OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C.

Respondent

and

Case No. WA-CA-30043

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO

Charging Party

Steven R. Freedman

Representative of the Respondent

T. J. Bonner

Representative of the Charging Party

Susan L. Kane

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

On July 12, 1994, the General Counsel, FLRA, by the Regional Director, Washington Regional Office, issued a Complaint and Notice of Hearing which were duly served by certified mail and received by Respondent. The Complaint alleged that 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 refusing to negotiate with the Union concerning a foreign language bonus program for bargaining unit employees as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

The Complaint specifically advised the Respondent that it must file an Answer with the Washington Regional Director. The Complaint also stated, "If the Respondent does not file an answer, the Authority will find that the Respondent has admitted each allegation. See 5 C.F.R. § 2423.13." The Complaint also advised the Respondent that an answer filed in person must be received by the Washington Region no later than August 8, 1994 or, if filed by mail, postmarked by August 8, 1994. In addition, Respondent was advised to serve any Answer on the Chief Administrative Law Judge and on all other parties.

On August 8, 1994, Respondent served an Answer on the Chief Administrative Law Judge and the Union, but did not file or serve the Answer on the Washington Regional Director. Respondent's Answer admitted all factual allegations in the Complaint and only took issue with the legal conclusion that Respondent had committed an unfair labor practice.

On January 11, 1995, Counsel for the General Counsel filed a motion for summary judgment predicated on the argument that Respondent had not filed an Answer with the Washington Regional Director as required by 5 C.F.R. § 2423.13(a) and had, therefore, admitted all the allegations set forth in the Complaint pursuant to 5 C.F.R. § 2423.13(b).

The Chief Administrative Law Judge gave the parties until January 27, 1995 to file any pleadings or briefs with regard to the matter. Respondent failed to file a response by the January 27, 1995-deadline. On February 14, 1995, Respondent submitted a request to dismiss the motion for summary judgment on the basis that it had "filed" an Answer with the Chief Administrative Law Judge and the Union, and "it was clearly the Agency's intent" to file an Answer with the Regional Director, although, "in error" this had not been done. There is no indication that Respondent, upon discovering its error, ever filed or served the Answer on the Washington Regional Director.

On February 14, 1995, the Chief Administrative Law Judge ordered the Respondent to show cause why the hearing previously set should not be canceled and judgment rendered on the pleadings. Respondent made no response.

On February 27, 1995, the Chief Administrative Law Judge canceled the hearing previously set and gave the parties until March 24, 1995 to file briefs on the legal issues. The Union and the General Counsel filed responses, but Respondent did not.

Based on the record, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. Accordingly, the General Counsel's motion is granted, and I make the following concluding findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (Union) is a labor organization under 5 U.S.C. § 7103(a)(4).

2. The U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. (Respondent) is an agency under 5 U.S.C. § 7103(a)(3).

3. The charge was filed by the Charging Party with the Washington Regional Director on October 16, 1992.

4. A copy of the charge was served on the Respondent.

5. During the time period covered by the complaint, these persons occupied the position set opposite their names:

James J. Hogan	Executive Associate Commissioner
Marylou Whelan	Director, Personnel Division

6. During the time period covered by the complaint, the persons named in paragraph 6 were supervisors or management officials under 5 U.S.C. § 7103(a)(10) and (11).

7. During the time period covered by the complaint, the persons named in paragraph 6 were acting on behalf of the Respondent.

8. The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.

9. By letters dated December 30, 1991, January 27, 1992 and May 26, 1992, the Union demanded to bargain with Respondent concerning a foreign language bonus program for employees in the bargaining unit as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

10. Since August 26, 1992, the Respondent, by Hogan and Whelan, has refused to negotiate with the Union concerning the bargaining request.

Discussion and Conclusions

Respondent has failed to file an Answer with the Regional Director who issued the Complaint, as required by 5 C.F.R. § 2423.13(a), and good cause has not been shown for its failure to do so. Parties are responsible for being knowledgeable of the regulatory filing requirements. Cf. National Federation of Federal Employees, Local 405 and U.S. Department of the Army, U.S. Army Aviation and Troop Command, St. Louis, Missouri, 50 FLRA 3, 4 (1994). Accordingly, pursuant to 5 C.F.R. § 2423.13(b), the failure to file an Answer constitutes an admission of each allegation in the complaint, including the allegation that "[b]y the conduct described . . . the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(1) and (5)." Cf. U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida, 37 FLRA 603, 610 (1990); U.S. Army Aeromedical Center, Fort Rucker, Alabama, 49 FLRA 361 (1994).

Even assuming that Respondent had shown good cause for its failure to file an answer with the Regional Director, and Respondent's denial of a violation is therefore valid, still there is no genuine issue of material fact and the General Counsel is entitled to summary judgment as a matter of law.[1]

5 U.S.C. § 4523, part of the Federal Law Enforcement Pay Reform Act of 1990, effective January 1, 1992, provides as follows:

§ 4523. Award authority

(a) An agency may pay a cash award, up to 5 percent of basic pay, to any law enforcement officer employed in or under such agency who possesses and makes substantial use of 1 or more foreign languages in the performance of official duties.

(b) Awards under this section shall be paid under regulations prescribed by the head of the agency

involved, (or designee thereof). Regulations prescribed by an agency head (or designee) under this subsection shall include ----

(1) procedures under which foreign language proficiency shall be ascertained;

(2) criteria for the selection of individuals for recognition under this section; and

(3) any other provisions which may be necessary to carry out the purposes of this subchapter.

The Union's requests to bargain over the foreign language award program for bargaining unit employees involve a condition of employment within the meaning of section 7103(a)(14). The matter pertains to bargaining unit employees and directly affects their working conditions. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-37 (1986). Because the amounts of the awards under 5 U.S.C. § 4523 are within the Agency's discretion under procedures and criteria to be prescribed, the matter is not specifically provided by Federal statute within the meaning of section 7103(a)(14)(C) of the Statute.

The Authority has held that where law or applicable regulation vests an agency with exclusive authority or unfettered discretion over a matter, the agency's discretion will not be subject to negotiation. However, where an agency's discretion is not exclusive and the matters to be negotiated are not otherwise inconsistent with law or applicable rule or regulation, the agency is obligated under the Statute to exercise that discretion through bargaining.(2)

In its examination of the issue of unfettered discretion, the Authority has held that the absence of the preemptive clause "notwithstanding any other provision of law . . ." in a statute is a strong indication that Congress did not intend to grant unfettered discretion to an affected agency.(3) It is significant that the language at issue herein contains no such preemptive language. To the contrary, the legislative history of the Federal Law Enforcement Pay Reform Act of 1990 provides strong support for the position that Congress intended that the language bonus payments therein be implemented by all agencies:

> The Conferees have included a separate Title in [sic] pay reform section of the Act which is intended to provide immediate relief to the Federal law enforcement agencies who are facing severe recruitment and retention problems. These problems have been directly attributed to the large discrepancies which exist in the area of pay and benefits between Federal law enforcement officers and their state and local enforcement counterparts.
>
> The National Advisory Commission on Law Enforcement studies [sic] these problems and reported its findings and recommendations to the Congress in April, 1990. The legislation included in the conference agreement incorporates the major recommendations of the Commission and will bring about changes that will curb resignations of experienced personnel and increases the pool of available qualified applicants**.**

. . .

> Agencies will have discretion to pay, sums up to 5% of base pay to eligible Federal law enforce-ment employees whom the agency determines have demonstrated a level of proficiency in a foreign language and where a need exists to use that language in the performance of their duties.(4)

With respect to the payment of foreign language bonuses, the National Advisory Commission on Law Enforcement published the following findings:

> Foreign language bonuses are provided in some federal agencies but not in others. Currently, only the FBI, the Drug Enforcement Agency (DEA), and the State Department are authorized to pay foreign language bonuses for personnel who are required to have proficiency in a foreign language. Interest-ingly, this requirement in the Border Patrol is a major cause of retention problems. The difficulty of mastering another language causes many entry-level employees to leave.(5)
>
> . . . .
>
> As mentioned above, foreign language bonuses are provided in some federal agencies but not in others. Currently, only the State Department, FBI, and DEA are authorized to pay foreign language bonuses for personnel who are required to have proficiency in a foreign language. The increases in the numbers of international drug traffickers and criminal aliens in the United States justify the use of similar bonuses for all law enforcement officers who are required to have proficiency in a foreign language. For example, INS requires all newly hired Border Patrol agents to develop proficiency in Spanish. According to INS, the requirement for Border Patrol agents to speak Spanish is a major cause of retention problems**.** The Bureau of Prisons houses inmates from over 140 countries. Many other federal agencies require employees to maintain a proficiency in a foreign language, but none are authorized to pay bonuses for this skill.(6)

At the conclusion of its report, the Commission recommended the payment of a foreign language bonus to all qualified federal law enforcement officers:

> Congress should enact legislation to provide a foreign language bonus for all federal law enforcement officers who are required to speak a foreign language in the performance of their official duties.(7)

A review of the foregoing relevant provisions of the Federal Law Enforcement Pay Reform Act reveals a clear Congressional intent to implement the major recommendations of the National Advisory Commission on Law Enforcement in order to enhance the desirability of federal law enforcement positions. One of the major recommendations of the report was that all federal law enforcement officers who are required to speak a foreign language in the performance of their duties should be compensated for that skill. The language of the Federal Law Enforcement Pay Reform Act also supports the conclusion that Congress intended for all qualified employees to receive language bonus payments, granting discretion to agencies only with respect to the establishment of procedures to ascertain foreign language proficiency and criteria for the selection of qualifying individuals. Similar to the law in DVA, nothing in the plain wording of 5 U.S.C. § 4523 indicates that management's authority to establish a foreign language award program is to be exercised without regard

to other laws in general or the Statute in particular.

It is well established that the duty to bargain in good faith under the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters that are not contained in or covered by the collective bargaining agreement, unless the union has waived its right to bargain about the subject matter involved. See Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 46 FLRA 1184, 1186 (1993). There is no assertion or indication that the Union sought to bargain over a matter that is contained in or covered by the parties' agreement or waived its right to bargain. The negotiability of the individual proposals are not at issue in this case.

The Agency has failed to demonstrate that the Union's effort to bargain over the matter interfered with management's right to determine its budget under section 7106(a)(1) of the Statute under the Authority's two part test set forth in National Association of Government Employees, Local R14-52 and U.S. Department of the Army, Red River Depot, Texarkana, Texas, 48 FLRA 1198 (1993).

It is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, by refusing to negotiate with the Union concerning a foreign language bonus program for employees in the bargaining unit as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

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

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. shall:

1. Cease and desist from:

(a) Failing or refusing to bargain with the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, the exclusive representative of an appropriate unit of its employees, concerning a foreign language bonus program for bargaining unit employees as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

(b) In any like or related manner interfering with, restraining or coercing its 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 Federal Service Labor-Management Relations Statute:

(a) Advise the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, that it will negotiate in good faith concerning a foreign language bonus program for bargaining unit employees as authorized by the Federal Law Enforcement Pay Reform Act of 1990 and take such steps as are necessary to do so pursuant to section 7114(b) of the Statute.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, 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 Commissioner 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 19, 1995

GARVIN LEE OLIVER

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 HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to bargain with the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, the exclusive representative of an appropriate unit of our employees, concerning a foreign language bonus program for bargaining unit employees as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

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 negotiate in good faith with the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, concerning a foreign language bonus program for bargaining unit employees as authorized by the Federal Law Enforcement Pay Reform Act of 1990.

_____

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

1. 1/ Respondent has not presented a statement of its position on the merits of the case and/or its theory in support thereof to this Office although invited to do so. See 5 C.F.R. § 2423.19(l).

2. See, e.g., National Federation of Federal Employees, Council of VA Locals and U.S. Department of Veterans Affairs, Washington, D.C., 49 FLRA 923, 933 (1994), petition for review filed sub nom. United States Department of Veterans Affairs, Washington, D.C. v. FLRA, No. 94-1484 (D.C. Cir. April 11, 1995) [hereinafter cited as DVA]; Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky, 44 FLRA 162, 163-65 (1992) [hereinafter cited as VAMC]; and U.S. Department of Defense, Office of Dependents Schools and Overseas Education Association, 40

FLRA 425, 441-43 (1991).

3. See, e.g., DVA, *supra*, at 933-34 and VAMC, *supra*, at 165.

4. H.R. Conf. Rep. No. 101-906, 101st Cong., 2d Sess.

90-91 (1990) (Charging Party's Exhibit #1).

5. *Report of the National Advisory Commission on Law Enforcement*, April 1990, OGC-90-2, page 17 (Charging Party's Exhibit #2).

6. Id. at 70.

7. Id. at 121.