UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 29, 2002

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE ARMY
LETTERKENNY ARMY DEPOT
CHAMBERSBURG, PENNSYLVANIA

Respondent

and Case No. BN-CA-01-0670

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1442

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

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

DEPARTMENT OF THE ARMY LETTERKENNY ARMY DEPOT CHAMBERSBURG, PENNSYLVANIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1442 Charging Party	Case No. BN-CA-01-0670

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 30, 2002**, and addressed to:

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

PAUL B. LANG
Administrative Law Judge

Dated: November 29, 2002
Washington, DC

OALJ 03-09

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY LETTERKENNY army DEPOT CHAMBERSBURG, PENNSYLVANIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1442 Charging Party	Case No. BN-CA-01-0670

Alfred Gordon, Esquire

For the General Counsel

Everett Bennett, II, Esquire
Curtis Baker
For the Respondent

Dorothy Van Brakle
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 15, 2001, the National Federation of Federal Employees, Local 1442 (Union) filed an unfair labor practice charge against the Department of the Army, Letterkenny Army Depot (LEAD), Chambersburg, Pennsylvania (Respondent). On July 31, 2002, the Regional Director of the Boston Regional Office of the Authority filed a Complaint alleging that the Respondent violated §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by unilaterally withdrawing from negotiations with the Union concerning the Respondent's decision to terminate its School

Age Services (SAS) child care program and by subsequently terminating the SAS program without having fulfilled its statutory obligation to complete bargaining with the Union.[1]

A hearing was held before the undersigned Administrative Law Judge in Harrisburg, Pennsylvania on October 8, 2002. Each of the parties appeared, was represented by counsel and was afforded the opportunity to present evidence and to cross examine adverse witnesses. This Decision is based upon careful consideration of all of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by each party.

Positions of the Parties

The General Counsel maintains that the Union first received definite notice of the impending termination of the SAS program on January 23, 2001. The Union formally requested negotiations on January 30, 2001, in an e-mail message in which it identified the adverse impact of the termination and set forth bargaining proposals. In so doing, the Union satisfied the requirements of the collective bargaining agreement both as to timeliness and specificity.

The Respondent entered into negotiations with the Union but later withdrew on the grounds that the Union had impliedly waived its right to bargain by failing to make a timely response to the announcement of the termination of the SAS program. The Respondent thereupon terminated the program on August 31, 2001. Each of those actions is a violation of the Respondent's duty to bargain.

There had been prior discussions of the possibility of the termination of various services, including SAS, in the Labor-Management Partnership Council (LMPC).[2] However, the Respondent had never announced a specific plan and date for the termination prior to its letter of January 23, 2001, to the Union.

The Respondent maintains that the Union first received notice of the impending termination of the SAS program on

[1] The motion of the General Counsel to amend the Complaint was granted without objection from the Respondent.

[2] The LMPC was created by the collective bargaining agreement in order to facilitate attempts to resolve certain disputes by consensus.

April 16, 1997. Rather than requesting bargaining, the Union submitted the issue to the LMPC. Even if the Respondent had the obligation to bargain, it satisfied that obligation by granting a number of significant postponements of the SAS closing.

According to the Respondent, the Union's bargaining request of January 30, 2001, was untimely and occurred after the Union had withdrawn from the LMPC in July of 1999. Although the Respondent erroneously entered into negotiations with the Union, it was entitled to withdraw after discovering that it had no bargaining obligation.

Findings of Fact

The pertinent facts, as set forth below, are undisputed:

1. The Union is one of four labor organizations which represent civilian employees of the Respondent. Employees at the SAS were members of the collective bargaining unit which was represented by the Union. In addition, the SAS was utilized by members of the bargaining unit represented by the Union.

2. In or around 1995 the Department of the Army promulgated the recommendations of the Base Realignment and Closure Commission (BRAC). Among those recommendations was the transfer of certain of the functions of LEAD to other facilities.

3. Pursuant to the BRAC recommendations, the Respondent was directed to divest itself of all facilities and property which were not considered vital to the accomplishment of its revised mission. This included the transfer of certain buildings to the local government. Among those buildings was the site of the SAS program.

4. By memorandum dated April 16, 1997[3], Respondent informed the Union that the closure of SAS was scheduled to occur between September of 1998 and March of 1999.

5. By memorandum dated April 30, 1997, the Union and the other three labor organizations expressed concern over the proposed closure of SAS and other Child Care Services. The labor organizations proposed a number of alternatives to

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[3] The handwritten memorandum was dated "4/16/96", but it is undisputed that it was actually sent on April 16, 1997.

the closure and expressed the desire to discuss the closure and the alternatives through the LMPC.

6. Various aspects of the proposed closing of SAS were discussed at meetings of the LMPC on May 6, 1997; May 27, 1997; January 13, 1998; October 13, 1998; January 12, 1999; February 16, 1999; February 23, 1999 and April 27, 1999.[4]

7. At the LMPC meeting on October 13, 1998, Deborah Witherspoon, the President of the Union, produced a letter from the Chambersburg School District stating that the buildings currently used for child care would not be transferred to the District for "several years." This raised the possibility that child care services, including SAS, would remain open for an indefinite period of one or more years.

8. At the LMPC meeting on January 12, 1999, Colonel Suchting, the Commander of LEAD, stated that the child care facility could remain open if money were provided to fund it.

9. At the LMPC meeting on February 16, 1999, Colonel Suchting stated that he was looking into the possibility of re-engineering a vacancy to hold a child care position.

10. At the LMPC meeting on February 23, 1999, Colonel Suchting stated that the SAS program would remain open through August 26, 1999, and that the employees assigned to SAS would be re-hired as term employees.

11. On February 25, 1999, Denise Jumper, the Acting Child Development Center (CDC) Coordinator, sent a memorandum to all parents and guardians of the CDC and SAS services informing them that Colonel Suchting had announced that the SAS program would continue through August 27, 1999.

12. At the LMPC meeting on April 27, 1999, Colonel Suchting stated that he had assigned the processing of a request to establish SAS positions to the Resource Directorate.[5]

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[4] Minutes of each of the meetings were entered into evidence as joint exhibits. The parties have stipulated that the closing of SAS was not discussed at any of the other LMPC meetings between April 16, 1997, and July 13, 1999.

[5] The Resource Directorate was apparently a unit or department under Colonel Suchting's command.

13. In July of 1999 the Union withdrew from the LMPC. However, the Union did not withdraw the issue of the closing of SAS from the LMPC agenda.[6]

14. By memorandum dated January 23, 2001, to the Presidents of all four of the labor organizations representing the Respondent's employees Respondent informed them that SAS would be closed on August 31, 2001. The memorandum also described Respondent's intentions regarding the retention or separation of the employees assigned to SAS and stated that the employees to be separated would be allowed up to forty hours of excused absence to facilitate the transition process through activities such as job interviews, training and attendance at job fairs.

15. By e-mail dated January 30, 2001, the Union requested negotiations over the adverse impact of the change in working conditions in accordance with Article 5 of the collective bargaining agreement.[7] The Union proposed that adversely effected employees be reimbursed for the increased cost of child care, that a term employee receive a thirty day notice prior to termination and that the term employee receive a briefing on available assistance in obtaining new employment.

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[6] The bylaws of the LMPC provide that any member may withdraw an agenda item at any time before the Council makes a final decision. In the language of the bylaws, "Such issues will then revert to normal bargaining procedures." Neither the bylaws nor the collective bargaining agreement contain provisions for the tolling of the ten day time limit for a party to request bargaining.

[7] Article 5 is entitled "CONSULTATION AND NEGOTIATION". In Section 1 "consult" is defined as a process whereby the Respondent informs the Union of a proposed action and solicits the Union's views before reaching a final decision. "Negotiate" is defined as the presentation of written proposals by one or both parties. The parties then meet to bargain in good faith in accordance with the Agreement to Negotiate which is set forth in the front of the collective bargaining agreement.

The language of Section 4 requires the Respondent to provide the Union with written notice of proposed changes to the agreement or to conditions of employment when such changes result from new regulations or other directives from authorities outside of LEAD. The Union then has ten calendar days within which to inform the Respondent in writing of its views or to request negotiations.

16. The parties commenced negotiations in February of 2001, but did not reach full agreement.

17. By memorandum dated August 1, 2001, Respondent informed the Union that, in reliance on a letter dated August 6, 1999, from the Regional Director of the Boston Region of the Authority[8], it had concluded that it had erroneously entered into negotiations and that it was not obligated to bargain. The Respondent thereupon terminated negotiations.

18. The SAS program was terminated on August 31, 2001.

Discussion and Analysis

In *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997), the Authority held that a union's receipt of adequate notice of a proposed change in conditions of employment triggers its responsibility to request bargaining regarding the proposed changes. The union's failure to request bargaining after the receipt of adequate notice may be construed as a waiver of the right to bargain. In the words of the Authority, the notice, "must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change." See also, *U.S. Dept. of the Treasury, United States Customs Service, Port of New York and Newark and National Treasury Employees Union Chapter* 161, 57 FLRA 718, 720 (57 FLRA No. 151) (2002).

In this case, the timeliness of the Union's request to bargain over the closure of the SAS program must be determined in light of the ten day time limit contained in the collective bargaining agreement. The Authority has recognized the validity of such contractual time limits on the exercise of rights conferred by the Statute, *Dept. of*

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8 On June 14, 1999, the Union filed an unfair labor practice charge in which it alleged that the Respondent had closed the CDC on June 4, 1999, without having satisfied its obligation to bargain (Joint Exhibit 19). By letter dated August 6, 1999 (Joint Exhibit 21), the Regional Director of the Boston Region informed the Union and the Respondent that the issuance of a complaint was not warranted. The Regional Director's decision was based in part on the fact that the Union had not made a timely request to bargain within ten days of its having been informed of the proposed closure in April of 1997.

the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 51 FLRA 1532, 1536 (1996).

The Respondent's memorandum to the Union of April 16, 1997, while somewhat indefinite as to the effective date of the proposed closure of SAS, nevertheless provided adequate notice that the facility would be closed within a specified time period. The Union tacitly acknowledged the adequacy of the notice by its memorandum of April 30, 1997, to the commanding officer of LEAD it which it stated that, "We have just recently been officially notified that the Child Care facilities [of which SAS was a part] are to be closed . . . ." (Joint Exhibit 4).

Rather than requesting bargaining, the Union commenced what amounted to consultation through the LMPC. The submission of the issue to the LMPC was an understandable, and even commendable, attempt to explore alternatives to the closure. However, Article 5 of the collective bargaining agreement recognizes a clear distinction between consultation and negotiation and the Union is bound by that distinction. By relying on the discussions at LMPC meetings the Union, whether or not intentionally, waived its right to bargain.

The General Counsel's argument that the Respondent's memorandum of January 23, 2001, was the first definitive notice of the impending closure of SAS is unpersuasive. Neither the delay of the closure date nor the exploration of alternatives to the closure could reasonably have been construed as a recission of the decision to terminate the SAS program. Indeed, it was made clear to the Union that the closure of the SAS program was the result of a directive from an authority to which the Respondent was subordinate. Furthermore, there is nothing to suggest that the proposals which the Union eventually submitted on January 30, 2001, could not have been made on or after April 16, 1997, when it first learned of the proposed closure of the SAS program.

The ten day deadline for a request to bargain is, to some extent, inconsistent with the collaborative process contemplated by the bylaws of the LMPC. Nevertheless, the Union, in spite of its presumed knowledge of the collective bargaining agreement, allowed the deadline to pass at its own risk. The Union, like the Respondent, is bound by the collective bargaining agreement. The Union had the choice of either submitting a timely request to bargain (possibly while still pursuing an accommodation through the LMPC) or requesting an extension of the deadline. It did neither and

is not entitled to relief from the consequences of its actions.

Although the Respondent's reliance on the letter from the Regional Director dated August 6, 1999, was questionable, the fact remains that it had no duty to bargain and, therefore, no duty to bargain to conclusion.

In view of the foregoing, I have concluded that the Respondent did not commit an unfair labor practice as alleged in the Complaint. Therefore, pursuant to §2423.34 of the Rules and Regulations of the Federal Labor Relations Authority, I recommend that the Authority issue the following order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, November 29, 2002.

Paul B. Lang

Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-01-0670 , were sent to the following parties in the manner indicated:

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

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Dated: November 29, 2002

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