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

U.S. DEPARTMENT OF THE TREASURY BUREAU OF ENGRAVING AND PRINTING Respondent AND INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS OF NORTH AMERICA, AFL-CIO AND WASHINGTON PLATE PRINTERS UNION LOCAL NO. 2 AND ELECTROLYTIC PLATE MAKERS OF WASHINGTON D.C., LOCAL NO. 24 and WASHINGTON ENGRAVERS GUILD, LOCAL NO. 32 Charging Parties	Case No. WA-CA-70157

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R.

§§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 26, 1998**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 23, 1997
Washington, DC

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

MEMORANDUM DATE: December 23, 1997

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE TREASURY
BUREAU OF ENGRAVING AND PRINTING

Respondent

AND Case No. WA-CA-70157

INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS OF NORTH AMERICA, AFL-CIO

AND

WASHINGTON PLATE PRINTERS UNION LOCAL NO. 2

AND

ELECTROLYTIC PLATE MAKERS OF WASHINGTON D.C., LOCAL NO. 24

and

WASHINGTON ENGRAVERS GUILD, LOCAL NO. 32

Charging Parties

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE TREASURY BUREAU OF ENGRAVING AND PRINTING Respondent AND INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS OF NORTH AMERICA, AFL-CIO AND WASHINGTON PLATE PRINTERS UNION LOCAL NO. 2 AND ELECTROLYTIC PLATE MAKERS OF WASHINGTON D.C., LOCAL NO. 24 and WASHINGTON ENGRAVERS GUILD, LOCAL NO. 32 Charging Parties	Case No. WA-CA-70157

Suzanne L. Wilson
William G. Colbert
Counsel for the Respondent

Lawrence J. Sherman
Counsel for the Charging Party

Michelle Ledina
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The issue in this unfair labor practice case is whether the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by deciding on or about December 9, 1996 "not to grant an upward adjustment in wages of Prevailing Rate employees equal to the percentage of cost of living adjustments of General Schedule employees for fiscal year 1997" and implementing "the change . . . without negotiating with Local No. 2, Local No. 24, and Local No. 32 to the extent required by the [Statute]."

For the reasons set forth below, it is concluded that a preponderance of the evidence does not establish the alleged violation, and it is recommended that the complaint be dismissed.

A hearing was held in Washington, D.C. The Respondent, Charging Parties, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

Based on the entire record[1], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Three of the Charging Parties, referred to herein as Local No. 2, Local No. 24, and Local No. 32, are the exclusive representatives of three separate units of intaglio craft employees appropriate for collective bargaining at the U.S. Department of the Treasury, Bureau of Engraving and Printing (Respondent, Bureau, or BEP) and are affiliates of the other Charging Party, the International Plate Printers, Die Stampers and Engravers Union of North America, AFL-CIO (IPPDSEU). Local No. 2 and Local No. 24 each have a collective bargaining agreement with the Respondent, relevant excerpts of which are set forth in Appendix A and B respectively. Local No. 32 does not have a collective bargaining agreement with the Respondent. The pay of unit employees represented by Local No. 2, Local

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[1] Counsel for the General Counsel's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein.

No. 24, and Local No. 32 is established by 5 U.S.C. § 5349 (a).[2]

The August 16, 1990 Notice

In 1990, the Respondent announced that it would no longer make any pay determinations for employees performing work as Designer, Engraver, Plate Finisher, Plate Printer, Plate Hardener, Plate Maker, Sculpturer Engraver, and Siderographer using job-to-job comparisons with comparable jobs in the American Bank Note Company, New York, New York. Local Nos. 2, 24, and 32 represent employees performing work in these positions. By memorandum dated August 16, 1990 the Respondent stated that it would "conduct a study for the purpose of designing and implementing a new pay administration system" and --

> In order to administer pay for the steel and die crafts from the present time until development and establishment of a new wage system, the Bureau has requested that the Department approve or adopt the limit set on General Schedule wage increases (pay caps) in granting annual pay adjustments. The Bureau is recommending that the effective date for implementing these wage adjustments should continue to be tied to each craft's normal anniversary date, subject to the 90-day delay implemented with the pay caps.

Local Nos. 2, 24, and 32 and other affected unions sought to bargain over the methodology used to establish the

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[2] 5 U.S.C. § 5349(a) provides, in relevant part, that pay "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and in accordance with such provisions of this subchapter, including the provisions of section 5344, relating to retroactive pay, and subchapter VI of this chapter, relating to grade and pay retention, as the pay-fixing authority of each such agency may determine."

wages of the craft employees represented by the unions[3] and filed related unfair labor practice charges alleging that the Respondent violated section 7116(a)(1), (5), and (8) by unilaterally issuing the new policy and failing to bargain on the proposals.[4]

Pay-setting During 1991 - 1996

Prior to Fiscal Year 1997, the Respondent was empowered merely to make recommendations concerning pay raise determinations to the Department of the Treasury's Assistant Secretary for Management. The final decision rested solely with the Department of the Treasury as the pay-fixing authority which then authorized the Bureau to issue wage bulletins announcing what the pay adjustment would be for prevailing rate employees. The Respondent performed the analysis, established recommendations, and conferred with officials at the Department concerning the Respondent's position. The Department sometimes took two or three months to review the Respondent's documents and recommendations and to confer with the Respondent before the Department made a

[3] *See International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 and International Plate Printers, Die Stampers and Engravers Union of North America, Local Nos. 2, 24, and 32 and Graphic Communications International Union, Local No. 285 and International Association of Siderographers, Washington Association and U.S. Department of the Treasury, Bureau of Engraving and Printing*, 43 FLRA 1202 (1992) *(IAMAW and Treasury), remanded sub nom. U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 995 F.2d 301 (D.C. Cir. 1993) *(BEP v. FLRA), decision on remand International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 and International Plate Printers, Die Stampers and Engravers Union of North America, Local Nos. 2, 24, and 32 and Graphic Communications International Union, Local No. 285 and International Association of Siderographers, Washington Association and U.S. Department of the Treasury, Bureau of Engraving and Printing*, 50 FLRA 677 (1995) (*IAMAW and Treasury II), enforced (per curium) sub nom. U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996) *(BEP v. FLRA II).*

[4] A consolidated complaint of December 28, 1992, concerning 3-CA-10409 (charge filed April 5, 1991 alleging that the August 16, 1990 policy "vitiates the statutorily permissible tandem pay relationships that have long applied") and WA-CA-30009 (charge filed October 1, 1992), is currently pending before the Authority.

decision on the Respondent's recommendations. During the period 1991 through 1996 the Department never rejected the Respondent's recommendations on wage adjustments.

As noted, 5 U.S.C. § 5349(a) sets forth a two-factor formula for determining the wages of employees covered by that provision. The statute provides, in relevant part, that the pay of BEP employees shall be: (1) established in accordance with prevailing rates; and (2) adjusted consistent with the public interest. From 1991 through 1996 the Respondent applied the prevailing rate and public interests tests in making its pay rate recommendations pursuant to section 5349(a).

During Fiscal Years 1991 to 1996 the Department of the Treasury established, pursuant to a public interest determination, that wage adjustments for prevailing rate employees would be limited to an amount not to exceed that received by General Schedule employees. Thereafter, for Fiscal Years 1991 to 1996, the Respondent recommended, and the Department of the Treasury approved, wage adjustments for prevailing rate employees limited to an amount not to exceed that received by General Schedule employees. The General Schedule cap was a public interest determination and was not used to determine what the prevailing rate adjustment should be except for purposes of establishing the maximum that could be given once the prevailing rate was determined.[5] Other matters could also be considered in determining the public interest.

During Fiscal Years 1991 to 1996 the Respondent looked to the Government Printing Office (GPO) craft employees for the purpose of recommending the prevailing rate adjustment,

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[5] The General Counsel notes that the "Respondent's wage recommendations and the Department of the Treasury's approval of the recommendations consistently referred to the applica-tion of the General Schedule wage increase percentages as a 'policy'." The context of these communications demonstrates that the General Counsel's characterization is true only to the extent that the General Schedule increase was a limit that could not be exceeded in the public interest. This did not mean that the statutory criterion of "in accordance with prevailing rates" was not to be considered, and the referenced communications reflects that it was. Both the Respondent's 1995 and 1996 recommendations to the Department refer to "tying wage adjustments to the increases provided General Schedule employees," but go on to state that this is "consistent with the public interest and in accordance with prevailing rates" and then proceed to discuss prevailing rates.

although GPO craft employees were not tied directly to the three crafts that are the subject of this case. In the early 1990s the GPO was paying around three to six percent more, so the Respondent tried to get as close as possible to GPO wage rates without going over the General Schedule pay caps set by the Department pursuant to the public interest determination.

In 1992 and 1994 the Bureau's wage adjustments exceeded that given to GPO employees by less than one percent. In 1992 intaglio craft employees received 4.2 percent; GPO employees received 3.7 percent. In 1994 intaglio craft employees received 4.21 - 4.23 percent while GPO employees received 4 percent. In 1995 the Bureau noted that GPO had not yet negotiated its wages, but was approximately three percent ahead of the Bureau and, in the event of a GPO wage freeze, the recommended increases would place Bureau employees "slightly ahead of their GPO counterparts, but still within the parameters of setting pay in accordance with prevailing rates, and in the public interest." In 1996 there was a similar situation. The Bureau's recommendation noted that its recommendation was "consistent with the legal requirement to set pay in accordance with prevailing rates and in the public interest; that its wage rate was "slightly less than 1% higher than comparable occupations at the GPO. American Bank Note Company pay data indicates that comparator BEP jobs are approximately 25% behind ABNC rates."

Commencing in Fiscal Year 1991 and continuing through 1996, the Respondent, pursuant to the approval of the Department of the Treasury, provided annual increases in the hourly wage rates of intaglio craft employees in the exact same percentages as it increased the salaries of General Schedule employees at its two production facilities. More specifically, the Respondent increased the wage rates of all intaglio craft employees, as well as the salaries of all General Schedule employees, by 4.1% in 1991, 4.2% in 1992 and 3.7% in 1993. The Respondent similarly increased the wage rates of intaglio craft employees in Washington, D.C. by 4.23%, 3.22% and 2.54% in 1994, 1995 and 1996, respectively, the same as increases and locality pay adjustments afforded its General Schedule employees there. The Respondent likewise increased the wage rates of intaglio craft employees in Ft. Worth, Texas by 4.21%, 3.41% and 2.56% in 1994, 1995 and 1996, respectively, the same as pay increases and locality pay adjustments to its General Schedule employees there.

The wage adjustments for Local No. 2 and Local No. 32 were effective in July for the years 1991, 1992, and 1993. The wage adjustments for Local No. 24 were effective in

August for the years 1991, 1992, and 1993. The effective dates were determined by the anniversary dates of the parties' agreements in addition to a 90-day implementation delay. The Charging Parties' 1994 wage adjustments were effective on the anniversary dates without the 90-day implementation delay.

In 1995 and 1996, the Charging Parties' wage adjustments were effective in January. The Department of the Treasury approved the Respondent's request to consolidate the wage adjustment effective dates to the beginning of the first pay period prior to February 1 of the year in which the wage adjustment is due. Any actual delay in the payment of the 1995 and 1996 wage adjustments after the January effective dates was due to the fact that the Respondent required Department of the Treasury approval of the wage adjustments in those years and did not receive final approval until April 10, 1995 and February 23, 1996, respectively. Thus, unit employees received retroactive payment of their wage adjustments in 1995 and 1996.

Action Following 1996 Court Decision

Following the decision in *BEP v. FLRA II,* upholding the Authority's pay negotiability decision, and the denial of a petition for rehearing on July 16, 1996, the Respondent's Director, Larry E. Rolufs, by memorandum dated August 22, 1996, requested the Department of the Treasury to delegate to him the Treasury's pay-setting authority. Director Rolufs stated, in part, as follows:

> Pay to Bureau employees has never before been a subject for bargaining. Although pay negotiation will take us in a new direction in the establishment of pay rates for the craft and production support employees covered by this ruling, we believe that Bureau management, based on its familiarity with the Bureau's unique production processes, and its long experience in the administrative calculation and setting of pay, can bring an optimal degree of expertise to the negotiating table. We have 15 separate unions with which we must bargain, and our effort will be to develop a comprehensive and coherent strategy for approaching all pay negotia-tions. While the task will be somewhat daunting, nevertheless, we feel that the negotiating authority is best exercised at this level. We have already begun informal discussions with knowledgeable Department personnel in an effort to gather assistance and advice in determining the resources we will need

to utilize in order to conduct this ground-breaking effort properly.

In the meantime, Director Rolufs established a negotiation team and directed them to establish management's position with respect to anticipated bargaining. Robert Doering, Manager, Labor Management Relations Division, was the team leader and Vince Ackerman, Manager, Personnel Policy Division, was a team member and provided technical advice concerning pay.

With respect to the prevailing rate, Vince Ackerman determined that the Respondent was paying about 3½ percent more than the Government Printing Office. His recommendation to the team was that there was no longer a prevailing rate argument to increase wages. With respect to the public interest considerations, he considered a phase two report of Hay Management Consultants comparing jobs in the private and public sector with those of the Respondent. Based on his own expertise, Ackerman also provided an assessment of how he felt the Bureau's jobs compared with the federal wage system. He also considered that the Bureau was not having trouble recruiting personnel.

The team recommended to Director Rolufs that management's position should be that no upward adjustment in pay should be made for intaglio crafts and other prevailing rate employees in Fiscal Year 1997, given the prevailing rate and the public interest. Director Rolufs concurred with that recommendation. Director Rolufs considered the factors presented by Mr. Ackerman and the team, and also that the Bureau was beginning to lose a postage stamp program, was experiencing a slow growth rate in the currency program and, in an effort to reduce costs, had effected a 5% budget cut, reduced contract budgets by 10%, formed a committee to control overtime, and held a buy-out for employees.

Meetings

On October 25, 1996, Robert Doering and other Bureau representatives met with Dan Bradley, President of the IPPDSEU and President of Local No. 2, and other Local No. 2 representatives in order to determine how to proceed in response to the FLRA's decision on negotiating pay. At the time of the meeting, two sets of pay proposals were on the table. One set was a carryover from Local No. 2's 1975 contract. The other was the set of proposals from the FLRA negotiability case.

Mr. Doering expressed the view that the Bureau wanted to negotiate the issue of pay and a system for determining the prevailing rate and public interest as part of term negotiations since contract negotiations were open and a memorandum of agreement (MOU) with Local No. 2 had been effective since 1991. Local No. 2 representatives indicated that they did not want to negotiate pay within the confines of term negotiations. They said there was a pending FLRA case and pay would go on the back burner for purposes of contract negotiations. Local No. 2 representatives did bring up, and the participants discussed, a potential two track system in which the parties would negotiate over pay and, within term negotiations, a contract provision that would go in the contract. Local No. 2 representatives indicated, however, that they could not decide on how they wanted to proceed until they knew what the Bureau was going to do about the raise for 1997.

In November 1996, Union representatives asked Director Rolufs to put in writing his position with regard to the negotiability of pay and whether there would be a pay increase for 1997. Director Rolufs responded that he could not do so until the Treasury Department delegated authority to him.

Delegation of Authority and Notice to the Unions

A Department of the Treasury memorandum dated December 4, 1996 notified Director Rolufs that he had been delegated "the authority to set and administer pay for those prevailing rate employees of the Bureau of Engraving and Printing whose wages are established in accordance with the provisions of 5 U.S.C. 5349" and that the "current Departmental policy document on this subject will be eliminated."

By memorandum dated December 9, 1996, subject "Policy Determination on Wages for Fiscal Year 1997," Director Rolufs advised the affected Unions as follows:

> This states the policy determination for Fiscal Year (FY) 1997 with regard to Bureau of Engraving and
> Printing employees whose wages are set under 5 U.S.C. Section 5349(a). It is the Bureau's position that an upward adjustment in wages for FY 1997 is neither consistent with the public interest nor in accordance with the prevailing rate. Wage rates now in effect for BEP prevailing rate positions - at both the Washington, D.C., and Fort Worth, Texas, facilities, are consistently

higher than the pay of comparable jobs in the respective geographical areas.

The Bureau acknowledges its obligation, pursuant to the decision of the United States Court of Appeals for the D.C. Circuit in BEP v. FLRA, D.C. Circuit No. 95-1499, May 23, 1996, Rehearing denied, July 16, 1996, to negotiate with employees whose wages are fixed pursuant to Section 5349(a).

By letter to Director Rolufs dated December 11, 1996, Daniel Bradley, President of the International and Local No. 2 and Chairman of the Council of Unions at the Respondent, stated, among other things, that "it had become an established condition of employment at the Bureau for prevailing wage employees to receive the same general and locality pay increases as have been afforded to GS-employees," and that the Bureau had "unilaterally repudiated this longstanding commitment to assure pay equity." Mr. Bradley requested that Mr. Rolufs "rescind your December 9th memorandum and . . . take immediate and effective action to make partnership a viable and living concept at the Bureau."6

Following Mr. Bradley's letter, Director Rolufs instructed Mr. Doering to meet with Mr. Bradley. Bradley and Doering met on December 20, 1996. Mr. Doering said he wanted to discuss how the Bureau wished to proceed to negotiate an agreement over pay within term negotiations. They agreed that the ensuing discussion of specific proposals that the Bureau would make was off-the-record. At the end of the conversa-tion, Mr. Doering asked Mr. Bradley to give it some thought and get back to him. Mr. Bradley repled to the effect that he "was not interested in proceeding that way," apparently referring to Local No. 2's earlier comment of not wanting to negotiate pay within the confines of term negotiations.

Mr. Bradley testified that the employees were entitled to the raise and, if given it, the parties could have gone to the bargaining table in good faith to negotiate a contract. "As it turned out," according to Mr. Bradley, "the Unions [were] being dragged to the table, possibly having to beg for the three percent." (Tr. 31).

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Mr. Bradley testified that he was authorized by Local No. 24 and Local No. 32 to write on their behalf concerning this issue. He acknowledged that each Local has its own officials recognized by management, and he has never negotiated on any topic on behalf of Local No. 24 or Local No. 32.

On December 23, 1996, the Respondent closed for its usual calendar year shutdown of nine to twelve days, and the Charging Parties filed the instant unfair labor practice charge. During this period, Local No. 2, Local No. 24, and Local No. 32 did not request to bargain concerning the 1997 pay adjustment, and the Respondent did not reply to Mr. Bradley's December 11, 1996 request to rescind the December 9, 1996 memorandum.

By letter dated January 9, 1997, Director Rolufs replied to Mr. Bradley's December 11, 1996 letter. Mr. Rolufs stated, in part, that

> the Bureau specifically acknowledged in the notice of December 9, 1996, the Bureau's duty to negotiate with regard to this matter. Thus, the Bureau continues, as it did under the previous interpre-tation of section 5349(a), to consider the public interest and applicable prevailing rates in ascertaining appropriate pay rates for its employees. Yet, we depart from the previous system in our recognition that pay-setting is now a matter requiring collective bargaining.

The unit employees represented by the Charging Parties have received no upward adjustment in their wage rates for 1997 to date. Consequently, they also have received no increase in related matters, such as contributions to thrift retirement accounts, or the calculation of retirement benefits. In 1997, the rates of pay for General Schedule employees in the Dallas-Fort Worth, Texas locality area were increased by 2.46%. In 1997, the rates of pay for General Schedule employees in the Baltimore-Washington, D.C.-MD-VA-WV locality area were increased by 3.33%.

Discussion and Conclusions

Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to refuse to bargain in good faith with an exclusive representative of its employees. As a result, an agency must provide the exclusive representative with notice of proposed changes in conditions of employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable.

In order to conclude that the Respondent violated the Statute, it must be found that the Respondent's action constituted a change in conditions of employment. *U.S.*

Immigration and Naturalization Service, Houston District, Houston, Texas, 50 FLRA 140, 143 (1995). The determination of whether a change in conditions of employment occurred involves an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. *U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. and Michigan Airway Facilities Sector, Belleville, Michigan*, 44 FLRA 482, 493 n.3 (1992).

It is undisputed that the pay for the unit employees in this case is not specifically provided for by Federal statute and, therefore, constitutes a negotiable condition of employ-ment under section 7103(a)(14) of the Statute. *IAMAW and Treasury II* and *BEP v. FLRA II*.

The complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by deciding on or about December 9, 1996 "not to grant an upward adjustment in wages of Prevailing Rate employees equal to the percentage of cost of living adjustments of General Schedule employees for fiscal year 1997" and implementing "the change . . . without negotiating with Local No. 2, Local No. 24, and Local No. 32 to the extent required by the [Statute]."

The record reflects that the December 9, 1996 "Policy Determination" of the Respondent, actually notifying the unions of "the Bureau's position that an upward adjustment in wages for FY 1997 is neither consistent with the public interest nor in accordance with the prevailing rate," was a "change." It was a "change" in the sense that, from 1991 through 1996, unit employees whose wages were set under 5 U.S.C. Section 5349(a) had received notice of an upward adjustment in the exact amount as received by General Schedule employees but, for Fiscal Year 1997, were being notified of the Bureau's position that no upward adjustment was justified and that the Bureau acknowledged its obligation to negotiate such a wage determination. There was, however, no change with respect to the manner in which the Respondent determined whether and how to adjust the pay.

Past Practice

The General Counsel and the Charging Parties contend that by failing to grant the unit employees an upward adjustment in their wage rates for 1997 in an amount equal to the percentage wage increase afforded General Schedule employees, the Respondent unilaterally terminated a past practice concerning a negotiable condition of employment in violation of section 7116(a)(1) and (5) of the Statute.

"Authority precedent has established that in order for a condition of employment to be established through past practice, that practice must be consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899, 908 (1990)(*DOL*). Further, "the parameters of, or limitations on, the conditions of employment must be understood by both parties." *DOL* at 909.

Applying the *DOL* standard here, I conclude that an upward adjustment in wage rates in an amount equal to the percentage wage increase afforded General Schedule employees was not a past practice, but that the Respondent did afford the Charging Parties an opportunity to bargain over the Respondent's position not to grant such an increase in Fiscal Year 1997.

Although unit employees received an upward adjustment in their wage rates each year from 1991 through 1996 in the exact amount of the percentage adjustment in the wage rates of General Schedule employees, the record does not establish that the same upward adjustment would continue regardless of other factors. If this was the understanding of the Unions involved here, "the parameters of, or limitations on, the conditions of employment," as required for a past practice under *DOL*, was not one shared by both parties.

The record establishes that, as required by 5 U.S.C. § 5349(a), the Respondent had to apply the prevailing rate as well as the public interest tests in making its pay rate recommendations each year. Although a consideration of these factors resulted in a pay raise for the years 1991 through 1996, it was the position of the Respondent that a consideration of these same factors did not justify a pay raise in 1997. The Respondent's witnesses testified that they consistently used the two-factor formula, the public interest and prevailing wages, in reaching their recommendations from 1991 to 1996 and in reaching their negotiating position for 1997. I credit their testimony which is supported by many of the Respondent's exhibits for the pertinent period which discuss both factors. (See footnote 5).

The General Counsel contends that the Respondent failed to produce working papers to show evidence of calculations or comparisons of wage rates and an independent annual wage recommendation. The General Counsel has the burden of proof in this case, and the record reflects that the Respondent provided all subpoenaed documents. (Tr. 126). A presumption of validity attaches to agency action, and the

burden of proving that the action is invalid rests with the party challenging the action. *Colorado Health Care Association v. Colorado Department of Social Services*, 842 F.2d 1158, 1164 (10th Cir. 1988). *See also American Federation of Government Employees v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989) (a presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties).

The finding of a past practice is also undercut by the Respondent's actual responsibility for pay increases during the pertinent period and the Charging Parties reaction to the August 16, 1990 memorandum which they claim established the "tandem pay relationship." From 1991 to 1996, the Respondent could only make recommendations to the Department of the Treasury which had the pay-setting authority. It was not until late 1996 that the Respondent received delegated authority to make such determinations. Further, when the Respondent advised the Charging Parties on August 16, 1990 that it had "requested that the Department approve or adopt the limit set on General Schedule wage increases (pay caps) in granting annual pay adjustments," Dan Bradley, President of the IPPDSEU and President of Local No. 2, testified that his understanding of this memorandum was that the Charging Parties were then aligned with the General Schedule wage scale. (Tr. 24). Yet, the Charging Parties, and others, challenged this memorandum by filing a unfair labor practice charge alleging that the memorandum "vitiates the statutorily permissible tandem pay relationships that have long applied." Thus, the Charging Parties did not accept without challenge what they deem to be the birth of the past practice.

Opportunity to Bargain

Contrary to the position of the General Counsel and the Charging Parties, the plain language of the December 9, 1996 "Policy Determination" reveals that it was not "a final decision on wage adjustments for unit employees in 1997." The December 9, 1996 memorandum specifically stated that "the policy determination" was "the Bureau's position." Thus, the Charging Parties were provided with adequate notice of the proposed change -- no upward adjustment in wages for Fiscal Year 1997. *See U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997) ("the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change").

The Charging Parties were also provided a reasonable opportunity to request bargaining. The Respondent unequivocally acknowledged "its obligation, pursuant to the decision of the United States Court of Appeals . . . to negotiate with employees whose wages are fixed pursuant to Section 5349(a)." No Charging Party submitted a responsive request to bargain between the time of the December 9, 1996 memorandum and the January 1997 implementation. Mr. Bradley's letter of December 11, 1996 requested Director Rolufs to "rescind your December 9th memorandum," but did not request to bargain. As noted, the December 9th memorandum merely set forth the Respondent's position on the wage increase and an acknowledgment of its obligation to bargain. During Mr. Bradley's meeting, on behalf of Local No. 2, with Director Rolufs on December 20, 1996, to discuss how the Bureau wished to proceed to negotiate an agreement over pay within term negotiations, Mr. Bradley responded that he "was not interested in proceeding that way." Mr. Bradley did not choose to reiterate or clarify his position concerning Local No. 2's previous proposals and how they related to the 1997 notice or offer other options for bargaining on 1997 pay or the ground rules for such negotiations.[7]

The Authority has long held that once adequate notice is given, the union must act to submit proposals, request additional information, or request additional time, and that failure to take such action may result in a finding that the union has waived its bargaining rights. *Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536 (1996).

The fact that the Respondent was closed from December 23, 1996 until January 2, 1997, and the proposal was to be effective in January 1997, did not excuse the Charging Parties from taking appropriate action. The Charging Parties could have requested to meet over the shutdown or to hold bargaining in abeyance until after the holidays. Any

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[7] The Charging Parties' additional argument, that the Respondent violated the Statute by failing and refusing to bargain in good faith over the longstanding pay bargaining proposals made by the Charging Parties, was neither alleged in the complaint nor fully and fairly litigated. The record does not show that all parties understood (or reasonably should have understood) that this broad issue, allegedly extending over a six year period, was in dispute and had an opportunity to present relevant evidence. *See United States Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana*, 53 FLRA 789, 795-96 (1997) (due process considerations).

final agreement on pay could have been made retroactive to January 1997, as were the pay raises for 1995 and 1996. The 1995 and 1996 raises were not finalized by the Department of the Treasury until April and February, respectively. The pay raises for 1991 through 1994 also came after the first third of the year.

Based on the above findings and conclusions, it is concluded that the Respondent did not violate section 7116 (a)(1) and (5) of the Statute, as alleged. The Respondent did not change its practice in determining pay and afforded the Charging Parties the opportunity to bargain on its position that an upward adjustment in wages for FY 1997 was "neither consistent with the public interest nor in accordance with the prevailing rate."[8] It is recommended that the Authority issue the following Order:

ORDER

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[8] The Respondent also defended on the ground that "if the Agency's actions are deemed to constitute a change in an established policy, the bargaining agreements between the Agency and Local No. 2 and Local No. 24 . . . contain provisions which specifically allow the action the Agency took." It is not necessary to address this defense. *See U.S. Immigration and Naturalization Service, Houston District, Houston, Texas*, 50 FLRA 140, 144 (1995) (as the respondent did not change conditions of employment, the Authority found it unnecessary to address other arguments based on provisions of the parties' agreement or alleged *de minimis* impact). If it were deemed necessary to decide this issue, however, I would conclude that the agreements did not preclude Local No. 2 and Local No. 24 from bargaining on the 1997 determination, and, as found herein, they were provided the opportunity to do so. Paragraph 8 of the 1991 memorandum of understanding (Appendix A, 1991 Memorandum of Understanding, par. 8) expressly preserved Local No. 2's rights regarding "pay bargaining or any other matters" then pending before the Authority. With respect to the 1978 agreement between the Respondent and Local No. 24, there is no contract provision which expressly covers the subject of pay, and the subject of pay is not mentioned in any other provision of the contract. Article 3, Section 4, (Appendix B) relied on by the Respondent, which gives the Respondent "the unilateral right to change any condition deemed detrimental to the Bureau's operations," reasonably should not have been contemplated by the parties to foreclose further bargaining concerning pay. *IAMAW and Treasury II* and *BEP v. FLRA II.*

The complaint is dismissed.

Issued, Washington, DC, December 23, 1997

GARVIN LEE OLIVER
Administrative Law Judge

APPENDIX A

EXCERPTS FROM THE LABOR-MANAGEMENT AGREEMENT BETWEEN THE BUREAU OF ENGRAVING AND PRINTING, DEPARTMENT OF THE TREASURY, AND WASHINGTON PLATE PRINTERS UNION, LOCAL NO. 2, INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS UNION OF NORTH AMERICA, AFL-CIO, APPROVED JUNE 20, 1975, AND A MEMORANDUM OF UNDERSTANDING DATED JULY 30, 1991

1. The June 20, 1975 Agreement

ARTICLE IX
PAY

SECTION 1. Once, during each twelve month period of this Agreement the Union may propose in writing changes or modifications to the Employer's pay system applicable to Unit employees. Within 10 days after receipt of the Union's proposed changes the Employer will meet with the Union for the purpose of seeking clarification and explanation. Within thirty days of receipt of the Union's proposals the Employer and the Union will meet to consult on the Union's proposals and will then have thirty days in which to attempt to reach agreement on any changes.

SECTION 2. In the event that no agreement is reached as a result of Section 1 above, then the Union may within 10 days of the date of discussions terminate under Section 1, request a meeting with the Director to consult on the unresolved issues. The Director or his representative shall meet with the Union within 10 days after receipt of a request for a meeting.

SECTION 3. Within 25 days after a meeting with the Union under Section 2 above, the Director or, if he is not available, his representative shall provide the Union with his written decision on the unresolved issues. The written decision shall provide specific responses to each issue including rationale.

SECTION 4. The Employer agrees to recommend to the Department of the Treasury, if necessary, the implementation of any agreement reached between the parties as a result of the consultative process outlined in this Article.

SECTION 5. Only a violation of the procedure established in this Article is subject to the grievance and arbitration provisions of the Agreement. In all other matters related to the contents of this Article the Director's decision is final and binding and is not grievable, arbitrable, or appealable.

SECTION 6. The term "days" as used in this Article means calendar days. The term "consult" as used in this Article means to meet and discuss in good faith, exchange ideas and proposals and attempt to reach agreement; however, consult shall in no way be interpreted to impose on the Employer any obligation to negotiate.

2. The July 30, 1991 Memorandum of Understanding

3. STATUS OF CONTRACT ENTERED INTO ON JUNE 20, 1975 BETWEEN THE BUREAU AND THE UNION

Except to the extent otherwise expressly provided in writing, all articles of the 1975 agreement, not in conflict with existing or future laws and regulations of appropriate authorities and the Statute, shall remain in full force and effect until the completion of negotiations. Negotiations for this purpose include but are not limited to the pendency of impasses resolution procedures or any proceeding in which negotiability matters are adjudicated.

These groundrules (together with the provisions of the aforementioned contract) shall additionally remain in force during any subsequent period of renegotiation, whether initiated as a result of a ruling of the Federal Labor Relations Authority (FLRA) or court of appeals with regard to negotia-bility matters or for any other reason required or permitted by law.

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8. SPECIAL MATTERS

Every effort shall be made by the parties to expedite these negotiations. To the extent that

matters are within their exclusive control, the parties agree to conduct and to conclude negotiations on or before April 15, 1992.

In order to focus and expedite negotiations, the parties agree to begin bargaining based on provisions contained in the "1988 agreement" (which has never taken effect) to which neither party has raised a negotiability objection. This agenda is not intended to foreclose either party from making initially or subsequently any additional or substitute proposal(s) or counter-proposal(s) without regard to the matters set forth above.

The parties further agree to discuss thoroughly during negotiations and, if at all possible, to include gainsharing provisions in the successor collective bargaining agreement. They do so without prejudice to the maintenance, if the parties so desire, of the existing system of providing performance awards or other forms of incentive pay.

The provisions set forth in this paragraph do not in any manner constitute the waiver by either party of any position previously taken with regard to pay bargaining or any other matters currently pending before the FLRA.

APPENDIX B

EXCERPTS FROM THE AGREEMENT BETWEEN THE BUREAU OF ENGRAVING AND PRINTING, DEPARTMENT OF THE TREASURY, AND THE ELECTROLYTIC PLATE MAKERS OF WASHINGTON, LOCAL NO. 24, INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS UNION OF NORTH AMERICA, AFL-CIO, APPROVED JULY 27, 1978

ARTICLE 3

RIGHTS OF EMPLOYER

SECTION 4. Any previous past practices which violate law, regulation, Bureau policy, and this Agreement are null and void. Prior to changing past practices which prevent the Employer from conducting its operations in an efficient manner, the Employer will afford the Union the opportunity to negotiate the Impact and Implementation of the change. The Employer reserves the unilateral right to change any condition deemed detrimental to the Bureau's operation. No such change will be made without proper notice. Prior work benefits, practices and understandings which are presently mutually acceptable to the Employer and the Union but which are not specifically covered by this Agreement shall remain in force and effect during the term of this Agreement, unless otherwise mutually agreed to by the parties. The Employer reserves the right, however, to change any condition deemed detrimental to the Bureau's operation.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-70157, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Ms. Suzanne Wilson
Respondent Representative
Department of the Treasury
Bureau of Engraving & Printing
Office of Legal Counsel
14th & C Streets, SW - Main Bldg.
Washington, DC 20228
P 600 696 200

Mr. William G. Colbert
Respondent Representative
2755 St. Elliott Court
Alexandria, VA 22306
P 600 696 201

Mr. Lawrence J. Sherman
Attorney for the Charging Parties
Law Office of Lawrence J. Sherman
1828 L Street, NW, Suite 720
Washington, DC 20036
P 600 696 202

Ms. Michelle Ledina
Counsel for the General Counsel
Federal Labor Relations Authority
1255 22nd Street, Suite 400
Washington, DC 20037-1206
P 600 696 203

REGULAR MAIL:

Daniel Bradley, President
International Plate Printers
Die Stampers and Engravers of
North America
Bureau of Engraving & Printing
14th & C Streets, SW - Main Bldg.

Washington, DC 20228

Dated: December 23, 1997
Washington, DC