

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

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION Respondent and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 26 Charging Party	Case No. WA-CA-01-0386

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/her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 7, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: September 6, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM
2002

DATE: September 6,

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Respondent

and
CA-01-0386

Case No. WA-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 26

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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-56
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION Respondent and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 26 Charging Party	Case No. WA-CA-01-0386

Barbara Kraft, Esquire
Sarah J. Starrett, Esquire
For the Charging Party

Elizabeth J. Head, Esquire
Michele E. Gonsalves, Esquire
For the Respondent

Jeanne Marie Corrado, Esquire
Lisa Belasco, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed by the American Federation of State, County and Municipal Employees, Council 26 (the Charging Party/Union), against the Department of Transportation, Federal Aviation Administration (the Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the Washington Region, Federal Labor Relations Authority (the Authority/FLRA). The complaint alleged that the Respondent violated section 7116(a)(1)(5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101,

et seq. (the Statute), by its refusal to execute the collective bargaining agreement reached between the parties on February 21, 2001, in accordance with section 7114(b) (5) of the Statute.

A hearing in this matter was held in Washington, D.C. on December 5 and 6, 2001. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. The Respondent, General Counsel and the Charging Party all filed timely briefs. The parties were also afforded the opportunity to file reply briefs and both the General Counsel and the Respondent filed such reply briefs.

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

Jurisdictional Issue

In March 1996, section 437 of the Department of Transportation and Related Appropriations Act (Transportation Act) exempted the Agency from nearly all of title 5 and provided that it should develop and implement a personnel management system. Pub. L. No. 104-50, Title iii, § 347(b), 109 Stat. 460 (1995), as amended by Pub. L. No. 104-122, 110 Stat. 876 (1996) (codified at 49 U.S.C. § 106 note). Immediately following, the Federal Aviation Reauthorization Act of 1996 (FAA Act) was passed, providing that "[i]n developing and making changes to the personnel management system . . . the Administrator shall negotiate with the exclusive bargaining representatives of employees of the [FAA] under section 7111 of title 5[.]" *U.S. Department of Transportation, Federal Aviation Administration and Professional Airways Systems Specialists*, 56 FLRA 627, 628 (2000).

The Agency's collective bargaining obligations in the context of this new personnel system are codified at 49 U.S.C. § 40122 *et. seq.* This Congressionally mandated authority to negotiate wages is a significant departure from the typical government pay scheme set forth in the Civil Service Reform Act, 5 U.S.C. § 7101 *et. seq.*

49 U.S.C. § 40122 provides:

- (a) In general --
 - (1) Consultation and Negotiation. In developing and making changes to the personnel and management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the

Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.

(2) Mediation - If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress. The 60-day period shall not include any period during which Congress has adjourned sine die.

The Respondent argues that Congress preempted the provisions of title 5, Chapter 71 that govern the Authority's jurisdiction to hear disputes involving the FAA and arising out of pay negotiations. There is no reference to the Authority's role in this new scheme. Rather the Act directs the parties to seek mediation service of the Federal Mediation and Conciliation Service (FMCS) in an effort to resolve their differences and reach agreement. In the event the FMCS cannot facilitate an agreement between the parties, Congress reserved for itself the role of ultimate decision-maker in resolving FAA pay disputes. If Congress does not act, then the Administrator's proposal will be implemented. The Respondent argues that Congress clearly intended that pay disputes under the new scheme would be placed before the FMCS and not the Federal Service Impasses Panel (FSIP) or the Federal Labor Relations Authority. Accordingly, Respondent argues that the Authority should not assert jurisdiction over this dispute.

Both the General Counsel and the Union disagree with this position and argue that the unfair labor practice charge is properly before the Administrative Law Judge and the Authority. Both the General Counsel and the Union argue that the parties in this cases were not at impasse over the establishment of or a change to Respondent's personnel management system and further note that the parties, particularly the Respondent, never requested the services of FMCS. They both argue that the Respondent and the Union reached agreement over the terms of a collective bargaining agreement and the Respondent refused to execute that

agreement. Thus they argue that the Transportation Act does not affect the Authority's jurisdiction in this matter.

In the absence of extensive legislative history, the language of the Act must be construed according to its plain meaning. See generally *National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky*, 51 FLRA 386, 389-91 (1995). Moreover, it is also a well-recognized rule of statutory construction that "the plain meaning of the statute controls, and the courts will look no further, unless its application leads to unreasonable results." *United States v. Dass*, 198 F.3d 1167, 1174 (9th Cir. 1999).

The issue regarding the Transportation Act was raised in *Federal Aviation Administration*, 55 FLRA 1271 (2000). The Authority found that the Respondent had violated the Statute when it repudiated a Memorandum of Understanding that linked performance awards to rating levels for bargaining unit employees. The Judge further determined that bargaining unit employees were entitled to make whole relief under the Back Pay Act for the loss of performance awards. The Respondent filed exceptions to the Judge's decision, including an exception that under the Transportation Act, the Back Pay Act was no longer applicable to the Respondent. The Respondent also contended that even though the Statute applies to the Respondent under the Transportation Act, section 7118(a)(7)(C) restricts backpay awards by the Authority in accordance with the Back Pay Act to situations requiring the reinstatement of an employee.¹

The Authority denied Respondent's exceptions, finding that the Transportation Act does not prevent the Authority from ordering a make whole remedy based on the Back Pay Act. The Authority found that the Transportation Act was not so broadly written as to exempt the Respondent from the various provisions of law the Act references. Further, at the time of the Respondent's repudiation of the Memorandum of Understanding (MOU), it was not the new Performance Planning and Recognition System (PPRS), but rather the "old" personnel system that still covered the bargaining unit, and therefore the provisions of the Transportation Act were irrelevant.

¹

Interestingly, the Respondent did not assert that the Authority did not have jurisdiction to decide the dispute in the case.

However, the Authority further found that even if the Transportation Act was not irrelevant, the Act would not preclude a make whole remedy in that case.

In this regard, . . . , section 347(b) of the Transportation Act exempts the Respondent's PPRS from many provisions of title 5, United States Code. However, it also specifically makes applicable to the PPRS "chapter 71 [of title 5], relating to labor-management relations," i.e., the Statute. The Statute, in turn, not only establishes the framework of rights and responsibilities that underlies labor-management relations in the federal service; it also assigns the Authority the responsibility to administer the Statute and, of particular relevance here, broadly empowers the Authority to issue appropriate orders to remedy ULPs. 55 FLRA at 1275.

In Professional Airways Systems Specialists and U.S. Department of Transportation, Federal Aviation Administration and U.S. Department of Transportation, Federal Aviation Administration, Pittsburgh, Pennsylvania, 56 FLRA 798 (2000), a negotiability case, the Union asserted that the FAA Act diminished the Agency's rights under section 7106 of the Statute. The Authority disagreed, finding:

The FAA Act granted the FAA Administrator discretion to institute a personnel system in which "[t]he provision of title 5, United States Code, shall not apply" FAA Act, section 347(b). Thus, the Agency is not bound by many statutes that govern other federal agencies. However, the FAA Act, as amended, sets out several provisions of title 5 that continue to apply to the Agency, including the Statute. *Id.*, section 347(b) (3) (specifying that "chapter 71, relating to labor-management relations" does apply.) 56 FLRA at 800.

In U.S. Department of Transportation, Federal Aviation Administration and Professional Airways Systems Specialists, 56 FLRA 627 (2000), the Arbitrator ruled that the Agency did not have the discretion to grant employees all, part or none of the 1999 government-wide general pay increase. The Agency filed exceptions, asserting that the Arbitrator did not have jurisdiction to resolve the grievance under section 253 of the FAA Act. A second exception argued that since the Agency is no longer covered by the pay provisions of title 5, the general schedule pay adjustments under that title are not applicable to Agency employees.

The Authority denied the Agency's exceptions, stating, as follows:

As set forth above, the FAA Act requires the Agency to negotiate with a union and, absent agreement, submit to FMCS, "changes to the personnel management system. . . ." 49 U.S.C. § 40122(a)(1). The parties' dispute does not involve negotiations over changes to the PMS. Rather, the issue is whether the Agency had the discretion to grant or deny the 1999 pay increase. That is, the parties' dispute revolves around employee entitlements under the existing system. 56 FLRA at 629.

The Authority found the Arbitrator did have jurisdiction, noting "[a]s the matter at issue in the grievance and resolved by the Arbitrator arises from the personnel management system and does not involve negotiations over developing or making changes to that system, we find that the Arbitrator had jurisdiction under section 253 of the FAA Act to resolve the grievance." 56 FLRA at 629.

The matter before me involves the negotiations between the Respondent and the Charging Party for a single collective bargaining agreement for four newly established bargaining units at FAA. The Respondent argues that the FAA Act takes responsibility from the Authority and gives it to the FMCS and ultimately from Congress. Both the General Counsel and the Charging Party disagree.

The FAA Act requires the Agency to negotiate with the union and, absent agreement, submit to FMCS, "changes to the personnel management system". 49 U.S.C. § 40122(a)(1).

Clearly Congress created this exception to the Statute in the unique situation in which the only issue would be "changes to the personnel management system". Congress did not eliminate the FAA from other aspects of the Federal Service Labor-Management Relations Statute, such as the duty to bargain in good faith. And such issues are the responsibility of the Authority to ultimately decide. Congress neither took that responsibility for itself or removed the FAA from the Authority's responsibility.

It is clear that in this narrow range of issues, Congress eliminated the need for the FSIP and gave responsibility to the FMCS and then Congress itself. However, in the instant matter, neither the Respondent nor the Union, at any time, declared an inability to reach agreement and sought the services of FMCS. Nor were there any "changes to the personnel management system" that were

clearly identified and then changed by the Administrator of the FAA under the FAA Act.

Respondent's reliance on the FAA Act to remove the Authority from jurisdiction in this matter is misplaced. I find that the Authority, and therefore the Administrative Law Judge, have jurisdiction in this matter.

Statement of the Facts

Background Information

The American Federation of State, County and Municipal Employees, Council 26 (the Union) is the exclusive representative of four units of employees appropriate for collective bargaining at the Federal Aviation Administration, Washington, D.C. The Respondent and the Union agreed to negotiate on one collective bargaining agreement for the four bargaining units described above. (G.C. Exs. 1(b) and 1(f)).

The Union's primary representative on its bargaining team was Steven Kreisberg, Associate Director, Department of Research and Collective Bargaining Services, AFSCME. Each of the four bargaining units elected representatives for the bargaining committee. There were approximately 24 members on the Union bargaining committee, with Kreisberg as the primary spokesperson. The Respondent had two co-representatives on its bargaining team: Anthony Herman, a partner in the firm of Covington and Burling and a paid consultant for the FAA, and Raymond B. Thoman, Deputy Assistant Administrator for Labor and Employee Relations. Other management personnel were present during bargaining as needed. (Tr. 75, 77-79, 458, 546, 555).

Following preliminary discussions between the primary representatives of the Union and the Respondent in April and May, 2000, the parties understanding of the ground rules was reduced to writing in a May 24, 2000, letter from Kreisberg to Herman, as follows:

This will confirm our conversations relating to the bargaining process involving the Federal Aviation Administration and the four bargaining units represented by AFSCME Council 26.

1. We agreed that AFSCME may have a total of
24 bargaining unit members on official
time to participate in the bargaining.
2. We agreed on the following schedule:

July 17 through July 20;
August 14 through August 18;
August 28 through September 1; and
September 5 through September 8.

In addition, we agreed to assess our progress towards agreement in September and attempt to agree on additional dates in September in order to meet our goal of a final agreement by October 1, 2000.

3. We agreed that AFSCME will submit our proposals to the FAA in June and, at the request of the FAA, a meeting between the parties may be held in advance of July 17 for the purpose of clarifying the Union's proposals. It is our mutual intention to begin to substantively bargain on July 17.

Although we had not discussed the location of bargaining, I assume we will be bargaining in an appropriate sized room at the FAA's headquarters facility. Please let me know at your earliest opportunity if you do (sic) concur with any of the above. (G.C. Ex. 6; Tr. 79-80).

No other ground rules were submitted in writing by either party. (Tr. 80).

During these initial meetings with Herman, Kreisberg testified that he discussed the AFSCME requirement of ratification by the membership. "My standard practice is to put management on notice that ratification is a necessary condition for us to enter into a contract with the employer. The AFSCME house chief requires ratification." (Tr. 81-82) Herman was familiar with AFSCME and accepted ratification as a natural part of the process. (Tr. 82).

According to Kreisberg, during the ground rules discussions, there was no mention or discussion about the Office of Management and Budget (OMB) and any role it may, or may not, have in the bargaining process. (Tr. 82).

Herman, however, testified that from the very first meeting with Kreisberg and AFSCME International President Gerry McEntee, he made it clear that OMB approval of the contract was a necessary requirement. In fact, he referred to this approval as "the OMB problem" in discussions with McEntee, using this phrase as shorthand for his concern about getting OMB approval. (Tr. 465, 466). According to Herman, in one such conversation with McEntee, McEntee said "If you're telling me OMB is a problem, let me know when the

right time is and I'll call OMB myself, or I'll call the President [Clinton] and fix the problem." (Tr. 469).

By the end of June or early July, the Union had completed its preliminary process, and submitted its comprehensive proposal to the Respondent. The proposal was exhaustive and included all of the subjects the Union wanted to raise during bargaining. (Tr. 83).

Negotiations for the new agreement began in July 2000. At the first bargaining session, Kreisberg, Herman and Thoman made opening remarks and described their work backgrounds. According to the Union witnesses, at no time during this session did the Respondent's representatives indicate that any agreement reached by the parties would be subject to review by OMB. (Tr. 84, 85, 239, 270, 271, 282, 305).

At the first bargaining session, Respondent's witnesses testified that Herman told the participants that management had to take certain steps before any agreement could be final; and those steps were that the agreement had to be approved by the Office of the Secretary of Transportation, by the Office of Management and Budget and by the Congress. (Tr. 459). Herman testified that OMB had taken the position that before any collective bargaining agreement could become final, that OMB had to be consulted and had to approve any tentative agreement. This was true for all agreements negotiated with labor organizations that represented bargaining unit employees at FAA. (Tr. 461-63). Primarily in reference to Article 15 on pay, both Herman and Thoman made statements during the negotiations that there was a need of OMB's blessing or approval. While a proposal might be forwarded for consideration, it would be subject to OMB approval. (Tr. 356) According to William W. Buck, Manager of Air Traffic Labor Relations, Kreisberg objected, stating if you don't have authority to negotiate, then get the people here who can. Both Herman and Thoman responded that they had full authority to bind the agency to a tentative agreement, but as a condition of the negotiations, OMB would have to approve the deal. (Tr. 557-58).

Negotiations for the collective bargaining agreement continued through July, August and September. Additional dates were arranged for October, November and December. The negotiations all took place in Washington, D.C., with most at the FAA headquarters building. (Tr. 84) During the negotiations, when the parties reached agreement on an article, it would be set aside for a clean copy that the Respondent would furnish. The parties would then initial the agreed on article -- Kreisberg for the Union and Thoman

for the Respondent. Those initials signified that the parties had achieved tentative agreement on that article and that discussion was closed on that particular article. The Union and FAA had an understanding that neither party would reopen these agreed-on articles absent extraordinary circumstances or where an agreement in a subsequent article would affect the agreement that they had achieved. (Tr. 86-89) General Counsel's Exhibit 7 is a package of tentative agreements the parties had reached, each article is initialed and dated by Kreisberg and Thoman.²

On or about September 28, 2000, the Respondent, through Tony Herman, and the National Air Traffic Controllers Association, by its President John Carr, reduced to writing their agreement that their collective bargaining agreement would be contingent on approval by OMB and ratification by the NATCA membership. (C.P. Ex. 1). Herman never asked Kreisberg to enter into such an agreement on behalf of the Charging Party. (Tr. 534, 581). Ray Thoman testified that he brought up the NATCA/Engineers agreement at a formal bargaining session in October 2000. He pointed out that the agreement specifically provided for OMB approval of the tentative agreement. (Tr. 559).

The parties continued negotiations, reaching tentative agreement primarily on non-economic issues. In the fall of 2000, there were numerous discussions regarding the issue of pay. (Tr. 94) According to the Union witnesses, Herman first mentioned OMB during a bargaining session at a hotel in Northwest Washington, D.C. in the fall of 2000 when the parties began to discuss the pay portions of the contract. (Tr. 94, 305, 326, 327). At this time, the parties had already tentatively agreed on over half of the 75 contract articles. (Tr. 99, 285, 286, 305, 329). Herman had never raised OMB during the discussion of the already agreed-upon articles. The issue of OMB came up when, in an attempt to press the Respondent into producing an offer, Kreisberg asked Herman and Thoman when he could expect the Respondent to make a pay proposal. (Tr. 94, 244, 327). During a heated exchange, Herman stated that he had a lot of constituents that he had to deal with like the Secretary of Transportation, the FAA Administrator, senior FAA management

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The package is complete, except for three articles: Article 3, dealing with Union rights; Article 51, dealing with ethics and Article 59, unknown subject. (Tr. 87-88) The Union was not aware where these missing articles were. The exhibit was accepted, with knowledge that the three articles were missing and would be provided if possible. No additional articles were submitted after the hearing.

and the OMB. (Tr. 95, 244, 327). Herman indicated that he had to get authority from these constituents before coming to the bargaining table and dealing with the Charging Party. (Tr. 95, 282, 308). Kreisberg responded that if Herman did not have the authority to bargain, then he should bring the people there that had the authority to bargain. (Tr. 96, 250, 283, 327). Herman responded with words to the effect that he had full authority to bargain and that when he made the Charging Party an offer it was one that they could take to the bank. (Tr. 96, 283, 328). The issue of OMB was raised at other formal negotiating sessions, but Herman consistently portrayed that he would have to consult with OMB, like his other constituencies - the FAA Administrator, the Secretary of Transportation, etc., prior to making the Charging Party an offer on pay. (Tr. 96, 244, 245, 246, 311). Neither Herman nor Thoman portrayed OMB's involvement as an after the fact approval of the parties' agreement, and the Charging Party never agreed to such a condition. (Tr. 97, 251, 252, 287, 330).

The Union never agreed that OMB approval of the agreement would be all right. (Tr. 98) Kreisberg asserted he would never have agreed to such a condition. He was aware of 7114(c) review³ and would consider that to be the only review that would be required. "[I]t's the last thing I would ever agree to, is to allow somebody who's not at the bargaining table to come in and disapprove an agreement I'd reached at the bargaining table." (Tr. 99).

By December 2000, the parties had reached agreement on a majority of the articles in the contract, however, they had not been able to reach an agreement on pay and pay related articles. Kreisberg, AFSCME International President

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Section 7114(c) (1) states: (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency. (2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision). (3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation. (4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

McEntee and Herman met several times in the latter part of 2000 and early 2001. The purpose of these meetings was to facilitate a discussion on the pay and the pay related issues in the agreement. At no time during those meetings did Herman indicate that the Respondent needed OMB approval of the contract or any pay article. (Tr. 153, 154). Herman consistently represented that OMB would have to authorize offers in advance, and that he had to get authority to make offers from the Secretary of Transportation, the Administrator or OMB. (Tr. 153, 154). When McEntee questioned Herman's authority to negotiate, and suggested that the Charging Party should talk directly to OMB, Herman consistently indicated that he had authority to negotiate for the Respondent, and that "it wasn't about anybody else approving it after the fact" (Tr. 155).

On January 19, 2001, Kreisberg attended a high level meeting with Herman, Rodney Slater - Secretary of Transportation, Mortimer Downey - Deputy Secretary of Transportation, Jane Garvey - FAA Administrator, and McEntee. A female attorney from the Department of Transportation, Office of the General Counsel, whose name is unknown, was also in attendance. Secretary Slater called the meeting in order to facilitate the parties in reaching an agreement on the remaining issues. (Tr. 100). During this meeting, which lasted several hours, the parties reached agreement on the pay percentage salary increases employees would receive from October 1, 2000 through October 31, 2007. (Tr. 104, 106-07; G.C. Ex. 8). The parties also reached agreement on the parameters for other pay related articles covering sick leave buy back, child care subsidies and annual leave carryover. (Tr. 109-12; G.C. Ex. 8). Herman reduced the parties' agreement to a handwritten document, and Herman and Kreisberg initialed off on the document. (Tr. 105, G.C. Ex. 8). Garvey indicated that she did not want the parties to release the details of the agreement until she had an opportunity to brief incoming Secretary of Transportation Norman Mineta. (Tr. 112-13). Garvey indicated that, as a matter of respect to her new boss, she wanted to be able to brief him prior to making a major commitment. (Tr. 113). The briefing was "[por]trayed as a kind of protocol issue, more than a substantive review." (Tr. 113). During that meeting, Herman mentioned to Garvey, in Kreisberg's presence, that the agreed-upon percentages were within the parameters set out by OMB. (Tr. 116-17). At no time during the meeting did Herman or any other Respondent representative indicate that the parties' agreement would be subject to OMB approval, nor did the Charging Party agree to such a condition. (Tr. 117). At the conclusion of the January 19, 2001 meeting, the parties

set up a formal bargaining session for January 24, 2001. (Tr. 117).

On January 23, 2001, Kreisberg sent an e-mail message to Herman with an attachment outlining his understanding of the agreement reached on January 19, 2001. The e-mail states, "Please consider the attached 'embargoed.'" Kreisberg used the term "embargoed" because he wanted to let Herman know that he was respecting the FAA Administrator's request that the parties not disclose the terms of the agreement reached on January 19, 2001 until she had briefed the incoming Secretary of Transportation. Herman responded to the e-mail indicating that a Charging Party bargaining team member had disclosed the terms of the agreement and the Administrator was "livid." The message further stated, "Let me also remind you that, as we agreed on Friday, there is no agreement until Secretary-designate Minetta [sic] has been briefed. He has not yet been briefed and probably will not be until he is confirmed, which probably will not happen until sometime next week." Herman's statement about the briefing of Mineta was consistent with Kreisberg's understanding, *i.e.*, that the parties did not have an agreement on the terms reached on January 19, 2001, and by extension the entire agreement, until Mineta had been briefed. (G.C. Ex. 9; Tr. 118-22).

On January 24, 2001, the parties met for a formal bargaining session in a conference room at the law firm of Covington & Burlington. The meeting was originally scheduled so that the terms reached on January 19, 2001 could be presented to the bargaining teams as a whole. However, as Mineta had not yet been briefed, Article 15 was not finalized at this meeting. During this session, the parties resolved all but two articles. Herman, Thoman and Kreisberg had a side-bar discussion on a portion of the cost savings and productivity improvement article on the patio that was adjacent to the room where the teams were meeting. According to Herman and Thoman, they expressed their concerns about having a pay increase not offset by cost savings and how that would impact the OMB approval. Herman testified that he stated: "We're very worried that we're not going to get OMB approval. It's a new Administration. It's a new time. We don't know what this OMB is going to say. We don't know how they're going to react, we want to get as much ammunition as we possibly can to take this deal to them, in the hope that they'll approve it." Kreisberg only responded "I understand." (Tr. 486-87, 559) At the close of the January 24, 2001 meeting, the only articles which had not been TA'd were Article 15 - Salary System, and Article 74 - Cost Savings and Productivity Improvement. According to Kreisberg, at no time during this formal

bargaining session or during the side-bar discussions with Herman and Thoman was the issue of OMB raised. (Tr. 122-26).

The parties scheduled another bargaining session for 12:00 p.m. on January 30, 2001, at the Department of Transportation. The purpose of this meeting was to finalize the agreement, in particular Article 15 and Article 74. At 11:55 a.m. on January 30, 2001, Herman and Thoman called Kreisberg on his cell phone and cancelled the meeting. When Kreisberg asked why the meeting had to be cancelled, either Herman or Thoman indicated that they had not received all their "external clearances". Kreisberg asked them to explain what "external clearances" meant and Herman said, "you don't want to know." They told Kreisberg essentially that they would get back to him when they were ready to go. Kreisberg met with his bargaining team who had assembled for the meeting, and told them that the meeting had been cancelled. (Tr. 126-28).

On Friday, February 2, 2001, Kreisberg received a phone message from either Herman or Thoman at his hotel in Des Moines, Iowa. Kreisberg returned the call and had a conference call with both Herman and Thoman. During this conversation, Herman and Thoman told Kreisberg that they had received all their clearances and approvals, and specifically mentioned that they had gotten approval from OMB. They also indicated that they were ready to fax him an offer. Kreisberg put down the phone, and went to the hotel desk to obtain a fax number which he conveyed to Herman and Thoman. Kreisberg also told them that he would meet with his bargaining team on Monday and he would let them know the outcome of the meeting. Thoman faxed Kreisberg the proposed Article 15, and Herman faxed a paragraph of the Cost Saving and Productivity Improvement Article. (Tr. 129-30; G.C. Ex. 10) At no time during this conversation did Herman or Thoman indicate that these proposals had to be sent back to OMB for approval once the Charging Party agreed to them. (Tr. 135).

On February 5, 2001, Kreisberg met with his bargaining team to discuss the articles faxed to him on February 2, 2001. During that meeting, the Charging Party's team voted to accept both articles and to submit the agreement as a whole to the membership for ratification with a recommendation to vote yes to ratification. (Tr. 136). At the conclusion of the February 5, 2001 meeting, Kreisberg and Brian Klopp, an AFSCME representative, went to Thoman's office and notified him that the parties had a complete agreement, i.e., that the Charging Party had agreed to the articles and that they were sending the agreement to the

membership for ratification. (Tr. 127-29) Thoman asked that Kreisberg not announce the agreement for a day because the Respondent was still waiting for final review from OMB. Kreisberg told Thoman that he was not interested in the OMB's review because at this point, they had a deal. Thoman told Kreisberg that it was not a big deal and that he only needed a day. Kreisberg told Thoman that he would give him a day but that he was not acquiescing to OMB having any approval authority over the agreement (Tr. 138-39) This was the first time any Respondent representative had told Kreisberg that the Respondent was going to submit the contract to OMB after the parties had reached agreement. Kreisberg called Thoman the next day, and Thoman told him that they still didn't have OMB approval. (Tr. 146).

After February 5, Kreisberg had several conversations with Thoman in which they discussed the agreement. Thoman did not have OMB approval, but Kreisberg wanted to release the agreement in order for the Union membership to ratify the agreement and he noted that the Union had never agreed to OMB review. Thoman consistently responded that the Agency needed OMB review. (Tr. 147) There also may have been one or two conversations with Herman to the same effect. (Tr. 148).

Between February 10 and 17, 2001, Kreisberg received, by fax, a clean copy of Article 15 and Article 74 which were dated 1-29-01 and initialed by Thoman. Kreisberg initialed off on both articles and faxed them back to Thoman. (Tr. 141, 142, 145, 146; G.C. Ex. 11). Thoman's office subsequently e-mailed a final copy of the entire collective bargaining agreement to the Charging Party. (Tr. 148; G.C. Ex. 12). In turn, the Charging Party forwarded the agreement to its membership to review prior to ratification. (Tr. 148-49). The ratification vote was held on February 21, 2001, and the membership voted in favor of ratification of the agreement. The FAA was aware of the ratification process as it was held at FAA's facilities. (Tr. 150, 151, 313).

In mid-February 2001, AFSCME bargaining team members Throop and Bender, and Bill Chouinard, an AFSCME, Local 853 steward, went to Thoman's office to discuss a union issue unrelated to the execution of the contract. While they were there, Bender asked Thoman how the contract effort was going. Thoman replied that the Respondent had already briefed OMB and that they had a few questions, but told her not to worry because they still 'have a contract,' and that the Agency just had to finish its end of it. Thoman also indicated that the Agency might not be able to get its managers trained on the agreement prior to the ratification

date, but that their "drop dead date" for tying up their loose ends was the date of the ratification vote. Thoman indicated that the Agency might ask the Charging Party for a little more time to train its managers prior to implementation of the agreement. (Tr. 265, 266, 290-92).

On February 21, 2001, Kreisberg received an e-mail from Herman which confirmed an earlier voice mail message and stated:

"This confirms my voicemail yesterday regarding the status of OMB approval. Regrettably, the Bush Administration OMB has yet to approve the tentative agreement reached between AFSCME and FAA on January 19. As you know, that agreement cannot be final until and unless it has been approved by OMB. I hope, but cannot assure you, that OMB approval will be forthcoming in the near future." (G.C. Ex. 13 at 1-2)

Kreisberg immediately responded by e-mail, as follows:

"Although I understand that the agency would like OMB approval of the tentative agreement, I do not concede that the finality of our agreement is contingent upon OMB approval. When we met on January 19th, we agreed that FFA Administrator Garvey could seek approval from incoming Secretary Minetta and, in fact, you canceled a negotiating session scheduled for January 30 because such approval had not yet been received. On February 2, you and Ray Thoman had a telephone conference call with me wherein you told me that both the Secretary and OMB had approved the agreement and Ray faxed me Article 15 and you faxed me a revised proposal on attrition.

OMB is not a party to our agreement and, although I understand OMB may play [a] role in authorizing offers the FAA may make to us, OMB plays no role in approving our final contract.

We remain hopefully that any internal approvals you feel you need are forthcoming in the near term so we can implement this contract immediately without any dispute. But, I must reiterate, AFSCME does not concede that our agreement is contingent on outside approval." (G.C. Ex. 13)

Herman then responded, as follows:

"It is clear that we differ about the need for OMB approval. We have always made clear to you that there can be no agreement without such an approval. I recall discussing this with you and President McEntee at several of our early informal meetings, as well [as] at the formal bargaining table.

Having said that, I share your hope that, as we discussed, this debate is an academic one and that OMB approval will occur shortly as a matter of course. In the meantime, please rest assure[] that Administrator Garvey is doing everything reasonably possible to obtain OMB approval so that the Agreement can be finalized (assuming a successful ratification vote by your members.)" (G.C. Ex. 13)

Kreisberg responded, as follows:

"We disagree about both the need for OMB approval and the content of our conversation. Let's hope we never have to test the issue." (G.C. Ex. 13) (Tr. 152)

On February 22, 2001, the Union and the Respondent, through Kreisberg and Herman, exchanged another series of e-mails on the issue of ratification. Kreisberg first wrote:

"We have ratified the Agreement. At this time we need to execute the sideletters and the Agreement. I request that we seek to do both next week. If you let me know who you plan to have sign the Agreement for the agency, I can prepare a signature page. In the alternative, you can prepare the signature page since you all [know] the parties involved." (G.C. Ex. 14 at 2)

Herman responded, as follows:

"We are pleased that your members have ratified the tentative agreement. Unless and until, however, OMB has approved the tentative agreement, as we repeatedly told you, the agreement cannot be finalized. I am sorry to inform you that such approval has not yet taken place. Therefore, we are not in a position to execute any agreement, nor can we tell you if and when we will be in such a position. When OMB review is complete, we will let you know promptly." (G.C. Ex. 14 at 1)

Kreisberg responded, as follows:

"I understand your position, but I strongly disagree. Not only was a second OMB approval never discussed with us (you told me you obtained approval from OMB prior to making your February 2 offer), such an approval is not contemplated in law. For the past six months I had assumed you and Ray were authorized to bargain with the union. I am surprised to learn now that offers you make to us, which we accept, are now contingent on outside review other than the review required in 5 USC 7114(c). As a courtesy, I will allow you time to coordinate with OMB and any others with whom the agency would like to communicate. It is my hope and expectation that the coordination will be complete by early next week." (G.C. Ex. 14)

Herman responded, as follows:

"We appreciate your patience. Please be assured that we share your interest in finalizing the agreement as soon as possible.

We obviously have a difference of opinion regarding the role of OMB. We have always told you that any agreement between AFSCME and the FAA was conditioned on OMB approval, and neither Ray nor I recall telling you before conveying an offer of February 2 -- or any other time -- that OMB approval had been obtained." (G.C. Ex. 14, Tr. 158-60)

On February 26, 2001, Kreisberg advised Thoman and Herman that the Union had ratified the tentative agreement. He then stated: "In accordance with 5 U.S.C. § 7114(b)(5), I request that the agreement be executed immediately. I also request the execution of the sideletters referenced in Ray Thoman's fax cover sheet of February 2 (pertaining to the effective dates of the 2152 and attorney pay bands). The Union does not acquiesce to any outside review of the agreement other than the review required by 5 U.S.C. § 7114(c). We specifically reject the notion of OMB review and approval of the offer you formally made to us on February 2 and which our members formally ratified on February 21." (G.C. Ex. 15; Tr. 161).

Anthony Herman responded on February 28, 2001, stating "As we have repeatedly informed you, at the formal bargaining table, in meetings with you and Gerry, and in

recent e-mails, the tentative agreement between FAA and AFSCME cannot become final in the absence of OMB approval. I am sorry to inform you that OMB has not yet approved the tentative agreement. Therefore, execution of the agreement at this time would be inappropriate. We remain hopeful that such approval will be forthcoming shortly." (G.C. Ex. 16; Tr. 163).

On March 20, 2001, the Union filed the unfair labor practice charge in this case, alleging that the Respondent violated section 7116(a)(1) and (5) and section 7114(b)(5) of the Statute by refusing to execute a collective bargaining agreement agreed to by the parties. (G.C. Ex. 1(a)).

On May 9, 2001, Herman sent a letter to Kreisberg, stating, "I am sorry to have to confirm that the OMB has decided not to approve our tentative agreement. We stand ready to resume negotiations promptly when it is mutually convenient." (G.C. Ex. 17).

The Respondent has not signed the collective bargaining agreement that the Union's membership ratified on February 21, 2001. The parties have not resumed negotiations on the collective bargaining agreement.

Analysis

Positions of the Parties

General Counsel

Counsel for the General Counsel argues that the Respondent violated section 7116(a)(1)(5) and (8) of the Statute by failing to execute the parties' collective bargaining agreement on or after February 21, 2001. The evidence at the hearing established that: (1) the Union sent representatives to the table who were fully authorized to negotiate an agreement; (2) the Respondent's representatives consistently represented to the Union that they were fully authorized to negotiate an agreement, including a pay agreement; (3) the parties reached agreement on every article of the collective bargaining agreement by February 5, 2001; (4) the AFSCME, Council 26 membership ratified the collective bargaining agreement on February 21, 2001; and (5) the Respondent refused to execute the final agreement.

Counsel for the General Counsel further argues that the Respondent has not met the burden of proof with regard to its defense that throughout the negotiations its

representatives conditioned the finalization of any tentative agreement with the Union on the authorization of OMB. The General Counsel argues that Respondent failed to establish that it notified the Charging Party that the Respondent wanted OMB to approve the parties' agreement prior to execution and that the Charging Party agreed to this requirement as a condition precedent to the execution of the agreement, that is, that the Charging Party clearly and unmistakably waived its right under section 7114(b)2) of the Statute to have authorized representatives at the table for the purpose of negotiating an agreement.

The General Counsel and the Union take the position that the Respondent did not notify the Charging Party's representatives that OMB had to approve the parties' agreement before it would be final. The General Counsel further argues that even assuming the Charging Party had such notice that OMB approval was required after the parties had agreed on pay provisions at the bargaining table, notice alone was not sufficient and there had to be evidence that the Charging Party clearly and unmistakably waived its right to insist that the other party be represented by negotiators who are empowered to represent the party and enter into agreements. The General Counsel argues that OMB approval of a negotiated agreement is not a mandatory subject of bargaining, but rather a waiver of the Charging Party's right to have the Respondent represented by authorized negotiators. The Respondent did not have the statutory right to have the Charging Party agree to OMB approval of a completed agreement. Such a clear and unmistakable waiver by the Charging Party did not occur.

The witnesses on behalf of the Charging Party consistently testified that they were not aware that OMB approval was a condition precedent to Respondent's obligation to execute any agreed-upon contract terms. Rather they testified that it was their understanding that the Respondent would make no offers concerning pay unless they had already received approval by OMB. These witnesses all agreed that the Union never agreed to OMB have approval authority over any agreement that the parties reached. The General Counsel asserts that the evidence fails to establish that the Charging Party either agreed to, or through its conduct, acquiesced in, the condition that a final agreement was contingent on OMB approval.

The General Counsel finally argues that the Charging Party's exercise of its right to seek ratification of the contract did not allow the Respondent to seek OMB approval of the agreement before being bound by the agreement. While the Respondent may argue that OMB approval of the final

agreement was an analog to the Charging Party's ratification of the agreement, the General Counsel denies this and argues that the Respondent has confused the two concepts of the statutory right of a union to seek ratification by its membership and the waiver of a party's right to require that the other party have negotiators empowered to agree to contract terms. Union ratification is a right under the Statute; however, OMB approval requires the waiver by the Charging Party of its right under the Statute for the Respondent to be properly represented at the bargaining table.

Charging Party

The Charging Party asserts that the evidence clearly shows that the parties reached an agreement on terms and conditions of employment in mid-February 2001, which became final after ratification by the Union membership. The parties reached a "meeting of the minds" on all material terms of the agreement, including pay and productivity articles. Respondent's failure to execute the agreement is therefore a violation of the Statute.

The Charging Party argues that the Respondent's negotiators had both actual and apparent authority to reach agreement and to bind the Respondent on all aspects of the collective bargaining agreement, including pay. OMB has no statutory role in this process. The only approval contemplated by the Statute is the right of the agency head to approve or disapprove agreements within 30 days after execution if they are inconsistent with statute, rule or regulation, as set forth in section 7114(c). Neither OMB nor any other Federal agency has the legal authority to substitute its judgment for that of the agency in this arena.

Further the Charging Party asserts that the record evidence shows that the Union never agreed to any post-ratification veto by OMB or that it gave a clear and unmistakable waiver of its right to negotiate with fully authorized representatives of management. The Union repeatedly objected to any suggestion that OMB should play a substantive role in the negotiations.

Respondent

The Respondent argues that its conduct was not a violation of the Statute. Even with the new legislation (the Transportation Act), FAA labor agreements must comply with the federal government's budgetary guidelines and policies. The FAA therefore agreed to make OMB's approval

a condition to the execution of its labor agreements. This procedure had also been utilized successfully in two previous collective bargaining agreements -- with the National Air Traffic Controllers Union Engineers and Architects (C.P. Ex. 1) and Professional Airways Systems Specialists. Respondent argues that its condition that its final assent to the contract would be contingent on OMB approval was an internal matter and not the province or concern of the Union, similar to the Union's ratification procedure which is an internal union matter outside the province or concern of the FAA.

Because OMB did not approve the agreement, there was no final agreement for the FAA to sign. It is well settled that the duty of the Agency to execute and implement an agreement attaches "only if agreement is reached." *Internal Revenue Service, North Florida District, Tampa Field Branch, Tampa, Florida*, 55 FLRA 222 (1999) and *Internal Revenue Service and Internal Revenue Service, Brooklyn District*, 23 FLRA 63 (1986). Distinguishing *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312 (1997), Respondent argued that in the instant matter it had notified the Charging Party that OMB had to approve the tentative agreement. And once OMB made the final decision not to approve the tentative agreement, the Respondent indicated to the Charging Party that it was willing to continue negotiations. Further, Respondent argues that it made clear to the Union at the outset and during the negotiations that there could not be an agreement without OMB approval and that it did not have unfettered discretion to enter into an agreement unless and until there was OMB approval of such agreement.

Citing various NLRB cases, *NLRB v. Auciello IronWorks*, 980 F.2d 804, 141 L.R.R.M. 2955 (1st Cir. 1992), supplemental decision on remand, 317 N.L.R.B. 364, 149 L.R.R.M. 1145 (1995), enforced, 60 F.3d 24, 149 L.R.R.M. 2897 (1st Cir. 1995) aff'd, 116 S.Ct. 1754, 152 L.R.R.M. 2385 (1996); *NLRB v. Roll & Hold Div.*, 957 F.2d 328, 139 L.R.R.M. 2609 (7th Cir. 1992); *Torrington Extend-A-Care Ass'n v. NLRB (Beverly Cal. Corp.)*, 17 F.3d 580, 145 L.R.R.M. 2648 (2nd Cir. 1994). Respondent argues that if there was no "meeting of the minds", then a refusal to execute an agreement does not constitute unlawful conduct. The Board has no authority to order an employer to execute an agreement to which it has not assented. *New Orleans Stevedoring Co. and General Longshoremen Workers, Local No. 3000, International Longshoremen's Association*, 308 NLRB 1081 (1992) (citation omitted).

In this matter Respondent argues that the dispute over a material term, OMB approval, demonstrates that there was no "meeting of the minds". Thus no agreement was formed. Meeting of the minds is defined as "assent to the mutually agreed upon and understood terms of the agreement by the parties to a contract that may be manifest by objective signs of intent (as conduct)." Merriam-Webster's Dictionary of Law (1996).

And finally Respondent argues that the Charging Party was informed both during negotiations and when a tentative agreement had been reached that OMB approval was necessary for a final agreement. The Charging Party continued to negotiate. Therefore this constituted a clear and unmistakable waiver of the requirement set forth in section 7114(b) (2), that an agency has a duty to negotiate in good faith and that obligation includes being "represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]"

There was no finalized collective bargaining agreement since one of the Agency's requirements, the OMB approval, was not met. The Union was well aware of this requirement during the course of negotiations. Since there was no final agreement, the agency's refusal to sign the agreement was not a violation of the Statute. Further the Union waived its statutory right under 5 U.S.C. § 7114(b) (2) to negotiate with fully authorized representatives. In the alternative there was no meeting of the minds on the material issue of OMB approval, and therefore there was no agreement and the parties must return to the bargaining table.

Analysis and Conclusion

Section 7114(b) of the Statute states:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]

. . .

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

In *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 44 FLRA 205 (1992), the Authority found that section 7114(b)(5) of the Statute provides that the duty of an agency and an exclusive representative to negotiate in good faith includes the obligation, "if agreement is reached," to execute upon request a written document embodying the agreed terms and to take necessary steps to implement the agreement. 5 U.S.C. § 7114(b)(5)(emphasis added). This statutory language imposes an obligation on a party "to sign a document provided that an agreement is reached after negotiations thereon." *Internal Revenue Service, Philadelphia District Office*, 22 FLRA 245, 255 (1986) (emphasis in original). See *International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 36 FLRA 555, 560 (1990) ("In situations where the parties have reached an agreement bilaterally, the purpose of section 7114(b)(5) appears clear. Execution of a written agreement is necessary to ensure that, in fact, there is a 'meeting of the minds' on the terms of the agreement.").

An agreement, for purposes of section 7114(b)(5) of the Statute, is one in which authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining. See *id.* See also *Internal Revenue Service and Internal Revenue Service, Brooklyn District*, 23 FLRA 63, 64 (1986)(*Brooklyn District*) (the Authority adopted the administrative law judge's finding that the parties had not reached a final agreement during the bargaining sessions because the "[agency's] representatives . . . did not have authority to bind the agency" and the union's president "was aware of the [agency's] past failure to send fully authorized representatives to bargaining sessions"). Therefore, it is axiomatic that if the parties fail to send fully authorized representatives to the bargaining table, an agreement, for purposes of section 7114(b)(5) of the Statute, cannot be reached at the table.

While a statutory right may be waived, in this case specifically the right under section 7114(b)(5) of the Statute to have authorized representatives at the table for the purpose of negotiating an agreement, such a waiver must be clear and unmistakable. See, for example, *U.S. Department of Labor, Washington, D.C. and American Federation of Government Employees, National Council of Field Labor*

Locals, AFL-CIO, 38 FLRA 1374, 1384 (1991). Waiver may be established by express agreement or by bargaining history. A waiver may also be established by a past practice. Id.

The issue to be resolved in this matter is whether or not the parties had reached final agreement on their collective bargaining agreement. The Union asserts that the parties had reached agreement on all of the provisions of the collective bargaining agreement and that once the Union membership voted to ratify the agreement, the agency was then obligated to sign the final agreement, pursuant to section 7114(b)(5). After the agency signed the agreement, it would be subject to agency-head review under section 7114. The Union denies that there was ever any notice to it, or acquiescence by it, to the Respondent's seeking and receiving OMB approval of the tentative agreement. Respondent, on the other hand, asserts that it clearly informed the Union from the beginning of the negotiations that OMB approval of the tentative agreement would be necessary before there could be a final agreement.

There are no written ground rules or other documents that show, or do not show, that OMB approval of the tentative agreement was necessary before there could be a final agreement. Both Respondent and the Union rely solely on witness testimony to establish this necessary element of the case. Although the witnesses for both parties were clearly at the same negotiations, which lasted a period of several months, there is no similarity with regard to the OMB approval issue. According to the Union witnesses, the issue of OMB approval was only related to pre-approval of pay proposals to the bargaining table. Herman denies that he ever contacted OMB for approval of any pay proposals prior to such proposals being submitted to the Union. (Tr. 505) Respondent's witnesses assert that it was clear from the beginning of the negotiations that OMB would have final approval of the agreement.

While the Union asserts that it did not have notice that the Respondent intended for OMB to have final approval of any agreement negotiated between the parties, I find the record evidence shows that the Respondent did clearly set forth its position on OMB approval during the negotiations. I note that such a decision by FAA involves the subversion of its own statutory rights and places OMB in an unusual position with regard to a negotiated collective bargaining agreement. However, it appears that FAA has willingly placed itself in the position of acquiescing to OMB, not only with regard to the AFSCME negotiations, but also with regard to negotiations with other labor organizations representing various units within FAA, in particular NATCA

and PASS. I find it difficult to believe that AFSCME would not be familiar with the negotiations of other bargaining units involving similar units within the FAA, particularly since the negotiations included pay issues unique to FAA.

Further I find that Herman's testimony regarding his conversations with President McEntee regarding "the OMB problem" were not denied by the Union witnesses⁴ and specifically showed that the Union President had specific knowledge that OMB approval of the tentative agreement was necessary before there would be a final collective bargaining agreement. I find that the testimony of Respondent's witnesses regarding the need for OMB approval of the tentative agreement were consistent and logical within the time frame of the extended negotiations. In particular I note that references to OMB were primarily made in conjunction with pay proposals and used by Respondent's negotiators to discuss and obtain concessions regarding issues of cost savings in connection with pay raises. Considering all of the above, I therefore credit the testimony of Herman and Thoman with regard to this issue.

I find that the evidence establishes a clear and unmistakable waiver of the Union's statutory rights with regard to the Respondent having authorized representatives at the table. Although the Union, through Kreisberg, demanded on more than one occasion that Respondent have authorized bargaining representatives at the table, negotiations always continued by the parties.

The Respondent does not dispute that the parties reached agreement on all articles in the collective bargaining agreement by February 5, 2001. Nor were there any substantive terms upon which the Union and the Respondent had not yet reached agreement. Clearly there was a meeting of the minds on all substantive issues. The only dispute concerns whether the Respondent was obligated to execute the collective bargaining agreement under section 7114(b)(5) of the Statute, until OMB gave its approval of said agreement.

As set forth above, inasmuch as the Respondent had clearly given the Union notice that OMB would have to approve the tentative agreement before it could be final, and the Union acquiesced in this condition, Respondent's failure to execute the agreement after OMB disapproved the agreement is not a violation of the Statute. I conclude that the Respondent's actions did not violate section 7116

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International President McEntee did not testify at the hearing.

(a) (1) and (5) as alleged. I therefore recommend dismissal of the complaint in this case.

Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

It is Ordered that the complaint be, and hereby, is dismissed.

Issued, Washington, DC, September 6, 2002.

Judge

SUSAN E. JELEN
Administrative Law

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. WA-CA-01-0386, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Jeanne Marie Corrado, Esquire 7000-1670-0000-1175-3710
Lisa Belasco, Esquire
Federal Labor Relations Authority
800 "K" Street, NW., Suite 910
Washington, DC 20001

Elizabeth Head, Esquire
7000-1670-0000-1175-3727
Michele Gonsalves, Esquire
Dept. of Transportation, FAA
Office of Labor & Employee Relations
800 Independence Avenue, SW., Rm. 519
Washington, DC 20591

Barbara Kraft, Esquire
7000-1670-0000-1175-3734
Sarah J. Starrett, Esquire
Beins, Axelrod & Kraft, P.C.
1717 Mass. Avenue, NW., Suite 704
Washington, DC 20036

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 6, 2002
 WASHINGTON, DC