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

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF SSA FIELD OPERATIONS LOCALS Charging Party and SOCIAL SECURITY ADMINISTRATION REGION IX, MESA DISTRICT OFFICE MESA, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3694, AFL-CIO Charging Party	Case Nos. WA-CA-60600 DE-CA-70354

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 **APRIL 20, 1998**, and addressed to:

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

_____
GARVIN LEE OLIVER
Administrative Law Judge

Dated: March 17, 1998
Washington, DC

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

MEMORANDUM DATE: March 17, 1998

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MD

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF SSA FIELD OPERATIONS LOCALS

Charging Party

and Case Nos. WA-CA-60600

DE-CA-70354

SOCIAL SECURITY ADMINISTRATION, REGION IX, MESA DISTRICT OFFICE, MESA, ARIZONA
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3694, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF SSA FIELD OPERATIONS LOCALS Charging Party and SOCIAL SECURITY ADMINISTRATION REGION IX, MESA DISTRICT OFFICE MESA, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3694, AFL-CIO Charging Party	Case Nos. WA-CA-60600 DE-CA-70354

Wilson Schuerholz
Representative for the Respondent

Jeanne Marie Corrado
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

These unfair labor practice complaints were consolidated for hearing because they both concern the issue of whether the Respondent, Social Security Administration (SSA), the Agency, and its activity or component, SSA, Region IX, Mesa District Office, Mesa, Arizona (SSA Mesa) have a duty to bargain over matters which, under section 7106(b)(1) of the Federal Service Labor-Management Relations

Statute (the Statute), 5 U.S.C. § 7106(b)(1), an agency may elect to bargain.[1] The General Counsel claims that management made an express election to bargain by an unnumbered article entitled, "Partnerships," in the national collective bargaining agreement and/or that the President of the United States exercised Respondent's election to bargain under section 7116(b)(1) by issuing Executive Order 12871, entitled, "Labor Management Partnerships."

More specifically, the amended complaint in Case No. WA-CA-60600 alleges that SSA violated section 7116(a)(1) and (5) of the Statute when it refused to bargain over SSA's allocation of staff for field offices and teleservice centers, and violated section 7116(a)(1), (5) and (8) when SSA refused to provide information necessary and relevant to bargaining over the staffing allocation, and violated section 7116(a)(1) and (5) by refusing to comply with the parties' collective bargaining agreement. The Union had requested to bargain over the numbers, types, and grades of employees or positions assigned to SSA's field offices and teleservice centers.

The complaint in Case No. DE-CA-70354 alleges that SSA Mesa violated section 7116(a)(1) and (5) of the Statute when it refused to bargain with AFGE Local 3696 over Union-initiated proposals concerning matters set forth in section 7106(b)(1) of the Statute. The proposals were to add two service representative positions to the staff and provide them with computer terminals. In the alternative, the complaint alleges that SSA Mesa violated the Statute by refusing to comply with the parties' collective bargaining agreement.

For the reasons set out below, I find that SSA and SSA Mesa did not violate the Statute as alleged, and recommend that the complaints be dismissed.

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[1] Section 7106(b)(1) of the Statute provides, in pertinent part:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> > (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]

A hearing was held on January 22, 1998, in Washington, D.C. 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 General Counsel filed timely, helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

SSA and AFGE

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a nationwide consolidated unit of SSA employees, including employees in SSA Mesa. SSA and AFGE are parties to a collective bargaining agreement, dated March 5, 1996, which covers the employees in the nationwide consolidated unit. (Jt. Exh. 1). The AFGE National Council of SSA Field Operations Locals (AFGE Council) and AFGE Local 3694 are agents of AFGE.

Executive Order 12871

The President of the United States issued Executive Order 12871, "Labor-Management Partnerships," on October 1, 1993 (58 Fed. Reg. 52201-52203, October 6, 1993) (E.O. 12871 or Executive Order). Sections two and three of the Executive Order provide as follows:

> Sec. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5, United States Code shall:
>
> (a) create labor-management partnerships by forming labor-management committees or councils at appropriate levels, or adapting existing councils or committees if such groups exist, to help reform Government;
>
> (b) involve employees and their union representatives as full partners with management representatives to identify problems and craft solutions to better serve the agency's customers and mission;
>
> (c) provide systematic training of appropriate agency employees (including

line managers, first line supervisors, and union representatives who are Federal employees) in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches;

(d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; and

(e) evaluate progress and improvements in organizational performance resulting from the labor-management partnerships.

Sec. 3. NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

1994 National Partnership Agreement (MOU)

Pursuant to E.O. 12871, SSA and AFGE became parties to a National Partnership Agreement dated June 22, 1994 (Jt. Exh. No. 2)[2]. The Agreement established a National Partnership Council (NPC) and provided for cooperation on the development of component partnership councils. One of the nine "Objectives" of the Agreement was:

(8) Ensure full implementation of the Executive Order 12871 over all 7106(b)(1) issues, whether at the union's request or as the result of proposed Agency action, immediately upon signing of this agreement.

The "NPC PROCESS/PROCEDURES" section of the Agreement provides, in part, as follows:

An issue can be proposed for NPC consideration by either the union or management.

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[2] The SSA/AFGE National Partnership Agreement of June 22, 1994 is sometimes referred to in the transcript and in Jt. Exh. 1 as the "SSA/AFGE Memorandum of Understanding (MOU) of June 22, 1994."

Whether or not to accept and then jointly decide an issue within the partnership agreement will require a joint consensus decision at the outset.

When an issue is accepted for resolution by Partnership Council members, they will first agree upon a time deadline and an appropriate alternate dispute-resolution process for that issue. . . .

* * * * *

APPENDIX A

Initially, issues will be accepted under one of three categories: retained-rights issues, regular issues and test issues.

If the Partners do not wish to accept an issue for consideration, these matters will be handled under collective bargaining procedures using interest based techniques.

a. Retained-Rights Issues:

Retained rights are management and union statutory and contractual rights. These issues will be fully explored and discussed in the hope of reaching a consensual, integrative recommendation to the presenting party--management or union. However, the final decision as to whether or not to fully implement the Partnership decision(s) remains with the presenting party. In the event a decision cannot be reached within the agreed time frame, there will be no further action by the Council.

b. Regular Issues:

Regular issue are statutory rights including 7106(b)(1). These issues, proposed by any party to the NPC, will proceed within the accepted time deadline to a consensual, integrative

agreement. If no agreement is reached, the previous agreed-upon ADR process will be initiated.

c. Test Issues:

Test issues are defined as mid-term bargaining issues. For the interim period, it is agreed that the Union may raise such issues for consideration. It is agreed to test at least two (2) such issues. The process, time frames and evaluation for the test will be defined by a joint union/ management team. Upon completion of the second test the Partnership will timely decide how to proceed on such issues.

Bargaining On Contractual Provision

In late 1995 or early 1996, AFGE and SSA agreed that some provision should be included in the new contract to protect the developed partnership process, at least for another three years, in the event the Executive Order went away. AFGE sent SSA a proposed provision (Resp. Exh. 3). This provision provided, in relevant part, that the parties "shall bargain in the spirit of partnership over the substance of 7106(b) subjects whether at the Union's request or the Agency's request." The provision also stated that, in the event the parties were unable to reach agreement, they would use the services of the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel and, in the event of a Panel-ordered resolution, the agency head could not declare the proposal non-negotiable because it was a section 7106(b) subject.

SSA saw the AFGE proposal as going beyond the objective of codifying the existing partnership process and responded in January 1996 with a proposal which, under section two "Principles," provided, in part, that "Administration and Union representatives will bargain in good faith, using interest-based bargaining (IBB) with the objective of reaching agreement" (G.C. Exh. 2).[3]

During a NPC meeting on February 6, 1996, AFGE proposed that language be added to the above sentence to read "Administration and Union representatives will bargain in good faith, *including on issues that may fall under 7106(b)*

[3] Other portions of SSA's proposed section two of the partnerships article were unchanged and agreed upon, as set forth below from the national agreement.

(1), using interest-based bargaining (IBB) with the objective of reaching agreement." According to Witold Skwierczynski, President of the AFGE Council, who was present during the meeting, Union representative John Gage stated that SSA's proposal lacked any language regarding the 7106(b)(1) permissive areas of bargaining, and the contract should contain such language. Gage said it was "in the Union's interest that within our partnership relationship the parties . . . be empowered to bargain those issues," since the President had indicated this also in the Executive Order. (Tr. 25). Gage also indicated that the interest-based bargaining clause would be for any bargaining that occurred throughout the Agency. SSA agreed to insert the language.

There was no discussion at this time regarding who could initiate bargaining over 7106(b)(1) issues or of limitations on the context of such bargaining. The approved minutes for the February 6, 1996, NPC meeting reflect agreement by the parties on the above language and further reflect that, during a discussion of budget issues, Union NPC members expressed the view that they should work with management to determine staff allocation. SSA reportedly saw this "as a management issue," and the parties "agreed to disagree on this issue." (G.C. Exh. 3).

At the March 1996 NPC meeting, AFGE Council President Skwierczynski proposed that a section be added to the partnership provision in the contract to refer to the June 22, 1994, SSA/AFGE Memorandum of Understanding (National Partnership Agreement). He said that some procedural issues in the Memorandum of Understanding should be maintained. The parties agreed to add a section to provide that in areas where there was no conflict with the contractual partnership provision, the previous memorandum of understanding that dealt with such areas would remain in place.

The 1996 National Agreement "Partnerships" Article

On March 5, 1996 a new national agreement between AFGE and SSA became effective (Jt. Exh. 1). The agreement contained an unnumbered "Partnerships" article, placed on page three between the "Recognition and Coverage" and "Management Rights" articles. Sections 1, 2, and 4 of the "Partnerships" article provided as follows:

PARTNERSHIPS

Section 1. Introduction

The parties recognize that a new relationship between labor and management as partners is essential for transforming the Social Security Administration into an agency that works more efficiently and effectively and better serves customer needs. This partnership involves the open sharing of information at the earliest pre-decisional stage, thereby engendering mutual trust and respect to better serve the agency's mission.

Section 2. Principles

Administration and Union representatives will bargain in good faith, including bargaining on issues which may fall under 7106(b)(1), using interest-based bargaining (IBB) with the objective of reaching agreement. Every effort shall be made to reach agreements that address the interests of both parties. The procedures for implementing IBB, including providing necessary training and facilitation, and use of alternate dispute resolution procedures, will be developed by the National Partnership Council.

Section 3. Partnership Councils

A. The parties have established a Partnership Council at the Agency level. The existence of an Agency level council will not preclude the establishment of lower level councils where mutually agreed to by the parties.

B. Partnership Councils shall include an equal number of Administration and Union appointed members. The membership of the National Partnership Council has previously been determined by the parties.

C. Councils shall abide by the general principles set forth above.

D. The Councils shall meet on a regular basis, normally at least monthly.

E. The Councils shall develop a written agenda with topics being submitted by either party.

F. Council meetings will always be attended by the principals or designees only.

G. All official time utilized by Union representatives under Partnership shall not be charged to any bank or cap.

H. Travel and per diem for partnership activities shall be paid by the Administration in accord with the Federal Travel Regulations.

Section 4. Other

To the extent that no conflict exists, this article does not supersede the SSA/AFGE Memorandum of Understanding of June 22, 1994.

Management Rights Article

The "Management Rights" article of the new national agreement was essentially a restatement of the statutory rights of management found in section 7106 of the Statute. That article provides:

Section 1. Statutory Rights

A. Subject to subsection (B) of this section, nothing in this Agreement shall affect the authority of any management official of any agency--

1. to determine the mission, budget, organization, number of employees and internal security practices of the agency; and

2. in accordance with applicable laws--

a. to hire, assign, direct, layoff and retain employees in the agency or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

c. with respect to filing positions, to make selections for appointments from--

(1) among properly ranked and certified candidates for promotion; or

(2) any other appropriate source; and

d. to take whatever actions may be necessary to carry out the agency[’s] mission during emergencies.

B. Nothing in this section shall preclude any agency and any labor organization from negotiating--

1. at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work.

* * * * *

Article 4 - "Negotiations During the Term of the Agreement on Management Initiated Changes"

The agreement also contained Article 4, "Negotiations During the Term of the Agreement on Management Initiated Changes." The Article establishes the procedures for notice by management of proposed changes in conditions of employment during the term of the agreement and bargaining, upon request, by AFGE at corresponding levels of the Agency and the Union.

AFGE Council President Witold Skwierczynski, who was on the bargaining team for the first national contract, testified that Article 4 initially went into effect at that time, in 1982, and the major thrust of the Article has remained the same ever since.

According to Skwierczynski, during the negotiations for the Article in 1980 and 1981, there were also proposals by the Union regarding Union-initiated mid-term bargaining. Because the parties could not reach agreement, and since the case law had not completely evolved regarding the Union’s right to initiate mid-term bargaining, the parties decided to set the issue aside and let the developing case law prevail.

The Parties’ Interpretation of the Agreements

Janice Warden, Deputy Commissioner for Operations, SSA, and Albert T. Siemek, Deputy Director, Office of Labor-Management and Employee Relations, SSA, testified that the Partnerships Article of the Agreement pertains only to bargaining in the partnership council context; that if an issue is not accepted for bargaining by the council, or if, as in a local field office context, there is no partnership council,[4] then Article 4, regarding bargaining on mid-term changes, is the governing Article. Warden stated that Item C of Appendix A of the 1994 National Partnership MOU provides for two mid-term test issues, but none has been presented as of this point in time. She also testified that the language in the Agreement providing that "Administration and Union representatives will bargain in good faith, including on issues that may fall under 7106(b)(1), using interest-based bargaining (IBB) with the objective of reaching agreement" meant that management would be open to bargaining on 7106(b)(1) issues, as in the past, and, in compliance with the President's Executive Order, would consider all bargaining under those provisions, but it did not mean that management had to accept bargaining in areas where it had a retained right.

AFGE Council President Skwierczynski testified that the language in the Agreement providing that "Administration and Union representatives will bargain in good faith, including on issues that may fall under 7106(b)(1), using interest-based bargaining (IBB) with the objective of reaching agreement" is intended to apply to bargaining at all levels and not just partnership council issues. As noted, he testified that there was no discussion during the bargaining on the Article regarding who could initiate bargaining over (b)(1) issues or of limitations on the context of such bargaining and that Union representative John Gage mentioned at the time that the interest-based bargaining clause would apply to any bargaining that occurred throughout the Agency. Skwierczynski was of the view that Item C of Appendix A of the 1994 National Partnership MOU, providing for two mid-term test issues, conflicted with the Partnerships article and, pursuant to section four of that article, no longer applies.

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[4] AFGE and SSA have about 40 partnership councils. Most are at the level of the six major components -- Headquarters, Field Operations, Program Service Centers, Office of Hearings and Appeals, Program Integrity and Data Operation Centers. About seven are at the regional level. Of the 1,300 facilities, including district offices, branch offices, and teleservice centers, only 15 or so, located in the Chicago region, have established partnership councils.

AFGE Council Request to Bargain

By letter dated May 6, 1996, the AFGE Council made a request to bargain over SSA's allocation of staff for field offices and teleservice centers within the nationwide consolidated unit represented by AFGE. The AFGE Council specifically requested to negotiate the numbers, types and grades of employees or positions assigned to SSA's field offices and teleservice centers, including sub-components. The letter requested such bargaining "pursuant to 5 USC 7106 (b)(1)" and did not reference either the Executive Order or the Partnership articles of the Agreement. The letter also requested information pursuant to section 7114(b)(4) of the Statute. The letter stated, in part, as follows:

> Recently Congress has passed and the President signed a budget for FY 1996. This budget provided funding for SSA's administrative expenses. A significant aspect of SSA's budget consists of funding for the Agency's staffing needs.
>
> Although I have received no notice to date, I presume that the Agency has proposed allocations of its FY 1996 staff by component and subcomponent.
>
> This constitutes a request to bargain SSA's allocation of staff for field offices and TSC's. Please refrain from distributing field/TSC staff allocations until appropriate notice and an opportunity to bargain is provided to the union. This bargaining request is to fully negotiate staff distribution (i.e., numbers, types, grades, positions assigned to the field/TSC and all its subcomponents) in interest-based bargaining pursuant to 5 USC 7106(b)(1)).
>
> Please provide the following pursuant to 5 USC 7114(b)(4):
>
> 1. Copies of data that reflects the staff allocation of each major component of the field/TSC structure. This includes information regarding the numbers, grades, positions and tours of duty that you propose to allocate for the field/TSC component, the regions, areas, and each field/TSC facility.

2. Information regarding current staffing levels of each field/TSC facility by number, position, grade, and tour of duty.

3. Any documents reflecting SSA's proposed strategy for filling positions in each facility identified in items one (1) and two (2). This includes plans to hire from the outside, promote and/or reassign personnel. This strategy information should reflect SSA's recruitment plans by facility and position.

4. Information regarding data that SSA is using to justify proposed staffing allocations. This information should reflect the techniques SSA has utilized to determine specific staffing needs for each facility (i.e., work measurement information, WUPWY, bilingual tracking, 800# calls received).

The union's particularized need for the information in item one is to determine what the Agency views as the staff requirements for the field. The union under 7106(b)(1) can propose an alternative distribution. The information in item two is required so that the union understands any alterations in staffing distribution that SSA is proposing so that the union can determine whether such changes are justified and accurate or require modification. The information in item three is needed to determine how SSA proposes to fill its staffing needs in the FY. The union needs this information to determine whether to propose an alternate recruitment strategy. The information in four is required to determine whether the Agency is using reliable data in its recruitment strategy or whether alternative basis [sic] are required for staffing decision methodology.

Again, please take no action to implement your FY 96 staffing allocation until agreement from negotiations is reached.

SSA Response

By letter dated July 26, 1996, SSA, through Janice Warden, Deputy Commissioner for Operations, responded to the

AFGE Council's request to bargain and for information. The response, stated, in part, as follows:

> This is in response to your request for certain staffing information, and request to fully negotiate fiscal year 1996 staff distribution (i.e., numbers, types, grades, positions assigned to the field/teleservice center and all its subcomponents) via interest-based bargaining.
>
> As management's representatives on the National Partnership Council have noted before, the decisions on hiring, budget, and the allocation of staff are critical to the operation of the agency and are essential management rights. Therefore, we must decline your request for substantive bargaining.
>
> However, as to the staffing allocation/ budget process itself, we indicated at the June National Partnership Council meeting that we would be willing to set up a conference call whereby we would provide you, and the other Council members, with information on this subject. At this time, we could also discuss the process, and listen to your concerns. Certainly, the union's ideas would be factored into future decisions in this area.
>
> Furthermore, as with the exercise of any retained management right, we remain ready to fulfill our obligation in regard to impact and implementation matters, at the appropriate level, where such changes would trigger a duty to bargain.
>
> If you are interested in the discussion of the allocation and general budget processes, let me know and I will set it up as soon as possible.

SSA did not supply the requested information, nor respond further to the request for information. The information requested is normally maintained by the Respondent in the regular course of business, is reasonably available, does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining, and is not prohibited from disclosure by law.

Status of 1996 Staffing Allocations

At the time of AFGE Council's bargaining request, Congress had passed, and the President had signed, a budget providing funding for SSA in Fiscal Year 1996. The Commissioner and the Agency's Office of Budget had made the staffing allocations to each of SSA's components. Janice Warden, Deputy Commissioner, Operations, had given each of the ten SSA regional commissioners their staffing allocations in terms of numbers for all of their field offices and teleservice centers. The allocations set the numbers of employees each regional commissioner could have for the field offices and the teleservice centers, but not their types or the grades. For example, Deputy Commissioner Warden gave each of the regional commissioners the number of employees each could have in the field offices and teleservice centers. She may have also advised the regional commissioners whether they could hire a certain number of employees and whether in field offices or teleservice centers. The regional commissioners have a process within their own regions for distributing staff to individual offices or subcomponents.

The 1996 budget, in terms of staffing, distribution and numbers, was about the same as 1995. Out of 35,000 employees in the 1,300 field organizations, 1996 had about 14 fewer employees. However, even if the overall staffing allocation is identical to the staffing allocation from the year before, the way it is suballocated by regional commissioners to individual offices may vary depending upon the workload.

The complaints do not allege that SSA or SSA Mesa changed conditions of employment. No evidence was presented that there was, in fact, any change in staffing or in working conditions related to staffing.

AFGE Local 3694 Bargaining Request

On or about January 14, 1997, AFGE Local 3694 submitted to SSA Mesa a written request to initiate negotiations over the working conditions of service representatives at the district office. Attached to the bargaining request were specific proposals including the following:

> (a) Proposal 2, which states that the District Office will provide two (2) bargaining unit service representatives with computer terminals, without relocating any of the terminals from the claims representatives' desks and no more than one from the front end interviewing area; and

(b) Proposal 3, which states that the District Office will take the necessary action to increase the full time equivalent (FTE) allocation for additional bargaining unit employees by two slots, which will be filled by service representative positions.

The parties agree that the proposals concern matters set forth in section 7106(b)(1) of the Statute. There is no local agreement in effect between SSA Mesa and AFGE Local 3694 which pertains to the issues. SSA Mesa and AFGE Local 3694 do not have a partnership council.

SSA Mesa Response

Since January 14, 1997, SSA Mesa has refused to bargain with AFGE Local 3694 over the proposed matters.

Previous Section 7106(b)(1) Bargaining

Prior to E.O. 12871 and the June 1994 National Partnership Agreement, AFGE and SSA had negotiated some section 7106(b)(1) issues. In 1986, they bargained concerning technology (computer terminals).

Subsequent to the June 1994 National Partnership Agreement, the parties set up a work group through the NPC to streamline the disability adjudication process. The work group proposed the creation of an adjudicative officer position to screen cases pending formal hearings. When the proposal came before the NPC, the parties agreed to handle it through collective bargaining. The parties subsequently reached an agreement concerning the number of adjudicative officer positions and the number to be selected through reassignment or promotion. Later the parties also reached an agreement concerning the creation of a disability claims manager position as part of a three-year pilot project. They negotiated the number of positions to be filled and a procedure for selecting sites for the pilot project.

Subsequent to the Executive Order and the Partnership Agreement, the parties, through the normal collective bargaining process, have continued to deal with section 7106 (b)(1) issues. SSA's Office of Labor-Management and Employee Relations has advised the components that if these issues came up, they should not be rejected out of hand, but an attempt should be made to work through the issues and obtain an acceptable agreement. But the components have been further advised that, "if the negotiations immoderately intrude on the reserved areas of management's rights, in terms of management's ability to maintain budget and

personnel by which operations are conducted, they may have to pull back."

Positions of the Parties

The General Counsel

The General Counsel contends that by refusing to bargain over matters encompassed within section 7106(b)(1) of the Statute, SSA repudiated the Partnerships Article of the Collective Bargaining Agreement. The General Counsel claims that the refusal is a clear and patent breach of the Partnerships Article; AFGE Council President Skwierczynski's testimony concerning the parties' bargaining history demonstrates the parties' intent to apply the article to all levels of bargaining and not just to partnership councils; and to the extent Appendix A puts limitations on mid-term bargaining, it conflicts with the article and no longer applies. Therefore, the Union has the right to request to bargain mid-term over negotiable subjects as the Authority does not follow the Fourth Circuit decision to the contrary in Social Security Administration v. FLRA, 956 F.2d 1280 (4th Cir. 1992), relied upon by SSA. The General Counsel also argues that the issue of staffing allocations is not covered by the parties' agreement.

The General Counsel also urges that, even assuming the Respondents did not elect to bargain over section 7106(b)(1) subjects through the parties' Partnerships article, Section 2(d) of E.O. 12871 exercised Respondents' discretion, and the Respondents violated the Statute by refusing to bargain over such matters.

With respect to the Union's information requests, the General Counsel claims that, as the information was necessary and relevant to such bargaining, SSA violated the Statute by refusing to provide it.

SSA

The Respondents' position, portions of which are discussed in more detail below, contends that: (1) the parties' national agreement does not provide the Union with additional rights to bargain matters related to permissive subjects of bargaining; (2) the Partnerships provision applies to partnership councils; (3) under the agreement, the Union is not entitled to Union-initiated mid-term bargaining in the absence of a change in conditions of employment or test issues; and (4) staffing is covered by or contained in the collective bargaining agreement. SSA also claims that the Authority cannot enforce allegations of

noncompliance with E.O. 12871 concerning permissive subjects of bargaining. With respect to the Union's information requests, SSA contends that the information is not necessary as the issues are not negotiable in this instance.

Discussion and Conclusions

The issue presented is whether SSA and SSA Mesa violated the Statute by refusing to bargain with their respective delegated agent of AFGE, as requested in these cases, because section 2(d) of E.O. 12871 constitutes an agency election to bargain on section 7106(b)(1) matters by direction of the President[5], and/or thereby repudiated the Partnerships article of the national agreement, which allegedly constitutes a specific agency election to bargain on section 7106(b)(1) matters. The parties agree that the proposals in these cases concern matters encompassed by section 7106(b)(1) of the Statute.

SSA Did Not Repudiate the Partnerships Article of the National Agreement Concerning Bargaining in Good Faith on Section 7106(b)(1) issues

Analytical Framework

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[5] As announced in U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA 858 (1997)(PTO) (partial decision and procedural order), the Authority is determining in that case, and four other pending cases, whether section 2(d) of E.O. 12871 constitutes an agency election to bargain on matters set forth in section 7106(b)(1) of the Statute, and whether such an election can be enforced in Authority unfair labor practice cases and subsequent review proceedings. In its partial decision in PTO, the Authority discussed applicable precedent and questions that arose from the parties' arguments. The Authority directed the parties to submit briefs on the questions developed in its partial decision and afforded them an opportunity to request oral argument. By notice in the Federal Register on Friday, November 21, 1997, the Authority afforded other interested persons an opportunity to submit amicus curiae briefs on the questions and other matters deemed relevant. Briefs were to be received by Thursday, December 18, 1997. 62 Fed. Reg. 62315 (1997). SSA was a party in one of the listed cases in PTO and the General Counsel was a party in all of the cases. SSA and the General Counsel have furnished, together with their briefs to me in these cases, copies of their briefs to the Authority. The other submissions to the Authority are not before me.

In Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996) (Scott) the Authority clarified the analytical framework it will follow for determining whether a party's failure or refusal to honor an agreement constitutes a repudiation of a collective bargaining agreement.

Consistent with the framework that was set forth in Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991), the Authority held that it will examine two elements in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?). The examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached.

With regard to the first element, the Authority held that it is necessary to show that a respondent's action constituted a clear and patent breach of the terms of the agreement. If the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not constitute a clear and patent breach of the terms of the agreement. Scott, 51 FLRA at 862. In such a case it is not necessary to examine the second element. Id. at 864.

With regard to the second element, the Authority stated that if a provision is not of a nature that goes to the heart of the parties' collective bargaining agreement, a breach of the provision could not amount to a repudiation and, therefore, would not constitute an unfair labor practice. Id. at 862.

Application of Analytical Framework

In this case, I find that no repudiation occurred because the Respondents' actions did not constitute a clear and patent breach of the Partnerships article of the agreement. Respondents' argument regarding the interpretation of the agreement is reasonable.[6]

SSA claims that the Partnerships article sentence in issue -- "*Administration and Union representatives will bargain in good faith, including bargaining on issues which*

[6] I express no view on which would be the "most reasonable" interpretation of the provisions. Scott, 51 FLRA at 863-64 n.6.

may fall under section 7106(b)(1), using interest-based bargaining (IBB) with the objective of reaching agreement [,]" -- cannot be construed as an election to bargain on all section 7106(b)(1) matters, in all situations. SSA contends that it expreses not an election, but a commitment to good faith bargaining when an election to bargain has been made, and that "[e]lecting not to bargain on a [7106] (b)(1) matter is a statutory right and in no way indicative of bad faith bargaining." This is a reasonable interpretation in light of previous Authority precedent. See PTO, 53 FLRA at 870-75. Further, if this sentence is deemed to constitute such an election, another article is totally inconsistent. Immediately following the Partnerships article is the Management Rights article providing for such bargaining only "at the election of the agency[.]"

SSA also contends that the Partnerships article only applies to actions of Partnership Councils. The agreement and the 1994 MOU can reasonably be interpreted as supporting this view. Section 1 of the Partnerships article focuses not on the conditions of employment of bargaining unit employees but on "transforming the Social Security Administration into an agency that works more efficiently and effectively and better serves customer needs." Section 3C. of the Partnerships article provides that "Councils shall abide by the general principles set forth above." These principles include the bargaining sentence at issue. The 1994 MOU, which continues to govern nonconflicting procedures for the National Partnership Council, provides that a joint consensus decision is required in deciding whether or not to accept an issue in the defined areas of retained rights, regular issues, and test issues. The instant bargaining requests were not accepted, or processed, under that provision. Therefore, under the 1994 MOU, the normal collective bargaining procedures apply.

Article 4 of the agreement provides only for mid-term bargaining by the Union on management-initiated changes in conditions of employment. No management changes are involved here. Appendix A of the 1994 MOU can also be reasonably interpreted as limiting other mid-term bargaining to two "test issues." No "test issues" were proposed by the instant bargaining requests. SSA reasonably argues that

this provision does not conflict with the Partnerships article and is of continuing validity.[7]

Some of the bargaining history also reasonably supports SSA's interpretation that the provision was intended to apply to the partnership relationship. The Union's initial proposal, which would have provided for bargaining over section 7106(b) subjects, whether at the Union's request or the Agency's request, with full provision for the services of the FMCS and a FSIP-imposed resolution, in the event the parties were unable to reach agreement, was withdrawn in favor of the more ambiguous language. Also, according to AFGE Council President Witold Skwierczynski, Union representative John Gage said, at the time he proposed the language in dispute, that it was "in the Union's interest that within our partnership relationship the parties . . . be empowered to bargain those issues," since the President had indicated this also in the Executive Order (emphasis added). Further, at the same February 6, 1996, meeting where the parties reached agreement on the above language, the meeting notes reveal that they also "agreed to disagree" on practically the instant issue, whether the Union could work with management to determine staff allocation, in the Union's view, or whether staff allocation was "a management issue," in SSA's view. There is no evidence of a clear meeting of the minds that management at all levels, and in all situations, was making a decision to elect to bargain on all permissive subjects, such as bargaining mid-term, at the Union's initiation, on how the Agency would be staffed.

Thus, even if SSA and SSA Mesa breached the agreement, a finding I do not make, the breach was not clear and patent and no repudiation occurred. In light of this

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[7] SSA stated at the hearing and in its post-hearing brief that the issue of staffing was also covered by various other articles in the agreement, namely, Articles 10, 14, 15, 16, 18, 19, 26, 27, 33, 36, and 38. However, SSA presented no evidence to this effect at the hearing and has not elaborated further on this argument or explained how these particular provisions apply in light of the "covered by" analytical framework required by U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA). See 5 C.F.R. § 2423.32 (1997). I agree with the response of Counsel for the General Counsel and conclude, in light of the Authority's analytical framework, that these articles do not expressly encompass nor are they inseparably bound up with initial staffing allocations. They essentially deal with issues that arise after staffing allocation decisions have been made.

determination, it is not necessary to examine the second element set forth in Scott; namely, the nature of the agreement provision allegedly breached. Scott, 51 FLRA at 863-64.

Accordingly, SSA and SSA Mesa did not violate sections 7116(a)(1) and (5) of the Statute by failing to comply with the agreement, as alleged.

SSA and SSA Mesa Were Not Required to Bargain On the Section 7106(b)(1) Proposals as Section 2(d) of Executive Order 12871 Does Not, by Itself, Constitute an Agency's Election to Bargain on Section 7106(b)(1) Matters

Pursuant to section 7116(a)(5) of the Statute it is an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]" Section 7106(b)(1) makes it clear that matters concerning "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" are negotiable only at an agency's election.

E.O. 12871 at Sec. 2(d) provides that "the head of each agency . . . shall . . . (d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same[.]" Thus, the President directed the head of each agency to make the election to negotiate and to instruct subordinate officials to do the same. The President did not make the election himself, obviously recognizing that the discretion to negotiate resides with the agency under the Statute.

Despite the Executive Order, the Agency has not exercised its statutory discretion to negotiate pursuant to section 7106(b)(1) in these cases. In response to the AFGE National Council request, SSA refused to bargain because "the decisions on hiring, budget and the allocation of staff are critical to the operation of the agency and are essential management rights." SSA Mesa did not respond at all to AFGE Local 3694's bargaining request. Since the section 7116(b)(1) proposals were negotiable at the Agency's election, the Agency did not violate section 7116(a)(5) by "refus[ing] to consult or negotiate in good faith with a labor organization as required by this chapter" (emphasis added). Authority precedent to date establishes that a party is not required to bargain over a permissive subject of bargaining. PTO, 53 FLRA at 870-75 (citing cases); Federal Deposit Insurance Corporation, Headquarters, 18 FLRA 768, 771 (1985) (citing cases). The Agency was obligated to bargain over negotiable proposals only. Since all of the

Union's proposals were negotiable only at the election of the agency, the Respondents' refusal to bargain over such proposals did not violate the Statute. Department of Health and Human Services, Washington, D.C. and Department of Health and Human Services, Region X, Seattle, Washington, 19 FLRA 73, 74 (1985).

Section 3 of E.O. 12871 specifically states that the order "is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any right . . . enforceable . . . against the United States, its agencies . . ., officers or employees . . . ." By asserting that the President, by Section 2(d) of Executive Order 12871, exercised SSA's discretion to elect to bargain, the General Counsel is attempting to enforce a right (a mandatory election under section 7116(b)(1) of the Statute) arising from the Executive Order against an agency of the United States. There would be no alleged election absent the Executive Order and, therefore, these cases, in this respect, are about enforcing the Executive Order. This is prohibited by Section 3 of the Executive Order.

SSA Did Not Violate the Statute by Failing to Furnish Information Requested by the Union

SSA did not violate the Statute by failing to furnish information requested by the Union for the purpose of bargaining on matters negotiable only at the election of the agency under section 7106(b)(1).[8] Since SSA declined to elect to bargain on such matters, the information requested was not "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" as required by section 7114(b)(4) of the Statute.
Accordingly, SSA did not violate section 7116(a)(1), (5) and (8) of the Statute in this respect, as alleged.

Based on the above findings and conclusions, it is concluded that SSA and SSA Mesa did not violate the Statute as alleged, and it is recommended that the Authority issue the following Order:

ORDER

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8 It is noted that, in SSA's response, SSA reiterated an offer to provide the AFGE Council unspecified information on the subject through a conference call. The response said the offer was made earlier during National Partnership Council discussions of the staffing allocation/budget process (Jt. Exh. 4).

The complaints in Case Nos. WA-CA-60600 and DE-CA-70354 are dismissed.

Issued, Washington, DC, March 17, 1998.

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. WA-CA-60600 & DE-CA-70354, were sent to the following parties:

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Dated: March 17, 1998
Washington, DC