UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 15, 2002

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: PENSION BENEFIT GUARANTY CORPORATION

Respondent

and Case No. WA-CA-00602

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-77

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

PENSION BENEFIT GUARANTY CORPORATION Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-77 Charging Party	Case No. WA-CA-00602

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 17, 2002**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: May 15, 2002
Washington, DC

OALJ 02-40

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

PENSION BENEFIT GUARANTY CORPORATION Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-77 Charging Party	Case No. WA-CA-00602

Thomas F. Bianco, Esquire
For the General Counsel

Raymond M. Forster, Esquire
For the Respondent

Gina Lightfoot-Walker, Esquire
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge by the National Association of Government Employees, Local R3-77 ("Union") against the Pension Benefit Guaranty Corporation ("Respondent"). The General Counsel subsequently issued a Complaint alleging that the Respondent had violated §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 *et seq.* ("Statute"), by implementing a change in its internal organization and physically relocating certain bargaining unit employees without having completed negotiations with the Union.

A hearing was held in Washington, DC on February 4, 2002. This Decision has been rendered after full consideration of all oral and written evidence, the demeanor of witnesses and the post-hearing briefs of the respective parties.[1]

General Counsel's Motion

The General Counsel has moved to strike the portion of the Respondent's brief which refers to documents that were neither introduced nor admitted into evidence at the hearing. Those documents are portions of the collective bargaining agreement[2] and written declarations by witnesses for the General Counsel. The documents which had not been previously introduced were attached to the Respondent's brief.

In footnote 9 to its brief and in its response to the motion of the General Counsel the Respondent argues that it could not have known prior to the hearing that additional portions of the collective bargaining agreement would become relevant because it had no notice, either from the Union or the General Counsel, as to what adverse effects allegedly flowed from the organizational change and which of the Union's proposals allegedly triggered the duty to negotiate.

[1] The General Counsel filed a motion to strike a portion of the Respondent's brief and the Respondent was allowed to file a response. In its response the Respondent included a motion to reopen the record. The General Counsel filed a motion to strike a portion of the response as well as a response to the Respondent's motion. The General Counsel's initial motion will be addressed in this Decision. None of the subsequent motions will be considered inasmuch as they are not authorized by the Rules and Regulations of the Authority and there is no good cause to allow exceptions.

[2] The General Counsel, in both his motion and his posthearing brief, repeatedly refers to the collective bargaining agreement as the "pseudo contract." This somewhat disparaging terminology is apparently intended to draw attention to the fact that the agreement was negotiated by the predecessor to the current Union and that it has expired. Although a new contract has not yet been negotiated, both parties have cited the expired collective bargaining agreement in support of their respective positions and have repeatedly invoked the contract in their communications (GC Ex. 4, 5, 7). Therefore, the collective bargaining agreement will be considered as being in full force and effect for the purpose of this proceeding.

In its response to the General Counsel's motion the Respondent further maintains that, during the course of a prehearing telephone conference, counsel for the General Counsel (not the attorney who appeared at the hearing) stated that the only alleged adverse affect of the change to the Respondent's organizational structure was the office move of Deborah Schnitz, an actuary in the collective bargaining unit and one of the General Counsel's witnesses.[3]

The Respondent has not attempted to justify its references to the written statements of the General Counsel's witnesses. Those statements have been offered in support of the proposition that there was undue delay in the filing of the Complaint, thus making a *status quo ante* ("SQA") remedy inappropriate.

The principal thrust of the Respondent's position is that, because it was surprised at the hearing, the additional portions of the collective bargaining agreement should be taken into consideration as a matter of fundamental fairness and due process. Respondent also argues that, because the authenticity of the collective bargaining agreement is not in question and because it was admitted into evidence in a prior proceeding before the Authority involving the same parties, the Administrative Law Judge should take official notice of the entire document. The Respondent's arguments are unpersuasive for the reasons set forth below.

It is true, as the Respondent maintains, that the concept of official notice by an administrative agency is broader than that of judicial notice by a court. Official notice may be taken, not only of public records and generally accepted facts, but also of matters which are within the agency's area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989). Accordingly, the Authority has held that §2429.5 of

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[3] The undersigned Administrative Law Judge did not participate in the prehearing conference. There are no notes of the conference in the file.

its Rules and Regulations allows for official notice of the

record and transcript in a prior case involving the same parties, *Social Security Administration and AFGE, Local 1923*, AFL-CIO, 47 FLRA 410, 411 (1993).

Official notice, however, is not without its limits. It is one thing, as in *Social Security, supra*, to take notice of a record with the consent of all parties. It is quite another to admit additional evidence, even of unquestioned authenticity, after the record has been closed and over the objection of one of the parties. Such an irregular procedure would be appropriate only in extraordinary circumstances. Such circumstances are not present in this case.

Assuming, for the purpose of argument only, that the Respondent had shown that it relied to its detriment on representations made on behalf of the General Counsel at the prehearing conference, the Respondent could have protected its position during the course of the hearing. The Respondent did not object to the testimony of Deborah Schnitz regarding the allegedly adverse effects on her working conditions beyond the reduced size of her office, nor did the Respondent move to keep the record open or to have official notice taken of the collective bargaining agreement. Such a motion could have been made within 10 days after the close of the hearing pursuant to §2423.21(b)(3) of the Rules and Regulations of the Authority. During the course of his opening statement, counsel for the Respondent stated that he was prepared to go forward at that time in spite of his impression that, according to the opening statement on behalf of the General Counsel, the Respondent would be faced with a case which was broader than that which was represented by the General Counsel at the prehearing conference (Tr. 12-16)[4]. After having been afforded ample opportunity to counter what it describes as "trial by ambush", the Respondent will not be allowed to belatedly introduce additional evidence in its post-hearing brief.

All that having been said, it is surprising that the General Counsel did not introduce any portion of the collective bargaining agreement in view of the fact that he

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4 Counsel for the General Counsel (who had not participated in the prehearing conference) denied that the Respondent had been misled.

introduced a number of documents in which the Union invoked

its contractual rights. Better yet, the entire agreement could have been submitted as a joint exhibit. The parties would then have been able to cite whichever portions were supportive of their respective positions.

In view of the foregoing, the motion of the General Counsel to strike portions of the Respondent's post hearing brief is granted. Neither documents not entered into evidence nor references thereto will be considered in this Decision.

Positions of the Parties

General Counsel

The General Counsel maintains that the Respondent improperly implemented a realignment[5] of its auditing function without affording the Union an opportunity to complete bargaining over the impact of the realignment on members of the bargaining unit. In addition to groundrule proposals, the Union presented the Respondent with numerous substantive proposals both before and after the realignment had been completed. Although the realignment did not result in changes in pay, grade or position descriptions, its practical effect was to substantially change the working conditions of Anne Chen[6] and Deborah Schnitz, both of whom are classified as Auditors. Alleged changes in Ms. Schnitz's working conditions include differences in the nature of her work assignments,[7] a lower performance rating with a corresponding reduction in her performance award, a loss of the opportunity to earn overtime pay, the loss of a file cabinet and the loss of the use of a laptop computer, the effect of which was to make it more difficult for her to work at home. In addition, Ms. Schnitz, who formerly

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The action is at times identified as a reorganization. The distinction is not crucial to the issues in this case and the terms have been used interchangeably.

6
Although it was alleged that Ms. Chen's duties were substantially modified, there was no evidence to support that proposition. Ms. Chen did not testify.

7
It has not been alleged that Ms. Schnitz was required to perform functions outside of her job description.

occupied a 130 square foot office with windows on the fifth

floor, was moved to a 115 square foot office without windows on the sixth floor.[8]

The General Counsel argues that the Union is entitled to a SQA remedy which would require the Respondent to rescind the realignment and move all of the affected employees to their former offices and work stations.

Respondent

The Respondent maintains that it was entitled to implement the realignment, which was an exercise of its management rights under §7106(a) of the Statute, because, in spite of repeated requests, the Union never submitted bargaining proposals which identified or related to adverse effects on bargaining unit employees. The Respondent provided all of the information requested by the Union and delayed the physical relocation of the two bargaining unit employees while attempting to induce the Union to focus on substantive, rather than groundrule, issues. Specifically, the Respondent was not informed of the alleged adverse effects on Deborah Schnitz until she testified at the hearing.[9] It has never been made aware of allegedly adverse effects on other employees. The Respondent maintains that the relocation of Mr. Nelson and Ms. Schnitz was accomplished according to the procedure contained in the collective bargaining agreement. If Ms. Schnitz was dissatisfied with her office and equipment, the Union should have initiated a grievance on her behalf.[10]

The Union had ample opportunity to bargain prior to the implementation of the realignment and, later, of the relocation.

Findings of Fact

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[8] Fred Nelson, another Actuary, was also assigned to a different office, but has apparently not expressed dissatisfaction with the move. He was allowed to choose his new office before Ms. Schnitz according to an agreed order of precedence.

[9] In view of the Respondent's opposition to the General Counsel's motion to strike a portion of its brief, the Respondent presumably does not deny that it became aware at or before the pre-hearing conference that Ms. Schnitz was generally dissatisfied with her new office.

[10] Only a portion of the language of the collective bargaining agreement regarding office selection is in evidence. The language concerning the grievance procedure has been omitted entirely.

Some time in 1999 the Office of Personnel Management ("OPM") conducted a review of the Respondent's Financial Operations Department ("FOD"). The report of that review included a recommendation that the Respondent transfer certain auditing functions from the Premium Audit and Investigation Branch ("PAIB") of FOD to the Contracts and Controls Review Department ("CCRD"). The Respondent decided to implement the OPM recommendation and, by memorandum dated December 22, 1999 (GC Ex. 3), Respondent informed Valda Johnson, the president of the Union, that it intended to "organizationally relocate" the premium audit function from FOD to CCRD. Four permanent full time employees would be transferred: two actuaries, including Deborah Schnitz, and two auditors. The Union was requested to respond within five working days if it had any suggestions or issues concerning impact and implementation over which it wished to bargain.

By memorandum dated December 29, 1999 (GC Ex. 4), Stuart Bernsen, the executive vice president of the Union, informed the Respondent that the Union was invoking its right to bargain. The Respondent was requested to provide a briefing in accordance with Section 62.2 of the collective bargaining agreement[11] and an opportunity to provide additional comments after the briefing. The Union requested documents setting forth the reasons for the change in organization as well as those describing how CCRD would interact with the Collections and Compliance Division of FOD. The Union also requested documents pertaining to changes in office space or office assignment and a statement as to whether the positions being reassigned to

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11 Section 62.2 provides that, "The Chapter [*i.e.*, the Union] shall submit its request for information and/or briefings as soon as possible following notice of a change in working conditions." The only contractual language quoted or summarized in this Decision is that which is included in Respondent's Exhibit 1; that is the only portion of the collective bargaining agreement in evidence.

CCRD were considered to be part of the bargaining unit.[12] Finally, the Union asked if the affected employees were to be relocated from the sixth to the fifth floor and indicated that it would submit proposed groundrules for bargaining as well as substantive proposals on or before January 14, 2000, unless the parties agreed to another date. The letter cited Section 62.2, Section 62.3, which establishes time limits for the submission of written substantive proposals, and Section 62.4, which allows for the submission of additional groundrule proposals with the proviso that they are to be bargained only by mutual consent, ". . . unless the proposal patently and exclusively addresses the timing, scheduling, frequency or duration of the negotiations."

In a memorandum dated January 4, 2000 (GC Ex. 5), Janet Haddad, the manager of Respondent's Human Resources Department, provided Mr. Bernsen with the descriptions for the positions of Actuary, Auditor and Office Automation Clerk. The memorandum stated that those were the only positions to be organizationally relocated and that the Respondent's intent was for their duties, responsibilities and bargaining unit status to remain the same. No decision had yet been made as to the physical relocation of the employees or as to whether they would be moved to the fifth floor. However, the Respondent stated that it would bargain prior to the implementation of such moves. The Union was invited to attend a briefing which was scheduled for management officials on the next day. Mr. Bernsen was reminded that Section 62.3 of the collective bargaining agreement required the Union to submit proposals within 15 days of notification of the impending change. However, the Respondent stated that it would allow an extension until January 14 because of the holidays and "current negotiations."[13]

On January 5, 2000, Ms. Haddad sent Mr. Bernsen a memorandum with two documents which were identified as preliminary drawings of office space. The memorandum states that the Respondent was exploring the possibility of relocating the premium audit function to the fifth floor; no decision had been made as to whether the space would be occupied by bargaining unit employees and no construction would occur prior to bargaining over office space.

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[12] The four full time employees affected by the reorganization were within the bargaining unit at that time.

[13] Presumably, the Respondent was referring to negotiations over the collective bargaining agreement as a whole.

On January 12, 2000, the Respondent provided the Union with a copy of the portion of the OPM report containing the recommendation for the relocation of the premium audit function (Respondent's Ex. 2).

By memorandum of January 14, 2000, the Union submitted 12 groundrule proposals and 18 substantive proposals (GC Ex. 7). In the memorandum the Union requested, "assurance from the Employer that this reorganization is not part of a larger reorganization that is being done piecemeal." Among the so-called groundrule proposals was a proposal that the Respondent not implement the reorganization until the parties had reached agreement or until any impasses were completely resolved (Groundrule Proposal 8). The Union also proposed that, if the Respondent intended to further reorganize FOD, bargaining would be delayed until the complete plan of reorganization is announced and that, if the Respondent implemented a further reorganization of FOD during the current fiscal year, there would be a return to the *status quo ante* at the election of the Union (Groundrule Proposal 10).[14]

The Union's substantive proposals included requests for guarantees that the employees affected by the reorganization would suffer no loss of pay, benefits or entitlement to step increases, "except as otherwise provided in this Agreement" (Proposal 4).[15] Perhaps the most far-reaching aspect of the proposals was that the four affected PAIB employees would be entitled to priority in lateral placement in any position with the Respondent for which they are deemed even minimally qualified after a waiver of nonmandatory qualifications to the extent possible (Proposal 8). As part of this arrangement, the Union also proposed a detailed scheme of selecting employees for lateral placements which are declined by the affected employees and a freeze of outside hiring for positions for which the affected employees qualify or may be eligible to apply for on a competitive basis. This freeze was to continue until every affected employee is placed or voluntarily terminates employment (Proposals 7 through 12).

14
The proposal was substantially restated in Proposal 18 of the Union's substantive proposals.

15
The language quoted raises the intriguing inference that the Union foresaw the possibility that it might agree to losses in pay and benefits by affected employees. In any event, neither the Union nor the Respondent subsequently raised the issue.

Another notable proposal was that the four affected employees receive a performance appraisal from their current supervisor for the period from October 1, 1999, through the date when the parties reach agreement. Each of those employees receiving a rating of outstanding or excellent would receive a performance award or a step increase (Proposal 17).

The Respondent implemented the realignment on January 16, 2000, without physically relocating any bargaining unit employees.

By memorandum dated February 2, 2000 (GC Ex. 9), Ms. Haddad reminded Mr. Bernsen that the Respondent had assured the Union that the organizational relocation would not result in changes to duties or job descriptions. She again requested that the Union submit its proposals concerning the impact and implementation of the impending change and emphasized the Respondent's desire to address issues regarding office relocation.

Mr. Bernsen responded on February 7, 2000, stating that the Union looked forward to receiving written proposals from the Respondent and that it intended to submit its own supplemental proposals (GC Ex. 10).

On February 8, 2000, Raymond M. Forster, a member of the staff of the Respondent's General Counsel and of its bargaining committee, provided Mr. Bernsen with the agency seniority dates of the three employees who were to be physically relocated[16]. He again stated that all three of the employees would undergo no changes in their job descriptions and that their performance standards would remain the same. In response to the Union's request for bargaining proposals, Mr. Forster stated that the Respondent would follow the provisions of the expired collective bargaining agreement with regard to the construction and assignment of new offices. He proposed a meeting with the Union's bargaining committee on February 10 and thereafter as needed (GC Ex. 11).

The Union and the Respondent subsequently exchanged a number of communications in an unsuccessful attempt to schedule a bargaining session. Those attempts were frustrated by conflicts in the schedules of members of their respective bargaining committees. Bargaining sessions eventually were held in early March and on April 5. Although the record contains no minutes or notes of the

[16] Only two employees, Fred Nelson and Deborah Schnitz, were eventually moved to new offices on or about June 1, 2000.

bargaining sessions, both the testimony of witnesses for each of the parties as well as written communications indicate that the Respondent repeatedly requested that the Union identify the adverse effects on bargaining unit employees which it felt were associated with the realignment. The evidence further indicates that, while the Union continued to express concern over the realignment, it never identified such adverse effects other than changes in job classifications and pay grades. The Respondent repeatedly assured the Union that there would be no changes and the evidence is uncontradicted that such changes did not occur. However, the Union does maintain that Ms. Schnitz suffered adverse *de facto* changes in her duties. Those allegations, which were presented for the first time at the hearing, will be addressed below.

By an e-mail message dated March 21, 2000, with copies to Ms. Schnitz and Mr. Nelson, Respondent informed the Union that construction of four new offices in CCRD had commenced but that no immediate relocations were contemplated. The Respondent expressed the hope of concluding negotiations at a bargaining session scheduled for March 29.[17]

On May 1, 2000, the parties commenced an exchange of e-mail messages concerning office relocation (Respondent's Ex. 7); a copy of each message was sent to Ms. Schnitz and Mr. Nelson. The exchange was initiated by the Respondent which informed the Union that construction of new offices in the CCRD work area had been completed and suggested that the parties meet on May 4 or thereafter to discuss the new offices for Ms. Schnitz and Mr. Nelson. Alternatively, Respondent suggested that each of the two employees express their individual preferences. The Respondent also indicated that a decision on office space had to be made by May 8. The Union responded on May 3, stating that it did not choose to engage in "piecemeal bargaining" and that it did not recognize the "unlawful implementation of the construction". The Union further stated that it would not be available for negotiations on the reorganization until after June 6 and demanded that the office relocations be held in abeyance. On May 12 the Respondent informed the Union that it was implementing the office move in accordance with Article 58 of the collective bargaining agreement and that Ms. Schnitz and Mr. Nelson had expressed their preferences. The moves were to be accomplished in the near future. The relocation was accomplished on or about June 1, 2000.

17
The record is unclear as to whether bargaining occurred on that date.

There is no evidence of further bargaining over the reorganization or the relocation of employees. The unfair labor practice charge was filed on July 14, 2000 (GC Ex. 1(a)).

Discussion and Analysis

Management Rights and the Duty to Bargain

The General Counsel does not contest the proposition that the reorganization which the Respondent undertook in response to the OPM report was a valid exercise of management rights as defined in §7106 of the Statute. The reorganization would have fallen within the statutory definition even if it had it not been recommended by OPM. Neither the Union nor, indeed, the Authority is authorized to delve into the merits of the Respondent's changes to its own organization. The exercise of management rights is, therefore, excluded from the duty to bargain. The Respondent's duty to bargain, if any, is limited to proposals by the Union concerning procedures to be used by the Respondent in exercising management authority and arrangements for employees who have been adversely affected by the exercise of management authority.[18] Those subjects are collectively referred to as "impact and implementation".

In order for the Union to establish that any of its proposals was an "arrangement" within the meaning of §7106, it must have identified the effects, or reasonably foreseeable effects, on bargaining unit employees that flowed from the exercise of the management right and how those effects are adverse, *NAGE, Local R1-109 and U.S. Dept. of Veterans Affairs, Connecticut Healthcare System, Newington, Connecticut*, 56 FLRA 1043 (2001). In the words of the Authority:

> Proposals that address purely speculative or hypothetical concerns, or that are unrelated to management's exercise of its reserved rights, do not constitute arrangements (*Id.* at 1044).

Furthermore, an agency is not obligated to bargain over the impact and implementation of a management right that has only a *de minimis* effect on conditions of employment, *Dept. of Health and Human Services*, 24 FLRA 403, 407 (1986). When a proposal constitutes an arrangement, *i.e.*, when it

[18] It is axiomatic that the Respondent would have no duty to complete bargaining on subjects over which it was not required to bargain in the first place.

addresses an adverse effect that is more than *de minimis*, it then falls to the Authority to determine whether the arrangement is appropriate or whether it excessively interferes with the exercise of a management right, *NAGE, supra*. More specifically, the Authority must determine whether the negative impact of a union proposal on the exercise of management rights is disproportionate to the benefit of the proposal to employees, *NTEU and U.S. Dept. of the Treasury, Office of Chief Counsel, Internal Revenue Service*, 39 FLRA 27, 58 (1991).

It is against all of the above standards, as well as governing portions of the collective bargaining agreement, that the Union's proposals must be measured in order to determine whether the Respondent failed in its duty to complete bargaining.[19] The only proposals submitted by the Union are contained in Mr. Bernsen's memorandum of January 14, 2000 (GC Ex. 7). They will be addressed in the order stated.

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[19] It is not alleged, and the evidence does not indicate, that the Union's ability to submit substantive proposals was limited by the Respondent's failure to provide timely information concerning the reorganization and the relocation of employees.

Groundrule Proposals

The first twelve proposals are under the heading of "Groundrules". Those proposals must be evaluated in the context of Section 62.4 of the collective bargaining agreement. It is unnecessary to determine whether the Union and the Respondent specifically discussed all of the groundrules proposals since the Respondent did not consent to expand the scope of bargaining beyond the contractual limits. Furthermore, the General Counsel has not alleged that the Respondent refused to complete bargaining over the timing, scheduling, frequency or duration of negotiations except with regard to the Union's demand that no changes occur until all issues were settled regardless of the delay in completing negotiations. Even if that were not so, the overwhelming weight of the evidence is to the effect that most of the communications between the Union and the Respondent were devoted to those subjects rather than to substantive matters. Indeed, the difficulty in agreeing upon the scheduling of bargaining sessions substantially contributed to the delay during which the Respondent implemented the reorganization and, later, the physical relocation of the two employees.

Substantive Proposals

The Union submitted eighteen substantive proposals. Proposal 1 is no more than the description and names of each of the employees who were currently employed in the PAIB. That "issue" was never in dispute. The issue of the completion of bargaining over that proposal is inapposite to the issues raised by the General Counsel because there was no need to bargain in the first place.

Proposals 2 through 5 are concerned with the prevention of the loss of pay, position, benefits, anniversary dates for step increases and maintenance of status as full time permanent members of the bargaining unit. Again, the Respondent assured the Union at the outset that there would be no such changes. It is not alleged that the Respondent has subsequently acted contrary to those assurances.

The Respondent was only obligated to bargain over appropriate arrangements. In the case of Proposals 2 through 5 the adverse effects to be addressed are obvious but they were fully addressed by the Respondent. The remaining proposals are, for the most part, concerned with the establishment of a hiring freeze and special preference

for lateral transfers.[20] If those proposals were read without knowledge of the underlying circumstances, it might be supposed that the Respondent had announced its intention to implement a reduction in force or to close one of its facilities.[21] Such a supposition would be reinforced by the Union's characterization of the realignment of the auditing function as a reassignment and its reference to the effected employees as "Reassigned Employees". Although the General Counsel has alleged that the Respondent had a duty to continue bargaining as to the remainder of the proposals, there is no evidence that the Union ever identified the adverse effects that the proposals were designed to alleviate. The allegation by the General Counsel of a duty to bargain, without further support, is insufficient to meet the burden of proof by a preponderance of the evidence as required by §2423.32 of the Rules and Regulations of the Authority.

The General Counsel argues that the Union submitted "at least one" negotiable proposal, which was Proposal 6. Proposal 6 seeks to allow the two PAIB auditors, Anne Chen and Emil Meny-Plunkett to express their preferences as to remaining in FOD or being reassigned to CCRD. The Union did not propose that the employees' preferences would be binding, but only that they would be considered. Even if the Union had identified the adverse effects that this proposal was designed to alleviate,[22] it would still have been rendered moot by the fact that the Respondent informed the Union that those two employees were no longer involved in the realignment.

The Relocation of Offices

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[20] There are three exceptions. Proposal 13 states that violations of the "agreement" may be grieved in accordance with Article 55 of the collective bargaining agreement. Proposal 14 provides for the preservation of the rights of employees under the collective bargaining agreement or under any law, regulation or PBGC directive. Although styled as proposals, they are actually requests for legal stipulations. Proposal 15 is a demand that each of the effected employees be given a window office of at least 130 square feet. That proposal will be discussed separately.

[21] The unfair labor practice charge refers to a reduction in force.

[22] If the General Counsel maintains that the effect of the realignment was inherently adverse, he has failed to support that proposition.

There is no evidence that anyone other than Deborah Schnitz was dissatisfied with the relocation of offices. The Union does not maintain that the mere fact that employees were to be moved from the sixth to the fifth floor was, in itself, an adverse effect. In any event, the move itself was *de minimis*. Ms. Schnitz did not become aware of her new office assignment until some time between May 12 and June 1, 2000, and thus, neither she nor the Union could have had prior knowledge of the alleged deficiencies in her office. It is significant to note, however, that there is no evidence either that she complained to the Union or that the Union communicated her concerns to the Respondent between the date of the move and the date of the filing of the unfair labor practice charge on July 14, 2000. The significance of this lack of communication is not that the Union waived its right to negotiate, but that the alleged problems with Ms. Schnitz's office are not a part of this proceeding. If the Union felt that Ms. Schnitz's new office assignment was a violation of the collective bargaining agreement, it could have initiated a grievance on her behalf and possibly can still do so if it would not be time-barred.[23]

The General Counsel argues that Ms. Schnitz should not have been relocated prior to the completion of bargaining because the Union had proposed that employees be given window offices of at least 130 square feet. According to the General Counsel, the Respondent is not entitled to rely on its alleged compliance with Article 58 of the collective bargaining agreement because it has not proven the status of what the General Counsel identifies as the "pseudo contract" (see footnote 2). Yet, the Respondent introduced a portion of the collective bargaining agreement into evidence without objection and the General Counsel gave no indication that it intended to challenge its legal status. Furthermore, the General Counsel has cited no basis for the proposition that an expired collective bargaining agreement is not binding when it has been neither explicitly or implicitly disavowed by the parties and when the parties have continued to rely upon it.

The General Counsel also maintains that the Respondent has not complied with the provisions of Article 58 because

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[23] This general reference to a grievance procedure which is not in evidence is not inconsistent with the granting of the General Counsel's motion to strike a portion of the Respondent's brief. §7121 of the Statute requires the inclusion of grievance procedures in all collective bargaining agreements. The Union itself reserved the right to grieve in its initial proposals (GC Ex. 7, Proposal 13).

Ms. Schnitz and Mr. Nelson were not lawfully "reassigned" inasmuch as the Respondent had not fulfilled its bargaining obligation concerning the implementation and impact of the realignment. As stated above, the Respondent had no such obligation because the Union had not identified adverse effects on employees.

Finally, the General Counsel argues that the Respondent violated Article 58 because Ms. Schnitz, as a GS-13 employee, was entitled to an office of at least 120 square feet. If that is so, it is not supported by the evidence. Only Sections, 58.1, 58.2 and a portion of 58.3 were submitted at the hearing. That language does not suggest the establishment of minimum office sizes, but rather a procedure for employees to apply for vacant offices as well as the qualifications for applicants for offices of various sizes. The meaning of Article 58 can most appropriately be resolved by an arbitrator whose award would be subject to review by the Authority in accordance with §7122 of the Statute. It should be noted that the Authority has a well-defined policy of deference to the contractual interpretations of arbitrators, *U.S. Dept. of Justice, Bureau of Prisons, Federal Correctional Institution, Loretta, Pennsylvania and AFGE, Local 3951*, 55 FLRA 339, 342 (1999).

Ms. Schnitz testified as to a number of allegedly adverse effects arising out of the realignment. Some of those effects were related to the nature of her duties and others concerned her office equipment. There is no evidence to show that her concerns had previously been communicated to the Respondent. A belated statement of adverse effects cannot serve to impose a retroactive duty to bargain on the Respondent.[24]

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[24] It is not necessary to reach the issue of whether the adverse effects contained in Ms. Schnitz's testimony would justify a future demand by the Union for bargaining over the realignment.

In summary, the evidence shows that the failure of the Union

and the Respondent to come to terms over the impact and implementation of the realignment was primarily the result of the Union's preoccupation with elaborate groundrule proposals as well as substantive proposals which were unsupported by even the most cursory statement of alleged adverse effects which the proposals were designed to remedy. That defect could not be counterbalanced by repeated demands that the Respondent reverse or delay a realignment which fell squarely within its management rights as defined by the Statute.

For the foregoing reasons I have concluded that the Respondent did not violate §§7116(a)(1) and (5) of the Statute and recommend that the Authority issue the following order:

ORDER

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, May 15, 2002.

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PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-00602, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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