

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

MEMORANDUM

DATE: November 20, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

Respondent

and

Case No. WA-CA-02-0816

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO

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

U.S. DEPARTMENT OF LABOR WASHINGTON, DC Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO Charging Party	Case No. WA-CA-02-0816

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 **DECEMBER 22, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: November 20, 2003
Washington, DC

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

U.S. DEPARTMENT OF LABOR WASHINGTON, DC <p style="text-align: center;">Respondent</p>	
<p style="text-align: center;">and</p> AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO <p style="text-align: center;">Charging Party</p>	Case No. WA-CA-02-0816

Tresa A. Rice, Esquire
 Thomas F. Bianco, Esquire
 For the General Counsel

David Pena, Esquire
 For the Respondent

Before: PAUL B. LANG
 Administrative Law Judge

DECISION

Statement of the Case

On August 30, 2002, the American Federation of Government Employees, Local 12 (AFL-CIO) (Union) filed an unfair labor practice charge against the U.S. Department of Labor, Washington, DC (Respondent). An amended charge was filed on November 25, 2002. On April 30, 2003, the Acting Regional Director of the Washington Regional Office of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by implementing a permanent child care subsidy program without having given notice to the Union or affording the Union the opportunity to bargain concerning the program.

A hearing was held in Washington, DC on July 30, 2003. All parties were present with their respective counsel and were afforded the opportunity to present evidence and to cross examine witnesses. This Decision is based upon full

consideration of all of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by the parties.

Findings of Fact

The facts are undisputed. The Respondent is an agency as defined in § 7103(a)(3) of the Statute. The Union is a labor organization as defined in § 7103(a)(4) of the Statute and is the exclusive representative of a unit of Respondent's employees suitable for collective bargaining. At all times pertinent to this case the Union and the Respondent were parties to a collective bargaining agreement.

In the Spring of 2000, the Union and the Respondent engaged in collective bargaining over the implementation of a pilot child care subsidy program. The pilot program was established pursuant to regulations issued by the Office of Personnel Management (OPM) under authority granted by Congress in Public Law 106-58 which went into effect on September 22, 1999. On May 1, 2000, the Respondent submitted a proposed memorandum of understanding (MOU) to the Union which was identified as its final offer (Resp. Ex. 1, p. 3). The second to last paragraph of the final offer stated:

This MOU will remain in effect through FY 2000 in accordance with the legislation. If Congress and/or OPM reauthorizes the pilot program or makes the program permanent, within 30 days of such occurrence either party may notify the other in writing of the desire to reopen this matter for renegotiation. If neither party serves such notice, the MOU will remain in effect consistent with the term of the master Agreement.¹

By letter of May 17, 2000 (Resp. Ex. 2), Edward B. Montgomery, the Respondent's Acting Deputy Secretary, informed Russ Binion, who was then the President of the Union, that an impasse "might have" occurred and that the Respondent intended to implement its final offer. Montgomery also stated that the Respondent would prefer to resolve the impasse and that it looked forward to working with the Union prior to the implementation of the permanent program. Although Montgomery did not indicate the date on which the pilot program was to go into effect, the Respondent implemented the program shortly thereafter. The

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Neither the master Agreement nor a local collective bargaining agreement, if any, was offered in evidence.

Union did not refer the dispute to the Federal Service Impasses Panel (Panel) or take any other action in response to the Respondent's letter. On September 28 and November 13, 2000, the Respondent again invited the Union to bargain over an extension of the pilot program.² The Union did not respond to either of the invitations. By letter of November 30, 2000 (Resp. Ex. 6), Lelchook informed Binion that the Respondent had reached agreement with the NCFLL over an expanded pilot program for the remainder of the fiscal year and that the Respondent intended to announce the expanded program for NCFLL employees and all of its non-bargaining unit employees in the near future. Lelchook further stated that, prior to announcing the revised pilot program, the Respondent wanted a clear indication from the Union as to whether it wished to revisit the existing pilot program or would prefer to maintain the *status quo*. If the Respondent did not hear from the Union by December 4, 2000, it would assume that the Union wished to maintain the *status quo*. The Union did not respond and the Respondent implemented the pilot program.

On November 12, 2001, by virtue of Public Law 107-67 (GC Ex. 2, Sec. 630(a), p. 36), Congress authorized the use of appropriated funds for permanent child care subsidy programs for the benefit of federal employees. On December 12, 2001, after the expiration of the 30 day time limit in its final offer, the Respondent implemented a permanent child care subsidy program which is identical to the pilot program which was then in effect. The Respondent did not, at that time, give advance notice to the Union of its intent to implement the permanent program.

Jerry Lelchook, who is now the Respondent's Deputy Director of Human Resources, was the Respondent's sole witness. He testified that, after the Union failed to respond to the Respondent's final offer, the Respondent

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A memorandum dated September 28, 2000 (Respondent's Ex. 4), from Jerry Lelchook, who was then the Respondent's Director of Employee and Labor-Management Relations, was addressed to the Union through Binion and to Ron Yarman, the Acting President of the National Council of Field Labor Locals (NCFLL), another labor organization which represented a bargaining unit of Respondent's employees. In that memorandum Lelchook suggested that the Union and NCFLL engage in joint bargaining. By e-mail dated November 13, 2000 (Resp. Ex. 5), to Binion through Larry Drake, who was then the Executive Vice President of the Union, Lelchook indicated that the NCFLL had declined to engage in joint bargaining and suggested that the parties schedule their own bargaining sessions.

treated the final offer, "as if it had been signed by both parties and we treated it as a supplemental agreement to our master contract" (Tr. 65).³

Lelchook corroborated the testimony of Lawrence Drake, the president of the Union and the General Counsel's sole witness, that the collective bargaining agreement provides for mid-term bargaining on a quarterly basis. The Respondent has not challenged the General Counsel's contention that the subject of child care subsidies is not excluded from mid-term bargaining. In addition, the Respondent does not dispute Drake's testimony to the effect that the next mid-term bargaining session after the implementation of the permanent program began on March 4, 2002.

On March 5, 2002, the Union submitted to the Respondent a document which was entitled "Union Proposal No. 1" (GC Ex. 3). The proposal was in the form of an MOU which described a revised child care subsidy program along with a provision that the revised program was to be retroactive to November 12, 2001. By letter dated March 7, 2002 (GC. Ex. 4), Sandra Keppley, the Respondent's Supervisor of the Labor-Management Relations Center, informed Binion of the Respondent's position that the Union had waived the right to bargain over the child care subsidy program because it had not requested bargaining within 30 days of the effective date of the legislation which authorized the establishment of permanent programs.

Discussion and Analysis

The Permanent Program Was A Change In Conditions Of Employment

The General Counsel maintains that the permanent child care subsidy program represented a change in the working conditions of bargaining unit employees by virtue of the fact that it is a permanent rather than a temporary program. The Respondent takes the position that the implementation of the permanent program did not represent a change in conditions of employment inasmuch as the permanent program was identical to the pilot program. Therefore, according to the Respondent, it had no duty to bargain.

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On cross examination Lelchook read into the record the language of Article 47, Section 3, of the collective bargaining agreement which states that the provisions of any supplemental agreement or understanding become part of the agreement after it has been signed by a designated representative of each of the parties.

The Respondent has not contested the proposition that the subject of child care subsidy is a condition of employment over which the Union was entitled to bargain. The Respondent's repeated invitations to the Union are tacit acknowledgments of that fact. Even if that were not so, the Authority has long held that child care arrangements are within the duty to bargain, *375th Combat Support Group, Scott Air Force Base, Illinois*, 46 FLRA 640, 676 (1992).

In *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*), the Authority held that, in determining whether a matter involves a condition of employment, it will consider (a) whether the matter pertains to bargaining unit employees, and (b) whether there is a direct connection between the matter and the work situation of bargaining unit employees. That analysis is useful in determining whether the permanent program represented a change in conditions of employment.

Even though the permanent child care subsidy program provided for the same parameters for payments as the pilot program it still represented a change in conditions of employment according to the *Antilles* criteria. It is obvious that the permanent program pertains to bargaining unit employees since they are the recipients of subsidy payments. It is also evident that the conversion of the pilot program to a permanent program caused a change to the work situation of bargaining unit employees. The pilot program was, by its own terms, temporary since the OPM regulations authorizing the program were to expire on September 30, 2000. The paragraph of the final offer to which the Respondent attaches such significance not only set a 30 day time limit to request bargaining but also specifically stated that the MOU was to expire at the end of fiscal year 2000 (September 30, 2000).⁴ The permanent program has no expiration date and will remain in effect until after the completion of further bargaining by the parties, whenever it might occur. The Respondent has cited no legal or logical basis for the proposition that a change in conditions of employment can occur only when a new employment policy is totally different than its predecessor.

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Neither the subsequent extension of the pilot program nor the Respondent's implementation of a permanent program with the same provisions changes the fact that the pilot program was considered to be temporary by both parties at the time of its implementation.

The situation in this case is analogous to that in *American Federation of Government Employees, AFL-CIO, Local 2317 and U.S. Marine Corps Logistics Base, Nonappropriated Fund Instrumentality, Albany, Georgia*, 29 FLRA 1587, 1609 (1987) in which the Authority held that a proposal for the automatic renewal of a collective bargaining agreement was within the agency's duty to bargain. If a change in the term of a contract is negotiable as a condition of employment, so too is a change in the duration of a supplemental agreement.

The Respondent Provided Adequate Notice Of The Change

The General Counsel asserts that the Respondent violated the Statute by failing to provide the Union with notice and an opportunity to bargain prior to the implementation of the permanent child care subsidy program. The Respondent asserts that the language of the final offer gave the Union adequate notice that the pilot program would become permanent if neither party requested bargaining within 30 days of the legislation which authorized the Respondent to adopt a permanent program.

Prior to implementing a change in conditions of employment an agency must provide the exclusive representative of its employees with notice of the change and an opportunity to negotiate over those aspects of the change that are within the duty to bargain, *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). In order for a notice of a change in conditions of employment to be deemed adequate, it must give the union information as to the scope and nature of the proposed change, the certainty of the change and the planned timing. The union's receipt of adequate notice of a proposed change in working conditions triggers its responsibility to request bargaining. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997) (*Corps of Engineers*).

The Authority has never required that the notice of an impending change in conditions of employment be couched in particular language. What is required is that the, "Notice of a proposed change in conditions of employment must be sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining" or, stated differently, "The notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining." *Corps of Engineers*, 53 FLRA at 82.

The language of the Respondent's final offer regarding the pilot program stated that, if neither party exercised its option to request bargaining within 30 days of the passage of legislation authorizing the establishment of permanent programs, "the MOU will remain in effect consistent with the term [i.e., the duration] of the master Agreement." The 30 day "window" gave the Union a reasonable opportunity to request bargaining. The statement that the MOU would remain in effect could have left the Union with no legitimate doubt that, if it did not meet the 30 day deadline, the pilot program would become permanent so long as the Respondent did not request bargaining within the same time limit. Therefore, the Union received adequate notice in accordance with the standards set forth by the Authority in *Corps of Engineers*.

The Union Waived Its Right To Bargain Prior To The Implementation Of The Permanent Program

The Respondent maintains that it implemented the pilot child care subsidy program in May of 2000 after submitting its final offer, declaring an impasse and informing the Union of its intention to implement the final offer. At that point the Union had waived its right to bargain and the Respondent was free to implement the final offer. According to the Respondent, the Union again waived its right to bargain when it failed to respond to two separate invitations on September 28 and November 13, 2000. The Respondent argues that, in view of the waiver it was entitled to implement all aspects of the final offer. The final offer consisted of the pilot child care subsidy program and the provision which established a 30 day deadline for bargaining in the event of the passage of legislation authorizing a permanent program. According to the Respondent, the Union's failure to meet the deadline in the final offer amounted to a waiver of the right to further bargaining over a child care subsidy program during the term of the collective bargaining agreement.

A union's failure to request bargaining after adequate notice may be construed as a waiver of its right to bargain, *Corps of Engineers*. When, as in this case, it is alleged that a waiver arose out of the history of bargaining between the parties rather than by express agreement the Authority will focus on whether the union has "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter", *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 912 (2000) (*IRS*).

The Respondent's letter to the Union of May 17, 2000 (Resp. Ex. 2), contains the somewhat equivocal statement

that, "it appears we may have reached an impasse." However, the fourth paragraph of the letter contains the unequivocal statement that, "it is necessary to implement the Child Care Subsidy Program for all employees within the Department, including employees within the [Union's] bargaining unit in accordance with management's final proposal." In the fifth paragraph of the letter, the Respondent acknowledged that the Union would "prefer resolving the impasse first" but that it was necessary to implement the pilot program without further delay.

The General Counsel has not specifically stated his position as to whether an impasse actually occurred. In any event, when viewed as a whole, the Respondent's letter of May 17, 2000, was an unambiguous notice to the Union of an impasse, especially in view of the Respondent's statement of its intention to implement the pilot program without delay and of the undisputed fact that the parties had already bargained over the pilot program.

Upon its receipt of the notice of impasse, the Union was entitled to seek the assistance of the Panel pursuant to § 7119 of the Statute. Having failed to do so after what the General Counsel has acknowledged to have been a reasonable opportunity, the Union waived its right to bargain and the Respondent was free to implement its final offer, *Corps of Engineers*. That offer consisted of a pilot child care subsidy program and the provision for a 30 day time limit to request bargaining over a permanent program when and if such a program was authorized by Congress. In accordance with the terms of the final offer, the Respondent was also free to implement the permanent program after it became apparent that the Union had not made a timely request to bargain within 30 days after the passage of the legislation authorizing the permanent program.

The General Counsel maintains that the referral of the dispute to the Panel would have been a futile act in view of the Respondent's avowed intention to implement the pilot program. There is nothing in the record to suggest that this was so. On the contrary, the Respondent's repeated invitations to the Union to bargain strongly suggest that the Respondent would have cooperated in the Panel's efforts to resolve the impasse. Even if the Panel were unsuccessful in effectuating a voluntary settlement, it was empowered, pursuant to § 7119(c)(5)(B) of the Statute, to convene a hearing and issue a final ruling which would, in accordance with § 7119(c)(5)(C), have been binding on the parties during the term of the collective bargaining agreement in the absence of their agreement to the contrary. The Respondent's refusal to adhere to the Panel's orders would

have constituted an unfair labor practice in violation of § 7116(a)(1), (5) and (6) of the Statute, thus entitling the Union to relief in the form of an order by the Authority requiring the Respondent to comply. See *U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995).

The Union Did Not Waive Its Right To Invoke Mid-Term Bargaining

The Respondent maintains that, in waiving its right to bargain over the final offer, the Union thereby also waived its right to raise the issue of the child care subsidy program during mid-term bargaining. That argument is unpersuasive.

In *IRS* the Authority held that a waiver of bargaining rights may be established by express agreement or by bargaining history. It is undisputed that the Union did not sign the MOU which represented the Respondent's final offer and the Respondent does not contend that the Union otherwise expressly agreed to forego bargaining. Therefore, a waiver could only have arisen out of the parties' bargaining history.

Bargaining history concerns, "subject matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract", *Internal Revenue Service*, 29 FLRA 162, 167 (1987). There is no evidence that the parties ever negotiated over the subject of mid-term bargaining, let alone over the exclusion of the child care subsidy program from mid-term bargaining. In view of that lack of evidence, the Respondent has not established the existence of a waiver based upon bargaining history.

Even if a Union representative had signed the final offer, its language would not have been sufficient to establish a waiver of the contractual right to mid-term bargaining. The sole basis of the Respondent's position is the language setting forth the 30 day deadline for requesting bargaining. Specifically, the Respondent relies on the provision that, in the absence of a timely request to bargain, the MOU would remain in effect "consistent with the term of the master Agreement." In *IRS* and its progeny the Authority has consistently held that a strict standard must be applied in the construction of contractual language that is alleged to constitute a waiver of statutory rights. Judged by that standard, the language upon which the Respondent relies falls short of a clear and unmistakable waiver of the Union's right to request mid-term bargaining over the child care subsidy program. The Respondent

maintains that the final offer should be construed as depriving the Union of the right to request bargaining until the expiration of the term agreement. However, the final offer contains no reference to mid-term bargaining, let alone a statement that the failure of the Union to request bargaining within the 30 day limit would preclude it from raising the subject during the course of mid-term bargaining.

It is one thing to say that the Union's failure to make a timely request for bargaining operated as a waiver of its right to negotiate prior to the implementation of the permanent program. It is quite another thing to attempt to stretch the waiver to include a contractual right to mid-term bargaining, a subject that was not addressed in the final offer and which is distinct from the subject of the child care subsidy program which was the subject of the final offer and the preceding negotiations.

The Child Care Subsidy Program Was Not A Part of the Collective Bargaining Agreement

The Respondent maintains that, in view of the Union's waiver of the right to bargain, the permanent program became part of the contract, thus relieving it of the duty to bargain during the term of the contract. The General Counsel maintains that, regardless of whether the Respondent was entitled to implement its final offer, the child care subsidy program did not become part of the collective bargaining agreement because the Union did not agree to the program. Therefore, according to the General Counsel, the Respondent was not relieved of its duty to bargain.

In *U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia*, 56 FLRA 45 (2000) the Authority, upon remand from the United States Supreme Court, held that, under the Statute, an agency is obligated to bargain over a proposal whereby it would be required to engage in mid-term bargaining over matters not contained in or covered by the term agreement. A corollary to that holding is that the Union would not be entitled to engage in mid-term bargaining over the child care subsidy program if such a program were already addressed in the contract.⁵

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The General Counsel has not alleged the existence of a reopener clause that might have allowed for mid-term bargaining even on subjects specifically addressed in the contract.

The so-called "covered by" doctrine was first set forth in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1018 (1993) and was most recently clarified in *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 813 (2000) (*Customs Service*). Under the "covered by" doctrine a party is relieved of the obligation to engage in mid-term bargaining if (a) the matter at issue is either specifically addressed in the collective bargaining agreement or, (b) if not, it is inextricably bound up with a subject covered by the agreement.⁶

The Union did not sign the MOU which constituted the Respondent's final offer and there is no evidence of any other express agreement concerning child care subsidy. Therefore, the first prong of the "covered by" test has not been satisfied.

Moving to the second prong of the test, there is no evidence of any other contractual language that is even indirectly pertinent to the child care subsidy program.⁷ Therefore, the permanent program could only have become a part of the contract by virtue of the bargaining history. However, the only evidence of bargaining was over the pilot program; there was no separate bargaining over the permanent program. Just as the implementation of the permanent program represented a change in conditions of employment as compared to the pilot program, the history of bargaining over the pilot program may not be applied to the permanent program. It does not follow that, in failing to bargain prior to the implementation of the final offer, in which the Respondent proposed the pilot program, the Union consented to the inclusion of the permanent program in the contract.⁸ In other words, the evidence does not support the conclusion that, with regard to the permanent program, "the parties reasonably should have contemplated that the agreement would

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In *Customs Service* the Authority explained that the so-called third prong of the "covered by" test, *i.e.*, the bargaining history, was not a separate factor but was actually part of the second prong.

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The only evidence regarding the contents of the collective bargaining agreement was the testimony of Drake as to the provision for mid-term bargaining and the testimony of Lelchook as to the incorporation of signed agreements into the contract.

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There is no evidence that the parties have agreed to the incorporation of an unsigned MOU into the contract under any circumstances.

foreclose further bargaining", *Customs Service*, 56 FLRA at 813.

The Child Care Subsidy Program Was Not A Past Practice

The Respondent maintains that it had no duty to engage in mid-term bargaining because the child care subsidy program had become a past practice. The basis for this argument is that, by the time of the passage of the legislation authorizing the permanent program, the pilot program had been in effect for about a year and a half with the knowledge of the Union and without objection. The Respondent argues that the permanent program was identical to the pilot program and was no more than a continuation of the established past practice.⁹ The General Counsel maintains that the pilot program was not a past practice because the Union had never agreed to its terms.

In order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other, *United States Patent & Trademark Office*, 57 FLRA 185, 191 (2001).

Laying aside the issue of whether the Respondent had provided its bargaining unit employees with a child care subsidy program for a significant amount of time, the practice that was not challenged by the Union was the pilot program. Even if the pilot program had become a past practice, it was, by its own terms, due to expire at the end of the fiscal year. The issue in this case is whether the Respondent was entitled to implement the permanent program regardless the fact that it was identical to the pilot program other than for the lack of either a 30 day deadline to request bargaining or an expiration date. My conclusion that the permanent program represented a change in conditions of employment arises out of the finding that it differed in substance from the pilot program in view of its permanent nature. Accordingly, a past practice with regard to the pilot program, assuming that one existed, would not have been equivalent to a past practice regarding the permanent program.

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The Respondent does not maintain that the permanent program became a past practice by virtue of its having been in effect between the time of its implementation and that of the submission of the Union's proposal for mid-term bargaining.

In summary, while the Respondent was entitled to implement both the pilot and the permanent child care subsidy programs, the Union was still entitled to request mid-term bargaining on that subject.

The Remedy

The General Counsel asserts that, while a *status quo ante* remedy would be warranted, it does not seek such a remedy since it would necessitate the termination of the current child care subsidy program thereby creating a hardship for bargaining unit employees. Instead, the General Counsel proposes a bargaining order retroactive to December 12, 2001, which is the date when the Respondent implemented the permanent program. The General Counsel also proposes that the customary notice be signed by the Secretary of Labor in view of the fact that the Respondent's allegedly wrongful actions were ordered or approved by the Deputy Secretary, apparently with the knowledge and consent of the Secretary.

The General Counsel correctly states that a retroactive bargaining order is appropriate where the Respondent has failed in its duty to bargain, *Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 51 FLRA 35, 37 (1995). However, the Union did not request bargaining until March 5, 2002. In view of the fact that the Union had received adequate notice of the impending implementation of the permanent program, that date, rather than the date proposed by the General Counsel, is when the Respondent's duty to bargain arose. The General Counsel's proposed order will be modified accordingly.

The General Counsel may be correct in asserting that the actions of the Respondent were carried out with the knowledge and consent of the Secretary of Labor. Nevertheless, Edward B. Montgomery, the Acting Deputy Secretary, was the highest official who represented the Respondent in its dealings with the Union (Resp. Ex. 2). Furthermore, there is nothing in the record to suggest that a notice signed by the Deputy Secretary would not fully effectuate the purposes of the Statute.

In view of the foregoing factors, I have concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by failing and refusing to engage in mid-term bargaining with the Union over the permanent child care subsidy program. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED, pursuant to 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute, that the U.S. Department of Labor shall:

1. Cease and desist from:

(a) Failing and refusing to engage in mid-term bargaining with the American Federation of Government Employees, Local 12, AFL-CIO, concerning a child care subsidy program.

(b) In any like or related manner interfering with, restraining or coercing its bargaining unit employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative action:

(a) Bargain on request with the American Federation of Government Employees, Local 12, AFL-CIO, concerning a child care subsidy program and apply any agreement which is reached retroactively to March 5, 2002, unless an earlier date is agreed to by the parties.

(b) Post the attached Notice on forms to be furnished by the Authority for 60 days. The Notice is to be signed by the Deputy Secretary of Labor and is to be posted at all locations where employees represented by the American Federation of Government Employees, Local 12, AFL-CIO, are assigned, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Washington Region of the Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 20, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Labor has violated the Federal Service Labor Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse, upon request, to engage in mid-term bargaining with the American Federation of Government Employees, Local 12, AFL-CIO, concerning a child care subsidy program.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our bargaining unit employees in the exercise of the rights assured by the Statute.

WE WILL bargain on request with the American Federation of Government Employees, Local 12, AFL-CIO, concerning a child care subsidy program and apply any agreement which is reached retroactively to March 5, 2002, unless an earlier date is agreed to by the parties.

(Agency)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: Federal Labor Relations Authority, 800 K Street, NW, Suite 910N, Washington, DC 20001, and whose telephone number is: 202-482-6702.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-02-0816, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Tresa A. Rice, Esquire
3130

7000 1670 0000 1175

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3147

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REGULAR MAIL:

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President
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: November 20, 2003
Washington, DC