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

MEMORANDUM DATE:
May 24, 2007

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO

Respondent

and Case No. SF-CO-06-0374

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Charging Party

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO

Respondent

and Case No. SF-CO-06-0560

SOCIAL SECURITY ADMINISRATION
SEATTLE REGION
SEATTLE, WASHINGTON

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 cases 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

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3937, AFL-CIO

Respondent

and Case No. SF-CO-06-0374

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Charging Party

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3937, AFL-CIO

Respondent

and

SOCIAL SECURITY ADMINISTRATION
SEATTLE REGION
SEATTLE, WASHINGTON

Case No. SF-CO-06-0560

Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled cases 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 her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and these cases are 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 **JUNE 25, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: May 24, 2007
Washington, DC

OALJ 07-15

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO Respondent and SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Charging Party	Case No. SF-CO-06-0374
AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO Respondent and SOCIAL SECURITY ADMINISTRATION SEATTLE REGION SEATTLE, WASHINGTON Charging Party	Case No. SF-CO-06-0560

Stefanie Arthur
For the General Counsel

Wilson Schuerholz
For the Charging Party

Dave Rodriguez
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

Thess cases arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On April 10, 2006, the Social Security Administration, Baltimore, Maryland (SSA or Agency) filed an unfair labor practice charge with the San Francisco Region of the Authority in Case No. SF-CO-06-0374 against the American Federation of Government Employees, Local 3937, AFL-CIO (Respondent or the Union). (G.C. Ex. 1(a)) On July 17, 2006, the Social Security Administration, Seattle Region, Seattle, Washington (SSA Seattle or Agency) filed an unfair labor practice charge with the San Francisco Region of the Authority in Case No. SF-CO-06-0560 against the Respondent. (G.C. Ex. 1(b)) On December 12, 2006, the Regional Director of the San Francisco Region of the Authority issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(b)(5) of the Statute by failing to bargain in good faith with regard to negotiations concerning the relocation of the Coeur d'Alene Field Office and the expansion of the Regional Office of Quality Assurance. (G.C. Ex. 1(c)) On January 8, 2007, the Respondent filed an answer to the consolidated complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(e))

A hearing was held in Seattle, Washington, on February 1 and 2, 2007, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel, the Respondent, and the Charging Party each filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. §7103(a) (4) and the exclusive representative of a nationwide unit of employees of the Social Security Administration. AFGE Local 3937 is an agent of AFGE for the purpose of representing bargaining unit employees in the Seattle Region of SSA. (G.C. Exs. 1(c) and 1 (e)). This includes bargaining unit employees in the Coeur d'Alene Field Office and in the Regional Office of Quality Assurance (ROQA). At all times material to this matter, Stephen Kofahl has been the President and Chief Negotiator for the Respondent as well as the Regional Vice President, Seattle Region, for AFGE Council 224. Michelle Kimber has been a Steward for the Respondent in the Coeur d'Alene Field Office and Carrie Kitchen-Kofahl has been a negotiator for the Respondent. During the time period "covered by" the consolidated complaint, these individuals were acting on behalf of the Respondent. (G.C. Exs. 1(c) and 1(e))

SSA is an agency under 5 U.S.C. §7103(a)(3) and SSA Seattle is an activity under SSA. Eileen McSherry is the SSA Seattle Region's Program Manager for the Office of Labor and Management Relations (OLMR). Graeme Geib, a labor relations specialist for SSA Seattle, served as the Agency's Chief Negotiator for the negotiations covering the Coeur d'Alene relocation and the ROQA expansion. Beverly Sarles, the Manager of the Coeur d'Alene office, was also a part of the Agency's negotiation team on the relocation of that office. Don Skidmore, Management Analyst, was part of the Agency's negotiation team on the expansion of the ROQA. (G.C. Exs. 1 (c) and 1(e); Tr. 22, 34, 95-96)

AFGE and SSA are parties to a National Agreement (NA) which became effective on August 15, 2005. The 2005 agreement includes significant changes from prior agreements, particularly as regards mid-term negotiations. (Tr. 22-23; 428-430) Article 4 of the NA sets forth specific parameters involving the negotiations of management imposed changes at the local and regional level. Article 9 concerns Health and Safety, and Section 20 concerns Moves, Expansions, Relocations and Renovations. (Jt. Ex. 1))

Although the negotiations in the consolidated cases raised similar issues, each of the negotiations will be set forth separately.

Coeur d'Alene Relocation

On December 12, 2005, Dennis Wulkan, Assistant Regional Commissioner, Management and Operations Support, Social Security Administration, Seattle, Washington, sent a letter informing Steve Kofahl, Union President, of the Agency's intention to relocate the Coeur d'Alene, Idaho Social Security Office. A copy of the lease and the proposed floorplan were sent under separate cover. (G.C. Ex. 2; Tr. 25-26) The letter states, in part, "Following receipt of a timely request, we are prepared to negotiate over negotiable aspects of the proposed floorplan. To be clear, we do not believe there is a duty to bargain over procedures and arrangements other than the floorplan as these procedures and arrangements are covered by the National Agreement. Likewise, we do not intend to bargain outside the parameters of the Space Allocation Standards (SAS) as the SAS is a negotiated higher level agreement that covers room sizes." (G.C. Ex. 2; Tr. 27)

The Union, by Kofahl, responded on December 15, 2005, stating that Local 3937 "does wish to schedule a briefing, and to consult regarding the relocation of the Coeur d'Alene Social Security field office." (G.C. Ex. 4; Tr. 28-29)

The parties engaged in consultations by telephone on December 20, 2005. Present on the line were Geib and Sarles for the Agency and Kofahl and Kimber for the Union. Geib explained the circumstances surrounding the move, including the lessor redeveloping the area. The Union asked questions regarding the workstations shown on the floorplan, configuration, file cabinet placement and other issues. There was general discussion on these issues. Geib explained that the new location had some unique architectural features, primarily narrow columns throughout the space. Geib expressed a concern that the common areas would not be able to be placed down the center of the space. (Tr. 29-30) The parties reviewed the proposed floorplan.[1/] (Tr. 32)

The consultations continued for about 1½ hours. Geib determined that it was clear that the parties were not going to be able to resolve their issues through consultation and invoked formal negotiations, pursuant to Article 4, Section 5 of the Master Agreement. (Jt. Ex. 1; Tr. 33) The parties

---

[1/] Floorplans are generally 3' by 4' and the large size was used throughout the negotiations at issue in this matter. For the purposes of the hearing, the floorplans were reduced in size to 8½ " by 11½" by the Material Resources Team. (Tr. 32)

agreed to start the negotiations on Tuesday, January 4, 2006, at the Seattle Regional Office. (Tr. 33)

The parties met on January 4, 2006 [2/] in a conference room on the 29th floor of the Seattle Regional Office. Geib and Sarles were present for the Agency; Kofahl and Kimber were present for the Union. The parties discussed the ground rules and Geib presented a floorplan which he felt addressed some of the Union's concerns from the consultation. This included adding a privacy wall in the front-end interviewing area and adding a work station. (G.C. Ex. 4; Tr. 33-34) Geib also noted that they had changed the size of the general purpose rooms to correspond with the Space Allocation Standards and reoriented them slightly. Geib explained the various changes to the Union representatives, including why the Agency had not made certain changes and that the Agency could not move the file cabinets as requested. (Tr. 35) In the reception area, the Agency wanted two stand-up and one sit-down work stations, rather than three sit-down work stations as requested by the Union. The Union's request for a unisex bathroom in the reception area did not free up more space due to the location of a stairwell and Sarles wanted separate bathrooms. (Tr. 36)

At this time Kofahl submitted the Union's proposed MOU, which was eight pages and contained two attachments. The MOU contained five separate articles, Introduction and Background; General Provisions, Floorplan, Workstations; Employee Rights and Benefits; Union Rights; and Duration, Effective Date and Distribution. Geib quickly looked at the MOU and noted that many of the proposals were "covered by" the contract and reminded Kofahl that the Agency did not intend to negotiate a MOU over things that were "covered by" the contract. Geib stated that he would review the MOU later and redirected the conversation back to the floorplan. (G.C. Ex. 5; Tr. 38-41)

Kimber then pulled out a large blueprint, which she had obtained from a contractor who was already working on the new location for the Coeur d'Alene office. The Union was concerned that it appeared that construction had already begun and the contractor had a blueprint which looked like the Agency's proposed floorplan. Geib assured Kofahl and Kimber that SSA had not given a copy of the proposed floorplan to GSA or the contractor and had not given a go-ahead for anyone to begin construction. Geib again stated that the Agency was willing to negotiate the floorplan. (R. Ex. 1(c); Tr. 42-43, 219)

[2/] From this point, all dates in the decision are in 2006, unless otherwise specified.

The Union decided to draft their own floorplan and asked if they could meet with staff members from the Material Resources Team (MRT), who worked with AutoCad, a software program for floorplans. Geib denied this request and stated that was not the way the SSA Region conducted negotiations. Geib indicated he was willing to take the Union's options to the MRT to see if their suggestions were possible. (Tr. 44-45) Kofahl and Kimber then spent some time putting together a cut-and-paste floorplan, which they provided to the Agency. (G.C. Ex. 6; Tr. 45-46)

The Union's main concern with their floorplan was getting more natural light into the building and they suggested several ways to deal with that. (Tr. 46) Geib thought there were various problems with the Union's proposal but did take it to the MRT to see if it was workable. (Tr. 47-48)

The Union indicated that they wanted their version of the floorplan, they wanted several items that were specific to the floorplan, and they wanted their MOU. (Tr. 48) The Union wanted a Dutch door (half door) between the reception area and the front end interviewing area. The Union also wanted a wall extended to provide a barrier in the private interviewing room. (Tr. 49) In the private interview room, they wanted a barrier so irate members of the public could not get through to other spaces. They also wanted a full workstation outside that private interview room. (Tr. 50) The Union wanted the panels between the work stations to be higher, for a sound barrier and additional privacy. Geib indicated that decision would have to come through Central Office, but the Agency was willing to make such a request. (Tr. 51) With regard to the reception counter, the Union wanted three sit-down interview spaces; poly carbonate shields installed, and motorized roll shutters. (At the current space, there were manual shutters.) (Tr. 51-52). The Union also indicated that they wanted full-spectrum lighting, which is a more natural light. (Tr. 55)

On January 5, the parties met again. Geib offered a newer version of the floorplan. (G.C. Ex. 7; Tr. 56-57) The Agency would put in an emergency exit door near the employee bathrooms and rotated the direction that the cubicles were facing for additional privacy. (Tr. 56-57)

Kofahl stated that this was fine, but the Union still wanted their own floorplan and their MOU. Geib stated that they had gone through the Union's MOU and there wasn't anything that the Agency found negotiable. Geib indicated that the MOU contained items that were outside the scope of

bargaining, *i.e.* nonnegotiable, as well as "covered by" the parties' Master Agreement. (Tr. 58-59) In Geib's view the negotiations were not headed in the right direction and he did not feel the Union was meeting the Agency halfway. (Tr. 59) The parties agreed to call in a mediator to assist in the negotiations. (Tr. 60)

The mediator, Rick Ogelsby, arrived about 10:15 am, that same morning. (Tr. 61) The mediator divided them into separate spaces and met individually with the Union and Agency teams. Eileen McSherry, program manager, joined Geib and Sarles. (Tr. 160)

After some time, the mediator told the Agency group that the Union was willing to take their MOU off the table in exchange for a list of floorplan related items and management's proposed floorplan. (G.C. Ex. 8(a); Tr. 63) The Agency agreed that a letter of intent was a possibility. (Tr. 64) The mediator returned with a final list of the Union's concerns, which included six floorplan related items. (G.C. Ex. 8(b); Tr. 65) The Agency created a written response and agreed to almost all of the Union's proposals, including a strap between the reception area and the front end interview area, two sit-down stations, and that the Agency would request the higher panels, and might agree to Plexiglas. The Agency indicated that they were not authorized to agree to full spectrum lighting. (G.C. Ex. 8(c); Tr. 65-66) The Agency also drafted a letter of intent. (G.C. Ex. 8(d); Tr. 70) The Agency agreed to a full work station next to the private interview room. (Tr. 72) The Agency indicated that they were unable to do the external exit door due to the fire code. (Tr. 73) The Agency also prepared a new floorplan which included several changes it believed would meet previously expressed concerns of the Union, including a modification to the private interviewing room. The revised floorplan also included the location of the hot water dispenser, coat racks and other similar items requested by the Union. (G.C. Ex. 8 (e); Tr. 71-72) Essentially, at this time, Geib thought full spectrum lighting was the only issue the parties were unable to agree upon. (Tr. 74)

After meeting with the Union, the mediator thought the parties should address the Union's concerns regarding how the contractor got a copy of the blue print and whether the MRT specialists had really tried to work with the Union's proposed floorplan. (Tr. 74, 168-169) The parties then met together with the mediator. Cyndra Jones, Director of the Center of Material Resources, was brought into the meeting. (Tr. 75)

The Agency stated that the Union's proposed floorplan had not worked with AutoCad and assured the Union that SSA had not provided the blue print to the contractor and that there had been no go-ahead to begin construction. Jones indicated that because of the difficulties with the space, she had given a test fit layout to GSA. (Tr. 76-77, 169-170)

After this discussion, the mediator declared the parties were at impasse. (Tr. 78)

On January 11, an additional session to discuss the Coeur d'Alene relocation was arranged with the mediator and McSherry. The mediator requested that the parties try again since he did not feel they were that far apart in the negotiations. (Tr. 78-79, 171-172)

After some discussions, McSherry offered the Union full spectrum lighting. (Tr. 80, 174-175) The Union representatives took a separate caucus, and arrangements had been made for the Union to contact the employees in the Coeur d'Alene office. After discussion, the Union would not agree; while the local representative was willing to take the agreement with full spectrum lighting; Kofahl still wanted his written MOU. (Tr. 81, 175-176, 255)

On January 12, the mediator issued a letter to the parties stating that further mediation would be futile and recommending that the parties access other options. (G.C. Ex. 9; Tr. 82)

On January 17, the Agency, through Geib, sent a letter to Kofahl, advising that the Agency would implement its last best offer on January 31. A copy of the Agency's final floorplan was included. The letter stated, in part, "The Agency has fulfilled its statutory bargaining obligation regarding the relocation of the Coeur d'Alene, Idaho, office since the Union has insisted to impasse on proposals that are outside the statutory duty to bargain." (G.C. Ex. 10; Tr. 82-83)

On January 17, the Union filed its Request for Assistance with the Federal Service Impasses Panel. (Jt. Ex. 2; Tr. 85-86) The Union noted that it had modified its original MOU in three areas (inclusion of a retractable strap, deletion of electronically controlled shields, and deletion of a full service workstation in the private interviewing room). The Union noted that this was the second office relocation negotiations to be initiated under the terms of the parties August 15, 2005 National Agreement (NA) and the first in SSA

Seattle Region. The Union further stated that the parties had a 20 year history of successful office remodel and relocation negotiations and they had previously employed an interest-based approach. The Union complained of the failure of the Agency to grant it access to the MRT technicians to work with on their proposed floorplan. The Union further noted that the Agency broadly asserted that they had no duty to bargain any of the proposals in the Union's proposed MOU. The Union asserted that it took considerable care to craft proposals that were not "covered by" or inextricably bound up with any provisions of the NA. The Union further denies that any of its proposals were nonnegotiable. (Jt. Ex. 2)

On January 24, the Union filed an unfair labor practice charge against the Agency in Case No. SF-CA-06-0221. (R. Ex. 1(a)) This charge against the Agency was dismissed by the Regional Director of the San Francisco Region.

The Agency, through Wilson Schuerholz, Center Director, Center of Negotiation and Litigation, Social Security Administration, filed its Response to the Union's FSIP request. In this submission, the Agency asserted that the Union had violated section 7116(b)(1) and (5) of the Statute by engaging in bad faith bargaining by insisting to impasse on Union bargaining proposals that are "covered by" the NA, that are nonnegotiable, and that are permissive in nature, and by conditioning the Union's agreement on management's acceptance of permissive, nonnegotiable and "covered by" Union proposals, and that required the current NA to be modified by the Union's proposals to apply to the specific office move. (G.C. Ex. 11) The Agency then set forth the various proposals that it considered nonnegotiable and/or "covered by" the parties' NA. (G.C. Ex. 11)

On April 10, the Agency filed an unfair labor practice charge in SF-CO-06-0374. (G.C. Ex. 1(a))

On April 28, the Union filed its Response to the Agency's Position in Case No. 06 FSIP 47. The Union agreed that three of its proposals were "covered by" the National Agreement and withdrew them. However, it argued that its remaining proposals were not "covered by" the NA and/or nonnegotiable. (Jt. Ex. 3)

On June 15, 2006, the FSIP declined to assert jurisdiction in this matter, Case No. 06 FSIP 47, because "it is unclear that an impasse exists within the meaning of 5 C.F.R. §2470.2(e) of the regulations." (G.C. Ex. 12)

ROQA Expansion

On January 17, 2006, Rubie J. Toney, Director, Regional Office of Quality Assurance, sent the Union a revised notice of the Agency's intention to expand the space assigned to the Seattle Regional Office of Quality Assurance (ROQA) on the 10th floor for the Seattle Regional Office building. (G.C. Ex. 13) The total square footage in ROQA would increase by 20 percent and allow exclusive use for rooms within that space. Further, the Agency intended to create additional conference rooms/ offices, as well as replace certain individual workstations. The plans called for breaking down a wall between an office and the existing conference room to make a larger conference room (Room #1015); for construction of an additional supervisor's office (Room #1016); and for putting up a wall to create a new small conference room (Room #1025). (G.C. Ex. 13 (b); Tr. 91) Contingent upon the Center for Disability's move, the Agency intended to expand and retrofit the ROQA space in approximately April 2006. The letter further stated: "Any demand to bargain on this issue would be limited to subjects and proposals which trigger a duty to bargain under the Statute. To be clear, we do not believe there is a duty to bargain over procedures and arrangements other than the floor plan as these procedures and arrangements are covered by the 2005 SSA/AFGE National Agreement." (G.C. Ex. 13; Tr. 291-293) A copy of the proposed floorplan was furnished to the Union under separate cover. (G.C. Ex. 13(a); Tr. 291-293)

On January 18, the Union responded, naming Steve Kofahl as its Chief Negotiator and stating its intention to consult, and if necessary, bargain. (G.C. Ex. 14; Tr. 294)

The Union and the Agency had two consultation sessions, held on January 23 and January 27, in Don Skidmore's office in ROQA. (Tr. 95) Present for the Agency were Skidmore and Geib; present for the Union were Kofahl and Kerry Kitchen-Kofahl. (Tr. 95) Geib was the Chief Negotiator for the Agency and explained what management intended to do in the space. He also stated that he didn't see any negative impact and hoped the Union would sign off on the floorplan. (Tr. 96)

During these sessions, the Union questioned whether all the vacant workstations were going to be up for seat selection; requested a copy of the current floorplan; and wanted to negotiate the location of some Union file cabinets that were in the Center's space. (Tr. 96, 294) The Union also asked about construction and expressed concerns regarding

disruption to the employees as a result of construction. (Tr. 295)

The issue of the permanent placement of the Union file cabinets related back to Kofahl's move from Portland to Seattle. Kofahl and his representative John Mack had dealt with the Seattle Region's Executive Officer Steve Jollensten regarding this move. Not all of the Union file cabinets fit into the Union office space and a temporary agreement had been worked out to store those file cabinets in another space on the 10th floor. While the Union was interested in finding a permanent placement for its filing cabinets, the Agency considered this issue separate from the ROQA expansion and part of the Union's ongoing discussions with Jollensten. (Tr. 97-98)

The formal negotiations were held on January 31 on the 29th floor. Again Geib and Skidmore were present for the Agency; Kofahl and Kitchen-Kofahl were present for the Union. Geib talked about the floorplan and again expressed his view that management did not perceive any negative impact from the reorganization. (Tr. 99-100) Kofahl asked questions regarding the placement of the fire extinguishers and also about the "Shelter In Place" (SIP) location.[3/]

During these discussions, the Union submitted a six page proposed MOU, which contained sections on Purpose and Principles, Floorplans, Workstations, Employee Rights and Benefits, Health and Safety, Union Bulletin Boards, and Union Facilities and Space. Geib stated that he needed to review the MOU and would respond later. He reiterated his position that there was no negative impact on bargaining unit employees and that he did not intend to negotiate an MOU if there was no negative impact. Geib also indicated that he thought most of the Union's proposals were already "covered by" the parties' NA. (G.C. 15; Tr. 101)

The parties returned to discussing the floorplan. (Tr. 102) Kitchen-Kofahl suggested adding a door between Rooms 1010 and 1025, which everyone agreed was a good idea and allowed better access. (Tr. 103) After further discussion, Geib thought the parties were finished with the floorplan.

[3/] Shelter In Place (SIP) is a national program which provides employees a place to stay in case of a catastrophic emergency when they would be unable to leave the building. Various supplies are maintained in the SIP locations. This program was bargained at the national level by SSA and AFGE. (Tr. 100-101, 102)

The Union did not have any concerns about the floorplan, but would not sign off on the floorplan and indicated they wanted their MOU. (Tr. 104)

At this point, the mediator was called in to assist the parties. Gary Hattal arrived the same afternoon. (Tr. 104, 306) The parties were separated and after speaking with the Union, Hattal came to the management representatives with an annotated MOU, in which the Union noted the provisions it considered vital and noted which ones it thought the parties had a "conceptual" agreement with. (G.C. Ex. 16; Tr. 105, 307-309) After reviewing the annotated MOU, Geib stated that it wasn't clear to the Agency or the mediator exactly how the new annotations were intended to move the process forward and actually come to an agreement. (Tr. 106) Geib told the mediator that the Agency did not see any negative impact from the ROQA expansion, that they did not intend to negotiate over things that were not negotiable and that the Union's MOU "was filled with nonnegotiable stuff." (Tr. 107)

The mediator declared an impasse, which was confirmed by email on the February 1. (G.C. Ex. 17; Tr. 107, 310)

On February 14, the Agency, by Geib, sent the Union a letter, stating, in part:

> We have fulfilled our bargaining obligations regarding the expansion of the Seattle ROQA office.
>
> We bargained on January 31, and by the afternoon began using the services of a mediator to assist us, but no progress was made. You indicated at the table that the proposed floor plan was agreeable, but you refused to sign it without the additional items you proposed. At the end of the day, the mediator declared the parties at impasse over all of your proposals.
>
> We are of the view that we have fulfilled all of our bargaining obligations. You have insisted to impasse over matters outside the duty to bargain.
>
> We will proceed with the above referenced floor plan beginning on March 1, 2006.

(G.C. Ex. 18; Tr. 109)

Implementation of the expansion of ROQA was still ongoing

at the time of the hearing. (Tr. 109)

On February 3, the Union submitted a request for assistance to the Federal Service Impasses Panel (FSIP). The Union stated that the parties were at impasse over the Union's six page MOU and the Agency's proposed floorplan, noting that the parties had agreed to install a door connecting Rooms 1010 and 1025, to annotate "SIP" on the floorplan, and add SSA and AFGE negotiator signatures, and dates signed, on the floorplan. (Jt. Ex. 4)

On April 20, the Agency, through Schuerholz, filed its position statement with the FSIP. (G.C. Ex. 19; Tr. 110)

The Union responded to the Agency's submission on May 5. (Jt. Ex. 5) The Union did agree that three of its proposals were "covered by" the National Agreement and withdrew them from consideration by the Panel. (Jt. Ex. 5)

On June 15, the Panel declined to assert jurisdiction "because it is unclear that an impasse exists within the meaning of 5 C.F.R. ∋2470.2(e) of the regulations." (G.C. Ex. 20; Tr. 111)

On July 13, the Union filed an unfair labor practice charge against the Agency in SF-CA-06-0552. (R. Ex. 1(g) and 1(h)). The Regional Director for the San Francisco Region dismissed this charge. (Tr. 312-314)

On July 17, the Agency filed the unfair labor practice charge in SF-CO-06-0560, alleging that the Union had failed to bargain in good faith, in violation of section 7116(b)(1) and (5) of the Statute. (G.C. Ex. 1(b))

Issue

Whether the Respondent engaged in bad faith bargaining in violation of section 7116(b)(5) of the Statute by its conduct in connection with the negotiations of the Coeur d'Alene relocation and the ROQA expansion.

Positions of the Parties

General Counsel

The General Counsel asserts that the totality of circumstances in these cases establishes that the Respondent engaged in bad faith bargaining by its conduct in both the Coeur d'Alene and ROQA negotiations.

While the Respondent purported to be operating in good faith and with good will, its conduct was not designed to move negotiations forward and reach agreement. By any objective standard, the Respondent's conduct during these negotiations, beginning with offering MOUs filled with generalized and speculative proposals and ending with returning its proposed MOUs to the table virtually unchanged, was designed not to move the negotiations forward toward agreement but rather to frustrate the bargaining process. The General Counsel argues that in the private sector, the Respondent's conduct would be considered regressive bargaining as it clearly frustrated the progress of the negotiations.

Further, the Respondent's bad faith bargaining is shown by its insistence to impasse on permissive subjects. The Authority has long held that it is an unfair labor practice (ULP) to insist to impasse on a permissive subject. *Federal Deposit Insurance Corp., Headquarters,* 18 FLRA 768 (1985) *(FDIC); SPORT Air Traffic Controllers Org.,* 52 FLRA 339 (1996) *(SPORT).* In this case, the Respondent's proposed MOUs in both negotiations included numerous proposals which were clearly contained in or "covered by" the National Agreement.

The General Counsel asserts that the Respondent insisted to impasse on "covered by" proposals. The new National Agreement was intended to expedite mid term space negotiations. The Respondent, however, approached these negotiations with numerous generalized proposals based on speculation and conjecture, many addressing matters already "covered by" the National Agreement. Thus, part and parcel of the Respondent's bad faith bargaining was its insistence on offering MOUs with numerous proposals on matters "covered by" the National Agreement and insisting to impasse on these items. The agency has no duty to bargain over the Respondent's "covered by" proposals. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA Baltimore)* and the Respondent's insistence on these proposals to the point of impasse further evidenced its bad faith bargaining during the Coeur d'Alene and ROQA negotiations.

Charging Party

The Charging Party (SSA and SSA Seattle) asserts that the Respondent bargained to impasse on nonnegotiable proposals during the Coeur d'Alene and ROQA negotiations and thus committed unfair labor practices. *Army and Air Force Exchange*

Service, 52 FLRA 290, 304 (1996) *(AAFES); Department of Treasury, Internal Revenue Service, Memphis Service Center, 15 FLRA 829, 845-46 (1984).* Further, the Union attempted to get the Agency to agree to proposals that were outside the scope of bargaining or risk an indefinite delay in both negotiations. The Union forced the Agency to go to impasse regarding proposals for which there was no duty to bargain.

The Charging Party asserts that in both negotiations, the Respondent submitted nonnegotiable proposals that involved parties who were not subject to the negotiations. In addition, the Respondent submitted numerous proposals that were nonnegotiable as they interfered with management's right to direct and assign its employees and to determine its own security practices.

Further, the Respondent submitted proposals that are "covered by" the parties' 2005 National Agreement, and, therefore, violated the Statute as alleged by insisting to impasse on each proposal that was clearly "covered by" the parties' 2005 NA.

Respondent

The Respondent denies that it engaged in bad faith bargaining and insists its conduct demonstrated a sincere resolve to reach agreement. The Respondent participated in the consultation and briefing provided for in the parties' National Agreement and continued its participation in the formal negotiations. The Respondent notes that the negotiations were difficult, beginning with the failure to include the Union in the pre-site selection process; and continuing with, among other things, the Agency's refusal to afford Respondent's negotiators direct access to the Material Resources Team and its "Autocad" floorplan mapping program; SSA's use of limited negotiating time to review AFGE's proposals before it would discuss them with the Union; and the Agency's characterization of MOU proposals with general, conclusory assertions that in their entirety they were either "covered by" or were nonnegotiable. The Respondent also asserted that there was incomplete communication between the parties, including the mediator, which led to some misunderstanding about some concessions by both parties. Despite these problems, under the totality of circumstances standard, Respondent did not engage in bad faith bargaining. It is well-settled that the totality of conduct relative to bargaining determines whether a party has met its obligation to bargain in good faith. *U.S. Department of the Air Force,*

Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524 (1990) (Wright-Patterson).

The Respondent also asserts that following the use of settlement talks through the mediator, the parties were free to return to their original positions and proposals if a complete agreement was not reached. The Respondent was within its rights to move to FSIP with the proposals originally submitted for bargaining and its actions were not in violation of the Statute.

The Respondent argues that its proposals and conduct did not violate the "covered by" standard. During the negotiations on both the relocation and the expansion, the Agency only made generic claims that the MOU proposals were "covered by" the NA or were nonnegotiable. A mere assertion that a matter is "covered by" a controlling agreement is not sufficient to preclude bargaining. *U.S. Department of the Treasury, Internal Revenue Service,* 56 FLRA 906 (2000). The Respondent further asserts that the "covered by" standard is inapposite where there is no dispute about the underlying obligation to bargain at all. The "covered by" doctrine operates as a defense to an alleged unlawful refusal to bargain. *National Treasury Employees Union,* 59 FLRA 217 (2003). In these cases, both parties agreed that there was an obligation to bargain, *i.e.*, that "covered by" did not relieve SSA from the obligation to provide notice and an opportunity to bargain with the Respondent concerning bargainable aspects of the relocation and the expansion.

The Respondent asserts that the Agency seeks to create new case law that would transform a doctrine that is intended to provide a defense against excessive bargaining into a new kind of unfair labor practice that punishes the exclusive representative for engaging in aggressive bargaining. Under the aegis of, primarily, the "covered by" test, along with the analytical frameworks of permissiveness and nonnegotiablity, the SSA is pursuing a strategy of minimizing its bargaining obligations by creating a chilling environment where the Respondent is at risk if it misjudges the applicability of "covered by" and pursues proposals that until now were disposed of through negotiability procedures. How parties bargain, including the attention they give to the "covered by" test is clearly a part of the total circumstances that determine good or bad faith. But the "covered by" test is not a *per se* violation: each proposal is to be looked at in light of the express language of the controlling term agreement. The parties conduct also is relevant because what is excluded

from the obligation to bargain under the "covered by" test depends on whether the agency even identifies during the negotiation those matters that it believes it need not bargain, and the reasons it believes that. Otherwise, "covered by" becomes a meaningless phrase whose purpose is to minimize bargaining without a rational basis. Thus, a significant outcome from this case is whether or not to sanction a stringent, expanded standard of bad faith that would be based on mere allegations by an employer rather than on the totality of circumstances.

Analysis

Section 7103(a)(12) of the Statute defines collective bargaining as the "performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees." The duty to negotiate in good faith includes the obligation, under section 7114(b)(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement and, pursuant to section 7114(b)(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment. *Wright-Patterson*, 36 FLRA at 524.

The totality of conduct at the bargaining sessions must be considered in determining whether a party has met its obligation to bargain in good faith. *AAFES* (Management's refusal to resume negotiations over a "pay for Performance" system, which had been its original proposal during the negotiations, constituted bad faith bargaining); *Wright-Patterson* (Management's conduct prior to and during bargaining over a union initiated midterm subject, including its restrictive proposals, support conclusion that management did not bargain in good faith); *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Leavenworth, Kansas*, 32 FLRA 855, 872 (1988). *Also see, Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base,* 13 FLRA 492, 505 (1983). (Respondent's ground rules proposals were designed to set forth arrangements so that negotiations over the two union proposals would not be conducted. Respondent did not approach negotiations with a sincere resolve to reach agreement on the proposals submitted by the Union.)

The Coeur d'Alene relocation and the ROQA expansion were the first opportunities for the parties in SSA Seattle Region to negotiate following the completion of their new National Agreement. The NA contained numerous articles that changed the way in which negotiations were approached. In particular, Article 4 set forth various procedures for expediting mid-term negotiations. With regard to negotiations at the Field Office level (in this instance, the Coeur d'Alene relocation), the Union must request consultations or bargaining within three (3) workdays after notice of a change; if consultation is requested, formal bargaining will begin no later than the first Tuesday following the week that consultation ends; field office negotiations are limited to two days. Negotiations regarding the Regional Office level (in this instance, the ROQA expansion) have similar restrictions in time. (Jt. Ex. 1, Article 4; Tr. 23) Article 30 provided the Union a bank of official time which includes official time for preparation and participation in mid-term negotiations. (Jt. Ex. 1)

The record evidence establishes that "space" issues were the most frequently negotiated issues between the Union and the Agency. Further, it is clear from the testimony of management witnesses, that one of the goals of the Agency in the negotiation of the new NA was to limit the amount of time that was spent on such negotiations. As stated by Ralph Patinella, senior advisor for SSA's Labor Management and Employee Relations and the Chief Management Negotiator for the new agreement, "We wanted the contract to cover as many things as possible so that we would not have to have endless midterm bargaining. . . . And one of the things that was of interest to both sides was closing down in the contract language and provisions where if we had an office move, relocation, or expansion, it would be covered in the

contract." (Tr. 429-430).[4/]

While the Union admits that these negotiations took place under the auspices of the new NA, it is also clear that the Union, at least through Kofahl, struggled with these new limitations. In that regard, Kofahl complained that the Agency appeared to be in a rush to negotiate the Coeur d'Alene, without acknowledging the new explicit time provisions of the NA. Kofahl expressed concern that during the negotiations for the new NA, SSA revoked its previous waiver of its right to assert a portion of the Authority's "covered by" doctrine. Kofahl also expressed fondness for the manner in which the parties used to negotiate, using an

---

[4/] As noted by both parties, the new NA ended SSA's previous waiver of its right to assert a "covered by" defense to a statutory obligation to bargain except to the extent the matter is set forth explicitly and comprehensively in an agreement. As set forth by the Authority in Social Security Administration, 55 FLRA 374, 374-375 (1999) (SSA):

"As a result of the decision in Department of the Navy, Marine Corps Logistics Base v. FLRA, 962 F.2d 48 (D.C. Cir. 1992) (the Barstow decision), pertaining to the obligation to bargain on matters covered by a collective bargaining agreement, the parties [SSA and AFGE] negotiated a memorandum of understanding (the Barstow MOU) with respect to the application of Article 4 of the 1996 national agreement pertaining to mid-term bargaining. The MOU provided:

The Parties agree that in the administration of Article 4 of the National Agreement, SSA will continue its current practice of giving notice to AFGE concerning changes in conditions of employment without regard to the Barstow decision.

Unless it is clear that a matter at issue is set forth explicitly and comprehensively in the National Agreement or existing MOU, the subject is appropriate for mid-term bargaining."

interest based bargaining approach.[5/]

Kofahl further complained about Geib's characterization of the Union's MOU proposals in general, conclusory language, asserting that the proposals were either "covered by" the 2005 NA or were non-negotiable within the meaning of 5 U.S.C. 7117 and 5 C.F.R. Part 2424 (Tr. 222). However, while Kofahl may have objected to this general language, the evidence fails to establish that he ever requested more specific reasoning from the Agency during the negotiations.

During the course of both negotiations, the Agency asserted that numerous proposals set forth in the Respondent's proposed MOUs were "covered by" the NA. The General Counsel asserts that the agency had no duty to bargain over the Union's "covered by" proposals, *SSA Baltimore*, and the Respondent's insistence on these proposals to the point of impasse further evidenced its bad faith bargaining during the Coeur d'Alene and ROQA negotiations. *See Social Security Administration, Office of Hearings and Appeals, Kansas City, Missouri*, 65 FLRA 674, 680-681 (2005) (SSA Kansas City) (Agency had no duty to bargain over proposals concerning private office furnishings, free parking and ALJ office and hearing office space as these subjects were "covered by" the Facilities and Services article of the national agreement.)

In examining the proposed MOUs for both the Coeur d'Alene and the ROQA negotiations, it is clear that certain of the offered proposals are "covered by" the parties' NA. For example, Article 9 of the NA is entitled "Health and Safety" and covers such items as Inspections and Notifications, Temperature Conditions, Indoor Air Quality, Work Space, and

---

[5/] Another complaint that Kofahl expressed throughout the hearing process concerned the refusal by SSA to afford the Union's negotiators direct access to the Material Resources Team (MRT) and its "Autocad" floorplan mapping program. (Tr. 32) Kofahl asserts this had been allowed in the past, although the Agency denied such a claim. Interestingly, Kofahl did not make his request for access to the MRT until after the formal negotiations began. After access was denied Kofahl and Kimber spent some time drafting a "cut and paste" version of the floorplan. Kofahl complained that Geib took "bargaining time" to review the Union's proposed MOU, which was also presented after formal bargaining began, but did not have a problem with his own use of "bargaining time" to draft a "cut and paste" floorplan.

Moves, Expansions, Relocations and Renovations.[6/] (Jt. Ex. 1) In the Coeur d'Alene negotiations, the Union offered proposals requiring that "all aspects of office space design and layout will be sufficient to meet all Federal codes, laws, and SSA standards", that "all bargaining unit employees will be provided at least one fully electronically adjustable ergonomic work surface in their assigned workstations and interviewing stations"; and another for SSA to "assure that each unit employee is provided a workstation, work space and facilities, equivalent to each other bargaining unit member in a similar position. . . .". Employees already have ergonomic work stations. Further Article 9, Section 19 of the NA, specifically states: "Work space. The agency will make every reasonable effort to provide work space that comports with OSHA and ANSI standards and, in doing so, may consider other generally acceptable standards, to the extent that such standards do not conflict with OSHA and ANSI standards or with each other. Should the Agency decide to change employee workspace including ergonomic furniture, the Agency will provide notice and bargain to the extent required by 5 USC

[6/] Article 9, Section 20 reads as follows:

Article 9, Section 20. Moves, Expansions, Relocations and Renovations

The Agency will provide the Union with advance information related to any moves, expansions, relocations or renovations. Such actions will be accomplished in accordance with applicable Agency regulations and bargained to the extent required by 5 USC 71.

Employees will select their seats within designated units based on service computation dates (SCD).

Should the Agency choose to detail employees to other offices during the relocation, management will first determine the numbers, types and grades of employees to be detailed to each available office and the qualifications. Employees will then select from among available offices. Management will select based on SCD.

Should the Agency choose to retain a skeleton staff at the office during relocation, management will first determine the numbers, types and grades of employees and qualifications. Employees will be given an opportunity to volunteer. Management will select based on SCD. Should there be insufficient volunteers, management will use inverse seniority to assign qualified employees to the skeleton staff.

71." (G.C. Ex. 5, Article II, B.5; Article II, C.1; Article II, C.2; Jt. Ex. 1)

The Respondent also offered proposals on parking (G.C. Ex. 5; Article III, B), even though parking is specifically provided by Article 13, Section 2 of the NA, and proposals on granting leave and considering "commuting adjustments" during the relocation (G.C. Ex. 5; Article II, A.3, Article III, A.7), even though the "Time and Leave" provisions of the NA Article 31, Sections 2B and 3A, respectively, expressly cover these matters. Both MOUs include a proposal providing that "disruptions caused by the relocation will be considered conditions beyond employees' control in the evaluation and appraisal of employees' job performance" (G.C. Ex. 5, Article III, A.11; G.C. Ex. 15, Article III, 1.F) in the face of Article 21, which already provides that facts beyond the control of the employees will be considered when assessing performance. Both MOUs include numerous proposals on health and safety despite the extensive Health and Safety article in the National Agreement, Article 9. Thus, proposals to "request and act upon the carpet manufacturer's recommendation regarding the abatement of noxious and irritating fumes related to carpet installation" (G.C. Ex. 5, Article III, C.1; G.C. Ex. 15, Article III, 2.A); to provide for additional health and safety inspections (G.C. Ex. 5, Article III, C.7, 8, 9; G.C. Ex. 15, Article III, 2.E, F, G) or to provide for temperatures to be "as uniform as possible throughout the space" (G.C. Ex. 5, Article III, C. 21; G.C. Ex. 15, Article III, 2.M) are "covered by" Article 9, Section 11 (Indoor Air Quality); Section 7 (Inspections and Notification) and Section 8 (Temperature Conditions) of the NA, respectively. With regard to the ROQA negotiations, the Respondent's proposed MOU contained similar proposals that were clearly "covered by" the parties' NA.

In *Social Security Administration, Douglas Branch Office, Douglas, Arizona,* 48 FLRA 383 (1993), the Authority concluded that the agency's failure and refusal to bargain over a union's proposal concerning installation of an anti-fatigue mat at the office's reception counter was not violative of the Statute. The Authority found that the union's proposal was "covered by" the collective bargaining agreement, stating, in part:

> The parties have negotiated an extensive health and safety article, Article 9, in their MLA. Although that article does not specifically address the particular health and safety concern and its

> proposed resolution through the use of an anti-fatigue mat . . . it does set forth an agreed-upon procedure for identifying, investigating and resolving all health and safety concerns at the Agency's installations. Thus, Article 9, section 3, entitled "Field Office Structure," provides, at the installation level, a procedure of joint inspection and investigation by union and management representatives of reports of unsafe or unhealthy conditions . . .
>
> Thus, the parties have bargained over a procedure for the resolution of local concerns regarding possible unsafe or unhealthy working conditions. . . . Accordingly, we further conclude that the matter of installing an anti-fatigue mat to combat such stress and fatigue is an aspect of subjects expressly covered by the parties' MLA. (48 FLRA at 386-387)

Although the Respondent denies that its proposals were "covered by" the parties' NA, the record evidence establishes that numerous of its proposals in both the Coeur d'Alene and the ROQA negotiations were directly related to issues that were raised and dealt with in the National Agreement. Therefore, under *SSA Baltimore*, the Agency was under no obligation to bargain regarding these proposals. The question then becomes whether the Respondent can insist to impasse on such proposals.

In *FDIC*, 18 FLRA at 771-772, the Authority addressed the issue of whether the agency violated the section 7116(a)(1) and (5) of the Statute by insisting to impasse that the union adopt the agency's bargaining proposals calling for the union to waive certain of its rights under the Statute.

> The question here presented is whether the Respondent acted properly in insisting to impasse over its proposed Article 51, Sections 1 and 2.D(5). Resolution of this question is dependent upon a determination as to whether the proposals involved a mandatory subject of bargaining or a "permissive" subject of bargaining. . . .
>
> It is well-established that a party is not required to bargain over a permissive subject of bargaining. This applies equally to proposals advanced by agency management as it does to

proposals made by a union. . . .

> Clearly, if parties are not required to bargain over permissive subjects of bargaining, it follows that parties cannot insist on bargaining to impasse with respect to such matters within the meaning of section 7119 of the Statute. As previously noted, the Authority determine in *Vermont Air National Guard, supra*, that parties may bargain to impasse over mandatory subjects of bargaining. In so deciding, the Authority noted that parties have a mutual obligation to bargain in good faith and that where an impasse in negotiations is reached, either party may request the assistance of the Panel under section 7119. Where a matter falls outside the required scope of bargaining or is negotiable only at the election of an agency, there is no mutual obligation to bargain at all. If parties do bargain over such matters either may withdraw at any time prior to reaching agreement.

By insisting that the Agency bargain over proposals in connection with the Coeur d'Alene relocation or the ROQA expansion which are already included in the parties' collective bargaining agreement, the Respondent is demanding that it bargain over matters outside the required scope of bargaining. In accordance with *FDIC*, such conduct is in violation of section 7116(b)(5) of the Statute. *See also, U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 54 FLRA 630 (1998) (FDA's insistence on two separate contracts for employees in a single bargaining unit, a matter which is a permissive subject of bargaining, prevented any bargaining over the contract and thus, lead to an "impasse" and a finding that FDA had insisted to impasse on a permissive subject): *United States Department of the Treasury, Customs Service, Washington, D.C.*, 59 FLRA 703 (2004) (Union's ground rule proposal which conditioned negotiations over the impact and implementation of the management's revised assignment policy (NIAP) on first bargaining over the expired master collective bargaining agreement did not constitute a matter falling within the scope of sections 7106(b)(2) or (b)(3) and was a permissive subject on which the Agency could have elected, but was not obligated, to bargain.)

The General Counsel is not asserting that the Union engages in bad faith bargaining merely by presenting nonnegotiable proposals at the table. Nor does the General Counsel assert that aggressive bargaining by either of the

parties involved in negotiations to be violative of the Statute. However, in both of these negotiations, the Respondent insisted to impasse on matters that had already been bargained and settled in the National Agreement. *See SPORT Air Traffic Controllers Organization (SATCO),* 52 FLRA 339 (1996), in which the Authority agreed with the ALJ's determination that the Union had violated section 7116(b)(1) and (5) of the Statute by insisting to impasse on the tape recording of the parties' collective bargaining negotiations. When the agency objected to tape recording the negotiation sessions, "the Union insisted on continuing to record the session, even when put on notice that AFFTC asserted the right to refuse to proceed with recorded negotiations. Further discussions over the issue of recording, including a session with a mediator, resulted in an impasse that prevented further negotiations."

While the Respondent participated in the various aspects of negotiations, with consultation, formal negotiations and mediation, and insisted that its actions were in good faith, the totality of the evidence establishes that its conduct was not designed to move the negotiations forward and reach agreement. While the parties were able to discuss and reach some agreement on various aspects of the floorplans, the Respondent's primary focus throughout the negotiations was its proposed MOUs. Even following the negotiations and mediations, the Respondent returned to its original proposed MOUs almost without acknowledging there had been any negotiations at all.

The Respondent's actions then culminated in taking its Couer d'Alene and ROQA MOUs, with only minor changes, to the FSIP. By insisting to impasse on MOUs that contain numerous proposals that are "covered by" the parties' National Agreement, the Respondent is demanding that the Agency bargain over matters over which there is no duty to bargain and is therefore insisting to impasse on permissive subjects of bargaining. An objective analysis finds that the Union's conduct in both of the negotiations constituted bad faith bargaining and is found to be regressive bargaining as it was clearly designed to frustrate the progress of the negotiations. See, *e.g.*, *Golden Eagle Spotting Co., Inc.*, 319 NLRB 64 (1995) (Employer engaged in bad faith bargaining by regressive bargaining regarding union security, where this conduct was part of employer's effort to stall collective bargaining process). *Massillon Newspapers, Inc.*, 319 NLRB 349 (1995) (Employer found to have engaged in bad faith bargaining where, among other things, it failed to show good cause for

reneging on agreements reached on non-economic issues); *Hilton International Hotels*, 187 NLRB 947 (1971) (Employer engaged in bad faith bargaining by, among other things, withdrawing from concession to which it had previously agreed, *i.e.*, union shop provision).

Based on the totality of the conduct in these matters, I therefore find that the Respondent's conduct with regard to both the Coeur d'Alene and the ROQA negotiations was in violation of section 7116(b)(5) of the Statute. Having concluded that the Respondent violated section 7116(b)(5) of the Statute, I recommend the Authority issue the following Order:

ORDER

Pursuant to ∋2423.41(c) of the Rules and Regulations of the Authority and ∋7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the American Federation of Government Employees, Local 3937, AFL-CIO, shall:

1. Cease and desist from:

(a) Engaging in bad faith bargaining by insisting to impasse on permissive subjects of bargaining, including proposals on matters "covered by" provisions of the current National Agreement or which are permissive under §7106(b)(1) of the Federal Service Labor-Management Relations Statute.

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

(a) Post at its business office and its normal meeting places, including all places where Notices to members and employees of the Social Security Administration, Seattle Region are customarily posted, copies of the attached Notices on forms to be furnished by the Federal Labor Relations Authority. On receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 3937, AFL-CIO and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to members and employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or "covered by" any other material.

(b) The Labor Organization will submit signed copies of said Notice to the Regional Director who will forward them to the Agency whose employees are involved herein, for posting in conspicuous places in and about the Agency's premises where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

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

Issued, Washington, DC, May 24, 2007

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL MEMBERS AND EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the American Federation of Government Employees, Local 3937, AFL-CIO, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

We hereby notify our members and bargaining unit employees that:

WE WILL NOT engage in bad faith bargaining by insisting to impasse on permissive subjects of bargaining, including proposals on matters "covered by" provisions of the current National Agreement or which are permissive under §7106(b)(1) of the Federal Service Labor-Management Relations Statute.

Dated: American Federation of Government Employees, Local 3937, AFL-CIO

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 its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. SF-CO-06-0374 and SF-CO-06-0560, were sent to the following parties:

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

Stefanie Arthur — 7004 1350 0003 5175 2614
Counsel for the General Counsel
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103-1791

Wilson Schuerholz — 7004 1350 0003 5175 2621
Management Representative
Social Security Administration
Room G-314, West High Rise Bldg.
6401 Security Boulevard
2170 Annex Building
Baltimore, MD 21235

Dave Rodriguez — 7004 1350 0003 5175 2638
Labor Relations Specialist
American Federation of Government
Employees, AFL-CIO
20535 Nob Hill Circle
Groveland, CA 95321-9576

REGULAR MAIL:

President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

DATED: May 24, 2007

Washington, DC