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

U.S. GEOLOGICAL SURVEY MAPPING APPLICATIONS CENTER RESTON, VIRGINIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 Charging Party	Case No. WA-CA-80139

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 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 14, 1998**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 10, 1998
Washington, DC

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

MEMORANDUM DATE: November 10, 1998

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. GEOLOGICAL SURVEY
MAPPING APPLICATIONS CENTER
RESTON, VIRGINIA

Respondent

and Case No. WA-CA-80139

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1309

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 briefs filed by the parties.

Enclosures

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

U.S. GEOLOGICAL SURVEY MAPPING APPLICATIONS CENTER RESTON, VIRGINIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 Charging Party	Case No. WA-CA-80139

Frances Corcoran White
Representative for the Respondent

Thomas F. Bianco
Beth I. Landes
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The issues in this unfair labor practice case are whether the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by eliminating the night shift in the press room on November 21, 1997, without completing bargaining with the Charging Party (Union) and while negotiable proposals were still pending.

Respondent contends that it bargained in good faith on six separate occasions and bargaining had been completed on all negotiable proposals when it implemented the shift change.

For the reasons explained below, I conclude that the Respondent violated the Statute as alleged.

A hearing was held in Washington, DC, on September 17, 1998. The Respondent and the General Counsel were represented by Counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs. Based on the entire record[1], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Parties

The National Federation of Federal Employees, Local 1309, (NFFE/Union) is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

Proposed Change

On October 24, 1997, the Respondent notified the Union that it intended to reduce the number of work shifts in the press room and quality control functions of the Printing Branch (press room) to one, by eliminating the night shift on November 24, 1997.

At the time of the notice, there were two shifts, a day shift and a night shift. There were about 10 employees on the presses and one in quality control on the night shift and about 10 on the presses and 2-3 in quality control on the day shift. The day shift hours began from between 6:30 to 8:00 a.m. for eight and one-half hours, and the night shift hours started from between 3:00 to 3:30 p.m. for the same amount of time.

Negotiations

On October 28, 1997, the Union requested negotiations and asked that no changes take place until the negotiations were completed. The Union also requested information, which was provided by the Respondent and discussed at the initial meeting on November 6. The parties did not bargain

[1] / Page 11 lines 4 and 5 of the transcript are corrected to read as follows:

> extraordinary circumstances considering the representations in the response. Respondent's representative is not a lawyer and strict construction of the rules

over or reach agreement concerning ground rules for the negotiations.

On November 13, 1997, the Respondent and the Union commenced negotiations over the procedures which the Respondent would use in eliminating the night shift in the press room and arrangements for employees who would be adversely affected. The parties exchanged proposals and negotiated on five separate occasions between November 13 and November 21, 1997. They did not reach final agreement on any of the proposals, but came to a tentative agreement on some of them.[2] The Union expected that it might exchange some of the tentative proposals for agreement on other proposals.
The parties did not sign off or initial any of the proposals to signify agreement.

At the end of the November 21 session, the Respondent advised the Union that bargaining was completed, as it had bargained on all negotiable proposals. Respondent stated that the remaining proposals were not negotiable, and it would change to an one day shift on the next workday, Monday, November 24, as previously announced.

Later that afternoon, the Union sent each member of Respondent's negotiating team another set of bargaining proposals, discussed more fully below. Some of the proposals were in bold print. Some were not. Printed at the top of the document were the words "ITEMS WITHOUT AGREEMENT ARE IN BOLD" (G.C. Exh. No.5). All of the proposals appearing in bold had been presented by the Union previously, and had been discussed fully by the parties during their bargaining sessions. The quoted words were used to indicate the proposals on which tentative agreement had been reached in order to distinguish them from the proposals over which the parties still had major differences.

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[2] / The acting chief of the Printing Branch, Joseph M. Miller, testified that he believed that the parties had reached agreement on all proposals except those deemed nonnegotiable. He did not explain the reason for his belief, or whether he believed that the agreement between the parties was tentative or binding. His prior experience in collective bargaining was limited to one occasion several years ago, and he could not recall how the parties manifested their agreement on that occasion. I have credited the detailed testimony in this respect of Union chief steward Lisbeth Chandler in finding that there was only tentative agreement on the proposals deemed negotiable by the Respondent.

The Change

As a result of the change on November 24, 1997, the ten employees on the night shift were switched to the day shift. Rotation between the night and day shift had previously been voluntary for many years. However, employees occasionally did move from the night to the day shift at their discretion by bumping less senior day shift employees, who, in turn, were moved to the night shift involuntarily. Two employees had worked nights for 18 and 27 years, respectively.

Employees had a financial incentive to remain on the night shift: they were paid a night shift differential, which was also counted in base pay for calculation of retirement pay benefits. This pay was lost when they were switched to days. In addition, one employee had supplemented his income by working for employers other than Respondent during the day.

Of the nine employees who worked on the presses on the night shift, eight were assigned to the presses on the day shift. One was assigned to inventory and another was made a temporary supervisor at about this time.

Four offset press operators, previously assigned to the presses on the day shift, were detailed to different duties in other units of the Printing Section.

The Proposals

The parties agreed that the General Counsel's Exh. No. 5 of November 21, 1997, sets forth those proposals on which there was agreement (Respondent) or tentative agreement (Union) and those in bold represented those on which there was no agreement.

The General Counsel contends that the proposals set forth below, submitted to the Respondent and sought to be negotiated, are still in dispute. The General Counsel notes that the introductory paragraph of the set of proposals states that all of the proposals apply only to employees in the press room and not to all employees in the Printing Branch. (G.C. Brief at 6-7). See Tr. 11-12.

> <u>Proposal 1</u>
>
> When making assignments on the press the Employer will first consider qualifications, e.g., experience/seniority in grade, and then consider seniority in service *to break ties between two equally*

qualified employees. [Emphasis in original].

* * * *

The Union's Position

The Union states that it intended the first sentence to leave with management complete discretion to establish the qualifications applicable to assigning operators to presses and to make such assignments, unless management decided that two operators were equally qualified. Among equally qualified operators, the assignment criterion Respondent would be required to use is seniority.

The Respondent's Position

The Respondent has addressed the original proposal as a whole and not just the above sentence offered by the General Counsel as severable and negotiable. The Respondent contends, without further explanation, that the proposal directly interferes with management's statutory authority to assign work in accordance with section 7106(a)(2)(B) of the Statute. The Respondent also claims, without further explanation, that assignment to a particular press is a determination of "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and is a permissive subject of bargaining as provided for in section 7106(b)(1) of the Statute. Finally, the Respondent states that the procedures and criteria by which press assignments are made were not changed as a result of the elimination of the night shift and, therefore, management's obligation to bargain in accordance with section 7106(b)(2) and (3) of the Statute is nonexistent. In this regard, the acting chief of the Printing Branch, Joseph M. Miller, testified that press assignments are made by grade level and by a determination of who works the fastest and best on a particular press. Respondent also tries to accommodate preferences regarding coworkers. Press production is the bottom line in making assignments.

Proposal 3B.

> If the Employer finds it necessary to start the night shift back up, the employer will notify the union and negotiate with the union as appropriate.

The Union's Position

The Union offered proposal 3B so that it would be able to bargain should Respondent reinstate the night shift and in order to obtain some advantage, not otherwise obtained through proposal 3A[3], for offset press operators affected adversely by the termination of the night shift. The Union sought to postpone the decision about what substantive terms to seek because it preferred to make an assessment of the employees' situation if and when the night shift actually was reinstated rather than to guess in November 1997 as to the employees' future needs. The Union also was particularly concerned about the potential application of the Authority's "covered by doctrine," especially because of the parties' discussion of and tentative agreement to proposal 3A.

Respondent told the Union at negotiations that bargaining over proposal 3B was not required because proposal 3A covered all that was necessary with respect to the possibility that the night shift might be reinstated, and that proposal 3B did not concern the impact of the termination of the night shift.

The Respondent's Position

The Respondent claims that the proposal is not related to the current change in the conditions of employment resulting from management's exercise of its right to terminate the night shift and is outside the scope of bargaining in the immediate case. According to the Respondent, the proposal is neither a procedure that management will observe in exercising its authority nor an appropriate arrangement for adversely affected employees since there can be no adverse effect for an action not taken or proposed. Should management decide to reinstate the night shift for these employees, then, according to Respondent, the bargaining obligation imposed by the Statute would apply. Moreover, management asserts that proposal 3A (see footnote 3), which provides that employees coming off the night shift would have priority for electing to return to that shift, provides an appropriate arrangement for the

[3] / Proposal 3A, as to which there was tentative agreement, provides:

> The Parties agree that should the workload increase to a level which can again support a two-shift operation and the Employer decides to reinstate the night shift, those employees being moved to the day shift will have first consideration to night shift positions for which they volunteer and qualify.

affected employees. Respondent also asserts that negotiation between the parties is a matter covered by their collective bargaining agreement. However, no testimony in this regard was elicited, and the agreement is not in evidence.

Proposal 8

> Employees can keep the AWS schedules currently in effect or they may switch to a compressed schedule using the guidelines attached. The parties agree that altering an employee's press assignment may be necessary based on that employee's AWS schedule to ensure that everyone has work. If a problem develops with AWS/Compressed and scheduling of presses, the employer and the union agrees to work with each other to resolve it.

The Union's Position

The General Counsel contends that the Union's language and interpretation are designed to establish a compressed work schedule for all offset press operators on the day shift, on and after the elimination of the night shift. A compressed schedule is one that permits an employee to work less than 10 days in a pay period. According to the General Counsel, bargaining over the subject of compressed work schedules is mandatory, pursuant to the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §§ 6120-6133, e.g., U.S. Department of the Air Force, 416 CSG, Griffiss Air Force Base, Rome, New York, 38 FLRA 1136, 1147 (1990), and there is no basis for concluding that any portion of proposal eight, including the guidelines attached to it, would interfere directly or excessively with any retained management right.

The Union claims that its proposal is an appropriate arrangement as it seeks to enable one employee in particular, and other former night shift employees, to obtain day jobs, and thereby minimize their lost income potential, by working less than 10 days in a pay period and increasing to three the number of consecutive days off an employee would have. As the elimination of the night shift necessarily would result in some offset press operators not performing their assigned duties, the compressed work schedule would also provide those employees with the time during the week to seek employment as offset press operators elsewhere. Thus, the Union contends that the proposal is tailored to ameliorate the effect of the termination of the night shift on adversely affected employees.

Union chief steward Chandler admitted during her testimony that the existing AWS plan does provide for nine or 10 hour work days and that management separately agreed that employees could maintain their current schedule under that plan.

The Respondent's Position

The Respondent views the proposal as an attempt on the part of the Union to add the provisions of a compressed work schedule as an option for all employees. The Respondent states that it is not required to bargain over proposals that would be applied to employees without regard to whether the group as a whole is likely to suffer, or has suffered, effects as a consequence of management action. Respondent claims that there is no adverse effect on any bargaining unit employee because it proposed no restriction on the ability of employees to schedule work under the AWS guidelines in effect and agreed to allow employees to maintain their current AWS schedule, e.g., nine or 10 hour days.

Discussion and Conclusions

The Issues

There is no dispute that the Respondent proposed to terminate the night shift in the press room pursuant to management rights under section 7106(a) of the Statute, that the change had more than a de minimis impact on employees, and that the Respondent and the Union engaged in bargaining on several occasions pursuant to section 7106(b)(2) and (3) of the Statute, primarily concerning appropriate arrangements for employees adversely affected by the change.

The issue presented is whether the Respondent implemented the proposed change prior to completing bargaining with the Union and while a negotiable proposal was still on the table. The Authority has held that "[w]here a union submits bargaining proposals and an agency refuses to bargain over the proposals based on the contention that they are nonnegotiable, the agency acts at its peril if it then implements the proposed change in conditions of employment. If any one of the union's proposals is held to be negotiable, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute by implementing the change without bargaining over the negotiable proposal." U.S. Department of Health and Human

Services, Social Security Administration, Baltimore, Maryland,
and Social Security Administration, Hartford District Office,
Hartford, Connecticut, 41 FLRA 1309, 1317 (1991).

No Agreement

In addition to the proposals at issue being declared nonnegotiable by the Respondent, the parties had not reached final agreement on any proposal. 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. International Organization of Masters, Mates and Pilots and Panama Canal Commission, 36 FLRA 555, 560 (1990). In determining whether a party has fulfilled its bargaining obligation, the Authority considers the totality of the circumstances in a given case. E.g., Army and Air Force Exchange Service, 52 FLRA 290, 304 (1996); U.S. Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524, 531 (1990). In this case, the parties had no common understanding as to what would constitute an agreement, through ground rules or otherwise. In fact, at the time of implementation, there was no expression of agreement given by either party and no agreement was reached by the parties.

The Particular Proposals

In American Federation of Government Employees, HUD Council of Locals 222, Local 2910 and U.S. Department of Housing and Urban Development, 54 FLRA 171, 178 (1998), the Authority held that in cases where a union both disputes an agency's assertion that a proposal affects management's rights under section 7106(a) of the Statute, and asserts that the proposal is negotiable under section 7106(b), the Authority will first address whether the proposal affects those 7106(a) rights. If the proposal does not affect management's rights under section 7106(a), or if it constitutes a procedure or an appropriate arrangement within the meaning of section 7106(b)(2) or (b)(3), respectively, then the Authority will direct the parties to bargain over that proposal. Id. However, if the Authority finds that the proposal affects management's rights under section 7106 (a), and does not constitute a (b)(2) or (b)(3) matter, then the Authority will address whether the proposal concerns matters encompassed by section 7106(b)(1) of the Statute. Id. If the proposal concerns matters negotiable at the agency's election under section 7106(b)(1), then the

Authority will dismiss the petition for review. See, e.g., American Federation of Government Employees, Council of Prison Locals, Local 171 and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, El Reno, Oklahoma, 52 FLRA 1484, 1495 (1997).

The First Sentence of Proposal 1 is Negotiable

As set forth above, the first sentence of Proposal 1 would require the Respondent, when making assignments on the press, to first consider qualifications, e.g., experience/ seniority in grade, and then consider seniority in service to break ties between two equally qualified employees. Severance of that sentence from the rest of the proposal is practicable, and as severance has been requested, the sentence will be analyzed separately.[4] American Federation of Government Employees, Local 3354 and U.S. Department of Agriculture Farm Services Agency, Kansas City Management Office, 54 FLRA 807, 809 (1998).

The right to assign employees under section 7106(a)(2)(A) of the Statute includes the right to determine the qualifications and skills needed to perform the work of the position, including such job-related individual characteristics as judgment and reliability, and to determine whether employees meet those qualifications. National Association of Government Employees, Local R4-45 and U.S. Department of Defense, Defense Commissary Agency, Central Region, Virginia Beach, Virginia, et al. 54 FLRA 218, 223 (1998).

The Union stated that it intended the first sentence of proposal 1 to provide for the use of seniority in assigning employees to printing presses under very limited circumstances. Specifically, the Union stated that the proposal was meant to leave with management the discretion to decide what qualifications would be used in assigning employees to printing presses and the discretion to select the specific employees who will be assigned to any particular press, with one exception. That exception is when Respondent determines that two or more employees are equally qualified, in which case the sole selection factor will be seniority. The Union's interpretation is consistent with the language of the sentence, and, therefore, is accepted.

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[4] / I assume from this request that the Union no longer desires a negotiability determination in this forum concerning the rest of the disputed proposal.

It is well established that a proposal requiring the use of seniority in making work assignments from among employees management has determined to be equally qualified to perform the work does not directly interfere with management's rights to assign work. American Federation of Government Employees, Local 1138, Council 214 and U.S. Department of the Air Force, Air Force Materiel Command, 645 Air Base Wing/CE, Wright-Patterson Air Force Base, Ohio, 51 FLRA 1725, 1730-31 (1996).

The analytical framework for determining whether a proposal offered in response to an agency's plan to exercise a retained right is negotiable as an appropriate arrangement was established in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986). First, it must be determined that the proposal constitutes an appropriate arrangement for employees who will be adversely affected, that is, whether the proposals seek to address, compensate for, or prevent adverse effects produced by the exercise of management's rights. Second, if the proposals are arrangements, they must be appropriate in order to be negotiable. A proposal is appropriate if it does not interfere excessively with the exercise of a retained management right. This determination is made by weighing the practical need of employees and managers in order to ascertain whether the benefit to the employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right. E.g., American Federation of Government Employees, Local 3434 and National Aeronautics and Space Administration, Marshall Space Flight Center, Alabama, 49 FLRA 382, 388-89 (1994).

As a general rule, a proposal must be tailored to compensate or benefit employees who will suffer adverse consequences as a result of management's exercise of a retained right, and may not have such broad application that it affects all employees regardless of their likelihood of suffering adverse consequences. The Authority has recognized, however, that in circumstances where it is nearly impossible to ascertain in advance which employees will actually suffer adverse consequences, strict application of the general rule would effectively eliminate the ability of a union to draft a proposal that would compensate the actual sufferers. In those circumstances, the Authority has found a proposal to be an arrangement if it would apply to a group of employees each of whom is in the same position with respect to the possibility of suffering adverse consequences but none of whom can be identified in advance as the one(s) who will actually suffer. Id.; National Treasury Employees Union, Chapter 243

and U.S. Department of Commerce, Patent and Trademark Office, 49 FLRA 176, 181-85, 191-94 (1994).

Contrary to the Respondent's position that no change occurred in the procedures and criteria by which press assignments are made as a result of the elimination of the night shift, since Respondent lacked sufficient presses and work to accommodate all offset press operators on one shift, some of them clearly would not be able to be assigned to perform the duties of their position in a one-shift operation. Accordingly, each one of the employees, those who were to be switched to the day shift and those already working on the day shift, faced equally the possibility of not being among those who would continue to perform their assigned duties after the night shift was terminated. The Union proposal is a method for determining which of the operators among equally qualified employees would continue to perform their assigned duties. Thus, the proposal seeks to address, compensate for, or prevent adverse effects produced by the exercise of management's rights and constitutes an arrangement for employees who will be adversely affected. It is appropriate as it provides benefits to these employees and does not interfere excessively with the exercise of a retained management right.

Proposal 3B is Negotiable

As set forth above, Proposal 3 provides that the Respondent will notify the Union and negotiate with it as appropriate if the Respondent finds it necessary to reinstate the night shift.

Contrary to the Respondent's position, I find that the proposal does relate to the elimination of the night shift. As the General Counsel argues, the proposal calls for bargaining if and when the night shift is reinstated so that the Union would be in a position to know fully the situation of the employees at that time rather than to speculate in November 1997 about their future situation. A union is not foreclosed from later bargaining over issues that it could not reasonably anticipate would become relevant at the time of a change in conditions of employment. U.S. Patent and Trademark Office, 46 FLRA 278, 279 (1992). The proposal would also prevent possible application of the "covered by doctrine," see U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA, Baltimore), and thus would not foreclose further bargaining as a result of eventual agreement on proposal 3A. The Respondent has not identified any law, regulation, or Government-wide rule or regulation which

would bar negotiation on this proposal or demonstrated in what manner the proposal would interfere with any management right excessively or indirectly. Accordingly, I find that proposal 3B is negotiable.

Proposal 8 is *Not Negotiable*

As set forth above, Proposal 8 would, among other things, allow employees to keep the AWS schedules currently in effect or switch to a compressed work schedule under certain guidelines.

Contrary to the Respondent's position that the provision would apply to all employees, the Union has clarified the matter by stating that the provision applies only to all offset press operators on the day shift, on and after the elimination of the night shift. In interpreting a proposal, the Authority looks to its plain wording and any union statement of intent. If the union's explanation is not inconsistent with the plain wording, the Authority adopts that explanation for the purpose of construing what the proposal means and, based on its meaning, deciding whether it is, or is not, within the duty to bargain. International Federation of Professional and Technical Engineers, Local 35 and U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 54 FLRA No. 120 (1998). The clarification comports with the plain wording of the proposal and the preamble to the proposed memorandum of understanding and is adopted. See, e.g., National Education Association, Overseas Education Association, Laurel Bay Teachers Association and U.S. Department of Defense, Department of Defense Domestic Schools, Laurel Bay Dependents Schools, Elementary and Secondary Schools, Laurel Bay, South Carolina, 51 FLRA 733, 737 (1996).

The Respondent claims that the proposal cannot constitute an arrangement for employees who will be adversely affected by the exercise of management's rights because the Respondent has proposed no restrictions on the ability of concerned employees to maintain their current schedule or to schedule their work under the existing AWS guidelines, which provide for nine or 10 hour days. A compressed schedule is one that permits a full-time employee to work an 80-hour bi-weekly basic work requirement in less than 10 days. The existing AWS plan was not made part of the record nor were the proposed compressed schedule guidelines, but Union chief steward Chandler did admit that the existing AWS plan provides for nine or 10 hour work days. Since the Union's goal was to allow employees to work less than 10 days in a pay period, the existing plan provides the desired relief for adversely affected employees expressed by the Union. As the matter sought to be

bargained is an aspect of matters already negotiated, the proposed compressed schedule is covered by the existing plan in this respect. SSA, Baltimore, 47 FLRA at 1017-19. Since there was no management action to change this condition of employment, there is no obligation in the immediate case to bargain in this respect.

The Violation

In addition to the first sentence of proposal 1 and proposal 3B being negotiable, the parties had not reached final agreement on any proposal. Therefore, negotiable proposals were on the table, and bargaining had not been completed at the time Respondent implemented the proposed change. Accordingly, the Respondent violated section 7116 (a)(1) and (5) of the Statute, as alleged.

The Remedy

In addition to requesting an order requiring the Respondent to complete bargaining with the Union and post an appropriate notice, the General Counsel requests a status quo ante remedy, requiring the Respondent to reinstate the night shift, and a backpay award, requiring the Respondent to pay employees for the amount of night differential lost as a result of the termination of the night shift.

In Federal Correctional Institution, 8 FLRA 604 (1982) (FCI), the Authority set forth criteria for determining whether status quo ante relief would be appropriate in situations where the bargaining obligation pertaining to a change is limited to the impact and implementation of the decision. The Authority will consider, among other things:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and

effectiveness of the agency's operations. Id. at 606.

The criteria set forth in FCI are not all-inclusive, rather, on a case-by-case basis, the Authority may rely on "other things" in determining the appropriateness of a status quo ante remedy. Id.

The uncontroverted evidence in this case establishes that many of the FCI factors are met. The Union received notice from the Respondent by letter dated October 24, 1997. The Union then requested bargaining by letter on October 28, 1997. The Respondent willfully declared negotiations over the change complete on November 21, 1997, and implemented the change on November 24, 1997, prior to reaching impasse or agreement with the Union. This was an arbitrary date chosen by the agency, as no evidence was presented demonstrating that it was necessary that the agency implement this change on that date. Further, negotiable proposals remained on the table at the time of implementation. The change had a significant impact on unit employees: it reduced their pay by eliminating a night shift differential; it eliminated the pay some employees received, and others could potentially receive, from day jobs with other employers; and some employees were required to perform other duties.

The General Counsel urges that a status quo ante remedy would not disrupt or impair the efficiency and effectiveness of the agency's operations because, since the termination, the agency reinstated the night shift in the press room during the period May to August 1998. However, the night shift was originally eliminated because there was not enough work to justify the running of the presses on two shifts. There is no evidence that there is now enough work to justify reinstatement of the night shift. Therefore, I conclude that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations and would not be an interpretation "consistent with the requirement of an effective and efficient Government" as required by section 7101 of the Statute.

The Respondent having violated the Statute and, accordingly, having committed an unjustified personnel action that resulted in the reduction of earning opportunities for night differential for bargaining unit employees, a backpay award under the Back Pay Act is proper to remedy the refusal to bargain. United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128, 1129-30 (1992) (A backpay award ordered where employees lost opportunities to earn overtime, night differential, and

Sunday premium pay when the agency unilaterally changed shifts and tours of duty, even where a status quo ante award was deemed to be inappropriate.) The purpose of a "make whole" remedy is to place individuals who have been adversely affected by an improper action in the situation where they would have been if the improper action had not occurred. Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas, 32 FLRA 521 (1988).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Geological Survey, Mapping Applications Center, Reston, Virginia,
shall:

1. Cease and desist from:

(a) Failing and refusing to meet and negotiate, consonant with the obligations imposed by the Statute, with the National Federation of Federal Employees, Local 1309, the exclusive representative of its employees, over proposals it submitted regarding the procedures to be observed and appropriate arrangements for employees adversely affected by the elimination of the night shift in the press room on November 24, 1997, including those proposals found to be negotiable by the Authority.

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

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

(a) Upon request of the National Federation of Federal Employees, Local 1309, the exclusive representative of its employees, negotiate in good faith concerning the procedures to be observed and appropriate arrangements for employees adversely affected by the elimination of the night shift in the press room on November 24, 1997, including those proposals found to be negotiable by the Authority.

(b) Consistent with law and regulation, compensate bargaining unit employees for appropriate night differential or other pay, allowances, and differentials which the employees would have received if changes in the tours of duty and work shifts due to the elimination of the night shift in the press room on November 24, 1997, had not occurred.

(c) Post at the U.S. Geological Survey, Mapping Applications Center, Reston, Virginia, where bargaining unit employees represented by the National Federation of Federal Employees, Local 1309, 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, U.S. Geological Survey, and 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 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 10, 1998.

GARVIN LEE OLIVER
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. Geological Survey, Mapping Applications Center, Reston, Virginia, 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 to meet and negotiate, consonant with the obligations imposed by the Statute, with the National Federation of Federal Employees, Local 1309, the exclusive representative of our employees, over proposals it submitted regarding the procedures to be observed and appropriate arrangements for employees adversely affected by the elimination of the night shift in the press room on November 24, 1997, including those proposals found to be negotiable by the Federal Labor Relations Authority (Authority).

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

WE WILL, upon request of the National Federation of Federal Employees, Local 1309, negotiate in good faith concerning the procedures to be observed and appropriate arrangements for employees adversely affected by the elimination of the night shift in the press room on November 24, 1997, including those proposals found to be negotiable by the Authority.

WE WILL, consistent with law and regulation, compensate bargaining unit employees for appropriate night differential or other pay, allowances, and differentials which the employees would have received if changes in the tours of duty and work shifts due to the elimination of the night shift in the press room on November 24, 1997, had not occurred.

(Activity)

Date: 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 any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW., Suite 400, Washington, DC 20037 and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-80139, were sent to the following parties:

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

Thomas Bianco, Esquire — P168-059-604
Federal Labor Relations Authority
1255 22nd Street, NW, Suite 400
Washington, DC 20037

Beth Landes, Esquire — P168-059-605
Federal Labor Relations Authority
1255 22nd Street, NW, Suite 400
Washington, DC 20037

Lisbeth Chandler, Chief Steward — P168-059-606
NFFE, Local 1309
P.O. Box 5344
Herndon, VA 20172

Frances White, LRO — P168-059-607
U.S. Geological Survey
601 National Center
Reston, VA 20192

REGULAR MAIL:

Richard Brown, President
NFFE, AFL-CIO
1016 16th Street, NW, Suite 300
Washington, DC 20036

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: NOVEMBER 10, 1998
WASHINGTON, DC