LAUGHLIN AIR FORCE BASE, DEL RIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1749, AFL-CIO Charging Party	Case No. DA-CA-30422

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 **JULY 31, 1995**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 28, 1995
Washington, DC

MEMORANDUM DATE: June 28, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: LAUGHLIN AIR FORCE BASE
DEL RIO, TEXAS

Respondent

and Case No. DA-CA-30422

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1749, AFL-CIO

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

LAUGHLIN AIR FORCE BASE DEL RIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1749, AFL-CIO Charging Party	Case No. DA-CA-30422

Major Leonard R. Rippey
Counsel for the Respondent

Susan E. Jelen
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by failing to comply with the terms of a settlement agreement. Under the agreement, bargaining unit employee Jesus Sanchez was to be afforded priority consideration for a motor vehicle operator position when it became vacant.

Respondent's answer denied any violation of the Statute.

For the reasons set out below, I find that a preponderance of the evidence does not establish a violation of the Statute, as alleged.

A hearing was held in Del Rio, Texas. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

On November 14, 1991, Respondent and the Charging Party (Union) entered into a written agreement to resolve an unfair labor practice charge filed by bargaining unit employee Jesus Sanchez, Jr. Mr. Sanchez, an officer of the Union, had filed the charge over Respondent's failure to consider him for a motor vehicle operator vacancy that occurred earlier in 1991. The agreement provided that Mr. Sanchez would be granted priority consideration for the position of Motor Vehicle Operator, WG-5703-6, when the position was vacated by the incumbent, contingent on management's ability to fill the position. The agreement also provided that Mr. Sanchez would be offered such consideration only once, that Respondent would post a notice on all management bulletin boards, and that the Union would withdraw the unfair labor practice charge.

Because Mr. Sanchez had been improperly denied appropriate consideration for the motor vehicle operator vacancy, he was also entitled, as a remedy under applicable Air Force regulations, to a referral for the position on a non-competitive basis. However, his selection was not mandatory.

The motor vehicle operator position became vacant in late 1992. At that time, Respondent had received an application from a candidate who met the requirements of the position and was the spouse of a member of the military. Under Air Force regulations a military spouse preference eligible must be selected if selection is to be made on a competitive basis.

Mr. Ubil Flores, Respondent's Chief of Staffing, and his associates were uncertain as to whether Mr. Sanchez or the military spouse had the higher hiring priority under the Air Force regulations and contacted the Headquarters, Air Training Command, Civilian Personnel Division, for advice. Mr. Flores was erroneously advised that the military spouse had the higher priority, as if the two candidates were competing on a competitive basis. As a result, the military

spouse was referred for mandatory selection and was placed in the Motor Vehicle Operator position on or about January 25, 1993.

If Mr. Sanchez had been properly referred for priority consideration on a non-competitive basis, he could have been selected for the position. Had this occurred, the military spouse would not have been referred at all. However, as noted, Mr. Sanchez' selection was not mandatory, and the supervisor could have asked for other candidates to be referred.

When Mr. Sanchez learned through his supervisor that a military spouse had been selected for the position and that there would be no other interviews, he contacted the Union for assistance. The Union wrote Respondent on January 26, 1993 requesting an explanation for its failure to comply with the settlement agreement. After Respondent replied on February 1, 1993 that it was legally required to fill the position with the military spouse, the Union filed the instant unfair labor practice charge on February 4, 1993.

The Union continued to discuss the matter with Respondent and, on February 11, 1993, Respondent again requested Headquarters, Air Training Command, for an opinion concerning the correctness of the staffing action as well as guidance regarding the appropriate remedy if its action had been in error.

On March 1, 1993, Headquarters, Air Training Command, replied that the original priority assigned to Mr. Sanchez had been incorrect and that, upon further review, he should, in fact, have been referred for priority consideration prior to the referral of the military spouse. The Command stated that Mr. Sanchez' selection was not mandatory, and if Mr. Sanchez had been referred but not selected, the military spouse could have been referred and selected. Therefore, under Air Force regulations, the Command stated that this was a procedural error and the military spouse need not be removed from the position. To remedy the error, it was recommended that Mr. Sanchez be given two priority considerations for the next two vacancies for which he qualified.

On March 8, 1993, Respondent notified the Union of this determination and that Mr. Sanchez would be provided two priority considerations to remedy his having missed consideration for the Motor Vehicle Operator position.

The Union did not consider this offer to be appropriate and rejected it. The Union contended that Mr. Sanchez was

entitled to priority "A" under Air Force Regulation 40-330 and should have been referred and selected for the position at issue. (Priority "A" applies to mandatory placement in instances where an employee has been discriminated against, or secures an informal settlement, under applicable equal employment opportunity laws.) The Union also asserts that in the past its experience at Laughlin has been that an employee with priority consideration was selected for the vacant position. Union President Guadarrama also testified that he had been told by Leo Weber, the Labor Relations Officer at the time of the settlement agreement, that Mr. Sanchez would be selected for the position when it became vacant.

In keeping with its commitment to provide Mr. Sanchez two priority considerations, Respondent afforded Mr. Sanchez a priority referral in January 1994 for the position of Materials Handler, WG-6907-06. Mr. Sanchez was interviewed, but not selected for the position.[1] As of the date of the hearing, Respondent intended to provide Mr. Sanchez one more priority referral to a position for which he would qualify at the WG-6 and equivalent levels.

Discussion and Conclusions

Counsel for the General Counsel contends that Respondent's actions in this matter clearly amount to a repudiation of the agreement's terms and a violation of the Statute. The General Counsel points out that the agreement was limited to a one-time priority consideration for a specific position with no further consideration to be offered. Mr. Sanchez lost the priority consideration that was due him for that position. Further, knowledge of the agreement was widespread among employees and management due to the posting on management bulletin boards. The General Counsel urges that Respondent's argument that it acted in good faith be rejected because Respondent ignored the Union until after the decision had been made and only sought clarification when the Union did not accept its position and began to pursue the matter through the unfair labor practice procedure. The General Counsel claims that Respondent's efforts to give Mr. Sanchez priority consideration for other positions after January 1994 are not relevant to the repudiation issue. Counsel requests that a violation be found and that Respondent be required to redo the entire action with Mr. Sanchez being afforded the original priority consideration that was due him under the agreement.

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[1] A separate unfair labor practice charge was filed concerning this referral and selection. Action on the charge was pending in the FLRA, Dallas Region as of the date of the hearing.

Respondent claims that it has acted in good faith to honor its obligations under the agreement, and its action, based on mistaken advice received from Headquarters, Air Training Command, did not rise to the level of a wholesale repudiation of the settlement agreement. Respondent points out that when it first became aware of a potential conflict between the requirements of the agreement and its duty to a military spouse, it sought assistance from its Headquarters. After following the Headquarters' erroneous advice and referring the military spouse ahead of Mr. Sanchez, and after the Union's protest, the Respondent again sought the Headquarter's review which revealed the error. Respondent claims that it has also acted in good faith to rectify the mistake by arranging for Mr. Sanchez to receive two priority considerations for positions for which he is eligible. Respondent asserts that its actions reflect its ongoing commitment to honor its fundamental obligations under the agreement, and any technical violation of the Statute, even if found, would be de minimis.

In Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991) (Warner Robins), the Authority noted that "not every breach of contract is necessarily a violation of the Statute, but that the repudiation of an agreement does violate the Statute." 40 FLRA at 1218. The Authority stated that "the nature and scope of the failure or refusal to honor an agreement must be considered, in the circumstances of each case, in order to determine whether the Statute has been violated." Id. The Authority found a violation of the Statute in Warner Robins, where management refused to assign the union's designated negotiator to the day shift, admittedly a breach of the parties' ground rules agreement, because the refusal to comply with the agreement "went to the heart of the agreement and the collective bargaining relationship itself and, therefore, amounted to a repudiation of the obligation imposed by the agreement's terms." Id.

I agree with Respondent that its non-referral of Mr. Sanchez for the Motor Vehicle Operator position described in the 1991 agreement was based on a mistaken interpretation of ambiguous personnel regulations relating to the agreement and was not a wholesale repudiation of its obligations under that agreement. Unfortunately for Mr. Sanchez, it was a breach of the agreement as correctly interpreted by the governing regulations, but Respondent's breach did not go to the heart of the collective bargaining relationship of the parties. Rather, except for Respondent's failure to include the Union in its initial

interpretation of the agreement in light of its regulations, its ongoing commitment has been to honor its fundamental obligations under the agreement by trying to interpret it correctly under the governing regulations and rectify its mistake. Respondent has not disowned, rejected, or refused to recognize the validity of the agreement. See Department of Defense Dependents Schools, 50 FLRA No. 62 (1995); U.S. Patent and Trademark Office, 45 FLRA 1090, 1111-12 (1992); Army and Air Force Exchange Service, Case No. CH-CA-40546 at 18 (Judge Etelson, February 27, 1995). A preponderance of the evidence does not establish that Respondent violated the Statute, as alleged.

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

ORDER

The complaint is dismissed.

Issued, Washington, DC, June 28, 1995

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DA-CA-30422, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: June 28, 1995
Washington, DC