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| U.S. FOOD AND DRUG ADMINISTRATION<br>NORTHEAST AND MID-ATLANTIC REGIONS<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL NO. 242<br><br>Charging Party | Case No. BN-CA-50168 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

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

Any such exceptions must be filed on or before **APRIL 1, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: March 1, 1996
Washington, DC

MEMORANDUM DATE: March 1, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. FOOD AND DRUG ADMINISTRATION
NORTHEAST AND MID-ATLANTIC REGIONS

Respondent

and Case No. BN-CA-50168

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL NO. 242

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

**UNITED STATES OF AMERICA**
**FEDERAL LABOR RELATIONS AUTHORITY**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**
**WASHINGTON, D.C. 20424-0001**

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| U.S. FOOD AND DRUG ADMINISTRATION<br>NORTHEAST AND MID-ATLANTIC REGIONS<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL NO. 242<br><br>Charging Party | Case No. BN-CA-50168 |

Gary L. Lieberman, Esquire
For the General Counsel

Andrew Rudyk, Esquire
For the Respondent(s)

David Y. Tobias, Vice President, Council 242
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

**DECISION**

This case involves the issue of whether an agency's obligation to negotiate with the exclusive representative of employees in an appropriate unit includes the obligation to bargain for a single collective bargaining agreement covering the entire unit. The Regional Director for the Boston Region of the Federal Labor Relations Authority (the Authority) issued an unfair labor practice complaint pursuant to the Federal Service Labor-Management Relations Statute (the Statute). The complaint alleges that the "Respondent," U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions, as a statutory "agency" (implicitly as a single agency) violated sections 7116(a)(1) and (5) of the Statute by refusing to negotiate over a successor collective bargaining agreement covering

the entire consolidated unit that, as the Authority had recently determined, continued to be the appropriate unit.

The answer, submitted on behalf of the "Respondents," denies that the named Respondent or Respondents is or are an agency and denies that "the Respondent" did anything, including the commission of an unfair labor practice. Except for the denial of agency status, each of the denials is coupled with an explanation that there are two respondents, thus making it unclear whether any of the factual allegations are being denied independently of the assertion that "the Respondent" does not exist as such. However, since the facts as developed at the hearing are essentially undisputed, this ambiguity is now academic.

I also find to be academic the issue of whether the components of the Food and Drug Administration that are charged with the unfair labor practice constitute one or two respondents. I treat below the contention that they constitute separate employers, but that is a different issue. In effect, the complaint alleges that the Food and Drug Administration committed the acts complained of and should be held responsible. I shall treat the Food and Drug Administration (FDA) as the Respondent for purposes of this decision, and I trust that no one will be prejudiced by that choice. I shall refer to the Charging Party as the Union or Council 242.

**Findings of Fact**

Since 1979, the Union has been the certified exclusive representative of a consolidated bargaining unit including employees in FDA's District offices in New York and Buffalo, New York, and Newark, New Jersey. In 1982 the unit was clarified and was then described as including the employees of the "New York Field Office, Region II" of the FDA.[1] However, the parties, in their most recent complete collective bargaining agreement (1983), described the Employer as consisting of "four districts and one regional laboratory[.]" They were the Brooklyn, Buffalo, Newark, and New York Import Districts, and the New York Regional Laboratory. The agreement defines "Management" as the FDA, Region II.

In 1987, FDA reorganized itself geographically. Included in this reorganization was a redistribution of the offices that had been in Region II. Region II ceased to exist, and all of the facilities at which employees in the

[1] It is not clear from this description whether the "New York Field Office" was synonymous with or part of "Region II."

consolidated bargaining unit, except for the Newark District Office, were placed in a newly created Northeast Region. The Newark District office was placed in a new Mid-Atlantic Region. The parties signed a supplement to their collective bargaining agreement in 1988. This supplement amends the description of the parties, under the heading, "Recognition and Coverage," to substitute "the Mid-Atlantic and Northeast Regions" of the FDA for "Region II." It also re-defines "Management." Formerly "Region II," it became:

> For all components except Newark district, the term shall refer to the Regional Food and Drug Director, Northeast Region, and the managers of New York District, New York Regional Laboratory, and Buffalo District. For Newark District, the term shall refer to the Regional Food and Drug Director, Mid[-]Atlantic Region and the managers of Newark District.

In June 1991, Council 242 President James Nelson submitted a request addressed to three management officials to negotiate on a range of subjects encompassing 33 subjects covered by the parties' 1983 collective bargaining agreement. By virtue of the provisions of the 1983 agreement, this request constituted a request to renegotiate those subjects for purposes of a successor agreement. Two of the management officials to whom the request was addressed were Northeast Regional Director Arthur J. Beebe, Jr. and Newark District Director Matthew H. Lewis.

Lewis responded to Nelson in September 1991 with a letter that is puzzling in some respects. First, he reminded Nelson that the Newark District was now part of the Mid-Atlantic Region and that, since it no longer had any administrative relationship to what had been Region II, "it is the belief of Mid-Atlantic Region management [that] . . . Council 242 is not appropriate. Of course, this is not to say that we desire to deny any Newark District employee representation by the appropriate exclusive representative." The letter concludes, however, as follows:

> Mid-Atlantic Region Management, through its designated representative, the Newark District Director, is ready to negotiate a completely new agreement between Council 242 and the Newark District of the Food and Drug Administration. Below are the proposed groundrules.

Attached was a list of proposed ground rules, of which the first was to the effect that any agreement reached would be

binding only on Council 242 and the Mid-Atlantic Region, but that none of its provisions could bind any FDA managers outside that Region.

Council 242 President Nelson responded in October 1991 to Lewis' and another letter from management. In pertinent part, Nelson stated that the Union would not accept separate negotiations and demanded "that groundrules negotiations begin immediately." Regional Director Beebe, answering Nelson's October letter in November 1991, restated that FDA proposed two contracts, and, after setting forth an explanation for that proposal, stated that:

> Consequently, and for the time being, we've decided to exercise our unfettered right to deal with Council 242 individually . . . . A point to consider in this regard is that you cannot compel management of either region to acquiesce to your demands. Each Region, independent of the other, has the right to determine its own position regarding collective bargaining, and each has chosen to do so.

In conclusion, Beebe invited Nelson "and a small group of Union representatives" to meet with him and others "to see if we can come to some resolution of the Union's concerns that relate to the Northeast Region."

Lewis wrote a similar letter to Nelson in December 1991. It concludes with a proposal "that we begin to agree on some tentative dates on which we could begin ground rule negotiations."

Apparently this written exchange of views led nowhere in terms of negotiations. The FDA then petitioned to "clarify" the consolidated unit by excluding the employees assigned to the Newark District Office, based on the 1987 reorganization of the FDA's regional structure. The Regional Director dismissed the petition and the Authority denied the FDA's application for review. *U.S. Department of Health and Human Services, U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 48 FLRA 1008 (1993) (*USFDA*).

While the clarification matter was pending, and in response to a further request for negotiations, Lewis wrote to Nelson in August 1993. He reminded Nelson that, in response to an earlier (1991) request for negotiations, Lewis had sent Nelson a list of proposed ground rules. Lewis attached a copy of his earlier letter, together with those proposed ground rules. In his August 1993 letter,

Lewis stated that, since Nelson never rejected the proposed ground rules, Lewis assumed that he accepted them. The letter concludes: "Therefore, I stand ready to meet and negotiate my ground rules."

The record shows no activity by the parties after these events until June 1994. At that time, David Tobias had assumed the presidency of Council 242, and he made a new request to negotiate on 36 subjects. While delivering a supplemental list of requested bargaining subjects, Tobias had a conversation with Beebe, in which each reiterated the parties' respective positions about the scope of negotiations and of the resulting agreement. They had another conversation in October 1994 in which the same views were exchanged.

In December 1994 the current officers of the Union were still not aware of any response to its June bargaining request. Tobias had been replaced as president but sent to management, as the new president's designee, a "ULP Pre-Notification; Request for Negotiations" stating that the Union believed that management had committed an unfair labor practice by failing to bargain in good faith, and suggesting a date, time, and place to meet.

Beebe answered Tobias with a message stating that Tobias was or should have been aware that management had responded to the request for negotiations. Tobias was still not aware of any response to the June 1994 bargaining requests, and on December 7, Council 242 filed separate charges against the Northeast and the Mid-Atlantic Regions for failing to respond.

After filing the charge, Tobias had occasional conversations with management officials concerning whether there had been a response to the June 1994 bargaining request. Finally, in April 1995, Tobias requested a copy of the response management said it had sent. He was then given a copy of a September 1993 letter from Beebe to then-President Nelson that restates much of FDA's consistent position with respect to the scope of bargaining.[2] Attached to the letter were proposed ground rules that, with respect to the scope of the agreement, presented a mirror image of the 1991 proposed ground rules submitted by Newark District

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[2] The record does not explain how this odd juxtaposition of events with respect to a response to the June 1994 bargaining request came about. However, the complaint does not allege, as originally charged, that FDA committed an unfair labor practice by failing to respond to the those requests.

Director Lewis. Thus, Beebe's proposed ground rules limited the binding effect of any agreement that might be reached to Northeast Region management.

**Discussion and Conclusions**

Counsel for the General Counsel contends that FDA was obligated to negotiate a single collective bargaining agreement with the Union covering the entire consolidated unit, and that its insistence on separate negotiations for matters concerning unit employees in its Northeast Region and those in its Mid-Atlantic Region (Newark District Office) was unlawful. FDA responds in essence that the two FDA regions at which bargaining unit employees are employed are separate employers, and that they have exercised the right to withdraw from what FDA characterizes as a multi-employer bargaining unit.3

I find neither of the parties' contentions to be persuasive.

The Union cannot dictate to FDA who should represent it in any negotiations. On the other hand, FDA is required to appear at negotiation sessions with representatives who are authorized and prepared to negotiate at the level of exclusive recognition. *Department of Health and Human Services, Social Security Administration*, 6 FLRA 202 (1981) (*DHHS*).

When FDA declined to negotiate a single contract and insisted instead on negotiating separately with respect to the unit employees in each of the new regional subdivisions, was it refusing to negotiate at the "level of exclusive recognition"? An answer to this question requires an inquiry into what "level of exclusive recognition" means to the Authority.

"Level of exclusive recognition" is a term that is probably unique to public sector labor relations. It is, at least, in the Federal sector, usually self-explanatory, and therefore does not usually require definition. Thus, "exclusive recognition" is a commonly understood statutory term (section 7111). In fact, the word, "exclusive," is often dropped and the full term shortened to "level of

3 The parties have treated the issues of the scope of the negotiations and the scope of the resulting agreement as a single issue. For the purposes of my discussion of these issues as they relate to this case only, but remaining cognizant that they are not necessarily the same issue, I shall similarly link them.

recognition." Further, it is usually easy to identify what is meant by the "level," even if there is a dispute over which of two or more "levels" is the "level of recognition," because three elements usually coincide at that "level." These elements are (1) the "level" of management, (2) the "level" within the labor organization, and (3) the employee complement, that is, the appropriate bargaining unit. Further, all three are usually either undisputable or have been the subject of an Authority determination.

In its published decisions, the Authority usually identifies the "level of recognition" simply by referring to the level of **management** having the obligation to negotiate. Once that "level" has been identified, any disputes over the identity of the other two elements have usually been resolved. In the instant case, however, two circumstances make it useful to explore which of these elements is actually determinative. First, in the wake of FDA's lack of success in having the bargaining unit limited to employees within the new Northeast Region, there is no longer an identifiable level of adminis-tration on the management side that corresponds to the employee complement of the consolidated unit. Second, FDA has consistently acknowledged its duty and asserted it willingness to negotiate with the exclusive representative over the terms and conditions of employment of all the employees in the consolidated unit. Therefore, in order to find that FDA has refused to negotiate at the "level of exclusive recognition," one must identify the element or elements of a "level of exclusive recognition" that are absent from FDA's acknowledgment.

Although, as noted, the Authority often refers to the management element in the "level of recognition," I infer that, in those instances where it speaks of management "at" the level of recognition, the Authority is merely using a convenient shorthand and is not attempting to identify the essential element. *See, e.g., Defense Logistics Agency (Cameron Station, Virginia)*, 12 FLRA 412, 416 (1983); *U.S. Department of Transportation and Federal Aviation Administra-tion*, 40 FLRA 690, 705 (1991). However, in some cases, the Authority has spoken of the administrative level of the agency not as a shorthand designation but as the "level of recogni-tion" itself. For example, in *Department of Health and Human Services, Social Security Administration*, 10 FLRA 77 (1982), the Authority, stated that, upon the creation of a consoli-dated unit, the respondent agency "then became the new level of exclusive recognition[.]" *Id.* at 80. And in *Department of the Interior, Bureau of Reclamation, Washington, D.C.*, 33 FLRA 671 (1988), the Authority found that, "[s]ince the Regional

Office is the level of exclusive recognition, it was obligated to bargain with the Charging Party." *Id.* at 679.

In other instances, the Authority has associated the "level of recognition" with the organizational level of the exclusive representative, within the labor organization to which the representative belongs. For example, in *Department of the Treasury, U.S. Customs Service*, 19 FLRA 1155 (1985), the Authority held that, as the bargaining unit was a nationally consolidated unit, "the appropriate level of exclusive recognition is with the national union." *Id.* at 1159. But in another case where the authority of a union official at a certain organizational level was in issue, the Authority still linked the "level of exclusive recognition" with the "properly designated management official." *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1013 (1993). In still other cases, the Authority has identified the "level of exclusive recognition" by referring to **both** parties. *See Veterans Administration, Cincinnati, Ohio*, 19 FLRA 179, 180 (1985); *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 883 (1986).

What is conspicuous by its absence is any instance (at least that I have discovered) where the Authority identified of the "level" with the bargaining unit. Rather, the Authority has spoken separately of the level and the unit, and has independently described the scope of the collective bargaining agreement. Thus, in outlining the background facts in *U.S. Department of the Navy Marine Corps, Washington, D.C.*, 44 FLRA 36, 37 (1992), the Authority announced that: "This case arose at a local level activity which is part of a nationwide bargaining unit. The level of exclusive recognition is at the national level. A nationwide master labor agreement (MLA) covers the entire bargaining unit." *See also, in the same case, Decision and Order on Remand*, 48 FLRA 278, 279 (1993).

Absent a formal definition of "level of recognition," the manner in which the Authority has used the term is the best available textual clue to the Authority's understanding of its meaning. The references collected above appear to reflect and validate the ordinary meaning, in a labor relations context, of the key words in the term. Thus, "recognition" refers both to the process by which a labor organization obtains the right to represent a defined group of employees within a certain employing agency and to the result of that process. "Level" refers to the organizational components (the respective "levels" within the organizational structures) on each side of the bargaining relationship created by the recognition.

"Level" has meaning in this context only when one or both parties operates within a vertical or hierarchical structure. Thus, one would have no need to speak of the "level of recognition" when referring to the bargaining relationship between a hypothetical agency having only horizontal divisions, if any, and a local (single-level) independent union, even if the union represented several bargaining units within such an agency.

I conclude from all of these observations that it is the parties to the recognition, not the employee complement in the bargaining unit, that give meaning to the term, "level of exclusive recognition."

Unremarkable as this conclusion appears, in my view it undermines a major assumption in the General Counsel's case -- that the "level of recognition" requires negotiation of a single contract covering the entire bargaining unit. FDA, as noted, has always been willing to negotiate with Council 242, the "level" at which the Union achieved recognition. It has always been willing to negotiate contract terms for all the employees in the consolidated unit. FDA is no longer capable of negotiating on the management side at the "level" at which the Union's recognition was obtained, because that level, the former Region II, no longer exists. As the Authority recognized in its decision in the unit clarification case, however, both the new Northeast Region and the Newark District Office still receive labor relations support from the same regional personnel office. *USFDA* at 1011, 1017. There is, therefore, reason to presume and no reason to doubt, that in offering to negotiate with Council 242, the Northeast Regional and Newark District Office officials were willing to provide representatives who were authorized and prepared to negotiate at what remains of the original FDA "level."

As I understand the General Counsel's theory of the case, the above analysis would be considered incomplete because a single "level" of negotiations necessarily means a single set of negotiations, resulting in a single contract. But nothing in the nature of Federal sector bargaining requires such symmetry. *Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana*, 48 FLRA 6, 9 (1993), for example, describes a bargaining history in which a single collective bargaining agreement covered three different units.

In fact, parties would generally regard issues such as the order of negotiations and the number of contracts as

being in the nature of ground rules issues.[4] Proposals on such issues are presumptively negotiable. *Department of Defense Dependent Schools*, 14 FLRA 191, 193 (1984). Thus, they would be objectionable only if they were are found to impede, rather than further, the eventual bargaining process, and therefore evidenced bad faith. *Wright-Patterson* at 533-34; *Environ-mental Protection Agency*, 16 FLRA 602, 613-14 (1984), *remanded on other grounds*, 784 F.2d 1131 (D.C. Cir. 1986), Decision and Order on Remand, 21 FLRA 786 (1986). No such contention has been made here. Moreover, even proposals to authorize nego-tiation of certain issues below the "level of recognition" are negotiable. *United States Marine Corps, Washington, D.C.*, 33 FLRA 105, 113 (1988), *reconsidered on other grounds*, 42 FLRA 3 (1991), *remanded on other grounds*, Docket No. 91-1527 (D.C. Cir. December 4, 1992), *remanded to Administrative Law Judge*, 48 FLRA 123 (1993); *American Federation of Government Employees, AFL-CIO, Int'l Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service*, 11 FLRA 672, 679 (1983).[5]

The General Counsel relies, however, on the Authority's decision in *United States Department of Defense, Departments of the Army and the Air Force, Headquarters, Army and Air Force Exchange Service, Dallas,* Texas, 19 FLRA 652 (1985) (*AAFES*), in which the respondent was found to have committed

[4] Whether or not they are technically ground rules issues is unimportant. *See U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 533 (1990) (*Wright-Patterson*). Issues regarding single or multiple negotiations and single or multiple contracts are quite similar in effect to the issue of contract duration, which the Authority has found to be negotiable. *See U.S. Department of the Army, Headquarters III Corps and Fort Hood, Fort Hood, Texas and American Federation of Government Employees, Local 1920*, 40 FLRA 636, 642 (1991). Moreover, similar issues were recently decided in an interest arbitration award issued pursuant to a negotiation impasse submitted to the Federal Service Impasses Panel. *Department of the Air Force, Maxwell Air Force Base and Gunter Annex, Montgomery, Alabama and Local 997, American Federation of Government Employees,* AFL-CIO, Case No. 95 FSIP 79 (Sept. 8, 1995) (Issues 1 and 3), Panel Release No. 378.

[5] There is no suggestion in the cited decisions that the duty to bargain over such proposals exists only for management, and that such matters are "permissive" subjects for the union.

an unfair labor practice by refusing to negotiate over "national" impact and implementation proposals. Before analyzing the substance of the holding in *AAFES*, I must deal with an aspect of its procedural history that affects the decision's precedential weight.

*AAFES* came to the Authority on exceptions to an Administrative Law Judge's Decision. These exceptions were filed only by the General Counsel and the Charging Party and only with respect to the Judge's recommended remedy. There were no exceptions to the Judge's findings or conclusions on the substance of the violation. The Authority adopted the Judge's findings and conclusions with the following footnote explanation:

> The Judge concluded that the Respondent refused, when requested, to negotiate over national procedures to be observed in implementing reductions in hours. Noting particularly the lack of exceptions to the substance of the Judge's Decision, the Authority adopts the Judge's conclusions.

*Id.* at n.1. The Judge's decision had been issued on June 4, 1984, after section 2423.29(a) of the Authority's Rules and Regulations had been amended to provide that in the absence of exceptions, "the findings, conclusions, and recommendations in the decision of the Administrative Law Judge shall, without precedential significance, become the findings, conclusions, decision and order of the Authority . . . ." *Compare Marine Corps Logistics Base, Barstow, California*, 9 FLRA 1046 (1982) (amendment was effective by 1982) *with Delaware Army and Air National Guard*, 16 FLRA 398 (1984) (Authority's application of amended rule depends on whether Judge's decision was issued before or after amendment). While the Authority did not purport to apply section 2423.29(a) of its Rules and Regulations in *AAFES*, its announcement that it adopted the Judge's conclusions "[n]oting particularly the lack of exceptions . . .," gives at least a strong indication that it did not subject those conclusions to a searching review.

In *U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 991 (1993), the Authority applied section 2423.29(a) to a case in the same procedural posture as *AAFES* had been. Thus, having received exceptions only to the remedy, the Authority adopted the Judge's "findings, conclusions, and recommended decision without precedential significance." The Authority's explicit treatment of a party's failure to except to the pre-remedial part of a judge's decision as the equivalent of the "absence of

exceptions" for purposes of section 2423.29(a) leads me to conclude that today, at least, the Authority regards decisions it issues in circumstances like those in *AAFES* to be non-precedential. I think it more probable than not, therefore, that the Authority would now consider *AAFES* to be non-precedential.[6] I therefore consider the Judge's conclusions in *AAFES* as entitled to respect and as potential sources of guidance, but not as binding authority.

Turning to the *AAFES* case itself, its facts are similar in most significant respects with the instant case. The union demanded that negotiations be national in scope and the agency disagreed, taking the position that handling a matter at "the national level" that affects only "persons at [a] particular location, makes no conceptual sense and certainly militates against efficiency and effectiveness of governmental opera-tions." *AAFES* at 662.[7] However, in *AAFES*, unlike here, the union's response to the agency's position was to propose that the parties agree on the procedures about which the negotiations were concerned (procedures for the implementation of a reduction of hours), "and that the issue of the scope of the agreement be presented to the Federal Service Impasses Panel." 19 FLRA at 663. The agency did not accept that proposal. It did not, apparently, suggest that presentation to the Impasses Panel was premature. Instead, it insisted that the procedures involved only local matters and that any agreement reached concerning those matters would not be "binding in the future impact and implementation bargaining of a reduction in force at any other location within the consolidated unit." *Id.*

Implicitly, the agency in *AAFES* thus refused to negotiate over the scope of the agreement. Proceedings before the Impasses Panel, when necessary, are part of the process of collective bargaining as contemplated in the

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[6] I do not suggest that, by its decision in *Department of Veterans Affairs*, the Authority intended to take from *AAFES* any precedential weight it previously had. Rather, I treat the body of Authority case law as being, presumptively, internally consistent. Thus, the Authority's decisions should be considered to be in accord with its earlier decisions unless either (1) it announces otherwise or (2) the decisions are irreconcilable.

[7] Thus the agency, inartfully and, in my view, erroneously, referred to the dispute as one over the "level" of negotia-tions. Actually, negotiations had proceeded with both parties represented at the "national" or "headquarters" level. *Id.* at 662-63.

Statute. By rejecting the proposal for resolution of the issue of the scope of the agreement by the Impasses Panel without offering to attempt to resolve mutually the dispute over scope of the agreement, the agency in *AAFES* in effect declared the subject nonnegotiable. In any event, the agency made it clear that it had no intention to negotiate over the scope.

The complaint in *AAFES* alleged in pertinent part that the agency had implemented reductions in hours "and/or" in force without affording the union the opportunity to negotiate "on national procedures to be observed in implementing the changes and appropriate arrangements for adversely affected employees." The conduct described above prevented the union from negotiating even over whether the procedures to be observed would be national or local in scope. That was a sufficient basis for a finding that the agency had unlawfully refused to bargain in good faith, the ultimate allegation of the complaint.

While concluding that the agency had unlawfully refused to bargain, however, the Judge reasoned that the agency was required to negotiate for procedures that were national in scope because the agency had a policy of making staff reductions quickly at every facility affected by a reduced sales volume (thus making nationwide procedures necessary) and because "bargaining [must] be at the national level whenever any employee in a consolidated unit is affected." *Id.* at 665-66. This rationale, although unnecessary for finding a refusal to bargain in *AAFES*, supports the General Counsel's theory in the instant case and, as noted, forms the legal basis for the General Counsel's case. However, as I have concluded that the Authority adopted the Judge's conclusions in *AAFES* only in a more or less *pro forma* manner, and did not signify its approval of the rationale, I find it within my responsibility to re-examine it.

In *Department of Health and Human Services, Social Security Administration*, 6 FLRA 202 (1981) (referred to above as *DHHS*), another case where there had been a consolidation of previously separate bargaining units, the Authority held that "the mutual obligation to bargain as articulated in the Statute exists only at [the] level of exclusive recognition with respect to conditions of employment which affect any employee within the unit[.]" The Authority went on to explain that "a contrary result would render consolidation meaningless." *Id.* at 204. The Judge in *AAFES* used that language as one basis, and the one that is most relevant here, for concluding that the agency was **required** to engage in negotiations over procedures that were national (unit-wide) in scope. In doing so, the Judge

gave *DHHS* a breadth that I do not believe the Authority had intended. The Authority had defined the issue before it in *DHHS* as follows:

> Thus, the narrow question presented herein is whether, following the certification of AFGE for a nationwide consolidated unit, there remained a duty to bargain <u>new</u> conditions of employment at the local level pursuant to the reopener clause contained in the local agreement.

*Id.* at 203. The conclusion that the Authority ultimately reached in *DHHS* was that the agency was not required to negotiate with respect to a portion of the consolidated unit. It does not follow that an agency **is** required, simply by virtue of the scope of the unit, to engage in a single set of negotiations covering the entire unit and leading to uniform provisions for employees in all of the previously separate units. Such a leap from the actual holding in *DHHS* assumes, erroneously, as I have previously concluded, that the "level of exclusive recognition" describes the bargaining unit.[8] Instead, I believe that, consistent with the conclusion in *DHHS* that the agency was not required to bargain with respect to a portion of the unit, the **scope** of negotiations, as opposed to their **level**, is itself negotiable.

The conclusion that the scope of negotiations and of the agreement is negotiable is one that gives proper deference to the role of collective bargaining in resolving disputes. The Authority has recognized the desirability of providing the parties with the flexibility to fashion appropriate solutions to the problems giving rise to their disputes. Thus, it does not routinely require that an agreement reached after negotia-tions pursuant to a bargaining order be given retroactive effect, but does so only when such a requirement has a particular remedial justification. Otherwise, the Authority leaves it to the parties to determine whether retroactivity meets their needs. *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 989, 992-93 (1990); *Environmental Protection Agency*, 21 FLRA 786, 788-90 (1986). Similarly, the collective bargaining process should provide the basis for resolution of the issue presented here, one that has a certain affinity to that of retroactivity.

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[8] The Judge making that leap in *AAFES* may have been influenced by the agency's own inartful statement opposing negotiations at the "national level." *See* n. 7, above, and accompanying text.

In the instant case it was the agency, not the union, that manifested a willingness to negotiate over the scope of the agreement. Thus, in 1991, Northeast Regional Director Beebe "proposed two contracts" to Council 242, announcing that "for the time being, [both Regions have] decided to exercise our unfettered right to deal with Council FDA individually" (GC Exh. 5). Later, in response to another bargaining request from Council 242 in 1993, Beebe reiterated the position that negotiations should be between Council 242 and the constituent parts of the Northeast Region that are within the consolidated unit. Beebe attached **proposed** ground rules, which included a provision that any agreement reached would be binding only on Council 242 and the Northeast Region (GC Exh. 13). Similarly, Newark District Director Lewis informed Council 242 that Mid-Atlantic Region management "is ready to negotiate a completely new agreement between Council 242 and the Newark District." He attached **proposed** ground rules that included a counterpart to Beebe's proposal for bifurcation (GC Exh. 3).

Council 242 responded to Lewis (and to an earlier management memorandum of apparently similar import) with a letter stating in part that "[w]e will not accept separate negotiations." In response to Council 242's 1993 bargaining request, Lewis reminded Council President Nelson of the proposed ground rules Lewis had previously sent. He stated in conclusion that "I stand ready to meet and negotiate my ground rules" (R Exh. 1).

While there were subsequent discussions between the parties, and some mutual misunderstanding because Beebe's 1993 letter, apparently intended by FDA to serve as a continuing response to later Council 242 bargaining requests, did not come to the attention of Council President Nelson's successors until much later, the parties remained essentially in the posture described in their correspondence. They were thus at what might be described as a preliminary impasse on the subject of the scope of the agreement to be negotiated. FDA was sending a signal that, if somewhat ambiguous, was at least susceptible to being read as a willingness to negotiate over the scope. Council 242, on the other hand, has consistently taken and expressed the view that the scope was nonnegotiable because, as the General Counsel argues here, negotiation at the "level of recognition" requires a unit-wide collective bargaining agreement. Therefore I see no valid basis for finding that FDA refused to bargain.

On the other hand, I also reject FDA's current argument that the consolidated unit has become a multi-employer unit from which each of the FDA Regions involved here may withdraw. That position is substantially what was at issue in the unit clarification case, and the Authority's Order Denying Application for Review implicitly answers the withdrawal argument in the negative. Thus, FDA still has the duty to bargain with Council 242 over all negotiable issues, including the scope of the negotiations and of any agreements that may be reached. Accordingly, I recommend that the Authority issue the following order:

**ORDER**

The complaint is dismissed.

Issued, Washington, D.C., March 1, 1996

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JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. BN-CA-50168 were sent to the following parties in the manner indicated:

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Dated: March 1, 1996
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