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

DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE BOSTON SUPPORT OFFICE BOSTON, MASSACHUSETTS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3432 Charging Party	Case No. BN-CA-02-0540

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 **NOVEMBER 3, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

_____
RICHARD A. PEARSON
Administrative Law Judge

Dated: September 30, 2003
Washington, DC

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

MEMORANDUM DATE: September 30, 2003

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
BOSTON SUPPORT OFFICE
BOSTON, MASSACHUSETTS

Respondent

Case No. BN-CA-02-0540

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 3432

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE BOSTON SUPPORT OFFICE BOSTON, MASSACHUSETTS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3432 Charging Party	Case No. BN-CA-02-0540

David G. Davies
William J. Hughes
For the Respondent

Laurie R. Houle
Gary J. Lieberman
For the General Counsel

Vincent Castellano, Sr.
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This proceeding was initiated when the American Federation of Government Employees, Local 3432 (the Union or Charging Party) filed an unfair labor practice charge against the U.S. Department of the Interior, National Park Service, Boston Support Office, Boston, Massachusetts (the Agency or Respondent) on June 11, 2002. After an investigation, the Regional Director of the Boston Regional Office of the Federal Labor Relations Authority (the Authority) issued an unfair labor practice complaint on August 12, 2002, alleging that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by engaging in a course of bad faith bargaining in the negotiation of a collective bargaining agreement. The

Respondent filed a timely answer, denying that it committed an unfair labor practice and alleging instead that the Union had negotiated in bad faith.

A hearing in this matter was held in New York, New York on October 22, 2002, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered. I conclude, in agreement with the General Counsel, that the Respondent violated § 7116(a)(1) and (5) of the Statute.

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

The Union is the exclusive representative of a bargaining unit of approximately 500 nonsupervisory employees at approximately 22 National Park Service facilities in the states of New York and New Jersey. The most recent collective bargaining agreement (CBA) between the parties was negotiated in 1984; it had a three-year term, with a provision for automatic one-year renewal if neither party seeks timely renegotiation. In this manner, it has remained in effect to this date. Article 29 (Ground Rules) of the CBA established procedures for negotiations during the term of the agreement as well as "any renewal regulations following the life of this agreement." (Section 1). Section 2 provides, among other things: "All issues agreed upon will be initialed but will not be binding until the entire contract is approved at the appropriate level."

Over the years, the parties have engaged in sporadic attempts to renegotiate the CBA, but by the middle of the year 2000, the parties had little or nothing of substance to show for their efforts. Leadership of the Union had changed several times, often causing the contract negotiations to halt. Negotiations stalled during one period because the Agency successfully argued that the Union's request to bargain was untimely, and during another period because of a dispute over where to conduct the negotiations. While the parties were bargaining in early 1998, the Union asked for permission to adjourn, so that it could re-evaluate its entire contract proposal and submit a new one. The Agency agreed, negotiations ceased, and the Union's new contract proposal was submitted to the Agency in November of 1999. The Agency submitted a counter-proposal in June 2000, and the parties actually returned to the bargaining table in July 2000. It is the parties' conduct in the ensuing negotiations which forms the subject of the current ULP dispute.

The Union and the Agency met for three sets of bargaining sessions between July 2000 and June 2002: on two or three days in July 2000;[1] on October 30 and 31 and November 1, 2001; and on June 11, 2002. Vincent Castellano, Sr., a National Representative for the AFGE, served as the Union's chief negotiator. Timothy Donahue, a retired former labor relations manager for the Agency who had negotiated the 1984 CBA, was retained on contract by the Agency to serve as its chief negotiator again. Although the parties scheduled bargaining sessions for June 11-13, 2002, negotiations were suspended on the morning of June 11, and no further contract negotiations have occurred through the date of this hearing.

Over the course of the slightly more than six days of bargaining between 2000 and 2002, the parties reached agreement on six articles, and the spokesmen for each side initialed or signed copies of those articles (Joint Exhibits 2-6).[2] Of these six articles, the Agency sought to negotiate changes in at least two, perhaps three, of them subsequent to initialing them.[3] During the July 2000 sessions and again in October 2001, the Union objected to the Agency's attempt to change language that had already been agreed upon, but Mr. Donahue replied that Section 2 of the ground rules gave either party the right to propose changes to agreed-upon articles at any time. When the issue arose again at the start of the June 11, 2002 session, Donahue declared that negotiations were suspended until the ground rules dispute could be resolved by an arbitrator.

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[1] The exact dates of the 2000 sessions are unclear. Union negotiator Castellano testified that they met on July 18, 19 and 20, and other witnesses confirmed that there were three days of bargaining. But Union President Black's notes of those sessions (G.C. Exhibit 4) refer only to two days of negotiations, on July 20 and 21. While this issue is not essential to the resolution of the case, I find it most likely that there were three days of bargaining, since the parties' practice was to schedule sessions for three days at a time. I also find that the sessions, most likely, took place on July 19, 20 and 21.

[2] The Union's initial contract proposal (G.C. Exhibit 2) of 1999 contained 43 numbered articles, plus a Preamble. The Agency's June 2000 proposal contained 25 articles, which did not always correspond, numerically or in subject matter, with the Union's.

[3] As will be explained in more detail later, there was conflicting and confusing testimony regarding the precise articles that were reopened.

When the June 11 session broke up, the Union filed the instant ULP charge, and shortly thereafter the Agency filed a contract grievance against the Union's alleged violation of the ground rules concerning the non-binding nature of bargaining agreements. At one or more grievance meetings between the parties, they discussed the possibility of resuming bargaining while the ground rules dispute was resolved, but no agreement was reached on how to do so. No further contract negotiations have been held. As of the date of filing post-hearing briefs in the instant case, the Agency's grievance was pending decision by an arbitrator on procedural issues.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

In pursuing its contention that the Respondent engaged in a course of bad faith bargaining, the General Counsel cites two actions of the Agency in particular as obstructing and impeding progress during the negotiations: Mr. Donahue's attempts to "renege" on articles that had already been agreed upon, and his unilateral suspension of negotiations on June 11, 2002. The G.C. concedes that neither of these actions constitutes a per se violation of section 7116(a)(5) of the Statute, but it argues that the "totality of the circumstances" demonstrates that the Agency did not conduct its negotiations "in a good-faith effort to reach agreement," as required by section 7103(a)(12), or approach the negotiations "with a sincere resolve to reach agreement," as required by section 7114(b)(1). The General Counsel contends that the Agency's reliance on Article 29, Section 2 of the CBA for reopening previously agreed-upon terms at any time is "untenable," citing *American Federation of Government Employees, Local 2924, AFL-CIO*, 25 FLRA 661, 671 (1987) ("*Local 2924*"). The ground rule provision simply means that the agreed-upon articles will not be put into effect until the entire contract has been negotiated and approved by the agency head. Citing other FLRA and NLRB decisions, the G.C. argues that once agreed upon and initialed by the parties, an article cannot be reopened without good cause. The G.C. further asserts that the Agency had no valid reason for reopening the initialed articles here, and its insistence on doing so demonstrated the Agency's bad faith. Similarly, despite the parties' disagreement about the ground rules, suspending the negotiations entirely was unnecessary to resolve the dispute; the G.C. argues that the Agency's insistence on suspending negotiations while a grievance was pending further demonstrated the Agency's underlying desire to avoid reaching agreement on a new CBA.

In addition to the two primary examples of bad faith set forth above, the G.C. cites other actions of the Agency as further indicia of the Agency's bad faith. Such actions include the Agency's alleged delaying tactics in scheduling bargaining sessions, its refusal to name alternate negotiators so that one person's unavailability would not delay the scheduling of sessions, Donahue's repeatedly contacting higher Agency officials before committing to anything during negotiations, his refusal to exchange proposals by mail or by e-mail and then coming to negotiations unprepared, and his instructions from an Agency headquarters official just prior to the final bargaining session to suspend negotiations if the Union refused to reopen any of the agreed-upon issues. The General Counsel argues that these facts show a premeditated plan by the Agency to obstruct the negotiation of a new CBA.

The Agency, in turn, places the blame for the suspension of bargaining on the Union, which refused to comply with the basic ground rules for the negotiations themselves. According to this view, both the plain language and the bargaining history of Article 29, Section 2 reflect that any party can withdraw or seek renegotiation of any article at any time in negotiations, up until agreement is reached on all terms. This was intended to allow the parties maximum flexibility in conducting, and hopefully expediting, negotiations. Mr. Donahue was merely exercising his right to change his mind on a particular issue, and the Union was shutting off a legitimate subject of bargaining by refusing to discuss these articles. When Mr. Castellano repeatedly ignored the ground rules in this way, the Agency felt that the dispute over the meaning of Article 29 had become a barrier to continuing the negotiations: the dispute needed to be resolved before bargaining could resume. It was for this reason that Donahue had been advised to suspend negotiations if the dispute arose again on June 11, and it was for this reason that the Agency has sought arbitration of its contract grievance arising from the events of June 11.

The General Counsel and the Respondent take diametrically opposite positions concerning the breakup of negotiations on June 11. The G.C.'s witnesses testified that after Donahue declared the negotiations suspended, he rejected Castellano's appeals to continue bargaining while the ground rules dispute was resolved. The Agency's witnesses, however, testified that the Union team walked out as soon as Donahue suspended negotiations. According to the Agency's version, Donahue tried to convince the Union to continue the negotiations, but the Union representatives ignored his appeal and left the room. Similarly, each side blames the other for refusing to return to the bargaining table in the weeks after June 11.

The Agency further denies that it stalled or delayed the bargaining process in any way. It points to the fact that throughout most of the 1990's, negotiations had started and stopped, almost always due to changes in Union leadership and Union requests to modify its contract proposals. Once negotiations resumed in 2000, the primary cause of the difficulty in scheduling sessions was that Castellano and other Union officials were too busy with other bargaining units to identify many dates on which they were available. Donahue had full authority to make agreements and bind the Agency, but he also had valid reasons for wanting to change language in some of the previously agreed-upon articles on and prior to June 11.

Analysis

Section 7114(b) of the Statute provides:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –
>
> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays . . . .

As noted by all the parties in their arguments, the Authority has taken the following approach to allegations of bad faith bargaining: "In determining whether a party has fulfilled its bargaining responsibility, the totality of the circumstances in a case must be considered." *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990) ("*Wright-Patterson*"). This standard was most recently reaffirmed in *American Federation of Government Employees, Council 236 and United States General Services Administration*, 58 FLRA 582, 583 (2003). In other words, the Authority generally shuns the application of per se rules to identify bad faith acts during the bargaining process; instead, it looks at the evidence as a whole to evaluate whether a party has followed the mandates of section 7114(b) to (among other things) "approach the negotiations with a sincere resolve to reach a collective bargaining agreement[.]" In doing so, the Authority looks at the parties' actions to determine whether a party "has attempted to evade or frustrate the bargaining responsibility" outlined in section 7114(b). *Division of Military and Naval Affairs, State of New York*, 7 FLRA 321, 338 (1981).

This standard has been applied specifically in cases where a party has withdrawn or sought renegotiation of terms on which agreement had been reached, but none of those decisions offer a bright line for distinguishing when such an action is lawful or unlawful. In two early decisions under the Statute, the

Authority found that although the withdrawal from tentative agreements may be indicative of bad faith, such actions may also be justifiable; therefore they must be evaluated in the full context of the negotiations. In both of those cases, the Authority found that the respondent agency had not violated its obligation to bargain in good faith. *Division of Military and Naval Affairs, supra; Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base*, 13 FLRA 492, 506 (1983). However, in *Department of Treasury, Internal Revenue Service, Memphis Service Center*, 15 FLRA 829, 845-46 (1984), the agency's revocation of its earlier agreement to defer the transfer of several employees was found to demonstrate bad faith, despite the absence of other bad faith conduct by the agency.[4] And in a case with some similarities to ours, *Army and Air Force Exchange Service*, 52 FLRA 290 (1996), an agency was found to have bargained in bad faith by proposing a "pay for performance" (PFP) plan, then withdrawing it after agreement had been reached on a part of the plan, and breaking off negotiations with the union. While the ALJ (whose decision was adopted by the Authority) in this latter case recognized that the agency might be justified in changing its bargaining position, he stated that it had "placed an unwarranted barrier to agreement by **prematurely** cutting off negotiations along the path that had produced a partial agreement." 52 FLRA at 308. In this situation, it was the agency's refusal to discuss **any** PFP proposal that was found particularly objectionable, even more than the agency's revocation of its own PFP proposal. *Id.* at 309. Citing the Supreme Court decision in *NLRB v. Katz*, 369 U.S. 736, 747 (1962), the ALJ explained that this refusal "frustrated the negotiating process and the chances of reaching agreement." 52 FLRA at 304, 309. *See also, Social Security Administration Region IX, San Francisco, California*, Case No. SF-CA-70506 (1998), ALJ Decision Reports, No. 136 (July 10, 1998), ms. op. at 27.

As the case law outlined above demonstrates, there are no shortcuts or simple ways of identifying whether a party's conduct at the bargaining table violates the Statute. In the case at bar, I must look at the totality of the evidence and evaluate whether the Respondent satisfied its obligations under section 7114(b). Although I conclude that the Respondent has failed to bargain in good faith, the blame for the breakdown of the negotiations here is not as one-sided as any of the parties argue, and the Union must share at least part of the blame for

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[4] The agency was also found to have unlawfully refused to negotiate on another proposed change, but that allegation was considered separately by the ALJ and the Authority, and it does not seem to have factored into the finding of bad faith in revoking a prior agreement.

the situation that came to a climax on June 11, 2002. However, ultimately it was the Agency that compounded its own earlier sins of omission and commission by consciously deciding on that date to stage a confrontation with the Union that would have the likely result of bringing the negotiations to a halt.

Let me step back at this point to review some of the pertinent facts relevant to the contentions of the parties.[5] The dark shadow hanging over the entire bargaining process in recent years has been the fact that the current CBA was negotiated in 1984, and that on-and-off negotiations throughout the 1990's had resulted in absolutely no tangible progress toward a new contract. When the parties resumed substantive negotiations in July 2000, they had not sat down at the bargaining table together for more than two years, and they were working from a set of Union proposals submitted nine months earlier. As a result, the lack of progress over the previous ten years certainly affected the negotiators' attitudes as they started to bargain in 2000: any subsequent delays in the process would naturally have been viewed in the context of the earlier delays. Indeed, the slow pace barely improved after the negotiations began: only three sets of bargaining sessions were scheduled over the following two years.

Nonetheless, I cannot accept the Union's or the General Counsel's attempts to blame the Agency for this slow pace. Mr. Castellano himself testified that he was extremely busy representing several local unions for AFGE and that this limited the dates on which he could be available for negotiations. Although Agency representatives don't seem to have pushed to expedite the scheduling of bargaining sessions, Mr. Donahue made at least one personal visit to his Union counterpart after being treated at a VA hospital, in order to find some mutually available dates. In sum, the scheduling problems between July 2000 and June 2002 cannot be attributed to any intentional delaying tactics by the Agency.

The Agency's tactics at the bargaining table are more problematic. The General Counsel questions whether Donahue had sufficient authority to make commitments on behalf of the Agency, and his actions at the table certainly warrant such doubts. Especially in the 2000 and 2001 sessions, it appears

[5] In accordance with section 7118(a)(4), my findings of any unfair labor practice are based on actions of the Respondent which occurred within the six months leading up to the filing of the ULP charge on June 11, 2002. However, in order to properly understand the context of those actions and their effect on the parties' negotiations, it is necessary to also consider events predating that six-month period.

that Donahue frequently interrupted discussions to contact his superiors in Boston, particularly Frank Harris, the Chief of Labor and Employee Relations. The composition of the Agency's bargaining team should be noted here. Although Donahue was quite familiar with the Agency from his prior employment there, he had not worked for the Agency since 1987, and he had no role in drafting the Agency's June 2000 contract proposal. The other members of his team were all supervisors at individual Park Service sites, who had no apparent involvement in Agency labor policy. This structure, by its nature, made it very likely that Donahue would need to contact other officials in order to understand management's wishes. This inherent problem was compounded by Donahue's practice of seeking to renegotiate issues shortly after signing his agreement to them. Section 7114(b)(2) requires each party to be represented "by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]" Although I do not consider the evidence sufficient to specifically find that Mr. Donahue lacked that authority, I do find that the Agency impeded and delayed efficient negotiations in this manner.

One practice in particular that casts doubt on Mr. Donahue's overall motives was his oft-repeated statement to the Union negotiators that "he doesn't get paid unless he's at the table." (Tr. 39, 121, 290.) He appears to have made such comments in response to Union requests to exchange proposals by mail in between bargaining sessions, as well as in defense of his apparent lack of advance preparation for each bargaining session. (*Id.*) Donahue admitted that he said this to the Union, and he further admitted that it was not true, that he was indeed paid by the Agency for his preparation time away from the bargaining table as well as the actual negotiations (Tr. 220). While admitting that he knowingly told the Union something that wasn't true, he wouldn't admit that this was a lie; rather, he said he did it "to defer whatever [the Union] was saying to me at that particular moment." (*Id.*) The record does not disclose whether Donahue in fact used the time away from the bargaining table to prepare for the sessions, but whether he did or not, the practical effect of his ruse was to make the Union believe that he did no such preparation. Especially since Donahue did not work on a day-to-day basis with the other Agency negotiators or labor relations officials, this "cheated" the time that he could devote to real bargaining at the scheduled sessions, since it meant that Donahue needed to interrupt the bargaining sessions to caucus with his team and with his supervisors in Boston. This further compounded the effect of the other delays in the bargaining process, and it impeaches Donahue's overall credibility.

With these facts in mind, I approach the two primary allegations of the complaint: the revocation of agreed-upon

articles and the suspension of bargaining. Regarding the issue of revoking prior agreements, I find it is unnecessary to resolve the parties' contractual dispute over the meaning of Section 2 of the Ground Rules. The Respondent has asserted that the Ground Rules provision ("All issues agreed upon will be initialed but will not be binding until the entire contract is approved at the appropriate level.") is an affirmative defense to its conduct at the bargaining table, because it had the absolute right to seek changes in language until the very end of negotiations. The Respondent further urges me to resolve the contractual dispute in its favor, based on the Authority's decision in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1103 (1993). The General Counsel and the Union dispute the Respondent's interpretation of the Ground Rules, but they also argue that resolution of that issue is not necessary to decide the underlying issue here, and I agree. Even assuming that the Agency's interpretation of the Ground Rules were correct,[6] and that it had the right to renegotiate

[6] If the Authority concludes that interpretation of the Ground Rules is necessary in this case, I would find that once a bargaining issue has been agreed upon and initialed, neither party can reopen it without mutual consent. In general, "binding" means "enforceable," or imposing a legal obligation. *See*, Black's Law Dictionary 68, 161 (7th Edition 1999). The effect of the disputed Ground Rule is to clarify that agreed-upon terms will not be put into effect or become enforceable until the complete CBA has been negotiated. However, even though the interim agreements reached by the parties on individual articles are not enforceable while negotiations are ongoing, the negotiators must be able to place some reliance on those agreements in order to move on to other parts of the contract. In the context of labor relations, negotiators cannot make effective progress if their agreement on individual articles is infinitely renegotiable, as the Agency seeks. Over the course of lengthy contract negotiations, it is likely that some previously agreed-upon language will need to be altered to reflect subsequent agreements, but in such cases, the alteration of the prior agreement will be made by mutual consent. *See, Local 2924, supra*, 25 FLRA at 671-72, in which the Authority rejected an interpretation similar to that proposed by the Respondent here, of a comparable ground rule provision. Unilaterally revoking a prior agreement is not a per se violation of the Statute, but it is certainly indicative of bad faith, absent a good cause. I do not find Mr. Donahue's recollection from 1984 of the bargaining history of the Ground Rules to be a credible basis for discerning the meaning of the provision. Given his otherwise poor memory concerning more recent events, the self-serving nature of his testimony on this point, and his overall unreliability, I give his testimony on this issue little or no weight.

articles after agreement had been reached, the problem is that Mr. Donahue abused that right in a manner that impeded and obstructed progress in bargaining.

It is evident from Joint Exhibit 2 that the parties first were able to agree upon the Preamble, which was signed by Donahue and Castellano on July 20, 2000 (see also p. 2 of General Counsel Exhibit 4). The very next day, July 21, Donahue began the session by announcing that management was withdrawing its agreement to the Preamble (General Counsel Exhibit 4 at p. 4).[7] He explained this by saying, "we left something out of the Preamble I'd really like to have in." (Tr. 246, 43.) The Union disputed the Agency's asserted right to reopen articles in this manner, but the parties then moved on to discuss other articles in the contract. They continued to discuss the Preamble, as well as other articles, on July 21, 2000, and again October 30 and 31, 2001, without reaching any further agreements. Mr. Castellano was getting frustrated at the lack of progress and threatened to file a ULP charge against the Agency, but on November 1 the parties were able to reach agreement on a revised Preamble and four other articles (Joint Exhibits 2-4, 5a-5c). The Union had reluctantly agreed to discuss the changes to the Preamble sought by Donahue, without conceding the Agency's right to reopen agreed-upon articles, and this seemed to open the gates briefly to progress on other articles.

After the Preamble, agreement was reached next on Article 26, Duration of Agreement. The Union had proposed a three-year contract; the Agency's written contract proposal did not specify a duration, but Mr. Donahue told the Union that he wanted a five-year contract. Ultimately, however, after discussing the issue, the parties agreed on a three-year contract and signed off on written language to that effect (Joint Exhibit 4). When the negotiations recessed on November 1, they had signed off on five articles in total.

The bargaining resumed on June 11, 2002.[8] Prior to the bargaining session, which was supposed to begin at 9:00 a.m.,

[7] There was testimony that this did not occur until October 2001, but I find that Ms. Black's notes from July 2000 (General Counsel Exhibit 4) are the most reliable source of information on this issue, and accordingly I find that the Agency first sought renegotiation of the Preamble on July 21, 2000. (See also Tr. 246.)

[8] Since there was very little agreement on the precise events of that day, even between witnesses of the same party, my findings are based on the most credible aspects of the combined evidence, written and testimonial.

Donahue had a telephone conversation with Jim Gwyn, a labor relations officer in the Agency's Washington headquarters, because he'd been told that the Union would have an extra observer at the session. (See General Counsel Exhibit 5, which is a memo written by Donahue dated June 12, 2002.) Donahue also informed Gwyn of his ongoing dispute with Castellano over the right to reopen agreed-upon items. This dispute had previously arisen when Donahue sought to reopen the Preamble, and he told Gwyn on the morning of June 11 that "I had a couple of articles that I had signed off that we wanted to amend a few words." *Id.* Gwyn agreed with Donahue's right to reopen the articles, and he advised Donahue, "if Vinnie refused to abided [sic] by our ground rules that I should say 'I am suspended [sic] negotiations pending an answer from a mediator on the issue'." *Id.* The events of June 11 played out much as Gwyn had advised.

The parties gathered at the scheduled time, but a caucus was called before the parties actually sat down to negotiate. Mr. Donahue had left his bargaining files at home, and he asked for some time to meet with his team and try to print out some of the necessary documents. He also spoke to Ms. Black, who had e-mailed him in advance of the session, expressing her hope that management would be prepared to bargain when they returned to the table. Donahue reminded Black that he didn't get paid for work except at the bargaining sessions, and that he needed to meet with his team that morning before starting the sessions. A second caucus was also held, either immediately after the first caucus or after only a brief discussion period.

When the bargaining teams finally sat down together, Donahue submitted some proposals he wanted to discuss, including the Duration article (which he had previously sought to reopen), the Recognition and Unit Designation article (on which there had been no agreement), and perhaps some others. Some witnesses believed there was a second article, in addition to Duration, which Donahue sought to reopen, but the record is unclear on this point. With little debate, the parties reached agreement on Recognition and Unit Designation, and they signed it (Joint Exhibit 6). But the Union team members all noticed that Donahue was seeking to reopen the Duration article, and Castellano immediately objected. The parties again debated whether initialed articles could be reopened unilaterally, and Castellano finally said that the Union would not discuss articles that had already been agreed on. As he had been directed by Gwyn, Mr. Donahue then stated that if the Union would not follow the ground rules, he was declaring the negotiations suspended until an arbitrator could resolve the

matter.[9] The meeting broke up shortly thereafter, and the next two days' sessions were canceled.

As with most other aspects of the events of June 11, the witnesses disagreed as to who actually terminated the bargaining. While everyone agreed that Donahue declared the negotiations "suspended," the Agency's witnesses testified that Castellano immediately stood up, closed his files and walked out of the room. Donahue testified that he was "surprised that they walked out because I was ready to go on to look at some other articles, and at least discuss them." (Tr. 158-59.) Agency witness Gerbauckas testified that Castellano actually walked out of the room before Donahue declared the negotiations suspended (Tr. 252-53). The Union witnesses, however, insisted that Castellano refused to initially accept Donahue's suspension of negotiations, and that Castellano tried to persuade Donahue to negotiate on other issues while the ground rules dispute was resolved by a third party (Tr. 70-72, 129, 296-97).

This latter dispute is important, because it goes to the heart of the Agency's alleged unfair labor practice. If indeed Donahue intended to continue negotiating on other issues on June 11, then it was the Union and not the Agency that terminated the bargaining. If that were true, Donahue and the Agency could hardly be faulted for the breakdown in the process. But such an interpretation is not supported by logic or by the evidence. First, as I have already mentioned, I find Mr. Donahue's testimony to be replete with self-serving and disingenuous statements and an overall intent to bend facts to the Agency's advantage.[10] Second, it conflicts with Donahue's own memo of June 12 (G.C. Exhibit 5), which is a self-serving document in itself but which is also a useful, contemporaneous recitation of the events of June 11 while they were fresh in Donahue's mind. In this memo, Donahue noted the explicit advice of Gwyn that he "suspend[] negotiations pending an

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[9] In his memo (G.C. Exhibit 5), Donahue referred to sending the dispute to a mediator, but at the hearing, the witnesses recalled that he referred to an arbitrator.

[10] Another example of this occurred when he was asked whether the Union had ever sought to reopen an article that had been previously agreed upon (Tr. 240). He cited the two signed versions of the Preamble (Joint Exhibits 2 and 3) and suggested that Castellano had actually reopened this article, since both versions had the heading "Union Counter Proposal." (Tr. 244-47.) This was a total inversion of reality, and on further questioning Donahue could only concede that "we mutually agreed to a change in the Preamble. Who initiated it, I'm not saying." (Tr. 244.)

answer from a mediator on the [ground rules] issue." There is no mention here of suspending negotiations on the disputed articles while continuing negotiations on the other articles; on the contrary, the memo refers to suspending negotiations pending an answer from a mediator, which clearly indicates that Donahue and Gwyn had no intention of resuming negotiations until they obtained their answer from the mediator (or arbitrator). The clear meaning of the memo is also supported by the testimony of the Union witnesses, who all described how Castellano tried to continue negotiations on other issues and how Donahue refused to do so and walked out of the room.[11] Finally, toward the end of Donahue's June 12 memo, he summed up the incident at the bargaining table (which he had just "rehashed" with his team members "so that we all understood what had taken place" - G.C. Exhibit 5 at p. 2) with this comment: "Essentially I had not tried to trigger a confrontation that morning it just happened but, looking back it could not have been better if I had planned it." *Id*. While I reject the General Counsel's argument that this demonstrates that Donahue planned all along to terminate negotiations and had no intent of reaching agreement, I do find that it corroborates other dilatory and obstructive tactics by the Agency and reflects satisfaction that bargaining had come to a halt. It does not reflect well on the Agency's insistence that it has negotiated with "a sincere resolve to reach a collective bargaining agreement."

Taking all of these events into consideration, I conclude that the combination of the Agency's repeated reopening of agreed-upon issues and its termination of bargaining when the

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[11] While Agency team member Gerbauckas's recollection of this incident supported Donahue's, I give little weight to her testimony on this point. While Ms. Gerbauckas appears to have been trying to testify completely truthfully, she does not appear to have had a full perspective of the bargaining and the disputed issues between the management and the Union. In her testimony, she gives the impression that Castellano's objection to reopening the Duration article occurred as soon as the parties returned from their caucuses, and that Donahue only declared the negotiations suspended after the Union team began to walk out (Tr. 252-53). This conflicts with Donahue's own testimony that he declared the negotiations suspended prior to the Union leaving, and it conflicts with the known fact that the parties discussed and signed off on the Recognition and Unit Designation article before the dispute over reopening the Duration article triggered the walkout (Joint Exhibit 6). It appears that Ms. Gerbauckas's role in the negotiations was quite limited to technical matters, and that she simply didn't appreciate the significance of much of the parties' discussions.

Union objected thereto, violated the Respondent's duty to bargain in good faith. As I have stated, Donahue's reopening of the Preamble article at least once and perhaps twice, and his reopening of the Duration article were not inherently improper. There may be any number of valid reasons for seeking to renegotiate an issue, and the case law affords examples of these. The clearest such example was in *Division of Military and Naval Affairs, supra*, 7 FLRA at 338-42, where the Civil Service Reform Act came into effect in the midst of the parties' negotiations, prompting the agency to argue that many of their previously-negotiated articles had become obsolete.

But in our case, the reasons offered by the Agency for reopening these two provisions amounted to nothing more than "we've changed our minds." The Preamble had been the subject of lengthy discussions during the first two days of negotiations, yet no sooner did the parties reach agreement on it than Mr. Donahue sought to add new language to it. This set the tone for the remainder of the negotiations: the very first article agreed upon was immediately withdrawn. As a result, the parties recessed on July 21, 2000 from their first substantive negotiations in at least two years with nothing to show for their efforts except one reneged agreement. The pattern was repeated when the parties resumed bargaining in 2001, fifteen months after their last session. Two days of fruitless arguments were followed by agreement on four new articles on November 1, once the Union agreed to reopen the Preamble. But after another seven-month recess, Donahue and the Agency returned to the table with the conscious plan to "amend a few words" of "a couple of articles that I had signed off". G.C. Exhibit 5 at p. 1. While I do not attribute to Donahue a conscious plan to terminate negotiations, I do believe that he understood that Castellano would react angrily to reopening newly agreed-upon articles, and that Donahue hoped to use Castellano's response as an excuse to force a legal confrontation on their ground rules dispute.

While the Agency's proposed changes to the Preamble were relatively minor, the proposed change in the Duration article was drastic: immediately after demanding a five-year contract and then agreeing to the Union's demand of a three-year contract, Donahue turned around and demanded a five-year contract all over again. Nothing had occurred to justify this 180-degree turnaround on Donahue's part. Regardless of whether the Agency had the contractual right to reopen articles, the repeated use of this tactic for no good cause had the unavoidable effect of obstructing the negotiations and undermining the Union's trust in Donahue's word.

If the Agency's repeated use of this obstructive tactic did not, by itself, constitute bad faith bargaining, its

combination with the total suspension of bargaining by the Agency on June 11 did. I accept that the Agency felt it had a valid contractual right to reopen articles, pursuant to Section 2 of the Ground Rules, even though its use of that right in the facts of this case was dilatory and obstructive. And it had the further right under the contract to seek arbitration or mediation of that position. But it was not necessary to totally suspend negotiations while this dispute was being resolved. As of June 11, the parties had signed off on four articles in the contract, plus the Duration and Preamble articles which may have still been in dispute. Especially given the already-glacial pace of these negotiations, with their multi-month recesses, the ground rules dispute could easily have been resolved during a recess, while negotiations on the dozens of otherwise undiscussed issues continued. On June 11, the parties had just begun a scheduled three-day session after a seven-month recess. Negotiators had traveled considerable distances to attend the session. Yet the Agency's suspension of bargaining on June 11, and its refusal to discuss other issues until the ground rules were resolved, squandered the remainder of those three days, as well as many subsequent months.

After the talks broke down on June 11, one or more grievance meetings were held between Ms. Black of the Union and Mr. Harris and/or Mr. Hughes of the Respondent. Each party argues that the other demonstrated bad faith in refusing to return to the bargaining table during those meetings. I do not feel that an adverse inference can be drawn against either party's actions after June 11. Once the Union's ULP charge and the Agency's grievance had been filed, both parties appear to have taken the position that the other must renounce its view of the Ground Rules for negotiations to resume. In my opinion, the Agency's bad faith had been demonstrated by its actions on and before June 11. Its multiple attempts to renegotiate the Preamble and the Duration articles had delayed an already protracted bargaining process and undermined the Union's trust in the credibility of the Agency's word; its suspension of bargaining unnecessarily, when it could have pursued its ground rules grievance in combination with continued bargaining, attached the Agency's stamp of approval to Donahue's personal pleasure (as reflected in his memo) in seeing the process terminated. In total, I find that the Agency negotiated in bad faith and violated section 7116(a)(1) and (5) of the Statute.

The Remedy

While the Respondent did not address the appropriateness of any remedy except for dismissal of the complaint, the General Counsel seeks a cease-and-desist order; the posting of a notice to employees; an affirmative order that the Agency

return to the bargaining table and bargain in good faith; and that the Agency be specifically ordered "to abide by its agreements made during negotiations and not be allowed to renege on those agreements." G.C. Post-Hearing Brief at 38. The first three of the G.C.'s requests are commonly included as remedies for a party's failure to bargain in good faith, but the last is more unusual.

The General Counsel argues that "merely ordering the parties to return to the bargaining table does not fully address the bad faith conduct" of the Respondent. Since the Respondent's violation consisted partly of reopening provisions it had previously agreed to, the G.C. urges that the Respondent not be permitted to reopen any negotiated article without mutual consent. G.C. Post-Hearing Brief at 38. In effect, this would mean that the Respondent would be prohibited from reopening not only the Preamble and Duration articles, but also any unspecified articles signed-off on in future negotiations.

As noted above, when an agency violates its bargaining obligation and section 7116(a)(5) of the Statute, it is normal and appropriate that it be ordered to bargain. *See, e.g., U.S. Patent and Trademark Office*, 57 FLRA 185, 197 (2001); *Wright-Patterson*, 36 FLRA at 534. The Respondent here unlawfully terminated bargaining on June 11, 2002, and any remedy must require the Respondent to resume bargaining with the Union.

Additionally, when a party has negotiated a collective bargaining agreement and then repudiated it or refused to execute it, the Authority orders the recalcitrant party to execute the agreement. *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 321 (1997); *American Federation of Government Employees, Local 2924, AFL-CIO*, 25 FLRA 661 (1987). But in the above-cited cases, as in most cases on this point, the respondent had agreed to all articles in the CBA being negotiated. On the other hand, in the case at bar, the parties have agreed on only a few portions of the CBA, and the G.C. seeks to prevent the Respondent from reopening those articles as well as future articles that might be negotiated and then withdrawn.

Despite this distinction, I believe that the basic principle of the *FAA* and *AFGE* cases, *supra*, is applicable at least to the articles upon which the parties have already reached agreement. As I discussed in my analysis of the Agency's bargaining conduct, a party may sometimes have good cause for seeking to reopen an agreed-upon issue, but absent such cause, the behavior is indicative of bad faith bargaining. In the specific circumstances of this case, I have already found that the Respondent did not have good cause for seeking to reopen the Preamble and Duration articles, and that this conduct impeded bargaining. Similarly, no justification has been asserted for the reopening of any of the other four articles that the parties signed off on between July 2000 and June 2002. Therefore, in order to

effectuate the purposes of the Statute, I find it is appropriate to order that the articles already signed-off by the parties be included in any final collective bargaining agreement.

However, I cannot make the same finding regarding future articles that the parties may negotiate and sign off on, when they resume bargaining. While renewed attempts by the Agency to reopen newly agreed-upon articles will be viewed critically, in light of the Agency's past conduct, it would be unduly presumptive of me to forbid the Agency totally from making such a request.

In reaching this conclusion, I have also taken note of the Authority's decision in *U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois*, 19 FLRA 454 (1985). In that case, where an agency was found to have violated section 7116(a)(5) by unilaterally implementing a change in policy, the Authority held that it would be improper to order the agency to bargain upon request "and reach agreement" concerning the impact and implementation of that change. Section 7103(a)(12), in defining the mutual obligations to bargain collectively, cautions that this obligation "does not compel either party to agree to a proposal or to make a concession[.]" *Id*. at 455. Where I have already found that the Respondent fully agreed to the Duration and Preamble articles and then revoked such agreement without good cause, it is appropriate that the Respondent be ordered to execute that agreement. But since the appropriateness of future attempts to reopen articles cannot be evaluated prospectively, I cannot dictate the Respondent's decisions at the bargaining table.

I therefore recommend that the Authority issue the following remedial order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Interior, National Park Service, Boston Support Office, Boston, Massachusetts (Agency) shall:

1. Cease and desist from:

(a) Bargaining in bad faith during collective bargaining negotiations with the American Federation of Government Employees, Local 3432, AFL-CIO (Union), the exclusive representative of certain of its employees.

(b) Seeking to renegotiate articles of a proposed new collective bargaining agreement upon which agreement has already been reached, without good cause.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured them by the Statute.

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

(a) Notify the Union that it is prepared to resume bargaining for the purpose of negotiating a successor to the current collective bargaining agreement.

(b) Include, in any final agreement negotiated by the parties, the six articles on which agreement has already been reached and which have been signed off by the parties, absent the mutual consent of both parties.

(c) Post at all Agency facilities a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the Agency, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 30, 2003.

_____

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Interior, National Park Service, Boston Support Office, Boston, Massachusetts, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bargain in bad faith during collective bargaining negotiations with the American Federation of Government Employees, Local 3432, AFL-CIO (the Union).

WE WILL NOT seek to renegotiate articles of a proposed new collective bargaining agreement upon which agreement has already been reached, without good cause.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured them by the Statute.

WE WILL notify the Union that we are prepared to resume bargaining for the purpose of negotiating a successor to the current collective bargaining agreement.

WE WILL include, in any final agreement negotiated by the parties, the six articles on which agreement has already been reached and which have been signed off by the parties, absent the mutual consent of both parties.

_____
Department of the Interior
National Park Service
Boston Support Office
Boston, Massachusetts

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose phone number is: 617-424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. BN-CA-02-0540, were sent to the following parties:

_____

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Dated: September 30, 2003

Washington, DC