DEFENSE FINANCE AND ACCOUNTING SERVICE, HEADQUARTERS, ARLINGTON, VIRGINIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4015 Charging Party	Case No. WA-CA-40773

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 4, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: February 2, 1996
Washington, DC

MEMORANDUM DATE: February 2, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEFENSE FINANCE AND ACCOUNTING SERVICE, HEADQUARTERS, ARLINGTON, VIRGINIA

Respondent

and Case No. WA-CA-40773

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4015

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

DEFENSE FINANCE AND ACCOUNTING SERVICE, HEADQUARTERS, ARLINGTON, VIRGINIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4015 Charging Party	Case No. WA-CA-40773

Marilyn Blandford, Esquire
Daryl Adams, Esquire
For the General Counsel

Robert E. Campbell, Esquire
M. Lee Etter, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case involves the effects of an intra-agency transfer of responsibility for an administrative function affecting employees who were represented by a union, when the agency component to which that responsibility was transferred changed certain aspects of that administrative operation. Such changes were made in this case without any component of the agency having negotiated with the exclusive representative of the affected employees over the decision to make the changes. As a result, the union filed an unfair labor practice charge, and a complaint was issued alleging that the component that made the changes interfered with the bargaining relationship between the union and the agency

component that previously had administered the transferred function.

Findings of Fact[1]

Background

The Charging Party (the Union or Local 4105) is the exclusive representative of a unit of approximately 120 wage-grade employees at the Norfolk Naval Shipyard (the shipyard), with which it has a collective bargaining agreement. The latest collective bargaining agreement expired by its terms in April 1991. However, neither party then requested a renegotiation of any of its terms, and the parties, by oral agreement, have treated the provisions of the agreement as continuing in effect, at least to the extent that it is within the shipyard's power to honor its part of the contractual obligations. Other employees among the approximately 7,300 current employees of the shipyard are represented by other labor organizations, some affiliated with Local 4105's parent organization and some not.

Until 1993, the shipyard paid its civilian employees through its own payroll office. The expired collective bargaining agreement contained the following provisions concerning "special pay," which was described in the record as a salary payment made to employees other than through normal payroll processing, in order to correct underpayments with respect to earnings accrued but not previously disbursed:

> 2. (a) If an employee earns overtime and overtime pay is not included in an employee's paycheck for the pay period in which the overtime is worked, a special pay will not be made. However, should that overtime pay not be included in the employee's paycheck for the subsequent pay period, the employee may request special pay.
>
> (b) The employee may request the special pay the first business day after the payday of the aforemen-tioned subsequent pay period. The processing of the special pay shall begin the same day.

The practice under the contract was to treat an employee request for special pay, under the circumstances permitting such a request, as an event triggering an

[1] The material facts are essentially undisputed.

obligation to respond by taking the action requested. In addition, the shipyard routinely honored employee requests for special pay to correct any underpayments for regular (non-overtime) hours worked. This practice existed at least since 1982.2

Transfer of Payroll Operations

Beginning in 1991, the Department of Defense took steps to standardize and consolidate its civilian pay operations. It created the Defense Finance and Accounting Service (DFAS) as a single agency that would perform its finance and accounting operations. DFAS selected a standardized system for the department's civilian payroll and began consolidating the operations of over 350 payroll offices into four. At the time of the hearing the four consolidated offices, under DFAS, had taken over the operations of approximately 210 of the former payroll offices, including the shipyard's.

DFAS held a number of briefings of local management officials, including those of the shipyard, concerning developments in the consolidation process and various matters relating to payroll. DFAS also notified some national departmental officials of new payroll policies, including policies regarding special pay, and requested that local labor relations offices be provided with copies. DFAS also recom-mended that "impact and implementation bargaining with the local labor organizations begin as soon as possible in order to facilitate implementation." Some of this information was also distributed and otherwise shared with representatives of certain unions having "national representation rights" (Tr. 185), but not, apparently, any field representatives such as Local 4105.

Sometime in the latter part of 1992, Peggy Harshaw, then a Division Director of the Charleston Payroll Office (into which the shipyard's payroll operations were to be consoli-dated), requested a review of local union contracts, including that of the shipyard with Local 4105. On reviewing that contract, it was determined that there were special pay provisions that "needed to be negotiated" between the local parties. Harshaw asked Michael McNerney,

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There was also testimony about what appears to have been a discretionary policy of advancing wage payments in cases of severe financial hardship. Counsel for the General Counsel makes no reference to this policy in her brief, nor is it mentioned in the complaint. I shall not infer that the General Counsel contends it was an established past practice.

the Naval Sea Systems Command Labor Relations Advisor, to work with the shipyard's employee relations people concerning this need. McNerney's credible testimony makes it clear, however, although not stated directly, that the negotiations being suggested were not pre-implementation negotiations over the DFAS decision to make changes in special pay.3

DFAS, through the Charleston Payroll Office, was scheduled to assume responsibility for the shipyard's payroll in May 1993. In April, the shipyard made specific inquiries to Charleston regarding several matters including special pay. Information was received and passed on to the shipyard's labor relations officials and, by them, to the Union. From the responses it received from DFAS' Charleston office, shipyard officials had the impression that no substantive changes in special pay were contemplated, although there was some indication that checks for special pay would not be issued as quickly after the transfer of responsibility, and the Union was so informed.

On May 4, the shipyard invited the Union to engage in impact and implementation negotiations regarding the "conversion" to the consolidated payroll operation. The Union requested such negotiations.

The shipyard's payroll was "converted" on May 16, 1993. On June 16, shipyard accounting branch head Norman McIntosh received an "advance 'heads up'" memorandum from a Charleston office supervisor, containing a copy of a 1992 DFAS memorandum that included "guidelines for making special pays." These guidelines indicated that, among other things, special pay for underpayments of regular pay would be issued only to employees who had received less than 90 percent of their regular biweekly pay. The list of occasions for issuing special pay did not include failure to receive earned overtime pay. The covering memorandum to McIntosh stated that, "[s]pecific [illegible word, possibly 'written'] prior union agreements notwithstanding, I plan to abide by the policy as we [illegible word] continue on in our consolidation efforts." (GC Exh. 4.) During subsequent contacts between the shipyard and DFAS, the shipyard was informed that the new payroll were not negotiable and would

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Based in part on one of DFAS' legal contentions here, I believe the negotiations Harshaw's instructions contemplated were either those referred to in Article II, Section 2, of the collective bargaining agreement or the impact and implementa-tion negotiations mentioned in memoranda DFAS was distributing at the time. For the text and discussion of Article II, Section 2, see below at 9-10.

not be changed. By stipulation in this proceeding it was established that, since March 15, 1994, DFAS has refused to honor the special pay provisions of Article XIX of the collective bargaining agreement (concerning overtime pay) and has refused to honor the shipyard's practice of providing special pay to unit employees who received less than the full amount of their regular pay.

On March 15, 1994, the shipyard, having finally become satisfied that DFAS' position was fixed and unwavering, wrote to the Union, informing it, among other things, that:

> The policy limiting special pays to situations where the employee receives less than 90% of his/her regular hours worked is directed by DFAS. DFAS will not consider changing that policy.
>
> The policy of not providing advance pay or special pay for missed overtime is also directed by DFAS. DFAS will not consider changing that policy.

The Union then filed the unfair labor practice charge that led to this case. The shipyard, upon receiving the charge, wrote to the Union explaining that the purpose of its March 15 letter was not to terminate the impact and implemen-tation negotiations to the extent of the shipyard's remaining authority, limited as it now was. The Union did not pursue the impact and implementation negotiations after that point.

Discussion and Conclusions

Nature of the Alleged Violation

The statutory violation alleged here is, as described in section 7116(a)(1) of the Statute, interference with "any employee in the exercise by the employee of any right under this chapter." Such interference may take various forms, including actions by an agency at one organizational level that disrupt a bargaining relationship between another organizational entity, at the level at which exclusive recognition exists, and the exclusive representative. Thus, disruption of the bargaining relationship is deemed to interfere with employee rights within the meaning of section 7116(a)(1). *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 883-85 (1986).

One recognized form of interference occurs when an organizational entity within an agency takes action that precludes a component within the same agency from fulfilling its bargaining obligation. Such preemptive actions include

the implementation of a change in a negotiable condition of employment before the component at the level of exclusive representation has fulfilled its obligation to negotiate with respect to that change. *Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana*, 48 FLRA 6, 19 (1993), *enforcement denied in part on other grounds*, 56 F.3d 273 (D.C. Cir. 1995). In determining whether interference of this nature has occurred, it is irrelevant that the alleged violator has itself no bargaining obligation with the Union. *Commander Naval Air Pacific, San Diego, California and Naval Air Station Whidbey Island, Oak Harbor, Washington*, 41 FLRA 662, 676 (1991).

The Bargaining Obligation

A necessary element of the alleged interference, of course, is the existence of an obligation to negotiate, on the part of the component at the level of exclusive recognition. Such an obligation may have arisen because the putative condition of employment was established through agreement of the parties or through past practice. *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899, 910 (1990). To the extent that conditions of employment have been established through the parties' agreement, and concern mandatory subjects of bargaining, they continue in effect after the expiration of the agreement and may not be changed without completing the normal negotiation process. *Department of Health and Human Services, Social Security Administration*, 44 FLRA 870, 878 (1992). Likewise, a practice concerning a condition of employment that the parties have engaged in for a sufficient period of time regardless of the contract may not be altered unilaterally. *U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana*, 36 FLRA 567, 570-72 (1990); *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987). Such past practices include mutual actions by the contracting parties that go beyond the provisions of their contract. *Letterkenny Army Depot*, 34 FLRA 606, 610-11 (1990).

The "special pay" practices described in the collective bargaining agreement, and those described in the record as past practices not reflected in the agreement, is a mechanism for the processing of pay so as to facilitate employees' receipt of pay in amounts undisputedly earned. What makes this pay "special" is not the rate of pay but the recognition of special circumstances that have been deemed to warrant such a "special" mechanism.

Matters of pay procedure involving questions of how and when employees will receive their pay have generally been

regarded as fully negotiable. That is, they are negotiable with respect to the specifics of the procedures as well as the impact and implementation of such procedures. *See, e.g., U.S. Army Soldier Support Center* (change in pay lag); *Overseas Education Association, Inc. and Department of Defense Dependent Schools*, 29 FLRA 734, 770-71 (1987), *enforced* 911 F.2d 743 (D.C. Cir. 1990) (*OEA)* (payment when finance records have been lost, destroyed, or delayed, payment by separate checks for income from different aspects of job, for retroactive pay or adjustments in pay, and election of receiving payment during school year or 12-month period); *Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California*, 25 FLRA 465, 469 (1987) (*Metal Trades*) (manner of paycheck delivery).

In its frequently quoted *Metal Trades* rationale, the Authority explained why it considered such matters to be presumptively negotiable:

> The receiving of paychecks is the culmination of the employment contract between the employee and the employer. It consummates an agreement to exchange compensation for work performed, and therefore, it is inextricably bound to a fundamental condition of employment: pay.

Id. The Authority held in *OEA* that the *Metal Trades* rationale was applicable to proposals "dealing with [lost] pay records, paycheck delivery and how various types of pay will be disbursed" (*OEA* at 771), thus making such proposals negotiable.

Under the Authority's general approach to matters of pay procedure, its specific rationale in *Metal* Trades, and its holding in *OEA*, I conclude that the pay procedures collectively described as "special pay" that were in effect at Norfolk Naval Shipyard before DFAS took over the payroll operations were fully negotiable conditions of employment. Therefore the shipyard was obliged to bargain with the Union before making substantive changes in the special pay practices at issue here.

Such an obligation remained with the shipyard despite the fact that it no longer controlled the subject matter over which bargaining was required. If control over the subject matter had been transferred outside of the agency to which the shipyard belonged, its obligation, although continuing, would have been limited to negotiating to the extent of the discretion it retained. *See National Federation of Federal Employees, Local 1373 and U.S.*

Department of the Interior, Bureau of Land Management, Oregon State Office, Portland, Oregon, 44 FLRA 1246, 1249 (1992). However, control was transferred to DFAS, an organization within the shipyard's parent agency, the Department of Defense.

An agency is obligated to provide representatives at the level of recognition who are authorized to negotiate. It may not foreclose bargaining on an otherwise negotiable matter by withholding authority from the component at the level of recognition. Therefore, except as limited by other restraints (to be discussed below), the shipyard's bargaining obligation was not affected by the transfer of control to DFAS. *Department of the Army, Fort Greeley, Alaska*, 23 FLRA 858, 865 (1986) (*Fort Greeley*); *Overseas Education Association, Inc. and Department of Defense, Office of Dependent Schools*, 22 FLRA 351, 361, aff'd as to other matters *sub nom. Overseas Education Association, Inc. v. FLRA*, 827 F.2d 814 (D.C. Cir. 1987).

The general bargaining obligation described above is subject to limitations imposed by Federal law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. *Fort Greeley* at 864. DFAS contends that the Department of Defense special pay policy that superseded the policy formerly followed at the shipyard was an agency regulation for which there was **presumptively** a compelling need because no determination to the contrary has been made under section 7117 of the Statute.

This argument cannot prevail because DFAS has never alleged affirmatively that there is a compelling need for

these regulations.[4] In *Federal Emergency Management Agency*, 32 FLRA 502, 505 (1988)(*FEMA*), the Authority gave the Supreme Court's opinion in *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988) the following interpretation, in pertinent part:

> When an agency alleges that it has no duty to bargain because a proposal conflicts with an agency regulation for which a compelling need exists, the Supreme Court concluded that no duty to bargain arises under the Statute until the Authority has first determined that no compelling need justifies adherence to the regulation.

In *Professional Airways Systems Specialists, MEBA, AFL-CIO and Department of Transportation, Federal Aviation Administration*, 32 FLRA 517, 519 (1988), the Authority cited *FEMA* as standing for the proposition that an agency "may not be required to bargain over ***any proposals about which it has made compelling need assertions*** until the Authority has determined in a negotiability proceeding that no compelling need exists for the regulation involved" (emphasis added).

Absent a compelling need assertion, section 7117 provides that the duty to bargain extends to matters which are the subject of any rule or regulation that is not Government-wide. *See U.S. Department of the Army, Fort Campbell District, Third Region, Fort Campbell, Kentucky and American Federation of Government Employees, Local 2022*, 37 FLRA 186, 194 (1990). The duty is suspended while a compelling need assertion "exists," but resumes once it has been withdrawn. *U.S. Department of Transportation and*

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[4] At the hearing, counsel for DFAS questioned Labor Relations Advisor McNerney about the differences between certain contract language and Agency policy. In the course of this testimony Mr. McNerney was asked about hypothetical negotiations over these differences. McNerney affirmed counsel's characterization of the position management would have taken in those hypothetical negotiations as a "compelling need argument" (Tr. 202-05). I do not regard that testimony as the equivalent of an actual assertion, on behalf of DFAS or any other Department of Defense component having standing in this case, of a compelling need for the regulations in question. If it were deemed to be an attempt to allege a compelling need, there would remain the unresolved question of whether, and at what stage, the Authority permits such an assertion for the first time in an unfair labor practice proceeding. *See The Adjutant General, Massachusetts National Guard, Boston, Massachusetts*, 36 FLRA 312, 318-19 (1990).

Federal Aviation Administra-tion, 40 FLRA 690, 709 (1991), *remanded on other grounds*, 966 F.2d 702 (D.C. Cir. 1992). Moreover, compelling need is an issue that must be raised by an agency with respect to a specific union proposal. Section 7117 has not been interpreted to require a union to raise the issue of compelling need in order to obtain a determination that there is none. In short, the Statute's "compelling need" provisions "[do] not relieve [an agency] of its duty to properly notify the [u]nion, and upon request, bargain with it over substantively negotiable changes." *U.S. Department of the Air Force, Williams Air Force Base, Chandler, Arizona*, 38 FLRA 549, 559-60 (1990); *accord Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia*, 46 FLRA 339, 344 (1992).5

DFAS also asserts a contractual ground for denying the existence of an obligation to bargain over changes reflected in the regulations under which it administered the payroll operations. It relies on part of Article II, Section 2 of the collective bargaining agreement. The complete text of that section is set forth below; the part on which DFAS relies is reproduced here in boldface type:

> 2. It is understood that this agreement contains contractual obligations assumed by the parties, but also contains many provisions which inform the reader of substantive provisions of Laws, Executive Orders, government-wide rules and regulations, and published DOD and DON regulations in effect at the time the agreement was executed. **It is further understood that in the event of a change in these regulations which conflict with this agreement, the parties will negotiate new language that will satisfy the required changes, under the procedures specified in other applicable provisions of this agreement.**

DFAS contends that the sentence in boldface has the effect of rendering the special pay provisions of the contract non-binding on it and the shipyard, presumably on the theory

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5 When the Agency implemented the changes at issue here unilaterally, it not only short-circuited the Union's opportunity to file a negotiability appeal under section 7117(b); it also undercut any suggestion that, even without expressly alleging compelling need, it **constructively** declared special pay policies to be nonnegotiable. *See Patent Office Professional Association and Patent and Trademark Office, Department of Commerce*, 21 FLRA 580, 581 (1986).

that, pursuant to that sentence, the new, conflicting departmental pay regulations superseded the contractual special pay provi-sions. I cannot accept that. Section 2 must be read as a whole. The regulations referred to in the boldface sentence are those described in the first sentence--regulations about which certain provisions in the contract serve only the purpose of informing the reader. The boldface sentence does not refer to **all** regulations, and specifically not to regulations that conflict with provisions setting forth "contractual obligations assumed by the parties." Thus, Article 2, Section 2, has no effect on the post-expiration viability of the contract provisions about special pay. This conclusion also disposes of DFAS' related contention, which, as I understand it, interprets the Section 2 requirement that the parties "negotiate new language that will satisfy the required changes" as foreclosing any role for the Union other than negotiating language that conforms to the substance of the new special pay policies.6

Waiver Defense

DFAS seeks to portray the Union as proceeding from the erroneous assumption that the contractual special pay provisions survived the transfer of pay administration and permitted the Union to refuse to bargain over any changes. DFAS thus characterizes the Union's failure to pursue impact and implementation bargaining, after being informed that the controlling agency component (DFAS) would not consider changing the new policies it implemented at the shipyard, as a waiver of its bargaining rights.

These characterizations do not withstand scrutiny. It is true that, in response to the shipyard's May 4, 1993,

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Although DFAS does not mention it, I note that Article II, Section 1 of the contract provides that, "in the administration of all matters covered by this agreement, officials and employees are governed . . . [b]y existing or future Department of Defense and Navy Department policies and regulations." The Agency's consolidation of the payroll functions was consistent with this provision. However, as the provision addresses only **administration** of the (substantive) matters covered by the agreement, this is not a case where, as described in *U.S. Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Washington, D.C. and American Federation of Government Employees, Local 3407*, 37 FLRA 1066, 1069 (1990), the parties have agreed "to allow subsequently issued [policies or] regulations to override a preexisting collective bargaining agreement."

invita-tion to negotiate over the impact and implementation of the conversion of the payroll operation to a consolidated operation, the Union requested such negotiations. This, in itself, did not limit any of its bargaining rights. A union does not, by requesting negotiations only over the impact and implementation of a proposed change, waive any right it otherwise had to negotiate over the substance of the change. *Davis-Monthan Air Force Base, Tucson, Arizona*, 42 FLRA 1267, 1268, 1275-76 (1991).[7] Moreover, the May 1993 invitation for negotiations did not suggest, nor was the Union otherwise given notice, that the consolidation would result in the substantive changes made to the special pay policy. In these circumstances, the Union was justified in failing to pursue impact and implementation bargaining over the conversion after it learned of these substantive, unilateral changes. Nor did the shipyard's notification to the Union that it was not terminating impact and implementation bargaining (after the Union had filed an unfair labor practice charge concerning, among other things, changes in special pay) require the Union to pursue that limited course of bargaining. *Department of the Air Force, Scott Air Force Base, Illinois*, 35 FLRA 844, 858-59 (1990).

The Union's actions were consistent with an assertion of its right to bargain on the substance of changes in the availability of special pay. Its actions were consistent with the Authority's policies concerning the limited continuation of conditions of employment established under an expired contract. Thus, they did not imply a denial of the Unions's obligation to bargain, to impasse if necessary, or the right of its bargaining partner, the shipyard, to implement any negotiated changes.

Other Defenses

DFAS asserts that a finding of interference with the bargaining relationship would be inconsistent with the fact that it kept the shipyard and national union representatives informed of developments in connection with the conversion and recommended to various departmental components (although not the shipyard directly) that they bargain with local labor organizations on impact and implementation issues. DFAS cites these actions as evidence that it recognized and

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7 *But cf. Department of the Treasury, United States Custom Service, Region I, Boston, Massachusetts, and St. Albans, Vermont District Office*, 10 FLRA 566, 567, 578-80 (1982) (union waived right to bargain over substance of a proposed change by requesting impact and implementation bargaining ***and*** agreeing to negotiate after implementation of the decision.)

honored the local bargaining relationships, including that between the shipyard and the Union. DFAS suggests that the fault, if any, in failing to keep the Union informed and to provide it with the opportunity to exercise all of its bargaining rights, was with the shipyard.

Aside from the fact that there is no evidence that DFAS insured that the shipyard was informed about the changes in special pay policy before they were implemented, these conten-tions are irrelevant. The gist of the General Counsel's case is that the unilateral implementation of the changes by DFAS made it impossible for the shipyard to fulfill its bargaining obligation. This interference cannot be excused by the other actions DFAS took or by what steps the shipyard failed to take to facilitate impact and implementation bargaining.

Ultimate Conclusions

I conclude that the General Counsel has established that DFAS interfered with the bargaining relationship between the shipyard and the Union. I further conclude that DFAS has not shown any valid justification for its conduct. Therefore, I conclude that DFAS has violated section 7116(a)(1) of the Statute.

The Remedy

Counsel for the General Counsel requests, in the way of affirmative relief, a return to the *status quo ante* with respect to the previous special pay practices, withdrawal of any instructions to the shipyard to change its special pay practices until an agreement is reached, and a direction to DFAS to direct the shipyard to reopen negotiations with the Union over these practices. DFAS opposes these requests for 15 separately stated reasons.

Where a violation involves a change in a fully negotiable condition of employment without fulfillment of the obligation to bargain, a *status quo ante* remedy is presumptively appropriate to make the accompanying order to bargain meaningful. Thus, such remedy will be granted in the absence of special circumstances. *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899, 913 (1990). The purpose of this remedy is to place the parties in the positions they would have occupied had there had been no

unlawful conduct. *U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 996 (1992) (*DOL II*).[8]

In the instant case, the record is insufficient to determine whether DFAS has the authority to direct the shipyard to negotiate, and I shall not recommend that part of the requested remedy. However, it seems clear that, upon successful resolution of this case, the Union is ready to request the shipyard to bargain over the substance of the special pay changes, and it is reasonable to presume, on this record, that the shipyard is willing to fulfill its statutory obligation as ultimately determined in this case. It might be helpful, in view of the nature of the violation found, to direct DFAS to inform the shipyard that it has no objection to substance or impact and implementation bargaining concerning the changes, and I shall recommend such a provision. It is, therefore, necessary to consider whether, upon the Union's bargaining request, the *status quo ante* should be restored.

The nature of this violation, where the unlawful conduct prevented the component at the level of exclusive recognition from fulfilling its bargaining obligation, brings into play the same kinds of remedial considerations present in cases where the violation is a direct failure or refusal to bargain. *See, e.g., U.S. Department of the Interior, Bureau of Reclamation, Washington, D.C.*, 46 FLRA 9, 29-33 (1992), *enforcement denied on other grounds*, 23 F.3d 518 (D.C. Cir 1994); *U.S. Department of the Treasury*, 27 FLRA 919, 924-25 (1987); *Fort Greeley*, 23 FLRA at 866-67. Thus, the appro-priate inquiry is whether there are "special circumstances" that would render a temporary restoration of the *status quo ante* (pending the contemplated negotiations) inappropriate or unwarranted.

What kinds of "special circumstances" will be found to meet the Authority's standard? The standard must be regarded as a rigorous one, and the presumption that the *status quo remedy* is appropriate in these cases as a strong one, since, as the Authority commented in *United States Immigration and Naturalization Service*, 43 FLRA 3, 10

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[8] A *status quo ante* remedy "necessarily includes make-whole relief." *U.S. Department of Health and Human Services, Social Security Administration*, 50 FLRA 296, 299 n. 3 (1995). However, the General Counsel did not specifically request make-whole relief here, and there is no evidence that any employee suffered compensable loss. I therefore shall not recommend such relief. *Compare Fort Greeley*, 23 FLRA at 867, *with Department of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605, 612 (1986).

(1991), "no case has been cited, and we are aware of none, where the Authority has found such special circumstances." In the absence of examples of special circumstances that have been deemed sufficient, it may be noted at least that the Authority has considered a *status quo ante* remedy to be appropriate in the face of a finding that such remedy would result in a "serious disruption" of the respondent agency's operations. *Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 25 FLRA 32, 38, 66 (1987), reversed on other grounds, 834 F.2d 515 (5th Cir. 1987).

None of the 15 reasons given by DFAS in opposing the General Counsel's remedial request measures up to the kind of special circumstances the Authority might reasonably be expected to regard as rendering a *status quo ante* remedy inappropriate. In fact, except for one asserted reason that DFAS fleshes out with some explanation, the list of reasons presented bears negligible relevance, in my view, to its appropriateness. The Authority is, of course, part of the Federal Government, and must be as cognizant as any other agency of section 7101(a)(2) of the Statute, which provides, in pertinent part, that "the public interest demands . . . the efficient accomplishment of the operations of the Government." For the Authority to formulate a response to each of DFAS' tangential opposing reasons would be to engage in an exercise of such marginal usefulness as to violate the spirit of the quoted language.

The single asserted reason that DFAS presents with sufficient depth and apparent relevance to warrant an articulated response is that restoration of the special pay practices would be inefficient and disruptive to DFAS' mission. In this connection, DFAS refers to testimony concerning the partially completed standardization of the departmental pay systems, the complexity of the conversion system, and the necessity for uniformity to insure equitable treatment of all employees. DFAS also refers to testimony purporting to show that no special circumstances exist at the shipyard with respect to the need for special pay except for situations caused by the improper and untimely input of time and attendance records by shipyard supervisors, causing a number of errors in excess of DFAS' ability to correct through special pay.

Among these aspects of the potential difficulties with restoration, DFAS cites equitable treatment of employees as the most important. I am not persuaded by the implication that any employees will be treated unfairly because the special pay practices applied to one group of employees are temporarily restored. Uniformity is not necessarily the

same as equity. Here, the record fails to establish which employees, if any, other than those covered by Local 4105's collective bargaining agreement had enjoyed the benefit of the special pay practices that are the focus of this case. Moreover, the desirability of uniformity is diminished where, as here, there are legitimate reasons for benign discrimination that promotes other interests recognized by the Authority as consistent with the Statute's purposes and policies.

With respect to the difficulties that might be encountered because of the alleged sloppiness of the shipyard's time and attendance operations, these are management problems that must be addressed by management. They cannot **equitably** be used to defeat the Union's interest, on behalf of the employees it represents, to negotiate on an appropriately contoured playing field, or the public interest in insuring that it has that opportunity.

I therefore conclude that a *status quo ante remedy* is required in this case. However, I shall recommend the temporary restoration of the *status quo ante* only with respect to the bargaining unit employees who are represented by Local 4015. *Compare DOL II*, 44 FLRA at 998 (Authority's Order), *with Id.* at 1011 (Judge's recommended Order).

The General Counsel also requests that an appropriate notice, signed by the Director of DFAS, be posted. Of course, the purpose of such a notice will be served only if it is posted where employees who were affected by the unfair labor practice are likely to see it. Normally this result is obtained by having the respondent, when it is the employing agency or activity, post the notice where notices to its employees are customarily posted. Where, as here, the respondent, the agency component that committed the unfair labor practice is neither the employing agency nor is in the employing agency's chain of command, it is at least arguable that the respondent can do no more than to request the employing agency to post the appropriate signed notices. However, the Authority has rejected such an argument, in the absence of an affirmative showing by the respondent that "it would be estopped from either posting the notices or ensuring that the appropriate authorities post the notice." *U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254, 1263-64 (1993). Instead, the Authority has ordered the respondent agency component to post the notice at the facilities of the employing agency. *Id.* at 1266. *See also Headquarters, Defense Logistics Agency, Washington, D.C., supra,* 22 FLRA at 887.

I therefore recommend that the Authority issue the following order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, Defense Finance and Accounting Service, Headquarters, Arlington, Virginia, shall:

1. Cease and desist from:

(a) Taking actions which interfere with the collective bargaining relationship between the American Federation of Government Employees, Local 4015, and Norfolk Naval Shipyard.

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

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Rescind the changes in special pay policies regarding underpayments for regular and overtime work from the policies in effect at Norfolk Naval Shipyard prior to the transfer of payroll operations from Norfolk Naval Shipyard's payroll office, to the extent that those policies apply to employees represented by American Federation of Government Employees, Local 4015.

(b) Inform Norfolk Naval Shipyard that it has no objection to the shipyard's conducting negotiations with American Federation of Government Employees, Local 4015, over the substance and the impact and implementation of any changes in special pay policy.

(c) Post at all locations at Norfolk Naval Shipyard where bargaining unit employees represented by the American Federation of Government Employees, Local 4015, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Defense Finance and Accounting Service, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, February 2, 1996

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT take actions which interfere with the collective bargaining relationship between the American Federation of Government Employees, Local 4015, and Norfolk Naval Shipyard.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the changes in special pay policies regarding underpayments for regular and overtime work from the policies in effect at Norfolk Naval Shipyard prior to the transfer of payroll operations from Norfolk Naval Shipyard's payroll office, to the extent that those policies apply to employees represented by American Federation of Government Employees, Local 4015.

WE WILL inform Norfolk Naval Shipyard that we have no objection to the shipyard's conducting negotiations with American Federation of Government Employees, Local 4015, over the substance and the impact and implementation of any changes in special pay policy.

Defense Finance and Accounting Office

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, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW, 4th Floor, Washington, D.C. 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-40773 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Robert Campbell
Defense Finance and Accounting Center
Crystal Mall # 3, Rm. 308
1931 Jefferson Davis Highway
Arlington, VA 22240-5291

Mr. M. Lee Etter
Defense Finance and Accounting Center
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Denver, CO 80279-8000

Ronald Gardner, President
American Federation of Government
Employees, Local 4015
P.O. Box 1032
Portsmouth, VA 23705

Marilyn Blandford, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
1255 22nd Street, NW, 4th Floor
Washington, DC 20037-1206

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: February 2, 1996
Washington, DC