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

MEMORANDUM DATE: August 12, 2008

TO: The Federal Labor Relations Authority

FROM: Richard A. Pearson
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

AND Case No. DE-CA-07-0592

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1547

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
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DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547 Charging Party	Case No. DE-CA-07-0592

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **September 15, 2008**, and addressed to:

Chief, Case Intake and Publication
Office of Case Adjudication
Federal Labor Relations Authority
1400 K Street, NW., Suite 200
Washington, DC 20424-0001

RICHARD A. PEARSON

Administrative Law Judge

Dated: August 12, 2008
Washington, DC

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

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
AND	Case No. DE-CA-07-0592
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547 Charging Party	

Timothy Sullivan
For the General Counsel

Phillip G. Tidmore
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On September 6, 2007, American Federation of Government Employees Local 1547 (the Union or Charging Party) filed an unfair labor practice charge against the Department of the Air Force, Luke Air Force Base, Arizona (Luke or Respondent). After investigating the charge, the Regional Director of the Authority's Denver Region issued a Complaint and Notice of Hearing on January 31, 2008, which alleged that the Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union over its proposals relating to the assignment and rotation of Aircraft Engine Mechanics at three

duty locations. On February 21, 2008, the Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that it had an obligation to bargain, and asserting instead that the Union's proposals were covered by a Memorandum of Understanding (MOU) previously negotiated by the parties.

A hearing was held in this matter on March 20, 2008, in Phoenix, Arizona, 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.

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 Respondent, Luke Air Force Base, Arizona, is a subdivision of the Department of the Air Force and is an agency as defined by section 7103(a)(3) of the Statute. The Union, American Federation of Government Employees Local 1547, is the exclusive representative of a unit of the Respondent's employees, and it is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4). Luke and the Union are parties to a Labor-Management Agreement (LMA) dated December 3, 1996. Although the contract has expired, the parties continue to abide by its terms. Tr. 11, 42.

The dispute in this case involves employees working in the 56th Component Maintenance Squadron, referred to as the Engine Shop, on Luke. The Engine Shop consists of three repair facilities: the Jet Engine Intermediate Maintenance (JEIM), also called the Main Shop, where aircraft engines are disassembled, inspected, repaired and reassembled; the Modular Repair Section, where specific components or modules of the engines are repaired; and the Test Cell Section, where the repaired engines are put through a variety of tests to ensure that they are operating properly before being flown again. Tr. 83, 153-54.

There are approximately 29 bargaining unit employees working in the 56th Engine Shop, all of whom are classified as Aircraft Engine Mechanics, WG-8602-10 (except one, a work leader, who is classified as WL-8602-10). While the work in

the Modular Repair and Test Cell sections is more specialized than in the Main Shop, there is some movement of employees from one section to another.[1] Specialized certifications are required to perform many of the repair functions in the shops, although witnesses for the General Counsel and the Respondent disagreed as to how long it would take for an employee to move from the Main Shop to either of the other shops. Tr. 87-89, 160-62.

Most of the Engine Shop's civilian employees work in the Main Shop, while two civilian mechanics work in each of the other two sections. Active duty and Air Force Reserve mechanics work alongside the civilians in the three shops, and most of the civilian employees in the Engine Shop have considerable prior military experience as aircraft engine mechanics. Tr. 89, 158. The active duty and Reserve mechanics are rotated among the different types of repair work to a greater degree than the civilians, so that at least some of the civilians with prior military experience have done modular repair and test cell work as well as engine assembly. Compare, Tr. 88-89 and 158-59.

In the last couple of years, the Engine Shop along with the rest of Luke has been hit by RIFs, and as a result several of the mechanics in the Engine Shop have either retired or been bumped, downgraded or reassigned to different positions within the Engine Shop or elsewhere on the base. This has also brought to the fore dissatisfaction among some employees with the manner in which mechanics are assigned to their sections in the Engine Shop. For instance, when one series of RIFs occurred, a relatively junior mechanic in the Modular Repair section (Mark Lawry) was bumped to a lower-graded position outside the Engine Shop, but when a mechanic in the Modular Repair section retired in September 2007, Mr. Lawry was moved back to Modular Repair, despite the fact that some senior employees in the Main Shop also wanted to move to Modular Repair. Tr. 29-30, 84-85, 150-51. While some mechanics are happy to remain in one section on a permanent basis, other mechanics would like to move to a different section or to enhance their skills by working in a new area. Tr. 20, 22, 84-85, 91-92, 103-05. Those mechanics interested in moving to a different section of the shop can inform their supervisors of their interest, and on one or more occasions a list of employees interested in moving has been circulated

[1]/ Tr. 21, 24, 29, 150-51. Employees generally are not moved temporarily from one section to another, but rather they are permanently assigned to a particular section. Tr. 162-63.

among the mechanics, but the only formal procedure for such moves is for employees to apply (or "self-nominate") for positions when vacancy announcements are posted by management. Tr. 92, 104, 137-39, 153.[2]

In the summer of 2007, Union President Harley Hembd became aware of some of the employees' complaints about the process of assigning and reassigning mechanics in the various sections of the Engine Shop, while he was handling a management proposal to change the work hours of some of the mechanics. Tr. 19-20, 148-49. After the scheduling matter was resolved, Hembd decided to address the assignment issue by submitting a request to bargain to Paul Shows, the Propulsion General Foreman, who runs the Engine Shop. In an email dated August 22, 2007, Hembd advised Shows:

> I know that some employees want the opportunity to work in these other locations [of the Engine Shop] and I don't believe there is an establish [sic] procedure and the issues proposed in this message are not included in the LMA or any other of the parties supplemental agreements, therefore, consider this as a Union initiated request to bargain. The follow [sic] are the Union's proposals.

G.C. Ex. 3, p. 2. The letter then listed ten proposals, some procedural and others substantive. Portions of these include:

> 3. Bargaining unit employees that work in the Propulsion Flight duty locations may volunteer, at any time, to work in the main Engine Shop, Test Cells or the Modular Repair Section as openings become available...

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[2]/ Air Force Manual (AFMAN) 36-203 (Resp. Ex. 2) permits management to reassign employees from one position to another at the same grade and with no additional promotional potential, either on a competitive or noncompetitive basis. Section 2.21.1; Tr. 176-77. It appears that the Respondent has noncompetitively reassigned mechanics from one section of the Engine Shop to the other on at least one occasion (Tr. 150-51), and possibly other occasions as well (Tr. 86). This has also occurred routinely in other units on the base (Tr. 40-41).

4. All volunteers for changes for duty locations will sign their names on a volunteer roster that will be maintained by Management, the Union will be provided copies of these rosters as changes to each of the volunteer rosters are made. These rosters will be maintained for future openings and placements.

. . . .

10. Employees may volunteer to rotate duty locations with another employee on a 1 for 1 basis. The two employees will rotate locations on 30, 60, 90 day basis, which will be agreed upon by management and the Union prior to the change.

Id., pp. 2-3. Shows sent a reply email that same day, stating, "we have an MOU on Staffing Civilian Positions (MOU-AFMAN 36-203) dated 17 Dec 2001, which governs how vacant positions are filled at Luke AFB." *Id.*, p. 1. Hembd pursued the issue with Robert Davies, Luke's Labor Relations Officer, who echoed Shows' comments. He told Hembd, in a September 2 email, "I don't believe we have an obligation to bargain this issue. We are already covered by contract, and have an MOU on filling vacant positions." G.C. Ex. 4, p. 2. On September 4, Hembd disputed this position, saying: "I don't understand why you keep making that statement. You do have an obligation to bargain with the exclusive representative, and that includes just about any subject matter not covered in an existing agreement, 29 FLRA 162." *Id.*, p. 1. Hembd expanded on his position later in the day on September 4:

As I explained to Paul Shows, the Union's proposals do not concern the advertisement and filling of vacancies through the Randolph web site (MOU subject matter). The Union's proposals are to address the current un-negotiated processes used to arbitrarily move certain bargaining unit employees within the CMS Propulsion Flight. . . . This is especially a concern to the Union since these employees are all

the same job series, however, not all are afforded the same opportunities.

Id., p. 1. The Respondent did not alter its prior refusal to bargain, however, and the Union filed the instant unfair labor practice charge two days later.

Applicable Bargaining Provisions and Other Documents

The Labor Management Agreement, negotiated between Luke and the Union in 1996 and still followed by the parties, provides in Article III, Rights of the Parties, Section C: "In accordance with 5 U.S.C. 7106, Management retains the right to . . . hire, assign, direct, layoff and retain employees, or . . . to assign work . . . and to determine the personnel by which operations shall be conducted [.]" Jt. Ex. 1, p. 3.

Article XII of the LMA, Assignment of Work, provides: "The parties agree that Management retains the right to assign work and to determine the personnel by which work will be conducted[.]"

Outside the sphere of collective bargaining, the Air Force and Luke have implemented a variety of regulations and manuals governing civilian personnel. AFMAN 36-203 (Staffing Civilian Positions)(Resp. Ex. 2) was drafted and implemented by the Air Force in mid-2001. The Respondent notified the Union of the new manual in May 2001 and invited the Union to submit impact and implementation proposals regarding it. Resp. Ex. 1. The 2001 version of AFMAN 36-203 replaced an earlier version that had been in effect for about a year, as well as Luke AFB Regulation 40-1. *Id.* While AFMAN 36-203 covers a wide range of subjects relating to hiring and promotion, its most significant change was to delete Chapter 8 (The Regionalized Merit Promotion and Internal Placement Program) and to

replace it with a revised Chapter 2 (The Air Force Merit Promotion Program). Resp. Ex. 2, p.1 (Summary of Revisions); Tr. 52-54, 132-33. The new promotion program eliminated a system in which employees were considered automatically for promotions based on the skills described in their resumes, and in its place employees are required to "self-nominate" for positions they are interested in. Tr. 38-39, 49, 135-36. Vacancy announcements are posted on the Randolph Air Force Base website, and employees under the new program are expected to respond by applying, either on the website or on an automated telephone system. Tr. 50-51, 136. Resp. Ex. 2, p.17, Section 2.12.

Chapter 2 of AFMAN 36-203 sets forth the procedures and criteria for both competitive and noncompetitive personnel actions. Sections 2.8, 2.9. Section 2.21, titled "Reassignments and Changes-to-Lower-Grade Absent an Announcement," allows employees to be reassigned on a noncompetitive basis to positions that have no known promotion

potential beyond the employee's current position, as long as the employee meets the qualifications for the new position.[3] It further provides:

1... Management-Initiated Reassignments.

Selecting officials may request the reassignment of an employee with the concurrence of the losing organization with coordination from the CPF [Civilian Personnel Flight].

2... Management-Directed Reassignments.

Management officials may direct the reassignment of a [sic] individual to a position within their

[3]/ This is an exception to the normal rule, stated in Section 2.15.2, that employees voluntarily seeking reassignment or a change to a lower-graded position will be evaluated in a competitive process.

organization or their line of command without referral of other candidates.

AFMAN 36-203 itself was not negotiated with the Union, but Luke officials and the Union did negotiate an MOU which states in its preamble that it "implements" AFMAN 36-203.[4] G.C. Ex. 5. The Union was particularly concerned that some of its members did not own a computer while others were not fluent in using one, and that these employees would be disadvantaged by the switch to a promotion system that requires employees not only to apply for positions on the computer, but also to actively search online to find vacancy announcements.[5] Tr. 39, 58, 65-66. Thus the Union obtained assurances in the MOU that Luke would publicize the new system, train employees in the use of computers and the applicable software, and make computers and personal email accounts available to employees during duty hours (Paragraphs 1-7 of the MOU). Procedures were established for updating vacancy announcements on a regular basis (Paragraph 8). Management agreed to consider internal candidates before looking outside the bargaining unit (Paragraph 9), and to give equal consideration to applicants temporarily on active military duty (Paragraph 11). Guidelines for

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[4]/ Specifically, the preamble states:

This Memorandum of Understanding (MOU) is between the American Federation of Government Employees, Local 1547 AFL-CIO (Union) and Luke AFB, AZ (Employer). It implements Air Force Manual 36-203 (AFMAN 36-203 Staffing Civilian Positions); supersedes Luke AFB Regulation 40-1; applies to Luke AFB bargaining unit employees and remains in effect until superseded by law or government-wide rule/regulation or subsequent agreement between the parties.

[5]/ Employees can also apply for vacancies by using the Air Force's IVRS telephone system, but this does not help the employee search for suitable vacancy announcements.

interviewing

applicants (Paragraph 10), protections for employees whose security clearances are revoked and later reinstated (Paragraph 12), and procedures for notifying successful and unsuccessful applicants (Paragraph 13), were established.

The next-to-last paragraph of the MOU provides:

14. Bargaining unit employees who self nominate for reassignment or a change to lower grade and are qualified for an open/vacant position shall be given consideration prior to referring external candidates. When an [sic] bargaining unit employee requests and is placed in a lower graded position, the pay will be set in accordance with AFI 36-802 and AETC Sup. #1.

G.C. Ex. 5, p. 3.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel alleges that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing the Union's request to negotiate a "process for the assignment and/or rotation of Aircraft Engine Mechanics" at the three duty locations of the Engine Shop. G.C. Ex. 1(b), paragraph 9. The GC argues that: (1) the Union made a valid bargaining request; (2) the subject of the proposed negotiations, as well as the proposals offered by the Union, were negotiable; (3) the issue of rotating or assigning mechanics among the three engine shops was neither covered by nor contained in the LMA or the MOU; and (4) the Union did not waive its right to bargain over this issue during the 2001 negotiations resulting in the MOU.

The General Counsel notes that the Union's request to bargain here occurred neither as part of negotiations for an overall collective bargaining agreement (CBA) nor in response

to a management-initiated change in conditions of employment; rather, the Union initiated its own proposals to address a

specific problem (the perceived absence of any controlling rules or procedures for assigning mechanics in the Engine Shop), at a time when the LMA had expired but the parties were continuing to follow its provisions. The GC asserts that a union is entitled to initiate bargaining over its own negotiable proposals, unless the proposals concern an issue that is contained in or covered by the CBA, or unless the union has waived its right to bargain on this issue. *See U.S. Department of the Interior, Washington, D.C.*, 56 FLRA 45, 53 (2000) and *U.S. Patent and Trademark Office*, 57 FLRA 185, 192 (2001)(*PTO*).

In support of its contention that the proposals submitted with the Union's bargaining request were negotiable, the General Counsel cites *American Federation of Government Employees, Local 1164 and Social Security Administration*, 60 FLRA 785 (2005)(*AFGE Local 1164*). In that decision, the Authority found a proposal negotiable which required management to fill vacancies for certain positions on a rotating basis from a roster, in order of seniority. An agency's statutory right to assign work and to select employees for positions includes the right to set the qualifications needed for the positions and to determine which employees meet those qualifications. However, the Authority said that a proposal requiring the rotation of employees or assignment by seniority does not infringe on those rights as long as the roster consists of employees who have been deemed qualified by the agency. *Id.* at 787. That is what the Union wanted to do here, the GC argues.

For its part, the Respondent argues that it engaged in extended negotiations with the Union for much of 2001, after it proposed to implement AFMAN 36-203 (in its latest of several incarnations); at the end of that process, the MOU, read in conjunction with AFMAN 36-203 and the LMA, fully covered the issue of assigning and reassigning employees. Moreover, any issues within this subject that were not covered by the text of those documents were waived by the Union.

The Respondent starts with Articles III and XII of the LMA, which restate an agency's statutory right to assign work and to determine which employees will perform the work; it then proceeds to section 2.21 of AFMAN 36-203, which describes

the circumstances under which employees may be reassigned on a noncompetitive basis; and it concludes with paragraph 14 of

the MOU, which gives priority consideration for reassignments to qualified bargaining unit employees over external applicants. Respondent argues that these provisions conclusively deal with the issue of reassigning employees and preclude the Union from reopening the topic until a new LMA is

negotiated. Thus, Luke acted properly in August 2007 in refusing to bargain with the Union over its new proposals on this subject. It cites *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993)(*SSA*), as establishing the analytical framework for this principle, and *U.S. Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois*, 49 FLRA 1444 (1994), and *U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California*, 48 FLRA 102 (1993), as demonstrating the applicability of the principle to the case at hand.

The Respondent also argues that the history of the 2001 MOU negotiations demonstrates that the Union waived any right to bargain further on the issue of reassignment. Pointing to early proposals submitted by the Union and by Luke management on a preamble to the MOU, the Respondent notes that the Union initially (and unsuccessfully) sought to continue any past practices not specifically addressed by AFMAN 36-203 or the MOU. Resp. Ex. 3, p. 30. Management negotiators, in contrast, proposed that the MOU and AFMAN 36-203 would be "the sole documents governing the staffing of bargaining unit positions at Luke AFB". *Id.* Although the preamble ultimately included in the MOU was different from both of these proposals (see note 4, *supra*, and G.C. Ex. 5), Respondent asserts that the agreed-upon language prohibits the parties from raising new issues that are not contained in the MOU or the AFMAN. Similarly, Respondent argues that bargaining on the provision that became paragraph 14 of the MOU demonstrates the Union's waiver of other issues. An early version of the Union's proposed language regarding reassignments was offered on August 21, 2007 (Resp. Ex. 4, p. 38, paragraph 18), and management's response to the proposal was made on September 18 (Resp. Ex. 3, pp. 23-24). Compromise language emerged at the September 18 session (*Id.*) and was put into nearly-final form on September 24 (*Id.* at pp. 32-33). According to the Respondent, the Union used the 2001 bargaining sessions to fully negotiate the procedures for reassignments; therefore, anything not included in the December 17 MOU was waived by the Union.

In response, the General Counsel argues that the subject of assigning or rotating mechanics among the three areas of the Engine Shop is neither "expressly contained in" the LMA or expressly covered by those documents. The provisions of the LMA relied upon by the Respondent restate the "management rights clause" of section 7106(a) of the Statute; citing the Authority's decision in *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 899 (1999), the GC argues that such restatements of statutory language do not waive a party's bargaining rights and are not properly considered under the "covered by" defense. Then, citing *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 911-12 (2000), the GC asserts that procedures for rotating or assigning employees among the three Engine Shop locations were at most tangentially related to the general right of Luke managers to assign work, and that the issue raised by the Union was therefore not inseparably bound up with Articles III and XII of the LMA.

Turning next to the MOU implementing AFMAN 36-203, the General Counsel submits that the Engine Shop assignment/ rotation issue was neither expressly contained in nor inseparably bound up with paragraph 9 or 14 of the MOU. The MOU focused on the Air Force's (and Luke's) introduction of a process for employees to "self nominate" by computer or by phone for vacancy announcements posted on the Randolph AFB Internet website. The provisions of the MOU were directed toward vacant positions that the Respondent advertises, whereas the Union's 2007 bargaining request was directed at moving or rotating employees in the absence of an advertised vacancy.

Finally, the General Counsel denies that the Union waived its right to bargain on the issue of rotating employees among work locations by its conduct during the 2001 negotiations. Citing *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582, 585 (1992)(*Selfridge)*, the GC asserts that the test for a bargaining waiver is whether the matter has been "fully discussed and consciously explored during negotiations" and whether the Union has "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." Since even the Respondent's chief negotiator admitted that the parties did not discuss at any point during the 2001 negotiations a procedure for rotating or permanently moving employees from one work area to another (Tr. 145-47), the GC submits that the standard for waiver has not been met in this case.

Analysis

A. The Respondent Was Obligated to Bargain With the Union, Regardless of Whether the Union's Proposals Were Covered By the LMA

The timing of the Union's bargaining request in this case raises special issues that were not fully identified, much less addressed, by the parties, either at the hearing or in their briefs. Specifically, how are the Respondent's bargaining obligations, and the applicability of the "covered by" test, affected by the fact that the LMA had expired?

Union President Hembd testified that the contract had expired (Tr. 11) and that the parties continued to follow its terms (Tr. 11, 42), but he further testified that "We did give notice concerning permissive subjects." Tr. 42. From these comments, I infer that the LMA was not simply renewed automatically pursuant to the terms of Article XXX, but rather that the agreement had lapsed. This distinction can be significant, as noted by the Authority in *Professional Airways Systems Specialists and U.S. Department of Transportation, Federal Aviation Administration*, 56 FLRA 798, 804 n.11 (2000) (*PASS*). There, the Authority noted that it "has previously suggested, but not decided, that the 'covered by' doctrine does not apply to expired agreements." *Id.* However, it was unnecessary in that case to resolve the question, because the FAA-PASS contract had not expired; instead, by its own language the contract continued in full force while new term negotiations were ongoing, and therefore the agency was permitted to raise the covered by defense. *Id.* at 804.

The Authority has long held that on the expiration of a collective bargaining agreement, those provisions of the contract representing mandatory subjects of bargaining generally continue to be binding on the parties; on the other hand, either party is free to unilaterally terminate its consent to contract provisions on permissive subjects. *See Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C.*, 14 FLRA 644, 647-49 (1984), which was reaffirmed expressly in *United States Border Patrol Livermore Sector, Dublin, California*, 58 FLRA 231, 233 n.5 (2002)(*Livermore*), and indirectly in *National Treasury Employees Union, Chapter 137 and United States Department of*

Homeland Security, Bureau of Customs and Border Protection, 60 FLRA 483, 486 (2004*) (NTEU, Chapter 137*). It was clearly in this context that, in our case, Hembd referred to the Union's having given "notice concerning permissive subjects." Tr. 42.

In their post-hearing briefs, the parties gloss over the potential legal significance of the LMA's expiration, apparently due to the fact that the Union and Respondent continue to apply virtually all of the LMA's terms. The Respondent's brief contains lengthy legal discussions of mid-term bargaining and impact and implementation bargaining (neither of which is applicable here), but it never confronts the theoretical paradox of using an expired contract as a shield against bargaining. The only glimmer of recognition on the Respondent's part is a single cryptic sentence: "The covered by defense does not require bargaining over a subject covered by a negotiated agreement after the agreement has expired unless bargaining was requested before the change." Respondent's Brief at 8. Respondent cites *Livermore* in support of this proposition (absent a page citation that might offer a clue to Respondent's reasoning), but it fails to explain how a "change" is relevant to our own case or to indicate how *Livermore* linked the covered by defense to the timing of a bargaining request.

For its part, the General Counsel correctly cites the *PTO* decision for the principle that "a union can compel negotiations on bargainable local issues that arise after an agreement expires by demanding bargaining at the appropriate level of representation." 57 FLRA at 192, *quoting American Federation of Government Employees, National Border Patrol Council, Local 2366 v. FLRA*, 114 F.3d 1214, 1219 (D.C. Cir. 1997)(*AFGE v. FLRA*). The GC refrains, however, from either attributing any broader meaning to the *PTO* decision or arguing that the covered by defense is inapplicable to this case, despite the fact that in *PTO* the Authority questioned the applicability of the covered by rule after the expiration of a CBA. "As there is no valid collective bargaining agreement between the parties, the Judge did not err in not applying the 'covered by' test expressed in *SSA*." 57 FLRA at 193.

The GC's restraint is understandable, because the *PTO* case presented the unusual situation in which the parties had no CBA, rather than an expired agreement that the parties were continuing to apply or renegotiate. Moreover, the Authority

sent a somewhat different signal in its *Livermore* decision, stating that despite the expiration of the CBA, the agency there could raise a covered by defense "to the same extent that it could during the term of the contract." 58 FLRA at 233. But this holding was also limited to the special circumstances of that case, where the union had requested bargaining at an inappropriate level. *Id.* From these and other decisions, it is evident that the Authority has repeatedly discussed, but refused to fully resolve, the availability of the covered by defense when a CBA has expired, but continues to be followed. *See also PASS, supra,* 56 FLRA at 804 n.11; *U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 93, 98 (1999); *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 1561, 1565 (1996). Indeed, these decisions raise more questions than answers on the subject.

I believe that the Authority's reluctance to make any sweeping pronouncements regarding the covered by doctrine is based on the varied factual contexts in which a covered by defense may be raised. Although the doctrine is applicable only as a defense to a refusal to bargain,[6] it may be asserted by an agency as a justification for (a) unilaterally changing working conditions, (b) taking a managerial action pursuant to a contractual provision, or (c) refusing to discuss a mandatory subject of bargaining initiated by a union, to use just three possible examples.[7] The possibility that the answer to these hypothetical questions might not always be the same is suggested by footnotes 7 and 8 of the Authority's majority opinion in *Livermore*. 58 FLRA at 233 n.7, 8. Rather than lumping all such post-expiration situations together, the Authority in that case used separate footnotes to note, first, in footnote 7, that:

> [T]he Authority has never actually decided this question; that is, whether an agency may, without further bargaining, implement changes in conditions of employment in a manner consistent with the provisions of an expired agreement.

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[6]/ Social Security Administration, Baltimore, Maryland, 60 FLRA 674, 681 (2005).

[7]/ For other possible scenarios in which the covered by defense may arise, see NTEU, Chapter 137, 60 FLRA at 487-88 and its progeny.

and then, in footnote 8:

> This case does not present the issue of whether the Respondent would have been able to assert a "covered by" defense if a proper request had been made to initiate term bargaining on the mandatory subject of details following the expiration of the agreement, or if there had been a past practice in existence that was contrary to the terms of the expired agreement. Accordingly, we do not address that issue here.

As discussed in greater length by the ALJ in *Livermore*, the Authority's suggestion that the covered by defense may not be applicable after expiration of the CBA "is in apparent tension with the well-established principle that, absent agreement to the contrary, contract provisions resulting from negotiations over mandatory subjects of bargaining continue in effect after the expiration of a contract." 58 FLRA at 239. Primarily because the union had not made a proper request for bargaining, the ALJ and the Authority in *Livermore* held that the agency was entitled to rely on the contract provisions.

However, both the Authority and the ALJ in *Livermore* cited the *PTO* case, 57 FLRA at 191-92, for the principle that "upon the expiration of a collective bargaining agreement, it is well-established that either party may seek to renegotiate its terms, and the parties have an obligation to engage in such negotiations upon request." 58 FLRA at 233, 239-40. In *PTO*, the parties disputed whether they had a binding CBA. They had previously negotiated one, but it had been disapproved by the agency head, and the union continued to insist that it was binding until renegotiated. During this period, the agency proposed to change certain aspects of its performance appraisal system, and the union countered with a demand to renegotiate the entire performance appraisal system. The agency then withdrew its proposed change, but the union continued to demand bargaining on the overall issue. Although the Authority rejected the union's factual assertion that there was a CBA in effect, it held that the agency was obligated to bargain over negotiable union-initiated proposals. 57 FLRA at 192. The Authority never discussed the applicability of the covered by defense: the agency had not raised the defense, since it insisted there was no contract.

But it is the Authority's discussion in *PTO* of an agency's bargaining obligation, in the absence of a binding CBA, that holds the key to the use of the covered by defense.

The case at bar appears to confront us with the situation posed and left open by the Authority in footnote 8 of its *Livermore* decision. As noted in the body of the *Livermore* majority opinion, the covered by doctrine serves the same underlying purpose (affording the parties stability in their relationship) as the general rule that parties continue to be bound by the provisions of an expired agreement until otherwise agreed or until the provisions are modified in accordance with the Statute. 58 FLRA at 233. Thus the parties should be able to rely on the terms of the agreement after expiration, but neither party should be able to block the renegotiation of all or a part of the expired agreement. Where, as in *Livermore* and in *AFGE v. FLRA*, 114 F.3d at 1218-19, the union requests bargaining at an inappropriate level, the agency need not accede to that request, and it is entitled to rely on the continuing applicability of the contract provisions. But as the court emphasized in *AFGE v. FLRA*, and as the Authority emphasized in *PTO* while citing *AFGE v. FLRA*, an agency is obligated to bargain after the expiration of a contract when the union makes a negotiable proposal on a mandatory subject at the appropriate level of bargaining.
114 F.3d at 1219; 57 FLRA at 191-92.

Thus, in determining whether a covered by defense is applicable, it is not enough to simply know whether the CBA has expired. If a union has not made an appropriate request to renegotiate an expired contract provision, then considerations of stability and continuity entitle the agency to rely on the contract provisions; and when it acts in accordance with such a provision, it can assert a covered by defense. *Livermore* at 232-33; *U.S. Department of the Air Force, HQ Air Force Materiel Command and American Federation of Government Employees, Council 214*, 49 FLRA 1111, 1121 (1994). However, once the contract expires, contract provisions on mandatory subjects are open to renegotiation. The court in *AFGE v. FLRA* went out of its way to note that the agency would have been obligated to negotiate on the subject raised by the union (assignment procedures), notwithstanding the expired contract, if the bargaining request had been made

at the proper level. 114 F.3d at 1219. In *PTO*, the Authority discussed and applied the *AFGE v. FLRA* decision, and particularly the court's statement that, in general, an agency has a duty to bargain in response to a request "for 'term negotiations' to renegotiate an expiring or expired contract . . ." 57 FLRA at 191, *citing* 114 F.3d at 1218. The Authority explained that "[t]his category is broad and includes negotiations following the expiration of an agreement. It does not define such negotiations as limited to a full, term agreement." 57 FLRA at 192. The Authority went on to conclude that the union's request to negotiate a new system of performance appraisals was a mandatory subject, and that the agency's refusal to bargain was unlawful. *Id.*

I conclude, in this case, that the Respondent was similarly obligated to negotiate a process for assigning or rotating employees among the different sections of the Engine Shop. As long as Luke management could determine who was qualified to perform the work (something that the Union and the GC concedes), this was a mandatory subject of bargaining that did not interfere with Respondent's right to assign work.

AFGE Local 1164, supra, 60 FLRA at 787; *United States Department of Housing and Urban Development*, 58 FLRA 33, 35 (2000). Indeed, the issue that the Union sought to negotiate in this case is quite similar to the one raised by the union in *AFGE v. FLRA*, which was conceded to be negotiable by all participants at all levels of the case. 114 F.3d at 1219. Upon the expiration of the LMA, those provisions relating to mandatory subjects of bargaining continued to be binding on the parties, subject to an appropriate request by either party to renegotiate all or some of those provisions. After the LMA expired, the Union here could have demanded bargaining to renegotiate the entire LMA, or it could demand negotiations on any one or more mandatory subjects. This conclusion flows logically and directly from the Authority's opinions in *Livermore*, 58 FLRA at 233, and in *PTO*, 57 FLRA at 191-92. The Union was free to seek bargaining over any mandatory subject, regardless of whether it related in any way to, or was "covered by," the old LMA. In this context, the covered by doctrine is irrelevant. While the parties may have been privileged to rely on the mandatory terms of the LMA after expiration, and to utilize the covered by defense in following those terms, both parties were also free to demand bargaining over any mandatory subject, whether it involved the renegotiation of an old provision of the LMA or the creation of an entirely new provision.

That is what the Union did on August 22, 2007: it identified an area of concern regarding the ability of equally-qualified mechanics to work in the different areas of the Engine Shop, and it requested bargaining to develop procedures for addressing the concern. Whether or not this issue was covered by the old contract, it was still negotiable. The Respondent's refusal to negotiate violated section 7116(a)(1) and (5) of the Statute.

B. The Union's Proposals Were Not Covered By the LMA

Even if the Authority were to rule that the covered by defense was available to Respondent when the Union requested bargaining in August 2007, I would still find that the Respondent committed an unfair labor practice, because some, if not all, of the Union's proposals were not covered by any negotiated agreement between the parties.[8]

The elements of the covered by doctrine have been articulated frequently by the Authority and were accurately stated by the parties in their respective briefs. As promulgated in *SSA*, 47 FLRA at 1018-19, and clarified in *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 813-14 (2000)(*Customs Management Center*), the defense consists of two prongs. First, we look at whether a bargaining proposal is "expressly contained" in the CBA. Second, we look at whether the proposed subject is "inseparably bound up with . . . a subject expressly covered by the contract." 47 FLRA at 1018 (citations omitted). If the answer to either of these questions is yes, then the agency has no duty to bargain on the issue. In evaluating the second prong of the test, we are to "examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." 56 FLRA at 813-14. It is the intent of the parties concerning their agreement that is the determinative factor. 56 FLRA at 814.

In *National Air Traffic Controllers Association and United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 61 FLRA 437, 441 (2006), the

[8]/ The Respondent has not objected to individual proposals within the Union's August 22, 2007 bargaining request. Accordingly, I can only address the overall context and meaning of the proposals.

Authority noted that under the first prong of the test, "[E]xact congruence of language" is not required. "Instead, 'if a reasonable reader would conclude that the provision settles the matter in dispute[,]' then the subject matter is covered by the agreement." *Id., citing SSA*, 47 FLRA at 1018. It further explained that the first prong of the test has been found to be met "where the proposals would have modified and/or conflicted with the express terms of a contract provision." 61 FLRA at 441. Moreover, the Authority said that it has found the first prong not to be met when the proposals did not modify and/or conflict with the express terms of the contract, "even if the proposals concerned the same general range of matters addressed in the provisions." *Id.* at 441-42.

In applying the case law to the instant case, I evaluate the Union's proposals (G.C. Ex. 3, pp. 2-3) against two documents: the LMA and the December 17, 2001 Memorandum of Understanding (G.C. Ex. 5). The latter document was negotiated pursuant to impact and implementation bargaining in response to AFMAN 36-203, and its meaning and intent are to be understood in the context of AFMAN 36-203; but the AFMAN itself is not a "negotiated agreement" to which the covered by doctrine is applied. *NTEU, Chapter 137*, 60 FLRA at 487-88; *but see* Chairman Cabaniss's concurring opinion therein, *id.* at 489.

Articles III and XII of the LMA do not help the Respondent at all. They simply incorporate management's right to assign work that is inherent in section 7106 of the Statute; even if these provisions were not in the LMA, Luke managers still have this right. What the Respondent is apparently trying to say is not that the Union's proposals are "covered by" the LMA, but that they are nonnegotiable infringements on management's 7106 right to assign work and direct the workforce. But I have already discussed in the earlier section that at least some of the Union's proposals are negotiable, that they do not restrict management's right to determine which employees are qualified to work, and that they simply seek to develop procedures for allowing engine mechanics to work in different positions that management has found them qualified to perform. Only one of the ten specific proposals mentions seniority as a factor in assigning mechanics. Some of the proposals are simply ground rules, such as requiring "face to face negotiations" and the maintenance of the status quo until negotiations are complete.

Others are entirely procedural, in that they allow mechanics to volunteer to work in the different shops, require that a volunteer roster be maintained for changes in duty locations, and entitle employees who don't have or use email to receive personal notice of Engine Shop openings. These do not in any way infringe on management's right to assign or direct work. The Respondent's across-the-board refusal to bargain at all with the Union on any of these proposals cannot be justified on the basis of the LMA.

As for the MOU, this document arose from the implementation of a new Air Force Manual on Staffing Civilian Positions, AFMAN 36-203, in 2001 (Resp. Ex. 1). The primary change in this manual was a new Chapter 2, regarding the Air Force Merit Promotion Program. While the entire manual is comprehensive in its coverage of many areas of hiring and promotion, the I&I negotiations with the Union in the summer and fall of 2001 focused on the Air Force's change to a computer-based application process for filling positions, in which employees would be required to search on their own for open positions that interested them, and to apply for them ("self-nominate") online through a central personnel office at Randolph Air Force Base. The I&I negotiations dealt only with the filling of vacant positions at Luke that are posted by the Air Force, and within that scope, almost entirely with ensuring that employees would be given access to computers and the tools to become familiar with the new computer-based system.

The particular provision of the MOU cited by the Respondent as covering the Union's 2007 proposals is the first sentence of paragraph 14: "Bargaining unit employees who self nominate for reassignment or a change to lower grade and are qualified for an open/vacant position shall be given consideration prior to referring external candidates." Other portions of the MOU require that vacancy announcements will be posted for at least ten work days and will be updated at regular intervals; provide that bargaining unit applicants will be considered for vacancies before external candidates; and establish guidelines for selection interviews, in addition to provisions enabling employees to have training on, and access to, computers and the Air Force's online application system.

All of the provisions of the MOU have one thing in common: they involve the process of posting and filling vacant positions on a competitive basis. The bargaining proposals

submitted by the Union in 2007, however, seek a noncompetitive process for assigning work and moving employees within the Engine Shop, a process in which mechanics volunteer to work in other sections of the shop and the work is assigned to qualified employees without a formal vacancy announcement and competitive selection. AFMAN 36-203, Sections 2-8 and 2-21.1, make it clear that under the Respondent's existing personnel procedures, the type of reassignments proposed by the Union could be effectuated by the Respondent noncompetitively, as all of the mechanics in the Engine Shop are at the WG-8602-10 level, with no increased promotion potential. Indeed, it is not even clear that a "reassignment" or formal personnel action would be required for a manager to move a mechanic from the Main Shop to the Modular Repair or Test Cell shops: as Ms. Whitney, Luke's former Labor Relations Officer, testified, such a move could be made as "management's option of assigning duties." Tr. 138.

The process that the Union envisioned in its August 2007 proposals was quite different, and much more narrowly focused, than the competitive procedures for filling vacancies set forth in AFMAN 36-203 and in the 2001 MOU. The 56th CMS is a small, specialized segment of the bargaining unit, and all of the mechanics work in the same job classification at the same pay grade. The Union sought to develop procedures that would allow these mechanics to work in the different areas of the shop, if they were so interested. If the Respondent did not engage in a competitive personnel action to move a mechanic from one section of the shop to another, the procedures set forth in the 2001 MOU would be similarly unnecessary.

As my discussion above suggests, I conclude that paragraph 14 of the MOU does not expressly contain the subject of assigning or rotating mechanics within the sections of the Engine Shop. This paragraph gives bargaining unit (internal) applicants prior consideration for a promotion or reassignment over external candidates. If a position is filled noncompetitively, or if an employee is moved to a different work location without a formal personnel action, then the provisions of paragraph 14 are inapplicable. The Union's proposals neither modify nor conflict with the provisions of the MOU; rather they are entirely separate and complementary. *See, e.g., Customs Management Center*, 56 FLRA at 814.

Moving to the second prong of the covered by test, I find that the Union's 2007 proposals were, at most, "tangentially related" to the promotion and reassignment procedures of the 2001 MOU. *See U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 911-12 (2000). As noted earlier, the 2007 proposals were made to enable employees to move from one duty location within the Engine Shop to another, through a process that would not involve the posting of vacancy announcements or employee "self-nominations." The 2001 MOU gives employees certain rights, and imposes certain requirements on the Respondent, when the Respondent undertakes a competitive selection process to fill a vacancy. I do not believe that the within-shop moves are "so commonly considered an aspect" of the competitive selection process that a reasonable observer would conclude that the 2001 negotiations resolved the former issue or foreclosed further bargaining on it. Unlike the leave-swapping system proposed by the union in *United States Department of the Treasury, Internal Revenue Service, Denver, Colorado and National Treasury Employees Union, Chapter 32*, 60 FLRA 572 (2005), which permitted the granting of leave to employees who would not be entitled to it under the CBA, the noncompetitive moves within the Engine Shop proposed in this case do not upset a detailed scheme established in the MOU. On the contrary, the MOU establishes no detailed scheme at all, but simply offers computer training and facilities for employees and guarantees them prior consideration over external applicants. AFMAN 36-203 permits reassignments of employees to other positions at the same grade and similar promotion potential to be accomplished either competitively or noncompetitively, and in that respect, the process suggested by the Union in 2007 could conceivably considered a reassignment. But this is an indirect and tangential relationship at best.

The bargaining history of the MOU does not support the Respondent's assertion that the negotiating parties had the movement of employees to different duty locations in the same unit, at the same grade, in mind in 2001. Both the Union and Respondent witnesses indicated that the 2001 negotiations were triggered by the Air Force's introduction of a new, centralized system of posting vacancy announcements electronically, thereby forcing employees to take their careers in their own hands by self-nominating for such positions. The subject of employees rotating or changing assignments in the same job to another duty location on the same base was not discussed in those negotiations. Tr. 146-47. The Respondent points to early proposals by the parties

concerning the MOU's preamble, but this evidence supports the Union rather than the Respondent. Management negotiators initially proposed a preamble that would make the MOU and the AFMAN "the sole documents governing the staffing of bargaining unit positions at Luke AFB" (Resp. Ex. 3, p. 30), but the final language simply says that it "implements" 36-203 and "applies" to unit employees. Although the Union was unsuccessful in incorporating its language continuing past practices not addressed in the MOU, the process proposed by the Union in 2007 was not a past practice, but was entirely new. Similarly, the negotiations regarding early versions of what became MOU paragraph 14 simply show insignificant language changes on the Union's part regarding priority consideration for internal applicants for reassignments, but nothing suggesting that the Union sought a noncompetitive procedure in the MOU for within-unit moves at the same grade and position.

Accordingly, I conclude that the proposals made by the Union on August 22, 2007, were neither expressly contained in the 2001 MOU nor inseparably bound up with a subject expressly covered there. The Respondent has failed to establish this as a defense to its refusal to bargain. Neither has it demonstrated that in the 2001 negotiations the Union waived its right to bargain in the future on the subject of rotating or assigning mechanics within the Engine Shop. I have already discussed the bargaining history of the MOU in my rejection of the Respondent's covered by defense, and this analysis applies with greater force on the question of waiver. In order to demonstrate a bargaining waiver of an issue, the record must show that the Union "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." *Selfridge, supra*, 46 FLRA at 585. The evidence regarding the 2001 negotiations suggests that the parties did not anticipate, much less discuss, the current issue while negotiating the MOU. It appears that the bargaining was limited to the procedures for employees to self-nominate for competitive vacancy announcements, and there is nothing to demonstrate that the Union consciously yielded the right to make other assignment-related proposals later.

Therefore, I conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing the Union's August 22, 2007, bargaining request.

In order to remedy the unfair labor practice, a cease and desist order and the posting of a notice are appropriate. My order requires the Respondent to negotiate, to the extent consistent with the Statute, regarding a process for the assignment and/or rotation of Aircraft Engine Mechanics among the three duty locations within the Engine Shop.

Accordingly, I recommend that the Authority issue the following remedial order:

ORDER

Pursuant to section 2423.41(c) of the Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Air Force, Luke Air Force Base, Arizona (the Respondent), shall:

1. Cease and desist from:

(a) Failing or refusing to bargain with the American Federation of Government Employees, Local 1547 (the Union), to the extent consistent with the Statute, regarding a process and procedures for the assignment and/or rotation of bargaining unit employees among the three duty locations within the Engine Shop of the 56th Component Maintenance Squadron.

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

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

(a) Upon the request of the Union, bargain to the extent consistent with the Statute, regarding a process and procedures for the assignment and/or rotation of bargaining unit employees among the three duty locations within the Engine Shop of the 56th Component Maintenance Squadron.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies 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 Commander, Luke Air Force Base, and 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.

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

Issued, Washington, D.C., August 12, 2008.

_____
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 Air Force, Luke Air Force Base, Arizona, has violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the American Federation of Government Employees, Local 1547 (the Union), to the extent consistent with the Statute, regarding a process and procedures for the assignment and/or rotation of bargaining unit employees among the three duty locations within the Engine Shop of the 56th Component Maintenance Squadron.

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

WE WILL, upon request of the Union, bargain to the extent consistent with the Statute, regarding a process and procedures for the assignment and/or rotation of bargaining unit employees among the three duty locations within the Engine Shop of the 56th Component Maintenance Squadron.

_____
(Agency/Activity)

Dated:_____ By:_____

(Signature) Commanding Officer)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-07-0592, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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_____
Catherine Turner

Dated: August 12, 2008
Washington, DC