presence on Complainant's negotiating team gives Complainant any special or unfair advantage or works to the Union's disadvantage in the negotiations between them. It is concluded, therefore, that the mere presence of a bargaining unit employee on a management negotiating team does not ipso facto constitute sufficient grounds for a union to refuse to negotiate, and that the Union's refusal to negotiate on this ground was violative of Section 19(b) (6) of the Order.

4. The Union knew from the beginning of negotiations that Mrs. Easton was a unit employee. To wait 5 months and after half the contract was agreed to and after 56 hours of negotiations to raise her status as a reason for refusing to negotiate constitutes a waiver of that fact as a reason.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(b) (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the

Assistant Secretary of Labor for Labor-Management Relations hereby orders that American Federation of Government Employees, Local 41, AFL-CIO, shall:

1. Cease and desist from refusing to consult, confer, or negotiate with Department of Health, Education and Welfare, Office of the Secretary, Headquarters, by refusing to engage in further negotiations of a basic agreement until such time as a bargaining unit employee be removed as a member of that Agency's negotiating team.
2. Take the following affirmative action in order to effectuate the purposes of the Executive Order:
 - a. Upon request of the Chief Negotiator of the Agency's negotiating team, resume and continue to engage in further negotiations of a basic agreement.
 - b. Notify its officers and agents, as well as its membership, in the form of letters, notices on bulletin boards, or other effective means of communication, that its refusal to engage in further negotiations of a basic agreement has been found to be unjustified and in violation of Section 19(b)(6) of Executive Order 11491.
 - c. Notify the Assistant Secretary within 20 days from the date of this Order what steps have been taken to comply herewith.


JOYCE CAPPS
Administrative Law Judge

Dated: April 7, 1976
Washington, D.C.

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

VETERANS ADMINISTRATION HOSPITAL,
MURFREESBORO, TENNESSEE
A/SLMR No. 702

This case involved an unfair labor practice complaint filed by Local 1844, American Federation of Government Employees, AFL-CIO (Complainant), alleging violations of Section 19(a)(1), (2) and (6) of the Order. It was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Acting Regional Administrator.

Specifically, the case involved a dues paying unit employee who was terminated by the Respondent. After appealing his termination to the Civil Service Commission (CSC), it was ordered that he be retroactively restored to his former position. The Complainant sought to have dues withheld from the individual's back pay. However, the Respondent stated that it did not have authority to make the requested deductions inasmuch as the Federal Personnel Manual (FPM) states that dues withholding is terminated when an employee is separated from the Federal service and provisions for the deduction of dues from back pay do not exist. Furthermore, the Respondent contacted the individual involved in an attempt to ascertain whether or not he wanted dues withheld and was told that he did not wish to have dues deducted.

The Complainant alleged that the Respondent violated the Order by contacting a unit employee regarding the withholding of dues from his back pay and by refusing to withhold dues in the absence of an executed SF 1188 cancellation form.

The Assistant Secretary found that the evidence did not establish that the Respondent attempted to deal or negotiate directly with the unit employee or to threaten or promise benefits to him by contacting him with regard to withholding dues from his back pay. Rather, the Respondent merely sought to ascertain the position of the unit employee regarding the dues withholding. It was further determined that the Respondent's refusal to comply with the Complainant's request for dues withholding was not a violation of the Order inasmuch as the evidence established that the Respondent was uncertain as to the appropriate course of action to be taken and, therefore, sought a decision from the Comptroller General regarding compliance with Complainant's request. In this context, the

Assistant Secretary concluded that where, as here, an agency, in good faith, seeks a decision from the Comptroller General, it should be given a reasonable opportunity to comply with the consequences which flow from the Comptroller General's decision. Finally, it was found that the evidence did not establish that the Respondent's action in the subject case tended to encourage or discourage membership in the Complainant by discrimination in regard to conditions of employment.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 702

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

VETERANS ADMINISTRATION HOSPITAL,
MURFREESBORO, TENNESSEE

Respondent

and

Case No. 41-4577(CA)

LOCAL 1844, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Regional Administrator Hubert J. Sigal's Order transferring the case to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation, accompanying exhibits, and the Respondent's brief, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19 (a)(1), (2) and (6) of Executive Order 11491, as amended, by contacting a bargaining unit employee and inquiring whether or not he desired to have union dues withheld from his back pay granted pursuant to a U.S. Civil Service Commission's (CSC) decision ordering that the employee involved be retroactively restored to his former position. It is further alleged that the Respondent violated the Order by not withholding dues in the absence of an executed SF 1188 form cancelling authorization for dues withholding. The Respondent, on the other hand, maintains that it is precluded by applicable Federal Personnel Manual (FPM) provisions from deducting the dues as requested by the Complainant. In this respect, it argues that FPM Supplement 990-2, Book 550, Chapter 3, Section 3-5 (g)(2) (i) states that "an allotment for the payment of dues for a labor organization

is... terminated when the allotter is separated from the Federal service." It further argues that the FPM Supplement 990-2, Book 550, Chapter 8, Section 8-7, entitled "Authorized Deductions," does not authorize the deduction of dues withholding from back pay.

The undisputed facts, as stipulated by the parties, are as follows:

The Complainant is the exclusive representative of a unit of all nonprofessional employees of the Respondent. Effective September 13, 1974, Henry Wade, a unit employee, was terminated by the Respondent. Prior to his termination, Wade had executed a dues withholding authorization form, SF 1187, and at the time of his separation was a member in good standing of the Complainant. After appealing his termination to the CSC, it was ordered, by decision dated May 19, 1975, that he be retroactively restored to his former position.

Subsequently, on May 23, 1975, the Complainant's President telephoned the Respondent's Personnel Director and requested that union dues be withheld from Wade's back pay. The following day, the Personnel Director orally informed the Complainant's President that he did not have regulatory authority to withhold dues from the back pay. Although the matter was further explored by the parties, they were unable to reach an agreement on Wade's dues withholding.

Wade was reinstated on June 2, 1975, and returned to work on that date. On June 23, 1975, the Complainant's President sent a memorandum to the Hospital Director requesting that union dues be withheld from Wade's back pay. Shortly thereafter, the Personnel Director telephoned Wade and asked him if he wanted dues withheld from his back pay. Wade stated that he would confer with his attorney and notify the Personnel Director of his decision. Wade, however, did not return the call. The following week Wade received a check for his back pay and union dues had not been withheld. When the Personnel Director again contacted Wade on July 10, 1975, regarding dues withholding, Wade stated that he did not wish his dues withheld. Wade did not submit a SF 1188 form cancelling the authorization for union dues withholding.

On November 14, 1975, the Hospital Director wrote to the Comptroller General requesting an opinion as to whether or not the Respondent may withhold dues from an employee's back pay and, if not, was the hospital liable to the labor organization for the payment of such back union dues? A copy of this letter was sent to the Complainant's National Representative on November 19, 1975.

At the time the parties submitted the stipulation of facts and exhibits to the Acting Regional Administrator, Wade had not executed an SF 1188 form cancelling his authorization for dues withholding and dues were not being withheld from his pay.

All of the facts and positions set forth above are derived from the parties' stipulation, accompanying exhibits and the brief submitted by the Respondent.

With respect to the Complainant's allegation that the Respondent violated the Order by contacting a unit employee regarding the withholding of dues from his back pay, I find that such conduct by the Respondent was not improper under the particular circumstances herein. Thus, the evidence does not establish that the Respondent attempted to deal or negotiate directly with the employee involved or threaten or promise him benefits. ^{1/} Rather, the Respondent sought to merely ascertain the position of the employee regarding dues withholding.

Regarding the allegation that the Respondent violated the Order by not withholding dues in the absence of an executed SF 1188 cancellation form, I find that, under the particular circumstances herein, the Respondent's conduct did not violate the Order. The evidence indicates that dues allotment, as referenced under Article XXV, Section 1 of the parties' negotiated agreement, is subject to the regulations of the CSC. As previously noted, the FPM provides for the termination of the payment of dues to a labor organization when an individual is separated from the Federal service. However, dues withholding regarding reinstatement and back pay is not categorized under "Authorized Deductions" of the FPM. The FPM also provides that "when an appropriate authority corrects an unjustified or unwarranted personnel action, the Agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account of the employee as if the unjustified or unwarranted personnel action had not occurred and the employee shall be deemed for all purposes to have rendered service in the agency for the period covered by the corrective action." Under these circumstances, the Respondent decided not to withhold dues from the employee's back pay and current pay pending a decision in this regard by the Comptroller General. In this context, I find that the Respondent's conduct was not violative of the Order. Thus, the evidence establishes that the Respondent was uncertain as to the appropriate course of action to be taken with respect to dues withholding and, therefore, it sought a decision from the Comptroller General regarding compliance with the Complainant's request. In these circumstances, and noting the absence of any evidence of bad faith, I find that the Respondent's conduct in refusing to comply with the Complainant's request for dues withholding was not improper. Rather, where, as here, an agency, in good faith, seeks a decision from the Comptroller General, I find that it should be given a reasonable

^{1/} See Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80.

August 26, 1976


opportunity to comply with the consequences which flow from the Comptroller General's decision. 2/

Based on all of the foregoing, and noting additionally that the evidence does not establish that the Respondent's conduct in the subject case tended to encourage or discourage membership in the Complainant union by discrimination in regard to conditions of employment, I find that the Respondent's conduct in the subject case did not violate Section 19(a)(1), (2) and (6) of the Order and that, therefore, dismissal of the instant complaint is warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-4577(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

2/ However, a party's request for an opinion of the Comptroller General will not automatically constitute a defense to an unfair labor practice where such party has failed to comply with its obligations under the Order. Thus, the Federal Labor Relations Council has held that a requested opinion of the Comptroller General is not a defense to an unfair labor practice based on the failure to implement an arbitration award where the requesting party has failed to file exceptions to the award with the Council. Department of the Army, Aberdeen Proving Ground, FLRC No. 74A-46.

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

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEAN SURVEY,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
A/SLMR No. 703

This case involved an Application for Decision on Grievability and Arbitrability filed by the National Marine Engineers Beneficial Association, AFL-CIO (Applicant). The Applicant contends that the grievance involves the interpretation of a provision of the negotiated agreement which provides for the payment of quarters allowances to engineer officers when their vessel is in drydock and quarters are not available or provided. In this respect, it asserts that, in accordance with an industrywide practice, the payment of quarters allowances applies to weekends as well as weekdays when a ship is in drydock. In response, the Activity contends that the grievance does not involve the interpretation of the negotiated agreement, which is silent as to the payment of quarters allowances for individuals "ashore in an off-duty status," but involves the application of an agency regulation which states that "room and meal allowances will not be provided to employees who are ashore in an off-duty status."

The Administrative Law Judge found that the resolution of the grievance herein involved the interpretation and application of an agency regulation, the National Oceanic and Atmospheric Administration (NOAA) Finance Handbook. In this respect, he concluded that, in order for an agency regulation to be subjected to interpretation by an arbitrator, such regulation must be included by reference or otherwise in the negotiated agreement. Under the circumstances herein, he concluded that it could not be established that the parties had agreed or intended to incorporate the NOAA Finance Handbook provisions in the negotiated grievance and arbitration procedure. Thus, the Administrative Law Judge found the grievance not to be arbitrable and recommended that the instant Application be dismissed.

The Assistant Secretary rejected the Administrative Law Judge's conclusion that an arbitrator would be precluded from interpreting an agency regulation which was not referenced or embodied in the negotiated agreement. He found that where, as in the instant case, a party to the dispute introduces an agency regulation which deals with the same subject matter as the provision in the negotiated agreement, an arbitrator should consider those laws and regulations introduced by the parties as relevant in resolving a grievance arising under the agreement whether or not those regulations and policies are contained in the agreement.

The Assistant Secretary further found that the instant matter was within the scope and coverage of Article III, Section 9(c)(4) of the negotiated agreement which states that quarters allowances will be provided to employees at all times when a "vessel is in drydock overnight and lodging with all facilities, including heat, light, hot and cold running water and sanitary facilities, is not provided aboard the vessel or by the shipyard nearby." The record indicated that, in fact, the grievants' vessel was in drydock for the entire week, lodging with all facilities was not available, but the grievants had received quarters allowances for only a five-day period during the week.

Additionally, the Assistant Secretary found that the disputed provision of the NOAA Finance Handbook (agency regulation) could not be interpreted as a bar to arbitration. Although Chapter 13-06(2)(h) of the NOAA Finance Handbook prohibits room and meal allowances to employees who are ashore in an off-duty status, other provisions of this same regulation could arguably support the Applicant's position that, in the instant case, the employees were entitled to quarters allowances because their vessel was in drydock during the weekend and facilities and lodging were not available aboard ship or nearby. Moreover, the Assistant Secretary noted that the presence of nearly identical language in Article I, Section 10(a) of the negotiated agreement, a Department of the Navy Regulation, and Chapter 13-01 of the NOAA Finance Handbook, all of which provide that the compensation of employees of vessels will be adjusted in accordance with prevailing rates and practices in the maritime industry, makes it arguable that, if an industrywide practice of paying quarters allowances payments during weekends does, in fact, exist, then under the instant circumstances such a practice may prevail in the subject case.

Based on all of the foregoing, the Assistant Secretary found that, under circumstances herein, the agency regulation could not be interpreted as a bar to arbitration and that the instant grievance was within the scope and coverage of Article III, Section 9(c)(4) of the negotiated agreement. Thus, he concluded that the instant grievance could be pursued to arbitration. Accordingly, he ordered that the Activity take certain affirmative actions to implement the finding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEAN SURVEY, NATIONAL
OCEANIC AND ATMOSPHERIC ADMINISTRATION

Activity

and

Case No. 22-5880(AP)

NATIONAL MARINE ENGINEERS
BENEFICIAL ASSOCIATION, AFL-CIO

Applicant

DECISION ON ARBITRABILITY

On January 29, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision on Arbitrability in the above-entitled proceeding, finding that the grievance involved herein was not on a matter subject to the arbitration procedure set forth in the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision on Arbitrability.

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

The instant Application for Decision on Grievability or Arbitrability sought a determination regarding the arbitrability of a grievance under the negotiated agreement. The grievance involved the entitlement of engineer officers, employed on vessels of the Activity, to quarters allowances for weekends while the vessels were in shipyards and the individuals in question were not actually performing work for the Activity.

The record shows that the grievance herein was filed by Wilford A. Dixon on behalf of himself and three other licensed marine engineers, who were denied quarters allowances while their vessel, the National Oceanic and Atmospheric Administration (NOAA) ship, Whiting, was in an inactive status and the grievants were ashore in an off-duty status. The record also reveals that, at all times material herein, the above-named vessel was in drydock and quarters were not available aboard ship for the grievants. During the week, the Activity paid the grievants quarters allowances, but refused to make such payments for the weekend, contending that the individuals were not entitled to quarters allowance payments on the weekends because they were "ashore in an off-duty status."

The instant grievance was filed under the parties' negotiated grievance procedure and, after being pursued through the initial steps of this procedure, was reviewed by the grievance committee in accordance with Article 1, Section 7(a), Step 5. 1/ The grievance committee concluded on January 7, 1975, that the intent of the negotiated agreement "was not to provide allowances for the grievants while ashore in an off-duty status." When the Applicant sought to arbitrate the matter pursuant to Article 1, Section 8 of the negotiated agreement, 2/ the Activity asserted that the matter did not involve the interpretation or application of the parties' negotiated agreement and, therefore, was not arbitrable. As a result, the Applicant filed the instant Application for Decision on Grievability or Arbitrability.

Specifically, the Activity contends that the grievance does not involve the interpretation of the negotiated agreement which is silent as to the entitlement of quarters allowances for individuals "ashore in an off-duty status," but, instead, involves the application of an agency regulation contained in the NOAA Finance Handbook, Chapter 13-06(2)(h), which states that "room and meal allowances will not be provided to employees who are ashore in an off-duty status." Noting that the Applicant does not dispute that the grievants were ashore in an off-duty status, the Activity asserts that it has consistently denied payment to employees under these circumstances. It further argues that it never intended Chapter 13-06(2) of the NOAA Finance Handbook to be subject to interpretation under the negotiated grievance procedure. In this regard, it

1/ Article I, Section 7(a), Step 5, states: "If the Marine Center Director does not resolve the grievance to the employees' satisfaction, then within two working days of receipt of the grievance he shall authorize a grievance committee to conduct a hearing. The grievance committee shall consist of three persons (employees, commissioned officers or both), one of whom shall be appointed by the Center Director, one by the Union and the third selected by the two persons appointed. The Marine Center Director shall designate the chairman from among these three. No person previously involved in the adjudication of the grievance shall serve on this committee."

2/ Article I, Section 8 (Arbitration), states: "If the Employer or the Union are not in agreement with the decision of the Marine Center Director, NOS, as the case may be, the grievance shall, upon written notice to the other party, be referred to arbitration providing both parties agree that the grievance involves only the interpretation or application of this agreement. Arbitration shall be invoked only by the Employer or the Union. All costs of the arbitration shall be shared equally by the parties."

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notes that this regulation was in effect at the time the parties' agreement was negotiated and that the applicability or interpretation of this regulation was never discussed during such negotiations. The Activity asserts that the incorporation of Section 12(a) of the Order into the negotiated agreement 3/ was to emphasize that all provisions of such agreement were to be in accordance with existing and future laws, the Order and appropriate regulations, and was not intended to imply that all regulations are included in the negotiated agreement by reference and, therefore, are subject to interpretation under the negotiated grievance procedure. Hence, it argues that the Applicant is attempting to submit for interpretation under the arbitration procedure a regulation not incorporated by reference into the negotiated agreement.

The Applicant, on the other hand, contends that the instant grievance involves the interpretation of Article III, Section 9 of the negotiated agreement inasmuch as that provision provides for the payment of quarters allowances when certain conditions have been met. These conditions, it asserts, include periods of maintenance, repair and inspection when a vessel is in drydock and quarters are not available or provided. The Applicant maintains that Article III, Section 9(c)(4) of the agreement requires the payment of quarters allowances to individuals who are unable to stay on board ship and must go ashore, as in the instant case. 4/ Moreover, it argues that this payment applies to weekends as well as weekdays when a ship is in drydock. The Applicant further contends that Article I, Section 10 5/ of the negotiated agreement incorporates by reference existing law (5 U.S. Code 5342) which provides that the compensation of officers and crew shall be adjusted in accordance with

3/ Article I, Section 2 (Principles and Policies), states: "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."

4/ Article III, Section 9(c)(4) (Room and Allowances), in pertinent part, states: "Employees shall be entitled to quarters allowances if they have notified the Commanding Officer/Master that one or more of the following conditions exist when the vessel is in port, and it is impossible for the Commanding Officer/Master to arrange for suitable quarters and the affected employees actually go ashore to sleep.... At all times when vessel is in drydock overnight and lodging with facilities, including heat, light, hot and cold running water and sanitary facilities, are not provided aboard the vessel, or by the shipyard nearby."

5/ Article I, Section 10 (Compensation), states: "5 USC 5342 provides that the compensation of officers and crew of vessels shall be fixed and adjusted from time to time as nearly as is consistent with the public interest, in accordance with prevailing rates and practices in the maritime industry."

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prevailing rates and practices in the maritime industry. In this respect, it argues that there is an industrywide practice of paying quarters allowances during weekends when a vessel is in drydock and individuals must go ashore because quarters are not available aboard ship. It also maintains that this practice is followed by the Department of the Navy and that language identical to Article 1, Section 10 appears in the Civilian Marine Personnel Instructions (CMPI) 593.1-5; 6/ a Department of the Navy Regulation. In light of the existing law referenced in the negotiated agreement and the above-mentioned industrywide practice, the Applicant argues that the Activity's contention that the NOAA Finance Handbook supersedes the negotiated agreement must be rejected, inasmuch as Chapter 13-06(2)(h) therein would preclude payment of quarters allowances which would be inconsistent with a prevailing maritime industry practice and, as a result, would be in contravention of a Federal Statute.

The Administrative Law Judge found that the denial of the grievance herein was predicted upon the provisions of the NOAA Finance Handbook and, thus, the application and interpretation of the NOAA Finance Handbook is clearly involved in any resolution of the grievance. He further concluded that, in order for the NOAA Finance Handbook of any other Agency regulation to be subjected to interpretation by an arbitrator, such handbook or regulation must be included by reference or otherwise in the negotiated agreement. Under the circumstances herein, he concluded that it could not be established that the parties had agreed or intended to incorporate the NOAA Finance Handbook provision in the negotiated agreement and to make any interpretation thereof subject to the negotiated grievance and arbitration procedures. He also determined that Article 1, Section 2 of the negotiated agreement was merely a restatement of the Executive Order and made clear that the terms of the agreement were subordinate to the existing regulations, including the NOAA Finance Handbook involved herein.

Under the particular circumstances of this case, and in accordance with the criteria for determining arbitrability established by the Federal Labor Relations Council (Council) in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19, I reject the conclusion of the Administrative Law Judge that the instant grievance is not arbitrable. In its Crane decision, the Council indicated that, in any dispute referred to the Assistant Secretary concerning whether or not a grievance is grievable or arbitrable under the negotiated grievance procedure, the

6/ CMPI 593.1-5, Section 1-2 (Authority), states: "This instruction is based on the following authorities: Classification Act of 1949 as amended (63 Stat. 594; 5 USC 1071). -- This Act provides in Section 202(8) that compensation of officers and crews of vessels shall be fixed and adjusted from time to time, as nearly as is consistent with the public interest, in accordance with prevailing rates and practices of the maritime industry. Pursuant to the statutory authority conferred by this Act, subsistence and quarters in kind, or cash in lieu thereof, are furnished civilian marine personnel generally in accordance with the rates and practices determined to be current in the maritime industry."

Assistant Secretary must consider not only 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, but also relevant provisions of the Order, existing laws, the regulations of appropriate authorities, and published agency policies and regulations in existence at the time the agreement was approved. In the instant case, the Administrative Law Judge addressed himself only to the question of whether a certain regulation of the Activity dealing with employees "ashore in an off-duty status" was incorporated by reference or otherwise in the existing negotiated agreement and thereby became subject to the grievance and arbitration procedure of such agreement. As a result, he concluded that, "In order for the Finance Handbook or any other Agency regulation to be subjected to interpretation by an arbitrator such handbook or regulation must be included by reference or otherwise in the collective bargaining agreement."

Contrary to the Administrative Law Judge's conclusion, I find that an arbitrator would not necessarily be precluded from interpreting an agency regulation which was not referenced or embodied in the negotiated agreement. In this regard, the Council has indicated "...that the parties can agree to provisions which would, in effect, extend the negotiated grievance procedure to matters such as the application of policies and regulations which are not embodied or incorporated in the agreement so long as the procedure does not extend to matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or the Order" (emphasis added). 7/ The Council has also stated "that where an arbitrator, in the course of rendering an award, considers an agency regulation which deals with the same subject matter as the provision in the negotiated agreement and which was introduced by the parties to the dispute, and thereafter considers and applies that regulation in reaching his judgment in the case, the agency may not challenge the application of that regulation..." 8/ Furthermore, the Council has held that under "the present Section 13 [of the Order], arbitrators of necessity now consider the meaning of laws and regulations, including Agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because Section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation." 9/

7/ Bureau of Prisons and Federal Prison Industries, Inc., Washington, D. C. and Council of Prison Locals, AFGE, FLRC No. 74A-24. See also Section VI of the Council's Report and Recommendations (1975).

8/ American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters, 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75-45A.

9/ Bureau of Prisons and Federal Prison Industries, Inc., cited above and Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101.

Based on the foregoing, I find that where, as in this case, a party disputing the interpretation and application of a negotiated agreement introduces an agency regulation which deals with the same subject matter as the provision in the negotiated agreement, i.e., Chapter 13-06 of the NOAA Finance Handbook and Article III, Section 9 of the negotiated agreement, an arbitrator could consider such regulation in resolving a grievance arising under the agreement, whether or not the regulation was expressly incorporated in the agreement. 10/ Consequently, I reject the Administrative Law Judge's conclusion that an arbitrator would be precluded from interpreting an agency regulation which was not referenced or embodied in the negotiated agreement.

Furthermore, I find that the threshold questions to be decided in the subject case are whether or not Article III, Section 9(c)(4) of the negotiated agreement is applicable to the instant circumstances and whether the application of this negotiated provision is controlled by Chapter 13-06(2)(h) of the NOAA Finance Handbook. With regard to the first question, Article III, Section 9(c)(4) of the negotiated agreement states that quarters allowances will be provided to employees, "At all times when a vessel is in drydock overnight and lodging with facilities, including heat, lights, hot and cold running water and sanitary facilities are not provided aboard the vessel or by the shipyard nearby." The record herein indicates that, in fact, the grievants' vessel was in drydock for the entire week, lodging with all facilities was not available, but the grievants had received quarters allowances for only a five-day period during the week. Under the circumstances herein, I find that the instant dispute concerning whether the foregoing provision also applies during weekend periods clearly embodies the interpretation and application of Article III, Section 9(c)(4) of the parties' negotiated agreement.

Thus, the remaining issue to be resolved is whether or not this negotiated provision is controlled by agency regulation. In this regard, the Activity maintains that inasmuch as the negotiated agreement is silent as to the payment of "room and meal allowances" to employees who are ashore in an off-duty status, Chapter 13-06(2)(h) of the NOAA Finance Handbook, which prohibits such payment, is controlling. Although the Applicant does not dispute that the grievants were ashore in an off-duty status, the record evidence indicates that this occurred because the grievants' vessel was in drydock for the entire week and facilities aboard ship or nearby were not available. In this connection, Chapter 13-02(1) of the NOAA Finance Handbook

10/ It is also clear that the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates applicable law or appropriate regulation. See Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26.

states that, "when suitable temporary government quarters and mess facilities are not available aboard vessels or on shore, wage marine employees will receive a daily commuted subsistence allowance on a seven day a week basis consistent with the requirements of this directive" (emphasis added). In my view, it is arguable that this provision conflicts with Chapter 13-06(2)(h) of the NOAA Finance Handbook which the Activity alleges prohibits the requested payments during weekends. Moreover, when Chapter 13-06(2)(h), which states that "room and meal allowances will not be provided to employees who are ashore in an off-duty status," is read together with Chapter 13-06(1)(d) of the same Finance Handbook, which states:

1. Employees shall be entitled to quarters allowance when the vessel is in port if the conditions listed below exist on board ship and the Commanding Officer is unable to arrange other suitable quarters, making it necessary for the affected employees to obtain sleeping quarters ashore:
- d. At all times when vessel is in drydock overnight and lodging with all facilities, including heat, light, hot and cold running water and sanitary facilities are not provided aboard the vessel, or by shipyard nearby. 11/

further ambiguity results. Thus, in my judgement, it is arguable that provisions within the NOAA Finance Handbook support both the Activity's and the Applicant's position.

In support of its contention that there is a prevailing industrywide practice of paying quarters allowances to employees whose vessel is in drydock during weekends and facilities and lodging are not available aboard ship or nearby, the Applicant cites Department of the Navy Regulation, Civilian Marine Personnel Instructions (CMPI) 593.1-5, Section 1-2, 12/ which provision is similar to Article I, Section 10 13/ of the negotiated agreement and to Chapter 13-01 of the NOAA Handbook. 14/ In my view, the presence of nearly identical language in each of the three provisions makes it arguable that, if an industrywide practice of paying quarters allowances payments during weekends does, in fact, exist, then under the instant

11/ Moreover, the language of Chapter 13-06(1)(d) of the NOAA Finance Handbook is practically identical to that of Article III, Section 9(c)(4) of the parties' negotiated agreement.

12/ Cited above at footnote 6.

13/ Cited above at footnote 5.

14/ Chapter 13-01, of the NOAA Finance Handbook, in pertinent part, provides: "Wage marine employees are compensated in accordance with prevailing rates and practices in the Maritime Industry as nearly as is consistent with the public interest (5 USC 5342(a)). Pursuant to this authority subsistence and quarters in kind or cash in lieu thereof are furnished to vessel employees in accordance with the rates and practices determined to be current in the industry."

circumstances such as a practice may prevail in the subject case. 15/

Under all of the foregoing circumstances, I find that the similarity of the above noted provisions mandating the uniform application of an industrywide practice, and the unclear relationship between Chapters 13-02(1), 13-06(1)(d) and 13-06(2)(h) of the NOAA Finance Handbook, at a minimum, raise questions as to the propriety of citing Chapter 13-06(2)(h) as the controlling regulation herein. Noting this ambiguity and in the absence of sufficient evidence to establish that the intent and meaning of Chapter 13 of the NOAA Finance Handbook was to bar quarters allowances in the circumstances involved herein, I find that Chapter 13-06(2)(h) cannot be utilized as a bar to arbitration in this matter. 16/ Accordingly, I find that the instant grievance is on a matter which can be pursued under the arbitration procedure contained in the parties' negotiated agreement.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 22-5880(AP) is subject to arbitration under the parties' negotiated grievance procedure.

15/ In addition, the CMPI 593, Section 4-1(a), which establishes the conditions necessary for quarters allowances payment is similar to Article III, Section 9(c)(4) of the negotiated agreement and Chapter 13-06(1)(d) of the NOAA Financial Handbook. Thus, it states, in pertinent part: "In addition, the quarters allowance shall be paid to affected crewmembers when the ship is in port under the following specific conditions: when the ship is on drydock overnight unless lodging with all facilities including heat, light, hot and cold running water and sanitary facilities are provided aboard the ship. Overnight shall mean after 1900 and before 0800; however, Personnel who go ashore in an off-duty status, not necessitated by the conditions stated above, are not entitled to such case allowances otherwise payable."


16/ Moreover, a conclusion that Chapter 13-06(2)(h) is controlling could, at best, be supported only by a reading of this provision in disregard of the other related provisions indicated above. In this connection, the Council held in Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordinance Station, Department of the Navy, FLRC No. 73A-21, that "(s)uch laws and regulations obviously cannot be interpreted in a vacuum. They draw their intent and meaning from relevant history, reports, decisions, interpretations, policy rules and the like which must be derived from sources outside the four corners of the agreement itself."

ORDER

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the U.S. Department of Commerce, National Ocean Survey, National Oceanic and Atmospheric Administration, shall notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D. C.

August 26, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



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 In the Matter of :
 :
 U. S. DEPARTMENT OF COMMERCE :
 NATIONAL OCEAN SURVEY, NATIONAL :
 OCEANIC AND ATMOSPHERIC ADMINISTRATION :
 Activity :
 and : Case No.
 : 22-5880 (AP)
 NATIONAL MARINE ENGINEERS :
 BENEFICIAL ASSOCIATION, AFL-CIO :
 Labor Organization/ :
 Applicant :
 :

Cmdr. John K. Callahan, Esquire
6001 Executive Blvd.
Rockville, Maryland 20852
Attention: CX2

For the Activity

Joel C. Glanstein, Esquire
Markowitz & Glanstein
50 Broadway
New York, N. Y. 10004

For the Labor Organization/
Applicant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION ON ARBITRABILITY

Statement of the Case

Pursuant to an Application For Decision On Grievability Or Arbitrability filed on March 21, 1975, under Section 13 of Executive Order 11491, as amended, by the National Representative, National Marine Engineers Beneficial Association, AFL-CIO, hereinafter called the Union or Applicant, concerning the arbitrability of the negative response issued by the U. S. Department of Commerce,

National Ocean Survey, National Oceanic and Atmospheric Administration, hereinafter called the Activity or Agency, to a grievance filed under the established grievance procedure in an existing collective bargaining contract between the Union and the Activity, a Notice of Hearing on Application was issued by the Assistant Regional Director for the Philadelphia, Pennsylvania Region on October 29, 1975.

The issue to be decided by the undersigned Administrative Law Judge is whether a certain regulation of the Activity dealing with employees "ashore in off-duty status" was incorporated by reference or otherwise in the existing collective bargaining agreement between the parties and thereby became subject to the established grievance and arbitration procedure contained in the collective bargaining agreement which is the sole procedure for settling disputes between the parties concerning the interpretation and application of the terms of the collective bargaining agreement.

A hearing was held in the captioned matter on December 2, 1975, in Washington, D. C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issue involved herein.

Upon the basis of the entire record, 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 agreement dated June 12, 1974, which contains in Article I, Sections 7 and 8 a grievance and arbitration procedure. The grievance and arbitration procedure is "the exclusive procedure for consideration of grievances over the interpretation or application of the provisions" of the collective bargaining agreement. The last step of the grievance procedure, prior to arbitration, is the final decision of the Marine Center Director or the Director, National Ocean Survey. According to Article I, Section 8 of the contract, if either the Activity or the Union is not in agreement with the final decision, the grievance, upon written notice to the other party, is to be referred to arbitration provided both parties agree that the grievance involves only the interpretation or application of the collective bargaining agreement.

Article III, Section 9 of the collective bargaining agreement sets forth the conditions under which room and meal allowances will, or will not be, paid to employees while a vessel is in port. No mention, whatsoever, is specifically made for payment or non-payment of employees who are "ashore in an off-duty status" while a vessel is in port.

Chapter 13 of the National Oceanic and Atmospheric Administration Finance Handbook, which is applicable to the Activity and constitutes a controlling regulation on the Activity's practices, sets forth the conditions under which employees will receive room and meal allowances while a ship or vessel is in port. Section 13-06, 2(h) states that room and meal allowances "will not be provided to employees who are ashore in an off-duty status". 1/

Chapter 13, Section 06,2(h) has been in effect since 1969. In the intervening years the Activity and the Union have executed two other contracts in addition to the current contract involved in the instant proceeding. During the negotiations leading up to the current contract and the two prior collective bargaining contracts, no discussions have occurred between the parties with respect to the subject matter of Chapter 13 of the Finance Handbook. In fact the record is silent as to any discussion whatsoever with respect to Chapter 13, Section 06,2(h), or any other portion of the handbook.

Article I, Section 2 of the collective bargaining agreement is a restatement of Sections 12(a), (b) and (c) of Executive Order 11491, as amended. Thus, Article I, Section 2 reads in pertinent part as follows:

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

1/ In almost all other respects Article III Section 9 of the collective bargaining contract and Chapter 13-06 of the handbook are identical.

of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

On November 4, 1974, a grievance was filed with the Activity concerning the denial of room and meal allowances to three engineer employees for periods when their ship or vessel was in in-active status and they (the three named grievants) were ashore in an off-duty status. The grievance was processed and/or heard by a three-member grievance panel which decided that Chapter 13, Section 06, 2(h) of the Finance Handbook prohibited the payment of room and meal allowances to employees "ashore in an off-duty status". Thereafter, pursuant to the applicable provisions of the contract, the Union requested that the matter be submitted to arbitration. The Activity, after concluding that the denial of the grievance turned on the provisions of the Finance Handbook rather than the collective bargaining contract, refused to agree to submit the grievance to an arbitrator for final decision. Thereupon, the Union filed the instant application for decision on grievability or arbitrability, which is the subject of this proceeding.

Discussion and Conclusions

The Activity contends that inasmuch as a resolution of the grievance involves the interpretation and application of an Agency regulation, i. e. the Finance Handbook, which has not been incorporated by reference or otherwise in the collective bargaining contract, the grievance is not arbitrable.

The Union, on the other hand, disclaims that it is attempting to submit the Finance Handbook for interpretation under the contract's established grievance and arbitration procedure. According to the Union, it merely wants to litigate whether under the collective bargaining contract employees ashore in a non-duty status but not on official leave are entitled to a quarters allowance. Alternatively, the Union contends that the Finance Handbook does not supercede the provisions of the collective bargaining agreement since the Finance Handbook contravenes a Federal Statute requiring that prevailing rights and practices in the private sector of the maritime industry should be applied in the public sector. 2/ Since the Finance Handbook is at variance with the practices in the private

2/ 5 U.S.C. Section 5348.

sector, the Union takes the position that the Handbook is illegal and therefore not controlling.

If the denial of the grievance was based solely on an interpretation of the various provisions of the collective bargaining agreement there would undoubtedly be merit in the Union's position. However, such is not the case. The denial of the grievance was predicated upon the provisions of the Finance Handbook which clearly prohibits the payment of room and meal allowances to employees "ashore in an off-duty status". Thus, the application and interpretation of the Finance Handbook is clearly involved in any resolution of the grievance. Litigation of the entitlement issue alone, as urged by the Union, would not only alter and be contrary to the original grievance which seeks payment for employees in the disputed status, but would also constitute a futile act since any remedy would be subject to the provisions of the Finance Handbook.


In order for the Finance Handbook or any other Agency regulation to be subjected to interpretation by an arbitrator such handbook or regulation must be included by reference or otherwise in the collective bargaining agreement. In this connection, the record is barren of any evidence indicating discussion of the Finance Handbook, or any provision thereof, prior to the execution of either the instant or prior collective bargaining contracts between the parties. In these circumstances, it can hardly be argued that the parties had agreed or intended to incorporate the Finance Handbook provisions in the collective bargaining agreement and make any interpretation thereof subject to the contract's grievance and arbitration procedures. Article I, Section 2 of the collective bargaining agreement cited by the Union does not alter this conclusion since such provision is merely a restatement of the Executive Order. In fact Article I, Section 2 of the agreement makes it clear that the terms of the collective bargaining agreement are subordinate to the existing regulations, which include the Finance Handbook involved herein.

Accordingly, since any arbitration proceeding concerning the instant grievance would by necessity involve an interpretation or application of the Finance Handbook, which, as noted above, was not included in the collective bargaining agreement and consequently is not subject to the contractual grievance and arbitration procedures of the contract, I find that the instant grievance is not arbitrable.

As to the Union's alternative contention concerning the illegality of Chapter 13, Section 06, 2(h), sufficeth to say that such issue is not before me. Moreover, and in any event, I find that an application for decision on grievability or arbitrability is not the proper forum to test the legality of an agency regulation.

Recommendation

It is hereby recommended that the Assistant Secretary of Labor for Labor Management Relations find the grievance not arbitrable.


BURTON S. STERNBURG
Administrative Law Judge

Dated: January 29, 1976
Washington, D. C.

September 15, 1976

A/SLMR No. 704

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

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

FEDERAL AVIATION ADMINISTRATION

A/SLMR No. 704

This case involved an unfair labor practice complaint filed by the National Association of Air Traffic Specialists (NAATS) alleging that the Respondent had violated Section 19(a)(1) and (2) of the Order by taking disciplinary action against the NAATS' Facility Representative because of his union activity.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (2) of the Order by its issuance of a warning letter to the Facility Representative involved. In this regard, the Administrative Law Judge found that the Respondent had knowledge that the employee involved was the NAATS' Facility Representative. Even though the supervisor who issued the warning letter had no knowledge, the warning letter was issued with the Facility Chief's knowledge and approval, and he was aware of the employee's status as Facility Representative. The Administrative Law Judge found further that warning letters were not issued to ordinary offenders but had only been issued to Facility Representatives. Moreover, he noted that an investigation of the Facility Representative's interest in a vending operation was not made until he became Facility Representative even though he had been involved in the vending operation for several years. In the Administrative Law Judge's view, based on the disparate treatment and the timing of the disciplinary action, it could reasonably be inferred that the issuance of the warning letter was motivated, at least in part, by anti-union animus.

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from its violative conduct and take certain affirmative actions to effectuate the purposes and policies of the Order.

FEDERAL AVIATION ADMINISTRATION

Respondent

and

Case No. 30-6123(CA)

NATIONAL ASSOCIATION OF AIR
TRAFFIC SPECIALISTS

Complainant

DECISION AND ORDER

On May 18, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

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


2. Take the following affirmative actions in order to effectuate the purposes and policies 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 warning issued to Michael Winokur dated 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 local files, 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 station and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Facility Chief shall take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.
September 15, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce 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.

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 their rights assured by the Executive Order.

WE WILL expunge the letter of warning issued to Michael Winokur, dated January 2, 1975, and any notation or other memorandum thereof, from any and all local files, SF-7B cards, or other records of the Federal Aviation Administration.

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Suite 3515, 1515 Broadway, New York, New York 10036

September 15, 1976

A/SLMR No. 705

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
CINCINNATI DISTRICT, CINCINNATI, OHIO
A/SLMR No. 705

INTERNAL REVENUE SERVICE,
CINCINNATI DISTRICT, CINCINNATI, OHIO

Respondent

and

Case No. 53-7260(CA)

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 9

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 9 (NTEU), alleging that the Respondent violated Section 19(a)(1) and (6) by denying the NTEU the right to be represented at a formal discussion between management and a unit employee. In this regard, the NTEU claimed that the performance evaluation meeting in question was a formal discussion within the meaning of Section 10(e) of the Order because it involved an ongoing grievance filed by the NTEU on behalf of the unit employee. On the other hand, the Respondent contended that the meeting was not a formal discussion as it concerned matters relating solely to the grievant that had no unit-wide impact. Moreover, the Respondent alleged that the performance evaluation was part of the District Director's investigation of the grievance and the meeting was a "counseling session" between the employee and his supervisor.

On March 4, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief to the Respondent's exceptions.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the performance evaluation meeting involved herein constituted a formal discussion within the meaning of Section 10(e) of the Order as it was an integral part of the grievance process. Accordingly, the Assistant Secretary found that the failure of the Respondent to afford the NTEU the opportunity to be represented at such meeting constituted a violation of Section 19(a)(1) and (6) of the Order. Under these circumstances, he ordered the Respondent to cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

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

In agreement with the Administrative Law Judge, I find that, under the particular circumstances of this case, the performance evaluation meeting held on December 14, 1973, between supervisor Elliott and employee Rassenfoss was an integral part of the grievance process and, therefore, constituted a formal discussion within the meaning of Section 10(e) of the Order at which the exclusive representative had the right to be afforded an opportunity to be represented. Accordingly, the failure of the Respondent to afford the Complainant the opportunity to be represented at such meeting constituted a violation of Section 19(a)(1) and (6) of the Order. 1/

1/ See U.S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, A/SLMR No. 498. Compare Department of Health, Education, and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 419.

ORDER

APPENDIX

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

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:

1. Cease and desist from:

a. Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, Chapter 9, the employees' exclusive representative, the opportunity to be represented at such discussions.

b. Interfering with, restraining, or coercing its employees by failing to afford the National Treasury Employees Union, Chapter 9, 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.

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

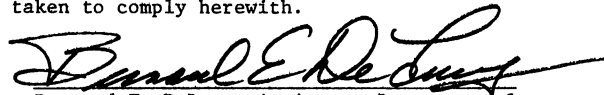
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

a. Notify the National Treasury Employees Union, Chapter 9, 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 marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.
September 15, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

WE WILL NOT conduct formal discussions between management and employees or employees representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, Chapter 9, the employees' exclusive representative, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by failing to afford the National Treasury Employees Union, Chapter 9, 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.

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.

Dated _____ By _____
(Agency or Activity)
(Signature)

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

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

September 15, 1976

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

U.S. DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF FIELD OPERATIONS,
REGION V, AREA IV,
CLEVELAND, OHIO
A/SLMR No. 706

This case involved a petition for consolidation of units filed by the Area IV Local Committee, Cleveland, Ohio, American Federation of Government Employees, AFL-CIO (AFGE), seeking to consolidate eight units for which its constituent members are the current exclusive representatives into a consolidated unit consisting of all the employees of Area IV of the Social Security Administration, Bureau of Field Operations, Region V, in Northeastern Ohio, except for the employees of the Lorain, Ohio, District Office, the only unrepresented employees within the Activity at the time of the filing of the instant petition. The Activity asserted, essentially, that the Order encouraged the inclusion of unrepresented employees along with currently represented employees in the context of a unit consolidation proceeding and that the proposed consolidated unit was inappropriate because it excluded the employees of the Lorain District Office, thereby fragmenting representation at the Activity inasmuch as all of its employees have a clear and identifiable community of interest, and such a fragmented unit would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary concluded that the Report and Recommendations of the Federal Labor Relations Council, which accompanied the issuance of Executive Order 11838, indicated clearly that the special procedures established by the Council for consolidation are applicable only to the consolidation of existing exclusively recognized units. As the employees of the Lorain District Office were unrepresented at the time of the filing of the subject petition for consolidation, the Assistant Secretary found that their inclusion in the proposed consolidated unit would be inconsistent with the purposes and policies of the Order. Under such circumstances, and noting also that no timely petition had been filed raising a question concerning representation with respect to the employees of the Lorain District Office, the Assistant Secretary concluded that the subject petition to consolidate certain existing exclusively recognized units was not rendered defective by virtue of the fact that it excluded the employees of the Lorain District Office.

Having found that, under the circumstances, the employees of the Lorain District Office may not properly be included in the consolidated

unit being sought, the Assistant Secretary considered whether such exclusion rendered the proposed consolidated unit inappropriate. He noted that the Council, in its Report and Recommendations, indicated that a reduction in unit fragmentation through the creation of more comprehensive units will foster the development of a sound Federal labor-management relations program and is a necessary evolutionary step in the development of such a program. The Assistant Secretary noted that the proposed consolidated unit would unite the employees in all eight of the Activity's current exclusively recognized units and that these employees are under the common supervision of the Area Director, have common work oriented relationships, and are subject to common personnel policies and practices administered on an Activity-wide basis. Under these circumstances, the Assistant Secretary found that the employees in the proposed consolidated unit share a clear and identifiable community of interest and that the creation of such a comprehensive unit will promote effective dealings and efficiency of agency operations, and is consistent with policies of the Council noted above.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF FIELD OPERATIONS, REGION V, AREA IV, CLEVELAND, OHIO

Activity

and

Case No. 53-8375 (UC)

AREA IV LOCAL COMMITTEE, CLEVELAND, OHIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

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

The Petitioner, Area IV Local Committee, Cleveland, Ohio, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks to consolidate eight units for which its constituent members are the current exclusive representatives 1/ into a consolidated unit consisting

1/ The following AFGE locals representing Social Security Administration employees within Area IV comprise the Area IV Local Committee: Local 3245 is the exclusive representative for all the nonprofessional employees of the Akron District Office; Local 3442 is the exclusive representative for all the General Schedule, nonprofessional employees of the Warren District Office; and Local 3443 is the exclusive representative of all the nonprofessional General Schedule employees of the Youngstown District Office. Local 3448 is the exclusive representative of all the nonprofessional employees of the Cleveland (Downtown) District Office, including the Midtown and Southeast Branch Offices; all the nonprofessional employees of the Cleveland Heights District Office, including the Euclid, Northeast and University Circle Branch Offices; all the full-time General Schedule, nonprofessional employees of the Cleveland, Ohio, Teleservice Center; the nonprofessional employees of the Cleveland (West) District Office, including the Cleveland Southwest and Cleveland Northwest Branch Offices; and the nonprofessional employees of the Ashtabula District Office.

of all employees of Area IV of the Social Security Administration, Bureau of Field Operations, Region V, in Northeastern Ohio, including all District Offices, Branch Offices and the Teleservice Center, excluding the Lorain, Ohio, District Office, 2/ professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, temporary employees (NTE 700 hours), and supervisors as defined in the Order. The Activity contends that the proposed consolidated unit is inappropriate because it excludes the employees of the Lorain District Office, that such a unit would fragment representation at the Activity inasmuch as all of its employees have a clear and identifiable community of interest, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. The Activity also asserts that the Order encourages the inclusion of unrepresented employees along with currently represented employees within the context of a unit consolidation proceeding. 3/

The AFGE, on the other hand, takes the position that the scope of the petitioned for unit is consistent with the policies of the Order and with the consolidation procedures promulgated by the Assistant Secretary. However, it indicates, alternatively, that it would be willing to represent an Activity-wide unit, including the employees of the Lorain District Office, if such a unit were deemed appropriate by the Assistant Secretary. 4/ The AFGE also contends that it would be willing to represent alternative units which would include, in addition to all Area IV employees, the employees of the Region V Office of the Bureau of Field Operations (herein called the Cleveland Regional Office) and/or the employees of the Reconciliation Analysis Unit, which is a component of the Cleveland Regional Office.

The record discloses that Region V of the Bureau of Field Operations is under the direction of a Regional Representative. Within its Cleveland Regional Office there are three Branches: Analysis and Appraisal, Management, and Operations. Each Branch is headed by a Staff Officer who reports to the Regional Representative. The Reconciliation Analysis

2/ The employees of the Lorain District Office were the only unrepresented employees within the Activity at the time of the filing of the instant petition. A representation election involving the employees of the Lorain District Office was conducted on May 6, 1975, and a Certification of Results of Election was issued by the Area Administrator on May 14, 1975, indicating that no exclusive representative had been selected by the employees of that Office.

3/ The Activity requested that an election be held in any unit found appropriate by the Assistant Secretary in this matter.

4/ The AFGE originally filed a petition seeking to consolidate its units within the Activity on August 5, 1975. That petition sought to include the unrepresented employees of the Lorain District Office in the proposed consolidated unit. Subsequently, the petition was amended to exclude the unrepresented employees of the Lorain District Office.

Unit, which is physically located in a suburb of Cleveland, is under the direction of the Staff Officer in charge of the Operations Branch. It services all of Region V, which encompasses a much broader geographical area than the Activity herein. Within Region V, there are five Area Offices, each headed by an Area Director who reports directly to the Regional Representative. The Activity herein, Area IV, is headed by an Area Director who is responsible for the operation of eight District Offices, such Branch Offices as are attached to the District Offices, and a Teleservice Center. Each District Office services a particular geographical area, while the Teleservice Center receives the telephonic inquiries directed to 5 of 8 of the District Offices. The Area Director controls the Activity's travel funds, as well as its expenditures for equipment, space, decor, telephones, supplies and other necessary services. He also administers the Activity's training program and is responsible for authorizing overtime and holiday work within the Activity, for authorizing quality increases and special achievement cash awards, for deciding grievances at the appropriate level of the grievance procedure, and for issuing reprimands. The evidence establishes that the Area Director has exercised authority to reassign employees between the various District Offices and/or the Teleservice Center and that he is the selecting official for all positions, GS-10 and below, within the Activity, which encompasses all positions within the proposed bargaining unit. The area of consideration for all such positions within the Activity is Area-wide. The record reveals also that various Area-wide councils, headed by District Office Managers, have been established by the Area Director for the purpose of rendering advice to the Area Director in the areas of personnel, program, public affairs, recruitment, and special projects. In this regard, the record shows that the Activity's chief negotiator for collective bargaining negotiations involving the Teleservice Center was the chairman of the personnel council, rather than the Manager of that particular facility.

The parties stipulated that the employees of the Lorain, Ohio, District Office were the only unrepresented employees within the Activity, and that they share with other employees of the Activity similar salaries, hours, duties, working conditions, work related skills and training, supervision, training and promotional opportunities, and access to transfers within the Area.

As noted above, the Activity contends that the proposed consolidated unit is inappropriate because it excludes the unrepresented employees of the Lorain District Office. In this regard, the Report and Recommendations of the Federal Labor Relations Council which accompanied the issuance of Executive Order 11838 indicates clearly that the special procedure established by the Council for consolidation is applicable only to the consolidation of existing exclusively recognized units. 5/ As the

5/ See, in this regard, Section IV of the Report and Recommendations.

employees of the Lorain District Office was unrepresented at the time of the filing of the subject petition to consolidate, I find that their inclusion in the proposed consolidated unit would be inconsistent with the purposes and policies of the Order. Under these circumstances, and noting also that no timely petition had been filed raising a question concerning representation with regard to the employees of the Lorain District Office, I conclude that the subject petition to consolidate existing exclusively recognized units was not rendered defective by virtue of the fact that it excluded the employees of the Lorain District Office. 6/

Having found that, under the circumstances, the employees of the Lorain District Office may not properly be included in the consolidated unit sought herein, the issue remains as to whether such exclusion renders the proposed consolidated unit inappropriate, as contended by the Activity. The Council's Report and Recommendations, cited above, indicates that, in the Council's view, a reduction in unit fragmentation through the creation of more comprehensive units will foster the development of a sound Federal labor-management relations program and is a necessary evolutionary step in the development of such a program. The proposed consolidated unit would unite the employees in all eight of the Activity's current exclusively recognized units and, as noted above, these employees are under the common supervision of the Area Director, have worked oriented relationships, and are subject to common personnel policies and practices administered on an Activity-wide basis. 7/ Under all of these circumstances, I find that the employees in the proposed consolidated unit share a clear and identifiable community of interest and that the creation of such a comprehensive unit will promote effective dealings and efficiency of agency operations and is consistent with the above noted policy of the Council. 8/

6/ As insufficient evidence was presented at the hearing with respect to the status of the Cleveland Regional Office and/or the Reconciliation Analysis Unit employees, I make no finding with respect to the alternative units proposed by the AFGE which would have included these employees.

7/ Indeed, the evidence establishes that collective bargaining negotiations with the current exclusively recognized representatives are already conducted by members of the Activity's personnel council.

8/ With respect to its contention that the proposed consolidated unit would not promote effective dealings and efficiency of agency operations, the Activity addressed itself primarily to the merits of an Area-wide unit, rather than adducing evidence specifically related to the impact of the proposed consolidated unit on effective dealings and efficiency of agency operations. Cf. General Services Administration, Region 4, A/SLMR No. 661, and Defense Supply Contract Administration Services Region, San Francisco, A/SLMR No. 559.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

September 16, 1976

All employees of the Social Security Administration, Bureau of Field Operations, Region V, Area IV, in Northeastern Ohio, including all District Offices, Branch Offices and the Teleservice Center, excluding the Lorain, Ohio, District Office, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, ^{9/} management officials, temporary employees (NTE 700 hours), and supervisors as defined in the Executive Order.

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
A/SLMR NO. 707

DIRECTION OF ELECTION

As requested by the Activity, an election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented in the proposed consolidated unit by the Area IV Local Committee, Cleveland, Ohio, American Federation of Government Employees, AFL-CIO.

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2667, AFL-CIO (AFGE), alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by removing the AFGE's President from her officially assigned job duties because of her union activities.

Finding that the issue raised in the instant unfair labor practice complaint had been raised previously under a negotiated grievance procedure, the Administrative Law Judge concluded that Section 19(d) of the Order barred consideration of this matter under the unfair labor practice procedures. Accordingly, he recommended that the instant complaint be dismissed in its entirety.

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

Dated, Washington, D. C.
September 15, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

9/ All of the existing exclusively recognized units which the AFGE seeks to consolidate specifically excluded guards and/or security guards. It has been held previously that Executive Order 11838 did not change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning representation and the issuance of an appropriate certification. See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629. As any guard employees within the Activity were therefore unrepresented at the time of the filing of the instant consolidation petition, I find that, consistent with the rationale above, their inclusion in the proposed consolidated unit would be inappropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent

and

Case No. 22-6505 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2667, AFL-CIO

Complainant

IT IS HEREBY ORDERED that the complaint in Case No. 22-6505(CA) be,
and it hereby is, dismissed.

Dated, Washington, D. C.

September 16, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

DECISION AND ORDER

On June 16, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

1/ The Administrative Law Judge determined that the issue in the instant unfair labor practice complaint had been raised previously under a negotiated grievance procedure and, therefore, Section 19(d) of the Order precluded the Complainant from raising the issue herein. Under these circumstances, it was considered unnecessary to pass upon the Administrative Law Judge's findings at footnote 3 of his Recommended Decision and Order with respect to the merits of the instant case. See Department of the Army, U.S. Army Transportation Center and Fort Eustis, Virginia, A/SLMR No. 681.

September 16, 1976

A/SLMR No. 708

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

NORFOLK NAVAL SHIPYARD
A/SLMR No. 708

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by prohibiting the Complainant's Chief Steward and designated representative from representing an employee at a pre-action investigation in violation of Article 31, Section 2 of the parties' negotiated agreement, and by the Respondent's designation of another steward in his place.

The Administrative Law Judge concluded that the case involved essentially a disagreement over the interpretation of the term "cognizant steward" in the parties' negotiated agreement and that the Respondent's interpretation of that term, even if erroneous, would be a simple breach of contract and not a unilateral change in the agreement. The Administrative Law Judge found also that it was not a violation of the Order, in the circumstances of the instant case, for the Respondent to have contacted directly the only available "cognizant steward" in order to comply with the terms of the agreement.

The Assistant Secretary concurred in the findings, conclusions and recommendations of the Administrative Law Judge. In this regard, he noted that the Complainant's right to designate its representative at a pre-action investigation was a negotiated right accruing from the parties' negotiated agreement and not from any right assured by the Order; that there was a good faith disagreement with respect to the interpretation of the agreement; and that, in these circumstances, the matter should be resolved through the negotiated grievance procedure rather than through the Executive Order's unfair labor practice procedures. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NORFOLK NAVAL SHIPYARD

Respondent

and

Case No. 22-6401(CA)

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On May 10, 1976, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Report and Recommendation.

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

Under the particular circumstances herein, I agree with the Administrative Law Judge that the Respondent's conduct herein did not constitute

1/ In my view, the Administrative Law Judge improperly granted the Complainant's motion, made at the hearing, to amend the complaint and reinstate the allegation that the Respondent's conduct violated Section 19(a)(5) of the Order. In this regard, I consider the Complainant's previous withdrawal of the Section 19(a)(5) allegation, with approval by the Regional Administrator, as the equivalent of a dismissal of that part of the complaint. However, in view of my decision to dismiss the instant complaint in its entirety, I find that the Administrative Law Judge's action did not constitute prejudicial error.

September 16, 1976

a violation of the Executive Order. Thus, as found by the Administrative Law Judge, the Complainant's right to designate a representative at a pre-action investigation was not a right granted under the Order, ^{2/} but, rather, was a right flowing from the parties' negotiated agreement. Accordingly, as the Respondent's position concerning who was the "cognizant steward" within the meaning of Article 31, Section 2 of the negotiated agreement reflected essentially its good faith interpretation, as distinguished from a clear unilateral breach, of the agreement, I find that the matter is a proper subject for the parties' negotiated grievance procedure rather than the unfair labor practice procedures of the Executive Order. ^{3/}

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6401(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 16, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

U.S. MARSHAL SERVICE,
DALLAS, TEXAS
A/SLMR No. 709

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3583, AFL-CIO (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by inquiring as to the effective date of union membership of an employee being represented by the Complainant and by misinforming the Complainant with respect to the identity of the Respondent's Equal Employment Opportunity (EEO) Officer.

The Administrative Law Judge concluded with respect to the first allegation that the Complainant had failed to prove by a fair preponderance of the credible testimony that a violation occurred. As to the second allegation, he found that the Chief Deputy Marshal was not aware of changed circumstances when he incorrectly identified the Respondent's EEO Officer and that the Complainant failed to show any lack of good faith on the Respondent's part.

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

^{2/} Cf. Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534, and Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 680.

^{3/} See General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528, and Federal Aviation Administration, Muskegon Air Traffic Control Tower, cited above.

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

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

U.S. MARSHAL SERVICE,
DALLAS, TEXAS

PUGET SOUND NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON
A/SLMR No. 710

Respondent

and

Case No. 63-5686(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 3583, AFL-CIO

Complainant

DECISION AND ORDER

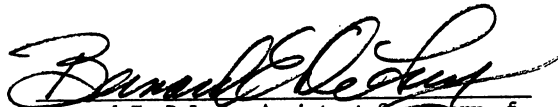
On April 29, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5686(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 16, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by the Bremerton Metal Trades Council, AFL-CIO (Complainant), alleging essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by its attempt to intimidate an employee for having filed a grievance under the negotiated grievance procedure over the disapproval of sick leave. The Respondent's alleged attempt to intimidate the employee occurred during the pendency of the employee's grievance when the Respondent proposed to suspend the employee three days for an alleged abuse of sick leave -- the same incident giving rise to the employee's grievance.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. He noted that filing a grievance under a negotiated grievance procedure is a right protected by Section 19(a)(1) of the Order. However, given the circumstances of the instant case, he found no evidence of anti-union animus, that the suspension was proposed because the grievance was filed, or discrimination to discourage union membership in violation of Section 19(a)(2).

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-3232

BREMERTON METAL TRADES COUNCIL,
AFL-CIO

Complainant

DECISION AND ORDER

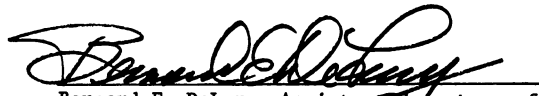
On April 22, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-3232 be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 17, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



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In the Matter of

PUGET SOUND NAVAL SHIPYARD :
DEPARTMENT OF THE NAVY :
BREMERTON, WASHINGTON :

Respondent :

and :

BREMERTON METAL TRADES :
COUNCIL, AFL-CIO :
P.O. BOX 488 :
BREMERTON, WASHINGTON :

Complainant :

.....

Richard L. Robertson
Route 1, Box 486C
Port Orchard, Washington 98366
Chief Steward, Local 574 I.B.E.W
William K. Holt
President, Bremerton Metal
Trades Council
P.O. Box 488
Bremerton, Washington 98310
For the Complainant

James C. Causey, Jr., Esq.
Labor Relations Advisor
Office of Civilian Manpower Management
Western Field Division
Department of the Navy
110 West "C" Street, Suite 1313
San Diego, California 92101
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 5, 1974 and

filed December 9, 1974 alleging violations of Sections 19(a) (1), (2), and (4) of the Executive Order. The complaint alleged that on June 12, 1974, Forest J. Cobb was issued a Standard Notice of Disapproval of Sick Leave, that he and his Council Representative filed a grievance through the negotiated grievance procedure over the disapproval of sick leave, and that the day after the hearing on the second step in the grievance procedure Cobb was given notice of a proposed suspension of three days, for infraction of sick leave, in an effort to intimidate Cobb for processing a grievance. By letter of December 19, 1974 the Respondent responded to the complaint, denying any violation of the Executive Order.

On May 7, 1975 the Regional Administrator dismissed the complaint. On May 12, 1975 the Complainant appealed the dismissal of the complaint to the Assistant Secretary. On August 22, 1975 the Assistant Secretary affirmed the Regional Administrator's dismissal of the complaint with respect to the alleged violation of Section 19(a)(4) and reversed the dismissal with respect to the alleged violations of Sections 19(a)(1) and (2). On November 14, 1975 the Regional Administrator issued a Notice of Hearing on the alleged violations of Sections 19(a)(1) and (2) to be held December 15, 1975 in Bremerton, Washington. On December 5, 1975 the Regional Administrator issued an Order Rescheduling Hearing to be held January 7, 1976 in Bremerton, Washington.

Hearings were held that day in Bremerton, Washington. The Complainant was represented by the Chief Steward of Local 574 of the International Brotherhood of Electrical Workers assisted by the President of the Bremerton Metal Trades Council. The Respondent was represented by a Labor Relations Advisor in its Office of Civilian Manpower Management. The parties presented witnesses who were examined and cross-examined, and the parties presented exhibits which were received in evidence. At the close of the evidence both parties made closing arguments. At the close of the hearing the time for filing briefs was extended to February 23, 1976. The Respondent filed a brief on February 18, 1976. The Complainant did not file a brief.

On January 19, 1976 the Complainant submitted to the Chief Administrative Law Judge a "Motion to Recuse" requesting that the Administrative Law Judge who heard the case be recused and withdrawn from further participation in this proceeding. On January 27, 1976 the Chief Administrative Law Judge denied the Motion.

Facts

The Complainant is the exclusive representative of a number of units of Respondent's employees. It consists of locals of a number of national unions representing individual units, including Local 574 of the International Brotherhood of Electrical Workers. Forest J. Cobb is a member of the unit represented by Local 574 and the Bremerton Metal Trades Council and at all relevant times was a member of Local 574.

On June 6, 1974* Cobb requested sick leave and took the day off. The Respondent sent two representatives, Greenwood and Lyons, to a dock where Cobb had a personal private boat and after a while Cobb appeared to do some work on his boat. Greenwood and Lyons asked Cobb why he was there when he was supposed to be on sick leave.

On June 8 Cobb's request for sick leave was denied. On June 12 Cobb was issued a standard form of notice of disapproval of his sick leave request for June 6 and was advised that he had the right to appeal the denial under the regular grievance procedure. Cobb did not receive pay for June 6.

On June 13 Cobb and a representative of the Complainant, Billy J. Knight, informally discussed the denial of sick leave with Cobb's immediate supervisor, Baron Duke, and filed a formal grievance under the negotiated grievance procedure. The first step of the formal grievance procedure was heard by Deane L. Prentice, Cobb's Shop Head, on June 21. Prentice denied the grievance on June 24. The grievance was processed to the second step to Cyril C. Laurie, Head of Respondent's Public Works Department, who discussed it with a representative of the Complainant on June 27. On July 1 Laurie sustained the decision below. On June 28, the day after the meeting with Laurie, Prentice wrote a letter to Cobb proposing to suspend Cobb for three days for his unauthorized leave on June 6 which was his second unauthorized absence within the "reckoning period" of his first unauthorized absence. Cobb submitted his grievance to the third step of the grievance procedure where it was heard on July 25 and the grievance denied on August 1.

On August 7 Laurie carried out the proposed suspension and ordered that Cobb be suspended for three days from August 13 through August 15. It is this suspension, and the proposed

*All dates hereinafter referred to were in 1974 unless otherwise so stated.

suspension, that Complainant contends was imposed to intimidate and coerce Cobb because he processed the grievance described above, allegedly in violation of Sections 19(a)(1) and (2) of Executive Order 11491 as amended.

Sometime prior to the events described above Cobb had been a shop steward of Local 574 for about six months. In that period he handled two grievances for employees in the unit both of which were disposed of at the informal stage.

One other employee of the Respondent had sick leave denied him for one day and was not paid for that day. He received a letter of reprimand which was later reduced to a letter of caution. It was the first time that that employee had been denied sick leave for a day he took off and had asked for sick leave. Cobb's denial of sick leave was his second and within the "reckoning period" of the first.

Discussion and Conclusion

During the hearing the Complainant tried to show, and argued, that the denial of sick leave to Cobb was unjustified. That matter was the subject of Cobb's grievance, was fully processed under the grievance procedure, and is not an issue in this case. It is not raised in the complaint.

The Complainant argued also that denying Cobb sick leave, and pay, for June 6 was punishment for his unauthorized absence, and thereafter suspending him for three days for the same misconduct punished him twice for the same deed and therefore was in violation of his constitutional rights. Assuming there is merit in such contention, that is a problem not dealt with in Executive Order 11491; the Executive Order is not a panacea for all the problems of Government employees.

There is no evidence that Cobb was treated discriminatorily to discourage membership in a labor organization. The record does show that one other employee was denied sick leave for a day he took off and was not suspended, but it does not show that that employee had absented himself for a second time, as Cobb had, within the "reckoning period" of a first unexcused absence. There was thus no violation of Section 19(a)(2) of the Executive Order.

Filing a grievance under a negotiated grievance procedure is a right protected by Section 19(a)(1) of the Order.
Department of Defense, Arkansas National Guard, A/SLMR No. 53;

National Labor Relations Board, Region 17, A/SLMR No. 295; California National Guard, A/SLMR No. 348. If the Respondent interfered with, restrained, or coerced Cobb in presenting his grievance in this case, by proposing a suspension over the same conduct that was the subject of the grievance, in the midst of his processing the grievance, there would have been a violation of Section 19(a)(1) by the Respondent.

I find no such violation under the facts of this case. There is no evidence that the suspension was proposed because of the filing of the grievance other than the bare fact that it followed the grievance. Post hoc ergo propter hoc is not enough. The timing may, as it apparently did, give rise to suspicion that the suspension was motivated by the grievance, but suspicion is not enough without some corroborative facts. If the suspension had followed the completion of the grievance procedure, the same suspicion could arise. It cannot sensibly be the law that if an employee takes a day off and requests sick leave and is denied sick leave and files a grievance over the denial, he is forever after immunized from discipline for the unexcused absence, but if he does not file a grievance discipline may be imposed at any time.

In this case there is no evidence of anti-union animus, no evidence of any other employee ever having had discipline imposed after the filing of a grievance, no evidence of threats, in short no evidence of any impropriety except suspicion arising from the timing of the suspension in this one isolated instance, with nothing corroborative of the suspicion. I find no violation of Section 19(a)(1).

Since Complainant has not sustained its burden of proof of violation of either Section 19(a)(1) or (2), the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

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

September 17, 1976

A/SLMR No. 711

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

UNITED STATES DEPARTMENT
OF THE TREASURY, INTERNAL
REVENUE SERVICE, CHICAGO DISTRICT
A/SLMR No. 711

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 10 (NTEU), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by stating and taking the position that 14 of the 18 proposals submitted by the NTEU were nonnegotiable, and that it would not negotiate on the four admittedly negotiable proposals until the negotiability of the 14 proposals was determined by the Federal Labor Relations Council.

In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge concluded that the Respondent had satisfied its obligation to negotiate in good faith with the NTEU as the record indicates that despite its threat, the Respondent negotiated with respect to the four admittedly negotiable proposals submitted by the NTEU and, in fact, acceded to two of the four proposals. The Administrative Law Judge cited Vandenberg Air Force Base, 4392d Aerospace Support Group, FLRC No. 74A-77, to support his conclusion that the Respondent's "temporary and fleeting aberration from the obligation to negotiate [was] not a refusal to 'meet and confer' in violation of the Executive Order."

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

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

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

DECISION AND ORDER

On April 7, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent has not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, and the Respondent filed an answering brief to the Complainant's exceptions.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-11147(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 17, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

September 17, 1976

A/SLMR No. 712

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

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

DEPARTMENT OF THE NAVY,
ANTILLES CONSOLIDATED
SCHOOL SYSTEM,
FORT BUCHANAN, PUERTO RICO
A/SLMR No. 712

DEPARTMENT OF THE NAVY,
ANTILLES CONSOLIDATED
SCHOOL SYSTEM,
FORT BUCHANAN, PUERTO RICO 1/

Activity

and

Case No. 37-1574(RO)

NATIONAL MARITIME UNION OF AMERICA,
DIVISION OF INDUSTRIAL, TECHNICAL,
PROFESSIONAL, AND GOVERNMENT EMPLOYEES,
AFL-CIO

Petitioner

DECISION AND ORDER

This case involved a petition filed by the National Maritime Union of America, Division of Industrial, Technical, Professional, and Government Employees, AFL-CIO, seeking a unit of all appropriated fund custodial and maintenance employees of the Antilles Consolidated Schools at Roosevelt Roads, Puerto Rico.

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

The Petitioner failed to enter an appearance or present any evidence at the hearing in support of its petition in this matter although it attended the prehearing conference held the previous day. During the course of the hearing, the Petitioner notified the Hearing Officer that it would be withdrawing its petition in the subject case. Subsequently, the Petitioner submitted the request for withdrawal of the petition. However, the Acting Regional Administrator denied the request.

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

The Assistant Secretary found, contrary to the Acting Regional Administrator, that the request for withdrawal of the petition herein should be granted. In this regard, he noted that, pursuant to Section 202.3(j) of the Assistant Secretary's Regulations, the Petitioner would be barred from filing a petition for the same unit or any subdivision thereof for a period of six months.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Maritime Union of America, Division of Industrial, Technical, Professional, and Government Employees, AFL-CIO, sought an election in a unit of all appropriated fund custodial and maintenance employees of the Antilles Consolidated Schools at Roosevelt Roads, Puerto Rico. 2/

Accordingly, the Assistant Secretary granted the request for withdrawal of the petition.

The hearing in this matter was held on April 8, 1976. At the pre-hearing conference held on April 7, 1976, the Petitioner named its representatives who would be attending the hearing and gave no indication of any condition which could possibly preclude their presence at the hearing. However, shortly before the start of the hearing, the Hearing Officer was notified that the Petitioner's representative would not be attending the hearing. During the course of the hearing, the Hearing Officer was contacted by a representative of the Petitioner and

1/ The name of the Activity appears as amended at the hearing.

2/ The Activity stipulated that there is no election, certification or agreement bar to an election in this matter.

notified that the Petitioner would be withdrawing its petition in the subject case. Subsequently, the Petitioner submitted its request for withdrawal of the petition and, on April 22, 1976, the Acting Regional Administrator denied the request for withdrawal stating that, in his view, a decision should be rendered on the issues raised by the representation petition.

Under the particular circumstances herein, I find, contrary to the Acting Regional Administrator, that the request for withdrawal of the petition herein should be granted, and I shall so order. Thus, in my view, it would be an academic exercise to address issues posed by a petition which the Petitioner has clearly indicated it is no longer interested in pursuing. Accordingly, in view of the withdrawal of the subject petition after the issuance of a notice of hearing, pursuant to Section 202.3(j) of the Assistant Secretary's Regulations the Petitioner herein will be ". . . barred from filing another petition for the same unit or any subdivision thereof for six (6) months . . ." from the date of this decision.

ORDER

IT IS HEREBY ORDERED that the request for withdrawal of the petition in Case No. 37-1574(RO) be, and it hereby is, granted.

Dated, Washington, D. C.
September 17, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

DEFENSE SUPPLY AGENCY,
DEFENSE PROPERTY DISPOSAL SERVICE,
ELMENDORF AIR FORCE BASE, ALASKA
A/SLMR No. 713

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1668, AFL-CIO (Complainant), alleging that the Respondent violated Section 19(a)(1), (2), (5), and (6) of the Order by refusing to recognize the Complainant as the bargaining agent of employees of the property disposal operation at Elmendorf Air Force Base who were transferred from the Department of the Air Force to the Defense Property Disposal Service (DPDS) of the Defense Supply Agency (DSA) pursuant to a Department of Defense reorganization. The complaint further alleged that the Respondent refused to confer with the Complainant over a pending grievance and made coercive statements and remarks to union members.

The parties stipulated that the issues posed by the instant complaint regarding recognition of the Complainant by the Respondent would be governed by the disposition in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360. In addition, the Respondent argued that the alleged coercive statements and remarks could not constitute an unfair labor practice because the DPDS employees were no longer in the bargaining unit.

The Administrative Law Judge concluded that the Respondent had not engaged in any conduct prohibited by Section 19(a)(1), (2), (5), and (6) of the Order. In this regard, he found that in view of the final resolution of the issues in A/SLMR No. 360, the Respondent was not obligated to recognize the Complainant as the representative of the transferred DPDS employees or honor the negotiated agreement under which said employees were included prior to their transfer. Further, he found the Complainant's statements and remarks were not motivated by union animus or designed to interfere with employee rights assured by the Order and, consequently, were not violative of Section 19(a)(1) of the Order.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE PROPERTY DISPOSAL SERVICE,
ELMENDORF AIR FORCE BASE, ALASKA

Respondent

and

Case No. 71-2996(CA)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1668, AFL-CIO

Complainant

DECISION AND ORDER


On April 28, 1976, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in violative conduct as alleged in the complaint and recommending that complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2996(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 20, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ On page two of his Recommended Decision, the Administrative Law Judge inadvertently stated that the parties filed briefs. I have been advised administratively that only the Respondent filed a post-hearing and a supplemental brief. This inadvertence is hereby corrected.

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

U.S. ARMY RECEPTION STATION,
FORT KNOX, KENTUCKY
A/SLMR No. 714

This case involved a petition filed by the American Federation of Government Employees, AFL-CIO, Local 2809 (AFGE), seeking an election in a unit of all professional and nonprofessional employees of the U.S. Army Reception Station, Fort Knox, Kentucky (Activity). The Activity contended that the proposed unit was inappropriate in that it contained employees who shared common interests and working conditions with other employees of the facility involved and such a unit would not promote effective dealings or efficiency of agency operations.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, he noted that the employees of the claimed unit are serviced by the same Civilian Personnel Office as other U.S. Army Armor Center and Fort Knox, Kentucky, (Fort Knox) employees and have similar areas of consideration for reductions-in-force and promotions. Further, the job classifications and skills utilized by the employees within the claimed unit are found among other Fort Knox employees and there have been several instances of transfer and interchange between employees of the claimed unit and those of Fort Knox. In these circumstances, the Assistant Secretary found that the employees in the claimed unit did not share a separate and distinct community of interest from other Fort Knox employees, and that the proposed fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY RECEPTION STATION,
FORT KNOX, KENTUCKY 1/

Activity

and

Case No. 41-4587(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 2809

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2809, seeks an election in a unit consisting of all professional and nonprofessional employees of the U.S. Army Reception Station, Fort Knox, Kentucky (Fort Knox). In this regard, the Activity asserts that the proposed unit is not appropriate as the claimed employees share common interests and working conditions with other employees of the U.S. Army Armor Center (Armor Center) and Fort Knox, and, further,

1/ The name of the Activity appears as amended at the hearing.

that the petitioned for unit would not promote effective dealings and efficiency of agency operations. 2/

The Activity is 1 of 28 administrative units organized into 6 commands at the Armor Center and Fort Knox. Its mission is to process male enlistees into the U.S. Army; to provide command, administrative and logistics support; and to coordinate processing support such as finance, troop movements, issuance of clothing and medical services. In addition to processing male enlistees within 72 hours after arrival at Fort Knox, the record shows that the Activity coordinates its operations with other administrative units at Fort Knox in order to expedite driving, educational, language, medical and fingerprinting tests.

The evidence establishes that the claimed unit consists of 56 employees, the majority of whom are cooks and clerk typists. Specifically, the proposed unit consists of 28 cooks, 12 clerk typists, 8 military personnel clerks, 6 general administrators, 1 supply clerk, and 1 secretary. Each of these job classifications is found in other administrative units at Fort Knox. In addition, the record reveals that the employees within the claimed unit are serviced by the same Civilian Personnel Office, have similar areas of consideration for reductions-in-force and promotions, identical medical and recreational programs, and essentially the same job skills as other Fort Knox employees. Further, the Civilian Personnel Office at Fort Knox hires personnel for the Activity and keeps its personnel records.

The record shows that the Activity often details employees in the claimed unit for 30 days or less to other administrative units at Fort Knox and that in the past there has been considerable transfer between employees in the claimed unit and Fort Knox. Thus, in calendar years 1975 and 1974 11 employees were either promoted or reassigned from the Activity to other administrative units at Fort Knox and 4 employees from Fort Knox were transferred into the Activity on a permanent basis. The record shows also that employees in the claimed unit have substantial work contacts with other Fort Knox employees, even though they have separate immediate supervision. Further, employees in the claimed unit utilize essentially the same agency grievance procedure as other employees at Fort Knox.

Based on the foregoing circumstances, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under the


2/ The Petitioner represents approximately 53 percent of the Armor Center's and Fort Knox's complement of civilian employees in 7 units ranging in size from 65 to 660 employees. Also, the Retail Clerks International Association, Local Union 445, AFL-CIO, represents 70 employees at the Armor Center and Fort Knox. The above-mentioned units were established under Executive Orders 10988 and 11491.

Order. Particularly noted in this regard is the fact that the employees within the claimed unit, among other things, are serviced by the same Personnel Office as other Fort Knox employees and have similar areas of consideration for reductions-in-force and promotions. Moreover, the job classifications and skills of the employees in the claimed unit are found among other Fort Knox employees and, in this regard, there have been several instances of transfer and interchange between employees in the claimed unit and employees of other administrative units at Fort Knox. Accordingly, I find that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and apart from other employees at Fort Knox. Moreover, in my view, such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the subject petition be dismissed. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 41-4587(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 20, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

3/ In view of the disposition herein, I find it unnecessary to decide eligibility questions concerning a clerk stenographer, an administrative clerk (typing), and a supervisory military personnel clerk.

September 23, 1976

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

UNITED STATES ARMY,
CRIMINAL INVESTIGATION COMMAND,
THIRD REGION, FORT GILLEM,
FOREST PARK, GEORGIA
A/SLMR No. 715

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 626, a subsequent hearing was held in this case for the purpose of adducing additional evidence concerning the appropriateness of the unit of nonprofessional employees of the Criminal Investigation Command, Third Region, Fort Gillem, Georgia, sought by the Petitioner, American Federation of Government Employees, AFL-CIO, Local 81 (AFGE), and for the purpose of adducing evidence concerning whether the claimed employees were exempt from coverage of the Order by virtue of Section 3(b)(3) and Section 3(b)(4) of the Order. The Activity also asserted that, in view of a Department of Defense directive, its employees located in the Panama Canal Zone should be excluded from any unit found appropriate pursuant to Section 3(c) of the Order.

The Assistant Secretary concluded that the region-wide unit sought by the AFGE, which consists of some 52 clerical employees, was appropriate for the purpose of exclusive recognition in that the claimed employees share a clear and identifiable community of interest. In this regard, he noted that the petitioned for unit included all employees of the Activity eligible for inclusion in a unit of exclusive recognition; that the employees in the claimed unit perform similar duties, are subject to common personnel policies and, except for the two field offices, receive personnel services from the same personnel office; and that the Region Commander exercises final authority over personnel actions and has the final review authority with respect to grievances. Further, the Assistant Secretary found that the petitioned for unit would promote effective dealings and efficiency of agency operations. Noting that no determination had been rendered by the Secretary of the Army exempting the Activity's employees from the coverage of the Order pursuant to Section 3(b)(3) and (4), the Assistant Secretary found also that the employees in the claimed unit were subject to the coverage of the Order. However, based upon a Department of Defense directive indicating that the Order did not apply to employees in the Panama Canal Zone unless otherwise authorized by the Secretary of the Army, the Assistant Secretary excluded from the unit found appropriate the Activity's employees located in the Panama Canal Zone.

Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY,
CRIMINAL INVESTIGATION COMMAND,
THIRD REGION, FORT GILLEM,
FOREST PARK, GEORGIA

Activity

and

Case No. 40-6506(RO)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 81

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held in the subject case. Thereafter, on March 23, 1976, the Assistant Secretary issued a Decision and Remand 1/ in which he ordered that the subject case be remanded to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence with regard to, among other things, the appropriateness of the unit sought and the eligibility of certain of the petitioned for employees. Pursuant to the above-noted Decision and Remand, a further hearing was held before Hearing Officer Robert E. Woodland, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including those facts developed at the initial and reopened hearings, and briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 81, hereinafter called AFGE, seeks an election in a unit of all employees of the Third Region of the United States Army Criminal Investigation Command, excluding professional employees, management

1/ A/SLMR No. 626.

officials, criminal investigators, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. The Activity contends that the employees sought do not share a clear and identifiable community of interest and that the proposed unit would not promote effective dealings and efficiency of agency operations. In this regard, it takes the position that the appropriate unit would consist of all employees of the Criminal Investigation Command nationwide, or, in the alternative, all employees of each of the Activity's individual field offices. The Activity further maintains that, in view of its investigative mission, the employees in the petitioned for unit are covered by Sections 3(b)(3) and 3(b)(4) and, therefore, are exempt from the provisions of the Order. 2/ Additionally, if the Assistant Secretary finds any unit appropriate, the Activity takes the position that its employees located in the Panama Canal Zone should be excluded from such unit pursuant to Section 3(c) of the Order. 3/

The Activity, which is headquartered at Fort Gillem, Georgia, is 1 of 3 regions of the Criminal Investigation Command throughout the United States. Its mission is to provide criminal investigation support to Army elements located within the states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee; parts of the states of Texas and Kentucky; the territory of Puerto Rico; and the Panama Canal Zone. In addition to its Headquarters, the Activity has 13 field offices and 8 branch and resident offices which are subordinate to the field offices. While, as noted above, the mission of the Activity is to provide investigative support to certain Army elements, the record discloses that the investigative functions are carried out by military personnel. Thus, the only civilian employees of the Activity

2/ Section 3(b)(3) of the Order provides that employees of any agency, or any office, bureau, or entity within an agency which has as a primary function intelligence, investigative, or security work may be exempted from the coverage of the Order (except Section 22) when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations. Section 3(b)(4) of the Order provides that employees of any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct of work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge or performance of their official duties may be exempted from the coverage of the Order (except Section 22) when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency.

3/ Section 3(c) of the Order provides, in effect, that the head of an agency may, in his sole judgment, suspend any provision of the Order (except Section 22) with respect to any agency installation or activity located outside the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

who would be eligible for inclusion in the petitioned for unit are the approximately 52 clerical employees located throughout the Third Region.

The record reveals that the employees in the claimed unit have similar duties, i.e., performing stenographic and typing duties in connection with the investigation of criminal cases. Also, they are subject to essentially the same personnel policies. Thus, personnel and payroll services for employees of all but two of the field, branch, and resident offices are provided by the Civilian Personnel Office at Fort McPherson, Georgia. Further, the evidence establishes that the Region Commander controls the approval of position vacancies, the upgrading and downgrading of positions, the abolishment of slots and the approval of performance appraisals within the Third Region. The Activity's grievance procedure provides for the resolution of grievances at the lowest feasible level within the region with the Region Commander having the final review authority in this regard.

Under the foregoing circumstances, I find that the unit sought herein is appropriate in that the claimed clerical employees share a clear and identifiable community of interest. Thus, the petitioned for unit includes all employees of the Activity eligible for inclusion in a unit of exclusive recognition, and these employees perform similar duties, are subject to common personnel policies and, except for two field offices, receive personnel services from the same personnel office. Further, the evidence establishes that the Region Commander exercises final authority over personnel actions and has the final review authority with respect to grievances. Moreover, I find that such a unit of all eligible employees of the Activity, who are subject to the direction of the Region Commander, will promote effective dealings and efficiency of agency operations. In this regard, while the Activity contended that the claimed unit would not promote effective dealings or efficiency of agency operations, it failed to support this bare assertion with supporting evidence. 4/

As noted above, the Activity contends also that, based on Sections 3(b)(3) and (4) of the Order, the claimed employees should be exempted from the coverage of the Order. However, to be granted an exemption pursuant to either Section 3(b)(3) or Section 3(b)(4) it is required that the head of the agency clearly indicate that the provisions of the Order cannot be applied in a manner consistent with national security requirements and considerations or the internal security of the agency. 5/

4/ See Department of the Navy, Alameda Naval Air Station, FLRC No. 71A-9, and Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28.

5/ See United States Army, Criminal Investigation Command, Third Region, Fort Gillem, Forest Park, Georgia, cited above at footnote 1.

In the instant proceeding, although the Activity alleged at both the original hearing and the reopened hearing that it had sought a Section 3(b)(3) and (4) determination from the Secretary of the Army, there was no evidence adduced that such determination has, in fact, been rendered. Therefore, in the absence of evidence of such a determination, I find that the employees in the claimed unit are subject to the coverage of the Order. 6/

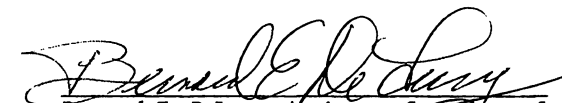
Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees of the Third Region of the United States Army Criminal Investigation Command, excluding professional employees, management officials, criminal investigators, employees located in the Panama Canal Zone, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 81.

Dated, Washington, D. C.
September 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

6/ Based upon a Department of Defense directive indicating that, pursuant to Section 3(c) of the Order, the Order does not apply to employees located in the Panama Canal Zone unless otherwise authorized by the Secretary of the Army, I find that employees of the Activity located in the Canal Zone should be excluded from the unit found appropriate herein.

September 23, 1976

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

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
UTAH DISTRICT,
SALT LAKE CITY, UTAH
A/SLMR No. 716

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 17 and Thomas Shaffer (Complainants) alleging that the Respondent violated Section 19(a)(1) and (3) of the Order by interfering with the rights of Thomas Shaffer to serve as a union official and by interfering in the internal affairs of the Union by voicing an opinion with respect to the selection by the Union of a steward.

Based on credited testimony, the Administrative Law Judge concluded that the sole reason that the Complainant Local's President decided not to appoint Thomas Shaffer as the Union's steward was the President's fear of Shaffer's eventual complete domination of the Union. In this regard, the Administrative Law Judge found that certain comments made by the Respondent's District Director and its Chief of the Intelligence Division to the Complainant Local's President concerning the selection of the Union's steward were not, under the circumstances, intended or designed to persuade or influence the Complainant Local's President in regard to the selection or non-selection of Shaffer. Therefore, the Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(1) and (3) of the Order.

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

A/SLMR No. 716

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

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
UTAH DISTRICT,
SALT LAKE CITY, UTAH

Respondent

and

Case No. 61-2525(CA)

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 17 and
THOMAS SHAFFER

Complainants

DECISION AND ORDER

On May 27, 1976, Administrative Law Judge Joyce Capps issued her Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, both parties filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-2525(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

September 24, 1976

A/SLMR No. 717

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

DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT,
TOOELE, UTAH
A/SLMR No. 717

This case involved a petition for clarification of unit (CU) filed by the Activity-Petitioner seeking to exclude ten Management Analyst positions, GS-0343-11 and 12, from the exclusively recognized unit. In this regard, the Activity-Petitioner contended that the particular Management Analysts were management officials within the meaning of the Order and/or confidential employees. On the other hand, the incumbent exclusive representative, the American Federation of Government Employees, AFL-CIO, Local 2185 (AFGE), took the position that the employees in question were neither management officials nor confidential employees.

The Assistant Secretary found (with one exception where no finding was made) that none of the subject employees were management officials within the meaning of the Order. In connection with their official duties, he noted that the reports and recommendations prepared by these employees do not extend beyond that of an expert rendering resource recommendations with respect to well-established policy, and that the employees' role in making recommendations does not extend to the point of active participation in the ultimate determination of policy. With respect to the Activity-Petitioner's contention that the Management Analysts were confidential employees, the Assistant Secretary found that only the Management Analyst employed by the Activity-Petitioner's Directorate of Administration is a confidential employee and, thus, should be excluded from the unit.

Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT,
TOOELE, UTAH

Activity-Petitioner

and

Case No. 61-2867(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2185

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

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

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

The Activity-Petitioner, the Tooele Army Depot (Depot), seeks to clarify the status of ten Management Analysts, GS-343-11 and GS-343-12, who are employed in the Directorate of Administration, in the Force Development Division of the Directorate of Administration, and in the Work Measurement Branch and the Analysis and Evaluation Division of the Comptroller Directorate. The Depot contends that the Management Analysts are both management officials within the meaning of the Order and confidential employees. The American Federation of Government Employees, AFL-CIO, Local 2185, hereinafter called AFGE, which is the exclusive representative of certain employees of the Depot, contends that the employees in question are neither management officials nor confidential employees and are eligible for inclusion within its recognized unit.

The mission of the Depot is the supply and maintenance of Army material, including the storage, preservation, renovation, and demilitarization of ammunition, explosives and chemicals. The Depot also is responsible for the repair, reconditioning, and rebuilding of various types of vehicles and equipment, such as automotive equipment, combat vehicles, construction equipment, missile systems, armament, rail equipment, and topographic and reproduction equipment. Organizationally,

the Depot is divided into seven directorates each reporting to the Commanding Officer. The Directorate for Administration is responsible for planning, executing and directing the activities of the Adjutant Division and the Civilian Personnel Office, the Force Development Division, the Security Division, and the Safety Division. The mission of the Force Development Division is to plan, promote, implement, organize, coordinate, manage, and evaluate the Army Authorization Document System, to conduct manpower surveys and organizational and functional reviews on a cyclical basis, and to prepare and to maintain the Depot organizational publication and Depot regulations. The Comptroller Directorate is responsible for implementing, directing, executing and coordinating accounting, budgeting, internal review, management analysis, work measurement, and review and evaluation activities of the Depot. The mission of the Analysis and Evaluation Division of the Comptroller Directorate is to analyze Depot management programs in order to increase efficiency, effectiveness, and economy of operations, and the mission of the Work Measurement Division of the Comptroller Directorate is to implement, control, and coordinate the Depot Work Measurement Program. Since its certification on February 15, 1974, the AFGE has been the exclusive representative of a residual unit of all nonprofessional General Schedule (GS) employees of the Depot, including the employees in the Directorate of Administration and the Comptroller Directorate.

Harvey Oakeson, Beverly Hunt, Walt Wickham, Terry Samuels, Carston Pomeroy, Management Analysts, GS-343-11 and 12, Force Development Division, Directorate of Administration

The Depot asserts that the above-named employees are management officials and/or confidential employees and should, therefore, be excluded from the exclusively recognized unit. The employees in the subject classifications are engaged in essentially the same duties and functions, the only distinction being the complexity of the work performed. Pursuant to the direction of the Director of the Force Development Division, they conduct manpower surveys and organizational and functional reviews and develop consolidation plans which lead to the development and preparation of Depot regulations. The record reflects that their surveys and the recommendations which result therefrom are developed within well-established guidelines and that they are implemented only after review and approval by several levels of management.

Under the foregoing circumstances, I find that the Management Analysts, GS-343-11 and 12, in the Force Development Division of the Directorate of Administration are not management officials within the meaning of the Order. Thus, although the employees in these classifications are required to exercise discretion and independent judgment in the preparation of surveys and reviews, the record indicates that they do not have the authority to make or influence effectively Depot policies with respect to personnel, procedures, or programs. Rather, they serve as experts or resource persons rendering resource information or

recommendations with respect to the implementation of existing policies. 1/ In addition, I find that the employees in these classifications are not confidential employees. 2/ Thus, while they may, in the course of their duties, make reports and recommendations to the Director of Administration and Division Chiefs who are responsible for formulating management policies in the field of labor relations, the record reveals that their studies do not concern labor relations and that they do not act in a confidential capacity with respect to any labor relations matters.

Accordingly, I find that the subject employees are neither management officials nor confidential employees and should be included in the exclusively recognized unit.

Howard Sherlock, Dick Griffith, Don Zeller, Management Analysts, GS-343-11, Analysis and Evaluation Division, Comptroller Directorate

The Depot asserts that the three employees in the above classification are management officials and confidential employees and should be excluded from the unit.

The record indicates that these individuals are employed in the Analysis and Evaluation Division of the Comptroller Directorate and perform job functions involving planning and conducting management studies of a wide variety of Depot programs and systems, such as Depot supply functions, Depot maintenance programs, heat and vehicle fuel conservation, xerox machine placement, and the procedures and operations of the Civilian Personnel Office. These duties are undertaken pursuant to the direction and under the supervision of the Comptroller and his subordinate, the Chief of the Analysis and Evaluation Division. The record reveals that, while their recommendations are usually accepted with only minor change, they work within established guidelines and directives and the final determination of acceptance or rejection of their recommendations is made by higher management authority.

Under the foregoing circumstances, I find that the Management Analysts, GS-343-11, in the Comptroller Directorate are not management officials within the meaning of the Executive Order. Thus, in my view, the evidence establishes that the subject employees serve as experts or resource persons rendering information and recommendations with respect

1/ See Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621; Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596; and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

2/ See Virginia National Guard Headquarters, 4th Battalion, 111th, Artillery, A/SLMR No. 69.

to implementing existing policies, as distinguished from employees who actively participate or influence effectively the ultimate determination of what policy should be. Nor do I find these employees to be confidential employees. In this regard, the record does not indicate that any of these employees act in a confidential capacity to persons who formulate and implement labor relations policy for the Activity. Thus, the record reveals that none of the subject Management Analysts have discussed as part of their routine duties labor relations matters with the Director of Civilian Personnel or other persons involved in formulating and effectuating labor relations policy. 3/

Accordingly, I find that the subject employees are neither management officials nor confidential employees and should be included in the exclusively recognized unit. 4/

U.U. Hill, Management Analyst, GS-343-11, Directorate of Administration

The Depot asserts that Hill, a Management Analyst, GS-343-11, in the Directorate of Administration is a management official and/or a confidential employee. Hill serves as Depot Coordinator in the development, compilation, distribution, implementation and maintenance of mobilization, contingency and emergency plans and acts as the Commanding Officer's advisor on all mobilization and emergency planning matters. The record reveals that in the course of his duties he prepares labor-management plans, in conjunction with the Civilian Personnel Office, for use by the Commanding Officer in all emergency situations. In this connection, he makes recommendations on personnel policies, including labor-management contingency plans in the event of work stoppages.

3/ See Virginia National Guard Headquarters, cited above. With respect to contention that the one-time survey conducted by one of these employees for the Civilian Personnel Office could lead to possible conflicts of interest, the evidence establishes that the survey was conducted only to provide resource information concerning the operation and procedures of the Civilian Personnel Office and did not concern the Activity's labor-management relations program. Nor is there any evidence that the analyst involved conducted the survey in any way other than as a resource person rendering information and recommendations with respect to existing policies.


4/ The Depot also seeks clarification of the status of a vacant Management Analyst, GS-343-11, position in the Work Measurement Division of the Comptroller Directorate. In this context, although I find it unnecessary to determine the status of an employee who might fill such a position, it was noted that the record reveals that such an employee would perform similar work and have duties similar to other management analysts in the Comptroller Directorate.

Based on the foregoing, I find that Hill works in a confidential capacity to individuals involved in formulating and effectuating management policies in the field of labor relations and, thus, he is a confidential employee and should be excluded from the unit. 5/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 2185, was certified on February 15, 1974, be, and hereby is, clarified by excluding from the unit the Management Analyst, GS-343-11, in the Activity's Directorate of Administration, and by including in the unit the Management Analysts, GS-343-11 and 12, in the Force Development Division of the Directorate of Administration and Management Analysts, GS-343-11, in the Analysis and Evaluation Division of the Comptroller Directorate.

Dated, Washington, D. C.
September 24, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

5/ In view of the foregoing, it was considered unnecessary to decide whether Hill should be excluded from the unit on the basis that he is a management official.

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

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

FORT CARSON EXCHANGE,
ARMY AND AIR FORCE EXCHANGE SERVICE
A/SLMR No. 718

FORT CARSON EXCHANGE,
ARMY AND AIR FORCE EXCHANGE SERVICE

This case involved two petitions for clarification of unit (CU) filed by the American Federation of Government Employees, Local 1345, AFL-CIO (AFGE), seeking to clarify the unit status of two job classifications, Department Supervisor, HPP-7, and Exchange Detective, HPP-5. While the AFGE contended that both classifications should be included in the existing unit, the Activity maintained that Department Supervisors were supervisors within the meaning of Section 2(c) of the Order and that the Exchange Detective not only was a confidential employee, but also had previously been excluded from coverage under the Executive Order pursuant to Section 3(b)(4) of the Order.

The Assistant Secretary found that the Department Supervisors were supervisors within the meaning of the Order and should be excluded from the exclusively recognized unit. In this regard, he noted that employees in this classification had the authority to responsibly direct and assign work to employees and effectively make recommendations regarding the scheduling of hours of work, annual leave, and hiring. With respect to the Exchange Detective, the Assistant Secretary found that the employee in this classification was responsible for the enforcement of rules to protect Activity property and, thus, he concluded that the employee in this classification was a guard. Under these circumstances, and noting that Executive Order 11838 did not mandate the inclusion of unrepresented guards in existing exclusively recognized units or otherwise change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning their representation and the issuance of an appropriate certification, the Assistant Secretary found that the Exchange Detective should be excluded from the exclusively recognized unit which specifically excluded guards.

Activity
and Case No. 61-2881(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1345, AFL-CIO

Petitioner
FORT CARSON EXCHANGE,
ARMY AND AIR FORCE EXCHANGE SERVICE

Activity
and Case No. 61-2971(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1345, AFL-CIO

Petitioner
DECISION AND ORDER CLARIFYING UNIT

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Paul Hirokawa. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in these cases, the Assistant Secretary finds:

The Petitioner in the subject cases, American Federation of Government Employees, Local 1345, AFL-CIO, hereinafter called AFGE, which was certified as the exclusive representative of certain employees of the Activity on August 13, 1971, filed two petitions for clarification of

1/ The Hearing Officer made certain rulings with regard to the admissibility of documents pertaining to the application of Section 3(b)(4) of the Order to the job classification involved in Case No. 61-2971(CU). In view of the disposition herein, I find it unnecessary to make a determination with regard to the Hearing Officer's rulings in this regard.

addition, they have the authority to train new employees and to make recommendations with respect to such employees' retention once their probationary period is completed. Further, they prepare performance appraisals for annual performance ratings and have the authority to recommend subordinates for awards.

Under these circumstances, I find that the six Department Supervisors, HPP-7, involved herein are supervisors within the meaning of Section 2(c) of the Order inasmuch as they have the authority to responsibly direct and assign work to other employees and make recommendations which are effective regarding hiring, the scheduling of hours of work and annual leave. Accordingly, I find that the Department Supervisors should be excluded from the existing exclusively recognized unit.

Exchange Detective, HPP-5

The Exchange Detective's responsibilities include the surveillance of store customers and employees to detect theft, the detention of suspected shoplifters until military air police arrive, and the reporting of thefts by employees to management officials. Also, the Exchange Detective conducts periodic examinations of the Main Store with regard to the upgrading of security.

Under these circumstances, and noting particularly that the Exchange Detective is responsible for the enforcement of rules to protect Activity property, I find that he is a guard ^{3/} and, therefore, is not included within the exclusively recognized unit. In this respect, the Assistant Secretary has held previously that although Executive Order 11491, as amended by Executive Order 11838, now permits the inclusion of guards with non-guard employees in newly-established units, Executive Order 11838 did not mandate the inclusion of unrepresented guards in existing exclusively recognized units or otherwise change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning their representation and the issuance of an appropriate certification. ^{4/} Therefore, as the exclusively recognized unit specifically excludes guards, I find that the Exchange Detective should be excluded from the existing exclusively recognized unit. ^{5/}

^{3/} Cf. Army and Air Force Exchange Service, Alaskan Exchange System Southern District and Headquarters, Elmendorf Air Force Base and Fort Richardson, Anchorage, Alaska, A/SLMR No. 208.

^{4/} See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629.

^{5/} Under these circumstances, I find it unnecessary to determine whether the Exchange Detective is a confidential employee or has been excluded from coverage of the Order pursuant to Section 3(b)(4).

unit (CU) seeking to clarify the status of certain job classifications. As stipulated by the parties, the unit represented by the AFGE, which currently includes approximately 230 Activity employees, covers all regular full-time and regular part-time Hourly Paid Plan (HPP) and Commission Paid Plan employees employed by the Fort Carson Post Exchange at Fort Carson, Colorado, and the Pueblo Army Depot, Pueblo, Colorado, ^{2/} excluding, among other classifications, guards and watchmen. The mission of the Army and Air Force Exchange Service, of which the Activity is a part, is to provide merchandise and services of necessity and convenience which are not furnished from appropriated funds to authorized patrons at uniformly low prices.

In Case No. 61-2881(CU), the AFGE seeks to clarify the status of six Department Supervisors, HPP-7, located at the Fort Carson Main Store, while in Case No. 61-2971(CU), the AFGE seeks to clarify the status of the Exchange Detective, HPP-5, at the Fort Carson Main Store. In this connection, the Activity contends that the Department Supervisors are supervisors within the meaning of Section 2(c) of the Order and that the Exchange Detective is a confidential employee. Moreover, it contends that the Exchange Detective has been excluded from coverage under the Executive Order pursuant to Section 3(b)(4) of the Order. Conversely, the AFGE contends that the Department Supervisors are not supervisors within the meaning of the Order and that the Exchange Detective is not a confidential employee. It further contends that Section 3(b)(4) of the Order has not been invoked with regard to the Exchange Detective.

The record indicates that organizationally the Fort Carson Main Store has a Manager who supervises two sub-managers, a Sales and Merchandise Manager and an Operations Manager. Department supervisors report directly to the Sales and Merchandise Manager, while the Exchange Detective reports directly to the Operations Manager.

Department Supervisors, HPP-7

Department Supervisors are responsible for maximum merchandising of one or more departments at the Fort Carson Main Store, including all phases of merchandise presentation (i.e. stocking, pricing, displaying, housekeeping, customer assistance, etc.), sales accountability, and proper training of subordinates. The record discloses that Department Supervisors have under their authority approximately 7 to 15 employees. In this connection, the evidence establishes that Department Supervisors have the authority to assign and direct subordinates within assigned sales areas to assure adequate coverage of those areas; to effectively recommend the scheduling of subordinates' hours of work and annual leave; and to make effective recommendations with regard to the hiring of applicants for vacancies within their assigned sales areas. In


^{2/} The parties stipulated that only one unit employee is stationed at the Pueblo Army Depot.

ORDER

September 27, 1976

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 1345, AFL-CIO, was certified on August 13, 1971, be, and hereby is, clarified by excluding from said unit employees assigned to the positions classified as Department Supervisor, HPP-7, and Exchange Detective, HPP-5.

Dated, Washington, D. C.
September 24, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

UNITED STATES AIR FORCE,
FAIRCHILD AIR FORCE BASE, WASHINGTON
A/SLMR No. 719

This case involved a severance request by the International Association of Fire Fighters, Local F-180, AFL-CIO (IAFF), for a unit of fire fighters currently represented in an Activity-wide unit by the National Federation of Federal Employees, Local 11, Independent (NFFE). The NFFE has been the exclusive representative since 1967.

In the circumstances of this case, the Assistant Secretary found no "unusual circumstances" justifying a severance of the petitioned for employees from the exclusively recognized unit represented by the NFFE, and, in accordance with the policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, he denied the severance request and dismissed the IAFF's petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
FAIRCHILD AIR FORCE BASE, WASHINGTON

Activity

and

Case No. 71-3687

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL F-180,
AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 11, INDEPENDENT

Intervenor

DECISION AND ORDER

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

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

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, International Association of Fire Fighters, Local F-180, AFL-CIO, hereinafter called IAFF, seeks to sever all fire fighters, including Supervisory Fire Fighters, GS-6, employed at Fairchild Air Force Base, Washington, from an Activity-wide unit of approximately 620 civilian employees currently represented on an exclusive basis by the Intervenor, National Federation of Federal Employees, Local 11, Independent, hereinafter called NFFE. The NFFE was granted exclusive recognition for the existing unit herein on November 3, 1967, and the

parties executed their first negotiated agreement on June 24, 1968. Subsequent negotiated agreements were executed on June 21, 1971, and March 16, 1973.

The Activity and the NFFE contend that severance of the petitioned for employees from the NFFE's exclusively recognized unit would be inappropriate because this would undermine the stable labor-management relationship in existence between the Activity and the NFFE and would not promote effective dealings and efficiency of agency operations. Moreover, the Activity contends that the Supervisory Fire Fighters, GS-6, are supervisors within the meaning of the Executive Order.

The responsibility for fire prevention and protection rests with the Activity's Fire Protection/Crash Rescue Branch which employs approximately 45 civilian fire fighters, including one Chief and two Assistant Chiefs. The record reveals that the Activity's fire fighters are in different job classifications from other Activity employees and that they possess unique technical skills and knowledge which require continuous training. Fire fighters work three 24-hour shifts per week, including Sundays and holidays, and are entitled to pay and retirement eligibility computations which are somewhat different from those received by other Activity employees. However, the record indicates that fire fighters are otherwise subject to the same centrally administered personnel policies, practices, and procedures as other unit employees, including a Merit Promotion Plan, an Equal Employment Opportunity Plan, and Activity-wide reduction-in-force bidding.

Although the most recent negotiated agreement between the NFFE and the Activity contains no special provisions with respect to fire fighters, the record reveals that the Activity and the NFFE have had discussions specifically concerning the fire fighters' pay computations, retirement eligibility, and tours of duty. The record discloses also that the NFFE interceded in the case of a fire fighter who, for medical reasons, was unable to continue in his firefighting duties, and facilitated his transfer to another position at the Activity even though he was not a member of the NFFE. There is no record evidence indicating that the NFFE has represented fire fighters in a manner inconsistent with its representation of other unit employees.

Based on the foregoing, I find that the petitioned for unit of fire fighters is inappropriate for the purpose of exclusive recognition. It has been held previously that "where the evidence shows that an established, effective, and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." ^{1/} I find no such "unusual circumstances"

^{1/} See United States Naval Construction Battalion Center, A/SLMR No. 8.


in the instant case. Thus, there is no evidence that the NFFE has failed to represent fire fighters or that it has treated them in a disparate manner.

Accordingly, and in the absence of any unusual circumstances, I find that the unit sought by the IAFF is inappropriate for the purpose of exclusive recognition, 2/ and I shall, therefore, dismiss its petition. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-3687 be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 27, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

2/ Cf. United States Department of the Navy, Naval Air Station and Naval Air Test Center, Patuxent River, Maryland, A/SLMR No. 73, United States Naval Air Station, Moffet Field, California, A/SLMR No. 130, and Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24.

3/ The record indicates that since the NFFE received exclusive recognition the Activity and the NFFE have considered Supervisory Fire Fighters, GS-6, to be supervisors within the meaning of the Executive Order. However, in view of the disposition herein, I find it unnecessary to decide the eligibility question concerning the Supervisory Fire Fighters, GS-6, raised by the IAFF.

September 27, 1976

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

U.S. DEPARTMENT OF THE ARMY,
U.S. ARMY TRAINING CENTER ENGINEER
and FORT LEONARD WOOD,
FORT LEONARD WOOD, MISSOURI
A/SLMR No. 720

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R14-32 (NAGE) alleging essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by eliminating a position held by an employee because the employee had engaged in activities on behalf of the NAGE.

The Administrative Law Judge found that the elimination of the position in question was based on economic considerations, rather than as a reprisal for the employee's activities on behalf of the NAGE. Thus, he found that the employee was hired solely because no military personnel were then available to perform the work, and when qualified military personnel were assigned to the facility where the employee worked they assumed his duties. He concluded also that the evidence failed to establish that the Respondent had engaged in a pattern of reprisal against employees who had participated in union activities. Accordingly, he recommended that the complaint be dismissed in its entirety.

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

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

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

U.S. DEPARTMENT OF THE ARMY,
U.S. ARMY TRAINING CENTER ENGINEER
and FORT LEONARD WOOD,
FORT LEONARD WOOD, MISSOURI

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2221, AFL-CIO
A/SLMR No. 721

Respondent

and

Case No. 62-4364 (CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-32

Complainant

DECISION AND ORDER

On July 13, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-4364 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 27, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

This case involves an unfair labor practice complaint filed by Erma Jean Hutchinson (Complainant) against the American Federation of Government Employees, Local 2221, AFL-CIO (AFGE), alleging that the latter labor organization violated Sections 19(b)(1) and (2) of the Order by making unfounded allegations in a letter to the Newark Air Force Base, Aerospace, Guidance and Metrology Center, Newark, Ohio (Activity). Specifically, the AFGE's letter alleged that the Complainant, a Head Cook at the Activity, threatened its members with potential loss of their jobs if they did not terminate their membership in the AFGE. The letter requested that the Activity investigate the matter involved and take corrective action, if necessary, and suggested that failure to do so would violate the Order. The Complainant, who previously had filed a petition for decertification of the AFGE, contended that the AFGE's letter to the Activity was in retaliation for her activities in support of the decertification petition and interfered with her rights assured under Section 1(a) of the Order.

The Administrative Law Judge found that the AFGE's allegations in its letter to the Activity were unfounded in the light of the Complainant's uncontested testimony. He noted that the Complainant was a unit employee and not a supervisor within the meaning of the Order. Under these circumstances, he concluded that her conduct in support of the decertification petition was protected by the Order. However, the Administrative Law Judge noted further that the filing of an unmeritorious unfair labor practice charge does not constitute a violation of the Order. In this regard, he found that the AFGE merely leveled a misplaced unfair labor practice allegation against the Complainant. Under these circumstances, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2221, AFL-CIO

Respondent

and

Case No. 53-7998(CO)

ERMA JEAN HUTCHINSON

Complainant

and

NEWARK AIR FORCE BASE,
AEROSPACE, GUIDANCE AND METROLOGY
CENTER, NEWARK, OHIO

Party-in-Interest

DECISION AND ORDER

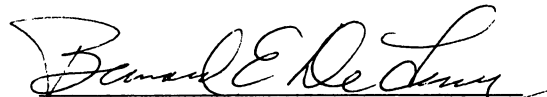
On April 23, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-7998(CO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 27, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA
A/SLMR No. 722

This case involved an Application for Decision on Grievability or Arbitrability filed by Local 1744, American Federation of Government Employees, AFL-CIO (Applicant) challenging a determination by the Department of the Navy, Naval Avionics Facility, Indianapolis, Indiana, (Activity) that a grievance filed by the Applicant was not cognizable as a grievance under the terms of the parties' existing negotiated agreement.

The Administrative Law Judge noted that the underlying dispute raised by the grievance involved an alleged unilateral change in evaluation standards and the question as to whether the Activity's conduct subsequent to the initial grievance "settled" the dispute within the meaning of the terms of the negotiated agreement. He found that the grievance as raised in the Applicant's Application was capable of resolution without violating the prohibitions of the agreement, law, regulations or the Order, and recommended that the Assistant Secretary determine that the grievance is on a matter subject to the grievance-arbitration procedures set forth in the parties' negotiated agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the Activity take appropriate action to implement his finding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA

Activity

and

Case No. 50-13052(GR)

LOCAL 1744, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Applicant

DECISION ON GRIEVABILITY-ARBITRABILITY

On May 11, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision in the above-entitled proceeding, finding that the grievance involved herein was on a matter subject to the grievance-arbitration procedures set forth in the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

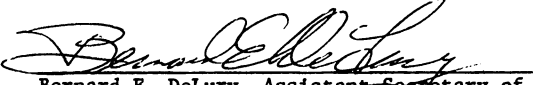
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case,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

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 50-13052(GR) is subject to the grievance-arbitration procedures set forth in the parties' negotiated agreement.

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

Dated, Washington, D. C.
September 28, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ On page 5 of the Administrative Law Judge's Recommended Decision the word "not" was inadvertently included after the word "were" on line 5. This inadvertent typographical error is hereby corrected.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



RECOMMENDED DECISION

Preliminary Statement

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In the Matter of
DEPARTMENT OF THE NAVY,
NAVAL AVIONICS FACILITY,
INDIANAPOLIS, INDIANA
Activity
and
LOCAL 1744, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
Applicant
.....

Case No. 50-13052 (GR)

MITCHELL ARKIN, ESQ.
Labor Relations Advisor
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C.

and

DONALD J. SHERFICK, ESQ.
Staff Consultant to the Civilian
Personnel Director
Naval Avionics Facility
Indianapolis, Indiana
For the Activity

ROBERT G. KELLY
President, Local 1744
American Federation of Government
Employees, AFL-CIO
607 S. Carr Road
Plainfield, Indiana
For the Applicant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

This matter arises from an Application for Decision on Grievability or Arbitrability under Section 13 of Executive Order 11491, as amended (hereinafter called the Order). The application was filed by Local 1744, American Federation of Government Employees, AFL-CIO (hereinafter called the Union or the Applicant) challenging a determination by Naval Avionics Facility, Indianapolis, Indiana (hereinafter called the Activity) that a grievance filed by the Union was not cognizable as a grievance under the terms of the parties existing collective bargaining agreement.

Pursuant to a Notice of Hearing issued by the Labor-Management Services Administration on November 26, 1975, a hearing on the application was held in Indianapolis, Indiana on January 13, 1976. At the hearing the parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs 1/ and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times material hereto the Union has been the exclusive collective bargaining representative for various of the Activity's employees including card punch operators. In the fall of 1973 the parties executed a two-year collective bargaining agreement, the terms of which were in effect at all times material herein. The agreement contains a four-step procedure for the resolution of disputes over the interpretation and application of the agreement, the fourth step being referral of the matter to a third party for binding decision (arbitration). The procedure expressly does not cover matters for which statutory appeals procedures exist such as performance ratings. The agreement also contains the

1/ In its brief the Applicant made reference to excerpts from a U.S. Civil Service Commission Report of Personnel Management Evaluation of the Activity for the period February 3-14, 1975. I have not relied upon the Commission's Report in reaching my decision herein. Accordingly, I need not rule upon the Activity's objection to such reference by the Applicant.

following provision:

"Article XIII RELATIONSHIP OF AGREEMENT TO NAVY POLICIES, REGULATIONS AND PRACTICES"

"Section 1. Consultation - NAFI and the Union shall confer with respect to matters concerning personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Personnel Manual, published NAFI and Navy policies and regulations, and Executive Order 11491, as amended.

"Section 2. Changes in policy or regulations initiated by NAFI, having significant effect on working conditions of employees in the unit, will be subjects of consultation with the Union prior to implementation, except in emergency situations. The views of the Union on such changes will be considered."

On February 7, 1975, three card punch operators received from the Activity notices of unsatisfactory performance of duties. The notices provided, in relevant part:

"1. Your general manner of performance on your job is unsatisfactory and this memorandum is to be considered notice that unless your performance is sufficiently improved with 60 days after your receipt of this letter, disciplinary or adverse action including removal may be proposed.

"2. Your status as a satisfactory employee is adversely affected by the following unsatisfactory performance, as defined by your position description (satisfactory accuracy and speed):

a. Quantity - Failure to achieve at least 200,000 keystrokes per week.

b. Quality - Failure to limit your error rate to a maximum of 10% of the fields keyed each week.

c. Effort - Failure to spend a minimum of 6.5 hours per day/32.5 hours per week at your keystation keying data.

"3. The above measures of quantity, quality and effort are measured by the CMC Key processing System on a daily basis and accumulated for an indefinite period. The following basic guidelines apply to the requirements mentioned in paragraph 2 above.

a. Each hour of leave will reduce the keystroke requirement by 5000 keystrokes, each hour of overtime will add to the requirement at the same rate. Equipment outages also reduce the requirement at the same rate.

b. Each hour of overtime will add 52 minutes to the effort requirement, each hour of leave will reduce this requirement at the same rate. Equipment outages also reduce the requirement on a minute by minute basis.

By letter dated February 17, 1975, Union President Robert G. Kelly filed a grievance with the Activity regarding the notices given to the card punch operators alleging a "(f)ailure to consult and confer as prescribed by the Executive Order and Article XIII Sections 1 and 2 of the negotiated agreement". The grievance stated it was "...filed because management failed to consult with the Union prior to establishing the specific production measures now adversely affecting Card Punch Operators." Further, the grievance invoked that part of the grievance-arbitration clause which provides that the Union President may file a grievance directly with the Commanding Officer 2/ and, if not settled, the Union may refer the matter to arbitration. However the grievance was thereafter processed through the regular four-step grievance procedures.

Shortly thereafter, Kelly met with Donald H. Young, Computer Operations Branch Chief, on a number of occasions to discuss the grievance. At the meetings it was Kelly's position that the notices were based upon new standards of production without such change in standards having been negotiated with the Union. As a remedy the Union sought withdrawal of the notices and a commitment that in any subsequent performance evaluations, the old standards be used and the evaluation be made based upon future work performance.

2/ The grievance was addressed to the Chief, Computer Operations Branch with a copy to the Commanding Officer.

By memorandum dated February 28, 1975, Young issued his decision on the grievance. In the memorandum he recited both the Union's position, as he understood it, and the report he received from the card punch operators' supervisor. ^{3/} The Union's remedial actions sought were not set forth as: "(a) withdraw the Notification of Unsatisfactory Performance letters to the recipients; and (b) utilize only the measurement criteria expressed in the position description. Young's decision on the grievance stated:

The two remedies you have requested will be implemented. I will have the letters which contain the "200,000 KS/wk" notation withdrawn (cancelled), and will utilize the words in the present position descriptions as the basis for determining the employees' satisfactory level of performance.

There is obviously a difference of opinion between you and the supervisor regarding the meaning of the "200,000 KS/wk" performance requirement. Taking into account the apparent misunderstandings, and the unintended impression the content of the letters may have conveyed, I am withdrawing them, and deleting the numbers, since I do not see this as being critical to this supervisor's need in judging satisfactory performance, nor to giving notice to his employees of unsatisfactory performance. He can certainly make more subjective types of judgments, if that is what the employees concerned want. Consequently, I shall have the supervisor reevaluate his judgments in this light (sans any specific numbers), and act accordingly. The possibility remains open, of course, that the employees may again be served notice of continuing unsatisfactory performance where so judged by the supervisor. Encouraging,

^{3/} The memorandum also stated that keystroke and error rate factors had been previously discussed with the employees involved including the Union steward in that section who was one of the employees receiving a notice; denied that a "production measure" had been imposed (although acknowledging such measures were in the planning stage); and advised that in the future discussions with the Union would be held on the matter when background work was sufficiently complete to warrant discussions.

I hear the "good news" that some of the employees have already responded in the right direction since being notified of their unsatisfactory performance.

By memorandum dated March 3, 1975, Young rescinded the three notices. By memoranda dated March 4, the Activity issued new notices of unsatisfactory performance of duties to the three card punch operators stating, in relevant part, as follows:

"1. Your general manner of performance on your job is unsatisfactory and this memorandum is to be considered notice that unless your performance is sufficiently improved within 60 days after your receipt of this letter, disciplinary or adverse action including removal may be proposed.

"2. Your status as a satisfactory employee is adversely affected by the following unsatisfactory performance:

a. You have failed to attain an acceptable level of quantity of keystrokes during the last 6 months.

b. You have failed to maintain an acceptable level of accuracy in the data fields that you have keyed.

c. You have repeatedly failed to spend an acceptable amount of time keying data at your workstation during the last 6 months.

The above items have resulted in your supervisor being unable to assign you work as required to meet schedules.

Kelly immediately took issue with the subsequent re-issuance of the notices contending that the Activity did not attempt to resolve the grievance in good faith. He requested the grievance be advanced for further consideration. The Activity responded by, *inter alia*, taking the position that it was "under the impression" that the remedies sought at the first level of the grievance had been entirely satisfied. The response inquired as to what specific grievance the Union had in the matter and what corrective action was being sought.

Subsequent attempts to resolve the matter were not productive and on March 31, 1975, Kelly sought to advance the grievance further. He requested that the unsatisfactory performance notices of March 4, 1975 be rescinded; the employees performance be judged "from this day forward" applying the same standards used by the employees' prior supervisor; 4/ and the Activity abide by the intent and spirit of the Executive Order regarding the obligation to consult and confer.

The Activity responded to Kelly on April 3, 1975. In its letter the Activity professed "bewilderment" as to the exact nature of the grievance. The Activity contended, inter alia, that the grievance had been fully satisfied; that the later notices had no connection with the original grievance; and that any grievance on the new notices must begin at the first step of the grievance procedure. The Activity requested further clarification of the grievance so it might be put into "the proper channel" and expressed the opinion that, in any event, the Union had sought to arrive at Step 3 of the grievance procedure without having properly gone through Step 2.

Kelly replied to the Activity on April 7, 1975, contending, in part, that the original grievance had never been resolved and was properly advanced in the grievance procedure. Kelly also stressed that management could not make a unilateral decision regarding the interpretation or application of the agreement.

The dispute between the parties continued. Accordingly, by letter dated April 17, 1975, the Activity issued its "final determination" taking the position that the original grievance had been fully satisfied at the first stage and that any complaint with regard to the March 4 notices would

4/ In 1974 new card punch equipment was installed which, unlike the prior equipment, had the capability of recording keystrokes, error rate, and time the operator spent keying data at the keystation. When the new equipment was installed, the supervisor of the card punch operation was replaced by a new supervisor who was responsible for issuing the notices involved herein.

only be properly processed through the administrative grievance procedure and not the negotiated procedure. 5/

Thereafter, on June 9, 1975, the Union filed the application being considered herein. The application described the unresolved question as follows: "Can management deprive the Union of the relief sought as a corrective action necessary to resolve the grievance and unilaterally decide that the grievance is satisfactorily settled, therefore, not subject to further processing under the negotiate grievance procedure?"

Discussion and Conclusions

By the express terms of Article VIII of the agreement, the grievance procedure is established as the exclusive method for the parties to resolve disputes over the interpretation and application of the terms of the agreement. Article XVI of the agreement provides that if the parties to the agreement "...fail to settle any grievances processed under the negotiated grievance procedure, such grievances ...may be submitted to arbitration, except grievances based upon admonitions, letters of caution or requirement, letters of reprimand, or suspensions of 30 calendar days or less."

The basic grievance herein concerned a contention by the Union that the Activity failed to consult with the Union prior to changing standards for evaluating card punch operators. The Union was not satisfied with the method the Activity chose to "settle" the dispute. 6/ The employees had been re-evaluated for the prior performance period and not for future performance as Kelly had requested in his meetings with the Activity in February 1975. In addition, the Union had no assurance that new standards for evaluation were not used in the subsequent evaluation even though specific numbers were omitted from the notices. Thus, the Union contends,

5/ The Activity further indicated that it would not raise the contention that the Union was not at the proper stage of the negotiated grievance procedure if the Union sought a grievability decision from the Assistant Secretary under Section 13(d) of the Order.

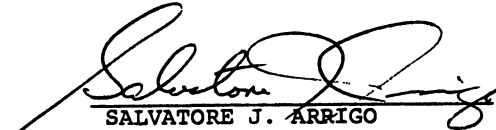
6/ While not articulated to the Activity during the processing of the grievance, the Union indicated at the hearing that it was also seeking an "apology" from the Activity as a remedy for the alleged unilateral change in performance standards.

and I find, that a dispute continued to exist regarding the appropriateness of the Activity's actions in "settling" the dispute. 7/

Further, I find nothing in the Order, the regulations or the agreement which would preclude arbitration of the Union's grievance. Although under the agreement performance ratings and letters of requirement are specifically precluded from consideration as grievances, the performance ratings and notices herein are only tangentially related to the grievance. The underlying dispute and issues raised by the grievance involves an alleged unilateral change in evaluation standards 8/ and whether the Activity's subsequent conduct "settled" the dispute within the meaning of the terms of the agreement. The grievance did not attack the accuracy of the performance ratings. Rather, the Union's complaint was with the alleged unilateral settlement. Accordingly, in all the circumstances, I find that the grievance as raised in the Union's application is capable of resolution without violating the prohibitions of the agreement, law, regulations or the Order.

Recommendation

I recommend that the Assistant Secretary determine that the grievance is a matter subject to the grievance-arbitration procedures set forth in the parties collective bargaining agreement.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 11 MAY 1976
Washington, D.C.

7/ I make no finding however regarding whether the Activity's conduct fully remedial the grievance leaving questions of the nature to the grievance-arbitration process.

8/ It is well settled that the standards an activity uses to evaluate employees is a negotiable condition of employment. Cf. Patent Office Professional Association and U.S. Patent Office, Washington, D.C., FLRC No. 75A-13 (October 28, 1975), Report No. 85; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, N.J., A/SLMR No. 438, Case No. 32-3071(CA).

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

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION II, SOCIAL
SECURITY ADMINISTRATION, BUREAU
OF DISABILITY INSURANCE
A/SLMR No. 723

This case arose when the American Federation of Government Employees, Local 1760, AFL-CIO (AFGE), filed a petition seeking an election in a unit of all employees employed by the Department of Health, Education and Welfare's (DHEW) Bureau of Disability Insurance (BDI), Social Security Administration (SSA) in the New York Region. The Activity asserted that the claimed unit did not meet the criteria set forth in Section 10(b) of the Order and that said unit would exclude a substantial number of other employees within the DHEW's Region II Headquarter's Office in New York, which employees, it was contended, share a clear and identifiable community of interests with those in the proposed unit. The Activity also asserted that the proposed unit would hinder the development of meaningful and effective labor-management relations and would impair the efficiency of agency operations and lead to undue fragmentation in that the petitioned for unit is for only a part of the Regional Headquarters Office.

Under all of the circumstances, the Assistant Secretary found that the claimed unit was not appropriate for the purpose of exclusive recognition. In this regard, he found that the operations of the BDI, the other Bureaus of the SSA, and the other DHEW Regional Offices are highly integrated, and that the employees of the BDI work closely with other Bureaus of the SSA and with various other offices in DHEW Region II in the programs involving disability projects. Furthermore, he found that the BDI is subject to the administrative direction of the DHEW Region II Regional Director and, like other components of the DHEW Regional Offices, receives all its personnel services from the Regional Personnel Office. It was noted also that the area of consideration for promotions, filling of job vacancies and reductions-in-force is Region-wide; that all employees of the DHEW Region II, including those in the BDI, receive the same benefits, have the same working hours and leave policies, share the same health facilities, come under the same grievance procedure, and are serviced by the same labor relations section of the Regional Personnel Office. Accordingly, the Assistant Secretary concluded that the employees in the claimed unit do not possess a clear and identifiable community of interest separate and distinct from the other employees of the SSA and the other DHEW Region II headquarters. Moreover, it was found that the claimed unit, which includes the employees of only one bureau of the SSA, which, in turn, is only one of a number of operating components and administrative offices in the DHEW Region II Headquarters, could not reasonably be expected to promote effective dealings and efficiency of agency operations. Therefore, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION II, SOCIAL
SECURITY ADMINISTRATION, BUREAU
OF DISABILITY INSURANCE

Activity

and

Case No. 30-6501(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760, AFL-CIO

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, 1/ the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 1760, AFL-CIO, hereinafter called AFGE, seeks an election in a unit of all employees employed by the Department of Health, Education and Welfare's (DHEW) Bureau of Disability Insurance (BDI), Social Security Administration (SSA) in the New York Region, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order. The Activity contends that the proposed unit is inappropriate. In this regard, it asserts that the claimed unit does not meet the criteria set forth in Section 10(b) of the Order and that said unit would exclude a substantial number of other employees within the DHEW's Region II Headquarters Office in New York, which employees, it is contended, share a clear and identifiable community of interest with those in the proposed unit. It also asserts that the proposed unit

would hinder the development of meaningful and effective labor-management relations and would impair the efficiency of agency operations and lead to undue fragmentation in that the petitioned for unit is for only a part of the Regional Headquarters Office. The AFGE, on the other hand, contends that the claimed unit is appropriate and meets the criteria set forth in Section 10(b) of the Order in that it is being established on a craft and functional basis. 2/

The BDI 3/ is 1 of 4 Regional Office Bureaus within the Office of the Regional Commissioner of the SSA. The regional SSA Office is, in turn, one component of the Region II Offices of the DHEW in New York. Thus, the SSA is 1 of the 9 major operating components within Region II which include the Office of Education; the Public Health Service; the Food and Drug Administration; the Social and Rehabilitation Service; the Bureau of Health Insurance; the Office of Regional Commissioner; the Bureau of Hearings and Appeals; the Office of Human Development; and the Office of Long Term Care. These operating components are serviced by the administrative offices of Region II which include, among others, the Regional Personnel Office; the Financial Management and Budget Office; the Office of the General Counsel; the Audit Agency; and the Office for Civil Rights. There are approximately 1000 employees in the DHEW Regional Office and some 71 eligible employees in the claimed unit. The majority of the Regional Office employees are located in the same office building in New York City. 4/

The record reveals that there is a Regional Director of the DHEW in Region II who represents the Secretary of the DHEW in the Region. In this capacity, she provides leadership and coordination in the various Department programs exercising general supervision over Regional activities. In performing this responsibility, the Regional Director coordinates the program operations of all DHEW components including the BDI and other bureaus of the SSA (which receive technical direction from their separate headquarters offices) in order to assure maximal use of resources and

2/ The record indicates that the AFGE considers an alternative unit of all nonsupervisory employees of the SSA in the Regional Headquarters Office also to be appropriate. However, I am administratively advised that the AFGE's showing of interest is inadequate to support such an alternative unit.

3/ The record reflects that Bureaus in Region II of the SSA are now or soon will be referred to as Programs rather than Bureaus.

4/ There is a small group of Region II employees located at the World Trade Center and in Queens, New York.

-2-

1/ The Activity and the Petitioner filed untimely briefs which were not considered.

to avoid disparities in interprogram functions. In addition, the Regional Director exercises administrative authority over all DHEW employees in the Regional Headquarters Offices and in Region II.

The mission of the BDI, which is headed by a Regional Representative, is to oversee the Disability Insurance portion of the Social Security Program to ensure that it is operating efficiently in Region II of the DHEW. In this regard, the BDI is the primary liaison with the State Disability Determination Agencies within Region II and the BDI oversees their general operations, maintains control over their budgets and staffing, and is responsible for insuring the quality of disability cases produced by the State agencies. Also, the BDI insures that there are adequate policies and procedures available for the Disability Determination Services and the District Offices of the SSA Bureau of Field Operations to process disability cases. Further, the BDI is responsible for a public information program dealing with Disability Insurance.

The record reflects that the BDI is functionally interrelated and interdependent with the various other bureaus of the SSA and with other operating components and administrative offices of the Regional headquarters of the DHEW. Thus, the record reflects that the employees of the BDI work on a day-to-day basis with the Bureau of Field Operations of the SSA, and that they work with the Bureau of Supplemental Security Income of the SSA Regional Office on matters related to the disability aspects of the Supplemental Security Income Program. The record reflects also that the BDI and Region II's Office of Human Development conduct reviews of state vocational rehabilitation and referral programs to ascertain the adequacy of staffing and program success and also that they work jointly to assure that funds allocated to the Social Security Trust Fund are properly disbursed for the specific purpose of vocational rehabilitation. In addition, the BDI deals with the DHEW Region II Audit Agency in reviewing and evaluating reports of audit exceptions identified during the course of DHEW audits of state disability programs; it deals with the DHEW's Financial Management Section where it receives advice on financial management matters; it deals with the DHEW's General Counsel who provides legal advice to BDI concerning the interpretation and administration of statutes affecting its programs; and it deals with the Social Rehabilitation Service in monitoring disability referral policies and practices. The record shows also that the BDI conducts studies of the District Office operations of the SSA as well as other Regional facilities and trains employees of other bureaus, such as its training of new personnel in the Bureau of Hearings and Appeals of the DHEW.

The evidence establishes that the Regional Director of the DHEW is the official within the DHEW Regional Office with the primary responsibility for personnel matters, including labor relations activity, for all components within the Region; that she has the final authority to approve any negotiated agreements within the Region; and that she has

designated the Region's Labor Relations Officer to provide labor relations assistance to all Region components. The record reflects, further, that the Regional Personnel Office has the responsibility for servicing all DHEW components within the Region, including the BDI which does not have any administrative staff of its own. Thus, the Personnel Officer of Region II, together with his staff, administers the personnel programs for the entire DHEW Regional Office on behalf of the Regional Director, and effects all appointments, promotions and other personnel actions in accordance with the Regional Personnel Plan. Further, all Region II disciplinary actions, including those regarding the BDI, are subject to pre-issuance review by the Regional Personnel Officer for sufficiency and compliance with DHEW regulations; all employees in Regional Offices in Region II operate under the same merit promotion plan and reduction-in-force procedures; all job announcements in the Regional Offices are posted Region-wide; and the area of consideration for all clerical position vacancies is the Regional Offices of Region II. Moreover, as noted above, the Regional Personnel Officer has a Labor Relations Officer who provides technical assistance and guidance to all Regional Office components, including the BDI. The employees of all the components of the Regional Offices receive the same benefits, have the same working hours and leave policies, share the same cafeteria and health facilities, come under the same grievance procedure, and are subject to common training programs.

Under all of the foregoing circumstances, I find that the claimed unit is not appropriate for the purpose of exclusive recognition. As noted above, the record reveals that the operations of the BDI, the other Bureaus of the SSA, and other DHEW Regional Offices are highly integrated, and that the employees of the BDI work closely with the other bureaus of the SSA and various regional offices in the programs involving disability projects. Furthermore, the record reflects that the BDI is subject to the administrative direction of the DHEW Regional Director and, like other components of the DHEW Regional Offices, receives all its personnel services from the Regional Personnel Office. Moreover, the area of consideration for promotions, filling of job vacancies and reductions-in-force is Region-wide and all employees of the DHEW Region II, including those in the BDI, receive the same benefits, have the same working hours and leave policies, share the same health facilities, come under the same grievance procedure, and are serviced by the same labor relations section of the Regional Personnel Office. ^{5/} Under these circumstances, I find that the employees in the claimed unit do not possess a clear and identifiable community of interest separate and distinct from the other employees of the SSA and the DHEW Region II Headquarters. I find, further, that the claimed unit, which


^{5/} Cf. Department of Health, Education and Welfare (HEW), Health Services and Mental Health Administration (HSMHA), Maternal and Child Health Services and Federal Health Programs Service, A/SLMR No. 192.

includes the employees of only one bureau of the SSA, which, in turn, is only one of a number of operating components and administrative offices in the DHEW Region II Headquarters, cannot reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the petition herein be dismissed.

October 7, 1976

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-6501(RO) be, and it hereby is, dismissed.
Dated, Washington, D. C.
October 7, 1976


Bernard E. DeLury, Assistant Secretary
of Labor for Labor-Management Relations

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

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592
A/SLMR No. 724

This case involved a complaint filed by the Director, Office of Labor-Management Standards Enforcement (LMSE), U.S. Department of Labor, in which it was contended that the Respondent, the American Federation of Government Employees, AFL-CIO, Local 1592, had engaged in certain violations of the standards of conduct for labor organizations set forth in Section 18 of the Order and Part 204 of the Regulations of the Assistant Secretary by applying monies received by way of dues or assessments to promote the candidacy of the Respondent's incumbent President in its election of officers held on May 23, 1975. It was further contended that such violations had affected the outcome of the election with respect to the contested office, that the election should, therefore, be declared null and void, and that a new election should be ordered under the supervision of the LMSE.

The Respondent conducted an election of officers on May 23, 1975. Subsequent to the election, a complaint was filed with the Respondent by a member in good standing, who was a defeated candidate for the office of President, alleging that monies received by way of dues or assessments were used to pay for a notice of election and for certain issues of the Respondent's newspaper which promoted the candidacy of the incumbent President of the Respondent Union. After exhausting the remedies available to her pursuant to the Respondent's Constitution, the complaining member filed a timely complaint with the Department of Labor pursuant to Section 204.63 of the Regulations. Having investigated the complaint, the Director, LMSA concluded that there was probable cause to believe that a violation of Section 204.29 of the Regulations had occurred in the conduct of the Respondent's election which may have affected the outcome of the election. As a result, the instant complaint was filed with the Chief Administrative Law Judge, U.S. Department of Labor.

The Administrative Law Judge concluded that the Respondent had violated the Order and the Assistant Secretary's Regulations in the conduct of the election by applying monies received by way of dues or assessments to pay for a notice of election and for certain issues of the Respondent's newspaper which served to promote and support the candidacy of the incumbent President in his attempt for re-election.

In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary ordered that the election conducted on May 23, 1975, be declared null and void with respect to the contested office, and that a new election be conducted under the supervision of the Director, LMSE, in accordance with Section 204.29 of the Regulations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Respondent

and

Case No. S-E-7

DIRECTOR,
OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT,
U.S. DEPARTMENT OF LABOR

Complainant

DECISION AND ORDER

On June 23, 1976, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain violations of the standards of conduct for labor organizations by applying monies received by way of dues or assessments to promote the candidacy of the Respondent's incumbent President in its election of officers held on May 23, 1975. The Administrative Law Judge recommended that the said election be declared null and void with respect to the office of president and that a new election for said office be conducted under the supervision of the Director, Office of Labor-Management Standards Enforcement, United States Department of Labor. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

herein, I find that the Respondent violated Section 18 of Executive Order 11491, as amended, and Part 204 of the Regulations of the Assistant Secretary by applying monies received by way of dues or assessments to promote the candidacy of the incumbent President in its election of officers, held on May 23, 1975, that the improper conduct involved may have affected the outcome of said election and that therefore, the holding of a new election is warranted.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 204.91(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that:

1. The election for the office of President conducted by the American Federation of Government Employees, AFL-CIO, Local 1592, on May 23, 1975, is null and void.
2. A new election for the office of President, American Federation of Government Employees, AFL-CIO, Local 1592, shall be conducted under the supervision of the Director, Office of Labor-Management Standards Enforcement, U.S. Department of Labor, in accordance with Section 204.29 of the Regulations.
3. Pursuant to Section 204.92 of the Regulations, the American Federation of Government Employees, AFL-CIO, Local 1592, shall notify the Assistant Secretary in writing within 30 days from the date of this decision as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 7, 1976



Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR,
TAMPA, FLORIDA

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR,
TAMPA, FLORIDA
A/SLMR No. 725

Respondent

and

Case No. 42-2853(CA)

LOCAL 1518,
NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Local 1518, National Federation of Federal Employees, Tampa, Florida, (NFFE) alleging that the Respondent violated Section 19(a)(1) of the Order based on the conduct of the Respondent's Sector Manager in making statements to an employee who had filed an informal grievance under the agency grievance procedure that he should not let the local union representative lead him around, as that was not the way to get ahead.

The Administrative Law Judge found that although the grievant was coerced, intimidated, and unfairly induced into discontinuing his informal grievance, the Sector Manager's conduct did not constitute a violation of Section 19(a)(1) of the Order as the coercive statements were made in the context of an agency grievance procedure and, thus, were not violative of rights assured by the Order.

The Assistant Secretary found, contrary to the Administrative Law Judge, that, under the circumstances of this case, the Respondent had violated Section 19(a)(1) of the Order. In his view, coercive or intimidating statements implying adverse consequences for employees seeking or accepting union assistance and representation in regard to such matters as the processing of grievances are of themselves separate and independent violations of Section 19(a)(1) of the Order unrelated to the particular nature of the procedure itself. Therefore, he found it immaterial that the improper statement was made in the context of an agency grievance procedure.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

On June 28, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

In his decision, the Administrative Law Judge found that the conduct of the Respondent's Sector Manager, including his statement to employee T. J. Chapman to the effect that Chapman should not let the local union representative lead him around as that was not the way to get ahead, while coercive and intimidating in nature, was not violative of Section 19(a)(1) of the Order because such conduct occurred in the context of the processing of an informal grievance under the agency grievance procedure, rather than in the context of the processing of a grievance under a negotiated grievance procedure.

I do not agree with the conclusion of the Administrative Law Judge. In my view, coercive or intimidating statements by agency management implying adverse consequences for employees seeking or accepting union assistance and representation in regard to such matters as the processing of grievances are of themselves separate and independent violations of Section 19(a)(1) of the Order unrelated to the particular nature of the procedure itself. ^{1/} Thus, I find it immaterial that the improper statement referred to above was made in the context of an agency grievance procedure. Accordingly, I shall order that the Respondent remedy its violation of Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, Airway Facilities Sector, Tampa, Florida, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by urging or admonishing them to refrain from seeking representation or assistance from representatives of Local 1518, National Federation of Federal Employees, concerning grievances, personnel policies and practices, or other matters affecting working conditions.

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

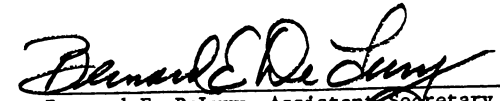
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its facility at the Federal Aviation Administration, Airway Facilities Sector, Tampa, 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 Manager, Airway Facilities Sector, Tampa, Florida, 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 Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

1/ Cf. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, A/SLMR No. 464, and Veterans Administration Center, Bath, New York, A/SLMR No. 433.

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

Dated, Washington, D. C.
October 8, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL NOT urge or admonish our employees to refrain from seeking representation or assistance from representatives of Local 1518, National Federation of Federal Employees, concerning grievances, personnel policies and practices, or other matters affecting 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 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, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N. E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



In the Matter of :
DEPARTMENT OF TRANSPORTATION :
FEDERAL AVIATION ADMINISTRATION :
AIRWAY FACILITIES SECTOR, :
TAMPA, FLORIDA Respondent :
and :
LOCAL 1518 :
NATIONAL FEDERATION OF :
FEDERAL EMPLOYEES Complainant :
Case No. 42-2853 (CA)

Geoffrey McLellen
Labor Management Specialist
Federal Aviation Administration
Southern Region
Post Office Box 20636
Atlanta, Georgia 30320
For the Respondent

Robert A. Hamilton
1112 North Florida Avenue
Tampa, Florida 33589
For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding brought under Section 19(a)(1) of Executive Order 11491 (hereinafter referred to as the Order).

Statement of the Case

The original complaint herein filed June 3, 1975, alleged violations of Sections 19(a)(1), (2), (4) and (5) of the Order. An amended complaint filed June 19, 1975, deleted the allegations of violation of Section 19(a)(2), (4) and (5), and added

an alleged violation of 19(a)(6). A second amended complaint filed June 27, 1975, re-alleged violations of Sections 19(a)(1) and (6) and reiterated the factual basis of the complaint as originally alleged.

On October 24, 1975, the Assistant Regional Director dismissed the portion of the second amended complaint alleging violation of Section 19(a)(6) of the Order. On November 12, 1975, a notice of hearing was duly issued with reference to the alleged violation of Section 19(a)(1) alone.

On February 4, 1976, a hearing pursuant to said notice was duly held before the undersigned in Tampa, Florida. Respondent filed a post-hearing brief on March 3, 1976.

The issue to be determined is as follows: whether Respondent violated Section 19(a)(1) of the Order by allegedly intimidating an employee and interfering with his right to have a grievance processed without fear of reprisal.

The hearing having been conducted and all the evidence having been considered in accordance with the provisions of the Order and the applicable Regulations promulgated thereunder (29 C.F.R. Part 203), 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, National Federation of Federal Employees, Local 1518, was the exclusive bargaining representative for non-supervisory personnel of the Respondent, Federal Aviation Administration, Airway Facilities Sector, Tampa, Florida.

2. On February 7, 1975, T. J. Chapman, an electronic technician, then Grade GS-11 and Secretary-Treasurer of the Complainant Union, presented to the Respondent's Sector Manager an undated letter, signed by himself and two other technicians having the same grade, containing their complaints with regard to explicit identification of certain subsystems for which they had certification responsibility, indicating, in their view, work of a higher grade.

3. After some discussion of the contents of the letter, it was left with the Sector Manager for his consideration, but without invoking the informal grievance procedures provided under Agency rules and orders.

4. On February 21, 1975, Chapman dated the letter as of that date and submitted it to the Sector Manager under the informal grievance procedure provisions of FAA Order 3770.2A, Paragraph 508.

5. Under date of February 24, 1975, the Sector Manager returned the grievance to the signers because it had not been taken to their immediate supervisor or the next higher supervisor in line as required by the Agency procedure.

6. After a meeting on February 28, 1975, of all parties concerned, the informal grievance was resubmitted through the immediate supervisor. Under the Agency procedure, the supervisor is required to reply as soon as possible, but not later than ten days after receipt of the complaint.

7. Chapman was on duty and available for conference or counseling on February 24, 25, 26, 27, and 28, and March 3 through March 6, 1975. The Sector Manager was on duty and available on many of the same dates.

8. On March 4, 1975, the Sector Manager sought out Chapman for what he (the Sector Manager) characterized as a general counseling session. He found Chapman alone at a remote transmitter site and entered upon a discussion of training and supervision, as well as the subject matter of the informal grievance. In the course of this discussion, he pointed out what he considered some poor staff work in the preparation of the grievance letter; he also advised Chapman that he should not let the local Union representative lead him around, as that was not the way to get ahead. The Sector Manager further said that he was glad to see that Chapman had taken some supervisory courses and that he had put in a bid for a supervisory job at Daytona Beach. He mentioned a new supervisory form in which he would have to evaluate Chapman in the future for such a bid, and said he would like to be in a position to recommend Chapman when people inquired as to whether he was a good worker and whether he was loyal.

9. In the above conversation Chapman was left with the impression that if he would drop the grievance and quit rocking the boat, then there would be no question of his loyalty. Chapman understood the Sector Manager to mean that the filing of a grievance was disloyal and that he would not be able to say that Chapman was a loyal employee if the grievance were continued.

10. On March 5, 1975, the following morning, Chapman informed his immediate supervisor that he was not going to pursue the informal grievance, as he thought it was going to do nothing but get him into trouble.

11. On March 6, 1975, the immediate supervisor filed a reply, and no further action was taken by anyone with respect to the informal grievance. Chapman did not thereafter file any complaints or grievances on his own behalf, his subsequent signing of some correspondence in the capacity of Secretary of the Union being wholly immaterial to the issues in this proceeding.

Conclusions of Law

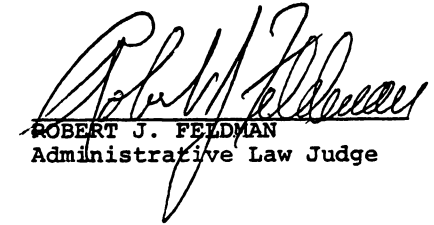
The record as a whole demonstrates beyond a shadow of a doubt that Chapman was intimidated and unfairly induced into discontinuing the informal agency grievance that he and his two colleagues had instituted. The Sector Manager did not have to drop a ton of bricks upon him. Considering the existing circumstances and the timing of the so called "counseling session", the thinly-veiled threat to withhold recommendation for promotion or transfer was more than sufficient to accomplish the purpose intended. That type of coercion is no less effective and no less wrongful because it is subtle rather than blatant.

The real question is whether the Sector Manager's conduct constituted a violation of Section 19(a)(1) of the Order, which provides that agency management shall not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order". Chapman was restrained and coerced in the exercise of his right to pursue the grievance procedures accorded him by FAA Order 3770.2A. Unfortunately that is not one of the rights assured by the Order, nor is it a right arising out of the collective bargaining agreement between the parties. It is expressly held that an agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order, and that an agency's failure or refusal to make the provisions of its own grievance procedure available to an employee cannot be said to interfere with rights assured under the Order and thereby be violative of Section 19(a)(1). Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334. The decision of the Federal Labor Relations Council relied on by Complainant (Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80) is not germane to the issue. I am constrained, therefore, to conclude that the evidence does not show facts constituting a violation of Section 19(a)(1) of the Order.

Nothing herein contained, however, should be deemed in any way to sanction or condone the conduct of the Sector Manager that gave rise to this proceeding. We do not review it here. The policing and enforcing of agency grievance procedures are the responsibility of the agency involved and the Civil Service Commission. They are not within the purview of unfair labor practice proceedings under Executive Order 11491.

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 28, 1976
Washington, D.C.

October 8, 1976

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

WATERVLIET ARSENAL,
U.S. ARMY ARMAMENT COMMAND,
WATERVLIET, NEW YORK
A/SLMR No. 726

This proceeding involved an unfair labor practice complaint filed by American Federation of Government Employees, Local 2352, AFL-CIO (AFGE), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally modified the terms and conditions of the parties' negotiated agreement.

The parties' negotiated agreement, which became effective on February 26, 1973, provided, in part, for the use of official time by union officials for the purpose of representing employees in grievance proceedings, appeals, and unfair labor practice proceedings. The agreement also permitted the Respondent to withhold its approval of official time for representational purposes under certain conditions. Pursuant to its interpretation of the agreement, the Respondent issued warnings to the Complainant's President, who had been spending virtually 100 percent of his work day engaged in representational work on official time, and to the Chief Steward, beginning in January 1975. On May 5, 1975, the Respondent implemented a policy limiting the official time per day which union officials could use for representational purposes to 4 hours for the President and 2 hours for all other union officials. The parties agreed that the agreement gave the Respondent the right to withhold its approval of official time for representational purposes, but they disagreed as to whether the Respondent's May 5, 1975, action was within its prerogatives as set forth in the agreement.

The Administrative Law Judge concluded that the Respondent's actions, insofar as they applied to the Complainant's President and Chief Steward, could not be said to have constituted a "patent" breach of the agreement tantamount to a unilateral change in the terms of the agreement, as the language of the agreement is susceptible to varying interpretations and, thus, it may be reasonably argued that the Respondent properly interpreted the agreement, although he withholds from making such a finding. However, he found that the general limitation on the use of official time unilaterally imposed by the Respondent on all other union officials constituted a flagrant and patent breach of the parties' agreement in violation of Section 19(a)(1) and (6) of the Order as there was no contention by the Respondent that any of the conditions set forth in the agreement had been met with respect to all other union officials before the Respondent limited their use of official time.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from imposing general limitations on the use of official time for representational purposes on all union representatives, and that it take certain affirmative actions, but that the complaint be dismissed insofar as it alleged a violation regarding the imposition of limitations on the use of official time by the Complainant's President and Chief Steward.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

WATERVLIET ARSENAL,
U.S. ARMY ARMAMENT COMMAND,
WATERVLIET, NEW YORK

Respondent

and

Case No. 35-3772(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2352, AFL-CIO

Complainant

DECISION AND ORDER

On April 30, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, both the Complainant and the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor

for Labor-Management Relations hereby orders that the Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York, shall:

1. Cease and desist from:

a. Unilaterally changing the provisions of the negotiated agreement with the American Federation of Government Employees, Local 2352, AFL-CIO, by establishing general limitations on the use of official duty time for representational purposes for all representatives of the Union other than President Carnard and Chief Steward Smith.

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

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

a. Withdraw the letter of April 29, 1975, insofar as the policy stated therein changed the provisions of its negotiated agreement with the American Federation of Government Employees, Local 2352, AFL-CIO, by imposing general limitations on the use of official duty time for representational purposes by all union representatives other than President Carnard and Chief Steward Smith.

b. Make whole any union representative for such losses as have been sustained as the result of an improper denial, pursuant to the parties' negotiated agreement, of a request by such union representative(s) for official duty time for representational purposes.


c. Post at its Watervliet, New York, facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to such employees are customarily posted. The Commanding Officer shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by other material.

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

IT IS HEREBY FURTHER ORDERED that the complaint in Case No. 35-3772(CA), insofar as it alleges that the Respondent violated Section 19(a)(1) and (6)

of the Order by unilaterally imposing limits on the amount of duty time President Carknard and Chief Steward Smith were to be allowed for representational purposes pursuant to the parties' negotiated agreement, be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 8, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change the provisions of our negotiated agreement with the American Federation of Government Employees, Local 2352, AFL-CIO, by establishing general limitations on the use of official duty time for representational purposes for all representatives of the Union other than President Carknard and Chief Steward Smith.

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

WE WILL withdraw our letter of April 29, 1975, insofar as the policy stated therein changes the provisions of our negotiated agreement with American Federation of Government Employees, Local 2352, AFL-CIO, by imposing general limitations on the use of official duty time for representational purposes by all union representatives other than President Carknard and Chief Steward Smith.

WE WILL make whole any union representative for such losses as have been sustained as the result of an improper denial, pursuant to the parties' negotiated agreement, of a request by such union representative(s) for official duty time for representational purposes.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 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
 .
 .
 WATERVLIET ARSENAL
 U.S. ARMY ARMAMENT COMMAND
 WATERVLIET, NEW YORK . Respondent
 .
 and
 .
 .
 LOCAL 2352, AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES, AFL-CIO .
 Complainant

Case No. 35-3772 (CA)

Angelo M. DiNovo
 Chief, Management Employee Relations
 Division
 Civilian Personnel Office
 Watervliet Arsenal
 Watervliet, New York
 For Respondent

Robert C. Ham
 2nd Vice-President
 Local 2352, AFGE, AFL-CIO
 3 Arthur Road
 Newtonville, New York 12128
 For Complainant

Before: SALVATORE J. ARRIGO
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Albany, New York on December 11, 1975, arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on November 19, 1975, with reference to alleged violations of Sections 19(a)(1) and (6) of the Order. The complaint,

filed by Local 2352, American Federation of Government Employees, AFL-CIO (hereinafter called the Union or Complainant) alleged that Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York (hereinafter called the Activity or Respondent) violated the Order by unilaterally modifying the terms of the parties collective bargaining agreement with regard to the use of official time by Union officers while engaged in employee representation activities.

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 and from my observation of testimonial demeanor, I make the following:

Findings of Fact

At all times material herein, the Union has been the exclusive collective bargaining representative of various of the Activity's employees. In September 1972, the parties executed an agreement, approved February 26, 1973, which was to be effective for two years. However, the agreement automatically renewed itself for another two year period commencing February 26, 1975, when the parties did not timely reopen the agreement for negotiations prior to the February 1975 expiration date.

Article XXXV of the agreement provides in relevant part:

"The EMPLOYER recognizes that the Union is obliged to represent members of the Unit in grievance proceedings; and appeals and unfair labor practice complaints when the UNION has been selected by the employee/s as his representative. The EMPLOYER also recognizes that the UNION will utilize reasonable time both in preparing and presenting the Unit members' point of view for these grievance and appeal procedures when the UNION has been selected by the employee to represent him. UNION officials will verbally request permission to conduct representational business from the Management-Employee Relations Division. The request will include the employee's name, nature of the business, where the official may be reached, if necessary, and the estimated time needed to conduct such business. The official time UNION officials are allowed will depend on the facts and circumstances of the individual case."

"Notes of Agreement", added to and made a part of the basic agreement during negotiations in 1972, amended Article XXXV, as follows:

"It is not intended, however, that official time will be granted to any one official for repeated service when such repeated service would result in an excessive amount of duty time.

"Any determination by the EMPLOYER that any UNION representative is approaching the point where his use of official time for representational purposes would be excessive, he will be appropriately cautioned. If the point of excessive use is reached, the EMPLOYER shall exercise his right to withhold the approval of official time for representational purposes."

The collective bargaining unit encompasses approximately 2200 employees. Although the Union has approximately seventeen elected officials, only three or four Union officers engage in representational activities processing employee grievances. 1/

On or about January 22, 1975, the Activity's Management-Employee Relations Division Chief, Angelo DiNovo, met with Union President Stephen Carknard. DiNovo complained that Carknard and Chief Steward Smith were using an excessive amount of official duty-time for representational activities. Carknard, since he took office as Union President on January 1, 1975, had spent virtually 100 percent of his work-day engaged in representation work on official time. 2/ Carknard told DiNovo that he would attempt to improve the workload distribution and thereby decrease the amount of time being spent on grievance matters.

1/ The number of Union officers engaging in such activity is not the result of any limitation imposed by the Activity or the terms of the agreement.

2/ Carknard testified that from the spring of 1974 to January 1975 while serving as the Union's Executive Vice-President, he also spent almost full-time on Union representation business on official duty-time.

Carknard and Smith continued to spend what the Activity felt was an excessive amount of duty time for representational tasks 3/, and on February 4, 1975, DiNovo sent letters to Carknard and Smith on the matter. The letter to Carknard 4/ mentioned Carknard's continuing to spend full-time on representation business and cited the "Notes to Agreement" relative to excessive use of duty time and the Activity's right to withhold approval of official time for such purposes. The letter advised Carknard that the use of official duty time for this purpose should be reduced immediately.

Subsequently, the Activity sent a letter to the Union's Executive Board dated April 1, 1975 stating, in relevant part:

"In view of the fact that both Messrs. Carknard and Smith have failed to take affirmative action to reduce the time spent on representational tasks, Local 2352 AFGE is hereby charged with violation of Article XXXV of the Agreement. The remedial action required is the immediate reduction of time spent on representational tasks to less than 50% of available work hours for the President, and 25% for the Chief Steward or any other officials."

The letter concluded by invoking the Union-Employee Disputes provision of the agreement 5/ and sought to arrange a meeting of the parties to attempt to resolve the matter.

By letter dated April 15, 1975 the Union advised the Activity that it did not consider the matter to constitute a dispute over the interpretation or application of the agreement per Article XXXVII, Section 5. On April 16 the Activity again requested a meeting and informed the Union, inter alia, that

3/ Carknard spend 98 to 100 percent of his work-day on representational matters from January 1, 1975 until the date of hearing.

4/ Smith's letter was not put into evidence.

5/ Article XXXVII, Section 5. This provision establishes a procedure to resolve disputes over the interpretation and application of terms of the agreement. The procedures apply only to "matters which have the effect of deviating from policy which might result in creating a precedent for the Unit" and culminates in arbitration upon the request of either party.

failure to respond to the second request for a meeting would leave the Activity "... with no alternative but to exercise it's right to establish controls on the use of official time for Union officials as authorized under Article XXXV... and ...the Notes of Agreement."

The Union adhered to its position and declined to meet as requested. Accordingly, on April 29, 1975 the Activity notified the Union that it was establishing "guidelines" for the future use of official time effective May 5, 1975. 6/ Those "guidelines" provided, in part, that with exception of the Union President, all Union representative would only be allowed a maximum of two hours of official duty time per day for authorized representational business. The President, however, would be allowed a maximum of four hours of duty time for authorized representational tasks. Permission would still have to be obtained from the Activity to conduct such activities during duty hours on Government time. Time used in excess of these limitations would be charged to annual leave or leave without pay at the Union representative's option. 7/ Accordingly, the "guidelines" were followed after May 5, 1975 and the instant unfair labor practice charge was filed.

Discussion and Conclusions

The Union contends that the "guidelines" constituted a unilateral modification in the terms of the negotiated agreement. The Union argues that under the terms of the agreement, the Union is to utilize "reasonable" amounts of time for representational matters and the Activity has the right to withhold approval of official time if it concludes such use is "excessive". The Union interprets the agreement to mean that official time may be withheld only with regard to individual Union representatives on a case by case basis. Accordingly, the Union contends that establishing maximum hours of available official duty time constituted a unilateral modification of the terms of the agreement violative of the Order. The Union supports this

6/ The Commanding Officer's April 29 letter to President Carknard recited the language of the Notes of Agreement amending Article XXXV. The letter also mentioned that Carknard and Smith had been previously cautioned about excessive use of official time for representational purposes and that "No reduction had occurred and on 1 Apr. 17, ... (it was) determine that the use of Official Duty Time was excessive."

7/ Permission to use non-official time was thereafter obtained from the representatives supervisor. However, no control was placed upon the total amount of time expended on any one case.

position by offering unrefuted testimony that during the negotiations for the 1973 agreement the Activity sought to obtain a clause in the agreement specifying maximum hours of official duty time for representation use. At that time Article XXXV was much the same as contained in the current agreement. The Union resisted setting out maximum allowable times in the agreement and subsequently, the parties agreed on the language contained in the Notes of Agreement. Thus, the Union denies the existence of any real question of interpretation of the agreement and sees the Activity's conduct as an attempt to do what it could not or did not accomplish by negotiation.

The Activity contends that it followed the contract provisions in establishing the guidelines and its actions were proper and in accordance with its interpretation of the Notes of Agreement. Therefore, the Activity argues that the Union should have brought the matter to arbitration since the parties have divergent interpretations of the applicability of the agreement to the establishment of the "guidelines".

In General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SIMR No. 528, the Assistant Secretary considered the question of when an alleged breach of the terms of an agreement may constitute a unilateral change or present a question of interpretation of an agreement to be resolved through the processes provided by the agreement, i.e. the grievance-arbitration procedures. In that case, the Administrative Law Judge noted 8/ that "(a) breach of contract can be not only a breach but under certain circumstances can be also an unfair labor practice. For example, if sufficiently flagrant and persistent, a breach of contract may rise to the seriousness of a unilateral change in the contract and hence a violation of the Executive Order." The Administrative Law Judge further noted that in a matter involving contract interpretation, if an unfair labor practice is alleged, it must be established that the breach was so patent as to imply that the respondent could not reasonably have thought otherwise and thereby engaged in an attempted unilateral change violative of the Order.

I find in the case herein that the imposition of new "guidelines" for the use of official duty time for representation purposes, as applicable to Carknard and Smith, did not constitute a violation of the Order. The terms of the Notes of Agreement

8/ The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

permit the Activity to impose restrictions on those Union representatives whose use of official duty time the Activity determines has been excessive. In the case of Carknard and Smith, the Activity specifically determined that their use of official duty time was excessive and the representatives were so "cautioned". It is reasonably arguable that imposing a maximum number of hours used by Carknard and Smith was an exercise of the Activity's right under the agreement to withhold approval of future use of official time for representational purposes. It is similarly arguable that the agreement does not give the Activity sufficient leeway to impose a maximum on the use of duty time even where excessiveness is determined. Thus, the language of the agreement is susceptible to an interpretation which might, or might not, authorize the Activity to implement its right to withhold approval to use official time by imposing maximums on Carknard and Smith as herein. 9/ Such being the case, the Activity's actions in this regard cannot be said to have constituted a "patent" breach of the agreement tantamount to a unilateral change in the terms of the agreement.

Accordingly, in these circumstances I find that as to Carknard and Smith, no flagrant or patent breach of the agreement constituting a unilateral change violative of the Order has been established. Nor has it been established that Respondent's interpretation of the clauses in question was not in good faith. Therefore, I shall recommend that the complaint as applicable to Carknard and Smith be dismissed. 10/

However, I find that, as applied to all other Union representatives, the imposition of a maximum number of duty time hours to be used for representational purposes constitute a flagrant or patent breach of the agreement amounting to a unilateral change in the terms and conditions of employment thereby violating Sections 19(a)(1) and (6) of the Order.

9/ I expressly withhold making any finding or giving any opinion as to whether the Activity or the Union is correct in its interpretation of the agreement as applicable to Carknard and Smith.

10/ I also reject Complainant's contention that the agreement was unilaterally changed by the limitation or disapproval being made by the Commanding Officer in his letter of April 29, 1975 rather than the Management-Employee Relations Division. The agreement specifically gives the "employer" the right to withhold approval of official time and not any particular division of the employer.

The Activity's pronouncement of April 29, 1975, above, uniformly limited the use of duty time to all Union representatives (aside from Carknard and Smith) to a maximum of two hours a day. The agreement clearly does not grant the Activity the right to withhold approval of use of duty time in such a wholesale manner. Under the agreement a specific determination of excessiveness must first have been made by the Activity and the particular representative must then be cautioned regarding the matter. No such determination was made nor is there any other evidence to support the Activity's general limitation on the use of duty time. In these circumstances I find Respondent's conduct amounted to a unilateral change and I further find its defense of contract interpretation to be without merit.

Recommendation

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

In all other respects I recommend that the complaint be dismissed.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Watervliet Arsenal, U.S. Armament Command, Watervliet, New York, shall:

1. Cease and desist from:

a. Unilaterally changing the provisions of the collective bargaining agreement with Local 2352, American Federation of Government Employees, AFL-CIO, by establishing rules for the use of official duty time for Union representation purposes which vary from the terms of the collective bargaining agreement.

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

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

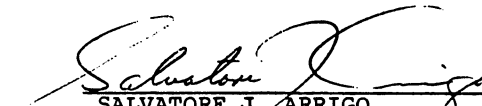
a. Withdraw the letter of April 29, 1975, announcing new rules for the use of official duty time for Union representation

purposes as made generally applicable to all Union representatives and reinstate the procedures used for utilizing official duty time prior thereto.

b. Make whole those Union representatives improperly deprived of the use of official duty time for Union representation purposes by adjusting the employees' appropriate leave records or, if not possible, by payment to those employees such sums of money which will fully reflect the amount of official duty time improperly denied said representatives.

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

d. 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 herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 30 APR 1976
Washington, D.C.

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 unilaterally change the provisions of the collective bargaining agreement with Local 2352, American Federation of Government Employees, AFL-CIO, by establishing rules for the use of official duty time for Union representation purposes which vary from the terms of the collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain or coerce unit employees represented by Local 2352, American Federation of Government Employees, AFL-CIO, in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL withdraw the letter of April 29, 1975 announcing new rules for the use of official duty time for Union representation purposes as made generally applicable to all Union representatives and reinstate the procedures used for utilizing official duty time prior thereto.

WE WILL make whole those Union representatives improperly deprived of the use of official duty time for Union representation

purposes by adjusting the employees' appropriate leave records or, if not possible, by payment to those employees such sums of money which will fully reflect the amount of official duty time improperly denied said employees.

October 13, 1976

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

Commanding Officer
Watervliet Arsenal

BOSTON DISTRICT OFFICE,
INTERNAL REVENUE SERVICE
A/SLMR No. 727

Dated: _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is Room 3515 - 1515 Broadway, New York, New York 10036

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 023 (NTEU), alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order by refusing to furnish information requested by the NTEU which the latter deemed necessary for the processing of an adverse action taken by the Respondent against a bargaining unit employee. The Respondent contended, among other things, that the complaint in this matter was barred by Section 19(d) of the Order in that the denial of the requested information as well as the propriety of the adverse action was the subject of an advisory arbitration proceeding conducted pursuant to the parties' negotiated agreement.

The Administrative Law Judge concluded that the denial of the requested information was violative of the Order. In so finding, he rejected the Respondent's contention that the complaint was barred by Section 19(d). Thus, he stated that the issue presented to the arbitrator was the propriety of the adverse action, while the issue involved in the unfair labor practice proceeding was the denial of the information. He concluded further that the two proceedings were distinguishable in that the advisory arbitration hearing involved the right of an individual for relief from disciplinary action, while the rights involved in the unfair labor practice proceeding were those of an exclusive representative under Section 10(e) of the Order.

The Assistant Secretary disagreed with the Administrative Law Judge's conclusion that the instant proceeding was not barred by Section 19(d). In this regard, he noted that the NTEU raised the matter in the processing of the adverse action and that in the advisory arbitration hearing the NTEU raised the issue of its alleged need for the particular documents now being sought in the instant unfair labor practice proceeding in order to properly present its case in the arbitration proceeding; that the issue was litigated before the arbitrator; that the issue was addressed by the arbitrator in several rulings at the hearing; and that in the presentation of its arguments to the arbitrator the Complainant relied, in part, on cited decisions of the Assistant Secretary pertaining to the rights of an exclusive representative to obtain such material. Therefore, the Assistant Secretary concluded that the request

for the information sought was incorporated by the NTEU with the merits of its case in the advisory arbitration proceeding. In these circumstances, he found that it would be inconsistent with the purposes of Section 19(d) for the Assistant Secretary to now consider, pursuant to the unfair labor practice procedures of the Order, the propriety of the Complainant's request for the particular documents it alleged were necessary for it to process the adverse action in the advisory arbitration proceeding. Accordingly, as he found the further processing of the unfair labor practice complaint was barred by Section 19(d) of the Order, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 727

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BOSTON DISTRICT OFFICE,
INTERNAL REVENUE SERVICE

Respondent

and

Case No. 31-8958(CA)

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 023

Complainant

DECISION AND ORDER

On March 9, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed a response to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. ^{1/} Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the instant case, including the Respondent's exceptions and brief and the Complainant's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The Administrative Law Judge concluded that the processing of the unfair labor practice complaint in the instant matter was not barred by Section 19(d) of the Order. In this regard, he stated that the issue presented to the arbitrator in the advisory arbitration proceeding held pursuant to the parties' negotiated agreement was the validity or propriety of employee Joseph J. Catania's discharge, while the issue involved in the instant unfair labor practice proceeding was whether the District Director's refusal to furnish certain requested information concerning the adverse action, which was the subject of the advisory

^{1/} As noted by the Administrative Law Judge on pages 5 and 6 of his Recommended Decision and Order, the Respondent manifested an intent not to cooperate with the Administrative Law Judge by refusing to
(Continued)

arbitration proceeding, was in violation of the Order. Thus, he concluded, the two proceedings were distinguishable in that the advisory arbitration proceeding involved individual rights under the agency procedure for relief from disciplinary action, while the rights involved in the instant unfair labor practice proceeding were those of an exclusive representative under Section 10(e) of the Order.

Under the particular circumstances of this case, I disagree with the conclusion of the Administrative Law Judge. 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 aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures." In this regard, the Federal Labor Relations Council's Report and Recommendations of June 1971, concerning the 1971 amendments of Executive Order 11491, noted, among other things, that "...it be made optional with the aggrieved party whether to seek redress under the grievance procedure or the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially to pursue the issue under the other procedure." (emphasis added)

In the instant case, the evidence establishes that on November 20, 1973, the Complainant's representative requested certain of the material involved herein from the Respondent in connection with the proposed adverse action proceeding; that similar requests were made several times thereafter; that on September 11, 1974, the Complainant's representative wrote the Respondent noting that the Internal Revenue Service Manual "and Article 31, Section 3 of the MDA require you to make available to me material in your possession which is relevant to the case" and asserting that the failure to make the items available violated his client's rights; and that, thereafter, on October 30, 1974 and December 6, 1974, the Complainant filed its charge and complaint in this matter. The record reveals further that in the advisory arbitration proceeding in this matter, which was held in December 1974 and February 1975, the Complainant asserted before the arbitrator its alleged need for the particular documents involved herein in order to properly present its case in the advisory arbitration proceeding; the issue was litigated before the arbitrator at the advisory arbitration hearing; and the issue was considered by the arbitrator and was the subject of several rulings

1/ comply with his request for the production of two documents. While not determinative of the disposition herein, it should be noted that I do not condone such uncooperative conduct by the Respondent and strongly suggest that in order to effectuate the purposes and policies of the Order the Internal Revenue Service insure that its representatives do not engage in similar conduct in the future. Cf. United States Customs Service, Region IX, Chicago, Illinois, A/SLMR No. 210.

at the hearing, as well as a written ruling with respect to whether the Complainant was entitled to certain of the material sought. Further, the record transcript of the advisory arbitration proceeding reflects that, in seeking the arbitrator's ruling with respect to the production of certain of the documents, the Complainant relied, in part, on cited decisions of the Assistant Secretary which pertain to the right of a labor organization to obtain material from an activity in connection with the processing of a grievance or otherwise pursuing its responsibilities as an exclusive representative.

Thus, the record clearly reflects that throughout the adverse action proceeding the Complainant incorporated with the merits of the case its asserted right to material deemed necessary and relevant to its role as the exclusive representative of Catania. 2/ In my view, for the Assistant Secretary to now consider, pursuant to the unfair labor practice procedures of the Order, the propriety of the Complainant's request for the particular documents it alleged were necessary to process the adverse action in the advisory arbitration proceeding would be inconsistent with the purposes of Section 19(d) of the Order as reflected by the Federal Labor Relations Council's Report and Recommendations of 1971. In these circumstances, I find that further processing of the unfair labor practice complaint in the instant matter is barred by the provisions of Section 19(d) of the Order. Accordingly, I shall order that the instant complaint be dismissed. 3/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-8958(CA) be, and it hereby, is dismissed.

Dated, Washington, D. C.
October 13, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

2/ Compare Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448.

3/ My decision herein should not be deemed to be an affirmation of the conclusions of the arbitrator with respect to the merits of the Complainant's request for the disputed material. In my view, the applicability of Section 19(d) in an unfair labor practice proceeding depends on whether the particular issue is subject to an appeals procedure or can and, in fact, has been raised in a grievance forum, and does not require the Assistant Secretary's acquiescence in the result reached in the appeals or grievance forum. Cf. U. S. Department of Agriculture, Forest Service, Regional Office, Juneau, Alaska, A/SLMR No. 595.

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 :
 :
 BOSTON DISTRICT OFFICE :
 INTERNAL REVENUE SERVICE :
 Respondent :
 and :
 Case No. 31-8958 (CA)
 NATIONAL TREASURY EMPLOYEES :
 UNION, CHAPTER 023 :
 Complainant :

Dolph David Sand, Esq.
 Internal Revenue Service
 Room 4425
 1111 Constitution Avenue
 Washington, D.C. 20224
 For the Respondent

Peter Conroy, Esq.
 36 Winding Lane
 Evon, Connecticut
 For the Complainant

Before: ROBERT J. FELDMAN
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding is brought pursuant to the provisions of Executive Order 11491 (hereafter referred to as the Order) by Chapter 023 of the National Treasury Employees Union, formerly known as the National Association of Internal Revenue Service Employees (hereafter referred to as the Union).

Statement of the Case

The complaint filed December 6, 1974, alleges that the Respondent violated Sections 19(a)(1) and 19(a)(6) of the Order in that it refused to furnish information concerning an

adverse action taken by Respondent against one Joseph J. Catania, an employee represented by the Union, although such information had been duly requested in September, 1974, and was necessary to process the adverse action. In response to the complaint, the Respondent alleges: that the complaint form is insufficient; that the claim was not timely filed; that the negotiated agreement between the parties provided for an appeal procedure of the adverse action by way of arbitration and the Union in fact availed itself of that procedure, as a result of which this action is barred under Section 19(d) of the Order; that the information requested was confidential and not subject to disclosure under pertinent regulations; that the information was not relevant to the defense of the adverse action and was not relied upon by Respondent as a basis for the charges against Catania.

Pursuant to Notice of Hearing issued June 6, 1975, by the Acting Assitant Regional Director for the New York Region, a hearing was held herein on August 19, 1975, at Cambridge, Massachusetts. 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. Thereafter the time for filing briefs was extended at the request of counsel until November 21, 1975, and such briefs have been duly submitted and considered.

On the basis of the entire record, including my observation of the witnesses and their demeanor, 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 Union was the exclusive representative of non-supervisory employees of the Respondent, pursuant to a collective bargaining agreement, known as the Multi-District Agreement, dated April 5, 1972, and effective at such times.

2. On or about November 12, 1973, Joseph J. Catania, a Revenue Officer, received a copy of a notice of proposed adverse action based upon his alleged violation of Respondent's Code of Conduct.

3. By letter dated November 20, 1973, counsel for the Union, advised the District Director of the Boston District Office that he was designated by Catania to represent him in the adverse action and requested the following information, stated to be relevant to his representation of Catania: a section of the Rules of Conduct, the administrative file with respect to the seizure of certain property from which the adverse action stemmed, and a copy of the inspection service report of the seizure and sale of that property.

4. On December 4, 1973, the District Director sent a copy of the Rules of Conduct to counsel, but declined to furnish him with either the administrative file or the inspection report. Similar requests were refused by the District Director on the ground that the data requested had not been relied upon in reaching a decision.

5. On March 21, 1974, Catania accompanied by counsel, presented an oral reply to the charges contained in the notice of proposed adverse action.

6. On June 21, 1974, Catania was removed from the Service. Thereafter he filed an appeal under the provisions of the collective bargaining agreement.

7. By letter dated September 11, 1974, counsel for the Union again requested the administrative file and the inspection service report, and in addition requested a copy of the oral reply officer's recommendation.

8. On September 13, 1974, the Respondent refused to furnish the information requested in the letter of September 11.

9. Under date of October 30, 1974, the Union filed the charge upon which the complaint is based. Thereafter Respondent furnished the administrative file, but continued to refuse the other information requested.

10. The complaint herein was filed on December 6, 1974.

11. At subsequent hearings before the arbitrator on his appeal from the adverse action, counsel again requested production of the documents and sought to obtain the testimony of the oral reply officer. Except for certain portions of the inspection service report, Respondent again refused to produce the document and refrained from calling the oral reply officer as a witness.

12. In an opinion and advisory decision dated July 25, 1975, the arbitrator found that the removal of Catania from the Service was justified.

13. Claiming that any information not previously furnished was not relied on as a basis for the charges against Catania, Respondent persists in withholding such information.

Conclusions of Law

The alleged insufficiency of the complaint form is without substance. The reference to the letter dated September 11, 1974, from counsel is neither indefinite nor ambiguous. Since the letter was addressed to and in the possession of the Respondent, any failure to annex a copy thereof to the complaint resulted in no uncertainty and caused no difficulty in understanding or responding to the allegation.

The contention that the complaint was not filed within nine months of the occurrence as required by Section 203.2(b)(3) of the Regulations is similarly untenable. Respondent contends that its refusal occurred on December 4, 1973, when the Director first communicated his refusal to disclose the administrative file or the inspection service report in response to counsel's initial request. It is clear, however, that the refusal did not terminate on that occasion, but continued throughout the period of preparation for the oral reply on March 21, 1974, and continued through the pendency of the appeal to the arbitrator. In any event, there can be no doubt that the request contained in the letter of September 11, 1974, was not the same as previous requests in that it sought the oral reply officer's recommendation, which was necessarily non-existent prior to March, 1974. Hence the District Director's refusal of December 4, 1973, could not possibly have been a "final decision" on the request referred to in the complaint. See Dugway Proving Ground, Department of the Army, Department of Defense, Dugway, Utah, A/SLMR No. 511.

The Respondent further contends that this proceeding is barred by the provisions of Section 19(d) of the Order, which provides that issues that can properly be raised under an appeals procedure may not be raised under Section 19, and that issues which can be raised under a grievance procedure may be raised either under a grievance procedure or a complaint procedure, but not under both. It must be borne in mind, however, that the issue submitted to the arbitrator under the collective

bargaining agreement was the validity or propriety of Catania's discharge. In this proceeding we are not concerned with that discharge as such; rather, the sole issue tendered for determination here is whether the District Director's refusal to furnish the information requested both before and after the discharge was in violation of the Order. The issue before the arbitrator concerned essentially the rights of an individual employee under agency procedure for relief from disciplinary action, while the rights involved in this unfair labor practice complaint are those of an exclusive representative under Section 10(e) of the Order. Consequently, Section 19(d) is inapplicable. Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448; Tennessee Valley Authority and Albright, A/SLMR No. 509.

Getting down to the merits of the alleged violation of Sections 19(a)(1) and 19(a)(6), the Assistant Secretary has expressly held the following:

Thus, under Section 10(e) of the Order, a labor organization is given the responsibility for representing the interests of all employees in the unit. Clearly, it cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances.

Department of Defense, State of New Jersey, A/SLMR No. 323.

The Respondent takes the position, however, that a labor organization may obtain only such information as the agency or activity in its sole and exclusive discretion deems relevant and necessary in connection with the processing of grievances. Relying upon pertinent provisions of the collective bargaining agreement and the Federal Personnel Manual, Respondent has furnished only such portions of the requested material as it says it relied upon as a basis for the charges against Catania. Yet it appears from the responses of officials of Internal Revenue Service in other cases involving comparable requests that there is no uniform policy in this regard. Moreover, Respondent manifests a willful purpose to withhold relevant data in its refusal to comply with my request for the production of its

reply to the Union's initial request for information, and in its failure (despite its commitment on the record) to attach to its brief, or to otherwise make available, the charges it brought against Catania which I requested in connection with the evidence as to whether the information requested had in fact been relied upon. It is reasonable to infer, of course, that the information thus withheld would be unfavorable to Respondent, and consequently would likely be relevant and necessary in connection with protesting the adverse action.

Applicable laws and regulations, including the Federal Personnel Manual, do not specifically preclude disclosure of reports such as requested herein as long as the relevant materials have been "sanitized" to protect the rights of privacy of informants or others. Department of Defense, State of New Jersey, FLRC No. 73A-59, A/SLMR No. 539, United States Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California, A/SLMR No. 573,

In view of the above, I conclude that Respondent's refusal to produce the information requested interferes with and restrains unit employees in their right to have the Union represent their interests in matters concerning grievances, personnel policies, and practices as required by Section 10(e), and that such refusal is contrary to the good faith consultation contemplated by the Order. Therefore, it violates both Section 19(a)(1) and Section 19(a)(6), 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 Boston District Office, Internal Revenue Service, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by National Treasury Employees Union, Chapter 023, inspection service reports and oral reply officers' recommendations utilized or read in connection with proceedings for the dismissal or removal from the Service of Joseph J. Catania, or any other non-probationary employee of the bargaining unit represented by such Union, which are necessary for such Union to discharge its obligations as the exclusive bargaining representative of all of the employees within the unit.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured under the Executive Order by denying National Treasury Employees Union, Chapter 023, prompt access to such reports and recommendations.


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

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

(a) Upon request, make available to National Treasury Employees Union, Chapter 023, inspection service reports and oral reply officers' recommendations utilized or read in connection with proceedings for the dismissal or removal from the Service of Joseph J. Catania, or any other non-probationary employee of the bargaining unit represented by such Union, which are necessary for such Union to discharge its obligations as the exclusive bargaining representative of all of the employees within the unit.

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

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


ROBERT J. FELDMAN
Administrative Law Judge

Dated: March 9, 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 RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to supply, upon request by National Treasury Employees' Union, Chapter 023, inspection service reports and oral reply officers' recommendations utilized or read in connection with proceedings for the dismissal or removal from the Service of Joseph J. Catania, or any other non-probationary employee of the bargaining unit represented by such Union, which are necessary for such Union to discharge its obligations as the exclusive bargaining representative of all of the employees within the unit.

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

WE WILL, upon request make available to National Treasury, Employees' Union, Chapter 023, inspection service reports, and oral reply officers' recommendations utilized or read in connection with proceedings for the dismissal or removal from the Service of Joseph J. Catania, or any other non-probationary employee of the bargaining unit represented by such Union, which are necessary for such Union to discharge its obligations as the exclusive bargaining representative of all of the employees within the unit.

(Agency or Activity)

Dated: _____ By: _____
(Signature and Title)

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

APPENDIX CONTINUED

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.

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

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD,
LONG BEACH, CALIFORNIA
A/SLMR No. 728

This case involved an unfair labor practice complaint filed by the American Federation of Technical Engineers, Local 174 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491 by refusing the Complainant access to documents used by a Ranking Committee to rate candidates for a merit promotion position. The Complainant sought access to the documents in order to prepare for a second-step grievance hearing.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) by failing to make available the documents requested in a "sanitized" form prior to the second-step grievance hearing. In reaching this conclusion, the Administrative Law Judge found, contrary to the Respondent's arguments, that the Federal Personnel Manual (FPM) does not bar disclosure of documents such as those sought herein, provided the material is first "sanitized" to protect the privacy of the employees whose records are involved and that Section 19(d) of the Order did not bar the instant proceeding because the matter of access to the requested documents was not the subject of the grievance. Finally, he concluded that knowledge of the material requested could not be imputed to the Complainant because a union designee served as a member of the Ranking Committee.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. In this regard, he found that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to provide the Complainant with certain documents which were relevant and necessary to its further processing of a grievance and that Section 19(d) of the Order did not bar the instant proceeding as the issue of access to the documents sought herein was not made an issue in the grievance, nor was it incorporated in or decided in the grievance proceeding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD,
LONG BEACH, CALIFORNIA

Respondent

and

Case No. 72-4744

AMERICAN FEDERATION OF TECHNICAL
ENGINEERS, LOCAL 174

Complainant

DECISION AND ORDER

On March 31, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

1/ In agreement with the Administrative Law Judge, I find that Section 19(d) does not bar further proceedings on the instant complaint. Thus, the evidence establishes that the matter of access to the requested documents was not made an issue in the grievance involved, nor was it incorporated in or decided in the grievance proceeding. Compare Boston District Office, Internal Revenue Service, A/SLMR No. 727.

and recommendations of the Administrative Law Judge. Thus, I agree that, under the circumstances herein, the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to provide the Complainant with certain documents which were relevant and necessary to its further processing of a grievance. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, shall:

1. Cease and desist from:

(a) Refusing to permit the American Federation of Technical Engineers, Local 174, access to the documents and materials, in a form which protects the privacy and confidentiality of the employees involved, which the Ranking Committee considered in evaluating John R. Abatie, and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

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

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

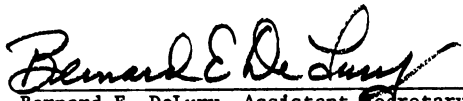
(a) Upon request, and after appropriate measures are taken to protect the privacy and confidentiality of the employees involved, permit the American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in determining the ranking of John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

(b) Post at its facility at Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take steps to ensure that such notices are not altered, defaced, or covered by any other material.

2/ Department of Defense, State of New Jersey, A/SLMR No. 539.

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

Dated, Washington, D. C.
October 13, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in evaluating and ranking John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

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

WE WILL, upon request, and after appropriate measures have been taken to protect the privacy and confidentiality of the employees involved, permit the American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in evaluating and ranking John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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



..... :
 In the Matter of :
 :
 Department of the Navy, :
 Long Beach Naval Shipyard, :
 Long Beach, California : Case No. 72-4744
 :
 and :
 :
 American Federation of Technical :
 Engineers, Local Union 174 :
 Complainant :

Basil L. Mayes, Esq.
 San Diego, California
 For the Respondent

Thomas Martin, Esq.
 Torrance, California
 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 15, 1974, alleging that Department of the Navy, Long Beach Naval Shipyard (hereinafter called Respondent Activity) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Assistant Regional Director 1/ for the San Francisco Region issued a Notice of Hearing on Complaint on January 13, 1975. The gravamen of the complaint is that the Respondent Activity refused to allow representatives of American

1/ This title has been officially been changed to Regional Administrator.

Federation of Technical Engineers, Local Union 174 (hereinafter called Complainant Union) access to official forms and documents used by a ranking committee rating candidates for a merit promotion position. The Complainant Union sought access to the documents in order to secure information for a second step grievance initiated by one of the unsuccessful candidates for the promotion.

A hearing was held in this case on February 11, 1975, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. 2/ Briefs were submitted by counsel and have been duly considered in arriving at the determination in this case.

Upon the entire record in this matter, including the stipulation by the parties, I make the following:

Findings of Fact

The Complainant Union is the exclusive representative of all employees at the Respondent Activity in a unit composed of "all graded non-professional technical employees in the engineering sciences and related fields in the unit but excluding supervisors and managerial executives." There was a collective bargaining agreement in effect between the parties at all times material to the events which gave rise to this proceeding.

On November 23, 1973, the Respondent Activity issued a Merit Promotion Opportunity Bulletin announcing a vacancy for an Electronics Technician GS-856-11 position. Employee John R. Abatie, an electronics technician GS-856-9, submitted a timely application for this position. At the time he made application for the GS-11 position, Abatie had been employed at the Respondent Activity for approximately 6 1/2 years. A total of six applicants, including Abatie, were certified to a Ranking Committee for evaluation and ranking.

The Ranking Committee was composed of two supervisors from the Electronics Engineering Branch and a bargaining

2/ The parties stipulated all of the relevant facts into the record. They also agreed that the decision in the instant case would be controlled by the decision in Department of Defense, State of New Jersey, A/SLMR No. 323, then pending before the Federal Labor Relations Council.

unit employee designated by the Complainant Union. The Complainant Union was granted the right to have a representative on all ranking committees by virtue of a provision in the negotiated agreement. 3/

On January 16, 1974, the Ranking Committee met to evaluate the six certified candidates. The Committee studied and evaluated the Standard Form 171, the Supervisory appraisal of performance, and the administrative record of each of the six candidates. 4/ As a result of its study and consideration, the Ranking Committee numerically ranked each applicant. On January 23, 1974, the names of the top three candidates, as ranked by the committee, were submitted to Frank Simons, the selecting official. The order of ranking of the top three candidates were T. E. Bogard, R. L. Chatman and John R. Abatie. On January 25, 1974, Bogard was selected for the GS-11 position by the selecting official.

On February 22, 1974, Abatie submitted an oral grievance stating that Bogard was pre-selected for the merit promotion position by the selecting official. The grievance was denied at Step 1 of the negotiated procedure and was appealed to Step 2. Before the commencement of hearing at the second level of the grievance procedure the Complainant Union forwarded a letter, dated March 7, 1974, to the Respondent Activity requesting "all the official forms and documents that were used by the Ranking Committee be made available to the Union prior to the second step hearing." The Respondent Activity orally denied the Complainant Union's request for the documents used by the Ranking Committee, but did supply the evaluation sheet of Abatie.

3/ Joint Exhibit No. 1, Article XIII, Section 4. The negotiated agreement provided as follows:

Sec. 4. The employer agrees to provide for Union representation on ranking committees for positions for which Unit employees may qualify.

4/ The administrative record consisted of sick leave records, annual leave records, disciplinary action, commendation action, and promotions.

The second step meeting on the grievance was held by the parties, and in a letter dated April 1, 1974, the Respondent Activity denied the grievance. The Complainant Union charged the Respondent Activity with a violation of Section 19(a)(1) and (6) of the Executive Order in failing to provide it with the documents requested prior to the second step meeting. It is this charge which gave rise to the hearing in this matter.

The Contentions of the Parties

The Complainant Union contends that under Section 10(e) of the Executive Order 5/ it has a duty and responsibility to represent the interests of all of the employees in the unit. The Complainant Union argues that the failure of the Respondent Activity to make available the papers and documents used by the Ranking Committee in rating the promotion candidates interfered with its ability to effectively represent Abatie at the second grievance meeting. In so doing, it is urged that the Respondent Activity failed to consult and confer with the Complainant Union as required by Section 19(a)(6) of the Executive Order. Further, it is asserted that such conduct interfered with, restrained and coerced Abatie in the exercise of his right to be represented by the Union and therefore violated Section 19(a)(1) of the Executive Order.

5/ Section 10(e) of the Order provides, in pertinent part:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for... all employees in the unit. It is responsible for representing the interests of all employees in the unit.... The labor organization shall be given the opportunity to be presented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, and other matters affecting general working conditions of employees in the unit.

The Respondent Activity, on the other hand, argues that it is prevented by the regulations and policies set forth in the Federal Personnel Manual from making available to the Complainant Union, in the context of a grievance proceeding, the documents used by the Ranking Committee in accessing the qualifications of the candidates for promotion. In addition, the Respondent Activity argues that the Complainant Union had a representative on the Ranking Committee who had knowledge of the records and forms requested by the Complainant Union and who fully participated in the ranking process. This argument imputes the knowledge of the designated union representative on the committee to the Complainant Union. The Respondent Activity also argues that the Complainant Union is precluded by Section 19(d) of the Executive Order from raising the issue of failure to provide the documents in a grievance proceeding under the unfair labor practice provisions of the Order.

Concluding Findings

In view of the line of decisions having their genesis in two cases decided by the Federal Labor Relations Council, 6/ there is no need here to examine the application of the specific provisions of the Federal Personnel Manual cited by the Respondent Activity as preventing it from complying with the Complainant Union's request. The Council's decision in the Department of Defense case 7/ makes it clear that disclosure of the material sought by the Complainant Union on behalf of the grievant does not violate law, rules, or CSC directives provided the material is first "sanitized" to protect the privacy of the employees whose records are involved. This is accomplished by maintaining the confidentiality of the records which could be identified with a given employee. The Council determined that such procedure "effectuates the purposes" of the Executive Order as it allows the grievant, or his representative, to make an intelligent and informed decision on whether or not to pursue the grievance.

6/ National Labor Relations Board, Region 17, FLRC No. 73A-53, Report No. 59 (October 31, 1974); Department of Defense, State of New Jersey, FLRC No. 73A-59, Report No. 71 (June 11, 1975).

7/ Id.

The failure to make available the documents and materials requested by the Complainant Union, after taking all requisite steps necessary to preserve the anonymity of the employees involved, is a violation of Section 19(a)(1) and (6) of the Executive Order. United States Department of Agriculture, Forest Service, Berkley, California, A/SLMR No. 573; Department of Defense, State of New Jersey, A/SLMR No.539 8/.

The Respondent Activity contends that the Complainant Union cannot raise the failure to provide the material in an unfair labor practice proceeding under Section 19(a) because the subject matter was raised in pursuing the grievance under Section 19(d) of the Order. I find this argument to be without merit. Clearly the matter of access to the requested documents was not the subject of the grievance. The grievance was over the claim of "pre-selection" of the successful candidate for the vacancy. Therefore, it cannot be said that the Complainant Union is barred from raising the issue of access to the relevant documents in an unfair labor practice context. U.S. Department of Agriculture, Forest Service, Berkley, California, Supra.

The final issue for consideration in this case is the contention that the Complainant Union had a representative on the Ranking Committee; and therefore had knowledge of the material considered by the Committee in ranking the promotion candidates. This argument rests on the invalid assumption that the union member designated to sit on the Ranking Committee is representing the interests of the Complainant Union rather than functioning as a member of a body chosen to rate candidates on the basis of objective criteria. The members of the Ranking Committee, both the management designees and the union designee, were charged with the responsibility of objectively rating the candidates under the agency merit promotion program. To suggest that any of the committee members were representing the interests of a particular constituency rather than objectively assessing

8/ Cf. Social Security Administration, Mid-America Program Center, Kansas City, Missouri, A/SLMR No. 619; Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, A/SLMR No. 411.

the relative merits of the candidates not only demeans the role in which they were serving, but is contrary to the entire concept of the merit promotion program of the Government. Since the Respondent Activity supplied the materials and documents considered by the members of the Ranking Committee, it is obvious that the agency had knowledge of the content of these materials. But the Complainant Union did not have any such knowledge, and indeed, it would have been a breach of faith for the member designated by the Union to have disclosed the contents of the materials considered by the committee. Therefore, knowledge of the material on the part of the union designee cannot be imputed to the Complainant Union. To hold otherwise, would defeat the whole purpose of the merit promotion program.

In summary, I find that the Complainant Union was entitled to access to the documents and materials, in a "sanitized form", which were considered by the Ranking Committee in evaluating the candidates for the available merit promotion position. The failure of the Respondent Activity to make available these documents, in a manner which protected the privacy and confidentiality of the employees involved, prior to the second step grievance hearing constitutes a violation of Section 19(a)(1) and (6) of the Act.

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 and purposes of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Navy, Long Beach Naval Shipyard, Long Beach, California shall:

1. Cease and desist from:

- (a) Refusing to permit American Federation of Technical Engineers, Local 174, access to the documents and materials, in a form which protects the privacy and confidentiality of the employees involved, which the Ranking

Committee considered in evaluating John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

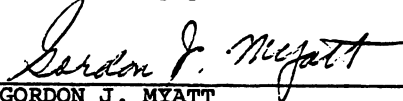
- (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

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

- (a) Upon request, and after appropriate measures are taken to protect the privacy and confidentiality of the employees involved, permit American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in determining the ranking of John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

- (b) Post at its facility at Department of the Navy, Long Beach Shipyard, Long Beach, California copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Department of Defense, Long Beach Naval Shipyard, Long Beach, California, and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous places, including all places where notice 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.

- (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 31, 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 permit American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in evaluating and ranking John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

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

WE WILL, upon request, and after appropriate measures have been taken to protect the privacy and confidentiality of the employees involved, permit American Federation of Technical Engineers, Local 174, access to the documents and materials considered by the Ranking Committee in evaluating and ranking John R. Abatie and other candidates who were certified for consideration for the GS-856-11 vacancy listed in Bulletin No. LB-19(73).

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

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

SOCIAL SECURITY ADMINISTRATION,
WILKES-BARRE OPERATIONS BRANCH,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
A/SLMR No. 729

SOCIAL SECURITY ADMINISTRATION,
WILKES-BARRE OPERATIONS BRANCH,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2809 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (3) of the Order by virtue of statements made by two supervisors and a section chief to a union steward that, among other things, he should run for president in local union elections and would receive assistance in posting his campaign materials.

Based upon the Administrative Law Judge's credibility resolutions, and noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

Respondent

and

Case No. 20-5293(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2809

Complainant

DECISION AND ORDER

On May 24, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.


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

1/ Under the particular circumstances herein, I find that the credited remarks of agency management, including the context and manner in which they were made, were not violative of the Order. In reaching the disposition herein, however, I do not adopt the Administrative Law Judge's general implication that encouragement of a union steward to run for president of a local by agency management, with an offer to assist his or her campaign by posting campaign literature, without more, would not, under any circumstances, constitute a violation of Section 19(a)(3) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 20-5293(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



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In the Matter of :

SOCIAL SECURITY ADMINISTRATION :
WILKES-BARRE OPERATIONS BRANCH :
DEPARTMENT OF HEALTH, EDUCATION :
and WELFARE :

Respondent : Case No. 20-5293(CA)

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, LOCAL 2809 :
Complainant :
.....

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James Farrar
National Representative
American Federation of Government Employees
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Philadelphia, Pennsylvania 19141
For 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 also referred to as the "Order"). It was initiated by a complaint dated July 29, 1975, alleging violations of Sections

19(a)(1) and (3) of the Order. A Notice of Hearing on the alleged 19(a)(1) and (3) violations issued December 4, 1975, and, pursuant thereto, a hearing was held before the undersigned in Scranton, Pennsylvania on January 15, 1976. At the request of Complainant, and for good cause shown, the time for the submission of briefs was extended from February 23, 1976, to March 8, 1976. Respondent's motion that Complainant's brief be disregarded, or, in the alternative, that Respondent be allowed to file a reply brief, for the asserted reason that Complainant's brief was not timely filed is hereby denied as it clearly appears that Complainant's brief was timely filed, although, through error, counsel for Complainant failed to mail a copy to Respondent until March 15, 1976.

All parties were represented at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved. Briefs, timely filed by the parties, 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 Recommendation:

Findings of Fact

1. Robert Haskell, a data entry operator, was employed by Respondent in November or December, 1972, as a student trainee during his senior year in high school. Mrs. Joan Rayfield, a unit chief (first line supervisor), was Mr. Haskell's immediate supervisor in 1972. Mrs. Rayfield, who has been employed by Respondent since 1956, had been made a unit chief in 1972 and some 20 student trainees, including Mr. Haskell, had been assigned to her. After graduation from high school in 1973, Mr. Haskell became a permanent employee and remained under Mrs. Rayfield's immediate supervision until About August, 1973. During this period a close, friendly relationship developed between the student trainees and Mrs. Rayfield. Mr. Haskell, for example, called her "Mom" and, on occasion, was in her home.

2. Prior to March, 1975, Mr. Haskell had become a union steward. Mr. Haskell testified that sometime in March, 1975, Mrs. Rayfield asked him to come to her desk and invited him to sit down, whereupon the following conversation occurred:

"Bob, why not run for president of the union?"

"She stated that at least I have some common sense. ...

"Upon this statement, I told Mrs. Rayfield at this particular time I didn't even consider running for president of the union; and that until this time, I never even thought about it until it was brought to my attention.

"Mrs. Rayfield then said, 'you could do it.'" (Tr. 15).

As this conversation was taking place, Mr. Haskell testified that his supervisor, Ms. Teresa Drugan, came over and Mrs. Rayfield asked what she thought of Mr. Haskell running for president and Ms. Drugan said:

"Sure, why not?" (Tr. 17).

3. Mr. Haskell was not a convincing witness, appeared over anxious to embroider the facts, was directly contradicted on various assertions by other witnesses, including Mrs. Rayfield, Ms. Parsons, President of Local 2809, Mrs. Schwartz and Ms. Drugan whose testimony I found convincing and fully credit. Accordingly, except as set forth in Paragraph 2, I do not credit the testimony of Mr. Haskell, except as it is corroborated by other testimony or its acceptance is otherwise required. Indeed, while I accept Mr. Haskell's assertion that Mrs. Rayfield asked him to come to her desk where she initiated the conversation concerning her suggestion that he run for union president, it is inherently more probable that, as Mrs. Rayfield testified, she kidded him about his forthcoming marriage; that during this banter Mr. Haskell was told that he was wanted in the union office; that Mrs. Rayfield asked Mr. Haskell if he enjoyed union work and, when he responded that he did, she said, in effect, well, why don't you run for president.

Mr. Haskell testified that Mrs. Rayfield told him he should put up posters so everyone would know he was running for union president; that she would put one near her desk; that probably Betty Schwartz would put one near her desk; that she would talk to Betty Schwartz, Section Chief, and get hold of GSA to see if he could put posters on the walls or in the conference rooms. Mrs. Rayfield denied any such statement (Tr. 120) and testified that, after asking why Mr. Haskell did not run for president, she said:

"I will decorate my desk" (Tr. 72, 120).

Although Mrs. Rayfield showed a lack of maturity and judgment, her testimony was so thoroughly consistent with her inane banter with Mr. Haskell that I credit her version and reject Mr. Haskell's, particularly as Mr. Haskell's credibility was so thoroughly impaired in other respects.

4. Mr. Haskell's assertion concerning a threat by Mrs. Schwartz that she would file harassment charges against the union was thoroughly discredited by Mr. Haskell's admission on cross-examination that the discussion actually involved Mr. Haskell's sick leave record; that on some 12 occasions Mr. Haskell and his fiancée had taken "sick" leave at the same time; and that Mrs. Schwartz had warned Mr. Haskell that if this were not corrected she would have to place him on strict accountability for sick leave. The only other discussion Mrs. Schwartz had with Mr. Haskell concerned a personal problem concerning his fiancée's dissatisfaction in the unit and Mrs. Schwartz assisted in obtaining a transfer for his fiancée. Accordingly, Mr. Haskell's assertion concerning a threat of harassment charges is rejected.

5. Mr. Haskell's assertion that Mrs. Rayfield told him that Mrs. Schwartz had got him into the Drug Alcohol Abuse Training Session, was directly contradicted by Ms. Parsons, Mrs. Rayfield, and Mrs. Schwartz and is rejected as without basis in fact.

6. Mr. Haskell did not run for president of Local 2809 but was nominated and elected Secretary in April, 1975.

CONCLUSIONS

Mrs. Rayfield, a supervisor, suggested and encouraged a union steward to run for president of the local union and said she would "decorate her desk". This was stated in a conversation between Mrs. Rayfield and Mr. Haskell and Mrs. Rayfield said to Mr. Haskell's supervisor, what do you think of Bobbie running for president and Ms. Drugan said "Sure, why not?"

Assuming that a supervisor encourages a union steward to run for president (Mr. Haskell stated that no threat or promise of benefit was made in relation thereto), encouragement, without more, does not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order" in violation of Section 19(a)(1). That is, encouragement, alone, does not impinge upon the right of the union steward "freely and without fear of penalty or reprisal, to ... assist in a labor organization or to refrain from any such activity ... the right to assist a labor organization extends to participation in the management of the organization ..." as set forth in Section 1(a) of the

Order. Here we have encouragement plus an offer to "decorate my desk" with campaign posters. Foolish, immature and imprudent as the offer was, there was not a violation of 19(a)(1) as the offer to "decorate my desk" does not rise to a level as to "interfere with, restrain, or coerce". True, it was an offer, or promise, to "decorate my desk" if the steward did run for president, but was not sufficient to interfere with Mr. Haskell's right freely and without fear of penalty or reprisal to assist a labor organization or to refrain from any such activity. It was a promise to assist in his campaign if he ran, which, if provided, would have been a violation, Department of the Navy, Office of the Secretary, Washington, D.C. and Boilermakers, Local 290, Bremerton, Washington, A/SIMR No. 393 (1974); but the promise to assist in such a limited manner is not sufficient to constitute a violation of 19(a)(1) of the Order.

Section 19(a)(3) makes it an unfair labor practice to:

"(3) sponsor, control, or otherwise assist a labor organization ..."

Encouragement of a union steward to run for president and the offer to assist his campaign by posting campaign literature, without more, does not constitute a violation of 19(a)(3) as the conduct is not sufficient to constitute sponsorship, control or assistance of a labor organization. As the Assistant Secretary stated in Department of the Navy, supra:

"... efforts to influence the election ... interfered with employee rights assured under Section 1(a) of the Order to form, join and assist a labor organization, and thereby violated Section 19(a)(1). Moreover, ... the memorandum of November 17, 1972, constituted, in effect, an effort by agency management to control improperly the BMTC by influencing its election of officers and thereby, violated Section 19(a)(3) of the Order."

By contrast, the encouragement of Mr. Haskell to run for president did not reach the point of influencing the election.

October 19, 1976

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) and (3), I recommend that the Complaint be dismissed in its entirety.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 24, 1976
Washington, D.C.

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

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION
SERVICE, SAN FRANCISCO DISTRICT,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 730

This case involves a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 1616 (AFGE) for a unit of all attorneys assigned to the Immigration and Naturalization Service (INS), San Francisco District of the INS' Western Region. The Activity contended that the unit petitioned for, which would include General Attorneys, Nationality, Trial Attorneys and Special Inquiry Officers, is inappropriate as it excludes other professional employees who share a community of interest with those in the claimed unit, and that such fragmentation would not promote effective dealings and efficiency of agency operations. It further asserted that Section 1(b) and 2(f) of the Order would preclude the inclusion of the Trial Attorneys and Special Inquiry Officers from any unit found appropriate. With regard to the latter contention, the Assistant Secretary noted that the Trial Attorneys and Special Inquiry Officers are involved in hearings relating to an administrative procedure for the consideration of adverse actions to be taken against employees of the INS, with the capacity to recommend the reversal of contemplated adverse personnel actions urged by the INS. Under these circumstances, the Assistant Secretary found that these employees serve as "representatives of management" and thus, are, in effect, "agency management" within the meaning of Section 2(f) of the Order, and should not be included in any unit found appropriate.

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. He noted that the General Attorneys, Nationality, have similar educational backgrounds, are subject to similar personnel policies and job benefits, occupy equivalent positions and perform similar duties as the General Attorneys, Nationality, located in other districts in the Western Region. He further noted that they are selected on an INS-wide basis, training is INS-wide, and transfers occur among the various geographical components of the INS. Under these circumstances, the Assistant Secretary concluded that the employees sought by the AFGE did not possess a clear and identifiable community of interest separate and distinct from General Attorneys, Nationality, assigned to the other districts within the Western Region, and that such unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
SAN FRANCISCO DISTRICT,
SAN FRANCISCO, CALIFORNIA

Activity

and

Case No. 70-5056

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1616

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, including the brief filed by the Petitioner, American Federation of Government Employees, AFL-CIO, Local 1616, herein called AFGE, 1/ the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The AFGE seeks an election in a unit of "all attorneys, including special inquiry officers, under the jurisdiction or working within the geographical area of the San Francisco District, excluding all nonprofessionals within the above jurisdiction and employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order." 2/ At the hearing, the parties stipulated that the attorneys in the claimed unit are professional employees within the meaning of the Order, and that they are the only professional employees assigned to the Activity.

1/ The Activity's brief was not timely filed and, accordingly, was not considered.

2/ The record indicates that the AFGE's petition relates only to those attorneys who are assigned to the San Francisco District.

The Activity contends that the employees sought do not share a clear and identifiable community of interest separate and apart from other attorneys and other professional employees at other locations within the Immigration and Naturalization Service (INS); that the proposed unit would not promote effective dealings or efficiency of agency operations; and that the claimed unit is based solely on extent of organization. In the Activity's view, the "most appropriate" unit should consist of all professionals of the INS, or, in the alternative, all attorneys of the INS. It further contends that Section 1(b) and 2(f) of the Order 3/ preclude the inclusion of the classifications of Trial Attorney and Special Inquiry Officer (also referred to as Immigration Judge) from any unit found appropriate.

The mission of the INS is the enforcement of the immigration and naturalization laws. The Activity is 1 of the approximately 38 districts in the INS. It is within the Western Region which is 1 of the 4 INS regions. The Western Region encompasses a geographic area which includes the states of Hawaii, Arizona, California, and Nevada, and contains 3 other districts besides the San Francisco District; namely, the Los Angeles, Phoenix, and Honolulu Districts. 4/

The record reveals that a region's function is to service its districts and sectors; to act as staff advisor to the district directors and chief patrol agents and officers, and to perform the administrative aspects of servicing its employees in such matters as procurement, finance, and personnel. The control of the districts is exercised by the regions. General policies with respect to operations, instructions, regulations and interpretations are programmed from the Office of the Assistant Commissioner for Naturalization located in the INS' Central Office in Washington, D.C., through the various regional commissioners, and the assistant regional commissioner for naturalization to the district directors. The record indicates that the regional commissioners have authority with regard to the functions of staffing, position classification, employee relations, equal employment opportunity, labor-management relations, and the processing of records for personnel. Each regional commissioner

3/ Section 1(b) of the Order states, in pertinent part, that "Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, ...or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with...the official duties of the employee." Section 2(f) of the Order defines "Agency management" as "...the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program established under this Order."

4/ In addition, there are five Border Patrol Sectors within the Western Region; namely, Livermore, El Centro, and Chula Vista, California, and Tucson and Yuma, Arizona.

may delegate responsibilities, with certain restrictions, to the district directors and the chief patrol officers and agents with the amount of delegation or restriction within the respective regional commissioner's jurisdiction. In addition, the record reveals that there is a Regional Counsel located in the Western Regional Office and that he is responsible for the professional guidance of the attorneys throughout that Region.

The San Francisco District is headed by a District Director whose office is located in San Francisco. Also with the San Francisco District are the following suboffices (sometimes referred to as field offices): the Fresno and Sacramento suboffices in California, and the Reno and Las Vegas suboffices in Nevada. The Activity is divided into four branches- Deportation, Travel Control, Investigation, and Citizenship. The record discloses that there are some 17 attorneys assigned to the Activity of whom 10 nonsupervisory General Attorneys, Nationality, 2 Trial Attorneys, and 2 Special Inquiry Officers (Immigration Judges) are assigned to the San Francisco Office. One General Attorney, Nationality, is located at the Fresno suboffice and one General Attorney, Nationality, is located at the Sacramento suboffice.

The District Director of the Activity is responsible for the administration and management of the various activities of the San Francisco District which carries out the day-to-day functions of the INS. The record indicates that he has authority to grant leave, make temporary changes in the hours of work, handle grievances, authorize modes of transportation, sign travel orders, and provide office space, equipment and stenographic help where needed. However, the evidence establishes that the Regional Commissioner of the Western Region has changed the level at which decisions may be made within the region by the district directors and the chief patrol agents and officers resulting in no delegation of authority to them for the following types of positions; district directors, chief patrol agents, special inquiry officers, attorneys and law clerks. Further, the record reveals that the final step for grievance adjustment is vested in the Regional Commissioner. In addition, although the District Director issues the initial report and makes recommendations for any disciplinary action with regard to the employees within the district, and may issue letters of admonition to any employee, this authority is subject to the approval of the region.

The record discloses that all the nonprofessional employees in the San Francisco District are represented by the National Council of Immigration and Naturalization Service Lodges of the AFGE which, since 1968, has been the exclusive representative of all employees of the INS, except Border Patrol and professional employees.

As noted above, there are within the claimed unit of all professional employees of the San Francisco District approximately 10 non-supervisory General Attorneys, Nationality, located at the San Francisco

District Office; 1 General Attorney, Nationality, located at the Fresno suboffice and 1 General Attorney, Nationality, located at the Sacramento suboffice. 5/ The record discloses that there are approximately 30 districts which employ General Attorneys, Nationality, with the larger district offices such as the San Francisco and the Los Angeles offices employing the greater numbers of such employees. The record indicates that the recruitment program of General Attorneys, Nationality, is initiated in the districts where the applications are generally received. The applications with recommendations are forwarded to the Central Office in Washington, D.C., which makes the decision as to hiring, with the appointments coming through the Attorney General's office. An applicant is required to have a degree in law and to have been admitted to practice before a state bar. The record discloses that there is a training program for General Attorneys, Nationality, at the INS' training facility at Port Isabel, Texas. Although the Assistant Director for Citizenship of the San Francisco District is responsible for the selection of the subject matter and its preparation, the students, and the instructors for General Attorneys, Nationality, from the San Francisco District, the program is administered at the Central Office in Washington, D.C., through the Assistant Commissioner for Naturalization.

The General Attorneys, Nationality, of the San Francisco District are all assigned to the Citizenship Branch of the District, and are under the immediate supervision of the Supervisory General Attorney, Nationality, who is also the Assistant District Director, Citizenship. The function of the General Attorneys, Nationality, (who also are sometimes referred to as Naturalization Examiners) is to conduct preliminary

5/ The record reveals that the Special Inquiry Officers (Immigration Judges) and the Trial Attorneys assigned to the San Francisco District are involved in hearings relating to the administrative procedure for the consideration of adverse actions to be taken against employees of the INS, with the capacity to recommend the reversal of contemplated adverse personnel actions urged by the INS. The record further discloses that these employees have been involved in at least 12 such hearings during Fiscal Year 1975. Under these circumstances, I find that both the Special Inquiry Officers (Immigration Judges) and the Trial Attorneys serve as "representatives of management" and, thus, are, in effect, "agency management" within the meaning of Section 2(f) of the Order, clearly acting in behalf of the agency on a regular basis with respect to the implementation of the agency's labor-management relations program, and should not be included in any unit found appropriate. Accordingly, I have considered the appropriateness of the unit limited to the General Attorneys, Nationality, of the San Francisco District. Compare U. S. Department of Treasury, Office of Regional Counsel, Western Region, A/SLMR No. 161, FLRC No. 72A-32. In that case, the evidence established that the attorneys involved were required to advise on personnel matters on only 3 occasions within a period of 20 years.

examinations of petitioners for naturalization and to make recommendations to the court as to an individual's eligibility for naturalization. In addition to representing the district in rendering recommendations to the court, they are also officers of the court in the naturalization process. Thus, they are authorized to advise petitioners for naturalization as to their rights and as to the most beneficial provisions of the law in the event such petitioners are not represented by counsel. They also examine and adjudicate various other applications for benefits under the nationality laws. While their duties are performed solely within the geographic area of the district, the record reveals that General Attorneys, Nationality, in the other districts are engaged in similar duties. Vacancies for promotions and transfers are posted throughout the INS for General Attorneys, Nationality. Although it appears from the record that there is no interchange of these employees from district to district, or from district to region 6/, or between them and the Central Office staff, the evidence establishes that there have been transfers of these employees among the various geographical organizational components of the INS.

Based on all of the foregoing circumstances, I find that the unit sought is not appropriate for the purpose of exclusive recognition under the Order. Thus, the claimed employees are selected on an INS-wide basis; vacancies for which they can apply are advertised and posted throughout the INS; transfers occur among the various geographical components of the INS; and their training is INS-wide. Further, the Regional Counsel is responsible for their professional guidance as well as for the professional guidance of the General Attorneys, Nationality, in the other districts in the Western Region, while the Regional Commissioner is responsible for labor-management relations in the Region. In addition, the petitioned for employees have similar educational backgrounds, are subject to similar personnel policies and job benefits, occupy equivalent positions and perform similar duties as the General Attorneys, Nationality, located in the other districts in the Western Region.


Under these circumstances, I find that the General Attorneys, Nationality, assigned to the San Francisco District do not share a clear and identifiable community of interest separate and distinct from General Attorneys, Nationality, assigned to other districts in the Western Region, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the petition herein be dismissed.

6/ The Regional Office staff does not normally handle applications for benefits such as petitions for naturalization. However, these functions have been performed by them when the work load has been extremely high.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-5056 be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 19, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

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

INTERNAL REVENUE SERVICE
 A/SLMR No. 731

INTERNAL REVENUE SERVICE

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally issuing revised regulations which established the Taxpayer Service Program for Fiscal Year 1975 and concerned, in part, the assignment of employees to that program. The complaint further alleged that the revised regulations, insofar as they dealt with the assignment of employees to the Taxpayer Service Program, conflicted with the parties' Multi-District negotiated agreement. The Respondent denied that its conduct in this matter was violative of the Order and, in this regard, it contended, among other things, that the revised regulations did not conflict with the parties' negotiated agreement and, further, that the agreement will prevail in the event that any conflict is shown to exist.

The Assistant Secretary agreed with the Associate Chief Administrative Law Judge's finding that, under the circumstances, the revised regulations did not constitute a "facial violation" of the parties' negotiated agreement. Accordingly, in agreement with the Associate Chief Administrative Law Judge, the Assistant Secretary found that dismissal of the instant complaint was warranted. In view of the disposition herein, the Assistant Secretary found it unnecessary to pass upon the Associate Chief Administrative Law Judge's conclusion that the Respondent's obligation to meet and confer with the Complainant concerning the issuance of revised regulations would arise only at the local level of recognition.

Respondent

and

Case No. 22-5921(CA)

NATIONAL TREASURY EMPLOYEES
 UNION

Complainant

DECISION AND ORDER

On April 15, 1976, Associate Chief Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Associate Chief Administrative Law Judge's Recommended Decision and Order.

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

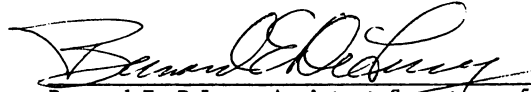
1/In view of the disposition herein, I find it unnecessary to pass upon the Associate Chief Administrative Law Judge's conclusion that the Respondent's obligation to meet and confer with the Complainant concerning the issuance of revised regulations would arise only at the local level of recognition. Cf. Department of the Treasury, Internal Revenue Service, A/SLMR No. 550.

The instant complaint alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally issuing revised regulations which established the Taxpayer Service Program for Fiscal Year 1975 and concerned, in part, the assignment of employees to that program. In addition, the complaint alleged that the revised regulations, in part, conflict with the parties' Multi-District negotiated agreement. The Respondent denied that its conduct in this matter was violative of the Order and, in this regard, it contended, among other things, that the revised regulations do not conflict with the parties' Multi-District negotiated agreement and, further, that the agreement will prevail in the event that any conflict is shown to exist. In this connection, the Associate Chief Administrative Law Judge found, and I concur, that the revised regulations do not constitute a "facial violation" of the agreement. Cf. Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark Ohio, A/SLMR No. 677. Under these circumstances, I find that dismissal of the instant complaint is warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5921(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 20, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



..... :
In the Matter of :
INTERNAL REVENUE SERVICE :
Respondent :
and : Case No. 22-5921 (CA)
NATIONAL TREASURY EMPLOYEES :
UNION :
Complainant :
..... :

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Before: JOHN H. FENTON
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491. Notice of Hearing was issued on August 14, 1975, by the Assistant Regional Director for Labor-Management Services, Philadelphia Region, based on a Complaint filed on April 28 alleging that Respondent violated Section 19(a)(1) and (6) of the Order by issuing Manual Supplements 62G-1 and 5(14) G-63 (hereinafter regulations) which established the Taxpayer Service Program (hereinafter TSP) for Fiscal Year 1975

without first consulting with Complainant, the recognized representative of the affected employees.

A hearing was held on September 24, 1975 in Washington, D. C. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties have submitted post-hearing briefs which 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 of law and recommendations:

Findings of Fact

A. Bargaining History

At all times material herein, NTEU has represented employees in separate units located in 56 of 58 IRS Districts and 11 of 12 IRS Service Centers.

From 1969 to 1971, while NTEU was the exclusive representative of employees in the vast majority of bargaining units in the IRS, agreements were negotiated in individual District offices and Service Centers. ^{1/} In 1971, however, this piecemeal bargaining process gave way to multi-unit negotiations conducted in Washington, D. C. Thus, a Multi-District Agreement (hereinafter MDA) was signed on April 5, 1972 and a Multi-Center Agreement (hereinafter MCA) was signed on April 13, 1973.

B. Detailing

During the negotiation of these agreements, NTEU proposed a provision later adopted as Article 8, Section 2, governing the detailing of employees to lower-graded positions. This Section provides as follows:

Article 8, Section 2: "The detailing of personnel to lower graded positions is considered to be inconsistent with sound planning and management and will be kept to an absolute minimum. However, the Employer may use details under the following circumstances: when a temporary shortage of personnel exists; when an exceptional volume of work suddenly develops and seriously interrupts the regular work schedule; to fill temporarily the positions of employees on extended leave with or without pay; or other urgent conditions of a special and temporary nature."

^{1/} During this period, agreements were negotiated in 12 of 58 District offices and 4 of 12 Service Centers.

This provision was the result of unit employees' dissatisfaction with detailing which they felt limited their promotional opportunities and made it impossible for them to perform their regularly assigned work. Robert Tobias, General Counsel fo NTEU and the chief spokesman for the union in the MDA and MCA negotiations, testified that it was the Union's hope that Article 8, Section 2 would meet employees' objections by eliminating detailing of employees on a regular, planned and recurring basis and limit such details only to those situations of an emergency or otherwise unforeseen nature (Tr. 35).

Article 8, Section 2 was adopted by the parties even though a provision of the Internal Revenue Manual ^{2/} (hereinafter IRM) and an IRS Policy Statement ^{3/} were in effect at the time and dealt rather thoroughly with the subject of detailing. Mr. Tobias testified that at no time during the 1971-2 MDA/MCA negotiations, - nor at any of the subsequent multi-unit negotiations, of which there have been five - has management ever raised the IRM or an IRS Policy Statement as a bar to negotiations.

C. Grievances

On February 25, 1975, Mr. Fred L. Vance, Acting President of Complainant's Chapter 13, filed a grievance with Mr. William Daniel, District Director of IRS' Jackson District alleging that Article 8, Section 2 of the MDA had been violated as a result of a notice issued to Revenue Officers announcing a regular schedule by which said officers would be detailed to perform Taxpayer Service activities. ^{4/} The Grievance claimed that this detailing, planned in advance and designed to extend over a long period of time, violated the MDA provision that detailing be done only in limited circumstances - all of an emergency or short-term nature. This grievance never went to arbitration, however, because a settlement was reached

^{2/} IR Manual MT 1800-103, §1870-1893.2 (Compl. Exh. 1).

^{3/} Policies of the Internal Revenue Service, §P-1870-1

^{4/} Respondent Exhibit 4.

between the parties. A written settlement agreement was drafted which provided as follows:

"... details of Revenue Officers to lower grade positions are appropriate when management has attempted to anticipate workload, has considered alternative methods to meet that workload, but finds that details of revenue officers are the only practical method for fulfilling its mission. Such details would be of temporary duration." (Compl. Exh. 3).

Shortly after this settlement, the parties renegotiated the MDA. The new agreement, which is currently in effect, contains a provision on details virtually identical to that in the first agreement (Tr. 19).

D. Internal Revenue Manual Supplements

On October 30, 1974, Mr. Robert H. Hastings, chief of the Employee Relations Branch of Respondent's Personnel Division, sent a copy of a draft IRM supplement concerning the Taxpayer Service Program for Fiscal Year 1975 to Mr. Vincent L. Connery, the President of NTEU. (A/S Exh. 1, Att. 1) Mr. Hastings' covering letter stated that the draft copy was being provided "for your (Mr. Connery's) information" and invited Connery to contact the Employee Relations Branch should he have any questions.

Having concluded that the draft IRM supplement violated the detailing provision in the MDA, Connery replied by letter on November 4, 1974 and stated, "NTEU is prepared to meet with IRS to discuss the substance, impact and implementation of the IRS program. We expect IRS to refrain from implementing any aspect of the program until agreement with NTEU is reached. (A/S Exh. Att. 2).

On November 13, 1974, Mr. Hastings sent Mr. Connery a revised draft of the manual supplement and the covering letter again indicated that the draft was being transmitted for Mr. Connery's information (A/S Exh., Att. 3).

On November 19, 1974, a meeting took place between Mr. Tobias, on behalf of Complainant, and several officials from the IRS National Office including Mr. Hastings. At the meeting, Mr. Tobias informed management officials that he considered the meeting to be a negotiating session. (Tr. 21). Mr. Hastings testified, however, that Mr. Tobias was specifically informed that the meeting was not to be

considered a negotiating session and that management did not consider any of the items in the program letter to be negotiable at the multi-unit or national level (Tr. 55-56). As for management's view of the purpose of the meeting, Mr. Hastings testified:

A. "We wanted to establish good labor relations with National Treasury Employees Union, and although we didn't believe there was anything in this program letter that was negotiable, we thought it would be good labor or management relations if we shared with the union what the draft of the letter was, and that if they wanted to meet to sit down and discuss it and ask any questions with regard to the letter, we would have such a meeting. That was the purpose of this meeting. (Tr. 54)."

On November 21, 1974, Mr. Tobias sent a letter which was styled "the NTEU counter-proposals in response to the IRS proposals concerning the Taxpayer Service Program." (A/S Exh., Att. 5). Respondent's written response of November 26, 1974 promised that management "will consider your (NTEU's) position and will respond as soon as possible. (A/S Exh., Att. 6). In order to alert management to the union's view of the relationship between the parties, NTEU wrote to IRS on December 4, 1974, announcing that "NTEU considers its November 21 letter as counter-proposals submitted in the context of a negotiation." (A/S Exh., Att. 7). Without any further contact between the parties, management on December 31, 1974 issued the regulations on the Taxpayer Service Program in final form. 5/ Complainant alleges that Section 3.02 is violative of the contract because it permits staffing of TPS by collection personnel "where necessary", arguing that this provides management a much broader parameter for decision making than is allowed by the specific criteria of Article 8, Section 2.

The second allegation in the complaint concerns Manual Supplement 5(14)G-63, Program and Work Scheduling Guidelines for Collecting for FY 1975, which was issued on November 12, 1974. At no time prior to the issuance of this regulation was Complainant ever consulted about its contents. It was to provide direction for the FY 1975 Collection program and guidelines for developing work schedules. The Complainant asserts that Section 6.03 conflicts with the contracts in that it indicates advanced planning of details. Thus, it required

^{5/} Manual Supplement 62G-1 entitled Taxpayer Service Program for Fiscal Year 1975.

that each District's schedule (which was to be prepared by June 30, 1974 should be accompanied by a statement showing the Revenue Officer man-years detailed to Taxpayer Service or to other activities. The former was accompanied by a caution - "collection enforcement personnel should not be assigned to Taxpayer Service as a general rule, except in those posts of duty where no other personnel are available."

Positions of the Parties

NTEU alleges that Respondent violated Sections 19(a) (1) and (6) of Executive Order 11491, as amended by unilaterally issuing regulations prior to agreement between the parties concerning the substance, impact, and implementation of those regulations which concerned personnel policies and practices and matters affecting working conditions and which were at variance with the terms of the negotiated agreement.

As to the Section 19(d) defense raised by Respondent, Complainant acknowledges that it has filed grievances as well as the instant unfair labor practice complaint. Complainant argues, however, that the grievances and the complaint were filed by different parties, - the former by local union officials and the latter by the union's national office. Furthermore, the interests and issues at stake were different in that the grievances dealt with the narrow question of whether details are violative of the agreement while the complaint raises the issue of whether Respondent was obligated to bargain with the Complainant prior to implementation of regulations which were the basis for the details. Absent on identity of issues in the grievances and the Complaint, Section 19(d) is not, argues the union, a bar to this action.

In the 1971-2 multi-unit negotiations on the subject of details, Respondent failed to raise the IRM regulations which dealt with details as a bar to said negotiations. Complainant maintains that such conduct constitutes a waiver of any right Respondent has to remove IRM regulations on details, including the regulations at issue herein, from the scope of negotiations.

Between the date of the issuance of the first set of draft regulations for the T.S.P., and the date they were issued in final form, IRS and the union exchanged correspondence, and met together, concerning the question of "details." Complainant argues that by so doing, the IRS had effectively "negotiated" with NTEU within the meaning

of Section 11 of the Order. Having convened negotiations, management should not be permitted to unilaterally withdraw from those negotiations and issue the subject regulations prior to reaching an impasse or agreement. To rule otherwise, argues the union, would be to make a "mockery and travesty" of the parties' bargaining relationship and would give management, in the Complainant's words, the "right to play" 'cat and mouse' with the union."

The Respondent advances several arguments in its defense. First, because the Complainant has filed grievances against Respondent concerning the same issue raised in the complaint before me, Respondent argues that the Assistant Secretary, under Section 19(d) of the Order, has no jurisdiction to decide this case.

Second, Respondent argues that the Complainant has not proved by a preponderance of the evidence that the disputed IRM Supplements conflict with the terms of the parties' collective bargaining agreement.

Third, Respondent maintains that the IRS was obligated by the Order to bargain with NTEU only at the level at which NTEU had exclusive recognition. NTEU enjoys exclusive recognition only at the district office and service center levels. Absent, therefore, some form of national recognition or national consultation rights, IRS was not obligated to bargain or consult with NTEU concerning the issuance of subject regulations. Respondent further urges that I find that the parties did not attempt to consolidate their bargaining units when they engaged in multi-unit bargaining, nor are they free to accomplish such a consolidation in this manner.

Respondent argues that the subject Manual Supplements are "program letters" which were intended to provide guidance to line management officials concerning the implementation of the Taxpayer Service Program. As the Supplements are "published agency policies and regulations" which have been made applicable to more than one subordinate activity, they are therefore, under Section 11(a) of the Order, beyond the scope of negotiations.

Respondent finally argues that the meeting held between the parties on September 19, 1974 was not a negotiating session but merely a mechanism to exchange information. It was Respondent's intention to communicate with the union, even when it was not required to do so, and in so doing promote better labor-management relations. It would severely "chill" labor-management relations, argues Respondent, if the undersigned were to find that

complaint alleges that the issuance of the regulations constitutes a violation of the Order in its own right, a bypass and derogation of the union - wholly apart from the regulations' impact upon specific instances of detailing.

Though the grievances were filed in behalf of all of the employees of each of the affected districts, the named grievants were but a few individual Revenue Officers. The Complainant in this case, however, is the union, and the alleged injury is to the union qua union and not to particular union members. The interests sought to be protected by the union in this complaint - , i. e. its status in the eyes of its members, its ability to negotiate detailing matters with management in the future, etc. - are far broader than the interests sought to be protected by the Revenue Officers who pursued the grievances procedure.

Finally, the relief sought in the grievances was the affected Revenue Officers' reassignment back to their original duties. The relief sought in this case, on the other hand, is the posting of an order directing, presumably, the revocation/cancellation of the disputed regulations and the negotiation by the parties of any future detailing regulations.

In light of the foregoing, I conclude that the "issues" raised in this case are sufficiently different from the "issues" raised in the grievances and that, therefore, Section 19(d) does not deprive the Assistant Secretary of jurisdiction of this case. 7/

B. Scope of Exclusive Recognition

The Assistant Secretary has consistently ruled that the obligation to meet and confer applies only in the context of the relationship between an exclusive representative and

7/ See, generally United States Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400; Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401. Compare with Department of the Navy, Aviation Supply Office, Philadelphia, Pennsylvania, A/SLMR No. 434.

by merely meeting with a union to discuss matters that are management's "perogatives" under Section 11 and 12 of the Order, management has thereby waived these perogatives. Such a holding would encourage agencies to "play it safe" and close off informal avenues of communication with exclusive representatives. Agencies would then be in compliance with the letter, but clearly not the spirit and purpose, of the Executive Order.

Discussion and Conclusions

A. Section 19(d)

Respondent contends that the Complainant has filed two grievances challenging management's policy of detailing higher graded Revenue Officers and Revenue Agents to lower graded positions, and that this policy is also being challenged in the instant case. Respondent concludes therefore, that because of the identity of issues in both the grievance and complaint procedures, Section 19(d) bars this action.

Assuredly this case and the grievances concern, in the broadest sense, the practice of "detailing". Upon closer analysis it is clear, however, that the grievances and the complaint differ greatly in 1) the nature of management's alleged offenses, 2) in the identity of the parties that have allegedly been prejudiced, and 3) in the scope of the remedy that has been prayed for.

As for the nature of the alleged offenses, the subject grievances challenged specific instances of detailing on the grounds that the circumstances set forth in Article 8, Section 2(A-D) of the negotiated agreement, under which detailing is permissible, did not exist at the time of the detailing. The complaint, on the other hand challenges IRS regulations which are allegedly in conflict with Article 8, Section 2(A-D), violative of the grievance settlement agreement (Compl. Exh. 3); and which establish new circumstances under which detailing is permitted. Complainant further challenges management's unilateral determination that detailing is non-negotiable. 6/ Unlike the grievances, the

6/ Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington, A/SLMR No. 332.

the activity or agency which has accorded exclusive recognition. 8/

In the recent case of Department of the Treasury, Internal Revenue Service, A/SLMR No. 550, Administrative Law Judge Chaitovitz found that the Respondent and the Complainant, the same parties as in this case, voluntarily intended, by multi-unit bargaining, to merge the separate units represented by the Complainant in the District offices into a nationwide District office unit, or to merge the separate units represented by the Complainant in the Service Centers into a nationwide Service Center unit, without utilizing the prescribed election procedures.9/ Relying on the original Executive Order 11491, - specifically, the provision that exclusive recognition must be obtained by a vote of the employees in the appropriate unit - Judge Chaitovitz further found that no matter what the wishes and aims of the parties, neither the bargaining nor the multi-unit agreements between the parties had the legal effect of merging the separate local units so as to accord NTEU exclusive recognition in new, nationwide units.

I am compelled to adopt the above finding that Complainant has never been granted national exclusive recognition; it is also uncontradicted that it has never been accorded national consultation rights. (Tr. 28-29).

C. Obligation to Bargain Concerning the Contents of IRM Supplement 62G-1 and 5 (14G-63)

It is well settled that higher level published policies or regulations may properly limit the scope of negotiations

8/ National Aeronautics and Space Administration (NASA), Washington, D. C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457.

9/ The IRS filed with the Assistant Secretary an exception to this finding that IRS intended to merge the existing units into one nation-wide unit. Though the Assistant Secretary, in agreement with Judge Chaitovitz, found that the dismissal of the complaint was warranted, he did not pass upon this disputed finding. In the brief filed in this case, the IRS has expressly requested that I reject Judge Chaitovitz's finding in Department of Treasury and find instead that the parties did not attempt to consolidate their bargaining units when they engaged in multi-unit bargaining. To facilitate my ruling on this issue, both parties stipulated, at the hearing that the transcripts and certain exhibits from Department of Treasury (Joint Exh. 2) would be considered as evidence in this case. I consider the parties intentions as they engaged in multi-unit bargaining to be immaterial to the merits of this case and I therefore decline to rule on the matter.

at subordinate activities under Section 11(a) of the Order if two conditions are met. First, the regulations or policies must be applied uniformly to more than one subordinate activity. Second, the published regulation or policies may not supersede or modify the terms of an existing agreement. Cf. United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71A-15; Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60; and Air Force Defense Language, Lockland Air Force Base, A/SLMR No. 322.

1. Uniform Application of the Disputed Regulation to more than one Subordinate Activity.

It is uncontradicted that the two subject Manual Supplements apply to all of the employees in the Collection and Taxpayer Divisions of the Respondent and not just to the units that are represented by the Complainant. (Tr. 46) The regulations were not, therefore, a means to violate the order by "unilaterally limit (ing). The scope of its bargaining obligation or otherwise negotiable matters peculiar to an individual unit in a single field activity merely by issuing regulations from a higher level." 10/

2. Conflict Between the Disputed Regulations and the Negotiated Agreements

The Respondent has argued that IRM Supplements 62G-1 and 5(14)G-63 do not supersede or alter the detailing provisions of the Multi-District Agreement or the Multi-Center Agreement between the parties. A review of the language in the regulations and the agreement is necessary before ruling on this argument.

The detailing provision in the MDA, Article 8, Section 2, provides as follows:

"The detailing of personnel to lower graded positions is considered to be inconsistent with sound planning and management and will be kept to an absolute minimum. However, the Employer may use details under the following circumstances:

- A. When a temporary shortage of personnel exists;

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

- B. Where an exceptional volume of work suddenly develops and seriously interrupts the work schedule;
- C. To fill temporarily the positions of employees on extended leave with or without pay; or
- D. Other conditions of a special and temporary nature."

Section 3.02 of the TSP regulation provides that "Staffing (for the Taxpayer Service Program) should consist of ..., where necessary, Collection personnel." It further provides that "in subordinate offices, it may be necessary to detail collection personnel to the Taxpayer Service Program."

"Necessary" is a word of very broad meaning, and its use in the regulation, standing alone without mention of the specific conditions set forth in Article 8, Section 2, must not be read to necessarily vitiate those conditions. That is, the omission of the Article 8, Section 2 conditions does not constitute their invalidation. I conclude, therefore, that the TSP regulation does not constitute a facial violation of the terms and conditions of Article 8, Section 2 of the agreement.


As for the second challenged regulation, that dealing with Program and Work Scheduling Guidelines for Collection for Fiscal Year 1975, Complainant argues that Section 6.03 of the regulation provides that details should be planned in advance and that this is exactly the kind of advance planning of details that Article 8, Section 2 sought to eliminate. Though Section 6.03 mandates the advance preparation of work schedules for Collection Personnel, it also provides that "collection enforcement personnel should not be assigned to Taxpayer Service as a general rule, except in those posts of duty where no other personnel are available." I conclude that this language envisions detailing collection personnel only on an emergency and short term basis which is consistent with the Article 8, Section 2 conditions. I find, therefore, that IRM 5(14)G-63 is not a facial violation of the agreement.

I would add that the dispute here is in any event so essentially semantic as to mandate its resolution pursuant to the grievance procedure. The quarrel is over the meaning of elastic words, in a context where it cannot be said that the asserted breach of contract is so obvious as to call for the conclusion that Respondent has deliberately attempted a unilateral change. On the contrary, Respondent insists the challenged regulations are consistent with contracts, and

further, that the contracts will prevail in the event any conflict is shown to exist. I fail to perceive how meaningful bargaining about such matters can take place in the abstract, and I conclude that a bargaining obligation could arise only at the local level of recognition, and only when local management announces its intention to carry out its received guidance in particular circumstances. At that point a real controversy might well exist over the question whether the contracts' criteria for the use of details are being flagrantly and hence unlawfully ignored as a consequence of local management's interpretation of that guidance. There is, of course, no complaint addressed to such local matters, and there is therefore no occasion to consider the question of the obligation to bargain about impact and implementation.

RECOMMENDATION

That the complaint be dismissed in its entirety.



 JOHN H. FENTON
 Associate Chief Judge

Dated: April 15, 1976
 Washington, D. C.

October 20, 1976

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

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SIMR No. 732

This case arose as a result of an unfair labor practice filed by the National Federation of Federal Employees, Local 476 (Complainant), alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to meet and confer over the impact and implementation of a base-wide reduction in spaces and by refusing to furnish information regarding the impact and implementation of a proposed reduction-in-force (RIF) in the laboratory section at Fort Monmouth.

The Administrative Law Judge found that on January 10, 1975, a meeting was held between the Respondent and those labor organizations, including the Complainant, holding exclusive recognition at Fort Monmouth. At the meeting the labor organizations were advised that higher agency authority had directed a six percent base-wide reduction in spaces and that attrition would be the means of achieving this reduction. In April 1975, the Complainant was notified by several employees that a RIF was being carried out in the laboratory section. Throughout April and May the Complainant requested information regarding the RIF which request was denied by the Respondent on the basis that no official action had been taken on the RIF and that, therefore, the Complainant's request was premature. In August 1975, the Complainant was notified that any plans for a RIF in the laboratory section were being abandoned and, further, that the base-wide reduction was proceeding in accordance with the procedure discussed in the January meeting.

The Administrative Law Judge concluded with respect to the proposed RIF in the laboratory section that inasmuch as it was purely a proposal and there was no evidence of a decision having been made or finalized to conduct such a RIF, the Respondent was under no obligation to furnish the requested information.

Noting the Respondent's obligation to meet and confer over the impact and implementation concerning its decision with respect to the base-wide reduction, the Administrative Law Judge found that the Complainant was put on notice of this decision in the January 1975 meeting; that the reduction and the means of its implementation were fully discussed by the parties at two separate meetings; that the Complainant was given an ample opportunity to fully explore the matters involved in the reduction prior to its actual implementation; that the

Complainant was kept informed of the progress of the reduction; and that the Respondent was responsive to the inquiries of the Complainant and furnished it with the available information to which it was entitled. Under these circumstances, the Administrative Law Judge concluded that the Respondent had not refused to meet and confer in good faith in violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge with respect to the Respondent's alleged failure to furnish information and its alleged failure to meet and confer over the impact and implementation of the proposed RIF in the laboratory section. As to the Respondent's alleged failure to meet and confer over the base-wide reduction, the Assistant Secretary agreed with the Administrative Law Judge that, under the circumstances herein, the Respondent's conduct was not violative of the Order. In this regard, the Assistant Secretary noted that from the time the Complainant received notification of the reduction in January 1975 until its actual implementation, the Complainant did not request bargaining over the impact and implementation of the Respondent's decision. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-4190(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

Complainant

DECISION AND ORDER

On May 21, 1976, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision.

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

With respect to the six percent base-wide reduction in authorized spaces, the Administrative Law Judge found, and I agree, that the Complainant was put on notice of a higher agency authority directive in this regard on January 10, 1975, in a meeting called by the Respondent with the Complainant and other labor organizations holding exclusive recognition at Fort Monmouth. Noting agency management's obligation to meet and confer over the procedures to be followed in connection with the implementation of a decision promulgated in accordance with Section 12(b) of the Order, the Administrative Law Judge found that the Respondent had notified the Complainant of the decision to conduct the base-wide reduction; that the procedures relating to the implementation of the decision were fully discussed by the parties at two separate meetings; that the Complainant was given an ample opportunity to fully explore


the matters involved in the reduction prior to its actual implementation; that the Complainant was kept informed of the progress of the space reduction; and that the Respondent was responsive to the inquiries of the Complainant and furnished it with the available information to which it was entitled. Accordingly, the Administrative Law Judge concluded that the Respondent had not refused to meet and confer in good faith in violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary has previously held that where agency management has an obligation to meet and confer over the impact and implementation of a decision promulgated in accordance with Sections 11(b) and 12(b) of the Order, it will not be deemed to have failed to meet its obligation in this regard when it affords the exclusive representative timely notice of its decision and the exclusive representative fails to request bargaining.^{1/} In the instant case, the evidence did not establish that the Complainant made a request to meet and confer after it received notification of the reduction prior to its implementation. Under these circumstances, I conclude that the Respondent did not fail to meet its bargaining obligations under the Executive Order and, therefore, I shall order that the subject complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 32-4190(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 20, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{1/} See U. S. Department of the Air Force, Norton Air Force Base, A/SLMR No. 261, and Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329.

October 21, 1976

A/SLMR No. 733

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

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, PACIFIC AIR FORCE
DEPARTMENT OF DEFENSE DEPENDENT
SCHOOLS, PACIFIC
A/SLMR No. 733

This case arose as a result of an unfair labor practice complaint filed by the Overseas Education Association, Pacific, National Education Association (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(6) of the Order by unilaterally changing Pacific Area staffing criteria for Fiscal Year 1976 and by refusing to bargain concerning the impact and implementation of the criteria.

The Administrative Law Judge found that the Respondent's unilateral determination and issuance of the aforementioned criteria did not constitute a violation of Section 19(a)(6) of the Order because such a decision by the Respondent is privileged under Sections 11(b) and 12(b) of the Order. Regarding the alleged refusal to bargain concerning the impact and implementation of the criteria, the Administrative Law Judge found that the record established that the Respondent furnished the Complainant with the criteria in sufficient time to permit it to review the criteria and to request bargaining as to its implementation and impact before it was implemented or had any impact, but that the Complainant did not at any time request to meet and confer, nor had the Respondent refused to bargain concerning implementation and impact. Accordingly, he concluded that the Respondent's conduct herein was not violative of Section 19(a)(6) of the Order.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, PACIFIC AIR FORCE
DEPARTMENT OF DEFENSE DEPENDENT
SCHOOLS, PACIFIC

Respondent

and

Case No. 22-5989(CA)

OVERSEAS EDUCATION ASSOCIATION,
PACIFIC, NATIONAL EDUCATION ASSOCIATION

Complainant

DECISION AND ORDER

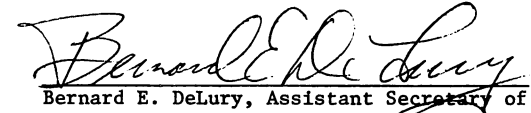
On April 13, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5989(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 21, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
In the Matter of :
 :
 :
DEPARTMENT OF THE AIR FORCE :
HEADQUARTERS, PACIFIC AIR FORCE :
DOD DEPENDENT SCHOOLS, PACIFIC :
APO SAN FRANCISCO 96553 :
 :
Respondent :
 :
and :
 :
OVERSEAS EDUCATION ASSOCIATION, PACIFIC :
BOX 70, USNS :
FPO SAN FRANCISCO 96651 :
 :
 :
.....

Case No. 22-5989 (CA)

JOAN HUSTED, Director, Field Services
Hawaii State Teachers Association
2828 Paa Street, Suite 3150
Honolulu, Hawaii 96819

LT. COL. DAVID M. LEWIS, JR.
Pacific Air Force, Dir. of Civil Law
Office of Staff Judge Advocate
Headquarters, Pacific Air Forces
APO San Francisco 96553

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on June 25, 1975, in Case No. 22-5989 (CA) under Executive Order 11491, as amended, (hereinafter called the Order) by the Overseas Education Association, Pacific, affiliated with the National Education Association (hereinafter called OEA or the Union) against Department of the Air Force,

Headquarters, Pacific Air Forces, DOD Dependent Schools, Pacific (hereinafter called the Activity or the Respondent), A Notice of Hearing on Complaint 1/ was issued by the Assistant Regional Director for the Philadelphia, Pennsylvania Region on November 24, 1975.

A hearing was held in this matter before the undersigned in Honolulu, Hawaii. Both parties were afforded full opportunity to be heard, to introduce evidence and to examine and cross-examine witnesses. Both parties had an opportunity to argue rally and to file briefs. The briefs have been duly considered.

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

Findings of Fact

A. The Collective Bargaining Unit

The Department of Defense (hereinafter called DOD) operates schools throughout the world for the dependents of military personnel stationed abroad. The Activity herein operates these schools in the Pacific Area. At all times material herein OEA has been the collective bargaining representative for a unit of the Activity's nonsupervisory professional school personnel, consisting primarily of teachers, specialists and counsellors, who are United States Citizens assigned to the DOD Dependent Schools, Pacific Area.

The Pacific Area school system consists of 42 schools in six countries and is subdivided into three administrative units. Unit 1 is the Japanese District; Unit 2 is Okinawa; and Unit 3 is the Philippines. The School on Midway is operated out of the School system's headquarters, or central office, located in Honolulu.

The parties are operating under a collective bargaining agreement which expired in January, 1975, but was extended, with some alteration, by ground rules of negotiation executed on November 2, 1974.

1/ This case was consolidated with Case No. 73-769. However, at the hearing the parties reached a settlement in Case No. 73-769 and a request to withdraw the Complaint in that Case was approved by the Regional Office.

B. Formulation of Staffing Criteria.

Dr. Edward C. Killin, Area Director of DOD Dependents Schools, Pacific Area, is responsible for the organization and administration of all Department of Defense Dependents Schools in the Pacific Area. One of the functions he directly supervises is the annual formulation of staffing criteria for schools within the Area. These staffing criteria consist of projected specialist and teacher to student ratios in the schools for the next school year. The staffing criteria are issued to district superintendents in the fall of the year and are, thereafter, used for planning purposes for both Dr. Killin's office and the superintendents. Actual implementation of personnel actions for the forth-coming school year normally takes place at the superintendent levels some five to six months following the issuance of the criteria, in March and April.

The process by which the staffing criteria are formulated actually starts a good deal earlier in the year in the Office of Overseas Dependents Education which is under the Assistant Secretary of Defense for Manpower and Reserve Affairs. This office formulates the DOD staffing guidelines in February or March, nearly a year and a half prior to the beginning of the school year in question. The purpose of these guidelines, which also consist of projected specialist and teacher to student ratios, is to obtain a degree of comparability in the Overseas Dependents' Education Program on a world-wide basis. The guidelines are issued to the Area Directors, including Dr. Killin, and they, in turn, utilize them for their planning and, specifically, for drafting their own area-wide staffing criteria for the next school year.

Both the DOD guidelines and the resulting area level staffing criteria issuances are part of the annual budgetary process. As such, these documents do not represent final determinations as to what staffing patterns will emerge, as the projections are subject to actions by the Secretary of Defense, Office of Management and Budget, Congress, and ultimately the President in providing for appropriations. Undoubtedly owing to fluctuations in factors influencing this annual process, the staffing criteria issued during Dr. Killin's tenure as Director, Pacific Area (since March 1972), have differed each year.

C. The 1975-1976 Staffing Criteria.

The Pacific Area staffing criteria for school year

1975-1976 (hereinafter sometime referred to as Fiscal Year 1976) were issued to the district superintendents on November 11, 1974. The evidence indicates that Pacific staffing criteria for previous years had been distributed to the Union, although on this occasion they were not.

During the latter part of October, 1974, the parties had engaged in consultations. In the course of these consultations, OEA representatives were advised by the Activity that there would undoubtedly be cutbacks in staffing, but that there are no known RIF actions at present which affect teachers. The context and scope of this discussion is somewhat unclear, however, it appears from the record, that although the Union's representatives were primarily concerned with pending developments in schools within Taiwan they also apparently raised the point in order to get an idea of the basic plan for the whole Pacific.

On December 27, 1974, during discussions concerning future contract negotiations, Miss Brenda Travis, Vice President for OEA Pacific, requested a copy of the Department of Defense staffing criteria from Dr. Earl Ficken, Assistant Superintendent for Personnel, Japan District. Dr. Ficken informed Miss Travis that he did not have the Department of Defense staffing criteria but he did have the Pacific Area Staffing Criteria and gave her a copy of that criteria without the cover memo from Dr. Killin dated November 11, 1974. Miss Travis noted that the Pacific Area staffing criteria for school year 1975-1976 differed from the DOD staffing criteria for school year 1974-1975. ^{2/} She apparently made no inquiries with respect to these differences, nor about any aspects of the criteria.^{3/} Aside from Dr. Killin's testimony that the staffing criteria differed somewhat from one year to the next, the record is silent as to the specific issue of whether and to what extent the staffing criteria issued

^{2/} Ms. Travis had in her possession a copy of the fiscal year 1975 guidelines. These guidelines, of course, covered what was then the current school year.

^{3/} She later confirmed that the staffing criteria differed in certain respects from the fiscal year 1976 DOD guidelines.

in November 1974 differed from those issued for the previous year. 4/

Sometime in late March 1975, Miss Travis requested a copy of the FY 1976 Department of Defense staffing criteria from Dr. Anthony Cardinale, Administrator of the Overseas Dependent Schools for the Department of Defense. He did not have a copy available to show her but informed her verbally that the DOD had not changed the national staffing criteria from FY 1975.

In mid-May, 1975, Miss Travis was given a copy of the DOD FY 1976 staffing criteria while on an Association trip to Germany. It was at this time that she noted that the Pacific Area Staffing Criteria differed in key areas from the DOD staffing criteria and filed the charge of unfair labor practice May 24, 1975.

The methods for implementing the Pacific Area staffing Criteria changes 5/ from Fiscal Year 1974 to Fiscal Year 1975 were already in existence (e.g. Transfers, RIF, etc.), and the record does not establish that the Activity instituted any new procedures or changed any existing procedures that would be used to implement the changes in the staffing criteria. 6/ The staffing criteria, although only a planning document and subject to change, if finally implemented could foreseeably have had some adverse impact on employees' working conditions. 7/

The record establishes that Dr. Killin never refused to bargain, meet and confer, consult or talk to the union concerning the implementation or impact of the staffing criteria. It also appears that neither Ms. Travis nor any union representative made any such demand on the Respondent. The matter of adverse impacts was touched

4/ On the other hand, apparently the DOD staffing criteria for fiscal year 1976 were not changed in the personnel area from those which had been issued for fiscal year 1975.

5/ The extent or magnitude of the changes were not developed in the record.

6/ Although there was a change in reduction in force procedures, the change was not applicable to employees in the Unit represented by OEA.

7/ Such impacts would be, for example, increased teaching load, more work for counsellors, disciplinary problems, etc.

upon briefly during a meeting between the parties on June 9, 1975. The Activity's representative brought this matter up and following the Activity's representations that they were unable to foresee or determine any adverse impacts flowing from the staffing criteria, the OEA did not pursue the matter.

Conclusions of Law

The Activity contends that the unfair labor practice charge was not filed timely pursuant to Section 203(a)(1) of the regulations because it was filed on May 24, 1975, which was more than 6 months after the issuance of the Pacific Area staffing criteria on November 11, 1974. However, the charge also dealt with the implementation and impact of the staffing criteria, and this is in the nature of continuing violation that continued up to the time of the filing of the charge. Therefore, it is concluded that the charge was timely within the requirements of Section 203(a)(1) of the Regulations. Similarly it is concluded that the complaint alleged that the Activity failed to bargain in good faith and violated Section 19(a)(6) of the Order, at least in part, because the Activity failed to bargain about the implementation and impact of the staffing criteria. Accordingly, it is concluded that there is not a sufficient variance between the charge and the complaint to warrant dismissal of the complaint. 8/

It is apparently undisputed, and in any event it is concluded, that the Activity did not have any obligation to bargain or negotiate with the Union concerning the formulation of the Pacific Area staffing criteria. Such a decision by the Activity is privileged under Sections 11(b) and 12(b) of the Order. Therefore, the Activity's unilateral determination and issuance of the Pacific Area staffing criteria did not constitute a violation of Section 19(a)(6) of the Order.

8/ Further, it noted that the Activity was fully and timely advised of its alleged violations of Section 19(a)(6) of the Order and the matters were fully litigated.

The law is clear, however, that eventhough the Activity did not have an obligation to bargain or negotiate concerning the decision and issuance of the staffing criteria, it was obliged, upon request, to bargain about the procedures to be used to implement the staffing criteria and concerning any adverse impacts the institution of the criteria would have on employees. 9/

The record establishes that the Union received a copy of the Pacific Area staffing criteria for Fiscal Year 1975 during December of 1974 and that no steps were to be taken to implement these criteria and no adverse impacts would be experienced before March or April of 1975. Further, the Union had copies of the Pacific Area staffing criteria for prior years and from these and its knowledge of the unit it represented, would be able to determine whether there was any difference between the new Pacific Area Staffing criteria for Fiscal Year 1976 and the situation as it then existed. Also, the record does not establish that any changes were made in the existing procedures or any new procedures were instituted to implement the Fiscal Year 1976 Pacific Area staffing criteria. In these circumstances it is concluded that the Activity furnished the Union the Pacific Area staffing criteria for Fiscal Year 1976 in sufficient time to permit the Union to review it and to request to bargain about its implementation and adverse impacts before it was implemented or had any impacts.

OEA however, did not at any time request to meet and bargain about the implementation and impact of the new Pacific Area staffing criteria. 10/ Further, the Activity

9/ Cf. Section 11(b) of the Order; Pennsylvania Army National Guard, A/SLMR No. 475; FAA, National Aviation Facilities Experimental Center, A/SLMR No. 438; and Army and Navy Airforce Exchange Service, Hawaii Regional Exchange, A/SLMR No. 454.

10/ OEA raised the fact that the DOD staffing criteria was not made available to it until May 1975 and that the Pacific Area staffing criteria was differed from the DOD staffing criteria. However, the Activity did not have to bargain concerning its formulation of the Pacific Area staffing criteria, it only had to bargain concerning its implementation and impacts. Therefore, it is concluded that the DOD staffing criteria, which is a document used by the Pacific Area in formulating its Staffing Criteria, and whether it differed from the Pacific Area Criteria is irrelevant as to implementation and impacts of the Pacific Area criteria. Thus the failure of the OEA in the Pacific to receive a copy of the DOD criteria did not constitute a violation of Section 19 (a) (6) of the Order.

at no time refused to meet and bargain with the Union concerning the implementation and impact of the Pacific Area staffing criteria for Fiscal Year 1976. 11/ In such circumstances it is concluded that the Activity did not refuse to meet and bargain concerning the implementation and impacts of the Pacific Area staffing criteria for Fiscal Year 1976 and therefore did not violate Section 19(a)(6) of the Order. 12/

Recommendation

In light of all of the foregoing it is recommended that The Assistant Secretary of Labor for Labor-Management Relations dismiss the subject complaint in its entirety.


 SAMUEL A. CHAITOVITZ
 Administrative Law Judge

Dated: April 13, 1976
 Washington, D. C.

11/ The record established that during June 1975 discussions of the subject alleged unfair labor practice the Activity advised the Union that the Activity recognized that it had an obligation to bargain about impact, but that it was aware of none. The record does not establish that the Union then requested to bargain and the Activity refused. Rather, the OEA apparently just accepted the Activity's statement.

12/ See Cases cited in Footnote 9, Supra.

October 21, 1976

A/SLMR No. 734

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3
A/SLMR No. 734

GENERAL SERVICES ADMINISTRATION,
REGION 3

Respondent

and

Case No. 22-5830(CA)

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2151, AFL-CIO (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by denying the Complainant access to certain documents related to the resolution of a grievance filed on behalf of certain unit employees assigned to the roofing shop in the Washington, D. C. metropolitan area.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2151, AFL-CIO

Complainant

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) by refusing to make available to the Complainant for over three weeks certain work assignment records which were relevant and necessary to the Complainant's intelligent consideration of the roofers' grievance concerning their entitlement to environmental differential pay. These documents consisted of a GSA Form R3-227 going back to January 1973, and an undisclosed number of "line page notes" which were posted daily to notify roofers of their particular assignments.

DECISION AND ORDER

On April 27, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

In reaching his conclusion, the Administrative Law Judge found that no valid reason existed for the refusal to make the records available to the Complainant between January 7 and January 31, 1975, when the Respondent finally offered to make the documents fully available. In this connection, he noted that the GSA Forms R3-227 were readily available on January 7 when the Complainant made its demand to see these documents. However, the existence and nature of the "line page notes" was less certain to the Respondent on January 7, 1975, when the Complainant made its demand to see these documents. Accordingly, the Administrative Law Judge found that while the Respondent's refusal to produce the notes on the Complainant's demand was reasonable, nevertheless, the Respondent was fully aware of the notes involved for three full weeks after the demand and never made an effort to make the notes available even though it was aware of the continuing nature of the demand.

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

Noting the absence of exceptions to the Administrative Law Judge's findings that unfair labor practices had been committed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that General Services Administration, Region 3, shall:

1/ While both the Complainant and the Respondent excepted to the Administrative Law Judge's Recommended Order, neither party excepted to his finding that certain unfair labor practices had been committed herein. Rather, both exceptions went to the scope and the content of the Recommended Order.

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by the American Federation of Government Employees, Local 2151, AFL-CIO, any information relevant to the processing of a grievance, which information is necessary to enable the American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by denying the American Federation of Government Employees, Local 2151, AFL-CIO, information necessary to enable such labor organization as the exclusive representative to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

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


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

(a) Upon request, make available to the American Federation of Government Employees, Local 2151, AFL-CIO, all information relevant to the processing of a grievance, which information is necessary to enable the American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligations as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(b) Post at its General Services Administration, Region 3 facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of General Services Administration, Region 3, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.
October 21, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

-2-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to provide, upon request by the American Federation of Government Employees, Local 2151, AFL-CIO, any information relevant to the processing of a grievance, which information is necessary to enable the American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

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

WE WILL, upon request, make available to the American Federation of Government Employees, Local 2151, AFL-CIO, all information relevant to the processing of a grievance, which information is necessary to enable the American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(Agency or Activity)

By _____

(Signature)

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

If employees have any question concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 15440, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

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



RECOMMENDED DECISION AND ORDER

Preliminary Statement

.....
 In the Matter of :
 GENERAL SERVICES ADMINISTRATION :
 REGION 3 :
 Respondent :
 and : Case No. 22-5830 (CA)
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 2151, AFL-CIO :
 Complainant :

Charles I. Liburd
 Labor-Management Relations Officer, and
 Edward B. Denney
 Labor-Management Relations Specialist
 General Services Administration, Region 3
 7th and D Streets, S.W.
 Washington, D.C.

For Respondent

Donald M. MacIntyre and
 Mary Lynn Walker and
 Raymond Booth
 National Representatives
 American Federation of Government Employees
 8020 New Hampshire Avenue
 Hyattsville, Maryland 20783

For Complainant

Before: SALVATORE J. ARRIGO
 Administrative Law Judge

This proceeding heard in Washington, D.C. on October 23 and 24, 1975, arises under Executive Order 11491, as amended (hereinafter referred to as the Order). On February 20, 1975 a complaint was filed by American Federation of Government Employees, Local 2151, AFL-CIO (hereinafter referred to as the Union or Complainant) against General Services Administration, Region 3 (hereinafter referred to as the Activity or Respondent) alleging Respondent violated Section 19(a)(1) and (6) of the Order by denying Complainant access to various work assignment records related to the resolution of a grievance. The complaint was dismissed on April 10, 1975 by the Acting Assistant Regional Director for Labor-Management Services. The Union requested review of the dismissal on April 21 and subsequently, on July 21, 1975, the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary) granted the request for review and remanded the matter for hearing, absent settlement. Accordingly, pursuant to the Regulations of the Assistant Secretary, a Notice of Hearing on Complaint issued on July 28, 1975 with reference to the alleged violations of Section 19(a)(1) and (6) of the Order.

At the hearing both parties were represented and 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 observations of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times material herein the Union has been the exclusive collective bargaining representative of various employees of the Activity including all nonsupervisory PBS wage grade employees assigned to the Roofing Shop in the Washington metropolitan area. On May 1, 1974, the Union steward for the Roofing Shop requested the Activity to investigate his contention that Roofing Shop employees (roofers) were entitled to extra pay for hazardous duty roof work. The Activity embarked on an environmental survey of roofers work but progress was slow. Accordingly, on November 7, 1974 a grievance was filed on the Activity's failure to provide environmental differential pay. By letter dated December 2, 1974,

the Union requested a list of five arbitrators from the Federal Mediation and Conciliation Service for use in arbitrating the claim. On December 18, 1974, the Activity filed with the Area Director, Labor-Management Services Administration, a request for a decision on the arbitrability or grievability of the claim contending, in part, that arbitration was premature at that time. The Union responded to the request by letter to the Area Administrator dated January 6, 1975.

In the interim, the Activity's study of roofers' environmental conditions was completed. On December 17, 1974, Position Classification Specialist Billy Grabeel issued his report on the matter recommending that roofers were entitled to hazardous duty pay for certain types of work performed. However, Grabeel determined that payments retroactive to November 1, 1970 could only be made if based upon adequate written records showing the names of employees and the dates and times of exposure to hazardous conditions. The Grabeel recommendation was adopted by the Activity and payment to roofing employees was authorized by Regional Personnel Officer Arthur Palman by memorandum of December 19, 1974.

Sometime before January 6, 1975, the Union was given a copy of the Grabeel report. National Representative Donald MacIntyre, who was representing the Local Union in this matter, considered the report to be a vehicle for the resolution of the roofers' grievance. In an attempt to discover what records were available to support a claim for back pay, MacIntyre telephoned Roofing Shop foreman Arthur Thomas on January 6. Thomas informed MacIntyre that he had two types of documents revealing past work assignments for Roofing Shop employees. Those consisted of a GSA form R3-227 going back to January 1973 and an undisclosed number of "line page notes" which were posted daily to notify roofers of their particular assignments. Thomas informed MacIntyre that he was welcome to look at the notes and offered him a tour of roofers' work sites.

After talking with MacIntyre, Thomas called his supervisor, Building Manager Willard Meyer, and notified him of MacIntyre's interest in the roofers' assignment records. 1/ Meyer informed Thomas that MacIntyre should come through him (Meyer) for any such request and told Thomas to bring the records to his office. There-

1/ Meyer received the Grabeel report on January 3, 1975, although he knew the general content of the report for some weeks previously. Upon receiving the Grabeel report Meyer inquired and was told by Thomas that he had "some records" which would reflect roofers' past work assignments.

upon Thomas brought the R3-227's to Meyer. The R3-227's were daily records spanning a two year period and were arranged in monthly packets. Thomas did not mention or produce the line page notes at that time.

On January 7, 1975, MacIntyre called Thomas to arrange a visit to the Roofing Shop. Thomas told MacIntyre he was too busy to meet with him or show him the records. Thomas eventually indicated that he could meet at some future time but informed MacIntyre to see Building Manager Meyer before a meeting could be arranged. Shortly thereafter, MacIntyre called Meyer and requested an opportunity to see the roofers' assignment records. 2/ Meyer said he was in the process of sorting the records and until the sorting was complete, it would not be proper for MacIntyre to see the records. MacIntyre then asked if he could watch the sorting. Meyer responded that he had no objection if Labor-Management Relations Officer Charles Liburd gave his permission.

MacIntyre then called Liburd and told him of his conversation with Meyer. MacIntyre informed Liburd of the Grabeel report and its conclusion that retroactive back-pay was permissible if based upon appropriate records, and asked to see the Roofing Shop records to ascertain whether such records would resolve the grievance. Liburd told MacIntyre that the records would not be available to MacIntyre until they were sorted and he (Liburd) determined they were pertinent. Liburd told MacIntyre that a Activity official would contact him once the records were assembled.

MacIntyre, accompanied by another National Representative, William Waldenmaier, went to Meyer's office to see if Meyer could be convinced to let them look at the records. MacIntyre explained to Meyer that he had the Grabeel report and wanted to look at the records. MacIntyre informed Meyer of his conversation with Liburd and gave his opinion that Liburd was wrong in refusing access to the records and suggested that such conduct violated the Executive Order. After some discussion, Meyer said he would talk to Area Manager, Thomas Harrington, who was in the building on another matter at that time.

Harrington was located and came to Meyer's office. MacIntyre

2/ The parties to the January 7 conversations related hereinafter gave divergent accounts of precisely what transpired in those discussions. The account presented herein is a synthesis of the various parties' testimony and is based upon my credibility resolutions, having given due regard to the nature of the witnesses testimony, the circumstances surrounding the situation and my observation of the witnesses demeanor.

reviewed the matter and asked to see all roofer assignment records including line page notes kept by Thomas and again indicated he considered the Activity's refusal to produce the records to be violative of the Order. Harrington at that time was serving in a detail capacity as Area Manager, having been detailed to that job on November 11, 1974. 3/ While somewhat familiar with the Grabeel report, Harrington was unaware of the grievance and felt he lacked sufficient background information of the situation. Accordingly, he indicated a desire to have some time to privately discuss the matter with Meyer and make a telephone call to the Activity's Personnel Office. After the Union representatives retired to another office, Meyer indicated he had the R3-227's but disclaimed knowledge of the line page notes. Harrington then called James Zaiser, Director of the Activity's Management Operations Division, who was in charge of the Activity's labor-management relations. Liburd was meeting with Zaiser at the time and had already explained to Zaiser the Union's desire to see Roofing Shop assignment records. Harrington informed Zaiser of the nature of MacIntyre's request; described the contents of the R3-227's; and explained that the R3-227's spanned a two year period and were stapled in one-month bundles. Zaiser then told Harrington to "show him one of the bundles so he knows what type of records we have."

After completing the telephone call, Harrington and Meyer again met with the Union representatives. Harrington then informed MacIntyre and Waldenmaier that he had permission to show them a one-month bundle of the R3-227's which, in his opinion was a representative sample of the other records the Activity had in its possession. 4

3/ Harrington was officially promoted to the position on May 11, 1975.

4/ I construe Harrington's producing one month's records with a comment indicating these were the records he had permission to make available, was, in effect, a refusal to produce any more R3-227's, as MacIntyre obviously interpreted it to be. Although Harrington testified that Zaiser was not his supervisor and therefore he could have rejected the "advice" Zaiser gave him, in these circumstances I do not evaluate Zaiser's comments as the type of "advice" Harrington was likely to reject. The conversation between Harrington and Zaiser was not couched in terms of opinion which could freely be rejected or accepted. Moreover, Harrington was new to his job, with little background information on the dispute and under these circumstances would be inclined not to go beyond the specific authorization he had received from the chief labor relations officer to show the Union a "sample" of the available records.

A one month bundle of the R3-227's was handed to MacIntyre 5/ who quickly leafed through them and inquired as to the whereabouts of the line page notes. Harrington and Meyer responded that they had no knowledge of such notes and the Union representatives departed shortly thereafter. On the following day Meyer obtained the daily line page notes of roofers' assignments from Thomas.

By letter dated January 8, 1975, MacIntyre filed an unfair labor practice charge with the Activity with regard to denying Union representatives access to information relevant and necessary to the resolution of the roofers' grievance. Subsequently, on January 29, 1975 MacIntyre had a telephone conversation with Jerome Kaplan, Special Assistant to the Director, Management Operations Division. Kaplan was responsible to Liburd. At that time, Kaplan was aware of MacIntyre's prior request to see all records dealing with the assignment of roofers which could be used to resolve the grievance. MacIntyre expressed concern that the Activity's retention of the records during this period would give the Activity an opportunity to destroy or remove the records. MacIntyre asked Kaplan for permission to see the records. Kaplan told MacIntyre that MacIntyre would be allowed to see the records if he withdrew the unfair labor practice charge of January 8 or a "proper authority" ordered the Activity to comply with his request. MacIntyre would not withdraw the charge and the parties arranged for a meeting to be held January 31 to discuss the grievance.

Kaplan and MacIntyre met on January 31, 1975, and during a discussion of the grievance Kaplan informed MacIntyre that the Activity would, within thirty days, develop a formula to ascertain the amount of retroactive hazardous duty pay due to roofers. MacIntyre was agreeable to this course of action and the parties decided to put off the question of arbitrating the grievance until the Activity came forward with an offer of settlement. Kaplan had a sample of the R3-227's and line page notes with him and told MacIntyre that the Activity was willing to produce the records which were available. Kaplan pointed out, however, that the records alone would not fully support back pay for the entire period in question. MacIntyre deferred looking at any records, deciding rather to wait until he saw the Activity's proposed formula. While the records in question were used, in part, to establish a formula for retroactive payments to roofers, the Union thereafter never requested the production of the records. The grievance was disposed of through payments made under the formula and sending remaining disputed matters to arbitration.

5/ The remaining records were kept in an office adjacent to where the meeting occurred.

Discussion and Conclusions

Since the Grabeel report in December 1974 conditioned the payment of back-pay to roofers on the availability of records to support such payments, it was obvious to all involved that the records sought by the Union were necessary and relevant to a resolution of the matter. By January, 1975, the R3-227's had been located, were readily available and no valid reason existed in failing to give the Union access to those documents. The Activity's need for them was no greater than that of the Union. Both were equally interested in how they might be used to support back pay to the roofers. The records were already stacked in monthly bundles and the only sorting which might have been required was the ministerial act of arranging them chronologically. It would not have deprived the Activity of their use to have allowed the Union to review all the documents as requested rather than produce merely a one month sample.

However, the existence of and nature of information contained on the line page notes was less certain to the Activity on January 7, 1975 when MacIntyre made his demand to see these documents. Accordingly, the Activity's failure to produce the notes on the Union's demand was reasonable. Nevertheless, the Activity was fully aware of the notes involved for three full weeks after the demand and never made an effort to make the notes available to the Union. The Activity was also on notice that the demand was a continuing one for both the R3-227's and the line page notes through the unfair labor practice charge filed by the Union and MacIntyre's further demand to Kaplan on January 29. Kaplan's response to this demand demonstrates that the Activity declined to make the records fully available to the Union at all times prior to January 31.

For over three weeks, from January 7 to January 31, 1975, the Activity refused to make available records which were relevant and necessary to the Union's intelligent consideration of the roofers' grievance. Such conduct does not comply with the requirement under the Order that parties to a collective bargaining relationship meet and confer in good faith with one another. Accordingly, I find and conclude Respondent's conduct in refusing to provide the Union access to the records involved herein was violative of Section 19(a)(1) and (6) of the Order. 6/

6/ See Department of Navy, Dallas Naval Air Station, Dallas, Texas, A/SLMR No. 510; Department of Health, Education, and Welfare, Social Security Administration (Kansas City) A/SLMR No. 411; and Department of Defense, State of New Jersey, A/SLMR No. 323.

Recommendation

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that General Services Administration, Region 3, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by American Federation of Government Employees, Local 2151, AFL-CIO, any information relevant to the processing of a grievance, which information is necessary to enable American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by denying American Federation of Government Employees, Local 2151, AFL-CIO, information necessary to enable such labor organization as the exclusive representative to discharge its obligation to represent effectively all employees in the exclusively recognized unit.


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

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

(a) Post at its General Services Administration, Region 3 facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of General Services Administration, Region 3, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted.

The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 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: April 27, 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 withhold or fail to provide, upon request by American Federation of Government Employees, Local 2151, AFL-CIO, any information relevant to the processing of a grievance, which information is necessary to enable American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

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

WE WILL, upon request, make available to American Federation of Government Employees, Local 2151, AFL-CIO, all information relevant to the processing of a grievance, which information is necessary to enable American Federation of Government Employees, Local 2151, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(Agency or Activity)

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 15440, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

October 22, 1976

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

VETERANS ADMINISTRATION HOSPITAL,
WACO, TEXAS
A/SLMR No. 735

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1822 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by failing to consult in good faith with regard to the implementation of an arbitration award.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing an arbitrator's award and refusing to process the Complainant's grievance under the negotiated grievance procedure. In this regard, he found that although the Complainant had agreed to the Respondent's proposed plan for implementation, it was not bound by this agreement inasmuch as the Complainant gave timely notice of its change of position, no action had been taken which could not have been readily revoked without detrimental effect to the Respondent, and an inordinate amount of time had not passed between the original agreement and the withdrawal therefrom. The Administrative Law Judge further found that when the Complainant filed a grievance over the interpretation and application of the award the Respondent did not act in good faith when it refused to process the grievance. In his judgment, the Respondent's insistence that the Complainant be bound by the original agreement and its refusal to process the grievance under the negotiated agreement constituted a failure to bargain in good faith on the implementation of the award in violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary rejected the conclusion of the Administrative Law Judge. The evidence established that the Respondent met with the Complainant's representatives on or about September 5, 1974, and proposed a plan for implementation of the award. It is undisputed that the Complainant agreed to and accepted this proposal. Moreover, the Respondent, in accordance with this agreement, immediately began to effectuate the implementation of the award by issuing a notice of proposed change to a lower grade to Bonnie Nalor on September 6, 1974, by selecting Ruth Chappel for promotion from the reconstructed eligibility list, and by posting a new announcement on September 9, 1974, for the vacated Frances Mosley position. In this context, the Assistant Secretary concluded that the Respondent did not fail to meet and confer in good faith with respect to the implementation of the award but, instead, had discussed the implementation with the Complainant and proceeded to implement the award in the manner agreed upon. The Assistant Secretary further found that the Respondent did not act in bad faith by refusing to process the complainant's

grievance through the negotiated procedure. In this respect, he noted that the Respondent stated that it did not believe the matter involved the interpretation and application of the negotiated agreement and that if the Complainant was of the view that the grievance was arbitrable it should seek a determination on arbitrability from the Assistant Secretary in accordance with Section 13(d) of the Order. The Assistant Secretary concluded that such an action did not constitute a failure to meet and confer in good faith concerning the implementation of the award and, accordingly, ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
WACO, TEXAS

Respondent

and

Case No. 63-5605(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1822

Complainant

DECISION AND ORDER

On April 20, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

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

The complaint herein alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult in good faith with regard to the implementation of an arbitration award.

The essential facts of the case, which are not in dispute, are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary as indicated below.

On August 15, 1974, the parties to the instant dispute received an arbitration award wherein the arbitrator found that, in the course of filling three supervisory Clerk-Dictating Machine Transcriber positions, the Respondent violated Article XIX (Promotion Procedure) of the negotiated agreement and the U.S. Civil Service Commission (CSC) Merit Promotion Plan No. 73-33. In this respect, the arbitrator found that the Respondent, after certifying a list of highly qualified employees, had sought and accepted additional personnel information from all the 21 qualified applicants and used this information to construct a second certificate of highly qualified employees. On the basis of this second certificate, the Respondent selected Frances Mosley, Bonnie J. Nalor, and Dora Miller for the supervisory positions. The arbitrator instructed the Respondent to immediately offer to reconstruct the first promotion certificate using personnel information that was in the applicant's files prior to the closing date of the promotion announcement, January 10, 1974.

On or about September 5, 1974, the Respondent's Personnel Officer met with the Complainant's President and Chief Steward to discuss the implementation of the arbitration award. At this meeting, the Personnel Officer stated that pursuant to his interpretation of the arbitration award he reconstructed the certificate and Miller and Mosely remained on the list as highly qualified. However, Nalor did not remain on the highly qualified list and, accordingly, was found to be ineligible for selection. The Personnel Officer informed the Complainant's representatives that corrective action would be taken to remove Nalor from the supervisory position. The Respondent also stated that Mosley had transferred to another job 1/ and, therefore, if she was reselected for the supervisory position she obviously would not accept it and the Respondent would consider that vacant position to be outside the scope of the arbitrator's award and a new merit promotion announcement for her vacancy would be posted. The Complainant agreed to the Respondent's plan for implementation.

On September 6, 1974, the Respondent issued to Nalor a notice of proposed change to a lower grade and Ruth Chappel was selected from the reconstructed list to fill the Nalor vacancy. On or about September 7, 1974, Mosley was reselected for the supervisory clerk position and was transferred administratively from the Secretary, Medical Services position to the supervisory clerk position and then reassigned back to the secretary position. On September 9, 1974, the Respondent posted a merit promotion opportunity announcement for the position vacated by Mosley. Thereafter in a letter dated September 16, 1974, the Complainant voiced its opposition to the Respondent's proposal for implementation which had been agreed to on or about September 5, 1974, and asserted that Mosley's position, as well as Nalor's position, should be filled from the reconstructed list in order to satisfy the arbitrator's award. The Complainant contended that the promotion

1/ On July 28, 1974, prior to the issuance of the arbitrator's award, Mosley was selected for and had accepted a position as secretary to the Chief, Medical Services. Therefore, at the time the arbitrator rendered the award Mosley's supervisory clerk position was vacant.

vacancy announcement for Mosley's position was premature and should be cancelled inasmuch as the proper implementation of the award was still unresolved.

The promotion announcement for Mosley's position was not cancelled. Instead, on October 4, 1974, the Respondent withdrew Nalor's proposed notice to change to a lower grade and selected her for Mosley's vacated position. As a result, the Complainant, on October 11, 1974, filed a grievance under the negotiated grievance procedure contending that Nalor was shown favoritism and was preselected for Mosley's position in violation of the negotiated agreement. In response, the Respondent asserted that the matter was not grievable or arbitrable inasmuch as it did not involve a violation of the negotiated agreement. The Respondent further stated that, in accordance with the Order, the Complainant could seek a determination on the arbitrability of the matter from the Assistant Secretary. The Complainant then filed an Application for Decision on Grievability or Arbitrability. The application was subsequently withdrawn and the instant unfair labor practice complaint filed.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing the arbitrator's award and refusing to process the Complainant's grievance under the negotiated grievance procedure. In this regard, he found that, although the Complainant had agreed to the Respondent's proposed plan for implementation, it was not bound by this agreement inasmuch as the Complainant gave timely notice of its change of position, no action had been taken which could not have been readily revoked without detrimental effect to the Respondent, and an inordinate amount of time had not passed between the original agreement and the withdrawal therefrom. The Administrative Law Judge further found that the award became an extension of the negotiated agreement and that the Complainant's grievance over the interpretation and application of the award ordinarily would have been a proper subject for arbitration. However, he noted that the underlying matter in the case had already been arbitrated and the issue here involves how the award will be enforced or applied. The Administrative Law Judge concluded that the Respondent's insistence that the Complainant be bound by the original agreement and its refusal to process the grievance under the negotiated agreement constituted a failure to bargain in good faith on the implementation of the award in violation of Section 19(a)(1) and (6) of the Order.

Under the particular circumstances of this case, I reject the conclusions of the Administrative Law Judge. Thus, it is undisputed that the parties reached agreement concerning the interpretation and implementation of the arbitrator's award on or about September 5, 1974. In this regard, the evidence establishes that the Respondent's Personnel Officer met with the Complainant's President and Chief Steward and proposed a plan for implementation of the arbitration award. It is undisputed that the Complainant agreed to and accepted this proposal. Moreover, the Respondent, in accordance with this agreement, immediately began to effectuate the

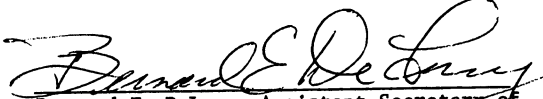
implementation of the award by issuing a notice of proposed change to a lower grade to Nalor on September 6, 1974, and by selecting Chappel for promotion from the reconstructed eligibility list. In addition, the Respondent posted a new promotion announcement on September 9, 1974, for the vacated Mosley position. In this context, I find that the Respondent did not fail to meet and confer in good faith with regard to the implementation of the award but, instead, had discussed the implementation with the Complainant and proceeded to implement the award in the manner agreed upon. I further find that the Respondent did not act in bad faith by refusing to process the Complainant's grievance through the negotiated procedure. In this respect, the Respondent stated that it did not believe the matter involved the interpretation or application of the negotiated agreement and, as such, was not grievable or arbitrable. It suggested, however, that the Complainant seek a determination on the matter from the Assistant Secretary in accordance with Section 13(d) of the Order. In my judgment, such action did not constitute a failure to meet and confer in good faith concerning the implementation of the award as the Complainant had a right under Section 13(d) of the Order to file an application requesting the Assistant Secretary to decide questions as to grievability or arbitrability of the grievance involved. Under all of these circumstances, I find that the Respondent did not violate Section 19(a)(1) and (6) of the Order.

Accordingly, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT the complaint in Case No. 63-5605(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 22, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

November 3, 1976

A/SLMR No. 736

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

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA
A/SLMR No. 736

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trade Council, Metal Trades Department, AFL-CIO (Complainant) alleging, in effect, that the Respondent violated Section 19(a)(6) of the Order by circumventing and bypassing the Complainant through a January 21, 1975, memorandum establishing a Productivity Improvement Plan whereby "productivity tours" were made in work areas.

The Chief Administrative Law Judge found, among other things, that the Respondent's use of "productivity tours" was an established past practice and did not constitute a change in employee working conditions. Accordingly, he concluded that the Respondent had no duty to meet and confer with the Complainant regarding the "productivity tours" or their impact and the procedures for implementing them, and he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary concurred with the conclusion of the Chief Administrative Law Judge that the "productivity tours" did not constitute a change in employee working conditions, and he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA

Respondent

and

Case No. 70-4714(CA)

FEDERAL EMPLOYEES METAL TRADES COUNCIL,
METAL TRADES DEPARTMENT, AFL-CIO

Complainant

DECISION AND ORDER

On July 12, 1976, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Chief Administrative Law Judge's Recommended Decision and Order.


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

1/ I agree with the conclusion of the Chief Administrative Law Judge that the Respondent was not obligated to meet and confer with the Complainant concerning the "productivity tours" which are the subject of the complaint, as the "productivity tours" were an established past practice and did not constitute a change in employee working conditions. Under these circumstances, I find it unnecessary to pass upon the Chief Administrative Law Judge's additional findings with respect to the applicability of Section 12(b)(4) of the Order in this matter.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4714(CA) be,
and it hereby is, dismissed.

Dated, Washington, D. C.
November 3, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
In the Matter of :
: MARE ISLAND NAVAL SHIPYARD :
: VALLEJO, CALIFORNIA :
: Respondent :
: and : Case No. 70-4714
: FEDERAL EMPLOYEES METAL :
: TRADES COUNCIL :
: METAL TRADES DEPARTMENT :
: AFL-CIO :
: Complainant :
.....

John C. Robinson
Secretary-Treasurer
Mare Island Metal Trades Council
P. O. Box 2195
Vallejo, California

Richard T. Barras
Technical Advisor to Union
1526 Amodore Street
Vallejo, California
For the Complainant

John J. Connerton
Labor Disputes and Appeals Branch
Office of Civilian Manpower Management
Department of the Navy
1735 North Lynn Street
Rosslyn, Virginia 22219
For the Respondent

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 re-utilization of an existing policy and practice and that Respondent was under no duty to bargain respecting procedures or impact.

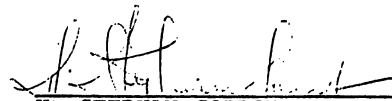
III. Management's Duty to Bargain Under Section 11(a) of the Order.

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.

November 3, 1976

A/SLMR No. 737

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

U.S. DEPARTMENT OF TRANSPORTATION,
U.S. COAST GUARD ACADEMY,
NEW LONDON, CONNECTICUT
A/SLMR No. 737

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 3655, (AFGE) seeking to include seven faculty members of the Activity in its exclusively recognized unit of professional employees of the civilian faculty at the Activity. The Activity contended that these seven employees were ineligible for inclusion in the unit inasmuch as they were supervisors and, further, that one of the employees was a nonprofessional employee.

The Assistant Secretary concluded that four of the employees in question, the Librarian, the Registrar, the Director of Cadet Musical Activities and the Section Chief in the Chemistry Section, were supervisors, and that three employees in question, the Assistant Librarian and two other Section Chiefs, were not supervisors. Further, he found, contrary to the Activity's assertion, that the Assistant Librarian was a professional employee and, therefore, was eligible for inclusion in the unit. Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF TRANSPORTATION,
U.S. COAST GUARD ACADEMY,
NEW LONDON, CONNECTICUT

Activity 1/

and

Case No. 31-9669(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3655

Petitioner 2/

DECISION AND ORDER CLARIFYING UNIT

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

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

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3655, hereinafter called AFGE, is the exclusive representative of a unit of all professional employees of the civilian faculty at the U.S. Coast Guard Academy, New London, Connecticut. In this proceeding, the AFGE seeks to clarify the status of the following seven employees: Paul Johnson, Librarian; Robert Dixon, Assistant Librarian; Philip Boeding, Registrar; Donald Janse, Director, Cadet Musical Activities; John Murphy, Section Chief, History and Government Section, Department of Humanities; Hugh Costello, Section Chief, Chemistry Section, Physical and Ocean Science Department; and Robert Boggs, Section Chief, Civil Engineering and Applied Mechanics Section, Department of Applied Science and Engineering. The AFGE contends that these employees are included within its exclusively recognized unit, while the Activity takes the

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

position that all seven employees are supervisors and, in addition, that Dixon is not a professional employee and, thus, would not be eligible for inclusion in the unit.

The mission of the Activity is to train and graduate individuals for service as commissioned officers in the United States Coast Guard. It is headed by a Superintendent and is divided into a number of divisions, with the divisions further subdivided into branches and academic departments. In some instances, the academic departments are divided into sections which consist of functional groupings of courses and faculty members dealing with specific academic areas.

Eligibility Issues

Paul Johnson, Librarian

Johnson is classified as the Activity's librarian. In this capacity, he is responsible for the operation of the library, including supervision of the library staff. In this regard, the evidence establishes that Johnson directs the work of the library staff, effectively recommends the hiring of employees, approves leave and prepares performance evaluations on library employees.

Under these circumstances, I find that Johnson is a supervisor as defined by the Order and should not be included in the exclusively recognized unit.

Robert Dixon, Assistant Librarian

Dixon is employed as the Activity's assistant librarian. As noted above, the Activity contends that Dixon is not eligible for inclusion in the exclusively recognized unit on the basis that he is a supervisor and also on the basis that he is not, in fact, a professional employee.

In my view, the evidence establishes that Dixon is a professional employee ^{3/} and is not a supervisor as defined by the Order. In this latter regard, the record reveals that Dixon is responsible for the library on a sporadic and intermittent basis and only in the librarian's absence. ^{4/} Further, any direction given by Dixon to other library

^{3/} Contrary to the Activity's assertion, I find that Dixon is a professional employee within the meaning of the Order. Thus, although he does not have a degree in Library Science, the record reveals that he has performed such work for a number of years and that he is engaged in work requiring knowledge of an advanced type in librarianship which is predominately intellectual in character and requires the consistent exercise of discretion and judgment.

^{4/} Cf. Army and Air Force Exchange Service, Richards-Gebaur Consolidated Exchange, Richards-Gebaur Air Force Base, Missouri, A/SLMR No. 219.

employees is routine in nature, within established guidelines and dictated by established procedures. Although Dixon evaluates other staff members, the record does not reflect the effectiveness of such evaluations and, further, in the absence of other supervisory indicia, the performance of this function alone is insufficient to establish that Dixon is a supervisory employee as defined by the Order. ^{5/}

Accordingly, as Dixon is not a supervisor, I shall clarify the exclusively recognized unit to include him within it.

Philip Boeding, Registrar

Boeding is the Activity's Registrar. The evidence indicates that he supervises a civilian clerical employee and a military yeoman. In this connection, the record reveals that Boeding effectively directs these employees in their duties and evaluates their performance. Moreover, he has effectively recommended hiring, promotion and termination of employees.

Under these circumstances, I shall clarify the unit to exclude Boeding on the basis that he is a supervisor.

Donald Janse, Director, Cadet Musical Activities

As Director of Cadet Musical Activities, Janse supervises the work of an assistant director of Cadet Musical Activities. The record reveals that he has the authority to hire, discharge and promote employees, or to effectively recommend such actions, and that, in addition, he effectively assigns work.

Under these circumstances, I shall exclude Janse from the exclusively recognized unit as a supervisor.

Robert Boggs, Section Chief, Civil Engineering and Applied Mechanics Section, Department of Applied Science and Engineering

Boggs is the Section Chief of the Civil Engineering and Applied Mechanics Section, which is one of three sections in the Department of Applied Science and Engineering. The record reflects that, despite his designation as Section Chief, Boggs functions primarily as a teaching professor rather than being involved in administrative duties. There is no evidence that Boggs assigns work to any other employee, or is involved in discharge or promotion actions. In this regard, although Boggs has served on a search committee for the filling of a vacant position in his section, the record indicates that the effective hiring authority resides with the Department head. Moreover, while Boggs has been involved

^{5/} See Section II of the Report and Recommendations of the Federal Labor Relations Council (January 1975).

in, or has been consulted with, in the execution of several types of performance appraisals, the record fails to establish that his recommendations or input leads to promotions or is effective for any other purpose.

Accordingly, I find that Boggs is not a supervisor and should be included in the exclusively recognized unit.

John Murphy, Section Chief, History and Government Section, Department of Humanities

Murphy is the Section Chief of the History and Government Section, which is 1 of 2 sections in the Department of Humanities. The record reveals that Murphy does not assign work, does not hire employees or recommend tenure, does not discipline employees, does not approve leave and does not determine curriculum. 6/

In the absence of evidence that Murphy performs supervisory functions within the meaning of Section 2(c) of the Order, I find that he is not a supervisory employee and should be included in the exclusively recognized unit.

Hugh Costello, Section Chief, Chemistry Section, Physical and Ocean Science Department

Costello is the Section Chief of the Chemistry Section of the Physical and Ocean Science Department. The record reveals that he effectively recommended the hiring of a clerical employee in the Physical and Ocean Science Department, that he gives work direction to a physical science technician, and that he has evaluated such employee's work performance.

Under these circumstances, I find that Costello is a supervisor within the meaning of the Order and should be excluded from the exclusively recognized unit on that basis.

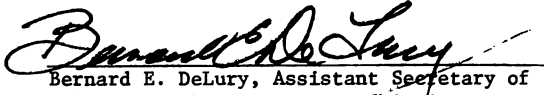
ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, AFL-CIO, Local 3655, on October 1, 1975, be, and it hereby is, clarified by including in such unit Robert Dixon, Assistant Librarian; Robert Boggs, Section Chief, Civil Engineering and Applied Mechanics Section, Department of Applied Science and Engineering; and John Murphy, Section Chief, History and Government Section, Department

6/ Like Boggs, Murphy served on a search committee which makes a recommendation to the Department head who has the effective hiring authority.

of Humanities; and by excluding from such unit Paul Johnson, Librarian; Philip Boeding, Registrar; Donald Janse, Director, Cadet Musical Activities; and Hugh Costello, Section Chief, Chemistry Section, Physical and Ocean Science Department.

Dated, Washington, D. C.
November 3, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

November 4, 1976

A/SLMR No. 738

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

DEPARTMENT OF DEFENSE,
AIR NATIONAL GUARD,
TEXAS AIR NATIONAL GUARD,
CAMP MABRY, AUSTIN, TEXAS
A/SLMR No. 738

This case involved an unfair labor practice complaint filed by the Texas Air National Guard AFGE Council of Locals (AFGE), alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing a memorandum prohibiting the consumption of alcoholic beverages on "Air Guard" facilities without first meeting and conferring with the AFGE, the exclusive representative of the civilian air technicians.

The Administrative Law Judge stated that "...a matter affecting working conditions within the meaning of Section 11(a) of the Order encompasses those perquisites, practices or privileges enjoyed by virtue of the employment relationship" and found that the use of alcoholic beverages at parties by the employees on "Air Guard" facilities was such an incident of employment constituting a working condition within the meaning of Section 11(a) which could not be changed unilaterally without proper notice to the exclusive representative and without affording it an opportunity to bargain on the subject.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that agency management's control of the consumption of alcoholic beverages on government facilities does not fall within the ambit of Section 11(a) of the Order. In this regard, he found that Section 11(a) describes limited areas of negotiation but does not embrace every issue of interest to agencies and exclusive representatives which indirectly may affect employees. Rather, Section 11(a) encompasses matters which materially affect, and have a substantial impact on, personnel policies, practices and general working conditions. The Assistant Secretary stated that, in his view, a restriction on the consumption of alcohol on a government facility did not reach such a level of importance.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE, AIR NATIONAL GUARD,
TEXAS AIR NATIONAL GUARD, CAMP MABRY,
AUSTIN, TEXAS

Respondent

and

Case No. 63-5604(CA)

TEXAS AIR NATIONAL GUARD AFGE COUNCIL
OF LOCALS

Complainant

DECISION AND ORDER

On April 9, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The complaint in the instant case alleges, in effect, that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing a memorandum prohibiting the consumption of alcoholic beverages on "Air Guard" facilities without first meeting and conferring with the Complainant, which is the exclusive representative of all civilian air technicians of the Texas Air National Guard. In his Recommended Decision and Order, the Administrative Law Judge stated that "...a matter affecting working conditions within the meaning of Section 11(a) of the Order encompasses those perquisites, practices or privileges enjoyed by

virtue of the employment relationship. The use of alcoholic beverages at parties by unit employees at Hensley Field was such an incident of employment." Finding that the use of alcoholic beverages at parties held at the Respondent's facility constituted a working condition within the meaning of Section 11(a) of the Order which could not be changed unilaterally without proper notice to the exclusive representative affording it the opportunity to bargain on the change, the Administrative Law Judge concluded that the directive issued on August 30, 1974, 1/ by the Respondent without notice to the Complainant and without affording it the opportunity to negotiate was violative of Section 19(a)(1) and (6) of the Order.

Under the particular circumstances of this case, I do not agree with the findings of the Administrative Law Judge. In my view, agency management's control of the consumption of alcoholic beverages at government facilities does not fall within the ambit of those personnel policies and practices and matters affecting working conditions which are contemplated by Section 11(a) of the Order. Section 11(a) describes the limited areas which are subject to the bargaining obligation on the part of agencies and exclusive representatives. In my view, it is not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees. Rather, Section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions. I do not consider a restriction on the consumption of alcohol on a government facility to reach such a level of importance. 2/

1/ This directive reads as follows:

SUBJECT: Alcoholic Beverages
TO: Each Division

The verbal policy of the Adjutant General's Department is furnished for compliance by all Air Guard personnel at this station: ALCOHOLIC BEVERAGES WILL NOT BE SERVED OR CONSUMED BY AIR GUARD PERSONNEL ON AIR GUARD FACILITIES

Signed:
FOR THE COMMANDER
Newton T. Williams, Major, TexANG
Administrative Officer


2/ It is noted that the agency memorandum herein did not prohibit or otherwise affect the practice of holding parties at Air Guard facilities for promotions, retirements, or other reasons.

Accordingly, in view of the foregoing, I conclude that the Respondent owed no obligation under Section 11(a) of the Order to notify, and, upon request, to meet and confer with the Complainant prior to the issuance of its memorandum concerning the consumption of alcohol, and that, therefore, its conduct herein was not in derogation of the parties' exclusive bargaining relationship. Hence, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5604(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



.....

In the Matter of .

DEPARTMENT OF DEFENSE, AIR NATIONAL .

GUARD, TEXAS AIR NATIONAL GUARD, CAMP. .

MABRY, AUSTIN, TEXAS .

Respondent . Case No. 63-5604 (CA)

and .

TEXAS AIR NATIONAL GUARD AFGE .

COUNCIL OF LOCALS .

Complainant .

.....

Ernest G. Boardman, Jr., and
Robert Gidding, Assistants to the Attorney
General
Texas Attorney General's Office
P.O. Box 12548
Austin, Texas 78711

For the Respondent

Pete Evans, National Representative of
The American Federation of Government
Employees, and Marion L. Crabb, President of
Texas Air National AFGE Council of Locals,
4347 South Hampton Road
Dallas, Texas 75232

For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Dallas, Texas, on September 30, 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 July 1, 1975, with reference to alleged violations of Sections 19(a)(1) and (6)

of the Order. The complaint filed by Texas Air National Guard AFGE Council of Locals (hereinafter called the Union or Complainant) alleged that Texas Air National Guard, Camp Mabry, Austin, Texas (hereinafter called the Activity or Respondent) violated the Order by issuing a memorandum prohibiting the consumption of alcoholic beverages on "Air Guard Facilities" without first consulting the Union as required by the Order.

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

1. Background

At all times since June, 1971, the Complainant herein has been the exclusive collective bargaining representative for all non-supervisory civilian air technicians employed by the Texas Air National Guard (hereinafter called TANG). The bargaining unit is composed of approximately 500 employees. Pursuant to 32 USC 709(b) 1/, military reserve membership is a condition of employment as a civilian air technician. The Activity does, however, have approximately 20 competitive jobs, essentially clerical in nature, where military reserve membership is not a condition of employment.

2. The Closing of TANG Clubs

On August 7, 1973, Major General Thomas S. Bishop, Adjutant General, Texas Air National Guard, issued an order concerning the operation of TANG clubs within his jurisdiction. The text of the order reads as follows:

1/ 32 USC 709(b) provides in pertinent part as follows: "(A) technician...shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position."

SUBJECT: Club Operations

1. Effective 1 September 1973, all clubs located in armories or other facilities owned, licensed or leased to the Texas Military Forces (Army and Air National Guard, Texas State Guard) which disperse alcoholic beverages of any type or character, will be closed. Accordingly, Section C, TANG Regulation 176-1, is rescinded.

2. The directive in the preceding paragraph does not prohibit the operation of facilities for sale of soft drinks, candies, cigarettes and other food items.

3. Established funds associated with club operations will be dissolved in the manner prescribed in paragraph 16, joint regulation TANG Regulation 230-2, TANG Regulation 176-2 and TSG Regulation 230-2. Resulting assets will be transferred to the Special Fund and administered as directed by above joint regulation.

This directive was sent to the commanders of the seven TANG bases and the associated Army National Guard Facilities under General Bishop's command. Most unit employees were made aware of this directive.

In order to implement the above quoted directive, Brigadier General Nowell O. Didear, the military commander at the Hensley Field TANG base, issued an order on August 21, 1973 captioned "Plan of Action in Closing the TANG Club." 2/ The order provided for the termination of alcoholic beverage sales at the Club, the sale of the existing liquor stock, the transfer of TANG Club assets to "the Special Fund," and the continued use of existing Club facilities for the sale of non-alcoholic food items. In relevant part this order states in paragraph (d):

2/ The order was addressed to "Club Officer, Club NCO, Board of Governors and Club Accountant". Apparently, knowledge of the existence of this order was not widespread.

"Stock not returnable (open bottles, outdated brands, etc.) will be marketed to the membership within 10 days. (For off base use only)." (Emphasis supplied)

3. The Use of Alcoholic Beverages and the August 30, 1974 Directive

The continued use of alcohol on the premises of Hensley Field at group parties was unaffected by the issuance of the Bishop and Didear orders. For a considerable number of years prior to August 1973 (perhaps back to 1948) and continuing to August 1974, parties were frequently held by employees at Hensley Field for various reasons including celebrating a promotion, retirement, or the completion of an inspection. Some parties were simply family get-togethers such as a Christmas party or a picnic barbecue. The parties involved primarily unit maintenance employees who numbered approximately 110 at Hensley Field. At the larger parties all maintenance employees were invited and these parties were held in the hanger or picnic area. Smaller parties consisting of approximately 15 employees occasionally took place in the propeller shop. Although the TANG Club was used for some of these parties prior to its closing, most of these parties were held at other locations at Hensley Field away from the Club. Beer was the primary alcoholic beverage served. During the year after the issuance of the Bishop and Didear orders of August 1973, approximately ten to twenty such parties involving unit employees occurred at Hensley Field, about the same frequency as in past years. General Didear and various officers and supervisors, all management officials, openly attended and participated in the parties on the base. On some occasions these same management officials arranged the parties and either ordered beer themselves or organized unit employees into refreshment committees for this purpose. While most of the parties occurred off duty time, some began on duty time and continued into off duty hours with the knowledge and consent of Activity management officials.

In August 1974, Colonel James T. Smith, Operations Officer at Hensley Field, notified the Office of the Adjutant General of an impending party to take place at the picnic grounds at Hensley Field. Smith asked General Belisario J. Flores, TANG Assistant Adjutant General, if it was permissible to serve alcoholic beverages at the party. After consulting with General Bishop, Flores

notified Smith that consumption of alcohol would not be permitted on any of the facility grounds at any time. The apparent confusion over this policy in the minds of TANG personnel prompted Flores to personally telephone the commanding officer of the seven TANG facilities to reaffirm what management considered to be an existing absolute prohibition on the use of alcoholic beverages on TANG premises.

On August 30, 1974, Major Newton T. Williams, TANG Administrative Officer at Hensley Field, issued the following directive which is the subject of this complaint:

SUBJECT: Alcoholic Beverages

TO: Each Division

The verbal policy of the Adjutant General's Department is furnished for compliance by all Air Guard personnel at this station:

ALCOHOLIC BEVERAGES WILL NOT BE SERVED OR CONSUMED BY AIR GUARD PERSONNEL ON AIR GUARD FACILITIES.

The Union and the Activity stipulated at the hearing that Respondent did not bargain or consult with the Union prior to the issuance of this memorandum.

Finally, Colonel Robert T. Mann, Technician Personnel Officer for the Texas Adjutant General's Department, testified that two TANG regulations exist prohibiting drinking intoxicants on duty hours. In the case of violations, these regulations prescribe disciplinary action to be taken, varying in severity depending on whether the safety of personnel has been jeopardized. 3/

Positions of the Parties

The Complainant contends that the consumption of alcohol on TANG premises has been a "past practice" enjoyed by unit employees with management's sanction for many years.

3/ No explicit testimony was adduced as to which management level promulgated these regulations.

As such, Complainant argues, the use of alcohol constitutes a "working condition" under Section 11(a) of the Order. 4/ Therefore, Respondent's failure to consult or negotiate with Complainant prior to the Williams memorandum of August 30, 1974 prohibiting said consumption constitutes an unfair labor practice under Sections 19(a)(1) and (6) of the Order.

Respondent takes the threshold position that a ban on the consumption of alcoholic beverages at Hensley Field was initiated by the Bishop memorandum on August 7, 1973. Therefore, according to Respondent, the instant complaint of April 24, 1975 was filed later than nine months after the alleged unfair labor practice in violation of Section 203.2 (b)(2) of the Regulations governing Executive Order 11491. Accordingly, Respondent contends that the instant complaint should be dismissed on the grounds that it was not timely filed.

Respondent further contends that the use of alcoholic beverages at Hensley Field is not a matter concerning working conditions within the meaning of Section 11(a) of the Order; that the August 30, 1974 memorandum did not change the Activity's policy but only amounted to clarification of a purely military directive; and that in any event the August 30 directive did not constitute a significant change in the Activity's policy on the use of alcohol at Hensley Field.

Discussion and Conclusion

I find and conclude that the use of alcoholic beverages at parties as described herein is a matter affecting working conditions within the meaning of Section 11(a) of the Order.

For many years employers in the private sector have provided various recreational programs to employees such as athletic and social activities including dancing, card

4/ Section 11(a) of the Order provides, in relevant part: "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate...."

games, parties, banquets and smokers. 5/ These activities have been considered employee services, which term is used "...to describe a wide range of benefits and assistance furnished employees because of, or as a part of, the employment relationship." 6/ Indeed, in the private sector the National Labor Relations Board has considered such matters as Christmas parties 7/, smoking privileges 8/, rest and lunch periods 9/ and coffee breaks 10/ to be conditions of employment within the meaning of Section 8(d) of the National Labor Relations Act. 11/

In my view, a matter affecting working conditions within the meaning of Section 11(a) of the Order encompasses those perquisites, practices or privileges enjoyed by virtue of the employment relationship. The use of alcoholic beverages at parties by unit employees at Hensley Field was such an incident of employment. Accordingly, I find such use constitutes a working condition within the meaning of the Order and may not be changed unilaterally without proper notice to the exclusive representative and affording it the opportunity to bargain on the subject.

Respondent urges that when General Bishop issued his August 1973 memorandum closing all TANG Clubs which disperse alcoholic beverages, he intended to completely prohibit the consumption of alcoholic beverages on guard facility premises. According to Respondent, the Didear memo implementing the Bishop directive underscored this

5/ D. Yoder, Personnel Management and Industrial Relations, (3rd ed. Prentice-Hall, Inc. 1948), at 650.

6/ Id. at 621.

7/ Ellis-Klatscher and Co., 40 NLRB 1037

8/ Wytherville Knitting Mills, Inc., 78 NLRB 640

9/ National Grinding Wheel Company, Inc., 75 NLRB 905

10/ Luby Learning, Inc., 198 NLRB No. 139.

11/ Section 8(d) of the National Labor Relations Act provides in relevant part: "...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages hours and other terms and conditions of employment...."

allegedly total prohibition by prescribing that the extant Hensley Field liquor stock which was to be sold to the TANG Club membership was "for off base use only."

I conclude that Respondent should be held to account for what was actually said in these directives and not what Respondent allegedly intended to say. The Bishop directive is expressly limited to the closing of clubs which disperse alcoholic beverages. It makes no mention of prohibiting the parties in the Hensley Field flight hangar, propeller shop or the picnic area where alcoholic beverages were customarily served. Further, the August 1973 Didear memo's prescription "for off base use only" applies only to liquor stock sold to the club membership as part of the closing of the Hensley Field TANG Club. Moreover, it is clear that General Didear did not interpret his own memorandum so as to entirely exclude the use of alcohol on the premises. Thus, the practice of having parties at which alcohol was served thereafter continued uninterrupted and management officials openly participated in them. Whatever the intended policy, the Activity's policy in fact during the year prior to Williams' directive of August 1974 did not preclude the use of alcoholic beverages at parties at Hensley Field. 12/

In this regard, the New Mexico Air National Guard case 13/ is on point. In that case, the Activity had instituted a policy concerning grooming which it was then lax in enforcing. It was found that the Activity had announced by memorandum a significant departure with respect to the enforcement of the existing grooming policy. The Activity's defense that this memo was merely a reiteration of the existing policy was rejected. However, because the matter of grooming was determined to be non-negotiable, the unilateral change did not constitute a violation of Section 19(a)(6) of the Order. Presumably, therefore, if grooming were a negotiable matter, the unilateral change would then

12/ In light of the foregoing, I conclude that the total prohibition relative to drinking intoxicants of Hensley Field was affected not by the Bishop memorandum of August 1973, but by the Williams memorandum of August 1974. Accordingly, since the April 24, 1975 filing date of the subject complaint falls within 9 months of the alleged unfair labor practice, this complaint was timely filed pursuant to Section 203.2(b)(3) of the LMSA Regulations. Respondent's motion to dismiss the instant complaint which was made at the hearing and renewed in its brief is therefore denied.

13/ New Mexico Air National Guard, Santa Fe, New Mexico A/SLMR No. 362.

have violated Section 19(a)(6). Nevertheless, by its failure to give the union an opportunity to meet and confer regarding the procedures by which the change would be implemented, and the impact on affected employees, the Assistant Secretary found the activity violated Section 19(a)(6) of the Order.

Similarly, in the Army Corps of Engineers case 14/, an official policy provided that employees were to be positioned at their job sites at the beginning and end of their work day. The Administrative Law Judge found this policy was modified however by the first line supervisor who permitted unit employees to report to, and after eight hours leave from, their duty stations. It was further found that it was not the announced policy but the policy in practice, as implemented by the first-line supervisor, which constituted a working condition. Accordingly, the Administrative Law Judge held the activity's unilateral reinstatement of the official policy violated Sections 19(a)(1) and (6) of the Order.

I conclude, therefore, that whether Major Williams' memorandum constituted a new policy or an attempt to strictly enforce an old existing policy, its issuance without notifying the Union or giving it an opportunity to negotiate, consult or confer about the change, constituted a violation of Section 19(a)(6) of the Order. Further, I find that such conduct by the Respondent is also violative of Section 19(a)(1) of the Order. 15/

Finally, I reject Respondent's contentions that the August 1974 Williams memorandum was a military directive and did not constitute a significant change in the Activity's policy. The change brought about by the Williams directive did not effect the military aspects of unit employees' relationship with the Activity in any respect. Further, the change was indeed significant in that it completely

14/ U.S. Army Corps of Engineers, Philadelphia District, Case no. 20-4753(CA), Recommended Decision and Order dated November 7, 1975.

15/ Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454.

prohibited the use of alcoholic beverages at parties held frequently and attended by a substantial number of unit employees. 16/ Whether unit employees could obtain alcoholic drinks at other clubs at Hensley Field is immaterial.

Recommendation

Having found that Respondent has 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.

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 Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, shall:

1. Cease and desist from:

(a) Unilaterally changing the alcoholic beverages policy without notifying the Texas Air National Guard AFGE Council of Locals, 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) 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:

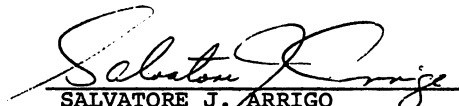
16/ The two TANG regulations prohibiting drinking intoxicants on duty hours are not applicable to the parties herein, the majority of which occurred primarily off duty time. In any event, the Activity never enforced these regulations with regard to the parties at issue.

(a) Rescind its August 20, 1974 prohibition of the use of alcoholic beverages by Air Guard personnel at Hensley Field facilities and reinstate its previously existing practice with respect to said use.

(b) Notify the Texas Air National Guard AFGE Council of Locals, or any other exclusive representative, of any intended change in the alcoholic beverage policy 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 Hensley Field, Dallas, Texas, copies of th 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, with 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: 9 APR 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 RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by unilaterally changing the policy with respect to the use of alcoholic beverages on Texas Air National Guard Facilities, without notifying Texas Air National Guard AFGE Council of Locals 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 reinstate our policy of allowing, with respect the use of alcoholic beverages by unit employees at parties on Texas Air National Guard facilities.

WE WILL notify Texas Air National Guard AFGE Council of Locals, or any other exclusive representative, of any intended change in the alcoholic beverage policy 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 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106

November 4, 1976

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

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA
A/SLMR No. 739

This case arose as a result of an unfair labor practice complaint filed by the National Treasury Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, based upon the alleged statement of the Respondent's supervisor to a union representative that as a result of his role in processing grievances his chances for promotion were negligible and that he would spend the remainder of his career in his present position.

The Administrative Law Judge found that the Respondent's supervisor had, in fact, made the alleged statement and, hence, had violated Section 19(a)(1) of the Order. In addition, he found that the reassignment of the union representative, subsequent to said statement, was predicated, in part, on his grievance activities and, thus, was violative of Section 19(a)(2) of the Order.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the statement involved was violative of Section 19(a)(1). However, with respect to the subsequent reassignment of the union representative, the Assistant Secretary found that the issue was not properly raised in the precomplaint charge, the complaint, or in the Complainant's posthearing motion to amend the complaint. Consequently, he ordered that the Section 19(a)(2) allegation be dismissed.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA

Respondent

and

Case No. 42-3057(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On March 16, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, 1/ except as modified herein. 2/

1/ At footnote 2 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to Section 203.14(g) of the Assistant Secretary's Regulations, rather than Section 203.16(g). This inadvertence is hereby corrected.

2/ The Administrative Law Judge granted the Complainant's motion, made in its posthearing brief, to amend the original complaint to conform to the evidence. Specifically, the basis of the complaint was amended to add the following language: "The threat by Supervisor Bondi that Inspector Rizzo would not be promoted because of his grievance activity would tend to discourage others from union membership." Rizzo's reassignment from the Training Department to Baggage Inspection was not specifically alleged as improper in the precomplaint charge, the complaint, or in the Complainant's post-hearing motion to amend the complaint. Consequently, in my view,

(Continued)

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. Custom Service, Region IV, Miami, Florida, shall:

1. Cease and desist from:

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 right under the Order to file and/or process grievances.


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

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

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

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

Dated, Washington, D.C.
November 4, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

2/ such reassignment was not properly raised in this proceeding. Therefore, I shall order that the allegation that the reassignment of Rizzo was violative of Section 19(a)(2) of the Order be dismissed.

NOTICE TO ALL EMPLOYEES

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

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order by threatening them with loss of promotions and undesirable assignments for exercising their right under the Order to file and/or process grievances.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPENDENT SCHOOLS,
EUROPEAN AREA
A/SLMR No. 740

This case arose as a result of a petition filed by the Overseas Education Association, National Education Association (OEA), seeking a unit of all professional employees of the Ramstein Elementary School. The Intervenor, Overseas Federation of Teachers, AFL-CIO (OFT), contended that the petition herein was barred by its European Area negotiated agreement with the Activity. The OEA argued, however, that pursuant to a merger of two elementary schools in July and August 1974, the petitioned for unit is a newly created unit no longer covered by the OFT's agreement with the Activity.

The Assistant Secretary found that the instant petition should be dismissed. In this connection, he found that the merger herein did not result in the creation of a new unit involving an operation with major personnel and administrative changes. Nor did it result in the professional employees of the Ramstein Elementary School having a new community of interest separate and apart from the unit as described in the existing negotiated agreement between the Intervenor and the Activity. The Assistant Secretary noted that a substantial portion of the employees from the aforementioned elementary schools were transferred without an accompanying change in the character of their jobs, their functions, or their supervision.

Accordingly, the Assistant Secretary found that the OFT's European Area negotiated agreement covered all the professional employees of both of the former schools who are now commingled at the Ramstein Elementary School and is a bar to the instant petition. He, therefore, ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPENDENT SCHOOLS,
EUROPEAN AREA

Activity

and

Case No. 22-6578(RO) 1/

OVERSEAS EDUCATION ASSOCIATION,
NATIONAL EDUCATION ASSOCIATION

Petitioner

and

OVERSEAS FEDERATION OF TEACHERS,
AFL-CIO

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Eugene M. Levine. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

1/ The subject case initially was consolidated for hearing with Case No. 22-6581(CU). Prior to the hearing, however, the latter case was withdrawn by the Overseas Federation of Teachers with the approval of the Regional Administrator.

2. The Petitioner, Overseas Education Association, National Education Association, seeks an election in a unit of all professional employees of the Ramstein Elementary School, excluding substitutes, management officials, supervisors, and employees engaged in Federal personnel work in other than a purely clerical capacity.

The Intervenor, Overseas Federation of Teachers, AFL-CIO, asserts that its current European Area negotiated agreement is a bar to this proceeding. The Petitioner contends, however, that the consolidation of the Ramstein Elementary School, North, and the Ramstein Elementary School, South, in July and August 1974, resulted in the creation of a new school which is not covered by the Intervenor's negotiated agreement with the Activity and, consequently, no agreement bar exists to the instant petition. The Activity takes no position on the issues involved herein.

On June 20, 1973, the Intervenor was certified as the exclusive representative of professional employees at a number of the Activity's overseas dependent schools in Europe. Thereafter, on June 4, 1974, the Intervenor and the Activity entered into a negotiated agreement effective for three years from the date of approval, September 6, 1974. The agreement covered professional employees at 34 schools in Europe, including the Ramstein Elementary School, North (Northside), the Ramstein Elementary School, South (Southside) and the Ramstein Jr. High School (Jr.High). The record shows that the Northside, Southside and Jr. High schools were all located on the Ramstein Air Force Base (Base), Germany, within a two mile area and that prior to the merger herein the Northside and Southside elementary schools contained approximately 61 professional employees and 1,700 pupils.

In July and August 1974, the Activity merged the Northside and Southside elementary schools into one elementary school called the Ramstein Elementary School. The merged Ramstein Elementary School was located in 2 newly constructed buildings on the Base and in space formerly housing the Jr. High School. The merged elementary school had a total complement of 79 professional employees and 2,000 pupils. As a result of the merger, the Jr. High was moved, in part, to the location previously occupied by the Northside School. The evidence establishes that following the merger of the elementary schools herein the Ramstein Elementary School had essentially the same supervision and administrative control, personnel policies and practices, teaching staff, grade structure and usage of professionals as the former Northside and Southside elementary schools. Approximately 70 percent of the professional staff at the Ramstein Elementary School had worked previously at either the Northside and Southside schools and the teachers involved did not require permanent change of status authorizations to resume their work at the Ramstein Elementary School. The record also discloses that following the merger herein unit employees continued to be primarily teachers, librarians, counselors and educational specialists. Moreover, while the record shows that following the merger of the Northside and Southside schools the Ramstein Elementary School experienced a slight increase in pupil enrollment and teaching staff, it also discloses that the Ramstein Elementary School basically contained a regrouping of pupils from the identical

districts that were formerly associated with the Northside and Southside schools and that professional job classifications largely remained intact following the merger.

November 5, 1976

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

Under all of these circumstances, I find that the merger of the Northside and Southside elementary schools did not result in the creation of a new unit involving an operation with major personnel and administrative changes. Nor did it result in the professional employees at the Ramstein Elementary School having a new community of interest separate and apart from the unit as described in the existing negotiated agreement between the Intervenor and the Activity. Thus, as indicated above, the evidence establishes that a substantial portion of the employees from the Northside and Southside elementary schools were transferred without an accompanying change in the character of their jobs, their functions, or their supervision. Accordingly, I find that the Intervenor's European Area negotiated agreement covers the professional employees of both the former Northside and the Southside elementary schools who are now commingled at the Ramstein Elementary School and, therefore, is a bar to the petition in this matter. I shall, therefore, order that the instant petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 22-6578(RO) be, and hereby is, dismissed.

Dated, Washington, D. C.
November 5, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

MANAGEMENT SYSTEMS DEVELOPMENT OFFICE
DETACHMENT, NAVAL AIR REWORK FACILITY,
JACKSONVILLE NAVAL AIR STATION,
JACKSONVILLE, FLORIDA
A/SLMR No. 741

This case involved a petition filed by the American Federation of Government Employees, Local 696, AFL-CIO (AFGE), seeking an election in a unit of all employees of the Management Systems Development Office Detachment, Naval Air Rework Facility, Jacksonville Naval Air Station, Jacksonville, Florida. The claimed employees, located in Jacksonville, Florida, are in the Work Load Control Department (WLCD) of the Department of the Navy's Management Systems Development Office (MSDO) which is headquartered in San Diego, California. The MSDO contended that only an Activity-wide unit of all its employees located in Jacksonville, Florida, and San Diego, California, would be appropriate for the purpose of exclusive representation; that the WLCD employees in Jacksonville do not share a community of interest separate and distinct from the other MSDO employees located in San Diego; and that a unit limited to MSDO employees in Jacksonville would lead to fragmented bargaining and would not promote effective dealings and efficiency of agency operations.

Under all of the circumstances, the Assistant Secretary concluded that the claimed unit was not appropriate for the purpose of exclusive recognition as the claimed employees, located in Jacksonville, Florida, do not possess a clear and identifiable community of interest separate and apart from the other employees of the MSDO. In this regard, the Assistant Secretary found that all MSDO employees, including those in the WLCD, are subject to the same personnel policies and procedures; have similar or the same job classifications; have the same types of skills; share a common mission; and are subject to the same administrative grievance procedure. It was noted that the area of consideration for all General Schedule (GS)-3 to GS-13 positions is Activity-wide and reduction-in-force procedures are the same for all MSDO employees, even though there were no bumping rights between employees in Jacksonville and San Diego. The Assistant Secretary found also that all the departments of the MSDO, including the WLCD at Jacksonville, operate under the centralized control of the MSDO Director in San Diego who has the authority to promulgate personnel policies and procedures for all the MSDO employees; that the Director of the MSDO in San Diego is the only individual with the authority to negotiate a collective bargaining agreement for the MSDO employees; and that the Director of the MSDO has the final authority in resolving grievances under the agency grievance procedure. Moreover, the Assistant Secretary concluded that the proposed unit, if established, would artificially fragment the MSDO and could not be reasonably expected to promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MANAGEMENT SYSTEMS DEVELOPMENT OFFICE
DETACHMENT, NAVAL AIR REWORK FACILITY,
JACKSONVILLE NAVAL AIR STATION,
JACKSONVILLE, FLORIDA

Activity

and

Case No. 42-3328(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 696, AFL-CIO

Petitioner

DECISION AND ORDER

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

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

1. The labor organization involved claims to represent certain employees of the Activity.

2. The American Federation of Government Employees, Local 696, AFL-CIO, hereinafter called AFGE, seeks an election in a unit of all employees of the Management Systems Development Office Detachment, Naval Air Rework Facility, Jacksonville Naval Air Station, Jacksonville, Florida, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order. ^{1/} The claimed employees, located in Jacksonville, Florida, are in the Work Load Control Department (WLCD) of the Department of the Navy's Management Systems Development Office (MSDO) which is headquartered in San Diego, California. The MSDO contends that only an Activity-wide

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

unit of all its employees located in Jacksonville and San Diego would be appropriate for the purpose of exclusive recognition. ^{2/} In this regard, it asserts that the WLCD employees of the MSDO located at Jacksonville do not share a community of interest separate and distinct from the other MSDO employees located in San Diego and that a unit limited to MSDO employees in Jacksonville would lead to fragmented bargaining and would not promote effective dealings and efficiency of agency operations.

The MSDO is subdivided into 7 organizational elements, 3 offices and 4 departments. Thus, in addition to the WLCD located in Jacksonville, Florida, it consists of the Maintenance Support Systems Department; the Nalcomis Department; the Fiscal, Supply, 3M Department; the Administrative Office; the Industrial Planning Office; and the Systems Support Office, all of which are located in the San Diego, California, area.

The mission of the MSDO is to develop a management information system for Naval Air Systems Command activities and Naval Air Rework Facilities (NARF's) and to man Industrial Air Stations and Squadrons and perform intermediate maintenance activities. The record reveals that the MSDO is primarily comprised of employees classified as computer specialists, computer programmers and computer analysts and that the MSDO's WLCD employees physically located in Jacksonville have basically the same types of skills, similar or the same job classifications, and similar training as the other MSDO employees assigned to San Diego. Further, the WLCD employees in Jacksonville develop programs for the same computers as other MSDO employees. As part of the MSDO's integrated mission, the computer programmers and computer specialists of the WLCD in Jacksonville are responsible for the design, development, implementation, modification, and updating of the Management Information System which is used by the various NARF's for informal production control. In this connection, the WLCD is headed by the Director of the MSDO Jacksonville Detachment who acts as the representative of the Director of the MSDO in coordinating all the work in the MSDO Jacksonville Detachment. The record reflects that the WLCD Director maintains an office in Jacksonville as well as one in San Diego where he has routine and frequent contact with the MSDO Director, both in person and by telephone.

The MSDO Director in San Diego is responsible for the coherent operation of the mission of all the MSDO's various departments, including the WLCD. In this regard, the record reveals that the Director of the MSDO has the centralized authority to promulgate personnel policies and procedures for all the MSDO employees, including those in the WLCD in Jacksonville. Additionally, the Director of the MSDO is the only person in the Activity authorized to negotiate a collective bargaining

^{2/} The record reveals that there are some 124 nonsupervisory employees employed by the MSDO and that, of the 35 employees in the WLCD assigned to the Jacksonville Detachment, four are physically located in San Diego. The remaining 89 employees of the MSDO are located in the other various departments of the MSDO in San Diego.

agreement for the MSDO employees. In connection with his responsibility for personnel policies, the Director of the MSDO has authorized the Naval Air Systems Command Representative Pacific (REPAC), subject to his direction, to promulgate personnel policies, procedures, and merit promotions for MSDO employees. The REPAC has, in turn, entered into cross-servicing agreements with the various NARF's to provide administrative services for the MSDO employees.

The record indicates that MSDO regulations apply to all MSDO employees regardless of location, and that MSDO employees are subject to the same environmental pay differential policies, are classified in the same manner, have the same Equal Employment Opportunity complaint procedure, are subject to the same administrative grievance procedure and employee relations practices, and have the same adverse action appeal procedures. Moreover, the area of consideration for promotions at the General Schedule (GS) 3 to 13 levels is Activity-wide and reduction-in-force procedures are the same for all MSDO employees, even though the MSDO's WLCD employees in Jacksonville do not have bumping rights with respect to the MSDO employees in San Diego or vice versa.

Based on all the foregoing circumstances, I find that the unit sought in the instant case is not appropriate for the purpose of exclusive recognition as the claimed employees located in Jacksonville, Florida, do not possess a clear and identifiable community of interest separate and apart from the other employees of the MSDO. It was noted particularly in this regard that all MSDO employees, including those of the WLCD, are subject to the same personnel policies and procedures established by the REPAC; have similar or the same job classifications; have the same types of skills; share a common mission; and are subject to the same administrative grievance procedure. Also, the area of consideration for all GS-3 to GS-13 positions is Activity-wide and reduction-in-force procedures are the same for all MSDO employees, even though there are no bumping rights between employees of Jacksonville and San Diego. Further, all departments of the MSDO, including the WLCD at Jacksonville, operate under the centralized control of the MSDO Director in San Diego who is the only individual with the authority to negotiate a collective bargaining agreement for the MSDO employees and who has the final authority in resolving grievances under the agency grievance procedure. Moreover, in my view, the proposed unit, if established, would artificially fragment the MSDO and could not be reasonably expected to promote effective dealings and efficiency of agency operations. Accordingly, as the unit sought is inappropriate for the purpose of exclusive recognition, I shall order the petition herein be dismissed. 3/

3/ Cf. U.S. Department of Agriculture, Agricultural Research Service, Budget and Finance Division, Accounting Services Branch, New Orleans, Louisiana, A/SLMR No. 579.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-3328(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 5, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

November 8, 1976

A/SLMR No. 742

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

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS,
TACTICAL AIR COMMAND,
LANGLEY AIR FORCE BASE,
VIRGINIA
A/SLMR No. 742

This case involved an unfair labor practice complaint filed by Frieda B. Cutts (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by refusing to allow her representation by her exclusive representative during the course of a grievance meeting.

The Administrative Law Judge found, among other things, that the discussion of the grievance in question was stopped during the course of the meeting when the Complainant indicated that she had unilaterally determined that it should not continue without the presence of her exclusive representative, and that it was undisputed that the grievant's representative was present at all subsequent discussions of the grievance.

Noting that the Respondent had not denied the Complainant the right to be represented by her exclusive representative at a discussion of the grievance involved, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE HEADQUARTERS,
TACTICAL AIR COMMAND, LANGLEY AIR FORCE
BASE, VIRGINIA

Respondent

and

Case No. 22-6262(CA)

FRIEDA B. CUTTS

Complainant

DECISION AND ORDER

On July 30, 1976, Administrative Law Judge Peter McC. Giese issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

The instant complaint alleged that the Respondent violated Section 19(a)(1) of the Order by denying the Complainant, Frieda B. Cutts, union representation at a grievance meeting. 1/ The Administrative Law Judge

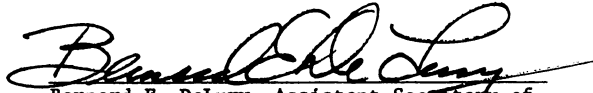
1/ The "formal papers" in the instant case, including the complaint and the Notice of Hearing, were not formally introduced into the record at the hearing. Thereafter, the Administrative Law Judge transferred the "formal papers" to the Assistant Secretary and issued an Order to Show Cause why such "formal papers" should not be entered into evidence as "ALJ # 1". The Assistant Secretary has accepted the "formal papers" and hereby makes them part of the record in accordance with Section 203.23 (b) of the Assistant Secretary's Regulations.

found that "...the discussion of the grievance stopped at the moment Ms. Cutts indicated that she had unilaterally determined that it should not continue without the presence of her "'rep.'" and that "...it is undisputed that ...the grievant's "'rep.'" [was] present at all subsequent discussions of the grievance" Under these circumstances, as the evidence establishes that the Respondent did not, in fact, deny the Complainant the right to be represented by her exclusive representative at a discussion of the grievance involved, I concur in the Administrative Law Judge's recommendation that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6262(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 8, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



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In the Matter of .
 .
Department of the Air Force .
Headquarters, .
Tactical Air Command, .
Langley Air Force Base, .
Virginia, .
 .
Respondents .
 .
and .
 .
Frieda B. Cutts, .
 .
Complainant .
.....

Case No. 22-6262 (CA)

Captain Edmund K. Brehl, Esquire
Labor Relations Counsel
Tactical Air Command
Langley Air Force Base
Virginia 23365
For the Respondent

Ms. Joan Greene
4500 Air Base Wing/TFIG
Langley Air Force Base
Virginia 23365
For the Complainant

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the terms of Executive Order 11491, as amended (hereafter, "the Order") by Ms. Frieda B. Cutts against Department of the Air Force, Headquarters Tactical Air Command. Ms. Cutts asserts that respondent violated section 19(a) of the Order by failing and refusing to allow her to be represented at a grievance discussion by the exclusive representative of the bargaining unit of which she was a member.

A hearing was held on April 28, 1976 in Washington, D. C. Briefly, the record shows the following circumstances.

Statement of the Case

Ms. Freida Cutts testified that in 1975 1/, she was employed as secretary to the Target Division of Tactical Air Command Headquarters. Sometime in January, she was "given" two hours leave to take care of personal business. Although it was her understanding that this time off was in compensation for extra (unpaid) time worked, she later discovered that the time and attendance clerk had "docked" her (deducted annual leave on her record). She complained to Colonel Carl Gerchman, Chief of the Targets Branch, who promised to "take care of it". Later, in March, Ms. Cutts spoke to Major James Rhodes, Acting Chief of the Targets Branch, concerning time off for a dental appointment. According to Cutts, he told her "you have this time coming" and need not "sign for this time". She later discovered that this time had been charged against sick leave by the time and attendance clerk.

When the time clerk summarily presented Ms. Cutts with her time card for certification of sick leave, she again complained to Colonel Gerchman and they both proceeded to the office of Colonel Krejci, next in line of command.

Colonel Krejci explained that it was he who had directed the time and attendance clerk to charge Ms. Cutts' sick leave and that the matter had apparently arisen because of the failure of Major Rhodes to communicate his desires to Colonel Krejci.

1/ All dates are 1975.

Later Ms. Cutts requested a private meeting with Colonel Clyde Dodgen, Deputy Chief of Staff for Intelligence. Colonel Dodgen met with her and, according to Cutts stated that "there seems to be a problem between you and the timekeeper" and that he would not hesitate to "reduce my work force" in the event "the bickering continues".

All witnesses agree that the dispute centered around the implementation of an instruction concerning time and attendance and, specifically, who, of the supervisory personnel, were authorized to grant or approve leave.

On March 13, Ms. Cutts, assisted by Ms. Joan Greene, then president pro tem of the labor organization representing the unit of which Ms. Cutts was a member, orally presented a grievance to Colonel Gerchman. According to the Colonel, he reduced the grievance to a written memorandum which he made available to Ms. Greene. After having the memorandum typed, he presented it to Ms. Cutts in order that she might read it to Ms. Greene "to make sure that it stated the grievance as presented".

On the afternoon of March 14, Colonel Dodgen requested that Ms. Cutts meet with him. When Colonel Gerchman informed Ms. Cutts, she told him that she didn't know whether she should "go without a Rep. [sic]." Ms. Cutts testified that when Colonel Gerchman told her that she was free to call her union representative, she replied that in view of the lateness in the day (Friday), she would go "on and see if we can settle it".2/

She proceeded to Colonel Dodgen's office where she discussed the grievance with him in the presence of the Colonel's Deputy, Colonel Manning. Ms. Cutts testified that Colonel Dodgen opened the discussion by telling her that he had heard that she believed he had threatened to fire her, he denied doing so. She then told him that she wanted to know why "time...was taken from me" and he replied, "that's the way its going to be...they're going to ride herd on you as long as you're down there...". She then told him that "you apparently want to discuss the grievance... I have been advised by Ms. Joan Greene, who's president of the Union, not to discuss this grievance without her being present". He replied, "well, what can she do for you that I can't...", and to her further insistence, that he was "not having her hammering at me". According to Ms. Cutts, Colonel Manning

2/ Ms. Cutts stated that she also knew that Ms. Greene was ill and unavailable.

interposed and explained that what Colonel Dodgen "means is we want to resolve this before the Union comes in". She replied that the informal stage of the grievance process had been passed.

Following interruption by a telephone conversation, Ms. Cutts asserts that Colonel Dodgen told her, "no, I will not meet with your Union Representative, I will meet with you and that is all". The meeting was then terminated.

Although there is differing testimony as to what occurred at the March 14 meeting, all witnesses agree that later meetings were held at which the Union Representative, the grievant and various management representatives, including the civilian labor relations officer, were present. The grievance was eventually resolved, albeit not to the complete satisfaction of the parties.

Findings of Fact and Conclusions of Law

All witnesses were credible. Predictably, their testimony reflects individual perceptions as well as varying degrees of accuracy in recall of events and conversations. For reasons discussed, infra, such conflicts as appear on the record need not be resolved in order to reach determination based upon substantial evidence on the record as a whole.

Thus, the gravamen of this case is the refusal by management to allow a grieving employee to be represented by an officer of the labor organization which was the exclusive agent of the employee in a unit appropriate for collective bargaining.^{3/}

It is undisputed that Ms. Cutts knew at the time Colonel Dodgen requested that she come to his office that her "rep." was ill and unavailable. She indicated that she was aware of the subject matter to be discussed with Dodgen. She testified to having made an informal decision to "go...on and see if we can

^{3/} Here, it is appropriate to note that it is not the Union's right to be present at the adjustment of grievances which is at issue. See, Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary, Case Nos. 22-6561(CA) and 22-6263(CA), FLRC No. 75A-123.

settle it". It is, in my judgement, grossly unfair and illogical to allow this employee - when she became displeased with the progress or content of the discussion - to transform management's good faith attempt to resolve a grievance into an unfair labor practice by demanding that her "rep." (whom she knew to be unavailable) be present.

It is undisputed that Colonel Dodgen's reaction was ill advised. I suggest that it was also understandable in the circumstances. However that may be, the discussion of the grievance stopped at the moment Ms. Cutts indicated that she had unilaterally determined that it should not continue without the presence of her "rep.". Moreover, it is undisputed that not only was the grievant's "rep." present at all subsequent discussions of the grievance but a satisfactory adjustment was made.

I do not underestimate the seriousness of the unfair practice that might have occurred had management refused to allow Ms. Cutts to be represented. The record here demonstrates that management did not do so. In my opinion, to find that Colonel Dodgen's words, standing alone and contradicted by his later actions, constitute an unfair labor practice would be to elevate form over substance and reduce the implementation of the intent of the Order to a semantic exercise. CF., Vanderberg Air Force Base A/SLMR No. 383, Assistant Secretary, Case No. 72-4140(CA); U.S. Department of Justice, Immigration and Naturalization Service, Washington, D. C., Assistant Secretary, Case No. 22-3617(CA) FLRC No. 73A-8;

Recommended Order

It is recommended that the Assistant Secretary dismiss the complaint.


PETER MCC. GIESEY
Administrative Law Judge

Dated: July 30, 1976

Washington, D. C.

November 8, 1976

A/SLMR No. 743

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

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

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITY
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY
A/SLMR No. 743

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITY
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

Respondent

and

Case No. 32-3902(CA)

This case arose upon the filing of a complaint by the National Federation of Federal Employees, Local 1340 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by refusing the Complainant, in its capacity as exclusive bargaining representative, access to documents regarding a merit promotion selection. The Complainant sought the documents in connection with its participation in an agency grievance proceeding brought on behalf of an unsuccessful candidate for the promotion. At all times material herein, there was no negotiated agreement in effect.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL UNION 1340

Complainant

DECISION AND ORDER

The Administrative Law Judge concluded that the Complainant was not entitled to the information and recommended that the complaint be dismissed. In reaching this conclusion, he noted that the request for information was made by the collective bargaining agent in its representative capacity, and that neither the grievant nor his personal representative requested the information. Therefore, any right to the information must be based on the exclusive representative's obligation to represent all unit employees imposed by Section 10(e). The Administrative Law Judge noted that the Federal Labor Relations Council has held that a labor organization has no inherent right to act on its own initiative on behalf of an employee where, as here, the matter arises under law or regulation, rather than under a negotiated agreement or the Executive Order. U.S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, FLRC No. 74A-54. In the circumstances of this case, the Administrative Law Judge determined that the Respondent had no obligation to recognize the Complainant as the representative of the grievant for the purposes of the proceedings involved herein, or to provide the Complainant access to the documents and information it sought on the grievant's behalf.

On June 16, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

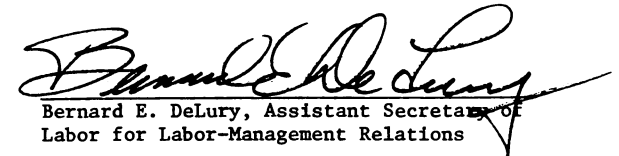
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case,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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 32-3902(CA) be, and it hereby is, dismissed.

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

Dated, Washington, D. C.
November 8, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



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 In the Matter of :
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 Federal Aviation Administration :
 National Aviation Facility :
 Experimental Center, :
 Atlantic City, New Jersey :
 Respondent :
 :
 and :
 :
 National Federation of Federal :
 Employees, Local Union 1340 :
 Complainant :
 :

Case No. 32-3902(CA)

EDWARD FABERMAN, General Counsel
 and
 RAYMOND D. THOMAN, Esq.
 Washington, D. C.
 For the Respondent

JOHN HELM, 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 December 26, 1974, alleging that Federal Aviation Administration, National Aviation Facilities Experimental Center (NAFEC), hereinafter called the Respondent Activity, violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Regional Administrator for the New York Region issued a Notice of Hearing on complaint on March 28, 1975. The complaint

asserted that the Respondent Activity refused to allow the Complainant Union access to all of the documentation used in the process of selecting a candidate for promotion to a vacant job position. It was asserted that the Complainant Union requested this information to enable it to prosecute a grievance, under the agency grievance procedure, on behalf of an unsuccessful candidate for the promotion in question.

A hearing was held on this case on June 3, 1975, in Atlantic City, New Jersey. All parties were represented by counsel and afforded full 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 decision in this case.

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

Findings of Fact

The Complainant Union is the exclusive representative of the electronic technicians employed by the Respondent Activity. Although it enjoyed this status since 1971, the parties did not have a negotiated agreement in effect at the time of the events in contention here.

On June 14, 1974, the Respondent Activity posted an announcement of a position vacancy for a Supervisory Electronic Technician (GS-856-12). The closing date of this vacancy notice was June 28, 1974. Lewis Eastlick, a GS-856-11 Electronic Technician, applied for consideration for the position along with a number of other employees. Pursuant to the agency merit promotion program, an ad hoc panel was convened to evaluate and rate the candidates seeking the vacancy.

As a result of the evaluation the panel assigned numerical scores to the candidates, and forwarded the list to the personnel office. Five of the candidates placed above 50 and 5 had ratings below 50. 1/

1/ One of the candidates was not rated by the panel because his application had been misplaced. When this error was discovered he was rated separately by an official of the Respondent Activity and his name was included on the selection list.

Eastlick had a rating of 54 and the lowest rating on the list was 45. The personnel officer certified the promotion list to Warren Herbicek, the selecting official. The list did not "break out" the candidates in groupings of highly qualified and qualified, but merely indicated that each of the candidates was qualified for the job vacancy.

Herbicek, using his own personal rating system, selected the individual who had the lowest rating on the promotion list. When Eastlick learned that he would not receive the promotion and heard by way of rumor that the successful candidate had a numerical far below his, he filed a grievance under the agency grievance procedure. The first step was an informal grievance placed with his first-line supervisor. Eastlick asserted that the procedures used in the selection of the successful candidate violated the agency merit promotion program. This informal grievance was denied by the supervisor and Eastlick then filed a formal grievance with the Respondent Activity. 2/ Pursuant to procedures established by the agency regulations, a grievance examiner was appointed to make an investigation and recommendations regarding the grievance. The agency regulations gave the grieving employee the right to present his grievance and to be assisted by a representative of his own choice. 3/ In addition, the agency grievance procedure conferred upon grieving employees the right to make a personal presentation to the grievance examiner. Section 514.b provided in pertinent part as follows:

b. Employees right to personal presentation.

the employee normally has the right to make a personal presentation to the examiner This presentation does not constitute the formal hearing, but is an informal meeting or interview where the employee can offer the arguments he believes significant

2/ The agency regulations setting forth the grievance procedure was contained in FAA Order 3770.2A, Chapter 5. (Joint Exhibit No. 11).

3/ Section 504 of the grievance procedure stated as follows: (footnote 3/ continued on page 4).

The agency regulations relating to grievances also contained a provision setting forth the role of a labor organization having exclusive recognition. Section 514 of the agency regulations provided:

e. Role of Labor Organization Having Exclusive Recognition

If the employee makes a personal presentation or attends a group meeting, a labor organization which holds exclusive recognition for the unit of which the employee is a part shall be given an opportunity to have an observer present.

Under the terms of the grievance procedure Eastlick selected William Nase as his personal representative. Nase was a member of the Complainant Union and was also a designated representative on behalf of the Union. Once the Respondent Activity notified the grievant of the appointment of a grievance examiner, it also sent notification to Michael Massimino, President of the Complainant Union. This latter notification indicated the right of the Complainant Union to be represented at a discussions or meetings involving the grievance. Because it developed that Nase's shift schedule conflicted with the schedule of Eastlick and made it difficult for him to attend any meetings regarding the grievance, Eastlick substituted Allen Erickson as his personal representative on October 21, 1974. In the letter making the substitution, Eastlick also indicated that he desired to make a personal presentation to the examiner regarding the grievance. 4/

Footnote 3/ continued from page 3.

RIGHT TO PRESENT GRIEVANCE AND HAVE A REPRESENTATIVE,

An employee, if otherwise in a duty status, is entitled to official time to present (but not prepare) his grievance. He may be assisted by a representative of his choice at any stage of the grievance and if the representative is an FAA employee and is available, he is also entitled to official time, if otherwise in a duty status, to participate in the presentation.

4/ Joint Exhibit No. 7.

On October 22, 1974, Massimino wrote the director of the Respondent Activity requesting "all documentation" concerning the procedures followed in making the selection of the successful candidate for the vacancy. The requested documentation specifically included "names of all bidders, their qualifications records, numerical ratings assigned, and any other information used in making the selection". Massimino stated that the requested information was necessary to enable the Union to properly represent Eastlick as a member of the unit in which the Union had exclusive representation. 5/

The Respondent Activity denied the Complainant Union's request. It took the position that Erickson was the grievant's personal representative and the Complainant Union was not involved, "directly or officially", in processing the grievance. 6/ Massimino then sought clarification of the Respondent Activity's position by asking if the personal representative of the grievant would be entitled to access to all of the documents previously requested by the Union. 7/ The Respondent Activity replied that its previous response was not intended to imply that the personal representative would have access to all documentation concerning the grievance. The Activity stated that it would provide the grievant and "those parties representing him" with "as much information as is properly permissible under governing laws and regulations". The Activity took the position it could not release personal information which would compromise confidentiality or constitute an invasion of privacy of other employees. 8/

It should be noted at this point that when the grievance examiner finished his investigation, he provided the grievant with the complete file for examination and inspection. The testimony indicates that the union president and the grievant inspected the file for a period of approximately three days, and the grievant with the assistance of the union president made written comments regarding the material that he felt was missing from the file. The file was then returned to the grievance

- 5/ Joint Exhibit No. 1.
- 6/ Joint Exhibit No. 4.
- 7/ Joint Exhibit No. 5.
- 8/ Joint Exhibit No. 6.

examiner who subsequently issued his report and recommendation on the grievance. 9/

Contention of the Parties

The Complainant Union contends that as the exclusive representative it had a duty under Section 10(e) of the Executive Order to represent the interests of all of the employees in the unit as well as the interests of the grievant. 10/

The Complainant Union further contends that its role is more than one of a passive observer, for it must be in a position to advise the grievant as well as to protect the interests of all of the unit employees. The argument is made that the denial of access to the requested information unlawfully prevented it from fulfilling the obligations imposed by Section 10(e).

The Respondent Activity defends on the ground that applicable Civil Service Commission regulations and agency rules promulgated pursuant thereto prevented it from making the material available to the Complainant Union. In addition, the Respondent Activity contends that the Complainant Union was not entitled to the material as it was representing the Union and not the grieving employee in the grievance procedure. Moreover, it is

9/ The union president not only actively assisted the grievant in commenting on the contents of the grievance file, but that he was also advised of and was present at every meeting involving the grievant and the grievance examiner and management officials, with one exception. The one meeting that the union president did not attend was by his own choice, as he had received prior notification of the meeting.

10/ Section 10(e) of the Executive Order provides, in pertinent part:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for ... all employees in the unit. It is responsible for representing the interests of all employees in the unit.... The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances....

urged that the documents requested were not material to the charges contained in the grievance, but even if they were, the Union could have obtained the information from the other candidates who were also members of the unit.

Conclusions

The issues here have been addressed in major part by decisions issued by the Federal Labor Relations Council. In National Labor Relations Board, Region 17, 11/ the Council held that while the directives of the Federal Personnel Manual prohibited an employee from seeing and adducing evidence regarding the appraisal of another employee in the context of an unfair labor practice proceeding, it did not preclude the Assistant Secretary, his representative or an Administrative Law Judge, acting in execution of official responsibilities under the Order, from reviewing such appraisal; provided, requisite steps were first taken to maintain the confidentiality of the appraisal involved. This principle was later extended to the right of a grievant or his representative, in the context of a grievance proceeding, to relevant and necessary information used by an evaluation panel in assessing the qualification of candidates for promotion. Department of Defense, State of New Jersey, FLRC No. 73A-59, Report No. 71 (June 11, 1975). In the latter case, the Council held that applicable laws and regulations, including policies set forth in the Federal Personnel Manual, did not preclude a grievant or his representative from reviewing relevant and necessary information used by an evaluation panel in assessing the qualifications of the candidates for promotion. This right of inspection was conditioned, however, upon the material first being "sanitized" to protect the privacy of the employees involved by maintaining the confidentiality of the records on which the information was contained, as required by the ruling in the NLRB, Region 17 case.

Thus, it is readily apparent the defense asserted by the Respondent Activity in the instant case that applicable regulations and policies contained in the Federal Personnel Manual and agency rules prohibited it, in a grievance proceeding, from allowing access to relevant

11/ National Labor Relations Board, Region 17, FLRC No. 73A-53, Report No. 59 (October 31, 1974).

information considered by the ad hoc panel is without support in the controlling decisions. It is now settled that in the context of a grievance proceeding disclosure of such information, after all steps necessary to protect the anonymity of the employees involved have been taken, "effectuates the purposes of the Order". Department of Defense, State of New Jersey, supra.

Having determined that the Respondent Activity was not precluded by law or regulation from making available to the grievant or his representative relevant information considered by ad hoc panel in evaluating the promotion candidates, the critical issue to be decided here is whether the Complainant Union, in its representative capacity, was entitled to such information. The evidence shows that neither the grievant nor his personal representative requested the information, but rather that the request was made by the union representative. Nor was the request subsequently adopted, renewed or ratified by the grievant or his personal representative. Therefore, the Union's entitlement to the information must rest upon its obligation to represent all of the unit employees, as imposed by Section 10(e) of the Executive Order.

While this argument has much appeal, it must be rejected, nevertheless, in view of the holding of the Council in U. S. Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, 12/ In that case the Assistant Secretary determined that Section 10(e) of the Executive Order imposed upon the exclusive representative an affirmative obligation to represent the interests of all of the employees in the unit. Therefore, in an adverse action proceeding involving a unit employee the exclusive representative had an ongoing obligation to represent the interests of the employee until he indicated a desire to choose his own representative. 13/ On appeal the Council held that Section 10(e) does not impose an obligation upon the exclusive representative "to represent the interests of unit employees in all circumstances." (Emphasis supplied).

12/ FLRC No. 74A-54, Report No. 87 (November 14, 1975).

13/ U. S. Department of Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400.

The Council drew a distinction between acts for all unit employees, i. e., negotiating and administering agreements, and acts for or on behalf of an individual employee in a proceeding not arising under the Executive Order or a negotiated agreement. In situations involving the latter circumstances, the Council stated:

... [W]hile a labor organization may on its own initiative act on behalf of a unit employee pursuant to its authority under contract or the Order, such a right is not inherent where... it concerns an employee's adverse action proceeding, which is a procedure established pursuant to law and regulation rather than by agreement or the Order. Such matters, which are fundamentally personal to the individual and only remotely related to the rights of the other unit employees, are not automatically within the scope of the exclusive representative's 10(e) rights, which are protected by the Order. (Emphasis supplied).

The principle set forth above, in my judgment, is directly applicable to the facts in the instant case. Here the agency grievance procedure was not the result of operation of a negotiated agreement or the Executive Order; it was established pursuant to law and regulation. Under the Council's ruling, the Complainant Union here had no ongoing obligation to represent the grievant unless and until specifically designated by him. Furthermore, in the absence of such a specific designation the Respondent Activity was not required to recognize the Complainant Union as the grievant's representative; nor was it under an obligation to honor the Union's request for access to the information considered by the ad hoc evaluation panel. The facts show that the grievant designated a personal representative other than the Union itself to represent him in processing the grievance. It is of little consequence that both the grievant and the union representative were under the impression that this afforded the grieving employee dual representation. It is clear that the Complainant Union's status in the agency grievance proceeding was bottomed on the requirements of section 10(e); wherein the Union, as the exclusive representative, was entitled to be given the opportunity to be represented at the formal discussions concerning the grievance. This requirement did not confer upon the Union, however, the right to act for or on behalf of the grievant without prior specific designation and authorization by the grievant. Therefore, the Respondent Activity was not under any duty imposed by the Executive Order to recognize the Complainant

Union as the representative of the grievant for the purposes of the proceedings. Nor was it under any obligation to provide the Union with access to the documents and information requested on the grievant's behalf.

In these circumstances, I find and conclude that the Respondent Activity has not violated section 19(a)(1) and (6) 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 Federal Aviation Administration, National Aviation Facility Experimental Center, Atlantic, New Jersey did not engage in conduct which violated Section 19(a)(1) and (6) of 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: June 16, 1976
Washington, D. C.

November 9, 1976

A/SLMR No. 744

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

UNITED STATES ARMY ENGINEER CENTER
AND FORT BELVOIR
A/SLMR No. 744

This case involved a petition for clarification of unit (CU) filed by the National Association of Government Employees, Local R4-87, Independent, (NAGE) seeking to clarify the status of approximately 28 General Schedule (GS) Store Checkers in the Activity's Commissary Store who, prior to a reclassification, had been Wage Grade (WG) Store Workers. The NAGE is the exclusive representative of the Activity's Commissary Store and Nonperishable Warehouse WG employees. The Intervenor, the American Federation of Government Employees, Local 1052, AFL-CIO (AFGE), which represents exclusively essentially all of the Activity's GS and WG employees, excluding, among others, the employees in the NAGE unit, contended that as a result of the reclassification action, the GS Store Checkers had "accreted" to its exclusively recognized unit. The Activity, while having no objection to either labor organization representing the Commissary Store employees, took the position that a single bargaining unit must be identified for all Commissary Store employees, including the GS Store Checkers.

Under all of the circumstances, the Assistant Secretary found that the GS Store Checkers had retained a clear and identifiable community of interest with the WG employees represented by the NAGE. In this respect, he noted that the duties of the positions in question had not changed despite the change in their designation and method of compensation; that the reclassified GS employees worked in the same location as the WG Store Workers; and that these employees' frequent work contacts with WG Commissary Store employees were neither altered nor reduced by the reclassification action. Moreover, he found that the continued inclusion of the instant positions in the NAGE's unit would prevent further unit fragmentation and, therefore, would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the NAGE's unit be clarified to include the GS Store Checkers in the Activity's Commissary Store. In addition, he ordered that the AFGE's unit be clarified to exclude said employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY ENGINEER
CENTER AND FORT BELVOIR 1/

Activity

and

Case No. 22-6778(CU)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-87, INDEPENDENT

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1052, AFL-CIO

Intervenor

DECISION AND ORDER CLARIFYING UNITS

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

Upon the entire record in this case, including briefs filed by the Petitioner and the Intervenor, the Assistant Secretary finds:

In this proceeding, the Petitioner, the National Association of Government Employees, Local R4-87, Independent, hereinafter called NAGE, seeks to clarify the status of approximately 28 Store Checkers (also called Sales Store Checkers) employed in the cashier unit of the Activity's Commissary Store.

Prior to an October 1973 reclassification survey, these positions had been Wage Grade (WG) Store Workers (also called Sales Store Workers) and were within the exclusively recognized unit represented by the NAGE. As a result of the 1973 survey, the positions were reclassified as General Schedule (GS) Store Checkers. The NAGE contends that the

1/ The name of the Activity appears as amended at the hearing.

employees in these positions perform essentially the same duties as were performed prior to the reclassification action by the WG Store Workers and that the change in the method of compensation for these positions should not remove them from the NAGE's unit. On the other hand, the Intervenor, the American Federation of Government Employees, Local 1052, AFL-CIO, hereinafter called AFGE, contends that as a result of the reclassification action, the employees in the affected positions have "accreted" to its exclusively recognized unit of certain GS and WG employees at the Activity. The Activity has no objection to either labor organization representing the Commissary Store employees, but takes the position that a single bargaining unit should be identified for all Commissary Store employees, including the GS Store Checkers.

The mission of the Activity's Commissary Store is to receive, store, prepare for sale, display, and sell subsistence and certain household supplies to authorized individuals, organizations, and activities. Its approximately 113 employees are organized into various "units", including the cashier unit, a meat unit, a produce unit, a perishable unit, a nonperishable unit, and a night crew unit. Each unit has its own foreman and leader who report to the Commissary Manager and his assistant.

The record reflects that the Retail Store Employees Union, Local 400, hereinafter called RSEU, was recognized by the Activity under Executive Order 10988 as the exclusive representative of all regular full-time and regular part-time selling and nonselling personnel employed in the Activity's Commissary Store and Commissary Nonperishable Warehouse. The record indicates further that all the employees in the RSEU's unit were, in fact, WG employees, including the employees in the disputed positions herein. Subsequently, on June 22, 1970, the AFGE was certified as the exclusive representative of essentially all of the Activity's GS and WG employees paid from appropriated funds, excluding, among others, the employees in the unit then represented by the RSEU. Thereafter, on September 15, 1971, as a result of a runoff election, the NAGE was certified as the exclusive representative of the unit previously represented by the RSEU. The record shows that at the time of the NAGE's certification, its unit was defined to specifically include all WG personnel employed in the Activity's Commissary Store and Nonperishable Warehouse. On April 10, 1974, the AFGE's certification was amended to delete from the exclusions the RSEU unit definition and to substitute in its place the definition of the NAGE's unit.

The record discloses that in October 1973, the Activity conducted a position and pay management survey of the Commissary Store which revealed that approximately 28 of its Sales Store Workers, WG-4 and 5, were, in fact, performing the duties of Store Checker, GS-3 and 4, and the positions were accordingly reclassified. To enable those WG Store Workers adversely affected by the reclassification action and the resulting downgrade to find other positions at comparable pay, the Activity implemented a one year Transition Plan which was in effect during the period from July 1, 1974,

through June 30, 1975. 2/

The evidence establishes that GS Store Checkers are responsible for ringing up sales on cash registers, ascertaining correct prices of merchandise, totaling receipts at the end of their shift, receiving customer complaints, and otherwise assisting customers during the check-out procedure. In this respect, the record indicates that these employees are performing essentially the same duties as were performed when the positions were classified as WG positions. Moreover, the physical location of the work stations of the affected positions was unchanged by the subject reclassification and, thus, the GS Store Checkers continue to regularly come in contact with the WG Commissary Store employees. In this connection, the record shows that with the exception of one GS clerical employee, certain GS supervisory and managerial employees, and the employees in question, the Commissary Store personnel continue to be classified as WG employees. Additionally, the record discloses that WG Commissary Store employees have, in emergency situations, performed the duties of the GS Store Checkers.

Based on the foregoing circumstances, I find that the GS Store Checkers employed at the Activity's Commissary Store have retained a clear and identifiable community of interest with the WG employees of the Activity represented by the NAGE. Thus, as noted above, the duties of the positions in question have not changed despite the change in their designation and method of compensation; the GS Store Checkers work in the same location as the WG Store Workers; and their frequent work contacts with WG Commissary Store employees have neither been altered nor reduced by the reclassification action. 3/ Moreover, I find that the continued inclusion of these positions in the NAGE unit would prevent further unit fragmentation and, therefore, will promote effective dealings and efficiency of agency operations. Accordingly, I find that the existing exclusively recognized unit represented by the NAGE should be clarified to include all nonsupervisory GS Store Checkers in the Activity's Commissary Store. In addition, I find that the exclusively recognized unit represented by the AFGE should be clarified to exclude said employees.

2/ The Transition Plan provided that when a vacancy in an affected WG Store Worker position occurred, that position would be converted to a GS Store Checker position. However, all affected WG positions were to be converted to GS positions effective July 1, 1975. In this regard, the record reveals that three former WG Store Workers voluntarily became GS Store Checkers through competitive procedures.

3/ Cf. Department of the Air Force, Aeronautical Systems Division, Air Force Systems Command, Wright-Patterson Air Force Base, Ohio, A/SLMR No. 590, Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547, FLRC No. 75-117, and Department of the Navy, Charleston Naval Shipyard, A/SLMR No. 302.

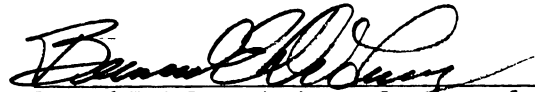
ORDER

November 9, 1976

IT IS HEREBY ORDERED that the unit for which the National Association of Government Employees, Local R4-87, Independent, was certified on September 15, 1971, be, and hereby is, clarified by including in said unit the GS Store Checkers assigned to the Commissary Store and Non-perishable Warehouse, United States Army Engineer Center and Fort Belvoir Virginia.

IT IS FURTHER ORDERED that the unit for which the American Federation of Government Employees, Local 1052, AFL-CIO, was certified on June 22, 1970, be, and hereby is, clarified by excluding from said unit the GS Store Checkers assigned to the Commissary Store and Nonperishable Warehouse, United States Army Engineer Center and Fort Belvoir, Virginia.

Dated, Washington, D. C.
November 9, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

DEPARTMENT OF THE ARMY,
DUGWAY PROVING GROUND,
DUGWAY, UTAH
A/SLMR No. 745

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R14-9 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing working conditions when it terminated a provision in the negotiated agreement between the parties.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he noted that the Respondent had been made aware by the Army Materiel Command of a statutory proscription with respect to providing domicile-to-home transportation to employees in Government-owned automobiles in most circumstances. Up to that time, the practice at the Respondent facility had been to provide such service to employees required to work overtime without prior warning because of the distance of the facility to the homes of the employees and the absence of public transportation. The practice had been instituted pursuant to the negotiated agreement, and was, since June 1972, the exclusive method of transporting employees home after performing emergency overtime duty.

The Administrative Law Judge found that the illegal practice could be discontinued unilaterally and that, subsequently, the parties met and conferred as required by the Order on procedures to enforce the law, and on the impact thereof. He noted further that the issues were largely rendered moot by the parties' subsequent negotiated agreement.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
DUGWAY PROVING GROUND,
DUGWAY, UTAH

Respondent

and

Case No. 61-2575(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-9

Complainant

DECISION AND ORDER

On July 29, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above-entitled proceeding, finding the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-2575(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 9, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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



.....
In the Matter of :

DEPARTMENT OF THE ARMY :
DUGWAY PROVING GROUND :
DUGWAY, UTAH :

Respondent

and

NATIONAL ASSOCIATION OF :
GOVERNMENT EMPLOYEES, :
LOCAL R14-9 :

Complainant

.....
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Captain Wendell G. Jewell
Office of the Post Judge Advocate
Dugway Proving Ground
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Vincent F. Rubbico
National Representative
National Association of
Government Employees
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Sandy, Utah 84070

For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding brought pursuant to Section 19(a) of Executive Order 11491 as amended (hereinafter referred to as the Order).

Statement of the Case

The original complaint, filed January 23, 1975, alleged violations of Sections 19(a)(1)(2)(5) and (6) of the Order. The amended complaint filed June 23, 1975, alleged violations of Sections 19(a)(1) and (6) only. The same facts were alleged as the basis for both complaints: that in August, 1974, the Respondent, in compliance with a directive of the Army Materiel Command, had discontinued its practice of providing transportation for employees who were required to work overtime in emergency situations and who were thus unable to obtain transportation to their homes; and that such discontinuance was a unilateral change in working conditions without prior consultation and a violation of Article VII, Section 7 of the negotiated agreement between the parties.

The Respondent admitted the discontinuance of the practice of providing transportation by Government vehicle from the duty station to the employees' homes, a practice claimed to be contrary to law; and denied any violation of the Order.

In September, 1975, the case had been transferred to the Assistant Secretary upon a stipulation of facts for decision without a hearing. By letter of January 30, 1976, however, the Assistant Secretary remanded the case for clarification of the issues. It was thereafter determined that a hearing should be held, and pursuant to notice thereof duly issued by the Assistant Regional Director, a hearing was held before the undersigned on June 7, 1976, in Salt Lake City, Utah. Respondent's brief was filed on July 6, 1976 and Complainant's brief was filed on July 9, 1976.

The issues to be determined are whether the unilateral change was pursuant to law or regulation of appropriate authorities and therefore expressly permitted by Section 12(a) of the Order; and if so, whether Respondent failed or refused to consult with Complainant on the impact of such change upon the employees concerned.

The hearing having been conducted and all the evidence having been considered in accordance with the provisions of the Order and the applicable Regulations promulgated thereunder (29 C.F.R. Part 203), I make the Findings of Fact, reach the Conclusions of Law, and submit the Recommendation set forth below.

FINDINGS OF FACT

1. At all relevant times the Complainant was the exclusive representative for all Appropriated Fund employees of Respondent at Dugway Proving Ground (formerly known as Deseret Test Center),

excluding certain categories of employees not here pertinent.

2. Pursuant to a collective bargaining agreement between the parties executed January 28, 1968, it was provided that if an employee was required to work overtime and was not able to obtain transportation home, sleeping facilities would be provided to the employee without charge, if possible.

3. The negotiated agreement between the parties executed June 2, 1972, and in effect at the time of the events in issue, contained the following provision in Article VII, Section 7:

It is agreed that when employees are required to work in excess of their scheduled shift in an emergency situation in which the employees are not informed of such requirements prior to the start of their regular shift and the employees are not able to obtain transportation home, the Employer agrees to provide transportation to the employees' residences, by the most advantageous means to the Government, or if requested, provide sleeping facilities in transient quarters, at no costs to the employees. The employees have the responsibility for requesting the latter of their supervisor, who is responsible for notifying billeting.

4. In compliance with Section 12 of the Order, Article III, Section 1 of the negotiated agreement contains the following statutory provision:

It is agreed and understood:

a. 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;

5. Dugway Proving Ground is approximately 40 to 45 miles from the nearest town. It is approximately 90 miles from Salt Lake City and approximately 80 miles from Provo. Most of the employees live from 50 to 90 miles away from Dugway.

6. There is no public transportation of any kind between Dugway and any of the surrounding towns or cities. Consequently, most of the employees ride to and from work in car pools. If they are required to work overtime, especially on short notice, they miss their car pools and have no means of getting home unless they can prevail upon members of the family or close friends to come out and call for them, which in each instance would require driving a round trip of from 100 to 180 miles.

7. Since commercial transportation was not available and the cost of providing private busses or cars by charter or rental appeared to be prohibitive, Respondent for several years prior to August, 1974, had provided Government vehicles whenever the performance of tests or other activities created such emergencies for employees who worked overtime.

8. On August 21, 1974, Respondent received from the Army Materiel Command in Alexandria, Virginia a teletype message (Joint Exhibit 1) terminating immediately the utilization of Department of Defense vehicles for transportation between domicile and place of employment. The message which was relayed through the Test Command, referred to Section 638a (c)(2) of Title 31 of the United States Code and to Department of Defense Directive 4500.36 dated July 30, 1974. Respondent was requested to advise Headquarters of its compliance by August 23, 1974.

9. Upon receipt of the above message, Respondent's Labor Management Relations Specialist, Harrison B. Mullendore, called Complainant's President, Vincent F. Rubbico, to his office and handed him a copy of the message. Mr. Rubbico upon reading the message stated that it was contrary to the negotiated agreement. Mr. Mullendore said that he would advise the Test Command of the contract provision and seek clarification.

10. Thereafter Mr. Mullendore sent a message to the Test Command calling attention to the contract provisions and advising that the Union President objected to the loss of transportation.

11. On or about September 2, 1974, Respondent received a reply from the Test Command (Joint Exhibit 3) stating that the operation of any form of domicile-to-duty transportation service using Government-owned vehicles without prior formal approval by the Department of the Army is illegal. Mr. Rubbico was thereupon informed of the reply.

12. Subsequently, Mr. Rubbico consulted with Respondent's Director of Test Operations and its Director of Logistics relative to getting some means of transportation. The possibility of getting employees to a centralized location was suggested, but no definitive solution was reached until the next contract was negotiated several months later.

13. During the interim, efforts were made to adjust requirements for transportation within the framework of the directive. Some tests were cancelled in order to avoid transportation problems and in some emergencies, approved by the Post Commander, Government vehicles were used to transport employees to centralized locations near their homes.

14. Pursuant to negotiated agreement between the parties effective April 10, 1975, when employees are required to work overtime in an emergency approved by the Post Commander and they are not able to obtain transportation home, Respondent agreed to provide transportation to a centralized location within the city limits of the town in which the employee resides by means most advantageous to the Government.

CONCLUSIONS OF LAW

By Federal statute antedating any of the negotiated agreements referred to herein, no appropriation available for any department shall be expended for the operation of any Government-owned passenger motor vehicle not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, with certain exceptions not here relevant. 31 U.S.C. 638a(c)(2). Although the provision in the 1972 Agreement (Article VII, Section 7) did not expressly require transportation by Government-owned vehicles, the unusual circumstance of Respondent's facility being inaccessible by any means of transportation other than privately-owned cars or Government vehicles resulted in the undeniable fact that for all practical purposes, the most advantageous means to the Government was to furnish Government-owned vehicles for the purpose intended.

Thus the established practice and the implementation, if not the express wording, of Article VII, Section 7 was in contravention of existing law, and its provisions were subject to such law pursuant to Section 12(a) of the Order and Article III, Section 1 of the 1972 Agreement. Consequently, the Respondent was entitled to discontinue the unlawful practice of furnishing such transportation by Government vehicles without the necessity of prior consultation with the Complainant. See IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC 70A-9; Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SLMR No. 322.

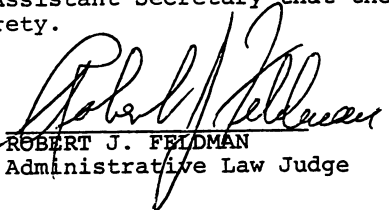
The decision of the Assistant Secretary in Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390, relied on by Complainant, is not inconsistent with the view that the term "appropriate authorities" as used in Section 12(a) of the Order was intended to mean those authorities outside the agency concerned, which are empowered to issue regulations and policies binding on such agency. Upon the facts of that case, as opposed to those presented herein, the Assistant Secretary held that an instruction from a higher echelon within the same agency could not serve as a valid basis for unilateral modification of a negotiated agreement between the parties during its term. There would seem to be little doubt that an Act of Congress is something more than an instruction from a higher echelon of the same agency.

Although the furnishing of transportation by Government vehicle could thus be discontinued unilaterally without prior consultation, there is no question that Respondent was under a duty to meet and confer with the Complainant on the procedures to be utilized in enforcing the law and on the impact of such discontinuance on adversely affected employees. Department of the Army, Headquarters, United States Army Armament Command, Rock Island Arsenal, Rock Island, Illinois, A/SLMR No. 527. It is clear from the testimony, however, that Complainant's President did in fact confer with appropriate officials of the Respondent with respect to the impact of the discontinuance of transportation by Government vehicle direct to employees' homes and with respect to methods of compliance with the law being enforced. There is nothing in the record to indicate that Complainant requested any further consultation or that the Respondent declined to meet and discuss procedures or impact with Complainant. Consequently, it has not been shown that Respondent's conduct was in violation of the Order. See U.S. Department of Air Force, Norton Air Force Base, A/SLMR 261; Alabama National Guard, A/SLMR 660.

In conclusion, it should be noted that the issues raised herein have been largely rendered moot by the solution worked out by the parties and embodied in the negotiated agreement that became effective April 10, 1975. Certainly, there appears to be no need for remedial measures.

RECOMMENDATION

On the basis 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. FRIEDMAN
 Administrative Law Judge

Dated: July 29, 1976
 Washington, D.C.

November 9, 1976

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

DEPARTMENT OF DEFENSE,
U.S. NAVY,
NORFOLK NAVAL SHIPYARD
A/SLMR No. 746

This case arose as a result of an unfair labor practice filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Complainant), alleging, in substance, that the Respondent, Norfolk Naval Shipyard, violated Section 19(a)(1), (2) and (6) of the Order by a statement made by a supervisor in a meeting with two employees and their union representative which urged unit employees to bypass their exclusive representative and deal directly with the Respondent. The Complainant also alleged that other actions taken by the Respondent - namely, the scheduling of a pre-action investigation and the subsequent issuance of letters of caution or requirement were in reprisal for the employees having exercised their rights guaranteed by the Order.

The Administrative Law Judge found that on October 22, 1974, two unit employees and a representative of the Complainant met with the boilermaker general foreman in an attempt to have rescinded a shift change notice given the employees the previous evening in response to their having returned late from their scheduled lunch break. During this meeting the union representative indicated that the employees had learned their lesson and requested rescission of the shift change. The boilermaker general foreman responded to the effect that if the employees had learned their lesson why had they gone to their union representative rather than to him. The Administrative Law Judge concluded that such a statement urged the bypassing of the exclusive representative and carried the implication that employees would receive more favorable treatment if they dealt directly with the Respondent in violation of Section 19(a)(1) and (6) of the Order. The Administrative Law Judge also concluded that the Complainant had not sustained its burden of proof in support of its allegation that the Respondent violated Section 19(a)(2) of the Order by the scheduling of a pre-action investigation and the issuance of letters of caution or requirement to the two employees. In this regard, he found that these actions were taken by the Respondent as a result of the employees having committed a second infraction of the work rules, and they were not retaliatory in nature nor were they taken in reprisal for the employees having exercised their rights guaranteed by the Order.

The Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge with respect to the 19(a)(2) allegation. Contrary to the Administrative Law Judge, however, the Assistant Secretary concluded that, inasmuch as the improper conduct herein took place in the context of

a single incident and there was no evidence of a concerted action on the part of the Respondent to cause employees to bypass their exclusive representative, the Respondent's conduct was not violative of Section 19(a)(6) of the Order. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of Section 19(a)(1) of the Order and that it take certain affirmative remedial actions.

- 2 -

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
U.S. NAVY,
NORFOLK NAVAL SHIPYARD

Respondent

and

Case No. 22-5751(CA)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On April 21, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order. The Complainant subsequently filed an answering brief to the Respondent's exceptions.

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

The Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (6) of the Order when, in a meeting with two unit employees and their union representative, a supervisor made a statement

which urged the bypassing of the exclusive representative and carried the implication that employees would receive more favorable treatment if they dealt directly with management. In agreement with the Administrative Law Judge, I find such conduct to be violative of Section 19(a)(1) of the Order. However, in the particular circumstances of this case, and noting that the improper conduct herein took place in the context of a single incident, and that there was no evidence of a concerted action on the part of the Respondent to cause employees to bypass their exclusive representative, I find there exists insufficient basis on which to find a violation of Section 19(a)(6) of the Order.^{1/}

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Defense, U.S. Navy, Norfolk Naval Shipyard, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing its employees by indicating to them that they should refrain from seeking representation or assistance from the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

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

2. Take the following affirmative actions in order to effectuate the purposes and policies 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 shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

^{1/} Compare United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42, which involved an attempt by agency management to dissuade an employee from utilizing her exclusive representative in connection with a pending grievance.

IT IS FURTHER ORDERED that the complaint insofar as it alleges violation of Section 19(a)(2) and (6) or the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 9, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

We hereby notify our employees that:

WE WILL NOT indicate to employees that they should refrain from seeking representation or assistance by their exclusive representative, the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

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

(Agency or Activity)

Dated _____ By: _____
(Signature)

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

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

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

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

DEPARTMENT OF DEFENSE,
DEFENSE MAPPING AGENCY DEPOT, HAWAII
A/SLMR No. 747

DEPARTMENT OF DEFENSE,
DEFENSE MAPPING AGENCY
DEPOT, HAWAII

Following a reorganization which merged three Defense Mapping Agency (DMA) Hawaii field offices into a new organization entity, Defense Mapping Agency Depot, Hawaii, (referred to herein as Activity-Petitioner or DMA-DH) at Hickam Air Force Base, the Activity-Petitioner filed a RA petition seeking a determination by the Assistant Secretary that a unit encompassing employees of the Defense Mapping Agency Topographic Center at Fort Shafter, Hawaii, (one of the three DMA Hawaii field offices relevant herein) was no longer appropriate and that an overall unit consisting of all General Schedule and Wage Grade employees of the Defense Mapping Agency Depot, Hawaii, is appropriate. In this respect, the International Association of Machinists and Aerospace Workers, Lodge 1998, AFL-CIO (IAM), who held exclusive recognition for the Topographic Center employees, contended that the DMA-DH became a successor employer and, therefore, was obligated to recognize the IAM. In contrast, the International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (IBEW), maintained that prior to the merger, the DMA Flight Information Office Pacific located at Hickam Air Force Base, was a part of the IBEW's certified unit at Hickam. In this connection, it contended that a negotiated agreement was in effect at the time the RA petition was filed and, therefore, the petition was untimely.

The Assistant Secretary concluded that the evidence established that the DMA-DH was, in effect, a new organizational entity. He noted that the mission of the DMA-DH was different from the three individual field offices that were merged; that the position description of the employee complement at DMA-DH had been changed to reflect their expanded responsibilities; and that the merger necessitated the actual physical movement of a number of employees who were required to relocate at Hickam Air Force Base. Under these circumstances, the Assistant Secretary found that there had been a substantial change in the character and scope of the IAM's unit which rendered it inappropriate.

The Assistant Secretary further concluded that a unit of all General Schedule and Wage Grade employees of the DMA-DH was appropriate for exclusive recognition. Hence, the Assistant Secretary directed an election in such unit.

Activity-Petitioner

and

Case No. 73-789

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LODGE 1998, AFL-CIO

Intervenor

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 1186, AFL-CIO

Intervenor

and

U.S. DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, PACIFIC AIR FORCES

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in the subject case, including the briefs of the Activity-Petitioner, the International Association of Machinists and Aerospace Workers, Lodge 1998, AFL-CIO (herein called IAM), the International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (herein called IBEW), and the Department of the Air Force Headquarters, Pacific Air Forces (herein called HPAC), the Assistant Secretary finds:

The instant RA petition seeks a determination that a unit encompassing employees of the former Defense Mapping Agency Topographic Center (Topographic Center) at Fort Shafter, Hawaii, was no longer appropriate inasmuch as it had been merged with two other Defense Mapping Agency (DMA) Hawaii field offices to form the Defense Mapping Agency Depot, Hawaii, (DMA-DH) located at Hickam Air Force Base, Hawaii. In this respect, the Activity-Petitioner seeks an election in an overall unit consisting of all General Schedule and Wage Grade employees of the DMA-DH.

The record indicates that the DMA was established on January 1, 1972, as an agency of the Department of Defense under the direction, authority and control of the Secretary of Defense. Relevant to the instant case is the establishment and operation of the Defense Mapping Agency Aeronautical Center-Flight Information Office Pacific (DMAAC), the Defense Mapping Agency Hydrographic Center (Hydrographic Center) Honolulu Office, and the Topographic Center at Fort Shafter.

The DMAAC became operational on July 1, 1972, and was 1 of 14 tenant organizations located at Hickam Air Force Base, Hawaii. ^{1/} The DMAAC reported to the DMA Aerospace Center in St. Louis, Missouri, and, among other things, was responsible for providing the Pacific Command Forces and other Department of Defense activities with aeronautical maps and charts. Although the DMAAC was serviced by the 15th Air Base Wing Central Civilian Personnel Office on Hickam Air Force Base, the record indicates that there was no interchange between DMAAC employees and employees of the 15th Air Base Wing; their working conditions were different; and they did not share common supervision.

The Hydrographic Center, Honolulu Office, was established effective July 1, 1972, at the Pearl Harbor Naval Shipyard. It reported to the

^{1/} On September 26, 1973, the IBEW was certified as the exclusive representative for a unit of "all General Schedule and Federal Wage System nonsupervisory employees serviced by the Central Civilian Personnel Office at Hickam Air Force Base, Hawaii, on the Island of Oahu, excluding all General Schedule and Federal Wage System supervisory employees, management officials, employees engaged in personnel work in other than a purely clerical capacity, fire fighters, guards, professional employees, military personnel, employees represented by other unions, and those occupying positions considered to be excluded in the best interest of national security."

DMA Hydrographic Center in Suitland, Maryland, and was responsible for the storage, maintenance, and distribution of nautical charts, maps, publications, and periodicals for issue to naval ships and activities. The Hydrographic Center, Honolulu Office, was serviced by the Consolidated Civilian Personnel Office, Northern Branch Office, Pearl Harbor, and its employees were not included in any exclusive bargaining unit.

The Topographic Center became operational on October 1, 1974, at Fort Shafter, Hawaii, and was responsible for the storage, maintenance, and distribution of topographic maps and related products. Personnel support services were received from the Army Personnel Office at Fort Shafter, Hawaii. Civilian employees of the Topographic Center were part of a unit represented by the IAM which included, "All Class Act and Wage Board nonsupervisory employees of the 29th Engineer Battalion (Base Topographic). Excluded are nonsupervisory employees assigned to the Plans, Programs, and Production Branch and the Office of the Commanding Officer, and all supervisory personnel covered by the provisions of paragraph 3-12, Chapter 711, Department of the Army Civilian Personnel Regulations." ^{2/}

On April 1, 1975, the DMA simultaneously disestablished and merged the Hawaii field offices of the DMAAC, the Hydrographic Center, and the Topographic Center to form the Defense Mapping Agency Depot, Hawaii, (DMA-DH) located at Hickam Air Force Base. In this regard, approximately six DMAAC civilian employees, two Hydrographic Center civilian employees and five Topographic Center civilian employees were transferred to DMA-DH. ^{3/} The mission of the DMA-DH is to provide aeronautical, hydrographic, and topographic maps and charts, target materials, flight information publications, and cartographic services to the Pacific Command Forces and all other Department of Defense activities. The record reveals that because of the expanded responsibility of the DMA-DH to provide aeronautical, hydrographic, and topographic maps and charts, the position descriptions of the civilian employees transferring to Hickam Air Force Base had to be changed to reflect these expanded duties.

The record indicates that the DMA-DH is serviced by the Central Civilian Personnel Office at Hickam Air Force Base which has been delegated authority by the Commander, DMA-DH, to administer the entire civilian personnel program for DMA-DH civilian employees. Although essentially the same merit promotion plan, incentive award and cash award policies ^{4/} apply to DMA-DH civilian employees and civilian employees of the 15th Air Base Wing, both entities have separate competitive areas for reductions-in-force, different work hours, and there is no interchange between DMA-DH employees and employees of the 15th

^{2/} The IAM was granted exclusive recognition on July 28, 1969, for the above mentioned unit. However, at the hearing all parties stipulated that the IAM had represented the civilian employees of the Depot which succeeded the Army's 29th Engineer Battalion.

^{3/} The Hydrographic Center and Topographic Center employees were physically relocated to Hickam Air Force Base.

^{4/} In accordance with the DMA cash award policy there must be a 24 month waiting period between the receipt of two cash awards. The Air Force has no similar policy regarding cash awards.

Air Base Wing. Moreover, the record indicates that these employees do not share common supervision and that the Commander of DMA-DH reports to the Director, DMA Aerospace Center, St. Louis, Missouri.

The IAM contends that inasmuch as the Topographic Center employees at Fort Shafter represented by the IAM were transferred to DMA-DH, the latter became a successor employer obligated to recognize the IAM as the exclusive representative of the employees in the proposed unit. On the other hand, the IBEW maintains that the DMAAC employees were part of the IBEW's certified unit at Hickam Air Force Base and that a negotiated agreement was in effect at the time the instant RA petition was filed, thus making the petition untimely. The IBEW further contends that there has been no showing of a substantial change in its unit and that the DMA-DH employees are also serviced by the Central Civilian Personnel Office at Hickam Air Force Base and, therefore, are included in the IBEW's unit. In contrast, the Activity-Petitioner contends that the merger of the three DMA Hawaii field offices has caused a substantial change in the character and scope of the IAM's unit and that it is not a successor employer. It further maintains that the DMAAC employees were never included or intended to be included in the IBEW's certified unit at Hickam Air Force Base. As a result, the Activity-Petitioner seeks an election to resolve the situation.

Based on the foregoing, I find that the DMA-DH is, in effect, a new organizational entity and that the April 1, 1975, merger as outlined above has resulted in a substantial change in the character and scope of the unit for which the IAM was recognized. Thus, the record indicates that the mission of the DMA-DH is different from the mission of the three individual field offices which were merged inasmuch as it provides aeronautical, hydrographic, and topographic maps and charts, target materials, flight information publications, and cartographic services to the Pacific Command Forces and all other Department of Defense activities. In this respect, the evidence establishes that the position descriptions of the employee complement of the DMA-DH have been changed to reflect the above-mentioned expanded responsibilities. Furthermore, the merger necessitated the actual physical movement of the Topographic Center and Hydrographic Center employees who were required to relocate at Hickam Air Force Base. Under these circumstances, I find that there has been a substantial change in the character and scope of the IAM's unit rendering it inappropriate. Moreover, and based on the factors outlined above, I find that the employees in the unit claimed to be appropriate by the Activity-Petitioner share a clear and identifiable community of interest and that a comprehensive unit of all DMA-DH employees serviced by the Central Civilian Personnel Office at Hickam Air Force Base will promote effective dealings and efficiency of agency operations. Hence, I shall direct an election in such unit. 5/

5/ In the instant case, a literal reading of the IBEW's unit description could reasonably be interpreted to mean that the DMAAC's employees were included in its unit. However, DMA and Department of Air Force officials testified that these employees were not included in the unit. Under the particular circumstances herein, as it is arguable that the IBEW's unit included the DMAAC's employees, I will permit the IBEW to appear on the ballot. If, however, the IBEW does not desire to proceed to an election in this matter, it should so inform the appropriate Area Administrator within ten days of the date of this decision.

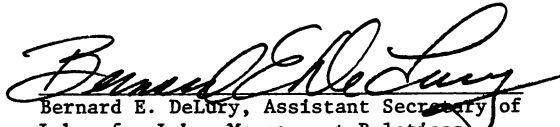
Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Grade employees of the Defense Mapping Agency Depot Hawaii, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a clerical capacity, and supervisors as defined in the Order. 6/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the International Association of Machinists and Aerospace Workers, Lodge 1998, AFL-CIO; by the International Brotherhood of Electrical Workers, Local 1186, AFL-CIO; or by neither of these labor organizations.

Dated, Washington, D. C.
November 9, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

6/ The Activity-Petitioner also sought to exclude the secretary to the Depot Director. In the absence of any evidence regarding this position, I will make no finding in this regard.

November 10, 1976

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

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT OFFICE,
CHICAGO, ILLINOIS
A/SLMR No. 748

This case involved an Application for Decision on Grievability or Arbitrability filed by Chapter 10, National Treasury Employees Union (NTEU). The NTEU contended that the instant matter, involving the termination of an employee for falsifying her employment application, was subject to advisory arbitration under the negotiated agreement. In this regard, it asserted, among other things, that only an adverse action which had become the subject of a pending criminal case was intended to be excluded from advisory arbitration. In response, the Activity maintained that the instant matter involved the falsification of an employment application "which prevented the Activity from making an accurate and proper suitability determination at the time of the selection." It contended that such an action is excluded under the negotiated agreement from advisory arbitration. Furthermore, the Activity asserted that a grievance was not filed in the instant matter and only when a grievance has been filed and pursued through the negotiated grievance procedure does the Assistant Secretary have the authority to make an arbitrability determination. Hence, it contended that the Assistant Secretary lacks the jurisdiction to decide the instant matter.

The Administrative Law Judge recommended that the application be dismissed because it did not seek to determine the arbitrability of a grievance. In this respect, he noted that the authority of the Assistant Secretary to decide arbitrability questions is bottomed in Sections 6(a)(5) and 13(d) of the Order, which only authorizes the Assistant Secretary to decide whether or not a grievance is subject to arbitration. Inasmuch as no grievance was filed in the instant case, the Administrative Law Judge recommended that the application be dismissed for lack of jurisdiction.

The Assistant Secretary disagreed with the Administrative Law Judge's conclusions and recommendations. In his view, the Applicant's expressed dissatisfaction with the adverse action taken herein is no different from a "grievance" specifically designated as such which is processed through the negotiated grievance procedure. In the instant matter, the Applicant sought to contest an adverse action decision regarding an employee's termination. The Assistant Secretary found that, in this context, the expressed dissatisfaction fulfilled the requirements of Sections 6(a)(5)

and 13(d) of the Order and, therefore, an arbitrability determination was within his authority. The Assistant Secretary further found that the instant matter was not excluded from advisory arbitration under the negotiated agreement inasmuch as the Activity had never alleged, nor was there any record evidence to show, that, consistent with the exclusion from arbitration under the negotiated agreement, the instant matter involved the "falsification of a material fact in an employment application, which if such fact had been known would have prevented the employee from being hired for the position for which he applied." Accordingly, he found that the instant matter was subject to advisory arbitration under the negotiated agreement.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

Activity

and

Case No. 50-13006(A~~R~~)

CHAPTER 10, NATIONAL TREASURY
EMPLOYEES UNION

Applicant

DECISION ON ARBITRABILITY

On February 26, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the application involved herein should be dismissed for lack of jurisdiction. Thereafter, the Applicant filed exceptions and the Activity filed an answering brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The instant Application for Decision on Grievability or Arbitrability sought a determination as to whether or not the adverse action taken against Mildred Embry was subject to advisory arbitration pursuant to Article 34 of the Multi-District Agreement between the Internal Revenue Service (IRS) and the National Treasury Employees Union (Applicant).

The record indicates that on June 30, 1974, the Acting Director of the IRS, Chicago District Office, issued a notice of proposed adverse action to Mildred Embry charging her with falsification of her employment application. Responding by letter on July 30, 1974, Embry denied the charges. 1/ On October 2, 1974, the IRS' Chicago Regional Commissioner rendered a decision sustaining the charges and specifications. The Applicant sought to invoke advisory arbitration with respect to the adverse action pursuant to Article 34 of the negotiated agreement which provides for advisory arbitration of adverse actions. On December 9, 1974, the Activity responded stating that the adverse action taken against Embry was specifically excluded from advisory arbitration under the negotiated agreement, and the Applicant petitioned the Assistant Secretary for a determination on arbitrability.

The Activity contends that the Assistant Secretary has authority to make an arbitrability determination only in matters where a grievance has been filed and pursued through the negotiated grievance procedure. It maintains that the language of Section 6(a)(5) and Section 13(d) of the Order expressly empowers the Assistant Secretary only to decide "whether or not a grievance is on a matter...subject to arbitration..." Thus, the Activity asserts that inasmuch as a grievance was never initiated in the instant case, the question of arbitrability is beyond the Assistant Secretary's jurisdiction. 2/ The Activity further contends, however, that if the Assistant Secretary assumes jurisdiction, the instant matter regarding the falsification of an employment application is excluded from advisory arbitration by Article 33, Section 4(c) of the negotiated agreement. 3/ In this respect, Section 4(c)(4) specifically states that a matter involving the "falsification of a material fact which...would have prevented the employee from being hired for the position for which he applied" will not be subject to arbitration. The Activity argues

1/ Additionally, the record shows that Embry orally denied the charges on August 16, 1974.

2/ Specifically, the Activity contends that the Applicant should have filed a grievance under the negotiated grievance procedure which challenged the Activity's interpretation and/or application of Article 34, Section 1 of the negotiated agreement. The Activity maintains that in failing to do so the Applicant waived any right to seek an arbitrability determination in this matter.

3/ Article 33, Section 4(c) states: An employee dissatisfied with the decision may, with the concurrence of the Union, appeal pursuant to Article 34, except that the following matters will not be subject to arbitration:

1. Bribery or attempted bribery;
2. misappropriation of government funds or seized property;
3. embezzlement; and
4. falsification of a material fact in an employment application, which if such fact had been known would have prevented the employee from being hired for the position for which he applied.

that Embry was discharged for falsification of her employment application which prevented it from making an accurate and proper suitability determination at the time of the selection. As a result, the matter is excluded from arbitration.

The Applicant, on the other hand, contends that the filing of a grievance is not required to invoke advisory arbitration under the negotiated agreement. It asserts that Article 34 of the negotiated agreement does not mention, nor does it require, the filing of a grievance. The Applicant further maintains that to file a grievance, as suggested by the Activity, under the negotiated grievance procedure regarding the interpretation and application of Article 33, Section 4(c)(4) would be inappropriate inasmuch as adverse actions are precluded under Article 36 (Binding Arbitration) of the negotiated agreement from binding arbitration, which is the final step of the negotiated grievance procedure. ^{4/} Moreover, it asserts that the Assistant Secretary is required to consider the arbitrability question in the instant case in light of the Federal Labor Relations Council's decision in Department of Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19, where the Council stated that "it is the Assistant Secretary's responsibility, under the Order, to render an arbitrability finding when there is an issue as to whether a matter is covered by the agreement's arbitration procedure... and it is not enough to tell the parties to resolve arbitrability issues by means of a separate grievance, [under] the [negotiated] grievance procedure." The Applicant further contends that not all cases involving falsification of employment applications are excluded from arbitration under Article 33, Section 4(c). In this respect, it maintains that the intent of Article 33, Section 4(c) is to exclude from arbitration only those matters which have become the subject of a pending criminal case. The Applicant asserts that at the time Section 4(c) was negotiated, management was concerned with having information regarding a pending criminal case publicly disclosed at an arbitration hearing. Moreover, it argues that Section 4(d) ^{5/} was intended to be read together with Section 4(c), emphasizing that only

^{4/} Article 36, Section 1(a) states, in pertinent part, "when arbitration is invoked over a grievance involving the interpretation of application of the terms of this Agreement other than Article 32 (Disciplinary Actions) and Article 33 (Adverse Actions), the parties will within then (10) days request a list of five (5) arbitrators from the Federal Mediation and Conciliation Service."

^{5/} Article 33, Section 4(d) states, in pertinent part, that, "Matters which may otherwise be appealable to advisory arbitration may not be processed under this Article or Article 34 if the matter is pending before a Federal court or the employee is under arrest, indictment or information."

criminal matters pending before a Federal court were intended to be excluded from advisory arbitration. Additionally, the Applicant asserts that in order for an adverse action to be excluded pursuant to Section 4(c)(4) of Article 33, the falsification must pertain to a material fact which, if it had been known, would have prevented the employee from being hired. It argues that except in circumstances involving treason, destruction of public records and bribery of government officials, which by statute would mandate the denial of employment or the removal thereof, a decision by management as to whether or not to hire an individual is discretionary. In the instant case, the Respondent did not allege in the letter of proposed adverse action that the issue involves one of those mandatory discharge actions and, therefore, the matter is not excluded under Article 33, Section 4(c)(4). Moreover, the Applicant contends that inasmuch as the decision of whether or not to hire Embry was a management discretionary action, it cannot be asserted that the falsification of her employment application would have, in fact, precluded her employment.

The Administrative Law Judge concluded that the dismissal of the application was warranted because it does not seek to determine the arbitrability of a grievance. In this respect, he noted that the authority of the Assistant Secretary to decide arbitrability questions is bottomed in Sections 6(a)(5) and 13(d) of the Order, both of which confer authority to "decide questions as to whether a grievance is subject to...arbitration under an agreement." He found nothing in that language, however, which conferred authority on the Assistant Secretary to decide an arbitrability question that did not arise from a dispute over whether a grievance is subject to arbitration. Inasmuch as no grievance was filed in the instant case, the Administrative Law Judge concluded that the application does not request the Assistant Secretary to determine whether "a grievance is on a matter...subject to arbitration" and, therefore, it should be dismissed for lack of jurisdiction.

Under the particular circumstances herein, I disagree with the Administrative Law Judge's conclusion that the Assistant Secretary does not have jurisdiction to determine the arbitrability of a matter which did not initiate as a grievance specifically designated as such. In my view, the expressed dissatisfaction in this matter with the adverse action taken herein is no different from a "grievance" which is specifically designated as such and processed through the negotiated grievance procedure. The mere fact that the Applicant's expression of concern and dissatisfaction with the adverse action herein was not designated as a grievance does not mean that it is not, in the definitional sense of the word, a grievance. In this regard, the record discloses that the Applicant was dissatisfied with an adverse action decision regarding an employee's termination and sought to invoke advisory arbitration pursuant to the negotiated agreement which does not require the filing of a grievance as a prerequisite. In this context, I find that such an expressed dissatisfaction fulfills the requirements of Sections 6(a)(5) and 13(d) of the

Order, and, therefore, an arbitrability determination is within the scope of the Assistant Secretary's authority. 6/

I further find that the instant matter is not excluded from advisory arbitration under Article 33, Section 4(c)(4) of the negotiated agreement. In this regard, although the employee was discharged for the falsification of her employment application, the Activity does not contend, nor is there any evidence, that the falsification would have prevented her employment within the meaning of Article 33, Section 4(c)(4) of the negotiated agreement. Instead, the Activity stated in its notice of proposed adverse action that the "falsification of your employment application as described above prevented this office from making an accurate and proper suitability determination at the time of your selection." Under the circumstances, I find that the instant matter is arbitrable under the parties' negotiated agreement.

FINDING

IT IS HEREBY FOUND that the matter in Case No. 50-13006(AR) is subject to advisory arbitration under the parties' negotiated agreement.

ORDER

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

Dated, Washington, D. C.
November 10, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

6/ See Internal Revenue Service, Austin Service Center, Austin, Texas, FLRC No. 74A-81. See also Internal Revenue Service, Greensboro District Office, Greensboro, North Carolina, FLRC No. 74A-79, where, under similar circumstances, the Federal Labor Relations Council sustained the Assistant Secretary's arbitrability determination and directed that the matter proceed to arbitration if the appeal involved was determined to be timely.

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



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In the Matter of :
:
DEPARTMENT OF THE TREASURY :
INTERNAL REVENUE SERVICE :
CHICAGO DISTRICT OFFICE :
Agency and Activity :
and : Case No. 50-13006(AR)
CHAPTER 10, NATIONAL TREASURY :
EMPLOYEES UNION :
Applicant :
.

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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 the filing by the Applicant of an Application for Decision on Grievability or Arbitrability dated January 15, 1975, and filed January 20, 1975. The Application states in Section 4C that the "unresolved question" is whether certain adverse action of the Agency against Mildred Embry

involved a falsification of sufficient magnitude to have prevented her being hired and therefore was not subject to advisory arbitration pursuant to Article 34 of the Multi-District Agreement. The Application was accompanied by several attachments. ^{1/} On March 12, 1975, the Agency filed an extensive Response to Application contending that the Assistant Secretary was without jurisdiction to entertain the Application and that if he had jurisdiction the matter was not arbitrable under the terms of the agreement between the parties. On April 17, 1975, the Applicant filed a Reply to Respondent's [sic] Response to Application.

On July 2, 1975, the Regional Administrator issued a Notice of Hearing to be held in Chicago, Illinois on October 20, 1975. Hearings were held on that date and place. Both sides were represented by counsel. Pursuant to an extension of time granted at the hearing, briefs were filed on December 8 and 11, 1975.

Facts

The Applicant is the exclusive recognized representative of a unit of employees employed by the Activity. Included in the unit was Ms. Mildred Embry.

By letter dated June 20, 1974, Ms. Embry was notified by the Activity that the Activity proposed to remove her from the service or otherwise impose discipline for falsifying her employment application (Standard Form 171), setting forth four specifications. By letter dated July 30, 1974, prepared for Ms. Embry by the Executive Vice-President of the Applicant, Ms. Embry submitted a written response. On August 16, 1974, she further responded orally. By letter dated October 2, 1974, Ms. Embry was advised by the Activity that the charge and its four specifications were sustained and it was decided to remove her from the service effective October 11, 1974. The October 2 letter also advised her of her right to appeal to the Civil Service Commission and the requirements for taking such appeal.

The Internal Revenue Service, the Agency, and the National Treasury Employees Union, the parent of the Applicant, have a Multi-District Agreement covering a large number of Districts of the Agency and their employees represented by various Chapters of NTEU, including the Applicant. The current Agreement ^{2/} was executed May 3, 1974, effective August 3, 1974.

^{1/} Exhs. AS 1A - 1D and attachments thereto.
^{2/} Exh. J.

It was preceded by a Multi-District Agreement ^{3/} executed April 5, 1972, to become effective July 1, 1972. The provisions relevant to this case are the same in the two agreements.

Article 33 of the Current Agreement covers "Adverse Actions" and procedures applicable thereto. Article 34 provides for "Advisory Arbitration of Adverse Actions". Article 35 covers "Grievance Procedure" for grievances arising from the interpretation or application of the terms of the Agreement. Article 36 provides for "Binding Arbitration" of grievances involving the interpretation or application of the terms of the Agreement other than Article 32 (Disciplinary Actions) and Article 33 (Adverse Actions).

By letter of October 17, 1974, NTEU wrote to the District Director of the Activity stating that pursuant to Article 34 of the Multi-District Agreement it was invoking arbitration of the adverse action concerning Mildred Embry. By letter of December 9, 1974, the Activity responded stating ^{4/} that the adverse action against Ms. Embry "is a matter specifically excluded from the advisory arbitration provisions of the contract", and it rejected the invocation of arbitration. The Applicant later filed the Application for arbitrability determination giving rise to this proceeding.

No grievance was initiated or is pending concerning the adverse action against Ms. Embry or the Activity's interpretation and application of the contract provisions as set forth in its letter of December 9, 1974.

^{3/} Exh. J2.
^{4/} There is no evidentiary document in the record before me establishing this fact. The fact of this letter having been sent is the heart of this case. The post-hearing brief of the Applicant quotes from it, citing the attachments to the Application as the source. The Activity's Response to Application also quotes the same words from it. The letter to the parties from the Regional Administrator (Exh. AS 4B), accompanying the Notice of Hearing, recites that the record before him shows there was such a letter. But it is not in any of the documents furnished for the record. Apparently the Regional Administrator inadvertently omitted it from the "formal" documents". I take the fact of the existence of such letter sufficiently established despite its absence from the record.

There is considerable additional evidence in the record which, in view of my analysis of the facts and the law governing the basic issue in this case, is irrelevant to the proper determination of the Application.

Discussion and Conclusion

I conclude that the Application should be dismissed because it is not an application for the determination of the arbitrability of a grievance. This is so whether the Executive Order as amended in 1975 governs this proceeding or whether the Executive Order prior to the 1975 amendments is applicable.

This case arises under Section 13(d) of Executive Order 11491 as amended. That Section was amended by Executive Order 11838 on February 6, 1975, effective ninety days thereafter. The wheels bringing this case to decision started turning before the most recent amendment and well before its effective date, but the hearing was not held until after the amendment and will not be decided until well after the amendment. This case was initiated by an Application filed January 15, 1975, before the amendment of February 6, 1975, and well before its effective date. But we need not decide whether it should be decided under the provisions of Section 13(d) before its 1975 amendment or after that amendment. The result is the same under both.

The only authority of the Secretary to decide arbitrability disputes is contained in Sections 6(a)(5) and 13(d) of the Executive Order as amended. Section 6(a)(5), before the 1975 amendment, confers the authority to "decide questions as to whether a grievance is subject to ... arbitration under an agreement." The 1975 amendment added the words "as provided in section 13(d) of the Order." This was not a substantive change but only a clarifying change. Section 6(a)(5) confers the authority on the Secretary to decide an arbitrability question, while Section 13(d) provides for the manner of presenting the question for resolution. Section 6(a)(5), both before and after the amendment, confers authority only "to decide questions whether a grievance is subject ... to arbitration. ..." I find nothing in that language, either before or after the amendment, that confers authority on the Assistant Secretary to decide an arbitrability question that does not arise from a dispute over "whether a grievance is subject ... to arbitration. ..."

The same conclusion is reached under Section 13(d).

Before the 1975 amendment that Section provided:

"Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter subject ... to arbitration under [the] agreement, may be referred to the Assistant Secretary for decision."

Here again only a question as to the arbitrability of a grievance is authorized to be referred to the Assistant Secretary, and here we have no grievance.

After the 1975 amendment, that provision became totally inapplicable to questions of arbitrability; it became limited to questions of whether a grievance was on a matter for which a statutory appeals procedure exists, and neither party raises such an issue. The remainder of the present Section 13(d), its second sentence, added by the 1975 amendment, provides:

"Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision."

Stripped of its words inapplicable to this case, 5/ the present second sentence provides:

"Other questions [other than whether a statutory appeal procedure exists] as to whether or not a grievance is on a matter ... subject to arbitration ... may be referred to the Assistant Secretary for decision."

This language also plainly authorizes the submission for arbitrability determination only of questions concerning the arbitrability of a grievance.

It is unnecessary to decide whether the essential grievance would have been a grievance over Ms. Embry's dismissal or,


5/ See Tr. 204-5.

as the Agency contends, a grievance over the rejection of the invocation of arbitration of her dismissal. In this case no grievance at all was filed and so the Application does not request the Assistant Secretary to determine whether "a grievance is on a matter ... subject to arbitration". Accordingly, it should be dismissed for lack of jurisdiction.

This may leave a gap in the administrative determination of arbitrability questions. It is conceivable that the parties, in their collective agreement, may contract for disputes other than over grievances to be submitted to arbitration. 6/ If they do, disagreement may arise over whether a particular non-grievance dispute is a dispute which they have agreed to submit to arbitration if either invokes arbitration. In such a situation, under my reading of Sections 6(a)(5) and 13(d) of the Executive Order, there would be no administrative resolution of such disagreement. But I cannot close the gap, if one exists, by reading Sections 6(a)(5) and 13(d) contrary to their plain literal meaning in the absence of some compelling reason. I find no such reason here.

RECOMMENDATION

The Application should be dismissed for lack of jurisdiction.


MILTON KRAMER
Administrative Law Judge

Dated: February 26, 1976
Washington, D.C.

6/ The Applicant contends that that is the situation in the present case.

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

COMMUNITY SERVICES ADMINISTRATION
A/SLMR No. 749

This case involved an Application for Decision on Grievability or Arbitrability filed by the Activity, Community Services Administration (CSA). The Activity contended, with respect to a grievance filed by the National Council of CSA Locals, AFGE, AFL-CIO (AFGE) over the filling of a position outside the bargaining unit, that the Order precluded the filing of grievances over positions outside the bargaining unit. Moreover, it contended that the grievance, as it related to the filling of vacancies generally is precluded by Section 12(b)(2) of the Order. A separate issue, raised by the AFGE in its response to the Application and litigated at the hearing, concerned a dispute over the language of Amendment 11 of the parties' negotiated agreement upon which the instant grievance was based.

In his Recommended Decision on Grievability, the Administrative Law Judge found that the grievance in the instant proceeding was grievable under the parties' negotiated agreement. In this regard, the Administrative Law Judge concluded that the language that appeared in the initialed draft of Amendment 11 was the version upon which he would rely for the purposes of resolving this dispute. Thus, he reformed the language of Amendment 11 finding no evidence that the AFGE had been advised of any changes in the initialed draft language to support the different language appearing in the final executed version of Amendment 11.

The Assistant Secretary, noting that the language of an agreement may be reformed where it clearly does not reflect the parties' agreement, found, contrary to the Administrative Law Judge, that reformation of the language of Amendment 11 was not appropriate. He indicated that reformation is a remedy accorded by courts of equity to parties only where there is evidence which is plain and convincing beyond a reasonable controversy. With respect to the instant case, he noted that the record established that the President of the AFGE, National Council of CSA Locals, at the time the agreement was signed, was involved at all stages of the negotiation of the Amendment; that he initialed each page of the final version of the Amendment prior to the ceremonial signing; and that he personally signed the final version which appeared in the printed copy of the negotiated agreement. The Assistant Secretary also noted that the Administrative Law Judge relied on heresay testimony that the President did not recall having renegotiated Amendment 11. Under these circumstances, the Assistant Secretary concluded that the language of Amendment 11 appearing in the executed negotiated agreement binds the parties for the purposes of the instant grievability dispute.

The above finding required that he make a de novo determination of the grievability dispute. In this regard, the Assistant Secretary, noting the decision of the Federal Labor Relations Council in Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71, in which the Council concluded that while agencies are not obligated to bargain over the filling of positions outside the bargaining unit, they may do so at their option, rejected the argument of the CSA that the instant grievance is not grievable because the duties of the position included Federal personnel work in other than a purely clerical capacity. However, noting the specific language of Amendment 11, which excludes from coverage those positions defined as "policy" position, the Assistant Secretary concluded, based on evidence adduced at the hearing, that the duties of the position in question involved the Agency-wide formulation of policy and, hence, such position was specifically excluded from the coverage of Amendment 11.

Accordingly, the Assistant Secretary found that the instant grievance was not on a matter subject to the parties' negotiated grievance procedure.

A/SLMR No. 749

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

COMMUNITY SERVICES ADMINISTRATION

Activity-Applicant

and

Case No. 22-5870(AP)

NATIONAL COUNCIL OF CSA LOCALS,
AFGE, AFL-CIO

Labor Organization

DECISION ON GRIEVABILITY

On February 20, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision on Grievability in the above-entitled proceeding finding that the grievance involved herein was on a matter subject to the grievance procedure set forth in the parties' negotiated agreement. Thereafter, the Activity-Applicant and the Labor Organization, National Council of CSA Locals, AFGE, AFL-CIO, herein called AFGE, filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision on Grievability and the AFGE filed an answering brief to the Activity-Applicant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision on Grievability and the entire record in the subject case, including the exceptions and supporting briefs filed by the parties and the answering brief to the Activity-Applicant's exceptions filed by the AFGE, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith. 1/

The essential facts of the case are set forth, in detail, in the Administrative Law Judge's Recommended Decision on Grievability, and I shall repeat them only to the extent necessary.

1/ The Administrative Law Judge inadvertently noted on page 5 of his Recommended Decision on Grievability that Phillip Kete signed the final copy of the Amendment to the negotiated agreement. In actuality, another individual signed for Mr. Kete. Additionally, on page 9 of his Recommended Decision on Grievability, the Administrative Law Judge, in quoting the reformed language of the Amendment, inadvertently left out the following portion of the quote between the words "posted" and "in": "and that all vacancies." These inadvertencies are hereby corrected.

The pertinent part of Amendment 11 of the parties' negotiated agreement as it currently appears in the printed copy of the negotiated agreement is 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...

The disputed version which appears in a draft copy of Amendment 11, initialed at an earlier date by the parties, is 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, 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 Administrative Law Judge concluded that in order to resolve the question whether the position involved in the instant grievance was encompassed under Section 11 of the Amendment to the parties' negotiated agreement, and thus make the necessary threshold determination of grievability, he first must make a finding as to which version of Amendment 11 was applicable. In this regard, he concluded that, "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." In his view, there was no evidence to establish that the AFGE was advised of changes in the initialed draft language of Amendment 11. Therefore, he concluded that he would not rely on the different version that appeared in the final draft signed by the parties. ^{2/} The Administrative Law Judge noted that, "To require parties to carefully read a contract that had previously been agreed upon, initialed and proof-read, 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." Under these circumstances, he concluded that the negotiated agreement should be reformed to reflect the draft language of Amendment 11, rather than the language appearing in the printed version of the agreement.

While I agree with the Administrative Law Judge that where the language of an agreement clearly does not reflect what the parties agreed to it may be reformed, I do not view the evidence herein as clearly

^{2/} The Administrative Law Judge assumed that the different version appearing in the final draft was an unintentional clerical error on the part of the Activity-Applicant.

establishing that the language appearing in the final printed version of Amendment 11 did not reflect the parties' agreement. Thus, reformation of an agreement is a remedy accorded by courts of equity to parties only where the agreement fails through fraud or mutual mistake to express the real agreement or intention of the parties. In this regard, two rules have been firmly established in equity to avoid needless disputes: First, that the burden is on the complaining party to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or other inequitable conduct of the other upon which he relies for a modification or avoidance of the agreement; and, second, that in view of the written record of the terms of the agreement, a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement. ^{3/}

The evidence in the instant case establishes that Wayne Kennedy, the President of the AFGE at the time the agreement was signed, was involved at all stages in the negotiation of the Amendment; that he initialed each page of the final draft prior to the ceremonial signing of the Amendment; and that he was present at the signing ceremony at which he personally signed the final draft of the Amendment incorporating the version of Amendment 11 appearing in the printed copy of the negotiated agreement. As noted above, the Administrative Law Judge viewed it as inequitable to require that those present at a signing ceremony be required to read what they signed. He also relied on the hearsay testimony of Phillip Kete, the Chief Negotiator for the AFGE who was not present at the signing ceremony, that Kennedy told him that he did not recall renegotiating Amendment 11 and the fact that the AFGE representatives were not advised about any changes in Amendment 11. In the Administrative Law Judge's opinion, this established that Amendment 11 was never renegotiated. However, in my view, such evidence does not satisfy the burden of proof requirement noted above and does not warrant reforming the negotiated agreement. Thus, I find that the evidence adduced herein failed to establish "beyond reasonable controversy" that the language of Amendment 11 of the negotiated agreement, as it appears in the printed version of the agreement, was not consistent with the actual agreement or intention of the parties. Consequently, I conclude that such language binds the parties for the purposes of this grievability dispute.

The use of a version of Amendment 11 different from that used by the Administrative Law Judge requires that I make a de novo determination with respect to the grievability dispute in question. In this regard, the parties agreed that the position in dispute, Employee Development Specialist, was not filled with a Community Services Administration employee. The parties also stipulated that the duties of the position in question included Federal personnel work in other than a purely clerical capacity. ^{4/}

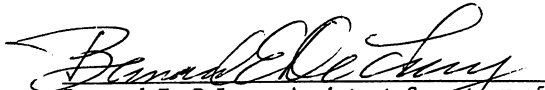
^{3/} See Williston on Contracts, Revised Edition, Sections 632, 633, 1552 and 1597.

^{4/} Citing United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266, the Administrative Law Judge

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 22-5870(AP) is not on a matter subject to the parties' negotiated grievance procedure.

Dated, Washington, D.C.
November 10, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

The Activity-Applicant contended, among other things, that the Order precluded a negotiated agreement from covering procedures for the filling of any vacancies outside the bargaining unit. In this connection, however, the Federal Labor Relations Council in Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71, concluded that, while agencies are not obligated to bargain over proposals concerning the procedures for filling positions outside the bargaining unit, they may, at their option, bargain over such proposals. In the instant case clearly the Activity-Applicant chose to bargain and reached an agreement with respect to a proposal which encompassed the filling of "all vacancies in the competitive service above the entry level." Therefore, unless the position in question is otherwise specifically precluded from coverage under Amendment 11, a question concerning the procedures for filling such position would be grievable despite the fact that the position was outside the bargaining unit.

There is no specific exclusion found in Amendment 11 with regard to positions involving duties related to Federal personnel work in other than a purely clerical capacity. However, Section 11 does exclude from coverage those positions defined as "policy" positions. 5/ The record reflects that the position in question is located in the Office of Administration, Personnel and Manpower Division. The duties of the position included serving as the Career Development and Training Officer for the Community Services Administration. Further, an employee in such position would have responsibility for all aspects of planning, developing, and evaluating the training and development program for the Community Services Administration headquarters and its ten regional offices. As, in my view, the foregoing establishes that the Employee Development Specialist is involved in the formulation of Agency-wide training policy, I find that the position in question is specifically excluded from coverage under Amendment 11 of the parties' negotiated agreement as a "policy" position. 6/ Accordingly, I conclude that the instant grievance over whether Amendment 11 was followed in filling the position in question is not grievable under the negotiated grievance procedure. 7/

4/ found that the Employee Development Specialist is within the unit exclusions set forth in Section 10(b) of the Order because an employee in such classification is engaged in Federal personnel work in other than a purely clerical capacity.

5/ The Activity-Applicant contends that the disputed position herein is a "policy" position. The Administrative Law Judge found it unnecessary to make a determination in this regard in view of his reformation of the language of Amendment 11 which broadened its coverage to cover "policy and supervisory" positions below the division level.

6/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

7/ In view of the disposition herein, I find it unnecessary to pass on the Activity-Applicant's further contention that Amendment 11 limits management's discretion in hiring and is, therefore, proscribed by Section 12(b)(2) of the Order.

November 17, 1976

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

BUREAU OF THE MINT,
U. S. DEPARTMENT OF THE TREASURY
and
BUREAU OF THE MINT,
U. S. ASSAY OFFICE,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 750

This case involved two unfair labor practice complaints, one filed by the American Federation of Government Employees, AFL-CIO (AFGE), and the other filed by Local 51, American Federation of Government Employees, AFL-CIO (AFGE Local 51), alleging essentially that the Respondent Bureau violated Section 19(a)(1) and (6) of the Order by granting the local management of its field offices discretion to grant up to two hours of administrative leave to employees on December 24, 1974, without consulting with the AFGE. It was also alleged that the Respondent Bureau's U. S. Assay Office in San Francisco violated Section 19(a)(6) of the Order by failing to consult and confer with AFGE Local 51 regarding the employees early release on that date.

The Administrative Law Judge found that the Respondent Bureau had engaged in conduct violative of the Order. Thus, he found that the Respondent Bureau's conferral of administrative leave was an employment benefit and, thus, constituted a matter upon which it was obligated to bargain under Section 11(a) of the Order. Finding that the Respondent Bureau had failed to negotiate over the unilaterally conferred administrative leave to unit employees and had failed to bargain about the implementation and impact of such decision, the Administrative Law Judge concluded that the Respondent Bureau violated Section 19(a)(1) and (6) of the Order. He also found that, based, in part, upon the parties' negotiated agreement, there was an obligation to bargain over the instant matter at both the national and the local levels with representatives of the AFGE. Thus, he concluded that there was a violation of the Order at the local level based on its failure to meet and confer with AFGE Local 51.

The Assistant Secretary disagreed with the Administrative Law Judge's conclusion that the Respondent Bureau was obligated to meet and confer with the AFGE concerning its decision to grant administrative leave. Thus, he concluded that the decision to grant administrative leave fell within the ambit of Section 12(b)(3) of the Order, and, accordingly, the Respondent Bureau was not obligated to meet and confer

concerning such decision. However, the Assistant Secretary concluded that the Respondent Bureau violated Section 19(a)(1) and (6) of the Order by failing to afford the AFGE the opportunity to meet and confer over the implementation and impact of the decision. Contrary to the Administrative Law Judge, however, he found that the parties' negotiated agreement did not require the Respondent to meet and confer with local representatives of the AFGE. Accordingly, he found that no violation occurred based on the alleged failure to meet and confer with AFGE Local 51.

To remedy the violations found, the Assistant Secretary issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF THE MINT,
U. S. DEPARTMENT OF THE TREASURY

Respondent

and

Case No. 22-6331(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

BUREAU OF THE MINT
U. S. ASSAY OFFICE
SAN FRANCISCO, CALIFORNIA

Respondent

and

Case No. 70-4841(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 51

Complainant

DECISION AND ORDER

On May 14, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

and recommendations of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that the Respondent Bureau's conferral, on December 24, 1974, of two hours of administrative leave time to unit employees (subject to the discretion of the officers in charge of the various facilities of the Respondent) was an employment benefit and, thus, constituted a matter upon which the Respondent Bureau was obliged to bargain under Section 11(a) of the Order. 1/ Finding that the Respondent had failed to negotiate over the unilaterally conferred administrative leave to unit employees and had failed to bargain about the implementation and impact of such decision the Administrative Law Judge concluded that the Respondent Bureau violated Section 19(a)(1) and (6) of the Order. He also found that Local 51 was authorized by the AFGE to meet and confer on such matters with the Respondent Bureau's San Francisco Assay Office and, further, that Article X, Section 8 of the parties' negotiated agreement required such consultation. 2/ Under the circumstances, the Administrative Law Judge concluded that there was an obligation to bargain over the instant matter at both the national and the local levels with representatives of the AFGE.

In the particular circumstances of this case, I do not agree with the Administrative Law Judge's conclusion that the Respondent Bureau was obligated to meet and confer with the AFGE concerning its decision to provide two hours of administrative leave to certain unit employees. Thus, Section 12(b)(3) of the Order reserves to agency management the right "to relieve employees from duties because of lack of work or for other legitimate reasons." In my view, the Respondent Bureau's decision to grant two hours of administrative leave to employees whose services were not needed on the afternoon of December 24, 1974, falls clearly within the ambit of that section of the Order. As subjects encompassed within Section 12(b) of the Order are non-negotiable, it follows that the Respondent Bureau was not obligated to meet and confer with the Complainant concerning its decision to grant administrative leave.

However, I find, in agreement with the Administrative Law Judge, that the Respondent Bureau improperly failed to afford the AFGE the

1/ The Complainant, American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, through its designated agent, the Mint Council, is the exclusive representative of a nationwide unit of all nonprofessional employees and a nationwide unit of all professional employees of the Respondent. The Mint Council is comprised of designated presidents of four AFGE Locals.

2/ Article X, Section 8 of the negotiated agreement provides, in part, that prior to the "...implementation of changes in shift assignments and hours of work affecting a substantial number of unit employees within a Field Office Installation, Management will consult with the Local Union."

opportunity to meet and confer over the implementation and impact of its decision to grant the administrative leave. In this regard, it is well established that an activity is obligated to bargain concerning the implementing procedures and impact on adversely affected employees of a decision, even though the subject matter of the decision is non-negotiable under Section 12(b) of the Order. 3/ The record herein does not reflect any overriding exigency which would have precluded the Respondent Bureau from making its decision with respect to the granting of the administrative leave involved in ample time so as to afford the AFGE an opportunity to bargain over the procedures and impact of its decision prior to its effectuation. I find, therefore, that the Respondent Bureau's failure to afford the AFGE notice and an opportunity to bargain concerning implementing procedures and impact constituted a violation of Section 19(a)(1) and (6) of the Order.

With respect to the scope of the remedial order herein, I shall limit such order to require only that the Respondent Bureau meet and confer with the exclusive representative, rather than requiring the Respondent Bureau to meet and confer with both the exclusive representative and its constituent locals as recommended by the Administrative Law Judge. 4/ The Assistant Secretary has held that an activity is obligated only to meet and confer with the national exclusive representative, and not with one of its constituent locals, unless such constituent locals have been authorized to act in behalf of the exclusive representative. 5/ Thus, absent such proper designation, the Respondent Bureau in the instant proceeding was not obligated to meet and confer with various locals of the national exclusive representative concerning the impact of its decision. In this connection, and contrary to the Administrative Law Judge, I do not find any specific authorization for Local 51 to act on behalf of the AFGE in this matter. Moreover, I do not find that Article X, Section 8 of the parties' negotiated agreement, which requires "consultation" with the "Local Union" on the implementation of changes in shift assignments and hours of work, is clearly intended to apply to such matters as the one-time grant of

3/ See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56.

4/ Under the particular circumstances of this case, I find further that no purpose would be served to order the Respondent Bureau to bargain concerning the procedures for the implementation of its decision to grant administrative leave on December 24, 1974. However, I shall order that the Respondent Bureau cease and desist from engaging in such conduct in the future.

5/ Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 251.

administrative leave involved herein. As the negotiated agreement does not clearly and unequivocally waive the Respondent's right to meet and confer solely with the national exclusive representative concerning the implementation and impact of its decision to grant two hours administrative leave on December 24, 1974, 6/ I shall not order the Respondent to meet and confer with the constituent locals on the impact of its decision. Accordingly, I shall dismiss the complaint in Case No. 70-4841(CA).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Bureau of the Mint, U. S. Department of the Treasury shall:

1. Cease and desist from:

(a) Instituting a policy of granting administrative leave for employees represented exclusively by the American Federation of Government Employees, AFL-CIO, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

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

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

(a) Upon request by the American Federation of Government Employees, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of the grant of administrative leave on December 24, 1974.

(b) Post at all Bureau of the Mint facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Bureau of the Mint and they shall be posted at all Bureau of the Mint facilities and installations and maintained by the

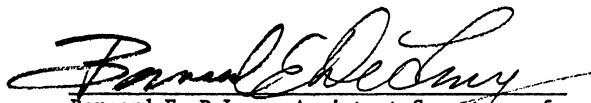
6/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint in Case No. 70-4841(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 17, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a policy of granting administrative leave for employees represented exclusively by the American Federation of Government Employees, AFL-CIO, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

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

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of the grant of administrative leave on December 24, 1974.

(Activity or Agency)

Dated: _____ By: _____
(Signature)

-5-

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.



Recommended Decision and Order

Statement of Case

..... :
In the Matter of :
: BUREAU OF THE MINT, :
U. S. DEPARTMENT OF THE TREASURY, :
Activity :
and :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, :
Complainant :
..... :

Case Nos. 22-6331 (CA)
70-4841 (CA)

The American Federation of Government Employees (hereinafter referred to as AFGE), filed an unfair labor practice complaint in Case No. 22-6331(CA) dated August 27, 1975 alleging that the Bureau of the Mint 1/ violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, (hereinafter called the Order) by granting the local management of its field offices discretion to release all non-essential employees up to two hours early on December 24 without consulting with AFGE and further that this resulted in the arbitrary denial of this benefit to certain employees. Local 51 AFGE, San Francisco, California filed an Unfair labor practice complaint in Case No. 70-4841(CA) on June 19, 1975 alleging that the U.S. Assay Office of the Bureau of the Mint violated Section 19(a)(6) of the Order by failing to consult and confer with Local 51 AFGE regarding the early release of the employees.

JAMES NEUSTADT, Esq.
Assistant General Counsel
American Federation of Government
Employees
1325 Massachusetts Avenue, N. W.
Washington, DC 20005

Pursuant to the above described complaints an Order Consolidating Cases and a Notice of Hearing on Complaint were issued by the Assistant Regional Director for the Philadelphia, Pennsylvania Region on December 9, 1975.

MILTON D. McFARLAND, President
American Federation of Government
Employees, Local 51
1325 Massachusetts Avenue, N. W.
Washington, DC 20005

A hearing was held in the subject case before the undersigned Administrative Law Judge, on January 22, 1976 in Washington, D. C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. All parties had an opportunity to argue orally and did submit briefs, which have been duly considered.

G. JERRY SHAW, Esq. and
RICHARD MIHELICIC, Esq.
Office of Chief Counsel
Internal Revenue Service
Department of the Treasury
Room 4568, 1111 Constitution Ave., N. W.
Washington, DC 20224

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

Findings of Fact

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

AFGE is the exclusive representative of a nationwide unit of all non-professional employees and a nationwide unit of all professional employees of the Bureau of the Mint. There was a negotiated agreement between AFGE and the Bureau of the Mint in effect at all times material to this case.

1/ Hereinafter sometimes referred to as the Bureau or the Mint.

AFGE represents employees in these units at all designated Bureau of the Mint facilities or installations by its designated agent, the Mint Council, comprised of designated agent presidents of 4 AFGE Locals.

(1) Local 51 AFGE at the San Francisco Assay Office and Mint;

(2) AFGE Local 695 at the Denver Mint;

(3) AFGE Local 1023 at the Philadelphia Mint; and

(4) AFGE Local 2856 at the New York Assay Office and West Point Depository and President of the Mint Council.

Further, Article X Section 8 of the agreement provides that prior to the "implementation of changes in shift assignments and hours of work affecting a substantial number of unit employees within a Field Office/Installation, Management will consult with the Local Union."

On December 24, 1974, as in prior years, very little, if any, work was actually performed at the various facilities of the Bureau of the Mint. It has been customary in the past for parties to be held at the Mint installations on the last workday before the Christmas Holiday. These parties usually begin in the late morning or around noon and extend through the rest of the workday. The Denver Mint, however, was an exception because it scheduled production on December 24.

A mint policy had been established prior to December 24, 1974 that employees were required to stay on duty status at the San Francisco Assay Office and the San Francisco Mint until the completion of their tours of duty during Christmas Eve days unless they were granted sick or annual leave. A similar policy had been in effect at the Philadelphia Mint as well as at the Denver Mint.

In the morning of December 24, 1974, the Mint's Deputy Director, Frank H. MacDonald, instructed a secretary in his office at the Mint Headquarters in

Washington to notify the Superintendents and Officers in Charge of the various Bureau facilities that they may use their administrative discretion in permitting employees to leave up to two hours early on that day. In so instructing the secretary, Mr. MacDonald made no mention that the Superintendents or Officers in Charge were required to inform, meet, confer and/or negotiate with the AFGE Mint Council nor with any of its member Locals concerning the possible early release of the employees.

This early leave instruction was relayed by telephone between 12 noon and 2 p.m. (Washington time) of the same day to "the Philadelphia and Denver Mints and the New York and San Francisco Assay Offices."

The early leave instruction was received on the same day by the acting heads of at least three facilities: the San Francisco Assay Office between 1 and 1:30 p.m. the Denver Mint in the morning (C. Ex. 1) or about 1 p.m. and the Philadelphia Mint between 12:30 and 1 p.m.

After receiving the leave instruction, management of the San Francisco Assay Office, the Denver Mint and the Philadelphia Mint, did not "inform, meet, confer and/or negotiate" during December 24, 1974 with the respective Mint facilities' presidents of AFGE Local 51, AFGE Local 695 and AFGE Local 1023 who, as mentioned above, were also members of the Mint Council.

U. S. Assay Office, San Francisco, California

On December 24, 1974, Mr. George Wright, then Acting Assistant Officer in Charge of Administration, was Acting Officer in Charge. At approximately 1:00 p.m. on that date a Ms. Jackson, Secretary to the Officer in Charge, received a call from the Washington Headquarters of the Mint advising that employees at the San Francisco Assay Office could be released up to two hours early at the discretion of the Officer in Charge. This message was relayed to Mr. Wright, who proceeded to tell the various division chiefs that they could release their employees when they were through partying. Mr. Tom Miller, the assistant program manager for production, who is the individual responsible for the production division, which includes the Wage Grade employees, was one of the men notified. It was Mr. Wright's

intention that all non-essential employees be released early on that day and many of the employees were permitted to leave, and did in fact leave, before 3:00 p.m., December 24, 1974. Some wage grade employees (WG) who had taken annual leave were recredited with Administrative leave, whereas others were not.

Mr. Wright was first notified on the first workday after the holiday by Mr. McFarland of Local 51 AFGE, that not all individuals got to leave early on December 24, 1974. At that time he, Mr. Wright, advised Mr. McFarland that he would discuss the matter with Mr. Brockenborough, Officer in Charge of the San Francisco Assay Office.

Mr. Wright, after discussing the matter with Mr. Brockenborough, told Mr. McFarland that Management would handle the cases on an individual basis if it were provided a list of the individuals who were not released early. Mr. Wright was never provided with the requested list.

The Philadelphia Mint

At approximately 12:30 p.m. on December 24, 1974, Mr. Seymour Rosenbaum, Acting Superintendent of the Philadelphia Mint received a call from the Mint Headquarters advising that he could release employees at his discretion up to two hours early that afternoon. At that time, Christmas parties had already begun throughout the facility, and Mr. Rosenbaum took no action on the discretion granted him until 3:00 p.m.; when, after believing the parties had continued long enough, he advised the guards to empty the building at 3:30 p.m. Most of the general schedule employees (GS) who worked in administration section had left for the day by 2:00 p.m. Apparently WG employees were released at about 3:30 p.m.

At Denver

Unlike the other Mint facilities, production rather than partying usually goes on at the Denver Mint on Christmas Eve. December 24, 1974 was no exception to this general rule. On December 24, 1974, at about 1:00 p.m. Denver time, Mr. Harry Lawrence, Deputy Superintendent of the Mint, recieved the same notification from Washington that the other facilities had received. Mr. Lawrence had already made the decision to keep actual production

going. However, because of the call from Washington, he authorized release of non-essential GS employees two hours early. Wage Grade employees were not given an early release on December 24, 1974 because Mr. Lawrence believed that coin production was necessary and therefore those individuals were essential to the continued operation of the plant.

Neither Washington nor any of the aforementioned facilities contacted any representatives AFGE or its locals prior to the release of the non-essential employees.

Conclusions of Law

A. Obligation to Bargain Regarding Conferral of Administrative Leave to Unit Employees

Section 11(a) of the Order provides that an Agency and a labor organization have an obligation to meet and confer with respect to personnel policies and practices and matters affecting working conditions. Although a change in the hours of work clearly constitutes a personnel practice, or matter affecting working conditions, the Mint maintains that certain "bonus" cases in private sector caselaw should apply herein and relieve management of its Section 11(a) obligations.

Under such a "bonus" doctrine, the principle issue to be decided is whether the "bonus" in question constituted a bona fide gift which need not be the subject of bargaining or was instead a form of compensation which then must be negotiated between the parties. 1a/

No conclusions are made as to whether management intended to confer administrative leave as a gift rather than as a benefit that employees would have an expectation of receiving on an annual basis and thus negotiable under the "bonus" doctrine, because I conclude that the private sector "bonus" doctrine, is clearly inopposite to federal labor-management relations where additional pay, extra allowance or compensation to employees in any form whatsoever is prohibited in the absence of authorizing Congressional legislation. 2/ Further, it seems quite apparent that two hours of administrative leave is an employment benefit and is within the bargaining obligation as envisioned by the Order.

1a/ Century Electric Motor Co., 180 NLRB No. 174 (1970) and Washington Hardware and Furniture Co., 175 NLRB No. 10 (1969).
2/ U.S. v. Garlinger, 169 U.S. 316 (1898); U. S. v. King, 147 U.S. 676 (1893).

Accordingly, the conferral of two hours leave time to unit employees in this case was negotiable with AFGE under Section 11(a) of the Order.

B. The Limited Time in Which to Implement the Grant of Leave Time as an "Exigency" Precluding Section 11(a) Bargaining.

The Bureau's decision to permit early dismissal of its employees was made at approximately 11:00 a.m. (Washington time) on December 24, 1974. This decision was relayed by telephone from Washington to the affected Bureau installations between 12:00 noon and 2:00 p.m. on the same day. The Mint contends that the AFGE officials who would normally have been notified of the decision were participating in the customary holiday festivities at the affected installations and consequently could not readily be consulted. Respondents further surmise that had management in fact attempted to consult with these union officials, it would have been too late in the day to implement the early dismissal plan and this benefit to the unit employees would have been lost. The Mint introduced no evidence to indicate that either it or any of its agents did, in fact, try to contact any AFGE representative.

The Assistant Secretary has indeed formulated an exception to the Section 11(a) bargaining obligation if there exists "an overriding exigency which would (require) immediate action." 3/ This exception is limited however, to those cases where management has exercised one of its Section 11(a) or 12(b) prerogatives; the exigency, requiring immediate action, and no meaningful opportunity to bargain, relieves management, therefore, of its obligation to consult regarding impact and implementation of the decision. By contrast, the immediate action exception is not available to management if the decision itself, as opposed to merely its impact and implementation, must be negotiated. If a management decision is not a reserved right under Sections 11(b) or 12(b), management's obligation to bargain about said decision is absolute. I conclude that similarly the "immediate action" exception would not be available if the parties did have some sufficient time, even if

3/ Department of the Navy, Naval Plant Representative Office, Baltimore. A/SLMR No. 486 at p. 11; Cf. Federal Railroad Administration, A/SLMR No. 418.

very brief, to bargain. Accordingly, the Bureau herein was obligated to consult with appropriate union officials, even if taking the time to do so might jeopardize the early dismissal program given the late hour at which it was conceived. Even if the Bureau had no obligation to bargain concerning the basic decision to grant the administrative leave, nevertheless the Bureau still would have been obliged to bargain concerning the impact and implementation of this decision. The record does not establish that had the Bureau promptly notified or attempted to notify AFGE concerning the decision that the parties would not have been able to engage in prompt and meaningful discussions over the impact and implementation.

C. Obligation to Bargain at Both the National and Local Levels

As stated herein above, this case consolidates two complaints; one was filed by AFGE's national office and the other by AFGE Local 51.

The Study Committees in its Report and Recommendations (1969), stated:

When national exclusive recognition has been granted in an appropriate national unit, no recognition should be granted to any other labor organization for employees within the national exclusive unit.

It follows therefore, and the Assistant Secretary has so held, that when a labor organization acquires exclusive recognition in a nationwide unit that encompasses previously recognized, less comprehensive exclusive bargaining units, as AFGE has done 4/ such less comprehensive units cease to exist for bargaining purposes. 5/ The Study Committee Report further provides

4/ See Certification of Representation, September 24, 1973. Joint Exhibit 3.

5/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR 251.

however, that "(t)his does not preclude consultation or negotiation at any level with representatives of the nationally recognized exclusive union." Accordingly, if a local union or other representative is authorized by the national representative to bargain on behalf of a portion of the over all unit, The agency and its agents have a duty to meet and confer not only with the national representative but to the local one as well. 6/

I conclude that AFGE, in its capacity as the exclusive bargaining representative at the national level, has authorized its Local 51 to meet and confer with Respondent's San Francisco Assay Office within the meaning of O.E.O., supra. Indeed, beyond a mere permissive authorization to meet and consult, Article X Section 8 of the existing agreement between the national offices of the Bureau of the Mint and AFGE requires such consultation between the local bureau offices and the AFGE locals.

Accordingly, I conclude that by unilaterally conferring administrative leave to unit employees, and by failing to bargain about the implementation and impact of such decision, the Bureau improperly refused to consult, confer, or negotiate with its employees' exclusive bargaining representative at both the national and local levels, in violation of Section 19(a)(6) of the Order.

Further, I find that the unilateral conferral of a benefit, such as administrative leave, to unit employees and the failure to bargain about its implementation and impact undermines the exclusive representative and therefore necessarily restrains and coerces unit employees in the exercise of the rights assured by the Order.

Recommendation

Having found that the Respondent has engaged in conduct prohibited by Sections 14(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.

6/ Id.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Bureau of the Mint, U. S. Department of the Treasury, shall:

1. Cease and desist from:

(a) Unilaterally granting leave or otherwise changing leave policies or other conditions of employment without first affording the AFGE Mint Council or its member Locals as appropriate, or any other exclusive representative, an opportunity to negotiate concerning such changes and/or to negotiate concerning the procedures to be used to implement such changes and their impact.

(b) Interfering with, restraining or coercing its employees by unilaterally granting leave or otherwise changing leave policies or other conditions of employment without first affording the AFGE Mint Council or its member Locals as appropriate, or any other exclusive representative, an opportunity to negotiate concerning such changes and/or to negotiate concerning the procedures to be used to implement such changes and their impact.

(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 by the AFGE Mint Council or its member Locals as appropriate, or any other exclusive representative, meet and negotiate concerning the impact and procedures for implementation of grant of leave time on December 24, 1974 and, if required as a result of said negotiations, appropriately readjust the leave records of any adversely affected employees.

(b) Post at all Bureau of the Mint installations copies of the attached notice marked "Appendix" on

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 affectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED LABOR-MANAGEMENT RELATIONS

IN THE FEDERAL SERVICE

We hereby notify our employees that:

forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Bureau of the Mint and they shall be posted at all Bureau of the Mint Installations and maintained by the Director for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply therewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: May 14, 1976
Washington, DC

WE WILL NOT unilaterally grant leave or otherwise change leave policies or other conditions of employment without first affording the American Federation of Government Employees Mint Council, or its member Locals as appropriate or any other exclusive representative, an opportunity to negotiate concerning such changes and/or to negotiate concerning the procedures to be used to implement such changes and their impact.

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

WE WILL, upon request by the AFGE Mint Council, or its member Locals as appropriate, or any other exclusive representative meet and negotiate concerning the impact and procedures for implementation of the grant of leave time on December 24, 1974 and, if required as a result of said negotiations, appropriately readjust the leave records of any adversely affiliated employees.

(Agency or Activity)

Dated: _____ By: _____
(Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of Labor-Management Services Administration, U.S. Department of Labor whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

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

SMALL BUSINESS ADMINISTRATION,
DISTRICT OFFICE,
HATO REY, PUERTO RICO, and
SMALL BUSINESS ADMINISTRATION,
REGIONAL OFFICE,
NEW YORK, NEW YORK
A/SLMR No. 751

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local Union 2951, AFL-CIO (Complainant), alleging that the Small Business Administration, District Office, Hato Rey, Puerto Rico, and the Small Business Administration, Regional Office, New York, New York (Respondents), violated Section 19(a)(1) and (6) of the Order by unilaterally changing working conditions when they refused to close the District Office and grant administrative leave to its employees in observance of Good Friday, a legal holiday of the Commonwealth of Puerto Rico, despite the fact that the office has been closed and administrative leave granted to employees in observance of this holiday in previous years. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties had submitted a stipulation of facts and exhibits to the Regional Administrator for Labor-Management Services.

The Respondents took the position that the closing of a field office and the granting of administrative leave to employees in observance of a state or local holiday is subject to Agency Regulations. Thus, the Respondents asserted that they merely applied the necessary criteria to determine if the request should have been granted. They further contended that the decision to either grant or deny such a request is a reserved management right under Section 12(b) of the Order and not subject to consultation.

The Assistant Secretary found that the Respondents' conduct was not violative of Section 19(a)(1) and (6) of the Order. In this regard, he noted that the Respondents' decision not to close the District Office was a reserved management right within the meaning of Section 12(b) of the Order and, therefore, the Respondents were not obligated to meet and confer with the Complainant with respect to such decision. The Assistant Secretary noted further that there was no evidence that the Complainant at any time requested bargaining concerning the impact and implementation of the Respondents' decision and that past practice and bargaining history are without controlling significance where a matter constitutes a reserved management right under Section 12(b) of the Order. Accordingly, he ordered that the complaint be dismissed in its entirety.

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

SMALL BUSINESS ADMINISTRATION,
DISTRICT OFFICE,
HATO REY, PUERTO RICO, and
SMALL BUSINESS ADMINISTRATION,
REGIONAL OFFICE,
NEW YORK, NEW YORK

Respondents

and

Case No. 37-01554(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 2951,
AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Benjamin B. Naumoff's Order Transferring Case to the Assistant Secretary of Labor, dated March 19, 1976, in accordance with Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in this case, including the parties' stipulation of facts, accompanying exhibits and the Respondents' brief, the Assistant Secretary finds:

The complaint herein alleges that on or about March 21, 1975, the Respondents violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by unilaterally changing working conditions when they refused to close the District Office and grant administrative leave to its employees in observance of Good Friday, a legal holiday of the Commonwealth of Puerto Rico, despite the fact that the office had been closed and administrative leave granted to employees in observance of this holiday in previous years.

The Respondents take the position that the closing of a field office and the granting of administrative leave to employees in observance of a local or state holiday is subject to Agency Regulations. In this regard, the Respondents assert that they merely applied the necessary criteria to determine if the request should be granted. In addition, they contend that the decision to either grant or deny such a request is a reserved management right under Section 12(b) of the Order and that they are not required to consult on such a decision.

The facts, as stipulated by the parties, are essentially as follows:

The Complainant was granted formal recognition in 1969 and was certified in 1971 as the exclusive representative for all professional and nonprofessional employees of the Small Business Administration District Office, Hato Rey, Puerto Rico (Respondent District Office).

On March 10, 1975, the Puerto Rico District Director requested authorization from the Small Business Administration, Regional office, New York, New York (Respondent Regional Office), to close the District Office with administrative leave for all its employees on Good Friday, March 28, 1975. On March 21, 1975, Assistant Regional Director for Administration of the Respondent Regional Office replied, suggesting that the conditions necessary to close the District Office, pursuant to Standard Operating Procedure 36-10 (SOP 36-10), did not exist and that the request be clarified and resubmitted if applicable. The District Director did not resubmit the request, but instead posted a memorandum to all Puerto Rico District Office employees stating that the request had been denied.

The evidence establishes that in previous years the District Director of the Puerto Rico District Office requested and was granted permission by the Regional Office to close the District Office and grant administrative leave to employees in observance of this holiday pursuant to Agency Regulations. SOP 36-10 reads, in part, as follows:

STATE AND LOCAL HOLIDAYS

State and local holidays shall not be observed by the mere fact of their occurrence. Such days usually shall be treated as regular workdays, and any absence when the office is not closed shall be charged to leave.

a. Criteria for Closing a Field Office on Local Holidays When the Functions of the Office May Not Be Performed Properly. Employees of the office must be actually prevented from working by one of the following conditions:

- (1) The building or office in which they work is physically closed, or building services essential to proper performance of work are not operating.
- (2) Local transportation services are discontinued or interrupted. Employees are thereby prevented from reporting to their work location.
- (3) The duties of the employees consist largely of dealing directly with business or industrial establishments; all such establishments

are closed to observe the local holiday; and there are no other duties (consistent with their normal duties) to which the employees can be assigned on the local holiday.

- b. Authority to Close Office. The closing of a field office requires the prior approval of the appropriate regional director. He shall apply the appropriate standards for determining when work may not be performed properly, and document which condition applies when he approves the closing of an office. Notice shall be sent to the Assistant Administrator for Administration whenever the regional director approves the closing of an office.
- c. If Office is Closed. If the regional director approves the closing of the office:
- (1) The day shall be considered a nonworkday under Section 205 of the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. 6302).
 - (2) Sick or annual leave shall not be charged for absence on that day, even though an employee may be on an extended period of approved leave which includes the holiday.
- d. If Office Is Not Closed. As in religious holiday, supervisors shall be liberal in granting leave to employees who wish to observe the local holiday. In determining who may be spared, supervisors shall consider such matters as:
- (1) The significance of the holiday locally;
 - (2) The workload in the office; and
 - (3) The immediate essentiality of the Federal services rendered.
- e. Absence on Local Holiday. When the office is not closed, absence shall be charged to leave.

FINDINGS AND CONCLUSIONS

As noted above, the Respondents contend that they merely applied the applicable Agency Regulations in denying the request to close the Puerto Rico District Office on Friday, March 28, 1975, in observance of Good Friday, and that consultation on such matters is not necessary. The Respondents contend further that the decision to deny the request is a reserved management right under Section 12(b) of the Order and not subject to consultation.

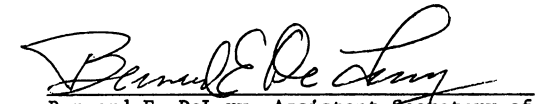
I agree with the latter contention of the Respondent. Thus, in my view, the Respondents' decision not to close the Puerto Rico District Office was a reserved management right within the meaning of Section 12(b) of the Order. Under these circumstances, the Respondents were under no obligation to meet and confer with the Complainant with respect to such decision. 1/ Nor would the fact that in previous years the Puerto Rico District Office was closed on Good Friday require a contrary result. Thus, the Federal Labor Relations Council has held, in effect, that where a matter constitutes a reserved management right under Section 12(b) of the Order, past practice and bargaining history are without controlling significance. 2/

Accordingly, and noting that there was no evidence that the Complainant at any time requested bargaining concerning the impact and implementation of the Respondents' decision 3/, I find that the latter's conduct herein was not violative of Section 19(a)(1) and (6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 37-01554(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 17, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

- 1/ Cf. Bureau of the Mint, U.S. Department of the Treasury, A/SLMR No. 750.
- 2/ See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 and U.S. Kirk Army Hospital, Aberdeen, Md., FLRC No. 70A-11.
- 3/ Cf. U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION, COLORADO
A/SLMR No. 752

This case involves two petitions for clarification of unit (CU) filed by the American Federation of Government Employees, Local 3499, AFL-CIO (Petitioner), seeking to clarify the status of two job descriptions, Property Management Specialist, GS-1170-12, and Office Management Assistant, GS-301-8. While the Petitioner contended that both classifications should be included in the existing unit, the Activity argued that the Property Management Specialist is a supervisor and/or a management official, and the Office Management Assistant is a management official. Accordingly, in the Activity's view, both should be excluded from the exclusively recognized unit.

The Assistant Secretary found the Property Management Specialist was a supervisor within the meaning of the Order and should be excluded from the unit. In this regard, he noted that Property Management Specialist had effectively recommended the hiring of one subordinate employee, a Clerk-Typist, GS-322-2, and that he had the authority to discipline and grant leave, as well as assign and review the Clerk-Typist's work. With respect to the Office Management Assistant, the Assistant Secretary found that this employee was engaged in Federal personnel work in other than a purely clerical capacity within the meaning of the Order. In this regard, he found the evidence established, among other things, that the Office Management Assistant reviewed program operations, records, communications, personnel and office management, as well as clerical and related work processes throughout the field structure of the Activity and conducted confidential interviews with employees in order to assess whether individuals are performing according to their job descriptions and to examine the Equal Employment Opportunity program.

Accordingly, the Assistant Secretary ordered that the exclusively recognized unit be clarified by excluding from such unit the aforementioned position classifications. Under the circumstances, he considered it unnecessary to decide whether the two position classifications should be excluded from the exclusively recognized unit on the basis that the incumbents were management officials.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION, COLORADO 1/

Activity

and

Case Nos. 61-2884(CU) and
61-2931(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3499, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

Upon the entire record in the subject cases, the Assistant Secretary finds:

In Case No. 61-2884(CU), the Petitioner seeks to clarify the status of a Property Management Specialist, GS-1170-12, requesting that such position be included in the exclusively recognized unit represented by the Petitioner. 2/ In Case No. 61-2931(CU), the Petitioner seeks to clarify the status of a Office Management Assistant, GS-301-8, requesting that such position be included in the exclusively recognized unit represented by the Petitioner.

1/ The name of the Activity appears as amended at the hearing.

2/ On February 26, 1974, the Petitioner was certified as the exclusive representative in a unit of all professional and nonprofessional employees, full-time, part-time, and temporary employees expected to be employed over 90 days, within the State of Colorado under the direction of the State Director, Farmers Home Administration, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined in the Order.

The Activity contends that Percival M. Lobb, Property Management Specialist, GS-1170-12, is a supervisor and/or a management official, and that Lois Jean Haines, Office Management Assistant, GS-301-8, is a management official. Accordingly, in the Activity's view, both should be excluded from the exclusively recognized unit.

The mission of the Activity is to provide assistance, through various loan programs, to rural Americans by: (1) encouraging and supporting family farm ownership and operation to provide an economic and social base; (2) providing adequate housing; (3) installing needed community facilities; (4) providing economic support to farmers affected by disaster; and (5) fostering economic development with loans for rural business and industrial enterprises.

The field organization of the Farmers Home Administration consists of 42 state offices, each of which administers all agency programs and activities in one or more states. The Activity is one such state office. It is headed by a State Director located in Denver, Colorado, who is responsible for a number of program divisions serving the state of Colorado. The field operations of the Activity are divided into four Districts, each headed by a District Supervisor. Under the 4 Districts are 25 county offices, each directed by a County Supervisor. Also, there are a number of sub or part-time offices.

Property Management Specialist, GS-1170-12

Percival M. Lobb, Property Management Specialist, GS-1170-12, is under the direct supervision of the State Director. The evidence shows that Lobb has one subordinate employee, a Clerk-Typist, GS-322-2. The evidence also establishes that Lobb effectively recommended that the Clerk-Typist be hired, that he has the authority to discipline and grant leave, and assigns and reviews the Clerk-Typist's work. There is no evidence that the exercise of the foregoing authority is of a merely routine or clerical nature or that it does not require the use of independent judgment.

Under these circumstances, I find that Lobb is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit. 3/

Office Management Assistant, GS-301-8

Lois Jean Haines, Office Management Assistant, GS-301-8, is under the direct supervision of the Administrative Officer who, in turn, reports to the State Director. The evidence reveals that Haines' duties involve continuous travel to the county offices in order to review program operations, records, communications, personnel and office management, as well as clerical and related work processes. In this connection, Haines

3/ In view of the foregoing, it was considered unnecessary to decide whether Lobb should be excluded from the unit on the basis that he is a management official.


conducts confidential interviews with all employees of an office in order to assess whether individuals are performing according to their job descriptions and to examine the Equal Employment Opportunity program, the Incentive Awards program, performance evaluation procedures, employee training, and employee-management relations. Also, the evidence establishes that Haines participates in regular state staff meetings where she makes substantive recommendations to the State Director on a number of items including personnel matters. The record reveals that her recommendations in this regard have been followed.

Based on the foregoing, I find that the character and extent of Haines' involvement in personnel matters warrants the conclusion that she is engaged in non-clerical Federal personnel work for the Activity. 4/ Section 10(b)(2) of the Order specifically excludes from bargaining units employees engaged in Federal personnel work in other than a purely clerical capacity. On such basis, I find that Haines should be excluded from the exclusively recognized unit. 5/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 3499, AFL-CIO, was certified as the exclusive representative on February 26, 1974, be, and hereby is, clarified by excluding from said unit Percival M. Lobb, Management Specialist, GS-1170-12, and Lois Jean Haines, Office Management Assistant, GS-301-8.

Dated, Washington, D. C.
November 18, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

4/ Cf. United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266, and Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Forth Worth, Texas, A/SLMR No. 230.

5/ Under these circumstances, it was considered unnecessary to decide whether Haines should be excluded from the unit on the basis that she is a management official.

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

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

NORTHEASTERN PROGRAM CENTER,
BUREAU OF RETIREMENT AND SURVIVORS
INSURANCE,
SOCIAL SECURITY ADMINISTRATION
A/SLMR No. 753

NORTHEASTERN PROGRAM CENTER,
BUREAU OF RETIREMENT AND SURVIVORS
INSURANCE,
SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 30-6595(CA)

This case arose as a result of an unfair labor practice complaint filed by Local 1760, American Federation of Government Employees, AFL-CIO, alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to bargain concerning the impact of a newly revised position description and over the procedures used by management to effectuate the revision.

LOCAL 1760, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

The Administrative Law Judge recommended dismissal of the complaint on the basis that the sole change occurred in the written job description and not in the affected employees' job duties, and, thus, it could hardly be argued that there existed an impact over which the Respondent was obligated to bargain.

DECISION AND ORDER

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

On May 28, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.


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

1/ On page 1 of his Recommended Decision and Order, the Administrative Law Judge inadvertently noted that the complaint was filed on "November" 9, 1975. The correct date should read "October" 9, 1975. On page 2 of his Recommended Decision and Order, the Administrative Law Judge inadvertently noted the weight "400" pounds. The correct weight should read "4000" pounds. These inadvertent errors are hereby corrected.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-6595(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 18, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



..... :
In the Matter of :
 :
NORTHEASTERN PROGRAM CENTER :
BUREAU OF RETIREMENT AND SURVIVORS :
INSURANCE, :
SOCIAL SECURITY ADMINISTRATION :
Respondent :
 :
and : Case No. 30-6595 (CA)
 :
LOCAL 1760 AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, AFL-CIO :
Complainant :
 :
..... :

FRANCIS X. DIPPLE, Esquire
Bureau of Retirement and Survivors Insurance
Northeastern Program Center
Social Security Administration
516 Altmeyer Building
Baltimore, Md 21235
For the Respondent

ALLAN R. ZAROFF, Esquire
Werner and Zaroff
299 Broadway
New York, NY 10007
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 9, 1975, under Executive Order 11491, as amended, by Local 1760, American Federation of Government Employees (hereinafter called the Union or AFGE) against the Northeastern Program Center, Bureau of Retirement and Survivors Insurance (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York, New York Region on March 8, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in refusing to bargain with the Union concerning the impact of a newly revised job description.

A hearing was held in the captioned matter on April 5, 1976, in Flushing, 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.

Upon the basis of the entire record, 1/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of the Respondent's non-supervisory employees working in the Northeastern Program Center.

On or about March 6, 1974, four bargaining unit employees, who were employed as WG-4 Warehousemen, filed a classification appeal with the Social Security Administration and the Department of Health, Education and Welfare. The appeal sought to have the four employees' jobs as warehousemen upgraded to a WG-5 grade level on the ground that the four employees had occasionally operated fork lifts, which work was generally regarded as a WG-5 through the Government.

Subsequently, the appeal was granted and the Respondent was instructed to make the reclassification from a WG-4 to a WG-5 effective as of May 12, 1974, and prepare a new position description. Accordingly, on July 5, 1974, Respondent prepared an interim position description by merely adding to the old WG-4 Warehousemen job description under the title "Duties and Responsibilities" the following:

- A. Operates forklifts capable of lifting 400 pounds to a height of 168 inches for at least one-half to one hour per day.

1/ Respondent's request to correct the transcript of his opening statement in two minor respects is hereby granted. Accordingly, the word "no" is inserted on Page 13, Line 14 between "was" and "classification". The word "right" is inserted on Page 13, Line 23 after the word "given".

The WG-4 Warehouseman job description was not altered in any other way, save noting that it was now a WG-5 position.

On May 2, 1975, Respondent, pursuant to a reorganization of the Facilities Management Branch which caused changes in both the organization and job locations, issued a new job description for a Forklift Operator WG-5. The new job description was in accordance with a new format adopted by the Civil Service Commission in attempt to more clearly describe the duties and responsibilities performed by the incumbents of all wage grade positions. In fashioning the new job description for a Forklift Operator WG-5, Respondent's personnel representative relied upon the general standards or models distributed by the Civil Service Commission for warehousemen and forklift operators. Noting that the Civil Service model job description for a warehousemen set forth under "physical effort" the requirement that the incumbent lift up to 70 pounds, Respondent's personnel officer included 70 pounds in the new job description under the physical effort category. The previous job description called for the incumbents only to lift objects weighing "25 to 40" pounds. 2/

Upon the front of the new position description issued on May 2, 1975, a block had been checked with a mark indicating that there had been a substantial change in the position description.

On May 21, 1975, pursuant to a request from the Union, representatives of the Respondent met with Union representatives to discuss the newly distributed job classification. Upon having the fact that the new position description had "substantial change" checked off, Respondent's representatives immediately acknowledged an error and corrected their copy of the job description. Thereafter, Respondent's representative explained the method utilized in drawing up the job description but refused to discuss the new description any further. Thus, Respondent took the position that there had not be a substantial change and hence there was no impact to bargain about.

2/ During the course of the hearing, the incumbent warehousemen-forklift operators testified that it had always been the general practice for them to lift objects weighing 70 pounds and more.

DISCUSSION AND CONCLUSIONS

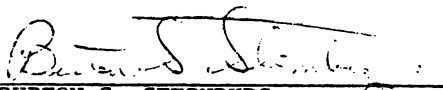
UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

It is well settled that under Section 11(b) of the Executive Order an Agency is free to change or alter the content of a job without bargaining with the exclusive bargaining representative concerning the content of same. International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N. Y., FLRC No. 71A-30, dated April 19, 1973. Irrespective of the above exclusion, the Respondent or Agency is, however, obligated to bargain with the exclusive bargaining representative with respect to the impact of any such change on the employees adversely affected. Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454.

In the instant case the sole change in the duties of the warehousemen-forklift operators occurred in the written job description and not in the job itself. Thus, the affected employees testified that it had always been the usual practice for the warehousemen-forklift operators to lift over 70 pounds. Accordingly, in these circumstances, i. e. the absence of any change in the employees' actual duties, it can hardly be argued that there existed an impact on them over which the Respondent was under a duty to bargain. In the absence of a duty to bargain, insufficient basis exists for a 19(a)(1) and (6) finding predicated upon Respondent's refusal to discuss the job description issued on May 2, 1975.

Recommendation

It is hereby recommended to the Assistant Secretary that the complaint be dismissed.


BURTON S. STERNBURG
Administrative Law Judge

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

PHILADELPHIA SERVICE CENTER,
INTERNAL REVENUE SERVICE,
PHILADELPHIA, PENNSYLVANIA
A/SLMR No. 754

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, and Chapter 071, National Treasury Employees Union alleging that the Respondent violated Section 19(a)(1) of the Order by virtue of a statement made by a representative of the Respondent to a union representative during a discussion concerning the training of a certain employee.

The record revealed that an incident occurred over the scheduling of certain employees for training whereby one of the affected employees brought the subject to the attention of her union representative. During the course of informally investigating the complaint of the employee the union representative was verbally attacked, in the presence of another supervisor, by the supervisor who had control over the scheduling of desk training for said employees. Other employees were in the area, but the evidence established that none of them heard the alleged statement. Although the parties who heard the alleged statement were in conflict over the exact language and gestures used by the supervisor, the record revealed that, in essence, the supervisor told the union representative that the union was not going to tell her how to manage her employees or tell her who or when to desk train.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) of the Order. In this regard, he found that, at most, the evidence established that a supervisor lost her temper and berated a union steward, but that the conduct of the Respondent did not result in the deprivation of rights assured union representatives by the Order. Moreover, there was no evidence that the supervisor's actions interfered with, restrained, or coerced other employees in the unit in the exercise of their Section 1(a) rights. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge.

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

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

PHILADELPHIA SERVICE CENTER,
INTERNAL REVENUE SERVICE,
PHILADELPHIA, PENNSYLVANIA

U.S. DEPARTMENT OF COMMERCE,
U.S. MARITIME ADMINISTRATION
A/SLMR No. 755

Respondent

and

Case No. 20-5380(CA)

NATIONAL TREASURY EMPLOYEES UNION and
CHAPTER 071, NATIONAL TREASURY EMPLOYEES
UNION

Complainant

DECISION AND ORDER


On June 30, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above entitled proceeding, finding that the Respondent had not engaged in violative conduct as alleged in the complaint and recommending that the complaint be dismissed in its entirety. 1/

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 20-5380(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 22, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by the United Federation of College Teachers, U.S. Merchant Marine Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO (Complainant), alleging that the Respondent agency violated Section 19(a)(1) and (6) of the Order by failing to bargain in good faith with the Complainant, the exclusive representative of the employees at the U.S. Merchant Marine Academy, before issuing revised regulations which deal with the terms and conditions of employment of the employees at a single subordinate activity, the Academy. The complaint further alleged that the Respondent agency used the content and process of the revision of its regulations to impact on the negotiations regarding salary proposals which had been found to be negotiable by the Federal Labor Relations Council.

The Assistant Secretary did not agree with the Administrative Law Judge's finding that the Respondent agency violated Section 19(a)(1) and (6) of the Order by refusing to negotiate in good faith with the Complainant concerning proposals for changes in personnel policies prescribed by the revised regulations and by its unilateral issuance of such regulations without prior good faith negotiation. The Assistant Secretary noted that, under the Order, the obligation to meet and confer in response to a legitimate bargaining request applies only in the context of the exclusive bargaining relationship. As the evidence in this case establishes that the Academy, which had not been made a respondent in this case, afforded exclusive recognition to the Complainant, the Assistant Secretary found the Respondent agency could not be in violation of Section 19(a)(6) of the Order based on its alleged failure to bargain in good faith with the Complainant. The Assistant Secretary further found that the Respondent's conduct did not constitute a violation of Section 19(a)(1) of the Order inasmuch as there was no evidence that the Respondent agency deliberately misled the Complainant or that it acted in any other way so as to improperly interfere with the bargaining obligation which the Academy had vis-a-vis the Complainant.

The Assistant Secretary adopted the Administrative Law Judge's conclusion that the allegation that the Respondent used the content and process of the revision of its regulations to impact on the negotiation of the salary proposals was not properly before him as an independent violation of Section 19(a)(1) and (6).

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

1/ Exceptions and a supporting brief were filed by the Complainant to the Administrative Law Judge's Recommended Decision, but were not considered. Thus, the Complainant's exceptions failed to comply with the content requirements for exceptions as described in Section 203.24(a) of the Assistant Secretary's Regulations. In addition, the Complainant's supporting brief, which was filed separately, was filed untimely.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

DECISION AND ORDER

On February 27, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The gravamen of the complaint herein is that, pursuant to the Federal Labor Relations Council's decision in United Federation of College

Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 [FLRC No. 71A-15], the Respondent agency was required to bargain in good faith with the Complainant, the exclusive representative of the employees at the U.S. Merchant Marine Academy, before issuing revised regulations which deal only with the terms and conditions of employment of the employees at a single subordinate activity, the U.S. Merchant Marine Academy. The Administrative Law Judge found that the Respondent agency violated Section 19(a)(1) and (6) of the Order by refusing to negotiate in good faith with the Complainant concerning proposals for changes in personnel policies prescribed by the above-noted revised regulations and by its unilateral issuance of such regulations without prior good faith negotiation. I disagree with these conclusions.

In Merchant Marine, the Council clearly reiterated the statutory authority of an agency to issue such regulations as it deems necessary for the operation of its department and the conduct of its employees. However, while the Merchant Marine decision established the principle that when such regulations deal with the terms and conditions of employment at a single subordinate activity they may not be interposed as a bar to a legitimate bargaining request made pursuant to Section 11(a) of the Order by the exclusive representative of the employees at that subordinate activity, 1/ it has also been held previously that, under the Order, the obligation to meet and confer in response to a legitimate bargaining request applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive representation. 2/ The evidence in this case establishes that it is the Academy, which has not been made a respondent in this case, that afforded exclusive recognition to the Complainant. Thus, I find that the Respondent agency could not be in violation of Section 19(a)(6) of the Order based on its alleged failure to bargain in good faith with the Complainant prior to, or upon, the issuance of its revised regulations.

It has been found that an agency, while it did not violate Section 19(a)(5) or (6) of the Order in circumstances where it had no bargaining relationship with the complaining labor organization, nevertheless violated Section 19(a)(1) of the Order by improperly interfering with an exclusive bargaining relationship. 3/ In the instant case, however, there is no evidence which would justify such a finding. Thus, as noted above, a regulation issued by the Respondent agency, under the circumstances herein, could not act as a bar to a legitimate bargaining request made

1/ See also Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, FLRC No. 73A-64.

2/ See National Aeronautics and Space Administration (NASA), Washington, D. C., A/SLMR No. 457, set aside on other grounds in FLRC No. 74A-95, and Federal Aviation Administration, Airway Facilities Sector, San Diego, California, A/SLMR No. 533.

3/ See Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 669; Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608; and The Adjutant General, State of Illinois, Illinois Air National Guard, and National Guard Bureau, Washington, D. C., A/SLMR No. 598.

November 23, 1976


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

by the Complainant to the Academy. However, the Complainant made no request to bargain with the Academy, the party which had granted it exclusive recognition, regarding the implementation and/or effect of the proposed revised regulations on the terms and conditions of employment of the employees it represents. While the evidence does indicate that the Respondent agency engaged in lengthy discussions with the Complainant with respect to its proposed regulations and that the Respondent agency's Personnel Officer served as the chief spokesman both on behalf of the Respondent agency in its discussions with the Complainant about the proposed revised regulations and on behalf of the Academy in the course of its simultaneous negotiations with the Complainant concerning the latter's salary proposals and other matters relating to the Academy's termination of the Complainant's negotiated agreement, there is no evidence that the Personnel Officer deliberately misled the Complainant concerning his separate roles on behalf of both the Respondent agency and the Academy or that the Respondent agency acted in any other way so as to improperly interfere with the bargaining obligation which the Academy had vis-a-vis the Complainant. Under all of these circumstances, I find that the Respondent's conduct herein was not in violation of Section 19(a)(1) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-5898(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 22, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

GENERAL SERVICES ADMINISTRATION
REGION II, NEW YORK, NEW YORK
A/SLMR No. 756

This case involved a petition for clarification of unit (CU) filed by Police Benevolent Association, Federal Protection Service, No. 2, (Petitioner) seeking to clarify its existing exclusively recognized unit of all guards and Federal Protective Officers (FPO's), including U.S. Special Police employed by the General Services Administration, Region II, New York, New York (Activity) to include approximately 19 employees in the classification of Supervisory Protection Officer, GS-6 (Corporal). The Activity contends that the incumbents in this job classification are supervisors within the meaning of the Order and, on this basis, opposes their inclusion in the certified unit.

The Assistant Secretary found that the employees assigned to the classification Supervisory Federal Protection Officer, GS-6 (Corporal), were not supervisors within the meaning of Section 2(c) of the Order as such employees do not exercise supervisory authority in a manner requiring the use of independent judgment. He noted particularly that these employees do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge or reward other employees, or to adjust grievances, or to effectively recommend such action. Moreover, he noted that such authority as they do possess to assign, direct or to discipline employees was of a routine or clerical nature not involving the use of independent judgment. Accordingly, the Assistant Secretary ordered that the unit be clarified to include employees in the position Supervisory Federal Protection Officer, GS-6 (Corporal).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION
REGION II, NEW YORK, NEW YORK

Activity

and

Case No. 30-6675(CU)

POLICE BENEVOLENT ASSOCIATION,
FEDERAL PROTECTION SERVICE, No. 2

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

The Petitioner seeks to clarify an existing exclusively recognized unit of all guards and Federal Protective Officers (FPO's), including U.S. Special Police, employed by the Activity 1/ to include approximately 19 employees in the classification of Supervisory Federal Protection Officer, GS-6 (Corporal), contending that these employees are not supervisors within the meaning of the Order. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of the Order and, on this basis, opposes their inclusion in the certified unit.

The Corporals are assigned to the Federal Protective Service Division (FPSD), which is one of several operating divisions within the Activity. The FPSD is responsible for the security and safety of the property, persons, buildings, and grounds under the charge and control of the Activity, which encompasses the States of New York and New Jersey, the Commonwealth of Puerto Rico, and the Virgin Islands. The FPSD is organizationally composed of an Investigation Staff, an Inspection Staff, a Program Staff, an Administrative Officer, and the operational units - Central Force. The Central Force includes all those operational units located within the geographical environs of New York City and all its boroughs and Newark, New Jersey. The balance of the operational units are stationed at the various Federal installation locations encompassed within the Activity's jurisdiction.

1/ The Petitioner was certified as the exclusive representative in the unit involved on January 16, 1975.

The record reveals that a majority of the Corporals are assigned to establishments within the Central Force where, normally, there is a senior officer stationed. An undisclosed number of Corporals are assigned to operational units outside the Central Force where they are the senior officer on duty. As a consequence, the duties, responsibilities and authority of the individuals in the subject classification vary dependent upon whether or not they are the senior officer on duty at the location involved. In addition, while it appears that this classification calls for a grade level of GS-6, the record reveals that, in a majority of cases, individuals classified as Corporals have had to wait a year after receiving such classification before receiving their promotion to GS-6 and, in fact, many of the Corporals involved herein are still at the GS-5 level. 2/

As noted above, the record reveals some variation in the duties, authority and responsibilities among the Corporals involved herein, dependent upon the location of their assignment and whether or not they are the senior officer at that location. However, it appears that all Corporals perform certain duties regardless of the location of their assignments. Thus, the record indicates that the major function of all Corporals is the responsibility for a duty post, whether stationary or roving, which job function is performed in the same manner as other FPO's. The Corporals also are responsible for the filling out of certain forms and reports, either to assist the sergeant or where they are the ranking FPO. In the absence of a superior officer or when the Corporal is the ranking FPO at the location, they check the performance of the FPO's.

The record further discloses that all Corporals have certain authority which, while more than that exercised by an FPO, is nevertheless narrowly restricted. Thus, while they are authorized to cite other FPO's for infractions of rules, the record does not reveal whether or not such citations could result in discipline, absent an independent investigation of the matter by the Corporal's superior. Corporals are authorized to make assignments to the FPO's, but the record indicates that such assignments are routine in most instances, and, even in emergency situations, Corporals do not have authority to assign off-duty FPO's to duty. Further, although the record indicates that Corporals are authorized to handle routine problems and minor complaints of the FPO's, it is clear that they have no authority with regard to grievances, and have no role in the established grievance procedure. Finally, the record indicates that only those Corporals located outside the Central Force, in assignments where they are the senior officer present, prepare performance evaluations for FPO's. In the majority of cases, however, the Corporals merely "assist" the sergeant, who actually prepares and completes the evaluation.

2/ The record reveals that the starting grade for FPO's is grade GS-4; an experienced rank and file FPO is rated as a GS-5; and a Supervisory FPO (Sergeant) is rated as a GS-7.

November 23, 1976

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

The record further reveals certain restrictions on the authority of the Corporals. Thus, Corporals have no authority to hire, transfer, suspend, lay off, recall, promote, discharge or reward other employees. Moreover, in situations involving disturbances or arrest, all Corporals must receive instructions from higher authority before taking action. Thus, in locations within the Central Force, the Corporals must contact a duty officer who is on-call at all times, and outside this area, the Corporals must contact and consult with the Activity building manager involved.

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
SOUTHERN REGIONAL RESEARCH CENTER,
NEW ORLEANS, LOUISIANA
A/SLMR No. 757

Under all the foregoing circumstances, I find that employees assigned to the classification Supervisory Federal Protection Officer, GS-6 (Corporal), are not supervisors within the meaning of Section 2(c) of the Order, 3/ as such employees do not exercise supervisory authority in a manner requiring the use of independent judgment. 4/ As indicated above, such employees are not authorized to hire, transfer, suspend, lay off, recall, promote, discharge or reward other employees, or to adjust grievances, or to effectively recommend such action. Moreover, the record indicates that such authority as they do possess to assign, direct or to discipline employees appears to be of a routine or clerical nature which does not require the use of independent judgment. Accordingly, I find that the subject employees should be included in the exclusively recognized unit.

This case arose as a result of a petition filed by the National Federation of Federal Employees, Local 1899, New Orleans, Louisiana (NFFE), seeking an election in a unit of all nonprofessional General Schedule employees employed by the Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana (Activity). The Intervenor, the American Federation of Government Employees, AFL-CIO, Local 3513, New Orleans, Louisiana (AFGE), agreed that the petitioned for unit was appropriate. The Activity contended that a separate unit of General Schedule employees was not appropriate as such employees did not have a community of interest separate and distinct from its Wage Grade employees, and the establishment of such a unit would not promote efficiency of agency operations or effective dealings.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the Police Benevolent Association, Federal Protection Service, No. 2 on January 16, 1975, at the General Services Administration, Region II, New York, New York, be, and hereby is, clarified by including in said unit the position of Supervisory Federal Protection Officer, GS-6 (Corporal).

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In this regard, he noted the existence of an already established unit comprised of all the Wage Grade employees of the Activity, and found that the claimed unit constitutes a residual unit of all unrepresented, nonprofessional employees of the Activity. The Assistant Secretary further noted that the petitioned for employees enjoy common supervision; have the same pay structure, areas of competition for merit promotions and reduction in force procedures; and have little or no interchange with the Wage Grade employees. He also found that the claimed residual unit would promote effective dealings and efficiency of agency operations by preventing further fragmentation of the Activity's employees.

Dated, Washington, D.C.
November 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

3/ Section 2(c) of the Order states:

When used in this Order, the term - "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

4/ See Naval Weapons Center, China Lake, California, A/SLMR No. 297, FLRC No. 72A-11.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
SOUTHERN REGIONAL RESEARCH CENTER,
NEW ORLEANS, LOUISIANA

Activity

and

Case No. 64-3064(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1899,
NEW ORLEANS, LOUISIANA

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3513,
NEW ORLEANS, LOUISIANA

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, including the briefs filed by the Activity, the Petitioner and the Intervenor, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, National Federation of Federal Employees, Local 1899, New Orleans, Louisiana, herein called NFFE, seeks an election in a unit of all General Schedule (GS) employees employed by the Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana, excluding all professional employees, Wage Grade (WG) employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order. The Intervenor, American Federation of Government Employees, AFL-CIO, Local 3513, New Orleans, Louisiana, herein called AFGE, agrees that the unit sought is appropriate.

Noting the existence of an exclusively recognized unit consisting of all of the Activity's WG employees, 1/ the NFFE and the AFGE contend that a separate unit comprised of all unrepresented, nonprofessional GS employees of the Activity is appropriate. The Activity, on the other hand, contends that a separate unit of GS employees is not appropriate as the GS employees do not have a community of interest separate and distinct from that of the WG employees, and that the establishment of such unit would not promote efficiency of agency operations or effective dealings.

The Activity is one of a number of research centers throughout the United States and several foreign countries which were established to conduct research and development on new and improved agricultural products and processes utilizing agriculture commodities grown in the locality served by the particular center. It is organizationally composed of an Office of the Director, an Administrative Staff, a Technical Service Staff, a number of Plant Management Groups, and six laboratories. The total complement of the Activity is 380 employees, the majority of whom are classified as GS employees. Of the WG employees, most are assigned to the plant management groups, with the balance assigned to the staffs and the laboratories. The majority of the GS employees are assigned to the six laboratories and the staff groups, with only a few assigned to the plant management groups.

The functions performed by the GS employees are, for the most part, technical in nature and are related to the mission of the Activity, while the majority of the WG employees are employed in craft and trade positions and are engaged in the minor construction and maintenance of the Activity's facilities. The GS employees enjoy a common pay structure and common competitive areas for merit promotions and reduction in force procedures that are separate from those of the WG employees. The record also indicates that there is little or no interchange between employees in GS and WG classifications.

Based on the foregoing circumstances, I find that the unit sought is appropriate for the purpose of exclusive recognition. Thus, the record demonstrates the employees in the unit requested include all of the remaining unrepresented, nonprofessional employees of the Activity and, thus, constitutes a residual unit of the Activity's nonprofessional employees. Moreover, all of the employees in the claimed unit enjoy common supervision; have the same pay structure, areas of competition for merit promotions and reduction in force procedures; and have little or no interchange with the WG employees. Further, I find that the claimed residual unit will promote effective dealings and efficiency of agency operations, and that the Activity's contention to the contrary is not supported by the record. Thus, in my view, where, as here, the claimed employees constitute a residual unit of all unrepresented, non-professional employees, the establishment of such unit will, in effect, prevent further fragmentation by establishing only one additional unit

1/ On October 29, 1963, National Federation of Federal Employees, Local 1587, New Orleans, Louisiana, was certified as the exclusive representative for a unit of all nonsupervisory WG employees of the Activity. Currently, there is in effect a three year negotiated agreement covering such unit which was approved on February 10, 1975.

for all the remaining unrepresented, nonprofessional employees. ^{2/} Under these circumstances, and noting the fact that no other labor organization seeks to represent the unrepresented, nonprofessional GS employees on any other basis, I find that the residual petitioned for unit is appropriate for the purpose of exclusive recognition under the Order.

November 24, 1976

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


Accordingly I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule employees employed by the U.S. Department of Agriculture, Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana, excluding all professional employees, Wage Grade employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined by the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military services who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1899, New Orleans, Louisiana; by the American Federation of Government Employees, AFL-CIO, Local 3513, New Orleans, Louisiana; or by no labor organization.

Dated, Washington, D.C.
November 23, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{2/} Cf. Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629.

COLORADO AIR NATIONAL GUARD,
BUCKLEY AIR NATIONAL GUARD BASE,
AURORA, COLORADO
A/SLMR No. 758

This unfair labor practice proceeding involved a complaint by the Association of Civilian Technicians, Inc., Mile-Hi Chapter (Complainant) alleging that the Respondent had violated Section 19(a)(6) and (1) of the Executive Order by unilaterally adhering to the procedures set forth in the National Guard Bureau's Technician Personnel Pamphlet 910 (TPP-910) in conducting a reduction-in-force (RIF) instead of by following the procedures contained in its Department of Military Affairs Regulation 2-3 (DMA2-3) which was incorporated in the negotiated agreement, dated September 17, 1973, with the Complainant. The Respondent contended that the issuance of a new regulation by the National Guard must be implemented by the Respondent.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that, in the circumstances of this case, the Respondent's action in adhering to the procedures set forth in TPP-910 in conducting the RIF, rather than following the procedures contained in DMA2-3, constituted, in effect, a unilateral change in the terms of the negotiated agreement in violation of Section 19(a)(6) and (1) of the Order.

To remedy the Respondent's improper conduct, the Assistant Secretary ordered, among other things, that the Respondent cease and desist from unilaterally implementing TPP-910 in any RIF during the term of its negotiated agreement with the Complainant unless such implementation was mutually agreed to by the parties in a supplemental agreement to the negotiated agreement. He ordered, further, that the Respondent take corrective action with respect to any employee adversely affected by the improper application of TPP-910 RIF procedures, by reinstating such employee to his appropriate position, and by making such employee whole, including reimbursement for any loss of monies occasioned by such improper RIF, consistent with the procedures of DMA2-3, and applicable laws, regulations, and decisions of the Comptroller General.

The Assistant Secretary noted that in issuing his remedial order he was cognizant of the fact that the Federal Labor Relations Council in Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52, had indicated that

where there is an established appeals system which may consider the issue of whether a RIF has been applied to particular employees in accordance with controlling regulations, Section 19(d) of the Order precludes consideration of such issue by the Assistant Secretary in the context of an unfair labor practice proceeding. However, the Assistant Secretary was of the opinion that the instant case was distinguishable from Yuma on the basis that the issue before him was not whether a particular regulation had been applied properly but, rather, which regulation or procedure (DMA2-3 or TPP-910) should have been followed in conducting the RIF. As the remedial order in the instant case was limited to directing that the appropriate procedure (DMA2-3) required by the negotiated agreement with the Complainant be followed in effectuating the RIF and remedying any improper effect on employees resulting from the Respondent's failure to adhere to such negotiated agreement, it was not deemed to be inconsistent with the strictures set forth in Yuma.

A/SLMR No. 758

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

COLORADO AIR NATIONAL GUARD,
BUCKLEY AIR NATIONAL GUARD BASE,
AURORA, COLORADO

Respondent

and

Case No. 61-2626(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS,
INC., MILE-HI CHAPTER

Complainant

DECISION AND ORDER

On July 27, 1976, Administrative Law Judge Joyce Capps issued her Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order.

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

The Administrative Law Judge concluded, and I concur, that the Respondent violated Section 19(a)(6) and (1) of the Order by adhering to the procedures set forth in the National Guard Bureau's Technician Personnel Pamphlet 910 (TPP-910) in conducting a reduction-in-force (RIF), instead of following the procedures contained in its Department of

1/ The Respondent's exceptions were untimely filed and have not been considered. Further, its request for an extension of time in which to file its exceptions also was untimely filed and is hereby denied.

Military Affairs Regulation 2-3 (DMA2-3), which was incorporated in its negotiated agreement with the Complainant. In this regard, the Administrative Law Judge found, among other things, that when the National Guard Bureau approved the parties' negotiated agreement on September 17, 1973, it did so with knowledge of the existence of its own policy set forth in its TPP-910; 2/ that Article XX, Section 1 of the parties' negotiated agreement provided that, "Reduction-in-force procedures will be in accordance with DMA Regulation 2-3 pending revision. A supplemental agreement will be negotiated"; that no such revision of DMA2-3 ever occurred and no supplemental agreement was ever negotiated; and that conducting the RIF in accordance with the procedures set forth in TPP-910 3/, rather than the procedures required by the negotiated agreement, DMA2-3, constituted, in effect, a unilateral change in the terms of the negotiated agreement. 4/

Having found that the Respondent's conduct in carrying out the RIF pursuant to the procedures of TPP-910 was violative of the Order, I shall order it to cease and desist from unilaterally implementing TPP-910 during the term of the parties' negotiated agreement of September 17, 1973, or until a supplement to the agreement is negotiated. I shall further order it to take such corrective action as is necessary to remedy its improper conduct. In this latter regard, I shall order it to follow, pursuant to the terms of the negotiated agreement, the RIF procedures set forth in DMA2-3 in connection with the RIFs which have occurred from January 6, 1975, to the end of the term of the negotiated agreement or until the negotiation of a supplemental agreement. Further, I shall order the Respondent, in accordance with the requirements of

2/ The Federal Labor Relations Council has indicated that actual or constructive approval of an agreement containing a provision contrary to published agency policy or regulations may be deemed as a waiver of such policy or regulations. See Section VII of the Report and Recommendations of the Federal Labor Relations Council (1975).

3/ In this regard, I concur in the conclusion of the Administrative Law Judge that the National Guard Bureau, in the circumstances of this proceeding, is not an "appropriate authority" within the meaning of Section 12(a) of the Order. See Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390, and IAM Local Lodge 2424 and Aberdeen Proving Ground, Maryland, FLRC No. 70A-9.

4/ Cf. Small Business Administration, Richmond, Virginia, District Office, A/SLMR No. 674, and Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, cited above.

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DMA2-3, 5/ and applicable laws, regulations, and decisions of the Comptroller General, to make whole any employees adversely affected by RIFs made pursuant to the procedures contained in TPP-910.

In issuing the remedial order herein, I am cognizant of the fact that the Federal Labor Relations Council in Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52, has indicated that where there is an established appeals system which may consider the issue of whether a RIF has been applied to particular employees in accordance with controlling regulations, Section 19(d) precludes consideration of such issue by the Assistant Secretary in the context of an unfair labor practice proceeding. However, in the instant case, the issue before the Assistant Secretary is not whether a particular regulation had been applied properly, but, rather, which regulation or procedure, i.e. DMA2-3 or TPP-910, should have been followed in conducting the RIF. Accordingly, as the remedial order herein is limited to directing that the appropriate procedure required by the negotiated agreement (DMA2-3) be followed in effectuating the RIF and remedying any improper effect on employees resulting from the Respondent's failure to adhere to its negotiated agreement, it is not deemed to be inconsistent with the strictures set forth in Yuma.

ORDER

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

1. Cease and desist from:

(a) Unilaterally implementing Technician Personnel Pamphlet 910 in any reduction-in-force at the Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, during the term of its negotiated agreement with the Association of Civilian Technicians, Inc., Mile-Hi Chapter, executed September 17, 1973, unless such implementation is mutually agreed to by the parties in a supplemental agreement to the negotiated agreement.

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

5/ In this regard, it is noted that DMA2-3 provides a procedure for appeals by employees if they believe that its terms have been improperly applied. Thus, Section 11 of DMA2-3, Appeals, provides: "Technicians have the right to appeal to the Adjutant General if they believe the RIF regulations have not been correctly applied in their cases."

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

(a) Abide by the terms and conditions of its negotiated agreement of September 17, 1973, with Association of Civilian Technicians, Inc., Mile-Hi Chapter, during the term of such negotiated agreement.

(b) Reconsider, in accordance with Department of Military Affairs Regulation 2-3 set forth in its negotiated agreement of September 17, 1973, with Association of Civilian Technicians, Inc., Mile-Hi Chapter, all reduction-in-force actions taken, in accordance with Technician Personnel Pamphlet 910, subsequent to January 6, 1975, to the expiration of the negotiated agreement, or until the effective date of a negotiated supplement to the negotiated agreement.

(c) If, following the action taken in accordance with paragraph 2(b) above, it should develop that any employee was adversely affected by the use of improper application of reduction-in-force procedures, such employee shall be reinstated to his appropriate position, and be made whole, including reimbursement for any loss of monies occasioned by such improper reduction-in-force, consistent with the procedures of Department of Military Affairs Regulation 2-3, and applicable laws, regulations, and decisions of the Comptroller General.

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

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

Dated, Washington, D. C.
November 24, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally implement Technician Personnel Pamphlet 910 in any reduction-in-force action during the term of the negotiated agreement of September 17, 1973, with the Association of Civilian Technicians, Inc., Mile-Hi Chapter, unless such implementation is mutually agreed to in a supplemental agreement to the negotiated agreement.

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

WE WILL abide by the terms and conditions of the negotiated agreement of September 17, 1973, with Association of Civilian Technicians, Inc., Mile-Hi Chapter, during the term of such negotiated agreement.

WE WILL reconsider, in accordance with Department of Military Affairs Regulation 2-3, set forth in the negotiated agreement of September 17, 1973, with Association of Civilian Technicians, Inc., Mile-Hi Chapter, all reduction-in-force actions taken in accordance with Technician Personnel Pamphlet 910, subsequent to January 6, 1975, to the expiration of the negotiated agreement, or until the effective date of a negotiated supplement to the negotiated agreement.

WE WILL reinstate to his appropriate position any employee adversely affected by improper application of Technician Personnel Pamphlet 910 reduction-in-force procedures, and make him whole, including reimbursement for any loss of monies occasioned by such improper reduction-in-force, consistent with the procedures of Department of Military Affairs Regulation 2-3, and applicable laws, regulations, and decisions of the Comptroller General.

(Agency or Activity)

Dated _____ By: _____
(Signature) (Title)

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 June 3, 1975, by the Association of Civilian Technicians, Inc., Mile-Hi Chapter (hereafter referred to as ACT or the Union), ^{1/} against the Colorado Air National Guard (hereafter referred to as Respondent). It is alleged in substance that Respondent violated Sec. 19(a)(6) of the Order by effectuating a reduction in force (RIF) in accordance with Technician Personnel Pamphlet (TPP) 910 rather than in accordance with Department of Military Affairs (DMA) Regulation 2-3 as required by the negotiated collective bargaining agreement between the parties.

In accordance with the notice of hearing issued on August 1, 1975, by the Regional Administrator for Labor-Management Services Administration, Kansas City Region, a hearing in this matter was held before me on October 2, 1975, in Denver, Colorado. The post-hearing briefs filed by the parties have been considered and are hereby made a part of the record.

Based upon the entire record herein, including the stipulations of fact by the parties, the evidence adduced, and my observation of the demeanor of witnesses, I make the following findings of fact, conclusions of law and recommendations:

Findings of Fact

There began in the fall of 1972 negotiations for a collective bargaining agreement between the Adjutant General, State of Colorado, and the Union, which is the exclusive representative of all Colorado Air National Guard Technicians, both competitive and excepted. A General Agreement (hereafter referred to as the Agreement) was signed by the members of the negotiating teams on August 1, 1973, and by the Adjutant General on August 14, 1973. It was approved by the National Guard Bureau (an

^{1/} Columbine Council is the successor name for Mile-Hi Chapter of ACT effective as of January 7, 1974, pursuant to the certification of name change issued by the Department of Labor in Case No. 61-227(AC).

agency of which the Colorado Air National Guard is an activity) on September 17, 1973. ^{2/} (Joint Exhibit No. 2). Article XX, Section 1, of the Agreement provides that "Reduction in force procedures will be in accordance with DMA Regulation 2-3 pending revision. A supplemental agreement will be negotiated." (Joint Exhibit No. 1).

The elimination of Lowry T-29 flight operations necessitated a RIF of technicians associated with that program. On January 6, 1975, the National Guard Bureau ordered the Adjutant General, State of Colorado, to issue RIF notices to the affected technicians in accordance with TPP 910 procedures. (Respondent's Exhibit No. 1).

Pursuant to the foregoing order, the Adjutant General by letter dated January 30, 1975, to "All Colorado Air National Guard Technicians" gave general notice of the impending RIF and advised that said RIF would follow the procedures of TPP 910. (Complainant's Exhibit No. 2). On March 15, 1975, the Union was oriented on methods of using RIF procedures prescribed by TPP 910 and how such procedures actually worked.

On March 13, 1975, the Union served a letter of intent on the Adjutant General that his "reduction in force" letter of January 30, 1975, implementing TPP 910 procedures constituted an unfair labor practice under Sec. 19(a)(6) of the Order because the implementation of TPP 910 procedures was not consonant with the Agreement he had with the Union. (Part of ALJ Exhibit No. 1).

DMA Regulation 2-3 was published on August 18, 1972, and TPP 910 was published on March 1, 1973. (Claimant's Exhibit No. 3 and Joint Exhibit No. 3, respectively). These documents are quite different as to the selection of which employees will or will not be affected by a RIF. The method of selection under DMA Regulation 2-3 is an objective method based primarily and almost solely upon seniority, whereas TPP 910 is a subjective method based upon performance ratings as evaluated by an employee's supervisor.

^{2/} A prior agreement had been signed on October 27, 1972, and sent to the National Guard Bureau for approval. It was not approved. On January 16, 1973, the National Guard Bureau required certain changes, none of which involved reduction in force procedures. After further negotiations the requested changes were made and included in the General Agreement.

It is undisputed that a supplemental agreement between the parties has never been negotiated nor has DMA Regulation 2-3 been revised. In fact, the only attempt at revision was on May 24, 1973, when Respondent furnished the Union a proposed draft of a revision of DMA Regulation 2-3 and asked for comments. The proposed revision in effect incorporated the RIF procedures of TPP 910. On June 5, 1973, the proposed revision was rejected by the Union because the Union preferred a seniority system of selection as opposed to an appraisal system.

The Technician Personnel Manual (TPM) is the National Guard Bureau official publication containing instructions to the several states on matters of National Guard technician personnel management. The TPM is used by the State adjutants general together with and as a supplement to the Federal Personnel Manual (FPM), which is the official publication of the U. S. Civil Service Commission, in administering technicians as Federal civilian employees.

Respondent presented evidence that on September 18, 1972, the National Guard Bureau published in its TPM that henceforth with respect to reduction-in-force procedures each State adjutant general "will implement those policies and procedures outlined in Technician Personnel Pamphlet 910." (Respondent's Exhibit No. 6). On August 27, 1973, the National Guard Bureau notified all State adjutants general that TPP 910 "is applicable to all National Guard Technicians, both excepted and competitive," and reminded them that the RIF procedures and policies outlined in the Federal Personnel Manual (FPM) "are not applicable to National Guard technicians." (Respondent's Exhibit No. 2).

Col. Darrell L. Rowland, who served as Technical Personnel Officer for the Colorado Air National Guard during contract negotiations as well as during the RIF, testified that in view of Respondent's Exhibits 2 and 6 the Respondent was in his opinion constrained to implement TPP 910 procedures rather than DMA Regulation 2-3 as required by the negotiated Agreement because the National Guard Bureau was higher regulatory authority.

Conclusions of Law

Complainant contends that by conducting the RIF in accordance with the procedures of TPP 910 rather than in accordance with DMA Regulation 2-3, Respondent unilaterally changed the terms of the

negotiated Agreement in violation of Sec. 19(a)(6). It is Respondent's position that it was required to follow TPP 910 procedures pursuant to order of its higher authority, the National Guard Bureau, and that the implementation of TPP 910 was proper under Sec. 12(a) of the Order. Therefore, the basic issue for determination is whether Respondent properly invoked the RIF procedures of TPP 910 as ordered by the National Guard Bureau (NGB).

RIF procedures were a proper subject of contract negotiation and after such negotiation it was agreed between the parties that DMA Regulation 2-3 procedures would apply in the case of a RIF. In other words, the parties agreed upon a seniority method of retention in the case of a RIF. TPP 910 was published on March 1, 1973. When NGB approved the Agreement on September 17, 1973, it did so knowing full well of the existence of TPP 910 and knowing that it provided for an appraisal method of retention.

Although the Agreement provided that RIF procedures would be in accordance with DMA Regulation 2-3 "pending revision" and that a "supplemental agreement will be negotiated" the undisputed and significant fact is that no such revision ever occurred and no supplemental agreement was ever negotiated. Contrary to the position taken by the Acting Regional Director in U. S. Dept. of Army National Guard Bureau, Case No. 22-3938(CA)(Aug. 14, 1973), I am of the opinion that the mere act of sending to the Union a proposed revision of DMA Regulation 2-3 to conform to the requirements of TPP 910 and asking for comment did not constitute a good faith attempt on the part of Respondent to confer and consult with the Union to change an existing regulation specifically included in the negotiated Agreement between the parties as required by Section 19(a)(6) of the Order. I specifically find that by implementing TPP 910 in connection with the RIF Respondent unilaterally changed the terms of the existing Agreement.

Respondent's contention that the unilateral modification of the Agreement was proper under Sec. 12(a) of the Order is rejected under the authority of Department of Navy Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Miss., A/SLMR No. 390 (May 15, 1974) (hereafter referred to as the "Navship case"). In the Navship case the Assistant Secretary found, contrary to the recommendation of the Administrative Law Judge, that the unilateral local implementation of a NAVSHIPS Instruction which was in contravention of the existing negotiated agreement between the parties was violative of

Sec. 19(a)(6) of the Order. It was also found in that case that Respondent failed in its obligation to confer, consult, or negotiate with Complainant prior to the implementation of the instruction, despite Respondent's contention that it had no such obligation with respect to the local implementation of a higher level instruction.

It is clear from a reading of the Navship case that a regulation or instruction can supersede or modify the terms of an existing agreement only if it meets one of the standards set forth in Sec. 12(a) of the Order. I conclude that the NGB instruction that Respondent implement the RIF procedures in TPP 910 (which was nothing more than an NGB pamphlet) met none of the standards contained in that section. More specifically, it is concluded that the NGB instruction is not a regulation of an appropriate authority within the meaning of Sec. 12(a) because the term "appropriate authorities" as used therein has been construed to mean an authority outside the agency involved and not a higher echelon, such as the NGB, within the same agency. Navship case, supra, citing the Study Committee in its Report and Recommendations (1969); and decision of the Federal Labor Relations Council in IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9 (March 9, 1971).

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sec. 19(a)(6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Sec. 6(b) of Executive Order 11491, as amended, and Sec. 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, shall:

1. Cease and desist from:

Unilaterally implementing the RIF procedures of TPP 910 at Colorado Air National Guard, Buckley Air National

Guard Base, Aurora, Colorado, during the term of the negotiated agreement with Association of Civilian Technicians, Inc., Mile-Hi Chapter (now known as Columbine Council), executed August 1, 1973.

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

- (a) Rescind the order of the National Guard Bureau dated January 6, 1975, instructing the Adjutant General, State of Colorado, to issue RIF notices to the affected air technicians in accordance with TPP 910 procedures retroactively to January 6, 1975, the date of its implementation, as well as the general notice which was issued by the Adjutant General on January 30, 1975, to "All Colorado Air National Guard Technicians" pursuant to the aforesaid order of the National Guard Bureau.
- (b) Observe and adhere to all provisions of the collective bargaining agreement in effect between the Adjutant General, State of Colorado, and the Association of Civilian Technicians, Inc., Mile-Hi Chapter (now known as Columbine Council), and consult, confer and negotiate in good faith with the Association of Civilian Technicians, Inc., Mile-Hi Chapter (now known as Columbine Council) with respect to any change in terms and conditions of employment.
- (c) Re-establish the personnel structure of air technicians to that which existed on January 6, 1975, and re-evaluate all removals from position or changes in position that occurred subsequent to such date as a result of the RIF improperly conducted in accordance with the procedures outlined in TPP 910.
- (d) If, following the action taken in accordance with paragraph 2(c) above, it should develop that an employee was removed from his position or his position was

changed or down-graded as a result of the improper implementation of TPP 910 who would not have been so affected had the RIF been conducted in accordance with DMA Regulation 2-3, such employee shall be reinstated to the position he held on January 6, 1975, and duly reimbursed for any loss of pay occasioned by the improper reduction-in-force action.

- (e) Post at the Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Adjutant General, State of Colorado, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.
- (f) 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 herewith.


JOYCE CAPPS
Administrative Law Judge

Dated: July 27, 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, LABOR-MANAGEMENT
RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally implement the reduction-in-force procedures of TPP 910 at Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, during the term of the negotiated agreement with Association of Civilian Technicians, Inc., Mile-Hi Chapter (now known as Columbine Council), executed August 1, 1973.

WE WILL rescind the order of the National Guard Bureau dated January 6, 1975, instructing the Adjutant General, State of Colorado, to issue RIF notices to the affected air technicians in accordance with TPP 910 procedures retroactively to January 6, 1975, the date of its implementation, as well as the general notice which was issued by the Adjutant General on January 30, 1975, to "All Colorado Air National Guard Technicians" pursuant to the aforesaid order of the National Guard Bureau.

WE WILL observe and adhere to all provisions of the collective bargaining agreement in effect between the Adjutant General and the Association and will consult, confer and negotiate in good faith with the Association with respect to any change in terms and conditions of employment.

WE WILL re-establish the personnel structure of air technicians to that which existed on January 6, 1975, and re-evaluate all removals from position or changes in position that occurred subsequent to such date as a result of the RIF improperly conducted in accordance with the procedures outlined in TPP 910.

WE WILL should it develop that an employee was removed from his position or his position was changed or down-graded as a result of the improper implementation of TPP 910 who would not have been so affected had the RIF been conducted in accordance with DMA Regulation 2-3 reinstate such employee to the position he held on January 6, 1975, and make him whole for any loss of back pay occasioned by the improper reduction-in-force action.

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

SMALL BUSINESS ADMINISTRATION,
REGION II,
NEW YORK, NEW YORK
A/SLMR No. 759

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

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

This case involved an RA petition filed by the Small Business Administration, Region II, New York, New York, (Activity-Petitioner) for a unit of all nonprofessional employees of the "New York District Office of the Small Business Administration". In 1970, the American Federation of Government Employees, Local 3134, AFL-CIO, (AFGE) was certified as the exclusive representative of essentially all nonprofessional employees of the "New York Regional Office" of the Activity-Petitioner. As a result of a reorganization in 1971, the New York City Regional Office and the New York Area Office of the Activity-Petitioner were combined into one unit for which the AFGE was certified on March 10, 1971, as the exclusive representative. Following this certification, the parties entered into a negotiated agreement on January 15, 1973. Sometime later in 1973, as a result of a new reorganization, the Activity-Petitioner reestablished the former New York City Regional Office and designated it as a district office. However, the employees in the New York District Office remained in the same building in which the New York Regional Office was located, performing essentially the same work as before the 1973 reorganization.

The Activity-Petitioner took the position that the 1973 reorganization changed the character and scope of the existing exclusively recognized unit so as to render it inappropriate, and that, as a result of the reorganization, there now existed two separate units conforming to the new organizational realignment. The AFGE contended, on the other hand, that the effect of the reorganization was superficial in nature and that its existing unit is still viable. In this regard, it noted that the parties have continued to operate under the negotiated agreement which was entered into before the 1973 reorganization.

The Assistant Secretary found that the exclusively recognized unit continued, after the 1973 reorganization, to remain appropriate for the purpose of exclusive recognition as the employees involved continue to share a clear and identifiable community of interest. In this regard, it was noted that the 1973 reorganization did not result in changes in the employees' job functions, their immediate supervision and the proximity of the physical location of the two offices. It was noted

also that the employees continue to be serviced by the Regional personnel office and share common prescribed policies and practices under the overall direction of the Regional Director for the Region, and that there is evidence of a number of transfers and details between the New York Regional Office and the New York District Office. In addition, the Assistant Secretary rejected the Activity-Petitioner's assertion that the establishment of two separate units in place of the existing exclusively recognized unit would result in increased effective dealings and efficiency of agency operations. In this regard, the Assistant Secretary concluded that, under the particular circumstances involved, including the fact that there is a history of effective collective bargaining between the parties which continued after the 1973 reorganization, the establishment of two new units would result in unnecessary fragmentation and would not promote effective dealings and efficiency of agency operations.

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

A/SLMR No. 759

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SMALL BUSINESS ADMINISTRATION,
REGION II,
NEW YORK, NEW YORK

Activity-Petitioner

and

Case No. 30-6108(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3134, AFL-CIO

Labor Organization

DECISION AND ORDER

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

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

On May 26, 1970, the American Federation of Government Employees, Local 3134, AFL-CIO, herein called the AFGE, was certified as the exclusive representative of essentially all nonprofessional employees of the "New York Regional Office" of the Activity-Petitioner. The New York Regional Office was 1 of 4 regional offices under the Activity-Petitioner's New York Area Office. In 1971, pursuant to a reorganization, the Activity-Petitioner combined its New York Regional Office and New York Area Office ^{1/} and, following a new election, the AFGE was certified on March 10, 1971, as the exclusive representative for the employees in the newly combined unit. Thereafter, the AFGE and the Activity-Petitioner entered into a negotiated agreement dated January 15, 1973. Sometime later in 1973, pursuant to a new reorganization, the Activity-Petitioner reestablished what before 1971 had been the New York Regional Office, but now designated such office as a district office. The employees in the New York District Office remained in the same building in which the New York Regional Office was located, performing essentially the same work as before the 1973 reorganization.

^{1/} In the 1971 reorganization, the other regional offices (Puerto Rico, Syracuse and Newark) were designated as district offices.

On March 26, 1975, the Activity-Petitioner filed the instant RA petition for a unit of "all nonprofessional employees of the New York District Office of the Small Business Administration located at or working out of 26 Federal Plaza, New York, New York, and excluding all temporary employees, managers, supervisors, guards, personnel employees other than clerical, those in the excepted services and professionals." ^{2/} In this regard, it asserts that the 1973 reorganization changed the character and scope of the existing unit so as to render it inappropriate and that, as a result of such reorganization, there now exists two separate units conforming to the new organizational realignment. On the other hand, the AFGE contends that the reorganization was superficial in nature and that its existing unit is still viable. In this regard, it notes that the parties have continued to operate under the negotiated agreement of January 15, 1973. ^{3/}

The record reveals that the primary mission of the Activity-Petitioner is to service the small business clientele within Region II of the Small Business Administration, which region includes Puerto Rico, the Virgin Islands, New Jersey, and New York. Its mission encompasses numerous programs—basically financial loan assistance programs—and includes training and assistance in establishing a business, maintaining it, and making it successful.

As indicated above, between 1970 and 1973 there was a single activity (Regional Office) in New York City for which the AFGE was certified as the exclusive representative on March 10, 1971. This unit performed all of the functions of the Activity-Petitioner in New York City as well as serving as the Regional Office. The reorganization in 1973 resulted in certain program functions being performed by the newly established District Office with the Regional Office performing staff functions for this and the other district offices. The record indicates, however, that no new functions or responsibilities were added as a result of the 1973 reorganization, but, rather, existing functions were reassigned within the recognized unit. Further, the evidence establishes that the

^{2/} The unit description appears as amended at the hearing.

^{3/} Under these circumstances, the AFGE contends that the RA petition herein was untimely filed with respect to the negotiated agreement of January 15, 1973, in that such agreement constitutes a bar to the filing of the petition. Inasmuch as the RA petition was based on an alleged change in the character and scope of the unit rather than on a contention that the AFGE no longer represents a majority of the employees in the appropriate unit, I find, contrary to the AFGE's contention, that the RA petition herein is timely and that the negotiated agreement does not constitute a bar to the instant petition. See Denver Airway Facilities Hub Sector FAA, Rocky Mountain Region, DOT Aurora, Colorado, A/SLMR No. 535; U.S. Department of Transportation, Federal Aviation Agency, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482; and Idaho Panhandle National Forests, U.S. Department of Agriculture, A/SLMR No. 394.

employees in the District Office have remained in the same building with the employees in the Regional Office, with one floor separating them, and that the previously established bargaining relationship has continued. In this latter regard, the record reveals that, subsequent to the 1973 reorganization, the parties have continued to adhere to the terms of the existing negotiated agreement which was executed on January 15, 1973, prior to the reorganization which created the District Office. Additionally, the employees in both the New York Regional Office and New York District Office continue to be serviced by the same personnel office located in the Regional Office; the final step for grievance adjustment is vested in the Regional Director; and the District Director reports to the Regional Director who has the ultimate responsibility for labor-management relations in Region II. ^{4/} The evidence also establishes that the employees involved continue, following the reorganization, to perform the same duties in the same physical locations and in close proximity. ^{5/} Further, the record indicates that the areas of consideration for promotions have not changed, although separate areas of consideration for reductions-in-force have been established. The record also reflects that the District Office performs certain non-reimbursable services for the Regional Office, such as mail and cash collateral functions, and that during the past year a number of transfers and details have occurred between the Regional Office and the District Office, with some of the details continuing for a considerable length of time up to and including the time of the hearing in this matter.

Under all the foregoing circumstances, I find that the exclusively recognized unit represented by the AFGE continues, after the reorganization, to remain appropriate for the purpose of exclusive recognition as the employees involved continue to share a clear and identifiable community of interest. In this regard, it is noted particularly that the reorganization did not result in changes in the employees' job functions, their immediate supervision, and the proximity of the physical location of the two offices. Moreover, they continue to be serviced by the Regional personnel office, share common prescribed policies and practices under the overall direction of the Regional Director for Region II, and there is evidence of a number of transfers and details between the New York Regional Office and the New York District Office.

^{4/} All District Directors under SOP 38S1-1, S.B.A. have the responsibility for consultation and negotiating agreements with the organizations having exclusive recognition in the specific district offices. However, the Regional Director, under the same SOP, retains ultimate responsibility for labor-management relations in his region.

^{5/} There was an indication that the Activity-Petitioner anticipates that in the future the General Services Administration may move the Regional Office to another location. It is clear from the record that the Activity-Petitioner has for some time sought to have that move accomplished. At the time of the hearing in this matter, however, the locations remained the same.

December 6, 1976

In reaching the foregoing disposition, I reject the Activity-Petitioner's claim that the establishment of two separate units in place of the existing exclusively recognized unit will result in increased effective dealings and efficiency of agency operations. Thus, in my view, under the particular circumstances herein, including the fact that there is a history of effective collective bargaining between the parties which has continued after the 1973 reorganization, the establishment of two new units will result in unnecessary fragmentation and will not promote effective dealings and efficiency of agency operations. ^{6/} Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-6108(RA) be, and it hereby is, dismissed. ^{7/}

Dated, Washington, D. C.
December 6, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

4500 AIR BASE WING,
LANGLEY AIR FORCE BASE, VIRGINIA
A/SLMR No. 760

This case involved an unfair labor practice complaint filed by Joan Greene, an individual, alleging essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by issuing the Complainant a low performance rating because of her activities as a union official.

When the Complainant failed to appear at the appointed time at the scheduled hearing in this matter, counsel for the Respondent, upon the request of the Administrative Law Judge, contacted the Complainant's union representative and indicated, on the record, that the union representative had informed him that neither the Complainant nor her representative would be at the hearing and, further, that the Complainant had forwarded a letter to the Chief Administrative Law Judge to the effect that she did not feel qualified to represent herself, and that she desired to have lie detector tests administered to all principal "parties." The Administrative Law Judge concluded that the Complainant had not attempted to meet her burden of proof by virtue of her failure to appear and proceed at the hearing and that the Respondent's motion to dismiss for lack of prosecution should be granted. Accordingly, he recommended that the complaint be dismissed in its entirety.

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

^{6/} Cf. Naval Aerospace and Regional Medical Center, Pensacola, Florida, A/SLMR No. 603, FLRC No. 76A-18.

^{7/} While it has been found that the exclusively recognized unit herein continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition, it is noted that such finding would not preclude the filing of an appropriate petition for amendment of certification in order to conform the recognition to the existing circumstances.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

4500 AIR BASE WING,
LANGLEY AIR FORCE BASE, VIRGINIA

Respondent

and

Case No. 22-6769(CA)

JOAN GREENE

Complainant

DECISION AND ORDER

On October 14, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding recommending that the complaint be dismissed in its entirety based on the Complainant's lack of prosecution. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6769(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 6, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20036



..... :
In the Matter of :
 :
4500 Air Base Wing, :
Langley Air Force Base, Virginia :
Respondent :
 :
and : Case No. 22-6769 (CA)
 :
Joan Greene :
Complainant :
..... :

Captain Edmund K. Brehl
Labor Relations Counsel
Tactical Air Command
Langley Air Force Base, Virginia
For the Respondent

Before: GORDON J. MYATT
Administrative Law Judge

DECISION AND RECOMMENDED ORDER

Statement of the Case

Pursuant to a complaint filed March 29, 1976, alleging that 4500 Air Base Wing, Langley Air Force Base (hereinafter called the 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 August 2, 1976. The complaint asserted that Respondent Activity issued the Complainant a low performance rating on June 30, 1975, because of her activities on behalf of the Union as an official of the Union.

A hearing on this matter was scheduled on September 2, 1976, in Norfolk, Virginia. At the appointed time for the hearing only the representatives of the Respondent Activity appeared. After a lengthy wait, counsel for the Respondent Activity was requested to attempt to contact the Complainant or her union representatives to inquire as to the failure to appear pursuant to the notice of hearing. Counsel subsequently

advised, on the record, that Complainant's union representative informed him that neither the Complainant nor her representative would appear or participate in the hearing. He further advised that Complainant had forwarded a letter 1/ to the Chief Administrative Law Judge to the effect that (1) she did not feel qualified to represent herself, and (2) that she desired to have lie detector tests administered to all principal "parties".

At the conclusion of the representation regarding Complainant's absence, counsel for the Respondent Activity made a motion for dismissal of the complaint for failure to prosecute.

Discussion

On the basis of the above, I find and conclude that the Complainant herein has not attempted to meet the requirements of proving the allegations of the complaint by virtue of her failure to appear and proceed with the hearing. 2/ Accordingly, I find and conclude that the motion to dismiss made by the Respondent Activity should be granted and the complaint herein dismissed in its entirety.


1/ Subsequent to the hearing, it was determined that the letter from the Complainant was received in the Office of Administrative Law Judges on September 2, 1976 -- the day of the hearing in Norfolk. The letter decried the fact that the Respondent Activity would be represented by "public defenders" and the hearing procedures did not provide for similar representation for the Complainant. The letter also requested that lie detector tests be administered to the chief witnesses, including Complainant, "in lieu of a hearing".

Because of the importance of the letter in explaining the Complainant's failure to appear, the record is hereby opened solely for the purpose of receiving into the record the letter as Administrative Law Judge Exhibit No. 1.

2/ 29 C.F.R. §203.15.

Recommended Order

Upon the foregoing findings and conclusion, it is hereby recommended that the complaint in this case be dismissed in its entirety.


GORDON J. MYATT
Administrative Law Judge

Dated: October 14, 1976
Washington, D.C.

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

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

HEADQUARTERS, 63d AIR BASE GROUP, (MAC),
UNITED STATES AIR FORCE,
NORTON AIR FORCE BASE, CALIFORNIA
A/SLMR No. 761

HEADQUARTERS, 63d AIR BASE GROUP, (MAC),
UNITED STATES AIR FORCE,
NORTON AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-5762(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1485, AFL-CIO

Complainant

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1485, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally changed the work shifts and tours of duty of certain unit employees without consultation as required by the Order and the parties' negotiated agreement.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that, under the particular circumstances of this case, the combining of two shift operations into one and the resultant abolishment of the swing shift were matters within the ambit of Section 11(b) of the Order. He further found that the Complainant had been afforded ample notice and an opportunity to request bargaining concerning the impact and implementation of the Respondent's decision, but had failed to do so in a timely fashion.

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

DECISION AND ORDER

On August 24, 1976, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

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

In reaching the decision herein, it was noted particularly that the Administrative Law Judge found that the combining of two shift operations into one and the resultant abolishment of the swing shift was integrally related to and determinative of the staffing pattern required for the Respondent to accomplish its mission and, therefore, were matters

1/ On page 7 of the Administrative Law Judge's Recommended Decision, the citation for the Federal Labor Relations Council's decision in AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y. was inadvertently given as FLRC No. 74A-11 (1971), rather than as FLRC No. 71A-11. This inadvertence is hereby corrected.

within the ambit of Section 11(b) of the Order. 2/ Further, the Administrative Law Judge found that, under the particular circumstances herein, the Complainant had been afforded ample notice and an opportunity to request bargaining concerning the impact and implementation of the Respondent's decision, but failed to do so in a timely fashion.

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



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-5762(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 6, 1976

Bernard E. DeLury
Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of :
:
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Headquarters, 63rd Air Base Group (MAC) :
United States Air Force :
Norton Air Force Base, California :
:
Respondent :
:
and :
:
American Federation of Government :
Employees, Local No. 1485 :
:
Complainant :
:
.....

Case No. 72-5762(CA)

Timothy J. Dakin
Major, U.S. Air Force
Office of the Staff Judge Advocate
Headquarters, Military Airlift Command
Scott Air Force Base, Illinois 62225

For the Respondent

William H. Shoates
National Representative
American Federation of Government Employees
1890 Pacific Avenue
Long Beach, California 90806

For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

2/ Compare Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656.

RECOMMENDED DECISION

Statement of the Case

Pursuant to a complaint and an amended complaint filed on December 16, 1975 and May 20, 1976, respectively, under Executive Order 11491, as amended, by Local 1485, American Federation of Government Employees (hereinafter called the Union and/or Complainant), against Headquarters, 63rd Air Base Group (MAC), United States Air Force, Norton Air Force Base, California, (hereinafter called the Respondent and/or Activity), a Notice of Hearing to be held on July 15, 1976 in San Bernadino, California was issued by the Regional Administrator, Labor Management Services, San Francisco Region, on June 10, 1976.

The complaint, as amended, 1/ alleges that the Respondent violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended, by reason of the following:

"On or about 29 August, 1975, Paul L. Green, Colonel, USAF, Commanding, by his agents Major Dorsey, Commander, 1965th Communication System and Technical Sergeant Houston, Section Supervisor did change the work shift of Robert E. Basore, Vernon V. Van Duvall and Russell D. Perry, Electronic Mechanics, W.G. 2614-12, tours of duty without consultation as required by the Executive Order and the negotiated agreement, Article XVII and Article VI, Section 7, an agreement between Norton Air Force Base, Calif. and American Federation of Government Employees Local 1485, San Bernadino, Calif."

1/ The amended complaint deleted an alleged 19(a)(5) violation contained in the original complaint and only the 19(a)(1) and 19(a)(6) alleged violations referenced in the Notice of Hearing are in issue in this proceeding.

A hearing was held as scheduled in the captioned matter on July 15, 1976. 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.

The facts in this proceeding are not in essential dispute. Upon the basis of the entire record including my observation of the witnesses and their demeanor and argument submitted by counsel for the respective parties, I make the following findings, conclusions and recommendation.

Findings of Fact

1. The Union is the exclusive representative of three bargaining units at Norton Air Force Base, California, including eligible employees in the 1965th Communications Squadron; the 63rd Security Police Squadron; 63 Air Base Group; and the Fire Protection Branch, Civil Engineering Division, Office of the Base Commander.
2. The negotiated agreement between Complainant/Union and the Respondent/Activity is dated September 18, 1973 and was in effect at all times material to this proceeding.
3. The negotiated agreement between the parties, signed on September 18, 1973, among other provisions, contained the following which are claimed to be pertinent to this proceeding.

Article III, Union Rights - Section 1:

. . . The Union shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning personnel policies and practices, or other matters affecting general working conditions.

Article IV, Management Rights - Section 3:

Management officials retain the right in accordance with applicable laws and regulations to:
(a) Direct employees of the units; (c) Relieve employees from duties because of lack of work

or for other legitimate reasons; (d) Maintain the efficiency of the Government operations entrusted to them; (e) Determine the methods, means and personnel by which such operations are to be conducted; and (f) Take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

Article V, Union Representatives/Stewards - Section 4. The Employer shall not permanently assign a steward to a different shift or cycle of rotating shifts without notifying the steward (who is in turn responsible for notifying the appropriate officers of the Union) seven calendar days in advance, except in emergency conditions.

Article VI, Basic Workweek and Hours of Work - Section 7. The employer agrees that at least a seven-day notice will be given before changes are made in the basic workweek, except as job priorities dictate.

Section 7. The Union shall insure that its members who are selected as stewards receive training in the contents of this agreement, and in applicable directives and procedures to fulfill the responsibilities of their steward positions in the most effective manner possible. The Employer will cooperate in the Union's training of its stewards in accordance with applicable directives.

Article XVIII, Joint Union Management Consultations - Section 1. It is agreed and understood that matters appropriate for consultation between the parties and policies and procedures involving working conditions which are within the authority and discretion of the Employer, including but not limited to such matters as . . . hours of work. These matters relate to

policy determinations, not day-to-day operations or individual dissatisfactions. The Employer agrees that he will make no policy or a negotiable issue without consultations with the Union

4. On August 15, 1975, Technical Sergeant Marcus Houston 2/ met with employee members working the swing shift 3/ in his unit 4/ at the Norton Air Force Base and announced that the swing shift would be abolished on August 31, 1975 and those working on it would be scheduled to work during the normal day shift; no persons were to be added to or removed from the work force as a result of the change. Vernon V. Van Duvall, a Union Steward was present at the meeting when the announcement was made along with other employees. After discussion, following the tour of duty change announcement, a duty roster was posted to cover the new schedule. The swing shift was later abolished on September 2, 1975 following the Labor Day weekend and holiday.

5. Technical Sergeant Marcus Houston testified that he was aware that Vernon V. Van Duvall, an employee in the Record Communications Maintenance unit was a steward in AFGE Local 1485 at the time he made the August 15, 1975 announcement of the abolishment or cancellation of the swing shift, and I find that this is substantiated by credible evidence of record.

6. AFGE Local 1485 President, Robert G. Humphreys learned of the swing shift cancellation announcement by rumor on or about Wednesday, August 27, 1975 and verified that the announcement and notice had been given when he contacted Union Steward, Vernon V. Van Duvall about 3:30 p.m. on August 28, 1976, when he (Humphreys) reported for swing shift

2/ Non Commissioned Officer in charge of Record Communications Maintenance.

3/ The Swift Shift hours were from 4:00 p.m. to 12:00 p.m.

4/ Record Communications Maintenance.

duty. 5/ At about 3:30 p.m. on Friday, August 29, 1976, President Humphreys contacted Chief Master Sergeant Marcel, one of the maintenance supervisors at the Communications Squadron and told him they had not talked to the Union about the shift change. 6/ The same day a routing slip was delivered to the Union with the following remarks: "Effective 01 Sept. 1975, all civilian personnel in the 1965 Comm. Sq/TTY Workcenter that are on swing shift will transfer to day shift. This change is necessary due to the shortage of maintenance personnel. 7/

7. Other than the communications indicated in paragraph no. 6 above, the swing shift was cancelled or abolished without any written notice to the President or other elected Union official.

Discussion and Conclusions

A. The Decision to Abolish the Swing Shift. The Complainant states in substance that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by the manner in which it announced and proceeded to carry out the cancellation of the swing shift in the Activity's Record Communications Maintenance section without consulting, conferring, or negotiating with the exclusive representative.

The Respondent contends that it had the right unilaterally to change from a two to a one shift operation in the Record Communications Maintenance Section pursuant to Section 11(b) of the Executive Order. Section 11(b) in relevant part, provides:

5/ Thursday, August 28, 1975 was the last day that Union Steward Van Duvall worked before the shift change was implemented on Tuesday, September 2, 1975. Tr. pp. 80 and 163 and Respondent's Exhibit No. 2.

6/ Tr. pp. 82 and 83.

7/ The routing slips, Respondent's Exhibit No. 2, had a typewritten date of September 29, 1975 but evidence at hearing establishes that the correct date was August 29, 1975.

". . . However, the obligation to meet and confer does not include matters with respect to the mission of an agency; . . . and the number and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . ."

The decision to abolish a swing shift operation and transfer all employees to the day shift concerned the mission of the agency and or Activity within the meaning of Section 11(b). Although not all changes in tours of duty are non-negotiable, the Federal Labor Relations Council (hereinafter "Council") has held non-negotiable, i.e., a reserved right, the determination of the number of work shifts or tours of duty, and the duration of the shift when an essential and integral part of the 'staffing patterns' necessary to perform the work of the agency" are involved. AFGE Local 1940 and Plum Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 74A-11 (1971). In AFGE, National Joint Council of Food Inspection Local and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Dept. of Agriculture, FLRC No. 73A-36 (Supplemental Decision (1975)) Report No. 73), the Council stated:

". . . a proposal relating to the basic work-week and hours of duty of employees is not excepted from an agency's bargaining obligation under Section 11(b) unless, based on the special circumstances of a particular case . . ., the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency."

In Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR NO. 656, the Respondent was held to have violated Sections 19(a)(1) and (6) of the Order when it "failed to notify the Complainant prior to making its final determination or decision to change the work hours of certain unit employees, and to afford the Complainant the

opportunity to bargain on the proposed change in work hours. In the Assistant Secretary's view, the change in work hours, being a matter affecting working conditions, was a negotiable item within the meaning of Section 11(a) of the Order, as under the circumstances, the change was not integrally related to and consequently determinative of the numbers, types, and grades of employees or staffing patterns of the Respondent/Activity and, thus, not within the ambit of 11(b) of the Order. The Assistant Secretary also found that even if the Respondent's change in work hours was viewed as being within the ambit of Section 11(b), the provisions of the parties' negotiated agreement indicated that the Respondent chose to make 'scheduling of work hours' a negotiable matter."

In the present case, the necessity of combining two shift operations into one was integrally related to and determinative of the staffing pattern required for the Respondent/Activity to accomplish its mission, 8/ that is, the numbers, types, and grades of positions or employees assigned to the organizational unit, work project, or tour of duty for maintenance of Respondent's communication equipment. Accordingly, the decision to consolidate a two shift operation into one was a management right within the meaning of Section 11(b). 9/

Management's decision to combine shifts was not seriously contested at the hearing and at the beginning of the proceeding, counsel for Complainant stated ". . . the Union was, in no way, trying to dictate to management, the number, kinds

8/ On the swing shift, certain of Respondent's equipment was not accessible for maintenance repair without having security personnel present while the machinery was being repaired; too, certain of employees were scheduled for training, leaving insufficient staff personnel to carry out the duties on the normal day shift. There was access to all machinery on the day shift.

9/ See Alabama National Guard, Respondent and Local 1730, National Federation of Federal Employees, Case No. 40-5783(CA) (Administrative Law Judge William B. Devaney (1976)) adopted by the Assistant Secretary in A/SLMR 660.

of people to perform the mission of the activity. They were only concerned with the adverse impact that this abolishment of that particular tour of duty would have upon the three employees effected, and management refused to negotiate this, as they felt it was management's right under the Order, and that was the conclusion on that." 10/

B. Notice to the Union as to Management's Decision to Abolish the Swing Shift. Having concluded that the decision to cancel the swing shift and to combine it with one single day shift operation was a reserved right of management, it must further be determined whether the Complainant had ample notice and opportunity to request negotiations concerning the impact and implementation of such decision.

(1) The Notice. It is undisputed that the Activity did not furnish the AFGE Local 1485 President or any elected Union official, written notice of the decision to abolish the swing shift prior to about 3:30 p.m. on Friday, August 29, 1975, when a memorandum was personally delivered to the President advising him of the action.

It is likewise undisputed that on August 15, 1975, Technical Sergeant Marcus Houston, the NCO in charge of Records Communications Maintenance, held a meeting in the section and advised all personnel as to the decision to abolish the swing shift and to combine it with the day shift. Among those present at the meeting was Union Steward Vernon V. Van Duvall and it is not contended that any employee affected by the change was not either present at the meeting or properly notified of the decision. In summary, it is concluded that Union Steward Van Duvall had actual notice of the change in shift to be effective September 2, 1975 or August 15, 1975. AFGE Local 1485 President Humphreys had constructive notice of the change on Wednesday, August 27, 1975 and actual notice delivered to him on August 29, 1975.

10/ The issue of adverse impact only was contested at the hearing. See Transcript, pp. 157, 158 and 159.

(2) Authority to make Decisions and Announcement. A question as to the authority of Technical Sergeant Houston to make the decision and announcement was raised at the hearing. The evidence adduced established that he did have such authority, that he had made the recommendation of the change in shifts, coordinated it with his immediate Commanding Officer and was given permission to initiate the change. The change was initiated and put into effect by the Activity. The announcement and action putting the decision into effect are deemed to have been approved in the absence of any contra expression by the Respondent/Activity. It is thus concluded that the decision and announcement of the cancellation of the swing shift were properly authorized pursuant to the negotiated agreement.

(3) Was Official Timely Notice Properly Given. Article V, Section 4 of the negotiated agreement provides that the Employer shall not permanently assign a steward to a different shift or cycle of rotating shifts without notifying the steward (who is in turn responsible for notifying the appropriate officers of the Union) seven calendar days in advance, except in emergency conditions.

It is undisputed that Union Steward Van Duvall was notified along with others at the August 15, 1975 meeting, that the swing shift would be abolished on September 1, 1975 and consolidated with the day shift. Vernon V. Van Duvall was known to Management and Technical Sergeant Houston who made the announcement, as a Union Steward and the announcement and/or notice was open, unrestricted, timely and pursuant to Article V, Section 4 of the negotiated agreement.

The Complainant's argument that the steward is not the proper party to receive notice because he is not an elected official and cannot make decisions is unpersuasive for several reasons including: One, the specific subject matter involved a change in shift of a Union Steward and others which was the specific subject matter the parties to the agreement had negotiated and it provided that the Steward would be notified and in turn he was responsible for notifying the Union. The intent and purpose of the announcement made in an open session were clear and constituted official notice to the parties affected thereby. I conclude that the

Respondent, in notifying the Steward at the open meeting did not abrogate the negotiated agreement. Second, the Union Steward was not required to make any decision as contended; his only responsibility as to this subject matter was to notify the Union.

(4) Did the Respondent Refuse to Confer, Consult or Negotiate with the Complainant? After the August 15, 1975 announcement and Notice to Steward Van Duvall, the Respondent Management Activity was not contacted by the Complainant until Friday, August 29, 1975 at about 3:30 p.m., less than one hour before the day shift concluded its weekly tour of duty. The next day of regular work was Tuesday, September 2, 1975 since Monday was a holiday. Of course, by late afternoon August 29, 1975 work schedules and notices had been posted. There was obviously insufficient time to rescind the change in schedule plan prior to the next workday, September 2, 1975, when implementation of the consolidation in shifts became effective. Even so, the Respondent did not refuse to consult, confer or negotiate with the Complainant because a meeting was scheduled and subsequently held on September 15, 1975 to discuss the change and effects thereof. I conclude that the Union had been furnished ample notice of the decision to change the swing shift tour of duty and consolidate it with the day shift as well as ample opportunity to request negotiations concerning the impact and implementation of the decision, but failed to do so. It, the Union, may not disavow the provisions of its agreement, or the deficiency of its steward, to fault the Respondent by waiting until the last working hour before implementation of the decision is scheduled, to make known its desire to bargain on the decision and its impact on affected employees. Since a reasonable notice to the Union is required by the negotiated agreement, it follows that notice to the Respondent should be in sufficiently reasonable time to consider before implementation of the decision is made. Of course, what is a reasonable time depends on the circumstances of a particular case, but I submit and conclude that the Union, having been notified of the shift cancellation on August 15, 1975, it did not make a timely request to bargain on impact of implementation of the decision when it waited until the last working hour before implementation of the decision was scheduled to

be effective, and, at a time too late to change or alter the decision and work schedule issued pursuant thereto. Further, even after implementation of the decision, the Respondent met with representatives of the Complainant/Union on September 15, 1975 but was not requested to bargain on the impact of the decision which it offered to do. 11/

C. Summary of Conclusions. In summary, I conclude as follows:

(1) The Respondent's August 15, 1975 decision to abolish the swing shift and establish a new tour of duty for certain employees in the bargaining unit beginning September 2, 1975 was a management right within the meaning of Section 11(b) of the Order, and that the Respondent was not obligated to bargain about such decision.

(2) The Complainant had ample notice and opportunity to request negotiations concerning the impact and implementation of such decision but failed to timely do so.

(3) After implementation of the decision on September 2, 1975, the Respondent met with representatives of the Union on September 15, 1975 and offered to bargain on the impact and on the three affected employees.

(4) The Respondent did not refuse to consult, confer or negotiate with the Union in violation of the provisions of Section 19(c)(6) of the Order. 12/

(5) The Respondent did not interfere with, restrain or coerce an employee in the exercise of rights in violation of the provisions of Section 19(a)(1) of the Order. 13/

11/ See Transcript, pp. 157, 158, 159.


12/ Section 19(a)(6) of the Order provides that Agency Management shall not: (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

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

6. In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of 19(a)(1) and (6) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusions and the entire record, I recommend to the Assistant Secretary that the complaint in Case No. 72-5762(CA), be dismissed in its entirety.


RHEA M. BURROW
Administrative Law Judge

Dated: August 24, 1976
Washington, D.C.

December 10, 1976

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

UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE, PACIFIC
NORTHWEST FOREST AND RANGE EXPERIMENT STATION,
FOREST SCIENCES LABORATORY, CORVALLIS, OREGON
A/SLMR No. 762

This case involved a representation petition filed by the American Federation of Government Employees, Local 3666, AFL-CIO (AFGE) seeking a unit of all the employees of the Pacific Northwest Forest and Range Experiment Station (Station) in Corvallis, Oregon. In the alternative, the AFGE would have accepted for inclusion in its petitioned for unit those employees of the Station located in Olympia, Washington. The Activity took the position that both the proposed unit and the alternative are inappropriate as they exclude other employees of the Station who share a community of interest with the petitioned for employees and such units would result in fragmentation of the Station's employees thereby reducing effective dealings and efficiency of agency operations.

The Assistant Secretary found that both the proposed unit and the alternative unit were inappropriate for the purpose of exclusive recognition. Thus, he found that all of the Station's employees share a common mission, overall supervision, similar skills, and classifications; that the Station has highly centralized administrative procedures, including common personnel policies and practices; that frequent interchange of both information and personnel occurs throughout the Station; and that substantial transfer occurs among the Station's employees. Moreover, noting the lack of common supervision at the level of recognition sought, he found that such units could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

A/SLMR No. 762

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

UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE, PACIFIC
NORTHWEST FOREST AND RANGE EXPERIMENT STATION,
FOREST SCIENCES LABORATORY, CORVALLIS, OREGON

Activity

and

Case No. 71-3696

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3666, AFL-CIO

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, including briefs submitted by the Activity and the American Federation of Government Employees, Local 3666, AFL-CIO, herein called the AFGE, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The AFGE seeks an election in a unit composed of all employees of the Pacific Northwest Forest and Range Experiment Station (Station), Forest Sciences Laboratory, U.S. Forest Service, Corvallis, Oregon, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professionals, student aids, temporary employees whose appointments are thirty days or less, and supervisors as defined in Executive Order 11491, as amended. ^{1/} At the hearing, the AFGE stated that it would accept as an alternative unit the inclusion in the petitioned for unit of employees assigned to Olympia, Washington. The Activity asserts that both the proposed unit and the alternative unit are inappropriate as they exclude other employees of the Station who share a community of interest with the petitioned for employees. Moreover, it contends that such units would result in fragmentation of the Station's employees and would not promote effective dealings and efficiency of agency operations.

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

The Station, with headquarters located at Portland, Oregon, is 1 of 8 such stations under the Chief of the Forest Service. Each carries out a broad research oriented mission which includes providing scientific knowledge, technology and alternatives for management use and protection of forest, range, and related environments for present and future generations. The Station encompasses a geographical area consisting of the states of Oregon, Washington and Alaska and is headed by a Director who is responsible to the Chief of the Forest Service. Under the Director, and directly responsible to him, are two Assistant Directors for Research and an Assistant Director for Research Support Services. The Assistant Directors for Research are located, respectively, at Corvallis, Oregon, and Seattle, Washington, while the Assistant Director for Research Support Services is located at the Headquarters in Portland. Each Assistant Director for Research has program responsibility for a number of research projects which are headed by Project Leaders. The Assistant Director for Research Support Services provides administrative support for the Station, and has elements of his organization assigned not only at the Headquarters Office, but also at various locations throughout the geographical area of the Station, including Corvallis.

The petitioned for unit includes all employees at Corvallis, including employees assigned to the administrative support unit which is responsible to the Assistant Director for Research Support Services, as well as certain employees under the program direction of the Assistant Director for Research. The alternative unit would include all employees under the program direction of the Assistant Director for Research, as well as the employees under the direction of the Assistant Director for Research Support Services located at Corvallis. The record discloses no history of bargaining in either unit sought. Further, the record reveals that, at the time of the hearing herein, only one exclusively recognized unit existed among the Forest and Range Experiment Stations, a station-wide unit located at Berkley, California.

The Assistant Director for Research in Corvallis is responsible for nine research projects located in Corvallis which employ 46 nonprofessional employees. He also is responsible for one research project employing seven nonprofessional employees in Olympia, Washington. ^{2/} The administrative support unit located in Corvallis, employing four nonprofessional employees, provides administrative services only for the employees at Corvallis. The employees at Olympia receive their administrative services from the Station Headquarters in Portland. The Assistant Director for Research at Corvallis has no authority with regard to the administrative unit stationed at Corvallis.

Each research project has been authorized at the Station level and has been allocated its own funding. The Project Leaders, who are scientists, direct the day-to-day activities of their respective research projects with relative independence, receiving only overall program direction from their Assistant Director. While each project is self-contained and independent of the other, the record reflects that the

^{2/} The Assistant Director located in Seattle, Washington, is responsible for research projects located in Juneau and Fairbanks, Alaska, Portland, Oregon, and Seattle, Washington.

Project Leaders frequently interchange both information and personnel, and that such interchange occurs between projects located throughout the Station. Moreover, the record reflects that there has been a substantial number of transfers of employees from project to project as a consequence of promotions pursuant to a Station-wide merit promotion plan.

The authority for most administrative matters remains at the Station level and, for the most part, has been delegated by the Station Director to the Assistant Director for Research Support Services. In this regard, such matters as payroll, procurement, contracting out, the publication of research papers, position classification, and the authority for most personnel actions have been delegated to him. However, the record reveals that the administrative field service units under the Assistant Director for Research Support Services located in Corvallis and Seattle, Washington, and Juneau and Fairbanks, Alaska, have limited authority for procurement and the hiring of temporary employees. While the Corvallis Assistant Director, or the Project Leaders under his direction, are authorized to make recommendations with respect to such matters as minor discipline, awards, and promotions, the record reflects that these matters generally are discussed at the regular monthly staff meetings held by the Director and, in some instances, the recommendations are denied by the Director.

The majority of the employees in the unit sought are biological or forestry technicians and clericals, and employees with similar duties and classifications are found throughout the Station. All of the Station's employees are subject to the Station-wide merit promotion plan and grievance procedure. However, the area of consideration for reductions-in-force is the local commuting area and includes other Forest Service activities. ^{3/}

Under all of the above circumstances, and having given equal weight to each of the criteria set forth in Section 10(b) of the Order, ^{4/} I find that the petitioned for unit herein is not appropriate for the purpose of exclusive recognition under the Order. Thus, all of the Station's employees, including those in the petitioned for unit, share a common mission, common overall supervision, similar skills and classifications, and enjoy highly centralized administrative procedures which include common personnel policies and practices, merit promotion procedures, and grievance procedure. Moreover, while the individual research projects throughout the Station are self-contained under the independent direction of the Project Leaders, the evidence establishes that frequent interchange of both information and personnel occurs among the projects throughout the Station and that there have been a substantial number of transfers of employees as a result of promotions. Under these circumstances, I find that the claimed employees do not share a community of

^{3/} The local commuting area is a 35 mile radius of Corvallis and does not include Olympia, Washington.

^{4/} See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Defense Contract Administration Office, (DCASO), Columbus and Akron, Ohio, A/SLMR No. 687.

December 10, 1976

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

interest that is separate and distinct from other employees of the Station. Moreover, noting that the petitioned for unit includes employees who are not under the same supervision at the level of recognition sought and the absence of the delegation of substantial administrative authority at the level of recognition sought, I find that such unit, based solely on geographical location, could not reasonably be expected to promote effective dealings and efficiency of agency operations. ^{5/} Further, as to the alternative unit suggested by the AFGE, for essentially the same reasons as set forth above, I find that such unit is not appropriate for the purpose of exclusive recognition under the Order as it does not encompass employees who share a separate and distinct community of interest apart from other employees of the Station. Nor, in my view, would such unit promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-3696 be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 10, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES INFORMATION AGENCY
A/SLMR No. 763

This case arose as a result of an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1418 (Complainant), alleging, in substance, that the Respondent had violated Section 19(a)(1) and (6) of the Order when it unilaterally abrogated its acceptance of a recommendation of the Joint Wage Council to exclude television channel 26 (WETA) as a data source from a wage survey.

The Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(1) and (6) of the Order. In his view, the inclusion of WETA as a data source was tantamount to a change in working conditions, but he found that the Respondent had met and conferred in good faith with the Complainant prior to putting the revised wage schedule into effect. Further, he found that while the Respondent did not comply with Complainant's demand for exclusion of WETA as a data source, it, nevertheless, fully discharged its obligations under the Order by conferring in good faith with the Complainant and was not required to obtain the Complainant's assent prior to instituting a change in working conditions.

The Assistant Secretary concurred with the Administrative Law Judge's conclusion that dismissal of the complaint was warranted but did so for different reasons. The Assistant Secretary noted that the evidence in the case established that after many efforts to reach a compromise regarding a change in the wage schedule the President of Local 1447, National Federation of Federal Employees (NFFE), a party to the Joint Wage Council, suggested that WETA be included as a data source as part of the solution. At a subsequent meeting, when the Respondent informed the representatives of NFFE Locals 1447 and 1418 (Complainant) that it proposed to include WETA as a data source, the General Counsel of the NFFE, who was also present, informed the Respondent that one Local had agreed and the other disagreed but the Respondent should go ahead and put the wage rates into effect and the Union would have to decide what action it would take. The Respondent did not put the revised wage schedule into effect until the Joint Wage Council specifically approved the inclusion of WETA as a data source in the computation of the wage rates finally recommended by the Council for adoption. Under all of these circumstances, the Assistant Secretary found that the Respondent's action in including WETA as a data source was not in derogation of its bargaining obligation under the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

^{5/} Cf. Department of the Army, U.S. Army Reserves, 425th Transportation, command, Forest Park, Illinois, A/SLMR No. 636.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES INFORMATION AGENCY

Respondent

and

Case No. 22-5903(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1418

Complainant

DECISION AND ORDER

On April 22, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The instant complaint alleged, in substance, that the Respondent had violated Section 19(a)(1) and (6) of the Order when it unilaterally abrogated its acceptance of a recommendation of the Joint Wage Council to exclude television channel 26 (WETA) as a data source from a wage survey.

The Administrative Law Judge concluded that the Respondent's conduct herein did not violate Section 19(a)(1) and (6) of the Order. In

his view, the inclusion of WETA as a data source was tantamount to a change in working conditions, but he found that the Respondent had met and conferred in good faith with the Complainant prior to putting the revised wage schedule into effect. Further, he found that while the Respondent did not comply with the Complainant's demand for exclusion of WETA as a data source, it, nevertheless, fully discharged its obligations under the Order by conferring in good faith with the Complainant and was not required to obtain the Complainant's assent prior to instituting a change in working conditions. While I concur with the Administrative Law Judge's conclusion that dismissal of the instant complaint is warranted, I reach this conclusion for different reasons.

In addition to the findings of fact set forth by the Administrative Law Judge in his Recommended Decision and Order, the record in this case also reveals that on January 20, 1975, after many efforts to reach a compromise regarding a change in the wage schedule, the Respondent received a telephone call from the President of Local 1447, National Federation of Federal Employees (NFFE), representing the Respondent's television technicians and a party to the Joint Wage Council, who suggested that a solution could be worked out. In a later call, the President of NFFE Local 1447 suggested that WETA be included as a data source as part of the solution.

Subsequently, on January 24 and 29, 1975, the Respondent met with representatives of Local 1447, Local 1418 (the Complainant), and the General Counsel of the NFFE and discussed computation methods and inclusion of WETA as a data source. The record and the findings of the Administrative Law Judge show that during the meeting on the morning of January 29 the Respondent informed the NFFE's General Counsel and the representatives of Locals 1447 and 1418 (the Complainant) that it proposed to use the trend line method of computation and to include WETA as a data source. The record also shows that after NFFE representatives caucused, the NFFE's General Counsel informed the Respondent that the locals were in disagreement with one another; one local had agreed and the other disagreed. The NFFE's General Counsel then asked the Respondent to go ahead and put the wage rates into effect and the Union would have to decide what action it would take.

On the afternoon of January 29, 1975, the Joint Wage Council met and discussed the Respondent's proposal concerning the inclusion of WETA as a data source and specifically approved its inclusion in the computation of the wage rates finally recommended by the Council for adoption. The evidence further establishes that it was only after the Council's recommendation that the Respondent put the revised wage schedule into effect.

Under all of these circumstances, and noting particularly the agreement by the General Counsel of the NFFE at the meeting of January 29, 1975, that the Respondent could put the new wage rates into effect and the Joint Wage Council's approval on January 29, 1975, of the inclusion of WETA as a data source, I find that the Respondent's action in including WETA as a data source was not in derogation of its bargaining obligation under the Order. Accordingly, I concur in the recommendation

f the Administrative Law Judge and shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5903(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 10, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



.....
In the Matter of :
UNITED STATES INFORMATION AGENCY :
Respondent :
and : Case No. 22-5903(CA)
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 1418 :
Complainant :
.....

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Washington, D.C. 20547
For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under the provisions of Executive Order 11491 (hereinafter called the Order). The complaint, alleging violations of Sections 19(a)(1) and (6), was filed on April 11, 1975. Under date of November 17, 1975, the Assistant Regional Director for Labor-Management Services, Philadelphia Region, issued a Notice of Hearing thereon. On December 11, 1975, a hearing was duly held before the undersigned in Washington, D.C.

pursuant to the Order and the applicable Regulations promulgated thereunder (20 C.F.R. Part 203).

The issues tendered for determination are: Whether the Respondent agreed to exclude employees of Station WETA from a wage survey; and whether the inclusion of such employees in the wage survey constitutes an unfair labor practice in violation of Section 19(a)(1) or (6) of the Order.

Upon all the evidence adduced, my observation of the witnesses, and consideration of the briefs of the respective parties filed January 16, 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, National Federation of Federal Employees, Local 1418, was the exclusive bargaining representative for all non-supervisory radio broadcast technicians employed by the Voice of America, operated by Respondent in Washington, D.C.

2. Pursuant to Article XI of the Employee-Management Cooperation Agreement between Respondent and Complainant dated August 15, 1968, and in effect to date, a Joint Wage Council was established.

3. Membership of the Joint Wage Council consisted of two union members (one from the Complainant Local 1418 and one from N.F.F.E. Local 1447 for television technicians) two management members and a representative of the office of Personnel and Training, the last named to serve as a non-voting participating member. It was later expanded to include a representative of A.F.G.E. Local 1812 for transmitter technicians and a counterpart for management.

4. Pursuant to Section 3 of Article XI of the Agreement, the function of the Council shall be to consider and make recommendations to the Chief, Domestic Service Personnel Division, concerning the timing of wage surveys; the identification of data sources and jobs to be surveyed; the selection of data collectors to conduct the surveys; and the proposed wage schedule to be established by the Chief, Domestic Service Personnel Division based on the data collected.

5. Section 5 of Article XI provides that the Chief, Domestic Service Personnel Division, after receipt and study of the Council's recommendations or other reports, will on behalf of the Agency, determine the timing and coverage of the survey; appoint the data collectors; issue the wage survey orders; and, after consultation with the Council, establish a wage schedule reflecting any adjustment warranted by the survey.

6. At a meeting of the Council on October 16, 1974, the then president of Complainant Local and its representative on the Council moved that Station WETA, a non-commercial station, be excluded from the survey. After discussion, the motion was tabled.

7. At a meeting of the Council on November 6, 1974, the motion to exclude WETA from the survey was renewed, and after discussion, the motion was carried. By memorandum of the same date, the Council recommended to Respondent six designated stations, excluding WETA, to be used as data sources for the 1974 wage survey.

8. Although a memorandum from Respondent's Domestic Personnel Chief bearing the same date of November 6, 1974, states that a full scale survey will be conducted at all possible sources for wage data in the Washington, D.C. area for radio and television technicians, Respondent accepted the recommendation that WETA be excluded. It was contemplated at that time that the television technicians would be converted to the general schedule and thus be taken out of the wage survey, and since WETA did not employ radio technicians, it did not appear that the exclusion would affect the anticipated separate survey of non-supervisory radio technicians.

9. On November 20, 1974, Respondent's Domestic Personnel Chief advised the Council that the Civil Service Commission had allowed him to expand the area to be surveyed to include New York City if sufficient data were not available in Washington, D. C. The Council thereupon unanimously adopted a motion to proceed with the wage survey as previously ordered, but if sufficient job matches could not be found, then major New York radio stations would be included as data sources.

10. At a meeting of the Council on December 23, 1974, the Domestic Personnel Chief reported that sufficient job matches had been found in Washington, so that there was no need to use the survey data from New York. After a discussion on the method of computing the survey data, the Council recommended

that on the basis of the field survey in Washington, unless and until substantial changes occurred, wage surveys should be based on combined radio and TV jobs as in the past, on the several stations surveyed this year and that the data be computed on the same basis as last year.

11. At a meeting held January 8, 1975, the Domestic Personnel Chief presented the Council with the results of the survey data. A motion was made and unanimously carried to amend the resolution adopted at the meeting of December 23, 1974, by deleting therefrom the provision that the data be computed on the same basis as last year. The Council recommended the adoption of the weighted average for journeymen as determined in the survey rates of radio and television combined in the Washington area, the computations setting the hourly pay rate for radio technicians at \$9.49 for Step 2 (and \$9.87 for Step 3).

12. Complainant's representative on the Council abstained from voting on the foregoing recommendation upon the ground that in his opinion the weighted average was an incorrect method of computation. A proposed rate schedule was prepared by Respondent, based upon the least squares formula for supervisory and non-supervisory positions, which resulted in rates of only \$9.23 for Step 2 and \$9.60 for Step 3.

13. At a Council meeting held January 17, 1975, the 1973 wage survey formula was reviewed and the Domestic Personnel Chief explained the weighted average formula used in both the 1973 and 1974 schedule. After discussion of the figures in the proposed schedule, the Council recommended wage rates of \$9.60 for Step 2 and \$9.98 for Step 3.

14. Contending that the Civil Service Commission required that the wage survey use the same method of computation as had been used the previous year, which had included WETA, Respondent proposed a revised schedule computed by the same method as the previous year which produced a wage rate of \$9.33 at Step 2 and \$9.72 at Step 3. At a meeting held on January 29, 1974, the revised wage rate was accepted by a majority of the Council, Complainant's representative voting against the motion. The revised rate, calculated with WETA as a data source, was put into effect.

15. The announced policy of the Civil Service Commission is to the effect that under Public Law 92-392, it is without authority to regulate or modify wages of prevailing rate employees resulting from negotiations between Government agencies and employee organizations.

16. After the meeting of the Wage Council on January 17, 1975, agency management held two meetings with representatives of the union (both Local 1418 and Local 1447) at which the method of computation was discussed. During this time, implementation of the proposed pay schedule was held up. At the second of these two meetings Respondent informed the union that it proposed to use the trend line method and to include WETA as a data source. The television local (1447) agreed to that method of calculation, but Complainant, Local 1418, opposed it. The union was never denied a meeting with management to discuss any of the wage survey problems.

Conclusions of Law

It is not disputed that Respondent initially agreed to the Wage Council's recommendation that WETA be excluded as a data source. Whether its subsequent decision to calculate prevailing wages from data sources including WETA was a breach of an enforceable contract is not the question. For purposes of determining whether an unfair labor practice resulted, it was tantamount to a change in working conditions. With respect to Local 1447, the change was consensual; but with respect to Complainant, Local 1418, the change was unilateral and would be prohibited under the Order in the absence of prior consultation.

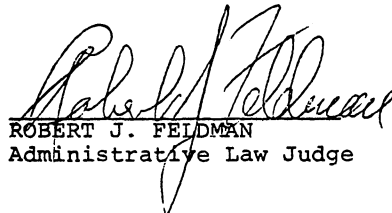
It is clear, however, that Respondent met and conferred with Complainant prior to putting the revised pay schedule into effect, and that it did not deny Complainant any opportunity to discuss the matter. True, Respondent did not comply with Complainant's demand for the exclusion of WETA as a data source. Nevertheless, it fully discharged its obligations by conferring in good faith with Complainant; it was not required to obtain Complainant's assent prior to instituting a change in working conditions. See Department of Health, Education and Welfare, Social Security Administration, Western Program Center, San Francisco, California, A/SLMR No. 501.

Complainant suggests that Respondent's erroneous reliance on purported Civil Service Commission requirements for making the change indicates a lack of good faith. It is not shown, however, that such reliance was a subterfuge; rather, it appears that under the circumstances the recalculation and ultimate change in the wage schedule was in the nature of a bona fide effort to reach a compromise. On the record as a whole, no lack of good faith on Respondent's part has been established.

In view of all of the above, I conclude that there was no violation of Section 19(a)(1) or (6).

RECOMMENDATION

On the basis 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: April 22, 1976
Washington, D.C.

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

UNITED STATES CUSTOMS SERVICE,
REGION IV, DEPARTMENT OF THE
TREASURY, MIAMI, FLORIDA
A/SLMR No. 764

This case arose upon the filing of a complaint by the National Treasury Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) of Executive Order 11491, as amended, by making statements through a supervisor to an employee explaining that he spent too much time on union activities and, thus, would not be effective in his regular job duties. It was alleged that the statement was made in reply to the employee's request for a change in his job performance evaluation. The Respondent made a motion to dismiss based on an allegation that the charge failed to comply with requirements of the Regulations.

The Administrative Law Judge denied the motion to dismiss and concluded that the Respondent had violated 19(a)(1) by the statement which, in his view, constituted an implied threat based on the employee's union activity and an attempt to thwart the employee's further union activity. In reaching this conclusion, the Administrative Law Judge found that the supervisor had told the employee that his union duties interfered with his effectiveness on his job and that would be a negative factor in his rating. He held that any threats, expressed or implied, in respect to an employee's union activity will have a coercive effect. It was noted that after the incident the supervisor who made the statement that the employee's union activities were hurting him repeated it in conversations with two other employees.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES CUSTOMS SERVICE,
REGION IV, DEPARTMENT OF THE
TREASURY, MIAMI, FLORIDA

Respondent

and

Case No. 42-3297(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On August 31, 1976, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt his findings, 1/ conclusions and recommendations. 2/

1/ An inadvertent error appears on page 4 of the Administrative Law Judge's Recommended Decision. It is clear that the second sentence in the paragraph numbered "7" should read "...Richardson asked Loudis..." The error is hereby corrected.

2/ The Complainant's motion to withdraw the Section 19(a)(2) allegation contained in the instant complaint is hereby granted.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Customs Service, Region IV, Department of the Treasury, Miami, Florida shall:

1. Cease and desist from:

(a) Threatening employees, expressly or impliedly, 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.


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

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

(a) Post at its facilities at the U.S. Customs 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 U.S. Customs Service 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
December 13, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT 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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, NE, Atlanta, Georgia 30309.

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

VETERANS ADMINISTRATION HOSPITAL,
MIAMI, FLORIDA
A/SLMR No. 765

This case involved a petition for clarification of unit by the National Federation of Federal Employees, Local 1453 (NFFE), seeking to clarify the existing exclusively recognized unit at the Activity in Miami, Florida, so as to include eligible employees of the Activity's Outpatient Clinic, located in Riviera Beach, Florida. The Activity agreed that the employees of the Riviera Beach Outpatient Clinic should be included in the existing unit and, in this regard, both the Activity and the NFFE asserted that the Riviera Beach Outpatient Clinic is not a separate organizational entity but, rather, is an extension of the Activity's Outpatient Clinic located at Miami.

Based on all of the circumstances, the Assistant Secretary found there was not a sufficient community of interest among the employees of the Riviera Beach Outpatient Clinic and the employees of the existing unit at the Activity to warrant the inclusion of the Clinic employees in the existing unit without a self-determination election. In this regard, he particularly noted the significant geographic separation of approximately 75 miles between the Activity and the Riviera Beach Outpatient Clinic; the minimal amount of any interchange or job-related contact among the employees of the Activity in Miami and the Riviera Beach Outpatient Clinic, especially among employees in classifications represented at the Activity by the NFFE; the fact that a majority of potential bargaining unit employees at the Riviera Beach Outpatient Clinic were selected from outside the bargaining unit exclusively represented by the NFFE at the Activity; and the lack of immediate common supervision among the majority of employees at the Riviera Beach Outpatient Clinic and those at the Activity represented in the exclusively recognized bargaining unit.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
MIAMI, FLORIDA

Activity

and

Case No. 42-3515(CU)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1453

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, National Federation of Federal Employees, Local 1453, herein called NFFE, the exclusive representative of certain employees of the Veterans Administration Hospital, Miami, Florida, 1/ seeks to clarify the existing exclusively recognized unit so as to include eligible employees of the Activity's Outpatient Clinic, located in Riviera Beach, Florida. The Activity agrees that the employees of the Riviera Beach Outpatient Clinic should be included in the existing unit. In this regard, the Activity and the NFFE assert that the Riviera Beach Outpatient Clinic is not a separate organizational entity but, rather, is an extension of the Activity's Outpatient Clinic at Miami.

The Activity, located at Miami, Florida, provides medical and surgical services, and outpatient medical and related services, to

1/ On May 16, 1968, the NFFE was recognized as the exclusive representative of all nonprofessional employees and canteen workers of the Veterans Administration Hospital, Miami, Florida, excluding management and supervisory personnel.

eligible veterans in the area in which it is located. Overall direction of the Activity is vested in the Hospital Director. Reporting directly to him is the Assistant Hospital Director who has primary responsibility for the Hospital's administrative services. 2/ Also reporting to the Director is the Chief of Staff who exercises overall direction of all employees engaged in performing the services specifically related to patient care. Reporting directly to the Chief of Staff is an Associate Chief of Staff for Ambulatory Care who exercises supervision over the Outpatient Clinic located at the Activity in Miami, as well as the Riviera Beach Outpatient Clinic.

The record reveals that the Riviera Beach Outpatient Clinic, which is located approximately 75 miles from the Activity, was established on July 12, 1976, as a result of Public Law 9283 authorizing the Veterans Administration to provide more convenient outpatient medical and related services to veterans. Its mission and functions do not differ materially from that of the Outpatient Clinic which is located on the Activity's premises in Miami. Thus, the Riviera Beach Outpatient Clinic performs medical and related services on an outpatient basis to qualified veterans, and also certifies admission to the Hospital for those veterans requiring additional care and services without further examination at the Activity.

The record reveals that the Riviera Beach Outpatient Clinic is headed by a chief, a physician, who reports directly to the Activity's Associate Chief of Staff for Ambulatory Care. In addition, there are several medical and related services presently located at Riviera Beach, including Medical Administration, Dental, Laboratory, Radiology, Pharmacy, and Prosthetics. In this connection, the evidence establishes that for each medical and related service component located at Riviera Beach, there is a similar component located at the Activity. Further, although the Chief of each service located at the Activity in Miami is also the Chief of the identical service at Riviera Beach, the record discloses that, with respect to the majority of employees, direct day-to-day supervision at Riviera Beach is performed by a supervisor located at Riviera Beach. The Riviera Beach Outpatient Clinic was authorized a full-time staff of 55 permanent employees, including 32 positions in the same classifications found in the exclusively recognized bargaining unit at the Activity. Initial staffing of Riviera Beach was accomplished by recruiting from the Activity's work force, from other Veterans Administration Hospitals, and by selections from Civil Service Commission registers. The record shows that of the some 30 employees hired by the Riviera Beach Outpatient Clinic in classifications represented by the NFFE at the Activity in Miami, 13 employees from the NFFE's unit

2/ These administrative services include engineering, building management, fiscal and personnel functions.

December 30, 1976

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

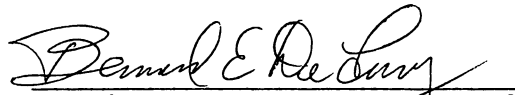
transferred to Riviera Beach with the other 17 employees coming to Riviera Beach from other sources. Further, the evidence indicates that, aside from a limited number of non-unit professional and supervisory employees, interchange and transfer of employees between the Activity and the Riviera Beach Outpatient Clinic has been minimal and is unlikely to increase, and that there is minimal job-related contact between employees of the Activity in Miami and the Riviera Beach Outpatient Clinic, particularly among those employees in classifications represented by the NFFE at the Activity.

Based on the foregoing circumstances, I find that there is not a sufficient community of interest among the employees of the Riviera Beach Outpatient Clinic and the employees of the existing unit at the Activity to warrant the inclusion of the employees of the Riviera Beach Outpatient Clinic in the existing unit without a self-determination election. In this regard, particular note was taken of the significant geographic separation of approximately 75 miles between the Activity and the Riviera Beach Outpatient Clinic; the minimal amount of interchange or job-related contact among the employees of the Activity and the Riviera Beach Outpatient Clinic, especially among employees in classifications represented at the Activity by the NFFE; the fact that a majority of potential bargaining unit employees at Riviera Beach were selected from outside of the bargaining unit represented by the NFFE at the Activity; and the lack of immediate common supervision among the majority of employees at the Riviera Beach Outpatient Clinic and those at the Activity represented in the exclusively recognized bargaining unit. 3/ Accordingly, I shall order that the petition herein be dismissed.4/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-3515(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

3/ See Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 551. See also Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558, FLRC No. 75A-122.

4/ In reaching the foregoing disposition, I have considered the three criteria specified in Section 10(b) of the Order. However, noting the above finding that there is not a sufficient community of interest among the employees of the Riviera Beach Outpatient Clinic and the employees of the existing unit at the Activity to warrant the inclusion of the employees of the Riviera Beach Outpatient Clinic in the existing unit without a self-determination election, I find it unnecessary to make specific affirmative findings as to the remaining two unit criteria set forth in Section 10(b) of the Order.

DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE
A/SLMR No. 766

This case involved an Application for Decision on Grievability or Arbitrability filed by American Federation of Government Employees, Local 1617, AFL-CIO (AFGE) challenging a determination by the Department of the Air Force, Kelly Air Force Base, (Activity) that a grievance filed by the AFGE was not grievable under Section 7, Article XXV of the parties' negotiated agreement.

The AFGE contended that Section 7 of the negotiated grievance procedure, which provided for union grievances over disputes arising from alleged violations or from the interpretation or application of the agreement, was the proper vehicle to grieve the Activity's alleged failure to comply with the procedural requirements of the agreement in issuing a "Notice of Proposed Reprimand" to three individual employees. The Activity contended that the grievance should have been brought under Section 6 of the negotiated grievance procedure as individual grievances filed by the aggrieved employees.

The Administrative Law Judge noted that the testimony of both AFGE and Activity witnesses indicated that a "Notice of Proposed Reprimand" was not grievable on the merits by the individual employees under Section 6 of the negotiated grievance procedure as a proposed reprimand was not a final decision. However, he found that the AFGE's case was predicated on a contract violation and that the AFGE could grieve under Section 7 of the negotiated grievance procedure to determine if the Activity has complied with the procedural requirements of the agreement.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and found the subject grievance grievable under Section 7 of the parties' negotiated grievance procedure. He found further that the matter also was arbitrable under Article XXVI of the aforementioned negotiated agreement. Accordingly, he ordered the Activity to take appropriate steps to implement his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE

Activity

and

Case No. 63-6072(GA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1617, AFL-CIO

Applicant

DECISION ON GRIEVABILITY-ARBITRABILITY

On August 13, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision on Grievability in the above-entitled proceeding, finding that the grievance involved herein was grievable under Section 7, Article XXV of the parties' negotiated agreement and arbitrable under Article XXVI of such agreement. Thereafter, the Activity filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision on Grievability.

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

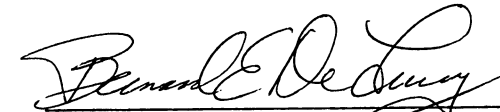
FINDING

IT IS HEREBY FOUND that the grievance in Case No. 63-6072(GA) is grievable under Section 7, Article XXV of the parties' negotiated agreement and arbitrable under Article XXVI of the aforementioned negotiated agreement.

^{1/} Although not clearly explicated in the Administrative Law Judge's Decision on Grievability, the record reflects that the Applicant pursued the contractual grievance procedure up to and including requesting arbitration, which request was rejected by the Activity in writing. Accordingly, the Application herein meets the requirements set forth in Report on a Ruling No. 61 for consideration by the Assistant Secretary.

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

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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



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In the Matter of
DEPARTMENT OF THE AIR FORCE
KELLY AIR FORCE BASE
Activity
and
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1617, AFL-CIO
Labor Organization/
Applicant
.....

Case No. 63-6072 (GA)

Captain Charles L. Wiest, Jr.
Office of the Staff Judge Advocate
San Antonio Air Logistics Center
Kelly Air Force Base, Texas 78220
For the Activity

Mr. Paul D. Palacio
225 Billy Mitchell Road
San Antonio, Texas 78226
For the Labor Organization/
Applicant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION ON GRIEVABILITY

Statement of the Case

Pursuant to an Application For Decision on Grievability Or Arbitrability filed on September 5, 1975, under Section 13 of Executive Order 11491, as amended, by American Federation

of Government Employees, Local 1617, AFL-CIO, hereinafter called the Union or Applicant, concerning whether or not a certain action taken by the Department of the Air Force, Kelly Air Force Base, hereinafter called the Activity, is grievable under Section 7, Article XXV of an existing collective bargaining agreement between the Union and the Activity, a Notice of Hearing on Application was issued by the Assistant Regional Director for the Kansas City, Missouri Region on April 21, 1976.

The issue to be decided by the undersigned Administrative Law Judge is whether or not certain proposed disciplinary actions directed against three employees may be processed by the Union under Section 7, Article XXV as an alleged violation of the provisions in the collective bargaining contract. 1/

A hearing was held in the captioned matter on June 3, 1976, in San Antonio, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issue involved herein.

Upon the basis of the entire record, 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 agreement which contains in Article XXV separate procedures for processing employee and union grievances. Thus, Section 6 of Article XXV sets forth the procedure to be utilized for employees' personal grievances, 2/ while Section 7 of Article XXV sets forth the procedures to be utilized by the Union when filing grievances over alleged

1/ The Activity is willing to process the grievance under Section 6, Article XXV, which deals with employee personal grievances as opposed to union grievances dealing with alleged violations, interpretations or applications of the collective bargaining contract.

2/ For purposes of Section 6, Article XXV, a grievance is defined "as a personal concern or dissatisfaction of an employee with a specific aspect of his employment, such as working conditions and environment; relationships with supervisors, management officials, and other employees, suspensions of 30 days or less; and official reprimands

violations, interpretations or applications of the provisions of the collective bargaining agreement. In the event that grievances cannot be settled under Section 6 and 7 of Article XXV, the Union may submit the matter directly to arbitration.

On March 27, 1975, the Activity sent letters to employees Sandoval, Olivarez and Padilla, wherein the aforementioned employees were notified of proposed reprimands for "making false, malicious, unfounded written statements dated December 4, 1974 against Mr. Labertic Swain, DSFSAA supervisor."

Several weeks thereafter, by letter dated April 15, 1975, the Union filed a grievance under Section 7, Article XXV charging the Activity with violations of certain sections of the collective bargaining agreement by virtue of the manner and methods utilized in proposing disciplinary action against Olivarez, Padilla and Sandoval. ^{3/} Attached to the April 15th letter were three separate letters from Olivarez, Padilla and Sandoval which described in detail the alleged contractual violations and informed the Activity that Union Staff Representative Palacio would act as their repective representative.

On May 15, 1975, the Activity wrote a letter to the Union wherein it took the position that the dispute was over the merits and procedure of the proposed reprimands "rather than a dispute over the interpretation and application of the agreement between the Employer and the Union". In such circumstances, the Activity declined to process or accept the grievance under Section 7, Article XXV and made it clear that it would only consider the grievance if it was processed in accordance with the procedures applicable to personal grievances contained in Section 6, Article XXV.

After the exchange of several more letters between the parties, the Union filed the instant Application for Decision on Grievability and Arbitrability.

During the course of the hearing both management and union representatives who were signatories to the collective bargaining contract testified that grievances concerning contract violations were to be processed under Section 7,

^{3/} According to the Union, the Activity has violated, among other things, Sections 1, 2 and 3 of Article XXIV dealing with procedures to be followed in disciplinary actions.

Article XXV. Section 6, Article XXV, according to the aforementioned witnesses, was applicable only to personal grievances of the employees. The Union representatives further testified that if a personal grievance also involved a contract violation, the grievance was to be turned over to the Union for the processing of the contractual violation which took precedence over the personal aspect of the grievance. All parties appeared to be in agreement that a proposed action was not grievable under Section 6, Article XXV.

Discussion and Conclusions

In the instant case the Union seeks to grieve over the procedure utilized by the activity in proposing to reprimand three employees. Inasmuch as the procedures allegedly violated are included in the collective bargaining agreement, it follows that the Union's case is predicated on a contract violation which is actionable as a union grievance under Section 7, Article XXV.

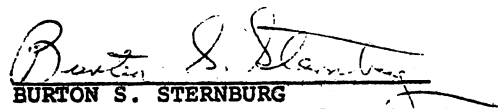
If the Union had been proceeding solely on the merits of the proposed reprimands, rather than contract violations, then any grievance predicated thereon would appear to be of a personal nature and cognizable solely under Section 6, Article XXV, as argued by the Activity. However, such is not the case. Moreover, and in any event, the record indicates that "proposed" actions, such as those involved in the instant dispute, are not actionable under Section 6, Article XXV and that in the case of employer actions which could be processed under either the "personal" or "union" grievance procedures, the "union" grievance procedure takes precedence. Lastly, contrary to the Activity's contention, I do not find that an employer's action must concern the entire unit before it is actionable as a contract violation under the union grievance procedure contained in Section 7, Article XXV.

Accordingly, in view of the foregoing considerations, a literal reading of the collective bargaining contract and the testimony of both management and union signatories to the collective bargaining contract, I find that the Union's complaint concerning the procedures utilized by the Activity in proposing reprimands is grievable as an alleged contract violation under Section 7, Article XXV of the contractual grievance procedure.

December 30, 1976

RECOMMENDATION

It is hereby recommended that the Assistant Secretary of Labor for Labor Management Relations find the grievance to be actionable under Section 7, Article XXV of the collective bargaining agreement and arbitrable at the Union's option under Article XXVI of the aforementioned agreement.


BURTON S. STERNBURG
Administrative Law Judge

Dated: August 13, 1976
Washington, D. C.

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

DEPARTMENT OF THE AIR FORCE,
BASE PROCUREMENT OFFICE,
VANDENBERG AIR FORCE BASE,
CALIFORNIA
A/SLMR No. 767

On February 4, 1975, the Assistant Secretary issued his Decision and Order in A/SLMR No. 485, in which he found that, under the circumstances, the Respondent's conduct in stating that the President of the complainant labor organization would have to perform a "fair (equal) share" of the work, interfered with, restrained, or coerced the employee involved in the exercise of her rights assured by the Order and, therefore, was violative of Section 19(a)(1) of the Order.

On November 19, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal, FLRC No. 75A-25, in which it held that the Assistant Secretary's finding of a violation of Section 19(a)(1), in the circumstances of the case, was inconsistent with the purposes of the Order. Accordingly, the Council set aside the Assistant Secretary's decision in A/SLMR No. 485, and remanded the case to him for appropriate action.

Based on the Council's holding in FLRC No. 75A-25, and the rationale contained therein, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
BASE PROCUREMENT OFFICE,
VANDENBERG AIR FORCE BASE,
CALIFORNIA

Respondent

and

Case No. 72-3863
A/SLMR No. 485
FLRC No. 75A-25

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL UNION 1001,
VANDENBERG AIR FORCE BASE,
CALIFORNIA

Complainant

SUPPLEMENTAL DECISION AND ORDER

On September 30, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding in which he found that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in its entirety. Thereafter, on February 4, 1975, in A/SLMR No. 485, the Assistant Secretary disagreed with the Administrative Law Judge's conclusion and found that the Respondent's conduct interfered with, restrained, or coerced the President of the Complainant, an employee of the Respondent, in the exercise of her rights assured by the Order and, therefore, was violative of Section 19(a)(1) of the Order.

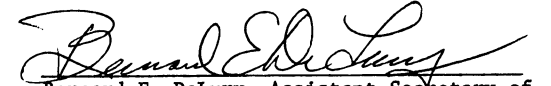
On November 19, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case, finding that the Assistant Secretary's decision that the Respondent violated Section 19(a)(1) was, in the circumstances of this case, inconsistent with the purposes of the Order. Accordingly, pursuant to Section 2411.18(b) of its Rules, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in the instant case, and the rationale contained therein, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3863 be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

-2-

Department of the Air Force,
Base Procurement Office,
Vandenberg Air Force Base,
California

and

A/SLMR No. 485
FLRC No. 75A-25

National Federation of Federal
Employees, Local Union 1001,
Vandenberg Air Force Base,
California

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California (herein called the union), found that, in the circumstances of the case, the Base Procurement Office, Vandenberg Air Force Base, California (herein referred to as the activity), had violated section 19(a)(1) of the Order by interfering with, restraining, or coercing an employee who was President of Local Union 1001 (the local president) in the exercise of rights assured by the Order to join and assist a labor organization.

The factual background of this case, as found by the Assistant Secretary, and based upon the entire record, is as follows: At the time of the events complained of herein, a collective bargaining agreement was in effect between the activity and the union. That agreement contained an article on the use of official time which recognized that certain duties related to the representation of employees in the unit may be accomplished on official time. Thus, it provided that when union officials or members were designated as representatives to present certain complaints, grievances, or appeals, they were to be afforded reasonable time to present the matter and a period of time, not to exceed 8 hours, to prepare for a hearing on such matters.^{1/}

^{1/} The collective bargaining agreement contained, among others, the following provisions:

Article IX. USE OF OFFICIAL TIME:

(Continued)

The local president's supervisor had received complaints from employees that the local president was not being assigned a fair share of the workload. The supervisor, together with an employee relations specialist from the activity's Civilian Personnel Office, met with the local president to discuss the problem and sought from her an estimate of the amount of time she would require in carrying out her employee representational activities. When the local president argued that she could not provide a specific estimate of the amount of time required because of the number of unknown factors involved, her supervisor informed her that he wanted her to handle a fair share of the workload and, under the circumstances, would assign her a fair share of the work and adjust it later.

The union then filed an unfair labor practice charge alleging various improper actions by the activity with respect to the local president, including the statement of the supervisor concerning the assignment of a fair share of the work to her. In the course of the parties' investigation of this charge,^{2/} the Chief of the Base Procurement Office was asked,

(Continued)

1. Management and the Union recognize that officials and members of the Union may accomplish certain duties in representing employees of the Unit on official duty time. Management agrees that when union officials or members have been designated as representatives to present a complaint, grievance or appeal under the provisions of AFR 40-771, or as specified in Article VIII, Negotiated Grievance Procedure, they will be afforded reasonable time to present the grievance. In addition, necessary time not to exceed eight hours may be used to prepare for a grievance or appeals hearing. . . .

.
4. The Union agrees to advise its officers and members of their prime responsibility as Vandenberg Air Force Base employees in utilizing official time. No Union official, who is a Vandenberg Air Force Base employee, will conduct union business on official time except as provided herein. The Union agrees that members or officials of Local 1001, who desire to use official time as prescribed herein or provided in Air Force, Command, base or local management directives, or where requested by a management official to attend meetings and be consulted within their capacity as Union representatives will obtain the express consent of their supervisors prior to leaving their duty station. . . .

^{2/} See Rules and Regulations of the Assistant Secretary, Section 203.2(a)(4) (20 CFR 203.2(a)(4)).

among other things, what the supervisor had meant by the words "a fair share of the work." He responded in a letter as follows:

I believe that [the supervisor] meant that each contract administrator would be assigned a fair share of the total work load in the Contract Administration Branch. Hopefully each administrator would have an equal work load and if possible an equal number of contracts to administer. He felt it was not fair to give [the local president] a lighter work load in comparison with other employees of the same GS grade and approximate pay. [The local president] draws her pay from the Air Force and the Air Force is entitled to first consideration from [the local president].

When, following this investigation, the parties were unable to resolve the unfair labor practice charge informally, the union filed a complaint with the Assistant Secretary, alleging, in pertinent part, that the activity violated section 19(a)(1) of the Order by virtue of the matters set forth in its charge. Subsequently, but prior to the hearing, the union amended its complaint, referring only to the statement of the supervisor and (for the first time) to a portion of the aforementioned letter of the Chief of the Base Procurement Office^{3/} as the basis for the activity's alleged violation.

^{3/} The amended complaint reads as follows:

On or about January, . . . [the supervisor], Contract Administration, Vandenberg AFB, advised [the local president] during a meeting, that he would assign her a "fair share" of the work in the office [for] which she would be responsible, thus she would have to gauge her union activities accordingly.

On or about July 12, . . . [the] Chief of the Procurement Division, stated in a letter that his view of [the supervisor's] reference to "a fair share of the work" meant that "each contract administrator . . . would be assigned a fair share of the total work load in the Contract Administration Branch . . . an equal work load. . . ." According to [the Chief of the Base Procurement Office], [the supervisor] "felt it was not fair to give [the local president] a light work load in comparison with other employees of the same GS grade. He concluded that "[the local president] draws her pay from the AIR FORCE and the AIR FORCE is entitled to first consideration from [the local president]."

By the act set forth above, the Activity interfered with, restrained or coerced this employee in the exercise of her rights assured by the Order.

The Assistant Secretary found that the Order does not authorize the use of official time by employees to engage in the conduct of union business. Indeed, he pointed out that "Section 20 of the Order prohibits the use of official time with respect to the solicitation of membership or dues, and other internal business of a labor organization."^{4/} However, as to matters unrelated to the internal business of the union, he noted that "the Order does not preclude an agency or activity from entering into an agreement with respect to the use of official time by union representatives in certain other situations. In this connection, the parties' negotiated agreement herein permits official time to be utilized for employee representational purposes in certain specified circumstances." He stated that, in his judgment, "to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement would interfere with, restrain, or coerce employees in the exercise of the rights assured by section 1(a) of the Order." On the basis of these considerations, the Assistant Secretary found "that, in the circumstances of this case, . . . [the supervisor's] statement to . . . [the local president] that she would be required to perform a fair (equal) share of the work, clearly implied that she could be penalized if she performed certain of her representational duties during official time, even though such use of time was permitted by the negotiated agreement." The Assistant Secretary concluded that such conduct interfered with, restrained, or coerced the local president in the exercise of her rights under the Order and, consequently, that it constituted a violation of section 19(a)(1).^{5/}

The activity appealed the Assistant Secretary's decision to the Council. The Council accepted the activity's petition for review, concluding that a major policy issue was present, namely: whether, in the circumstances of this case, the statement of the supervisor to the union president (that

^{4/} Section 20 provides as follows:

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not 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 one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

^{5/} In so concluding, the Assistant Secretary found that the evidence did not establish that the supervisor's statement to the local president led to an actual increase in the latter's workload or a denial of any contractually allowed time to engage in union activities. However, in his view, it was immaterial whether such change actually occurred since "the improper threat of such action is sufficient to constitute a violation of Section 19(a)(1) of the Order."

he wanted her to perform a fair share of the workload, and would assign her a fair share of the work and adjust it later) constitutes a violation of section 19(a)(1) of the Order. The Council also granted the activity's request for a stay, having determined that the request met the criteria set forth in section 2411.47(c)(2) of its rules.^{6/} The activity and the union filed briefs with the Council as provided in section 2411.16 of the Council's rules.

Opinion

As indicated above, the Assistant Secretary found that the activity violated section 19(a)(1) of the Order when the supervisor of the Contract Administration Office stated to the local president that he wanted her to perform a fair share of the workload and would assign her a fair share of the work and adjust it later. For the reasons stated below, we set aside the Assistant Secretary's decision herein as inconsistent with the intent and purposes of the Order.

Section 19(a)(1) 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.

Thus, in order for the Assistant Secretary to find a violation of section 19(a)(1), he must determine that a right assured by the Order is involved, and that agency management has interfered with, restrained, or coerced an employee in the exercise thereof. Where either element is absent, no violation of section 19(a)(1) can be established.

In the instant case, as previously stated, the Assistant Secretary found that the "right" in question concerned the local president's use of official time for employee representational activities as "permitted by the negotiated agreement." He found this right notwithstanding his further finding, with which we agree, that section 20 of the Order expressly prohibits the use of official time by employees to engage in the internal business of a union and that there is no inherent right under the Order for employees, in their capacity as union officials or representatives, to use official time for employee representational activities.^{7/}

^{6/} The Council subsequently amended its rules, redesignating the foregoing (without change) as section 2411.47(e)(2) (5 CFR 2411.47(e)(2)).

^{7/} As the Council stated in Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, 1 FLRC 489 [FLRC No. 72A-20 (Aug. 8, 1973), Report No. 43]:

(Continued)

It is clear that the Order does not prohibit the parties from negotiating contractual provisions for the use of official time in contract administration and other representational activities, as they did in the instant case (n. 1, supra). Thus, as the Council explained in a policy statement in this regard:

. . . nothing in the Order prohibits an agency and a labor organization from negotiating provisions . . . which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.^{8/}

However, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a "right assured by this Order." And, contrary to the reasoning of the Assistant Secretary, "to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement" would not of itself "interfere with, restrain, or coerce employees in the exercise of the rights assured

(Continued)

. . . section 1(a) places on heads of agencies an obligation to take action required to assure that no interference, restraint, coercion, or discrimination is practiced within their respective agencies to encourage or discourage membership in a labor organization. In the latter regard, section 19(a) further protects employees against unfair labor practices by management in the exercise of their rights under the Order. However, none of these protections of employee rights in section 1(a) places on agency management any "affirmative obligation to facilitate the exercise of [the] right to present views on behalf of a labor organization" Accordingly, section 1(a) provides no basis for finding an unfair labor practice because an agency failed and refused to grant official time to witnesses who appeared on behalf of a labor organization at a formal unit determination hearing. [Emphasis in original.]

^{8/} Request for Interpretations and Policy Statements, FLRC No. 75P-1 (May 23, 1975), Report No. 90.

by section 1(a) of the Order."^{9/} [Emphasis added.] Stated otherwise, the use of official time for employee representational activities, as recognized by the Assistant Secretary, is a contractual right, not a right guaranteed by the Order, and the threatened violation of that provision in the agreement as here found to have occurred is not thereby a violation of a section 1(a) right remediable under section 19(a)(1) of the Order. Accordingly, we must hold that the considerations relied upon by the Assistant Secretary in this case fail to support his finding of a 19(a)(1) violation.^{10/}

This does not mean that to penalize or threaten to penalize employees for asserting or exercising rights accorded them under a negotiated agreement could not constitute a violation of section 19(a)(1) of the Order where, unlike here, the effect of such penalty or threat of penalty is to interfere with, restrain, or coerce such employees in the exercise of rights assured by the Order, e.g., the rights to form, join, or assist a labor

9/ Section 1(a) provides as follows:

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. 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 within his agency to encourage or discourage membership in a labor organization.

10/ In view of our disposition of the case, it is therefore unnecessary to determine whether, in the circumstances herein, the supervisor's statement to the local president that he wanted her to perform a fair share of the workload and would assign her a fair share of the work and adjust it later, either standing alone or in conjunction with the subsequent interpretation of that statement by the supervisor's superior to mean an "equal" share of the work, would constitute interference, restraint, or coercion had she been exercising or attempting to exercise a right guaranteed by the Order. Nor is it necessary to determine whether the Assistant Secretary in fact relied upon the superior's subsequent interpretation of the supervisor's statement as probative evidence, and, if so, whether such reliance would have been consistent with the purposes of the Order.

organization.^{11/} Cf. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108.

Moreover, the Council's decision herein should not be construed as holding that no contractual violation may independently constitute an unfair labor practice. In fact, many acts by agency management and labor organizations can conceivably constitute separate violations of both the Order and negotiated agreements. Indeed, section 19(d) of the Order^{12/} recognizes that certain acts by a party can constitute separate, independent violations of both the Order and a negotiated agreement.^{13/}

11/ However, the protected right to engage in such activity is not without limitation. Pursuant to section 12(a) of the Order, in the administration of the agreement the parties are governed by laws and controlling regulations. Further, the Order mandates the retention to management of certain rights which may not be bargained away, including specifically the right "to direct employees of the agency." Thus, while the Order permits a labor organization to negotiate for the use of official time for contract administration and other employee representational activities and protects employees from interference with rights assured by the Order, the Order does not preclude agency management from insisting that employees abide by the terms of the agreement, applicable laws and regulations, and most certainly does not preclude agency management from directing those employees in the performance of their assigned duties.

12/ Section 19(d) provides, in relevant part, as follows:

Sec. 19. Unfair labor practices.

.

(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. . . .

13/ In this regard, the Assistant Secretary has recognized that "[a] breach of a contract can be not only a breach but under certain circumstances can be also an unfair labor practice. For example, if sufficiently flagrant and persistent, a breach of contract may rise to the seriousness of a unilateral change in the contract and, hence, a violation of Section 19(a)(6) of the Executive Order. . . . Other examples would be a breach of contract prompted by anti-union motivation to discourage union membership . . . which would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4)" General Services Administration, Region 5, Public Buildings

(Continued)

Finally, the Council's conclusion that the Assistant Secretary's 19(a)(1) finding in the instant case must be set aside clearly does not mean that the union is without recourse in this and similar situations. Rather, the relief for alleged violations of negotiated rights (such as involved herein) would be available through the negotiated grievance procedure, which section 13 of the Order^{14/} requires the parties to include in their agreement.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision that the activity violated section 19(a)(1) in the circumstances of this case is inconsistent with the purposes of the Order. Accordingly, pursuant

(Continued)

Service, Chicago Field Offices, A/SLMR No. 528 (June 30, 1976), and cases cited therein. Further, the Assistant Secretary himself has recognized that "alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. In those circumstances . . . the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures." [Footnote omitted.] Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624 (Mar. 23, 1976).

14/ At the time when the facts of this case arose, section 13 of the Order provided, in pertinent part:

Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure . . . shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances. . . . [Labor-Management Relations in the Federal Service (1971), at 13.]

By virtue of the most recent amendments to the Order contained in E.O. 11838, the coverage and scope of the grievance procedure that the parties may negotiate into their agreement have been expanded so that only matters for which a statutory appeal procedure exists may not be included, so long as the negotiated procedure does not otherwise conflict with statute or the Order.

to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 19, 1976

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

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

PUGET SOUND NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON
A/SLMR No. 768

PUGET SOUND NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-3679(CA)

BREMERTON METAL TRADES COUNCIL,
BREMERTON, WASHINGTON

Complainant

This case involved an unfair labor practice complaint filed by Bremerton Metal Trades Council (BMTc) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by temporarily detaching a BMTc shop steward to a lower grade position because of his union activities.

Based on his credibility finding that the sole reason for the temporary transfer of the steward without loss of pay was to accommodate the steward and allow him unlimited time to perform his union activities without having to be involved in the deadlines and pressures of his current job position, and in the absence of any evidence of union animus, the Administrative Law Judge concluded that the temporary transfer of the steward was not violative of Section 19(a)(1) and (2) of the Order. Accordingly, he recommended that the complaint be dismissed in its entirety.

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

DECISION AND ORDER

On September 23, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations. 2/

1/ On page 3 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to a discussion between Mr. Farmer and his supervisor as having occurred on September 15, 1976, rather than on September 15, 1975. This inadvertence is hereby corrected.

2/ It was noted that while the evidence indicated that the position to which the Complainant's shop steward, Mr. Farmer, a WG-13, was temporarily detailed was a WG-11 level position, the evidence did not establish that Mr. Farmer's WG-13 grade was, in fact, changed for the period of the detail.

Bremerton, Washington, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco, California, Region on July 12, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in transferring shop steward Robert Farmer to a new position because of his union activities.

A hearing was held in the captioned matter on August 4, 1976, in Bremerton, Washington. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

Findings of Fact

The Union and the Respondent are parties to a collective bargaining agreement which provides in Article Seven - Council Representation that Union "Stewards are authorized official time during duty hours to perform matters which directly relate to work situation and/or presentation of employees or Union initiated grievances and appeals." In terms of official time spent during duty hours on the aforementioned matters and/or subjects by duly authorized stewards, it appears from the record that there is no hourly or time restrictions on the stewards. Thus, if deemed necessary the stewards could spend their complete eight hour day on union business falling within the definition of Article Seven quoted above.

Robert Farmer, the alleged discriminatee herein, has been an electronic mechanic, shipboard systems, Wage Grade 13 since December 1967. 1/ Prior to the events leading up to the instant complaint, Mr. Farmer, who had been an active union steward since 1971, worked in the NTDS section of the electronics shop as a technical lead off man. In such capacity Mr. Farmer along with two other employees of similar standing in the NTDS section did trouble shooting and testing of electronic equipment and systems. According to the record, it was the general practice to assign a technical lead off

1/ Mr. Farmer was hired by the shipyard in 1964.

man to each particular ship which was in the shipyard for repairs. At the time of the incident involved herein, there were only two ships in the shipyard on which NTDS personnel were working. Mr. Farmer was not the leadman on either of the two ships.

In early September, Mr. Farmer, who had been deeply involved in a number of union grievances requiring on occasion some six hours per day, assumed the further responsibility of working on the grievances of some forty employees faced with downgrading. Although the downgrading had been rumored earlier, the official notice of the proposed action was not issued until September 12, 1975. Thereafter, Mr. Farmer spent approximately six out of his normal eight duty hours working on the forty new grievances and other relevant union matters. Inasmuch as there was a time limit with respect to challenging the downgrading, Mr. Farmer found himself pressed for time.

On September 15, the NTDS section under the supervision of foreman New was under pressure to finish its work aboard two ships, the Bainbridge and the Constellation, so that other departments could proceed aboard the two ships and perform the necessary work falling within their respective specialties. Foreman New approached Mr. Farmer and asked him if he would spend the remaining two hours of the day (September 15, 1976) within the NTDS display section on the Constellation working with a number of junior mechanics. Mr. Farmer replied that he had too much work to do with respect to the grievances involving the downgrading and that in the next two weeks he probably would have to devote full time to union grievances based thereon. Foreman New did not press the matter but asked Mr. Farmer if he would please put his position in writing. Mr. Farmer, who hoped to use the shortage of time and pressing business as a ground for requesting an extension of time within which to file grievance appeals on the downgrading, complied with Mr. New's request and submitted a memorandum within an hour. The memorandum entitled Time Allowed for Council Representation reads as follows:

"Because of my many different duties as a Council Representative and the current downgrading appeals and investigations required, I find I must use nearly all my hours of work to represent the Council, employees and even myself as an affected employee.

Please bear with me and if my service must be required by the jobs you have, give me a memo stating that requirement so I may ask for time extensions and waivers etc. of the council's business."

Upon receiving the memorandum from Mr. Farmer, foreman New then went up to the office of general foreman Bigler and presented him with Mr. Farmer's memorandum. The following day, September 16, 1975, at approximately 10 minutes to eight in the morning, Mr. Bigler told foreman New to inform Mr. Farmer that he should report to both Mr. Bigler and a Mr. Ebling who was the foreman of the RADIAC section. Mr. New then instructed Mr. Farmer to report upstairs to the front office where he was to meet Mr. Bigler and Mr. Ebling. Mr. Farmer, who admittedly is a high strung and sensitive individual, became very upset and questioned foreman New as to the reason for the front office visit. Upon hearing from foreman New that a possible transfer was involved, Mr. Farmer became very upset and sought the assistance of the Union president and other union stewards. 2/ Eventually, later in the morning, Mr. Farmer reported to RADIAC and informed Mr. Ebling that he was sick and that he was going home. At some unspecified later date, Mr. Farmer came back to work at the RADIAC section where he remained until November 23, 1975, when he voluntarily accepted a more desirable white collar position outside the unit.

Upon returning to work in RADIAC, Mr. Farmer was allowed unlimited time to pursue his union grievance activity. However, contrary to the practice in the NTDS section, walking slips were generally required before RADIAC personnel could leave the RADIAC area.

Thirty days after Mr. Farmer was assigned to RADIAC, the personnel department for some unexplained reason on October 15th executed or "cut" papers which indicated that Mr. Farmer was temporarily detailed for a period not to exceed 120 days to the RADIAC section as a WG-11 but at the same WG-13 salary he had been receiving prior to his transfer. 3/

2/ During the course of the heated conversation between Mr. Farmer and foreman New, foreman New made a statement to the effect that Mr. Farmer was no good to him anyway because of the time spent on union matters.

3/ Mr. Farmer was not replaced in the NTDS section.

All the supervisory personnel involved in the temporary transfer of Mr. Farmer credibly testified that the sole reason for such transfer was to accommodate Mr. Farmer and allow him unlimited time to perform his union activities without having to be involved with the deadlines and pressures associated with the trouble shooting work in the NTDS section. As noted above, during the time frame involved herein, Respondent shipyard was performing work on the USS CONSTELLATION and the USS BAINBRIDGE, and Shop 967, wherein Mr. Farmer worked, was having problems in meeting time schedules for the NTDS work being supervised by foreman New. In early September, foreman New had discussed his difficulties in meeting assigned dates with superintendent Jimmy Whiton and indicated that the problem was in part due to certain employees, including Mr. Farmer, not being able to work full time in the NTDS area. In fact, foreman New had talked to Farmer at about this time concerning his inability to effectively utilize Farmer's technical knowledge in the NTDS area because of his unavailability for undeterminable periods of time. On September 12, Mr. Farmer had confronted superintendent Whiton in his office and related the extent of his involvement in grievances and appeals which conflicted with his shop work.

Discussion and Conclusions

The use of official or duty time for the conduct of union business is not an inherent matter of right under the Executive Order, indeed Section 20 of the Order prohibits the use of official time with respect to the solicitation of membership or dues, and other internal business of a labor organization. However, the Order does not preclude an agency or activity and the exclusive representative from entering into an agreement with respect to the use of official time by union representatives in certain other situations. Once the parties negotiate an agreement permitting official time to be utilized for employee representation purposes in certain specified circumstances, subsequent deprivation of such negotiated rights by an agency or activity constitutes interference with, restraint and coercion of the rights assured employees by Section 1(a) of the Order. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485; Department of the Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 512.

In Vandenberg Air Force Base and Picatinny Arsenal, supra, the Assistant Secretary of Labor for Labor-Management Relations found 19(a)(1) violations predicated on (1) a supervisor's statement that the affected employee would be assigned a

fair share of the work and would have to gauge his union activities accordingly; and (2) a management proposal that the union representative give up certain time allocated for union representational duties in order that she be considered for a requested training program. Noting the contractual commitments between the parties in both cases, the Assistant Secretary found the actions of the respective agencies to be violative of Section 19(a)(1) of the Executive Order. Both cases were devoid of any independent evidence of union animus.

In a subsequent case also involving Vandenberg AFB and the same union representative, Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 537, the Assistant Secretary concluded that the transfer of the union representative to another position in order to allow her to freely continue her union activities without disrupting the mission of the agency was not violative of the Executive Order. In affirming the Administrative Law Judge's decision, the Assistant Secretary noted that the union representative had been doing poor work, that her supervisors were dissatisfied with such poor work, that the new job assignment would leave the union representative free to continue here union activities without any disruption to her fellow employees and that there was an absence of any evidence of union animus. Although not specifically stated as an underlying reason, the factual portion of the ALJ's decision indicates that the union representative had been spending anywhere from 25 to 90% of her official working time on union business.

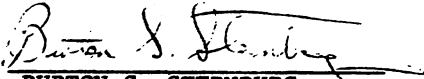
The instant case is very similar to the last Vandenberg Air Force Base case where the Assistant Secretary found the transfer of the union representative not to be violative of the Order. Thus, the record indicates that Mr. Farmer had been spending up to six hours per day on union business and anticipated spending more time thereon in the future due to the impending downgrading of some forty employees. Admittedly, he was not available for trouble shooting in the NTDS unit which was under pressure to complete its work on two particular ships. The pressures of union business were building up on Mr. Farmer and such pressures were reflected in the September 15th memorandum which set forth his tale of woe. In hopes of solving Mr. Farmer's problems, as set forth in his September 15th memorandum, the Naval Shipyard supervisory personnel looked around for an electrical position which did not contain or involve time limits on production. The RADIAC union fit the bill. Accordingly, Mr. Farmer was temporarily

transferred to RADIAC without any loss of pay. Thereafter, Mr. Farmer freely pursued his union activities on working time without any restriction.

Under all the above circumstances and in particular the absence of any evidence of union animus, I find that the transfer of Mr. Farmer to RADIAC was not violative of Sections 19(a)(1) and (2) of the Executive Order.

Recommendation

Having found that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (2) of the Order, I recommend that the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated: September 23, 1976
Washington, D.C.

December 30, 1976

A/SLMR No. 769

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
JACKSON/VICKSBURG, MISSISSIPPI
A/SLMR No. 769

GENERAL SERVICES ADMINISTRATION,
JACKSON/VICKSBURG, MISSISSIPPI

Activity

and

Case No. 41-4533(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3552, AFL-CIO

Petitioner

DECISION AND ORDER

This case involved a petition filed by the American Federation of Government Employees, Local 3552, AFL-CIO, (AFGE) seeking a unit of all employees of the General Services Administration (GSA) located at Jackson and Vicksburg, Mississippi. In the alternative, AFGE would accept a separate unit for each of the three program services in the Jackson/Vicksburg area. The Activity contended that the petitioned for unit was not appropriate as the employees involved did not possess a clear and identifiable community of interest separate and distinct from other employees of Region 4, and such a unit would not promote effective dealings and efficiency of agency operations.

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

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, he noted that the claimed employees did not share a clear and identifiable community of interest in that the unit sought included employees of three program services who were not engaged in an integrated operation, there was no interchange or transfer across service lines, and they did not enjoy common or similar working conditions, job classifications, skills and duties. The Assistant Secretary also found that such unit would not promote effective dealings and efficiency of agency operations. In addition, he found that the alternative units sought also were not appropriate for the purpose of exclusive recognition as such units would not promote effective dealings and efficiency of agency operations. In this regard, he noted that such units, if established, would lead to the artificial fragmentation of employees in the various services within Region 4, and would be based solely on their geographical location. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

Upon the entire record in this case, including the Petitioner's brief, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 3552, AFL-CIO, herein called AFGE, seeks an election in a unit of all employees of the General Services Administration (GSA) located at Jackson and Vicksburg, Mississippi, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, supervisors as defined in Executive Order 11491, as amended, and employees currently represented by the International Federation of Federal Police. ^{1/} In the alternative, the Petitioner indicated that it would be willing to represent the same employees in three separate units comprised of GSA employees assigned to each of the three GSA services: the Public Buildings Service (PBS), the Federal Supply Service (FSS), and the Automated Data and Telecommunications Service (ADTS) in the Jackson/Vicksburg area. The Activity asserts that the proposed unit is inappropriate because establishing such a unit will not promote effective dealings and efficiency of agency operations; the claimed employees do not possess a clear and identifiable community of interest separate and distinct from other employees of

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

Region 4 of the GSA; the petitioned for unit is based solely on the extent to which the employees have been organized; and the intent of the Federal Labor Relations Council to have broader and more comprehensive units would not be effectuated by establishing the proposed unit. It further asserts that the only appropriate unit would consist of a region-wide residual unit of GSA employees not covered by current negotiated agreements.

The mission of the GSA is to provide various services required by the agencies of the Federal government. To accomplish this mission, the GSA, which is headquartered in Washington, D. C., is organizationally composed of four services: the PBS, the ADTS, the FSS, and the National Archives and Records Service (NARS). In addition to its headquarters, the GSA has ten regional offices, each headed by a regional administrator. Under each regional administrator, there are four regional commissioners who head the program services within the region. Region 4 of the GSA is headquartered in Atlanta, Georgia, and encompasses the states of Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

The program services involved in the petitioned for unit are: the PBS, which is concerned primarily with providing care and maintenance for Federal buildings and with providing non-government office space where government owned space is unavailable; the ADTS, which provides a network of telephone communications; and the FSS, which is responsible, among other things, for operating interagency motor pools. 2/ The petitioned for unit consists of approximately 36 employees, of whom 23 are assigned to the PBS, 7 to the ADTS, and 6 to the FSS. 3/ The 23 PBS employees are organizationally assigned to a field office located in Jackson, Mississippi, which, in addition to a PBS field office located in Tupelo, Mississippi, and four PBS field offices located in Alabama, reports to a PBS Area Office located in Birmingham, Alabama. The claimed PBS employees are physically located both in Jackson and Vicksburg, Mississippi. The seven claimed ADTS employees are organizationally assigned to an ADTS Area Office located in Jackson which is 1 of 9 such ADTS area offices within Region 4. The six claimed FSS employees are organizationally assigned to a motor pool in Vicksburg, 1 of 13 such motor pools in Region 4, and they are physically located both in Vicksburg and Jackson.

2/ The other GSA program service, the NARS, which is responsible for storing and preserving records of Federal agencies and historical documents, has a records center at Eastpoint, Georgia, and a records management division in the Atlanta Regional Office.

3/ The parties stipulated that no previous bargaining history involving the petitioned for unit exists and that there are no election, certification, or agreement bars to an election. However, there currently exist 18 units throughout Region 4 with 6 of the 18 units having been recognized since 1970.

The record reveals that the operations of the three program services are not integrated and that they experience no interchange or transfer of personnel between them. Further, common supervision among the three program services occurs only at the level of the Regional Administrator. Thus, the PBS buildings manager in Jackson reports to the PBS Area Office in Birmingham, while the ADTS manager in Jackson reports to a separate Area Office, and the FSS manager in Vicksburg reports directly to the Director of the Motor Equipment Services Division of the FSS. The program services also differ from each other as to working conditions and physical proximity. Thus, with the exception of PBS and FSS personnel in Vicksburg, each program service is housed in separate buildings. The working conditions of employees of the three program services are distinguished from each other by their respective missions and, in the case of the PBS and the FSS, by geographic location as these services have offices in both Jackson and Vicksburg which are 45 miles apart.

The record further reveals that in each program service the job classifications, skills required, and duties performed are peculiar to the program involved, and that the personnel classifications of one program service are not found in either of the other two programs. While the employees in the three program services are all subject to the same personnel policies, practices, and job benefits, the field managers in each of the programs exercise delegated authority with respect to training, performance awards, disciplinary action, hiring, and promotions. With regard to personnel vacancies, the area of consideration for the announcement of vacancies is the local commuting area except when there is a known recruiting difficulty for a particular personnel position or where identical or similar personnel vacancies exist at two or more GSA locations in the Region. The competitive area for a reduction-in-force in a program service is also confined to the local commuting area and is restricted to each individual program service. 4/ Finally, authority for all labor relations matters within Region 4 has been delegated to the Director of Administration who is on the Regional headquarters staff.

Based on all of the foregoing circumstances, and having given equal weight to the three criteria set forth in Section 10(b) of the Order, 5/ I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. In this regard, it was noted that the claimed unit includes employees of three separate program services who have little or no commonality other than their geographical location. 6/ Thus, as noted above, the employees

4/ Jackson and Vicksburg are considered separate local commuting areas for the announcement of personnel vacancies and reductions-in-force.

5/ See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio; Defense Contract Administration Services Office, (DCASO), Columbus and Akron, Ohio, A/SLMR No. 687.

6/ Cf. General Services Administration, PBS, FSS, ADTS, Fresno, California, A/SLMR No. 293.

in the three program services do not interchange or transfer between services and are not engaged in an integrated operation. Moreover, they do not enjoy similar working conditions, and their job classifications, skills and duties are peculiarly unique based on the particular program service involved. Accordingly, I find that the claimed employees do not share a clear and identifiable community of interest and that such a unit composed of three diverse program services would not promote effective dealings and efficiency of agency operations.

I also find that the alternative units sought are not appropriate for the purpose of exclusive recognition under the Order. Thus, in my view, the establishment of such units would result in the artificial fragmentation of employees of the various program services within the Region and would be based solely on geographical location. Under these circumstances, I conclude that the establishment of such units could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 41-4533(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

December 30, 1976

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

UNITED STATES DEPENDENTS
SCHOOLS, EUROPEAN AREA,
UPPER HEYFORD HIGH SCHOOL
A/SLMR No. 770

This case arose as a result of representation petitions filed by the Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO (OFT) and the Overseas Education Association, National Education Association (OEA), and a petition for clarification of unit (CU) filed by the OEA. At the hearing, the OEA withdrew its CU petition and amended its representation petition to constitute a CU petition.

In its CU petition, the OEA seeks to clarify its existing exclusively recognized unit with respect to the eligible employees at the Upper Heyford Junior High School (Junior High School). The OFT, in its representation petition, seeks an election in a unit consisting of all nonsupervisory school professional employees at the Upper Heyford High School (High School). The OEA argued that the employees assigned to the Junior High School continued to remain a part of its exclusively recognized unit subsequent to a reorganization which resulted in the physical separation of these employees from the High School, which has been a portion of its exclusively recognized unit. The OFT contended that two new schools were created as a result of the reorganization, the High School and the Junior High School, neither of which constituted a portion of any existing exclusively recognized unit. The Activity took the position that the employees assigned to the High School remained a part of the OEA's exclusively recognized unit after the reorganization, but took a neutral position with respect to the status of the employees assigned to the Junior High School.

The Assistant Secretary found that the reorganization of the High School did not result in substantial or material changes in the scope or character of the existing exclusively recognized bargaining unit and that the employees in both the High School and the Junior High School continue to enjoy the same community of interest with the other employees in the exclusively recognized unit as before the reorganization. Moreover, he found that their continued inclusion in the unit will promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the employees of the Junior High School.

With regard to the OFT's representation petition, the Assistant Secretary concluded that the petition was untimely filed. In this regard, he noted that the termination date of the negotiated agreement covering the OEA's exclusively certified unit was September 26, 1975, and that OFT's petition was filed on September 15, 1975, during the insulated period. Under these circumstances, the Assistant Secretary ordered that the OFT's petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPENDENTS SCHOOLS,
EUROPEAN AREA, UPPER HEYFORD HIGH SCHOOL 1/

Activity

and

Case No. 22-6384(RO)

OVERSEAS FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

and

OVERSEAS EDUCATION ASSOCIATION

Intervenor

UNITED STATES DEPENDENTS SCHOOLS,
EUROPEAN AREA, UPPER HEYFORD JUNIOR
HIGH SCHOOL

Activity

and

Case No. 22-6472(CU) 2/

OVERSEAS EDUCATION ASSOCIATION, NATIONAL
EDUCATION ASSOCIATION

Petitioner

and

OVERSEAS FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Intervenor

1/ The name of the Activity appears as amended at the hearing.

2/ At the hearing in this matter, the Overseas Education Association, National Education Association (OEA) amended its RO petition in Case No. 22-6472(RO) to constitute a petition for clarification of unit (CU). In addition, the OEA withdrew a previously filed CU petition in Case No. 22-6339(CU).

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

Upon the entire record in these cases, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 22-6472(CU), the OEA seeks to clarify its existing exclusively recognized unit with respect to the nonsupervisory, professional school personnel who are employees at the Upper Heyford High School and Junior High School. 3/ In Case No. 22-6384(RO), the Overseas Federation of Teachers (OFT) seeks an election in a unit consisting of all nonsupervisory school professional employees at the Upper Heyford High School. 4/

The OEA takes the position that the employees assigned to the Upper Heyford Junior High School continue to remain a part of its exclusively recognized unit subsequent to a reorganization which resulted in the physical separation of these employees from the Upper Heyford High School, which has been a portion of its exclusively recognized unit. On the other hand, the OFT takes the position that, as a result of the reorganization, two new schools were created, the Upper Heyford High School and the Upper Heyford Junior High School, neither of which constitutes a portion of any exclusively recognized bargaining unit currently in existence. In this regard, the OFT asserts that its petition herein seeks an election in an unrepresented unit of employees assigned to the Upper Heyford High School which unit is appropriate for the purpose of exclusive recognition under the Order. The Activity contends that the employees assigned to the Upper Heyford High School remain, after the reorganization, a part of the OEA's exclusively recognized unit, but takes a neutral position with respect to the status of the employees assigned to the Upper Heyford Junior High School.

3/ The record indicates that the OEA is the exclusive representative of all nonsupervisory school professional personnel who are U.S. citizen employees and assigned to the United States Dependents Schools, European Area, except such personnel assigned to schools where other exclusive recognitions have been granted and are in effect or where majority status determinations have not been made to determine the representational questions arising from competing requests for exclusive recognition. The parties executed a negotiated agreement covering this unit on August 22, 1973, for a term of 2 years from the date of approval by the Department of the Army. The agreement was approved on September 27, 1973.

4/ The OFT filed its petition on September 15, 1975.

The record reveals that the Upper Heyford High School (High School), a component of the United States Dependents Schools, European Area, is a part of the Upper Heyford School Complex (Complex). Prior to the school year 1975 - 1976, the Complex consisted of 3 schools in addition to the High School: the Upper Heyford Elementary School, located in Upper Heyford, England; the Bicester Elementary School, located in Bicester, England; and the Croughton Elementary School, located in Croughton, England. Prior to 1975 each of the three elementary schools sent their students to the High School upon completion of the 6th grade. Each school in the Complex was supervised by a principal who was responsible to the Supervisory Principal of the Complex. The High School, the component of the Complex involved herein, consisted of grades 7 through 12. The departments in the High School, mathematics, english, etc., were organized across all the grades, and no teacher at the High School was designated as being solely a high school or junior high school teacher, although a few teachers taught only grades 7-8 or grades 9-12. 5/ The record reveals that the High School faculty meetings were attended by all teachers of the High School, irrespective of the grades taught, and that all the teachers at the High School were part of the exclusively recognized unit represented by the OEA.

Sometime before September 1975, a new facility was completed in Croughton, England, about 11 miles from Upper Heyford, and grades 9-12 at the High School were moved into the new building. Thereafter, the new building in Croughton became the Upper Heyford High School (New High School) and the old building in Upper Heyford, where grades 7 and 8 remained, became the Upper Heyford Junior High School (Junior High School). The faculty was divided between the two schools on a volunteer basis, although every teacher who volunteered to go to the New High School could not be assigned there. As a consequence of the reorganization, certain changes occurred. In this regard, the record reveals that the Supervisory Principal of the Complex, in addition to his regular duties, became the Principal of the Junior High School. The Principal of the High School became the Principal of the New High School. As noted above, the teachers comprising the faculty of the High School were divided between the New High School and the Junior High School. However, most of their conditions of employment remained the same. Thus, the same teachers remained in the system, teaching duties and responsibilities remained the same, overall supervision remained the same, working terms and conditions remained essentially the same, and pupils from the same area continued to be processed through the Complex in essentially the same manner. In essence, the evidence establishes that the only significant change occurring as a consequence of the reorganization was the physical separation of certain faculty members of the High School.

Based on all the foregoing circumstances, I find that the reorganization of the Upper Heyford High School did not result in substantial or material changes in the scope or character of the existing exclusively recognized

5/ There is no specific certification requirement for secondary (grades 7 through 12) teachers in the United States Dependents Schools, European Area School System, other than having college credits in subject areas applicable to secondary teaching.

bargaining unit. 6/ Thus, as noted above, the employees affected by the reorganization remained in the same general location, performed the same job functions involving the same general group of students, and were subject to the same overall supervision and essentially the same working terms and conditions. Under these circumstances, I find that the employees in both the New High School and the Junior High School continue to enjoy the same community of interest with the other employees in the existing exclusively recognized unit as before the reorganization. Moreover, their continued inclusion in such unit under the circumstances outlined above will, in my view, promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the employees of the Upper Heyford Junior High School.

In view of the above finding, I conclude, with regard to the OFT's petition in Case No. 22-6384(RO) seeking an election among the professional employees at the Upper Heyford High School, that further processing is barred by the negotiated agreement between the Activity and the OEA in existence at the time the petition was filed. Thus, as noted above, the employees sought by the instant petition are part of a unit exclusively represented by the OEA; the OEA's unit was covered by a negotiated agreement which was executed on August 22, 1973, approved by the Department of the Army on September 27, 1973, and had a term of two years from the date of approval; and the instant petition was filed on September 15, 1975. Section 202.3(c)(1) of the Assistant Secretary's Regulations 7/ clearly indicates that the controlling date in computing the "open" period for the filing of a petition for an election is the terminal date of an agreement which, as the one in this case, has a term of three years or less from the date it was signed. Noting that the terminal date of the OEA's agreement with the Activity was September 26, 1975, 8/ I find that the instant petition was untimely filed during the insulated period. 9/ Accordingly, I shall order that the OFT's petition be dismissed.

6/ Cf. Naval Aerospace and Regional Medical Center, Pensacola, Florida, A/SLMR No. 603.

7/ Section 202.3(c)(1) of the Assistant Secretary's Regulations provides: "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed ... [n]ot more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed ...;"

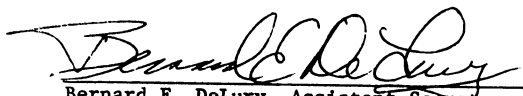
8/ See Report on a Ruling of the Assistant Secretary, No. 38.

9/ Cf. U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 413, and Veterans Administration Hospital, Montrose, New York, A/SLMR No. 484.

IT IS HEREBY ORDERED that the unit sought be clarified by the petition in Case No. 22-6472(CU) be, and it hereby is, clarified to include in said unit all eligible employees at the Upper Heyford Junior High School, Upper Heyford, England.

IT IS FURTHER ORDERED that the petition in Case No. 22-6384(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

INTERNAL REVENUE SERVICE,
PHILADELPHIA SERVICE CENTER,
PHILADELPHIA, PENNSYLVANIA
A/SLMR No. 771

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter No. 71 (NTEU) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by its instituting unilateral changes in working terms and conditions; its issuance on April 3, 1973, of a memorandum concerning the "Public Service Lobby" to employees which altered working conditions without first providing the NTEU an opportunity to bargain; its issuance of a memorandum entitled "Career Counseling" without prior consultation with NTEU; its unilateral imposition of certain restrictions in the use of telephones applicable only to officers and agents of the NTEU; and numerous instances of improper surveillance, harrassment and disparagement of NTEU officials.

In his Recommended Decision and Order, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by its action on April 3, 1973, in issuing a memorandum to all employees which announced the establishment of a "Public Service Lobby" in the building and restricted its use by employees only to those employed there without giving prior notification to the NTEU. Further, he found that Respondent had violated Section 19(a)(1) of the Order by the action of certain of its supervisors in uttering disparaging remarks to representatives of the NTEU in the presence of other employees. With regard to the remaining allegations in the complaint, the Administrative Law Judge found no merit and recommended that they be dismissed.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent did not violate the Order by its threatened unilateral limitation on the amount of official time spent by the Complainant's president discharging responsibilities under the parties' negotiated agreement. In this regard, the Assistant Secretary noted that his conclusion was based essentially on the conclusion reached by the Federal Labor Relations Council in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, FLRC No. 75A-25. Moreover, he noted the absence of evidence in the record that the Respondent altered or abrogated the terms of the negotiated agreement with respect to the use of official time by the NTEU's officers.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's issuance of its April 3, 1973, memorandum concerning the establishment of a "Public Service Lobby" without prior consultation with the NTEU did not violate Section 19(a)(1) and (6) of the Order. In this regard, he found, in agreement with the Administrative

Law Judge, that the Respondent had the right under Section 11(b) of the Order to establish the "Public Service Lobby" without first bargaining with the NTEU. He found also that the NTEU had never requested Respondent to meet and confer regarding the impact and implementation of such decision. In this context, the Assistant Secretary concluded that the Respondent did not violate its bargaining obligations under the Order in connection with its issuance to employees of the April 3, 1973, memorandum.

Accordingly, the Assistant Secretary, noting his agreement with the Administrative Law Judge's findings, conclusions and recommendations in all other respects, ordered the Respondent to cease and desist from engaging in the actions found violative of the Order, and to take certain affirmative actions. He further ordered that all other allegations of the complaint be dismissed.

A/SLMR No. 771

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
PHILADELPHIA SERVICE CENTER,
PHILADELPHIA, PENNSYLVANIA

Respondent

and

Case No. 20-4283(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND CHAPTER No. 71 (NTEU)

Complainant

DECISION AND ORDER

On January 27, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record of the subject case, including the parties' exceptions and supporting briefs, I hereby adopt the findings, 1/ conclusions and recommendations 2/ of the Administrative Law Judge, to the extent consistent herewith.

1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, it was held that as a matter of policy an Administrative Law Judge's resolution with respect to credibility would not be overruled unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings in this matter.

2/ On March 1, 1974, the Respondent filed with the Regional Administrator a "Motion to Dismiss Complaint Against Agency, Or, In The Alternative, Motion To Sever The Charges Into Separate Complaints, Or In The Alternative, To Group The Charges For Separate Consideration." On March 8, 1974, said motions were denied by the Regional Administrator. At the hearing in this matter, the Respondent again
(Continued)

The instant complaint alleges violations of Section 19(a)(1), (2) and (6) of Executive Order 11491, as amended, based upon the Respondent's alleged unilateral changes in working terms and conditions; the issuance by the Respondent on April 3, 1973, of a memorandum to employees which allegedly altered working conditions without first providing the Complainant an opportunity to bargain; the issuance of a memorandum entitled "Career Counseling" without prior consultation with Complainant; the alleged unilateral imposition by the Respondent of certain restrictions on the use of telephones applicable only to officers and agents of the Complainant; and numerous allegations of improper surveillance, harassment and disparagement of union officials. In his Recommended Decision and Order, the Administrative Law Judge found merit in certain allegations of the complaint and recommended that the balance of the allegations in the complaint be dismissed. In essence, he found that the Respondent violated Section 19(a)(1) and (6) of the Order by its action on April 3, 1973, in issuing a memorandum to all employees which announced the establishment of a "Public Service Lobby" in the building and restricted its use by employees only to those employed there without giving prior notification to the Complainant. Further, the Administrative Law Judge found that the Respondent had violated Section 19(a)(1) of the Order by the action of certain of its supervisors in uttering disparaging remarks to a representative of the Complainant in the presence of other employees. With regard to the remaining allegations in the complaint, the Administrative Law Judge found no merit and recommended that they be dismissed.

In its exceptions, the Complainant contends, among other things, that the Administrative Law Judge erred in his failure to find that the Respondent unilaterally changed working conditions when it attempted to restrict the amount of time utilized by the Complainant's officers in discharging their responsibilities under the parties' negotiated agreement. On the other hand, the Respondent contends in its exceptions, among other things, that the Administrative Law Judge erred in finding that it had violated Section 19(a)(1) and (6) of the Order by failing to notify the Complainant prior to issuing the April 3, 1973, memorandum concerning the "Public Service Lobby."

The essential facts of this case, which are not in dispute, are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order and I shall repeat them only to the extent necessary.

2/ moved that the various charges be severed into separate charges or separate groups of charges so as to afford the Respondent a fair and complete hearing concerning the matter in dispute. The Administrative Law Judge denied said motion. I find, in agreement with the Administrative Law Judge, that although there are numerous separable incidents or events involved herein, they all are encompassed by the Section 19(a)(1), (2) or (6) allegations in the subject complaint. Accordingly, as I find no merit in the Respondent's motion to sever the charges and place them in a number of specific groups, said motion is hereby denied.

With respect to the allegation concerning the Respondent's alleged unilateral changes concerning the amount of time spent by the Complainant's representatives in performing representational activity, I find, in agreement with the Administrative Law Judge, that the Respondent's conduct in this regard was not violative of the Order. My conclusion is based essentially on the Federal Labor Relations Council's decision in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, FLRC No. 75A-25, in which the Council concluded that the use of official time for representational activities by employee representatives of an exclusive representative in discharging their responsibilities under a negotiated agreement is a contractual right, not a right guaranteed by the Order. Consequently, in the Council's view, a threat to restrict unilaterally the use of official time by employee representatives would not constitute a violation of Section 19(a)(1) of the Order.3/

With respect to the allegation regarding the issuance of the Respondent's memorandum dated April 3, 1973, the record discloses that the Respondent had determined for security reasons that one of the entrances to its building, and the adjacent interior space known as the "Public Service Lobby," would be reserved for use by the public. Consequently, employees would be required to utilize other entrances, and were restricted from using the "Public Service Lobby" unless they were assigned to work in that area. Accordingly, in the January 12, 1973, issue of PSC Today, the Respondent's bi-weekly newsletter, an item appeared entitled, "Public Service Lobby," which informed employees of the beginning of construction of the "lobby" and the restriction on their use of that entrance. Thereafter, on April 3, 1973, Respondent issued its memorandum, in which it announced the opening of the "Public Service Lobby" and set forth the restrictions on employees. In his Recommended Decision and Order, the Administrative Law Judge concluded that Respondent had violated Section 19(a)(1) and (6) of the Order by its action in disseminating to employees its April 3, 1973, memorandum without prior notification to the Complainant. In this regard, he found that such conduct by the Respondent constituted an improper bypassing and undermining of the status of the employees' exclusive bargaining representative. Additionally, the Administrative Law Judge determined that the Complainant did not request the Respondent to bargain concerning the impact and implementation of its decision to establish the "lobby," despite the fact the Complainant had adequate and timely notice of the Respondent's decision in this regard. Consequently, he concluded that the Respondent did not refuse to meet and confer with respect to the impact of its decision.

While I agree with the Administrative Law Judge that the Respondent had the right, under Section 11(b) of the Executive Order, to establish the "Public Service Lobby" in furtherance of its internal security without first bargaining with the Complainant, I disagree with his

3/ There was no evidence that the Respondent actually altered or abrogated the terms of its negotiated agreement with the Complainant.

conclusion that the Respondent's failure to notify the Complainant of its intention to disseminate to employees the memorandum of April 3, 1973, regarding the "Public Service Lobby" constituted an improper bypassing and undermining of the status of the employees' exclusive bargaining representative in violation of Section 19(a)(1) and (6) of the Order. It has been held previously that where, as here, an activity is not required to meet and confer regarding a proposed decision involving a matter encompassed by Section 11(b) or 12(b) of the Order, it is, nevertheless, required to give timely notification to the exclusive representative of such proposed decision and, upon request, meet and confer regarding the impact of the decision on adversely affected employees in the exclusively recognized unit. 4/ As noted above, the Administrative Law Judge found, and I agree, that despite adequate notice of the proposed decision prior to its effectuation by the Respondent, the Complainant failed to request bargaining concerning the impact and implementation of such decision. In this context, I find that the Respondent did not violate its bargaining obligations under the Order in connection with its issuance to employees of the April 3, 1973, memorandum. 5/ Accordingly, I shall dismiss that portion of the complaint.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Making disparaging remarks to representatives of Chapter No. 71, National Treasury Employees Union, in the presence of other employees and otherwise interfering with their right to represent unit employees.

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

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

4/ See e.g. Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454, New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362, and U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341.


5/ Cf. Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80.

(a) 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 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1), (2) and (6) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

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

PURSUANT TO

A DECISION AND ORDER OF THE

NAVAL AIR STATION,
WILLOW GROVE, PENNSYLVANIA
A/SLMR No. 772

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:

This case arose as a result of a petition filed by the Joint Council for International Association of Fire Fighters, Local F-195, and American Federation of Government Employees, Local 3686, AFL-CIO, seeking a unit of all eligible Civil Service employees of the Naval Air Station, Willow Grove, Pennsylvania. The Intervenor, the National Association of Government Employees, Local R3-15, the current exclusive representative of the petitioned for employees, contended that the employees being sought are covered by a negotiated agreement which constituted a bar to the processing of the subject petition as the petition was not filed during the "open period" of that agreement as required by Section 202.3(c)(2) of the Assistant Secretary's Regulations. On the other hand, the Petitioner and the Activity contend that the instant petition was timely filed.

WE WILL NOT make disparaging remarks to representatives of Chapter No. 71, National Treasury Employees Union, in the presence of other employees or otherwise interfere with their right to represent unit employees.

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

The Assistant Secretary noted that Section 202.3(c)(2) of his Regulations provides, in effect, that the controlling date for computing the "open period" for the filing of a petition for an election is the expiration date of the initial three year period of an agreement, such as the instant agreement, which has a terminal date more than three years from the date it was signed and dated by the Activity and the incumbent exclusive representative. Utilizing the foregoing time requirements, the Assistant Secretary found that the subject petition was not filed timely.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

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

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AIR STATION,
WILLOW GROVE, PENNSYLVANIA 1/

Activity

and

Case No. 20-5591(RO)

JOINT COUNCIL FOR INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS, LOCAL F-195,
AND AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3686, AFL-CIO 2/

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R3-15

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including the briefs filed by the Activity and the Intervenor, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner seeks an election in a unit of all eligible Civil Service employees of the Naval Air Station, Willow Grove, Pennsylvania,

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

excluding all management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined by Executive Order 11491, as amended. At the hearing, the parties stipulated as to the appropriateness of the petitioned for unit.

The Intervenor, the current exclusive representative of the petitioned for employees, contends that the employees being sought are covered by a negotiated agreement which constitutes a bar to the processing of the petition in this case as the petition was not filed during the "open period" of that agreement as required by Section 202.3(c)(2) of the Assistant Secretary's Regulations. On the other hand, the Petitioner and the Activity contend that the instant petition was timely filed.

The record reveals that a negotiated agreement was signed and dated by the Activity and the Intervenor on June 8, 1973, and approved by the Office of Civilian Manpower Management on July 6, 1973, to be effective that date. Article VII of the agreement provides that the agreement "will remain in full force and effect for three years from the date approved by the Office of Civilian Manpower Management, except that upon the mutual consent of the parties concerned, it may be terminated at any time following the first anniversary of its effective date." Both the execution date and the approval date appear on the signature page of the agreement.

I find that the instant petition, filed on May 5, 1976, was untimely. Section 202.3(c)(2) of the Assistant Secretary's Regulations provides, 2/ in effect, that the controlling date for computing the "open period" for the filing of a petition for an election is the expiration date of the initial three year period of an agreement, such as the one in this case, which has a terminal date more than three years from its execution date. Thus, the terminal date of the negotiated agreement herein is July 5, 1976, more than three years from June 8, 1973, the date the Activity and the Intervenor signed and dated the agreement. Therefore, the controlling date for computing the open period is June 7, 1976, the expiration date of the initial three year period measured from June 8, 1973. 3/ Thus, the open period for filing a petition in the instant case would be not more than 90 days and not less than 60 days prior to June 7, 1976. As the petition herein was filed on May 5, 1976, I find that it was not filed timely.

2/ Section 202.3(c)(2) provides, in part, that, "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: * * * (2) Not more than ninety (90) days and not less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it was signed and dated by the activity and the incumbent exclusive representative...."

3/ See Report on a Ruling of the Assistant Secretary, Report No. 38.


Accordingly, as the petition herein was filed untimely, I shall order that it be dismissed.

December 30, 1976

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 20-5591(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

INTERSTATE COMMERCE COMMISSION
A/SLMR No. 773

This case involved an unfair labor practice complaint filed by Joseph F. Wilson, an individual, alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by discharging Wilson, an Attorney-Advisor for the Respondent, because of his union activity.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the evidence was insufficient to establish that the cause for Wilson's discharge, either in whole or in part, was his union activity. Accordingly, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed.

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

INTERSTATE COMMERCE COMMISSION

Respondent

and

Case No. 22-6500(CA)

JOSEPH F. WILSON

Complainant

DECISION AND ORDER


On June 15, 1976, Administrative Law Judge James W. Mast issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6500(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

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

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, NATIONAL FORESTS
OF MISSISSIPPI, JACKSON, MISSISSIPPI
A/SLMR No. 774

This case arose as a result of a petition filed by the National Federation of Federal Employees, Local 1894, seeking a unit of all General Schedule and Wage Grade employees of the National Forests of Mississippi. The petitioned for unit was substantially the same as a unit for which the Intervenor, the American Federation of Government Employees, Local 2543, AFL-CIO, is the incumbent exclusive representative. The Intervenor contended that the employees being sought are covered by a negotiated agreement which constituted a bar to the processing of the subject petition as the petition was not filed during the "open period" of the agreement as required by Section 202.3(c) of the Assistant Secretary's Regulations. On the other hand, the Petitioner and the Activity contended that the petition was filed timely.

The Assistant Secretary noted that Section 202.3(c)(1) of his Regulations provides, in effect, that the controlling date in computing the "open period" for the filing of a petition for an election is the terminal date of an agreement, such as the instant agreement, which has a term of three years or less from the date it was signed and dated by the Activity and the incumbent exclusive representative. In the instant case, the Assistant Secretary found that a third party, such as the Petitioner, relying solely upon the information contained within the "four corners" of the negotiated agreement would have no means by which it could ascertain the agreement's terminal date as neither the signature page nor any portion of the agreement indicated the date upon which it was approved. Under these circumstances, the Assistant Secretary concluded that such agreement did not constitute a bar to the processing of the petition in the subject case.

Accordingly, the Assistant Secretary ordered that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, NATIONAL FORESTS
OF MISSISSIPPI, JACKSON, MISSISSIPPI

Activity

and

Case No. 41-4452(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1894

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2543, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, National Federation of Federal Employees, Local 1894, seeks an election in a unit of all General Schedule (GS) and Wage Grade (WG) employees of the National Forests of Mississippi, excluding

all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order. ^{1/} The Intervenor contends that the employees being sought are covered by a negotiated agreement which constitutes a bar to the processing of the subject petition as the petition was not filed during the "open period" of that agreement as required by Section 202.3(c) of the Assistant Secretary's Regulations. On the other hand, the Petitioner and the Activity contend that the petition was filed timely.

On January 22, 1971, the Intervenor was granted exclusive recognition for a unit similar to the petitioned for unit except that it specifically excluded guards. The evidence establishes that on November 2, 1972, the Assistant Director of Personnel, U.S. Department of Agriculture, approved the negotiated agreement between the Activity and the Intervenor with instructions that the date of approval be included on the signature page of the agreement. The agreement states, in pertinent part, that "this agreement shall be effective on the date it is approved by the Director of Personnel, U.S. Department of Agriculture" and that "the initial term of this agreement shall be two years and shall be automatically renewed annually on each anniversary date thereafter...." However, neither the signature page nor any other portion of the agreement shows that it was approved by the Agency on November 2, 1972. The only reference to Agency approval contained in the agreement is the following: "This agreement approved by the Director of Personnel, USDA, and received by the Forest Supervisor on December 13, 1972." The December 13, 1972, date also is printed on the cover of the agreement. Further, the signature page of the agreement shows that it was signed by the Activity and the Intervenor on January 17, 1973.

Section 202.3(c)(1) of the Assistant Secretary's Regulations provides, in effect, that the controlling date in computing the "open period" for the filing of a petition for an election is the terminal date of an agreement, such as the instant agreement, which has a term of three years or less from the date it was signed and dated by the Activity and the incumbent exclusive representative. In the instant case, however, a third party, such as the Petitioner, relying solely upon the information contained within the "four corners" of the negotiated agreement would have no means by which it could ascertain the agreement's terminal date as neither the signature page nor any portion of the agreement indicates the date upon which it was approved.

In my view, the primary purpose of Section 202.3(c)(1) of the Regulations is to assure that third parties can clearly ascertain, without the necessity of relying on factors outside the "four corners"

^{1/} The unit appears as amended at the hearing. The record discloses that the amended unit is substantially the same as the unit currently represented exclusively by the Intervenor, American Federation of Government Employees, Local 2543, AFL-CIO. At the hearing, the parties amended the unit description to delete the exclusion of guards. As the record shows that no guards currently are employed at the Activity, I shall make no determination as to their inclusion in or exclusion from the unit sought herein.

December 30, 1976

of the agreement, the appropriate time for the filing of representation petitions. In this regard, it has been held previously that to permit agreements of unclear duration to constitute bars to elections would, in effect, be granting protection to parties who have entered into ambiguous commitments and could result in the abridgement of the rights of employees under the Executive Order. ^{2/} Therefore, under the circumstances herein, because the terminal date of the negotiated agreement between the Activity and the Intervenor is unclear, I find that such agreement does not constitute a bar to the processing of the petition in the subject case.

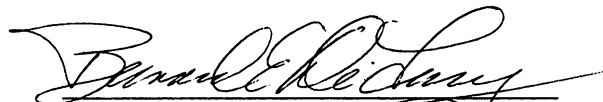
Accordingly, I shall direct an election in the following unit, which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Grade employees of the National Forests of Mississippi, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are all those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on furlough including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1894; by the American Federation of Government Employees, Local 2543, AFL-CIO; or by neither.

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

^{2/} See U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 413, and Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45.

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

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD
A/SLMR No. 775

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council, AFL-CIO (Complainant), alleging violations of Section 19(a)(1) and (2) of the Order. More specifically, the Complainant alleged that the Respondent Activity had violated the Order by interrogating an employee about his activities as a union steward during a job promotion interview and by failing to promote him because of his union activities.

The Associate Chief Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) by interrogating the employee involved about his union activities. However, the Associate Chief Administrative Law Judge found that the Respondent had not violated Section 19(a)(2) by failing to promote the employee. In this regard, while he was unable to conclude that the employee would have been selected but for his union beliefs and activities, the Associate Chief Administrative Law Judge concluded that the Respondent's violations of Section 19(a)(1) deprived the employee of a fair opportunity to compete for promotion. Accordingly, he recommended that the selection process be rerun for the purpose of reappraising the three highly qualified candidates, of which the subject employee was one, in an atmosphere free of any reference to union membership or activities.

Noting particularly the absence of exceptions by the Respondent to the Associate Chief Administrative Law Judge's finding that it had violated Section 19(a)(1) of the Order, the Assistant Secretary adopted the Associate Chief Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from its violative conduct and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD

Respondent

and

Case No. 70-4691(CA)

FEDERAL EMPLOYEES METAL TRADES COUNCIL

Complainant

DECISION AND ORDER

On August 10, 1976, Associate Chief Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Associate Chief Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions to the Associate Chief Administrative Law Judge's Recommended Decision and Order. 1/

The Assistant Secretary has reviewed the rulings of the Associate Chief Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Associate Chief Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed by the Respondent to the Associate Chief Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) of the Order, I hereby adopt the Associate Chief Administrative Law Judge's findings, conclusions and recommendations.

1/ The Complainant filed exceptions to the Associate Chief Administrative Law Judge's finding that the Respondent's conduct herein was not violative of Section 19(a)(2) of the Order.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Navy, Mare Island Naval Shipyard, Vallejo, California, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership and/or activities in the Federal Employees Metal Trades Council, or any other labor organization.

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

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

(a) Post at its facility at the Mare Island Naval Shipyard, Vallejo, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by Shipyard Commander 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. Said official shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

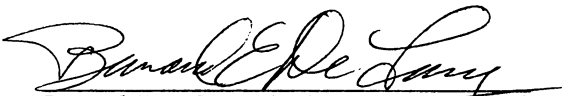
(b) Cause a New Advisory Selection Panel to be convened for the purpose of reappraising the three candidates in an atmosphere free of any reference to union membership or activities.

(c) Take steps to ensure that all panelists and selecting officials are made aware of the requirement that considerations of union membership and activity may not properly enter their deliberations and are not a proper subject of discussion in any interviews.

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

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

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate our employees as to their membership and/or activities in the Federal Employees Metal Trades Council, or any other labor organization.

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

WE WILL take appropriate steps to reappraise Mr. Charles Burghart, Mr. Theodore Gertz and Mr. Clyde Folds for the position of Boilermaker Instructor and will ensure that matters relating to membership or nonmembership in the Federal Employees Metal Trades Council will not arise in the interviews.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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



..... :
In the Matter of :
DEPARTMENT OF THE NAVY :
MARE ISLAND NAVAL SHIPYARD :
Respondent : Case No. 70-4691
and :
FEDERAL EMPLOYEES METAL TRADES :
COUNCIL :
Complainant :
.....

Richard C. Wells
Labor Advisor, Western Field Division
Department of the Navy, Office of
Civilian Manpower Management
760 Market Street, Suite 865
San Francisco, California 94102
For the Respondent

Joseph F. Ross, Jr.*
Bunch & White
155 Montgomery Street
Suite 1502
San Francisco, California 94104
For the Complainant

Before: JOHN H. FENTON
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491. The original complaint was filed on February 26, 1975; an amended complaint was filed on June 20, 1975. Notice of Hearing was issued on July 30, 1975, by the Assistant

*Since July 20, Claimant has been represented by L. Matt Wilson, Esq., of the same address.

Regional Director for Labor-Management Services, San Francisco Region. The Federal Metal Trades Council (hereinafter referred to as Complainant or the Union) alleged in its complaint that the Mare Island Naval Shipyard (hereinafter referred to as Respondent or the Activity) violated Section 19(a)(1) of the Order by interrogating a unit employee during a job promotion interview about his union activities. The union further alleges that the Respondent violated Section 19(a)(2) of the Order by failing to promote said employee on the grounds of his union activities.

A hearing was held on November 12, 1975, in San Francisco, California. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Upon the basis of the entire record, including my observation of witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

1. Respondent employs approximately 6200 production employees and at all times material herein, these employees have been represented by the Complainant. The parties in this case are governed by a collective bargaining agreement, in effect since September 25, 1970.

2. On October 1, 1974, Respondent published Merit Promotion Announcement No. 131-211-74 1/ which invited applications for the position of Boilermaker Instructor, W6-38008-12. Said Announcement stated that applicants would be evaluated on the basis of experience, training, performance, appraisals and pertinent awards. The Announcement further provided that in the evaluation of candidates, there would be no discrimination for any "non-merit reason such as race, color, religion, sex...(and) membership or nonmembership in an employee organization."

3. Attached to the Announcement was an official application form which Mr. Charles Burghart, the aggrieved unit employee herein, completed and submitted. On November 22, 1974, a management official notified Burghart by letter 2/

1/ Complainant's Exhibit 1.

2/ Complainant's Exhibit 2.

that on the basis of his application, he had received a rating of ninety-one (91) out of a possible one hundred (100) and had therefore been rated as "Highly Qualified." Two other candidates for the Boilermaker Instructor position, Theodore Gertz and Clyde Folds (who was eventually awarded the position) scored ninety-one (91) and eighty-nine (89) respectively and were also accorded a "Highly Qualified" rating. Gertz and Burghart were Union members. Folds was not.

4. Pursuant to Article XXV of the collective bargaining agreement between the parties, a three-member Advisory Selection Board was appointed to review the candidates. The interviewing panel consisted of Messrs. Charles O. Johnson, Training Supervisor for the structural group at Mare Island; John Aringdale, Production Controller, Shipbuilding; and Stanley Choy, Foreman, Boilermaker Shop 41. As chairman of the panel, Johnson was responsible for the designation of the other two members.

Under the bargaining agreement, Advisory Selection Boards have discretionary authority to interview job vacancy candidates. The panel in this case chose to hold such interviews and convened in the office of Boilermaker Superintendent Gravatt on December 3, 1974, to meet with the candidates.

After reviewing the candidates' applications, the panel decided upon a format for the interviews. The panel agreed that it would interrogate the candidates as to their background in instruction work as well as their knowledge of the apprenticeship and nuclear programs at the shipyard.

5. The candidates were interviewed in the order of Folds, Burghart and Gertz, respectively, and each interview lasted approximately 20 minutes. After routine greetings and introductions between the participants, each of the three candidates was asked to explain his experience in instruction and in boilermaker work; to explain why he felt that he would make a good choice for the vacant position; and to comment on his ability to work compatibly with the boilermaker instructor's prospective supervisor, Mr. Gravatt. Mr. Burghart's interview differed from the others, however, in that a discussion was had as to Burghart's union affiliation and the effect it might have on his performance as boilermaker instructor. Burghart was wearing a union steward's

badge as he entered Superintendent Gravatt's office for his interview. Noticing the badge, Aringdale commented that "I see that you are a union steward." Burghart testified that "the second question put to me was something about 'You file a lot of grievances against management' or something like that." According to Burghart, this line of questioning about his union work continued at length and was the dominant theme of the interview. The panelists admitted it consumed about 5 of the 20 minutes. Clearly it formed a substantial part of the interview.

In substance, Johnson asked Burghart whether he foresaw problems in working closely and effectively with Boilermaker Superintendent Gravatt as an instructor while simultaneously carrying out his duties as Union steward. He questioned Burghart's ability to present a grievance one day without affecting his working relationship with Gravatt on the next. He questioned his capacity to cope with his stewardship "and still get something done in the apprentice program". After ascertaining that Burghart had filed quite a few complaints against management, and stating that an instructor is a part of management, Johnson asked him whether he was aware that he would have to carry out policies in which he did not believe because of his Union convictions. Johnson persisted in a series of questions and statements addressed to the theme that the required loyalty to management would be seriously compromised by his Union office. Thus he told Burghart that as instructor he would have to see management's "side", and that he could not be filing grievance on behalf of employees who do a lot of griping. Burghart was pressed to the point where he said that he would resign his Union office if faced with a situation where his loyalties were divided.

6. Such questioning was not only clearly coercive, but was so disturbing to Burghart as to adversely effect his performance in answering questions germane to the purpose of the interview.

7. The selection panel members independently evaluated each candidate upon the completion of the interviews. A standardize Interview Evaluation Record 3/ used for this

3/ Court's Exhibit 1.

purpose provided for the evaluation of the candidate's personality, appearance and self-expression, objectivity, stability and maturity, interest and motivation, and leadership and supervisory capacity. Each of these seven promotion criteria were judged on the following point basis: (4) excellent; (3) above average; (2) average; and (1) reasonably satisfactory. A maximum rating of excellent, or four points, on each of the seven criteria would result in a score of 28. A combined maximum score from the three panel members, therefore, would be eighty-four (84). Burghart's evaluation score was forty-two (42) points while the other two candidates scored sixty-two (62) and sixty (60) points. 4/

On the basis of the application form ratings, rough notes made during the interviews, and the aforementioned standardized evaluation record scores, candidate Folds was the unanimous choice of the panel. The three panelists all testified that Burghart's union activities played no part in their decision. In this respect I credit Choy and Aringdale.

Finally, Group Superintendent Guido Joseph Gioana, the management official authorized to make the final selection from the three candidates, credibly testified that although he had the authority to pick any of the three candidates, he chose to follow the unanimous view of the panel and promote Mr. Folds. Gioana further testified that he had no discussion with the panel prior to its deliberations, in no way attempted to influence the panels choice, and, finally, charged the panel members to "come forth with the best man."

8. After the interview, Burghart complained to senior shop steward Richard Hall. Thereafter the two of them met with Johnson for an explanation of Burghart's nonselection. Johnson stated that Folds had more bricklaying experience and that Burghart needed to take some public speaking courses and to learn how to sketch. When asked what Union activity had to do with nonselection, Johnson responded that as a steward and an instructor, Burghart would be torn between two loyalties.

4/ Burghart received relatively low marks from all panel members in Personality, Appearance, and Leadership. Two of [continued on next page]

9. Folds had been serving as a temporary instructor in the position for some months, pending the posting and use of the formal selection procedures. Johnson made that decision, thus indicating his favorable view of Folds and suggesting the possibility of an element of preselection. Johnson had, in fact, encouraged Folds to apply.

10. I received for in camera inspection, and for inclusion in the record if found to be of any probative value, copies of the Noncompetitive Rating Records used in qualifying the three candidates. I did not find them worthy of inclusion in the record, as they represent back-up materials on which were bottomed the conclusion that all three candidates were highly qualified, with a slight edge to Burghart.

Positions of the Parties

The Complainant argues that the Respondent, in violation of Section 19(a)(1), coerced grievant Burghart in the exercise of his rights guaranteed under the Order by questioning him about his union activities during his promotional interview, and further, in violation of Section 19(a)(2) of the Order, discouraged Burghart's union activities by discriminatorily failing to promote him to the position of boilermaker instructor.

The Respondent argues that its limited interrogation of Burghart as to his union activity consisted of casual questions posed in an informal framework and thus did not constitute interference with Burghart's exercise of his rights. In defense to the Section 19(a)(2) charge, Respondent maintains that its failure to select Burghart for the promotion to boilermaker instructor was not discriminatorily motivated. Specifically, Respondent argues that the Complainant adduced no evidence of anti-union animus on the part of management and that Burghart was not promoted for bona fide business-related reasons, namely, his low rating on the job-related evaluation prepared after his interview.

4/ - continued

the three gave him low marks in Self-Expression. Each member of the Panel rated the other Candidates substantially (almost 50%) higher than Burghart.

Conclusions of Law

Johnson's interrogation of Burghart was clearly violative of Section 19(a)(1). Short of discharge threats, it is hard to imagine more coercive words than those which clearly indicate that adherence to a Union renders one unfit for a promotion. Likewise, Johnson's suggestion that Burghart's active role as a steward would simply not allow him time to properly discharge the responsibilities of an instructor was coercive.

It is my conclusion, nevertheless, that Respondent did not violate Section 19(a)(2). Thus, I was impressed particularly by the candor of Boilermaker Foreman Choy, and by Production Controller Aringdale. While this record makes it obvious that Johnson viewed an activist stewardship as a disqualifying matter, I believe both Choy and Aringdale made independent evaluations and were not influenced by union considerations. Both men rated the other candidates as substantially superior to Burghart in the areas of personality, appearance, interest, motivation and leadership and supervisory capacity. One gave him the lowest possible mark in self-expression. While I find that Burghart's performance in the interview was adversely-affected by the unlawful remarks of Johnson, I also find that Burghart was not doing well in responding to questions even before the Union became a subject of discussion. I credit Aringdale's observation that he was withdrawn and was floundering early in the interview. While convinced that the entire selection process was invalidated by the improper interrogation, I cannot conscientiously conclude that Complainant has proved discriminatory nonselection occurred. As noted, I do not find that Panel members Choy and Aringdale were influenced by Union considerations, and I believe Johnson was favorably disposed toward Folds from the beginning and had been sufficiently impressed by his performance as an acting instructor to solicit his candidacy for this post. As I am unable to find that Burghart would have been selected but for his Union beliefs and activities, I must conclude that no discrimination has been established. On the other hand, I cannot exclude the possibility that Burghart might have been selected, had his original nervousness and failure to respond impressively not been intensified by a series of highly improper and intimidating questions. I therefore conclude that Respondent's violations of 19(a)(1) can be adequately remedied only by

requiring that the selection process be rerun by a panel on which Johnson does not sit, and whose members are not designated by him. Although Complainant has not in my judgment established that Burghart was discriminatorily denied a promotion, it has established that Respondent's violations of Section 19(a)(1) deprived Burghart of a fair opportunity to compete for the promotion. I reject Complainant's contention that the selection process was a sham, but I find Respondent's conduct (Johnson's) to have vitiated it as a means of merit promotion. Since the process was so tainted, it is necessary that it be rerun, and that Johnson play no role. 5/ The consequences of such a reappraisal should, if favorable to Burghart, be prospective in effect. Finally, I would note, with respect to the breadth of my recommended remedy, that it is evident from Group Superintendent (selecting official) Gioana's testimony, that there exists no program for acquainting supervisors and management officials with the requirements of the law respecting the rights to Union membership.

Recommendation

Having found that Respondent has engaged in certain conduct which is violative of Section 19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491. In respect to the allegation of a discriminatory failure to promote Charles Burghart on December 13, 1974, in violation of 19(a)(2) of the Order, it is recommended that the complaint be dismissed.

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

5/ At the risk of belaboring the point, I wish to make it clear that I do not find the nonselection of Burghart was a deliberate, intended consequence of his Union views. Rather, I find he was deprived, by virtue of the unsettling nature of the unlawful interrogation, of an opportunity to receive a fair appraisal. Thus, indirectly, did Union considerations intrude into the process.

hereby orders that the Department of Navy, Mare Island Naval Shipyard, Vallejo, California, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership and/or activities in the Federal Employees Metal Trades Council, or any other labor organization.

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

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

(a) Post at its facility at the Mare Island Naval Shipyard, Vallejo, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by an appropriate management official 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. Said official shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

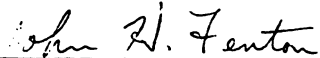
(b) Cause a new Advisory Selection Panel to be convened, for the purpose of reappraising the three candidates in an atmosphere free of any reference to Union membership or activities.

(c) Take steps to ensure that all panelists and selecting officials are made aware of the requirement that considerations of Union membership and activity may not properly enter their deliberations and are not a proper subject of discussion in any interviews.

(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.

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



JOHN H. FENTON
Associate Chief Judge

DATED: August 10, 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 interrogate our employees as to their membership and/or activities in the Federal Employee Metal Trades Council or any other labor organization.

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

WE WILL take appropriate steps to reappraise Mr. Charles Burghart, Mr. Theodore Gertz and Mr. Clyde Folds for the position of Boilermaker Instructor and will ensure that matters relating to membership or nonmembership in Federal Employees Metal Trades Council will not arise in the interviews.

(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 for Labor-Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

December 30, 1976

A/SLMR No. 776

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

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

AIRWAY FACILITIES FIELD OFFICE,
FEDERAL AVIATION ADMINISTRATION,
ST. PETERSBURG, FLORIDA
A/SLMR No. 776

AIRWAY FACILITIES FIELD OFFICE,
FEDERAL AVIATION ADMINISTRATION,
ST. PETERSBURG, FLORIDA

This case involved an unfair labor practice complaint filed by Harold M. Bowcock, an individual, alleging that the Respondent violated Section 19(a)(1) and (4) of the Order by issuing a letter of warning to the Complainant because he had, in his capacity as President of Local 1518, National Federation of Federal Employees, filed a prior unfair labor practice complaint. The Respondent contended that the Complainant received a letter of warning because he had used an FTS telephone despite the existence of an agency regulation which prohibits the use of such facilities by a labor organization.

The parties agreed that the purpose of the phone call in question was to convey a message from a Department of Labor Compliance Officer investigating a prior unfair labor practice complaint filed by the Complainant, at the request of the Compliance Officer. The Administrative Law Judge found that the Complainant's conduct in conveying a message to management constituted a protected activity as it "was...in furtherance of processing the complaint - and the use of the FTS telephone was in the course of the investigation thereof."

Under the particular circumstances of the case, the Assistant Secretary agreed with the Administrative Law Judge's finding of violation of Section 19(a)(1) and (4) of the Order. He found it clear that the use of the FTS telephone which precipitated the discipline was inextricably intertwined with and derived from the filing of the unfair labor practice complaint against the Respondent and the resultant investigation by the Area Administrator wherein a Department of Labor Compliance Officer requested that the Complainant convey a message to management. Accordingly, the Assistant Secretary concluded, in agreement with the Administrative Law Judge, that the disciplining of the Complainant was violative of the Order.

Respondent

and

Case No. 42-3321(CA)

HAROLD M. BOWCOCK

Complainant

and

LOCAL 1518, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Party

DECISION AND ORDER

On September 15, 1976, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (4) of the Order by issuing a letter of warning to the Complainant because he had, in his capacity as President of Local 1518, National Federation of Federal Employees, filed a prior unfair labor practice complaint against the Tampa, Florida Sector, Federal Aviation Administration, of which the Respondent is a subordinate part. The Respondent contends that the Complainant received the letter of warning because he had used an FTS telephone despite the existence of an agency regulation which prohibits the use of such facilities by a labor organization. The parties agree that the purpose of the telephone call in question was to convey a message from a Department of Labor Compliance Officer investigating a prior complaint filed by the Complainant. 1/ The Administrative Law Judge found that the Complainant's conduct in conveying a message to management constituted a protected activity as it "was...in furtherance of processing the complaint - and the use of the FTS telephone was in the course of the investigation thereof."

Under the particular circumstances of this case, I agree with the Administrative Law Judge's finding of violation of Section 19(a)(1) and (4) of the Order. Thus, it is clear that the controversy over the use of the FTS telephone which precipitated the discipline herein was inextricably intertwined with and derived from the filing of an unfair labor practice complaint against the Respondent and the resultant investigation by the Area Administrator wherein a Department of Labor Compliance Officer requested that the Complainant convey a message to management. Accordingly, I find, in agreement with the Administrative Law Judge, that the disciplining of the Complainant was violative of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Airway Facilities Field Office, Federal Aviation Administration, St. Petersburg, Florida, shall:

1. Cease and desist from:

(a) Disciplining or otherwise discriminating against Harold M. Bowcock, or any other employee, because they have filed a complaint or given testimony under Executive Order 11491, as amended.

(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.

1/ It is uncontroverted, and I find, that the Department of Labor Compliance Officer requested Mr. Bowcock to contact Section Manager Duggan and inform him that a Department of Labor representative would be interviewing Activity employees the following day.


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

(a) Remove and expunge any reference to the September 9, 1975, warning letter issued to Harold M. Bowcock from its files and submit to Harold M. Bowcock a written acknowledgement of same.

(b) Post at its facility at the Airways Facilities Field Office, St. Petersburg, 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 Field Office Manager and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Field Office Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.
December 30, 1976


Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT discipline or otherwise discriminate against Harold M. Bowcock, or any other employee, because they have filed a complaint or given testimony under Executive Order 11491, as amended.

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

WE WILL remove and expunge any reference to the September 9, 1975, warning letter issued to Harold M. Bowcock from our files and submit to Harold M. Bowcock written acknowledgement of same.

(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 its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 300, 1371 Peachtree Street, NE, Atlanta, Georgia 30309.

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



.....
In the Matter of

AIRWAY FACILITIES FIELD OFFICE
FEDERAL AVIATION ADMINISTRATION
ST. PETERSBURG, FLORIDA
Respondent

and

HAROLD M. BOWCOCK
Complainant

and

LOCAL 1518, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
Party

.....
ALAN M. MENDEL, ESQ.
FAA, Southern Region ASO-16
Post Office Box 20636
Atlanta, Georgia 30320
For Respondent

ALAN J. WHITNEY
Executive Vice-President
National Association of Government
Employees
2139 Wisconsin Avenue, N.W.
Washington, D.C. 20007
For Complainant

ROBERT R. BROWN
NFFE Area Coordinator
1709 Montcom Street
Orlando, Florida 32806
For Local 1518 NFFE

Before: WILLIAM NAIMARK
Administrative Law Judge

Case No. 42-3321 (CA)

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 28, 1976 by the Regional Administrator for Labor-Management Services Administration of the U.S. Department of Labor, Atlanta Region, a hearing in this case was held before the undersigned on June 29, 1976 at Tampa, Florida.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on April 9, 1976 by Harold M. Bowcock, an individual, (herein called the Complainant) against Airway Facilities Sector Field Office, Federal Aviation Administration, St. Petersburg, Florida (herein called the Respondent). An amended complaint was filed by Complainant against Respondent on May 7, 1976.

The said amended complaint alleged a violation of Sections 19(a)(1) and (4) of the Order based on a letter of warning issued to Harold M. Bowcock, an employee and president of Local 1518, National Federation of Federal Employees, because he filed a complaint with the Department of Labor against the Tampa, Florida office manager of FAA, Airway Facilities Sector.

All parties 1/ were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter Complainant and Respondent filed briefs which have been duly considered.

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

Findings of Fact

1. At all times material herein Local 1518 has been the collective bargaining representative of all non-supervisory personnel, wage rate and general schedule employees at the

1/ Local 1518, National Federation of Federal Employees (herein called Local 1518), named as a party and duly served, appeared at the hearing and participated fully thereat.

Tampa, Florida sector. At all such times, and during September 1975, a collective bargaining agreement was in effect covering such employees.

2. The Tampa sector comprises eleven field offices, including one located at St. Petersburg, Florida. Approximately 100 employees make up the bargaining unit of the Tampa sector.

3. On May 24, 1975 Harold M. Bowcock, president of Local 1518, filed a complaint (Case No. 42-2853) on behalf of said union against Federal Aviation Administration, Airway Facilities Sector, Tampa, Florida with the Department of Labor alleging a violation of 19(a)(1) and (6) of the Order. The complaint alleged that William F. Duggan, section manager, conducted a discussion with a unit employee without affording Local 1518 the opportunity to be present thereat.

4. On September 8, 1975 Hazel Ellison, compliance officer of Department of Labor, Miami, Florida called Harold M. Bowcock, president of Local 1518, who was employed at St. Petersburg, Florida. This telephone call was in response to a letter written by Local 1518 to the Department of Labor requesting that witnesses be interviewed in respect to the complaint filed on May 24, 1975.

Ellison informed Bowcock that compliance officer Curry would be coming to Tampa on the following day to speak with the witnesses 2/ as requested, and she asked Bowcock to make the witnesses available. Since she had been unable to contact William F. Duggan, section manager at Tampa, Ellison also asked Bowcock to advise Duggan that interviews would be conducted as mentioned.

5. Shortly after receiving the aforesaid phone call, Bowcock called Duggan at Tampa from St. Petersburg on the FTS line of the Government phone. He told the manager that he had spoken to Ellison who informed him that Curry from the Department of Labor would be coming up to interview witnesses.

2/ In the amended complaint it was alleged that Ellison stated Curry would be on hand to question Duggan. Complainant amended such allegation at the hearing to conform with the facts, supra.

6. On September 8, 1975 Duggan telephoned Lee Chupp, Acting Chief at the Sector Field Office, St. Petersburg, and asked if Bowcock was on duty at the time. When Chupp replied in the affirmative, Duggan remarked he had received a call from Bowcock concerning union business.

7. Upon receiving a call from the section manager, Chupp phoned Lee Mandel, who was Bowcock's former supervisor regarding the use by the employee of a Government phone in the past. Mandel told Chupp that Bowcock had been engaged in similar activity in 1974 and been ordered not to do so again. 3/

8. After speaking with Duggan and Mandel, and on the same day, Chupp called Bowcock into his office. The supervisor said he had been advised that Bowcock used the FTS line to call Duggan on union business. Bowcock stated he used the phone to relay a message from the Department of Labor to Duggan. When Chupp asked if Bowcock ever did this before, the latter replied he had been involved in a similar incident a year ago. The supervisor told Bowcock that the use of the FTS phone violated DOT order 3710.2 paragraph 29. The employee admitted that if using the phone as union president was prohibited by the regulation, he had violated same; but Bowcock asserted he did not use the telephone for internal union business.

9. Chupp, who testified he was unaware that a complaint had been filed by Bowcock in 1974 against management, conceded he knew the said employee was president of Local 1518. In a past recollection recorded, which Respondent introduced in evidence 4/, Chupp stated, and I find, that he told Bowcock in this conversation any further infractions would result in "more severe disciplinary measures", (underscoring supplied)

3/ Bowcock testified, and I find, that in December 1974, he used a commercial line (county but not FTS) to call employee Robert A. Hamilton, chief union steward, re the latter's attendance at a meeting with management; that Hamilton received a letter of warning in December 9, 1974 for using Government equipment to conduct union business; that Bowcock never used FTS phone again except to relay the message from Ellison to Duggan.

4/ Respondent's Exhibit No. 2.

10. On September 9, 1975 Chupp issued Bowcock a letter of warning 5/ which recited that the employee had violated the DOT order 3710.2 by using the Government phone for union business. The letter also stated that any further violations of this nature would result in formal disciplinary action against him.

11. An order, which governs the U.S. Department of Transportation, DOT 3710.2, contains a provision under Chapter VII dealing with "USE of Government Facilities". Paragraph 29(d) provides as follows:

"Equipment. Telephone, teletype, public address systems, xerox machines and other communicating and duplicating equipment may not be used by a labor organization."

Conclusions

Complainant contends that his use of the FTS telephone on September 8, 1975 was not to transact union business; that the call to Duggan was in futherance of processing a complaint previously filed against management, and which, as Bowcock related to Duggan, was being investigated by the Department of Labor. Further, it is urged that the letter of warning was a disciplinary measure for conduct involving such processing of said complaint - all in violation of 19(a) (1) and (4) of the Order.

Respondent asserts that Complainant's use of the FTS telephone in calling Duggan was contrary to DOT 3710.2 (29d) which prohibits using a Government phone for union business. Further, it argues that assuming arguendo, the call did not involve union affairs, supervisor Chupp had no knowledge that Bowcock had filed a complaint against management; and, moreover, the letter of warning was not issued because the employee had previously leveled charges against Respondent.

A. Knowledge by Respondent of Bowcock's Conduct

Cases are legion in the private sector which establish that knowledge by an employer of an employee's union or protected activity is a sine qua non before said employer can be found to have discriminated against the individual for such activity. The issue, however, of whether management

5/ Assistant Secretary's Exhibit 1A (attachment C).

knew of an employee's conduct has not always turned on actual notification to the particular supervisor who chastised that employee. Thus, in Lamar Creamery Co. 138 NLRB 323, the respondent contended that supervisor Mapes, who discharged the alleged discriminatee, had no knowledge of those who attended a meeting, and therefore the employer could not be charged with knowledge of concerted activities of its employees. However, the record showed that one of the employees told another supervisor, Hurst, who was at the meeting, and that Hurst spoke to Mapes regarding his conversation with the employee. The Board rejected the defense of lack of knowledge, and found that, based on the statements to Hurst and his conversation with supervisor Mapes, knowledge of concerted activity was attributed to the respondent. 6/

In the case at bar Bowcock informed Duggan via FTS telephone that the compliance officer from Department of Labor would be on hand the following day to investigate the complaint therefore filed by Bowcock against Respondent. While Chupp testified that Duggan called him to advise that Bowcock used the FTS for union business, the complainant did notify Chupp that he was relaying the message from the Department of Labor. Under these circumstances I conclude that the knowledge of Duggan that Bowcock had filed the prior complaint, which was in the process of being investigated as related by complainant, is attributed to Respondent.

B. Protection of Bowcock's Conduct Under 19(a) 4

Whether Complainant's conduct is of a nature intended to be protected under 19(a)(4) of the Order is both interesting as well as a matter of first impression. The cited section apparently stems from Section 8(a)(4) of the National Labor Relations Act which provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." Under 19(a)(4) of the Order agency management shall not "discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under the Order." (underscoring supplied).

6/ See Sears Roebuck & Co. 172 NLRB 2222.

Note is taken that in construing the extent of protection afforded employees under 8(a)(4) of the NLRA, both the Board and various courts have interpreted this section broadly. They have construed 8(a)(4) as giving the broadest reach to the persons it protects, the reprisals it prohibits, and the participation it encompasses. 7/ Thus in King Louie Bowling Corp., 196 NLRB 390, the Board found violation of 8(a)(4) of the Act by an employer based on discrimination against an employee for having given a sworn statement during an investigation of an unfair labor practice case. Moreover, the Supreme Court declared that 8(a)(4) protects employees during the investigative stage as well as in connection with filing a formal charge or giving formal testimony. NLRB v. Screvener, 405 U.S. 117.

Contrary to Respondent's contention, I am persuaded that the use by Bowcock of the FTS telephone on September 8, 1975 to convey a message to management re the investigation of the complaint filed against Respondent is a protected activity under 19(a)(4). While the employer herein concluded that the phone call to Duggan was for the purpose of transacting union business, the facts disclose otherwise. The conduct of complainant was, in my opinion, in furtherance of processing the complaint - and the use of the FTS telephone was in the course of the investigation thereof. Respondent, however, asserts that Chupp believed Bowcock used the phone to conduct union business, and thus it cannot be found to have acted unlawfully under 8(a)(4). The private sector has dealt with similar contentions by employers. In General Electric Co. 163 NLRB 198 the employer mistakenly thought a certain employee failed to shut off a machine and unlawfully went out on strike. It was held that the good faith of the employer was no defense where the employee did not in fact engage in misconduct. In the instant case Bowcock did not, in fact, use the FTS phone for union business, and therefore I conclude the Respondent may not rely on DOT 3710.2 (29d) as a defense herein. In sum, I find and conclude that Chupp sent Bowcock a warning letter on September 9, 1975 because the employee acted in furtherance of processing the complaint filed against Respondent initially; that the action taken by Respondent was during the course of said complaint's investigation - all of which is afforded protection under 19(a)(4).

7/ See Peterson v. NLRB 234F 2nd 417 (CA2); NLRB v. Dal-Tex Optical Co. Inc., 310F 2d 58(CA5).

C. Issuance of Warning Letter as Violative of 19(a)(4) of the Order

In the prior case of California National Guard, A/SLMR No. 348 the Assistant Secretary held that the issuance of a warning letter was violative of 19(a)(1) but did not contravene 19(a)(2). The latter section prohibits discrimination in respect to working conditions which tends to encourage or discourage union membership. However, the language of 19(a)(4) specifically outlaws discipline of an employee for filing a complaint or giving testimony. This contrasts with Section 8(a)(4) which prohibits a discharge or other discrimination for engaging in such conduct. Thus, it must be determined whether the letter of warning issued to Chupp was a disciplinary act within the framework of 19(a)(4).

The record reflects that Respondent's supervisor, who took the action against Bowcock, considered that the warning was an act of discipline. During the discussion between Chupp and Complainant the former admittedly stated that any further infractions would result in more serious disciplinary measures being taken. Moreover, in his warning letter Chupp referred to the fact that further infractions would result in formal disciplinary action against Bowcock, thus implying, at least, that the warning was itself an act of discipline, albeit informal in nature. In my opinion the issuance of a written letter of warning, and its insertion in the personnel file of an employee, is a form of discipline. It is a chastisement which fulfills the definition of the term "discipline". As such, I conclude that Respondent violated 19(a)(4) of such conduct; and, further, that it necessarily interfered with, coerced, and restrained employees in violation of 19(a)(1) of the Order.

RECOMMENDATIONS

Having found that Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and (4) of Executive Order 11491, as amended. I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Airway Facilities Field Office, Federal Aviation Administration, St. Petersburg, Florida shall:

1. Cease and desist from:

(a) Disciplining or otherwise discriminating against Harold M. Bowcock, or any other employee, because he has filed a complaint or given testimony under Executive Order 11491, as amended.


(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Remove and expunge any reference to the September 9, 1975 warning letter issued to Harold M. Bowcock from its files and submit to Harold M. Bowcock a written acknowledgement of same.

(b) Post at its facilities at the Sector Field Office of Respondent at St. Petersburg, 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 sector manager and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The section manager shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulation, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated:
Washington, D.C.

A P P E N D I X

N O T I C E T O A L L E M P L O Y E E S

P U R S U A N T T O

A D E C I S I O N A N D O R D E R O F T H E

A S S I S T A N T S E C R E T A R Y O F L A B O R F O R L A B O R - M A N A G E M E N T R E L A T I O N S

a n d i n o r d e r t o e f f e c t u a t e t h e p o l i c i e s o f

E X E C U T I V E O R D E R 1 1 4 9 1 , L A B O R - M A N A G E M E N T R E L A T I O N S I N

T H E F E D E R A L S E R V I C E

We hereby notify our employees that:

WE WILL NOT discipline or otherwise discriminate against any employee because he has filed a complaint or given testimony under Executive Order 11491, as amended.

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

WE WILL remove or expunge any reference to the September 9, 1975 warning letter issued to Harold M. Bowcock from our files and submit to Harold M. Bowcock a written acknowledgement of same.

Agency or Activity

Dated: _____ By _____

Reports on Rulings of the
Assistant Secretary of Labor
for Labor-Management
Relations Nos. 59-61

July 14, 1976

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 59

Problem

Objections to an election were filed concerning the status of certain void ballots.

Ruling

A question of ballot validity should be treated the same as a ballot challenge. Accordingly, when the observers for the parties to the election and the election supervisor are unable to reach agreement as to whether a ballot should be counted, that ballot should be placed in a separate envelope and listed as a challenged ballot on the "Tally of Ballots."

Such a challenge must be filed prior to the completion of the ballot count. When such a challenge is entered, the issue of validity will thereafter be resolved pursuant to the procedures set forth in Section 202.20 of the Assistant Secretary's Regulations.

November 12, 1976

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 60

Problem

The question was raised as to what criteria are used in determining when the holding of a representation election is "blocked" by an unfair labor practice complaint.

Ruling

Absent the filing of an appropriate Request to Proceed, the Assistant Secretary has a general policy of holding in abeyance the conducting of a representation election where a pending unfair labor practice complaint filed by a party to the representation proceedings is based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted. Likewise, if the complaint is filed after the investigation of the petition has begun and the complainant does not file an appropriate Request to Proceed, the holding of an election will normally be suspended. The petition shall be processed normally if the complainant is not a party to the representation case, e.g. an individual employee.

Only unfair labor practice complaints are considered to have a blocking effect on the processing of representation cases. Neither complaints filed pursuant to Section 18, standards of conduct for labor organizations, nor applications for a decision as to whether a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, filed pursuant to Section 13 of the Order, shall be considered as blocking the holding of a representation election.

November 22, 1976

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 61

Problem

The question was raised whether the Assistant Secretary should make a finding on grievability or arbitrability, pursuant to an Application for Decision on Grievability or Arbitrability, if the procedures set forth in the negotiated agreement of the parties involved have not first been exhausted.

Ruling

In Report on a Ruling No. 56, the Assistant Secretary ruled that: "For the purposes of computing the sixty (60) day filing period of an Application for Decision on Grievability or Arbitrability under Section 205.2(a) of the Assistant Secretary's Regulations, there must be a final written rejection after the arbitration clause is invoked."

While the primary purpose of Report No. 56 was to establish the starting point from which to compute the sixty (60) day filing period, that Ruling states that two things are necessary before an Application will be processed; i.e., the arbitration clause must be invoked, and, thereafter, a final written rejection must have been served on the other party. The purpose of the instant Ruling is to reaffirm and further clarify Report No. 56, and to extend its rationale to include Applications filed under Section 205.2(b) of the Assistant Secretary's Regulations.

Where one of the parties to an existing negotiated agreement has filed a grievance, all steps of the grievance procedure provided for in that agreement, including the invocation of arbitration where an arbitration provision exists, must be exhausted before the Assistant Secretary will consider an Application filed pursuant to Section 205.2(a) or (b) of the Regulations. Any employee or group of employees in the unit who chooses to file grievances and have them adjusted without utilizing their exclusive representative must exhaust all of the contractual grievance steps, except for arbitration, before the Assistant Secretary will consider an Application to be timely filed.



