UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-10, AFL-CIO Charging Party	Case No. WA-CA-60581

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26© through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 29, 1997**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: September 29, 1997
Washington, DC

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

MEMORANDUM DATE: September 29, 1997

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: FEDERAL AVIATION ADMINISTRATION

Respondent

and Case No. WA-CA-60581

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-10, SEIU, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-10, AFL-CIO Charging Party	Case No. WA-CA-60581

Rufus Beatty, Esquire
Counsel For the Respondent

Christopher M. Feldenzer, Esquire
Counsel For the General Counsel

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION

Statement of the Case

On May 6, 1997, the Regional Director for the Washington, D.C. Region of the Federal Labor Relations Authority, pursuant to a charge filed on August 15, 1996, and first amended on October 1, 1996, by the National Association of Government Employees, Local R3-10, AFL-CIO (herein called the Union/ Charging Party) issued a Complaint and Notice of Hearing alleging that the Federal Aviation Administration (herein called Respondent/Agency) violated section 7116(a)(1) and (5) of the Federal Service Labor-Managements Relations Statute (herein called the Statute) on or around June 1996 when Respondent refused to comply with a Memorandum of Understanding (herein called MOU) entered into on or about May 12, 1994, which provided, in part, for an interim performance evaluation system for the Air Traffic Assistants (herein called ATA's) represented by the Charging Party, pending the negotiation of the parties' first negotiated collective bargaining agreement.

A hearing was held in Washington, D.C., at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The General Counsel and the Respondent filed timely post-hearing briefs which have been carefully 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

At all times material, Respondent has been an agency within the meaning of section 7103(a)(3) of the Statute. At all times material, the Charging Party has been a labor organization within the meaning of section 7103(a)(4) of the Statute. Accordingly, the Authority has jurisdiction in this matter pursuant to section 7118 of the Statute.

A. Background

On September 9, 1993, the NAGE was certified as the exclusive representative of a bargaining unit consisting of approximately 350 Air Traffic Assistants, Series 2154, at the Agency. Local R3-10 is an agent of NAGE local within the Union which represents these bargaining unit employees. As of the date of the hearing, the parties did not have a collective bargaining agreement.

Prior to May 1994, it appears that bargaining unit employees represented by Local R3-10 were rated under a performance rating system with five levels: (1) outstanding; (2) exceptional; (3) fully successful; (4) partly successful; and (5) unacceptable. Under this system, employees, including those represented by Local R3-10, received cash awards "associated with the performance appraisal[s]."

B. The May 12, 1994 Memorandum of Understanding

On April 12, 1994, a representative from the Agency's Labor Relations Division, Richard Hamilton, contacted Local R3-10 President Mark Wilson. Hamilton told Wilson that the Agency recently had completed negotiations with the National Air Traffic Controllers Association (NATCA) resulting in a memorandum of understanding (MOU) establishing a 3-tier performance rating system.[1] Hamilton asked whether Local R3-10

[1] 1/ The purpose of the NATCA MOU was "to create an interim supplement to FAA Performance Management System in FAA Order 3500.7" and applied only to employees in the NATCA bargaining unit.

would be interested in also developing such a system. Wilson requested a fax copy of the NATCA MOU and promised to investigate the possibility of developing a 3-tier system.

It is undisputed that as a result of this discussion and subsequent "consultations" with other officers in the bargaining unit, the Union, drafted a proposal on the 3-tier system. Wilson, along with bargaining unit Flight Data Communications Specialists Doug Byron and Donald Parker, Local R3-10's Vice-President and Executive Secretary, respectively, ultimately drafted the final agreed-upon version of the May 12, 1994, NAGE MOU. In drafting the NAGE MOU, which has "no significant difference" from the NATCA MOU, the NAGE drafters used the NATCA MOU "as a model."

On May 12, 1994, Wilson and Hamilton executed the NAGE MOU which provides, in relevant part, as follows:

> **9. BUDGET FOR THE PAYMENT OF PERFORMANCE AWARDS**
>
> a. The NAGE bargaining unit is established as a single unit for the purpose of determining performance awards. (Parenthetical omitted).
>
> b. In determining the performance award budget for employees in the NAGE bargaining unit, the provisions of FAA Order 3500.7, paragraph 40(b)(1) shall apply.
>
> **10. PAYMENT OF PERFORMANCE AWARDS**
>
> a. At the end of the appraisal period, a number of shares for the payment of performance awards will be established by multiplying the number of employees with an Exceeds the Standards rating by 1.5 and adding to that number, the number of employees with a Fully Successful rating. A monetary value for each share will be established by dividing the performance awards budget by the number of shares which have been created.
>
> b. An employee who has a rating of Exceeds the standards will receive a performance award equal to the value of 1.5 shares. An employee who has a rating of Fully Successful will be given a performance award of the value of 1 share.

(Section 10a and b above replace Paragraph 40a.)2

* * *

This agreement contains the entire understanding of the parties. No modification or waiver of any of its terms shall be valid unless it is made in writing and executed by the parties.

As incorporated by reference in paragraph 9(b) of the NAGE MOU, section 40(b)(1) of FAA Order 3500.7 provides:

40. PERFORMANCE AWARDS.

b. Performance Award Budgets. In determining performance award budgets, consideration will be given to the number of PMS employees during the previous year, the aggregate rates of basic pay for these employees, the changes expected in the number of PMS employees, and the general pay increases and WIG's and QSI's to be paid to employees.

(1) At the beginning of each fiscal year, the FAA will allocate a percentage of the total PMS pay to be used for QSI's and performance awards. That percentage shall also meet any limitations established by

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2/ Paragraph 40a of FAA Order 3500.7 had provided:

a. Criteria. Performance awards under the PMS shall be granted as one-time cash payments outside basic pay when:

(1) The employee receives an Outstanding rating for the current appraisal period.

(2) The employee receives an Exceptional rating for the current appraisal period.

the OPM and the OST for the funding of general pay increases, WIG's, QSI's, and performance

awards. Funds shall not be transferred from one PMS unit's performance award budget to another PMS unit.

Under the NAGE MOU, two rounds of performance appraisals were issued — in 1994 and 1995 — which resulted in corresponding performance awards for bargaining unit employees.

C. The Instant Unfair Labor Practice

Sometime in October 1995, Respondent during term contract negotiations in Atlanta, Georgia approached the Local R3-10 negotiating team to propose a 2-tier performance and recognition system -- PPRS. After two days, negotiations stalled. At the close of these specific negotiations, the Union's chief negotiator, George Reeves, advised the Agency's chief negotiator, Marita Johnson-Llaverias, that the May 12, 1994, MOU was still in effect. According to Wilson, who was present during this exchange, Johnson-Llaverias acknowledged this fact without any further discussion.

In early April 1996, however, Wilson observed a "posted" March 26, 1996, memorandum from the Agency's Acting Program Director for Air Traffic Program Management, J. David Canoles, to Regional Air Traffic Division Managers. The memorandum read as follows:

> Negotiation with NAGE concerning adoption of the Performance Planning and Recognition System (PPRS) is at impasse. Although FAA Order 3500.7, Performance Management System (PMS), has been canceled, we are obligated to follow the procedures for performance management contained in Order 3500.7 for employees represented by NAGE until an agreement concerning adoption of PPRS is accomplished.
>
> The annual appraisal period under PMS for these employees will end on March 31, 1996. Therefore, employees represented by NAGE shall receive the following:

1. A "rating of record" for the appraisal period of April 1, 1995 to March 31, 1996.

2. An "initial" discussion of their performance plan for the appraisal period of April 1, 1996 to March 31, 1997.

This memorandum did not mention performance awards or any determination with respect to the budget allocations for performance awards.

Thereafter, on June 25, 1996, Wilson wrote the Agency's Labor Relations Representative for Air Traffic, Cully Beasley, regarding the NAGE MOU. Wilson's letter was prompted by the Canoles memorandum of March 26, 1996, he had seen, as well as the fact that approximately 2 months had passed since his performance appraisal — the usual timing between appraisals and cash awards based upon those appraisals. Wilson noted the following:

> The Federal Aviation Administration and the National Association of Government Employees Local R3-10, have a signed Memorandum of Understanding on Three-Tier Performance Management System. Recently Mr. Canoles, Director, Air Traffic Program Management issued a letter to the field on the above MOU. In that letter he stated that the agency must honor the MOU and that FAA Order 3500.7 must be retained and used to support the parties MOU.
>
> Under the terms of the MOU, members of the NAGE bargaining unit who are rated as exceeds the standards or meets the standards are eligible for cash bonuses. The terms of calculating the bonus are outlined in the MOU and in FAA Order 3500.7. Since the cut off date for ATA performance reports was March 31, 1996, I as President of NAGE Local R3-10 request that you provide me a time frame in which the agency anticipates the pay out of bonus money to NAGE bargaining unit personnel covered by the MOU.

Initially, Beasley responded by telephone and advised Wilson that he saw no reason why the Agency would not honor the MOU. However, no follow-up written response was ever received confirming what Beasley had stated.

Subsequently, Wilson received a letter dated July 24, 1996, from J. David Canoles (original signed by his deputy David R. Sprague) concerning the NAGE MOU. The letter stated:

> In October 1995, the Administrator approved the Federal Aviation Administration (FAA) Performance Planning and Recognition System (PPRS) to replace the existing Performance Management System (PMS). The intent of this new system was to implement a new approach in performance management, one aspect of which was to delink the performance appraisal and awards processes. Some FAA employees, including those represented by NAGE, continue to be covered under the PMS system. As you are aware, negotiations on the implementation of PPRS have not been completed with NAGE.
>
> FAA Order 3500.7, Performance Management System, paragraph 40(b)(1), states that the FAA will identify at the beginning of each fiscal year a percentage of the total PMS pay to be used for quality step increases and performance awards. Since it is the FAA's intent to delink awards from performance assessment, the Administrator determined at the beginning of this fiscal year that the percentage of total PMS pay to be used for awards would be zero.
>
> Therefore, since no money has been allocated for an award payout, those employees that continue to be covered by PMS will not receive a performance based award for the rating cycle that ended March 31, 1996.

Since this July 24, 1996, letter, no performance awards have been given to bargaining unit employees represented by the Union, including for the most recent rating period, April 1, 1996, through March 31, 1997.

Analysis and Conclusions

A. ***Whether the Agency Violated Section 7116(a)(1) and (5) of the Statute by Repudiating the May 12, 1994 MOU Linking Performance Ratings to Performance Awards.***

In analyzing an allegation of repudiation the Authority presently examines two elements: (1) the nature and scope of the alleged breach of an agreement (*i.e.*, was the breach clear and patent); and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart of the parties' agreement). *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 862 (1996)(*Scott AFB*), *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211 (1991). Examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached.

The General Counsel contends that both the scope of the breach and the nature of the breach are sufficient to constitute a repudiation of the May 12, 1994 MOU. The General Counsel also claims that the Performance Management System (PMS), in essence, linked performance ratings to performance awards. Therefore, it argues, that Respondent repudiated the MOU when it "delinked" appraisals from performance awards. In the General Counsel's view, the repudiation is established by Respondent's conduct, as well as by the express statement contained in a letter from Acting Program Director for Air Traffic Resource Management, J. David Canoles. Furthermore, it is argued that the record does not support the Agency's contention, at the hearing, that the MOU is still in force and effect. To the contrary, it was submitted that the record overwhelmingly supports a finding that the Agency had "delinked" appraisals from performance awards.

Respondent denies that the General Counsel proved that it breached or repudiated the May 12, 1994 MOU, when it determined that the PMS awards budget for the performance periods ending in 1996 and 1997 would be zero. Thus, Respondent suggests that the issue in the case is simply whether the Agency repudiated the May 12, 1994, MOU by establishing the PMS awards budget at zero for the performance periods that ended in 1996 and 1997.

In defense, Respondent attacks the strength of the General Counsel's evidence saying, for example, the NATCA agreement was not viable evidence because it did not involve NAGE and the Agency but, it involved a completely different Union, and was therefore, irrelevant to this matter. Respondent also attacks other exhibits of the General Counsel as irrelevant. Respondent specifically attacked certain evidence such as Wilson's performance appraisal for the appraisal period 4/1/92 through 3/31/93 and is dated April 25,

1993, and documents that Wilson received a performance award for the rating that he received in 1993; an excerpt from FAA Order 3500.7, dated May 24, 1988, which was incorporated in the MOU as being irrelevant. The only relevant portion of FAA Order 3500.7, according to Respondent, is paragraph 40(b)(1) which states that at the beginning of each fiscal year, the FAA will allocate a percentage of the total PMS pay to be used for QSI's and performance awards.

Respondent states that it allocated zero percentage of the total PMS pay to be used for performance awards for the appraisal periods that ended in 1996 and 1997. Respondent maintains that contrary to the General Counsel's assertion in the complaint, the MOU did not mandate, promise, or guarantee that NAGE would receive a monetary award. Rather it argues, it reserved the discretion to determine what percentage of PMS pay would be allocated and it determined that the percentage for 1996 as well as 1997 would be zero. Furthermore, it insists that its position that budget constraints resulted in reductions in the PMS performance awards budget was supported by a witness for the General Counsel. It further contends that the record shows that the Air Traffic Division was looking at a budget shortfall for FY 1996 of approximately 34 million dollars. One method of resolving the shortfall was to reducing awards by 95% (11 million dollars). Thus, it contends that the lack of funds to perform an act might constitute a defense to a repudiation of the parties' collective bargaining agreement such as found herein. *American Federation of Government Employees, AFL-CIO Local 1909, Fort Jackson South Carolina,* 41 FLRA 18 (1991). While it is correct that budget constraints can constitute a defense for a repudiation, it does not do so where, as here, there is already an existing program without the agency making a serious showing that "an increase in costs is significant and unavoidable and is not offset by compensating benefits. . . ." *U.S. Department of* Defense, *Defense Logistics Agency, Defense Distribution Region West, Defense Distribution Depot Red River, Texarkana, Texas and National Association of Government Employees, Local R14-52,* 52 FLRA 132, 134 (1996)(*Defense Distribution Depot Red River*).

The General Counsel asserts that the Agency's defense that the MOU merely required the Agency to allocate a percentage of the total of PMS pay to be used for QSRS and performance awards, lacks any merit. Here, the Agency used its discretion to set the performance award budget for FY 1996 and FY 1997 at zero. Respondent noted in its opening statement that employees' shares "no matter how you multiply it, it will still come out to be zero." This defense however, ignores or fails to refute the record evidence with evidence of its own. The Authority has looked askance at claims not supported by

documentary evidence or corroboration. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 35 FLRA 891, 899 (1990)(*Hill AFB*). Furthermore, *Defense Distribution Depot Red River,* requires such a demonstration.

The Respondent offered no evidence to show that Canoles' July 24, memorandum had been retracted or that the repudiation had in any manner been nullified by the Respondent. Moreover, none of the other documents corroborating the "delinkage" between the ratings and awards — — were ever addressed by Respondent.

Unfortunately, in making its "zero budget" or "reasonable interpretation" defense, as already noted, Respondent failed to present any evidence establishing the timing or deliberative process in arriving at its "zero PMS budget." Consequently, none of the "management team" which supposedly decided against allocating any percentage for the PMS budget testified at the instant hearing.3 Not only does such a failure to testify warrant an adverse inference in such circumstances, but the Authority has clearly stated that it will require corroborating witnesses or documentary evidence to rebut clear showings where there are differences. *See U.S. Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 926 (1996)(*ALJ Decision*)(adverse inference based on supervisor's failure to testify is appropriate where he was clearly the responsible decision-maker, and his motivation is central to the case. *Hill AFB, supra.* Further, the "1996 Awards Ceiling" memorandum from Chief Financial Officer Ruth Leverenz to the "FAA Management Board" actually raises doubt that any such decision to allocate a "zero budget" for PMS was ever made. Rather, this memorandum suggests that Respondent had implemented PPRS and that the "zero budget" for PMS was merely a consequence of that implementation rather than a discrete decision by the "management team." Finally, Respondent failed to present any evidence which would even show at minimum when the "management team" decided not to fund the PMS budget.

As part of its reasonable defense, Respondent points out that the Union did not contest the performance awards given in 1994 or 1995 even though the percentage was different for both years. It interprets the Union's failure to contest the percentage that was set for 1994 and 1995 as proving that the Union acknowledged that the Agency had the discretion to determine the PMS awards budget. Thus, it asserts, in

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3/ The Agency's management team was identified as: the Administrator (David Hinson), Deputy Administrator (Linda Daschle) and the Associate Administrators (Monte Belger, Ed Berberg et al.).

essence, that an interpretation that the MOU guaranteed cash awards based on performance ratings would be faulty. In my view, Respondent's interpretation would allow it to assert budgetary considerations without making a strong showing that a deficiency existed, and must be rejected.

Accordingly, it is concluded that Respondent's defense, to the extent it suggests that it acted in accordance with a reasonable interpretation of the MOU, is rejected as contrary to the existing evidence, but instead is merely an assertion that the record, in my view does not support. *See Scott AFB.*

1. Clear and Patent Breach of the MOU

In determining whether a clear and patent breach of the MOU exists, it is appropriate to consider both the statements and actions of Respondent. In this regard, Comment (b) for Section 250 of the Restatement 2d of Contracts is instructive in defining whether the nature of a statement amounts to a repudiation:

> b. Nature of the statement. In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness to perform or ability to perform is not enough to constitute a repudiation, although such an expression may give an obligee reasonable grounds to believe that the obligor will commit a serious breach and may ultimately result in repudiation under the rule stated in section 251 . . . Language that is accompanied by a breach by nonperformance may amount to a repudiation even though, standing alone, it would not be sufficiently positive . . . .

The record in the instant case provides ample support, including the actions of the Agency both prior and subsequent to the July 24, 1996, Canoles memorandum, to establish that the Agency's breach was "clear and patent."

Initially, it is significant to note that the Agency's breach occurs in the context of its efforts to introduce a successor system — PPRS — for the PMS one that existed in the parties' agreement. In this regard, the May 12, 1994, MOU itself provides:

14. **FUTURE SYSTEMS**

> The parties will enter into discussions regarding the design of a two level system no later than 60 days form the effective date of this Memorandum of Understanding. The parties will further cooperate on efforts to obtain authority to institute such a system.

Indeed, the Respondent's dissatisfaction with the status quo represented by the PMS system is further evidenced by a November 22, 1994, memorandum sent to all employees by the Respondent's Administrator regarding "Performance Awards." In this memorandum, Administrator Hinson stated:

> I want to be able to acknowledge excellence in our workforce, recognize outstanding contributions to fulfilling our mission, and make particular note of those whose efforts move us forward in streamlining and re-engineering the agency. While performance and incentive awards have been a traditional means of saluting excellence and accomplishments, the changing budget environment challenges us to think in new and innovative ways to recognize performance. Accordingly, I have asked that a review of our overall performance management system be conducted over the next several months.

Finally, the Agency's efforts to negotiate a new agreement replacing PMS with PPRS had been unsuccessful. All of these circumstances, coupled with the restriction contained in the penultimate paragraph of the MOU, *i.e.*, "[n]o modification or waiver of any of its terms of agreement shall be valid unless it is made in writing and executed by the parties[,]" provide a setting for the consideration of Respondent's repudiation in this matter. It was therefore, perfectly reasonable for the Union to consider that the status quo represented by the parties' May 12, 1994, MOU was not desirable to the Agency.

Coupled with the Agency's conduct in seeking to supplant the MOU was various statements that suggest that the Agency had already abolished the linkage of cash awards with performance ratings. For example, a document produced by the Agency at hearing under subpoena entitled "FAA Awards Facts" contains, inter alia, a number of bullets of award information

on the fiscal year 1996 budget.[4] One such bullet (p.1), which shows that the monetary award expenditures for Fiscal Year 1996 were projected at $2 million as opposed to the prior year (FY 95) spending of $22.8 million, states by way of explanation:

> Current trend is probably due to the fact that organizations have less to spend on awards because of reductions in funding and are not used to the fact that appraisals no longer trigger automatic awards.

Further, the footnote to this bullet provides:

> FY 95 was the last automatic payout under PMS. Under PPRS implemented in FY 96 ratings no longer trigger automatic cash awards.

In addition, in a 1996 letter (the exact date is illegible) from the Respondent's Chief Financial Officer, Ruth A. Leverenz, to the "FAA Management Team" provides further evidence that the Agency viewed any linkage between performance ratings and performance awards as abolished. In her letter, Leverenz points out that:

> As of November 1, 1995, FAA implemented the Performance Planning and Recognition Program (PPRS), which replaces the existing performance management system and awards program for GS and GM employees. Under PPRS, each line of business and staff office may either adopt the PPRS model performance and recognition program, or develop their own programs using the PPRS framework. PPRS eliminates payment of cash awards based on employees' performance ratings, and instead encourages acknowledging and rewarding of employees' individual or team contributions and accomplishments through monetary or nonmonetary recognition.

None of these official statements or documents, in any footnote, annotation or otherwise, indicates that an exception

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4/ Respondent's Manager of the Operations Budget Division, John R. Mathewson, who produced this document in response to a subpoena duces tecum, could not recall the document off-hand, but was familiar with the attachments.

existed for the unit employees represented by Local R3-10 and covered by the May 12, 1994, MOU.

In addition, to the above-cited circumstances, the March 26, 1996, memorandum from Canoles also provides a foundation for the July 24, repudiation. In this March 26, 1996, memorandum, Canoles advised Regional Air Traffic Division Managers only with respect to their obligations to provide a "rating of record" for the April 1, 1995 - March 31, 1996, appraisal period and to conduct an "initial" discussion of their performance plan for the following year. Nothing in his memorandum even mentions the Respondent's continued obligations under the May 12, 1994, MOU to link awards to performance ratings.

Given the Respondent's prior conduct in October 1995 wherein it sought to negotiate a 2-tier non-award linked PPRS system and the silence of the March 26, Canoles memorandum with respect to performance awards, Wilson certainly had reasonable grounds for seeking assurances from the Respondent that such awards would be forthcoming.5 Accordingly, Wilson's June 25, 1996, letter to Respondent sought assurances that the Agency would comply with the May 12, 1994, MOU by performing in accordance with sections 9 and 10 of that MOU. Not only did Respondent fail to provide such assurances — an act alone which might constitute a repudiation — it provided instead, a written declaration of its intention not to comply with the performance award provisions of the MOU.

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5/ In this regard, Section 251 ("When a Failure to Give Assurance May Be Treated as a Repudiation") of the Restatement 2d of Contracts provides some guidance in evaluating the parties' conduct here. This section provides:

> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under section 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

Thus, the meaning of the July 24, 1996, memorandum from Canoles is clearly and unmistakably stated that:

> [s]ince it is the FAA's intent to delink awards from performance assessment, the Administrator determined at the beginning of this fiscal year that the percentage of total PMS pay to be used for awards would be zero.

Moreover, the record disclosed no subsequent attempt by Respondent to retract this statement. Indeed, Canoles testimony at hearing on this issue tends to confirm his earlier statement of repudiation:

(GC) Q. So in July of 1996, it was merely your intent to de-link awards from appraisals?

(Canoles) A. I can't speak to specifically what my intent was at that time. So I can't agree nor disagree with that.

* * *

Q. What was your familiarity with the budget process for awards for any of the bargaining units, including NAGE?

A. The information I had relative to the budget was provided me by our budget staff. I recall 1996 as a challenging year. I guess would be an appropriate way to phrase it. I do recall that funding was not provided for PMS awards that year, because we were migrating from the old system to the new. And I see this letter as notification to the union of our intent to do that.

Canoles' testimony also supports his July 24, 1996, statement that performance awards, contrary to the express provisions of the May 12, 1994, MOU, were being "delinked" from performance ratings consistent with the Agency's move toward the PPRS. Thus, Canoles' July 24 statement, in the context of the Agency's prior conduct discussed *supra* and in the absence of any subsequent statements or conduct by the Agency to reaffirm the validity of the MOU or nullify the repudiation, constituted a clear and patent breach of the MOU. Accordingly, the Union treated these statements and actions as "final" and filed its unfair labor practice charge alleging repudiation.

2. Nature of the Breach

With regard to the second element of the repudiation analysis, there is little doubt that the linkage between performance ratings and performance appraisals represented the "core" aspect of the MOU. There is also little question that performance awards are a matter of significant concern to bargaining unit employees. Indeed, experience shows that employees will oftentimes challenge specific performance ratings or appraisals through the grievance/arbitration process for the sole purpose of attaining a higher performance award.

Respondent protests that, it was certainly reasonable to assume that the heart of the agreement was to ensure those bargaining unit employees were fairly rated and that this concern was the most important part of or the "heart" of the MOU.
While one might agree with Respondent, that the "intent of the parties" attachment does not indicate that the most important thing in the MOU was the payment of a cash award for a performance rating, it was certainly one of the most important things included in the MOU as a whole.

In considering the nature of the breach, it is noted that three of the MOU's nine provisions -- para. 9 ("Budget for the Payment of Performance Awards"), para. 10 ("Payment of Performance Awards") and para. 12 ("Quality Step Increases") -- specifically concern performance awards. These provisions, coupled with the related provisions in Chapter 40 of FAA Order 3500.7, constitute the most tangible and significant benefits in the entire agreement for bargaining unit employees. *See Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 52 FLRA 225, 232 (1996)(second element of repudiation established where "three of the agreement's nine provisions specifically required the Respondent to maintain the status quo until negotiations concerning outdoor smoking facilities had been completed.").

The May 12, 1994, MOU by its own terms, was "an interim supplement to the FAA Performance Management System in FAA Order 3500.7, dated May 24, 1988." Consequently, Respondent's actions in "delinking" performance ratings from performance awards not only abrogates those specific provisions in the MOU concerning performance awards but, also all of the other provisions of Chapter 40 of the FAA Order 3500.7. In these circumstances, it is concluded that Respondent's action in destroying the linkage between performance ratings and performance awards went to the "heart" of the parties' agreement.

Accordingly, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to

comply with the Memorandum of Understanding entered into on or about May 12, 1994, which provided, in part, for an interim performance evaluation system for the Air Traffic Assistants represented by the Charging Party, pending the negotiation of the parties' first negotiated collective bargaining agreement.

The Remedy

In addition to the normal cease and desist order and posting the General Counsel has requested a back pay remedy in this matter. A government employee found to have been affected by an improper or unwarranted personnel action resulting in the withdrawal or reduction of pay, allowances or differentials may be made whole under the authority of the Back Pay Act, 5 U.S.C. § 5596(b)(1)(a). *See Immigration and Naturalization Service, Los Angeles District, Los Angeles, California*, 52 FLRA 103 (1996). Respondent's action by repudiating the May 12, 1994, MOU represents, in my opinion an unwarranted or unjustified personnel action within the meaning of the Back Pay Act that entitles bargaining unit employees represented by NAGE Local R3-10 to "make whole" relief for the loss of performance awards for 1996 and 1997.

Respondent submits that the parties did not agree to a sum certain in the MOU for the payment of PMS awards. Respondent again maintains that the payment of a PMS award was contingent upon the budget that was determined by the Agency. Respondent insists that the PMS budget was different for each year because the Agency has always had the discretion to determine what, if any, budget would be established for the payment of PMS awards. It further argues that incentive award money payable to employees under 5 U.S.C. § 4502-03 does not constitute wages or salary therefore, the Back Pay Act would not provide an appropriate justification for a back pay remedy in this case. *National Treasury Employees Union and Internal Revenue Service,* 27 FLRA 136 (1987). Based on the record evidence, I reject these arguments.

In this case, the General Counsel offered two types of budgetary evidence. Some of the evidence simply merely revealed that a significant awards budget existed at the Agency for the years in question. The second type evidence shows that for the 2 years in which the Respondent observed the MOU, a specific formula and specific percentage — 0.43% of base salary — were used to determine the performance award payout to bargaining unit employees. Therefore, the very same percentage can be utilized in determining the "make whole" relief for the 1996 and 1997 performance years.

The main thrust of this case, is that Respondent agreed to pay out incentive awards based on a specific formula that

it negotiated with the Union. Incentive awards are "conditions of employment" where they meet certain tests. *See, Department of Veterans Affairs Medical Center, St. Louis, Missouri*, 50 FLRA 378 (1995). Here, however, the parties reduced their obligation to writing. The MOU makes no reference to awards being paid only where there is budget money for payment. Thus, Respondent's defense failed to satisfy its obligation to follow the negotiated MOU or to notify and bargain with the Union before changing any term or condition of employment. In the circumstances of this matter, noting particularly the absence of a significant showing that the payment of the performance awards was not offset by compensating benefits, it is my opinion that a back pay remedy is appropriate for this unwarranted personnel action which resulted in a reduction of pay for those receiving such performance awards. See, *Defense Distribution Depot Red River*.

Based on the foregoing, it is recommended that the Authority adopt the following:

Order

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Federal Aviation Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to honor the May 12, 1994 Memorandum of Understanding negotiated with the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO, the employees exclusive representative by failing and refusing to link performance ratings with performance awards.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the purposes and policies of the Statute:

(a) Upon request of the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO, the

employees exclusive representative link performance ratings with performance awards as required by the May 12, 1994 Memorandum of Understanding.

(b) Reimburse any employee for the loss of pay and benefits that he/she suffered as a result of the Agency's failure to honor or repudiation of the May 12, 1994, Memorandum of Understanding negotiated with the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO. The back pay will be made in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and will include the payment of interest.

(c) Post at all its facilities nationwide where members of the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO 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 Administrator 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 29, 1997.

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ELI NASH, JR.
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 Federal Aviation Administration, Washington, DC, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT, fail or refuse to honor the May 12, 1994 Memorandum of Understanding negotiated with the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO, the employees exclusive representative by failing and refusing to link performance ratings with performance awards as required by the Memorandum of Understanding.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL upon request of the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO, the employees exclusive representative link performance ratings with performance awards as required by the parties May 12, 1994 Memorandum of Understanding.

WE WILL reimburse any employee for the loss of pay and benefits that he/she suffered as a result of our failure to honor the May 12, 1994 Memorandum of Understanding negotiated with the National Association of Government Employees, Local R3-10, SEIU, AFL-CIO. The back pay will be made in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and will include the payment of interest.

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(Activity)

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, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW., Suite 400, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. WA-CA-60581, were sent to the following parties:

CERTIFIED MAIL, RETURN RECEIPT NOS.	**CERTIFIED**
Christopher Feldenzer, Esquire Federal Labor Relations Authority 1255 22nd Street, NW, Suite 400 Washington, DC 20037	P600-695-443
Rufus Beatty, L.R.S. Federal Aviation Administration 800 Independence Avenue, SW, AHR-12 Washington, DC 20591	P600-695-444
M. Jefferson Euchler, Esquire Neil C. Bonney & Associates 4652-A Haygood Road Virginia Beach, VA 23455	P600-695-445
Mark B. Wilson, President NAGE, Local R3-10 5 Finch Place Newport News, VA 23608	P600-695-446

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Dated: September 29, 1997
Washington, DC