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OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

WASHINGTON, D.C.

Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, COUNCIL OF GSA LOCALS — Case No. WA-CA-70126

Charging Party

Sharon J. Pomeranz, Esquire — For the Respondent
Christopher M. Feldenzer, Esquire — For the General Counsel
Before: WILLIAM B. DEVANEY — Administrative Law Judge

DECISION

Statement of the Case

This proceeding, 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. [(1)], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent implemented Voluntary Separation Incentive Payments (Buyouts) without bargaining as required by the Statute. Respondent contends: (a) there was no obligation to bargain before extending the buyout opportunity because the law under which the buyouts were offered dictated to whom it could be offered and its terms; (b) the issuance of the November 4, 1996, offer did not change any working condition; and (c) notwithstanding that it had no duty to bargain over the buyout offer, Respondent bargained in good faith.

A Consolidated Complaint issued in Case Nos. WA-CA-70087, in which the Charging Party was American Federation of Government Employees, Council 236, AFL-CIO, and WA-CA-70126. Prior to hearing, Case No. WA-CA-70087 settled. Although the hearing concerned only WA-CA-70126, some exhibits may, e.g. the Complaint (G.C. Exh. 1(b)), refer to WA-CA-70087 and/or AFGE, Council 236, and there are references in the testimony to AFGE (i.e. Tr. 37), all such references to AFGE and/or Council 236 have been excluded from consideration herein.

This case was initiated by a charge filed on December 9, 1996, which alleged violations of §§ 16(a)(1), (2), (5) and (8) of the Statute (G.C. Exh. 1(a)). The Consolidated Complaint issued June 30, 1997 (G.C. Exh. 1(b)); alleged violation of §§ 16(a)(1) and (5) only; and set the hearing for September 22, 1997, pursuant to which a hearing was duly held on September 22, 1997, in Washington, D.C., before the undersigned. At the conclusion of the hearing, October 22, 1997, was fixed as the date for the mailing post-hearing briefs and each party timely mailed an excellent brief, received on, or before, October 27, 1997, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The National Federation of Federal Employees, (hereinafter, "NFFE") is the exclusive representative of a nationwide consolidated unit of certain employees of General Services Administration (hereinafter, "Respondent") and the Council of GSA Locals (hereinafter, "Union") is the agent of NFFE for purposes of representing unit employees.

2. On Thursday, October 31, 1996, Respondent delivered to Mr. William English, President of the Union, a letter which informed him that Public Law 104-208, enacted September 30, 1996, authorized the granting of Voluntary Separation Incentives (buyouts) and, "Enclosed . . . a draft memorandum for employees concerning a limited opportunity for interested employees to apply for a Voluntary Separation Incentive Payment (buyout). A separation incentive payment of up to $25,000 will be offered. . . ." (G.C. Exh. 3; Tr. 15, 37, 39). As stated, a draft memorandum, from Acting Administrator David J. Barram, to be sent to all employees was attached.

The draft memorandum stated that employees must be a minimum of 50 years of age with 20 years of service or have 25 years of service regardless of age to qualify for early retirement; and that employees who elect early retirement may be subject to a reduction in their annuity.

The draft memorandum emphasized that employees who wanted to be considered for a buyout must submit a signed Declaration of Intent on, or before, November 15, 1996 (a sample "Declaration" was attached); and the employee must be separated from service, voluntarily, not later than January 3, 1997. The draft memorandum also set out the eligibility requirements, all of which were required by P.L. 104-208 except No. 2, "2. Occupy a position included on Attachment 1 of this notice. Only under extraordinary circumstances will I authorize an exception to this list." (G.C. Exh. 3, Attachment).

The draft memorandum explained the process involved. First, the employees must submit their requests to be considered for a buyout (Declaration of Intent) not later than November 15, 1996. Second, Respondent must decide whether it can dispense with the services of each applicant. Third, Respondent, on the basis of approved buyouts, must prepare and submit to the Office of Management and Budget (OMB), and to Congress, a strategic plan on the positions and functions affected by the buyouts. Fourth, each employee will be notified on, or before, December 20, 1996, if his, or her, request has been approved. Disapproved buyouts requests are not subject to appeal. Fifth, at the time of notification by Respondent of approval of a request, the employee must sign a Voluntary Separation agreement with an effective date no later than January 3, 1997. Sixth, employees were warned that if a buyout was accepted, if he, or she is employed by the Federal Government, or works for the Federal Government under a personal services contract, within 5 years after the date of separation, he, or she, will be required to repay, before the first day of employment, the entire amount of the bonus.

Finally, Attachment 1 listed the organizations excluded from the buyout offer; listed each included service and exclusions, if any, in each. It also was noted that, "Although all Staff Office employees nationwide may file . . . it is highly unlikely that employees in Regions 1, 5, 6, or 10 (except for Heartland Region Finance Division employees) will be approved for buyouts because those organizations are already at or below their staffing goals. (G.C. Exh. 3, Attachment 1).

3. P.L. 104-208, 110 STAT. 3009-383, et seq., as noted above, was enacted September 30, 1996, was effective October 1, 1996, and authorized buyouts during the period October 1, 1996, through December 31, 1997. Section 663(c) of the Act provided, in part, as follows:

"(c) AUTHORITY TO PROVIDE VOLUNTARY SEPARATION INCENTIVE

PAYMENTS.--

"(1) IN GENERAL. -- A voluntary separation incentive payment under this section may be paid by an agency to any employee only to the extent necessary to eliminate the positions and functions identified by the strategic plan.

"(2) AMOUNT AND TREATMENT OF PAYMENTS. -- A voluntary separation incentive payment--

. . .

"(B) shall be paid from appropriations or funds available for the payment of the basic pay of the employees; (Emphasis supplied) . . . ." (P.L. 104-208, 110 STAT. 3009-384).

4. On October 24, 1996, OMB issued guidance (Tr. 36; OMB Bulletin No. 97-02 (October 24, 1996)) and Respondent followed OMB's lead in preparing its draft plan on October 31, 1996 (Tr. 36-37, 39).

5. On Monday, November 4, 1996, without notice to, or consultation with, the Union, Respondent's Acting Administrator, Mr. Barram, issued a memorandum to all employee re: Voluntary Separation Incentive (G.C. Exh. 4). The issued memorandum was substantially like the draft memorandum (G.C. Exh. 3, Attachment), except that the following new paragraph was added:

"Guidelines for implementing the September 30, 1996, law were issued by the Office of Management and Budget (OMB) on October 24. In order to take advantage of this authority in the first quarter of Fiscal Year 1997, GSA must proceed with its plan immediately. GSA's proposed plan was provided to the national unions on Thursday, October 31, 1996, and we have not yet reached an agreement on implementation of the proposed plan with respect to bargaining unit employees. Accordingly, implementation of this buyout opportunity for bargaining unit employees is contingent upon completion of labor relations

obligations." (G.C. Exh. 4)

6. Mr. Edward P. Denney, Respondent's Director of its Labor Relations Division (Tr. 29), testified credibly, and wholly without contradiction, concerning the reason that buyouts, if they were to be offered in fiscal year 1997, had to be completed by the end of the first quarter of F.Y. 1997, as follows:

> ". . . the legislation was effective October 1st. We got the guidance from OMB October 24, and in order to take advantage of the buyouts, the financial people have proclaimed generally that you have to accomplish it, get the employees who are going to take advantage of the buyout. (sic) [,] Off the rolls, by the end of the first quarter of the fiscal year in order to make this financially viable, I think that allows the Agency to save a salary that the employee would make the remainder of the fiscal year, and that savings of salary enables the Agency to pay actual, the buyout amount, $25,000.
>
> "So that's why it was imperative, if we were going to take advantage of this buyout at all, that we do it before December 31st of the year, and we were already toward the end of October, early November, so we had to move fast if we were going to do it at all. Otherwise, the window would close; we couldn't take advantage of it, and that would be it. It would be a lost opportunity." (Tr. 39-40).

7. With regard to the exceedingly tight time frame, Mr. Denney further testified, in part, as follows:

> ". . . between the time the Agency offered the buyout until the employees had to leave the rolls, there were a lot of requirements that we had to meet, and they were imposed by the legislation and by OMB.
>
> "First thing you do is go to the employee and find out what their interest is, how many employees would be at least interested in taking advantage of the buyout, and that was what we called getting the declarations of intent from employees.
>
> "After that, we get those declarations of intent, we had to prepare, I think they call it a strategic plan, which is again a new requirement of this new legislation.

"We prepared a strategic plan, which had to be, again, based upon the declarations of intent from the employees, that had to be submitted to OMB and to Congress, specifically I think, to the committees that have oversight responsibility over GSA.

"For review and approval, we had to hear back from them, or at least allow a sufficient amount of time without any adverse reactions from them before we could actually begin to implement the buyout, that is, having employees go off the rolls. . . ." (Tr. 40-41)

Before it could prepare its strategic plan, Respondent first had to determine whether each employee expressing interest in taking a buyout could be spared. Thus, Mr. Denney explained,

". . . management authority had to be exercised with respect to each and every one of these. In other words, each and every one is subject to management approval.

"We couldn't let, for example, a particular employee go if that person had absolutely unique skills that the Agency had to rely upon, or other situations where we just couldn't approve certain buyouts.

"We tried to approve as many as possible, but again, each one had to be reviewed, and a determination had to be made as to whether or not that individual employee could be permitted to take a buyout." (Tr. 45)

8. Mr. English, for the Union, transmitted on November 6, 1996, an undated letter addressed to Mr. Denney which was received by Mr. Denney on November 7, 1996 (G.C. Exh. 5; Tr. 19), which: (a) requested negotiations over the buyout program; (b) submitted proposed Ground Rules which, inter alia, proposed negotiation on November 14 and 15, 1996; (c) requested information; and (d) submitted eight bargaining proposals[2] (G.C. Exh. 5).

9. Mr. Denney said he was sure that he had discussions with Mr. English but, ". . . I don't recollect specific conversations, or specific dates of conversations . . . I recollect from my conversations with Bill that he was concerned about the general trend of downsizing GSA . . . ." (Tr. 48).

On November 8, 1996, Mr. Denney responded to Mr. English's undated

letter, which he received on November 7, 1996, as follows:

"This is in response to your letter of November 7, 1996, concerning the Voluntary Separation Incentive Program (Buyout).

"In an effort to respond to Items 1, 2 and 3 of your information request, enclosed is a listing of unit employees who are scheduled to leave the agency in connection with the present buyout (i.e., the buyout in which employees have previously signed separation agreements and are scheduled to leave the rolls no later than March 31, 1997).

"In Items 3 and 4 of your information request you are seeking information concerning action taken on management requests for approval to fill vacant positions. Because such requests may have been acted on at various levels of management and at various locations, this information does not appear to be reasonably available.

"In response to Item 5 of your information request, in which you request the specific reasons that employees must voluntarily separate from the agency no later than January 3, 1997, the following information is provided. The buyouts will be an unbudgeted expense for the agency. That is, no additional funds were approved by Congress for the cost of the buyouts. Therefore, the buyouts must be self-financing, i.e., paid for by salary savings from departing personnel. Costs funded by the salary lapse include the voluntary separation incentive payments, 15% of annual salary as required by the legislation, and payment of terminal annual leave balances. Calculations based on the anti-cipated average annual salary range of departing personnel require departure by January 3 in order to fund requirements from within existing funds. This also applies to revolving funds, whose customers have already budgeted annual reimbursements, based on rates developed from annual operating plans. It should also be noted that employee considerations were taken into account in setting the buyout date, in that January 3 allows deferral of income into the 1977 tax year.

"In your proposals, you request that we provide a "strategic Long Term Plan (thru 1998)." In response, we are enclosing three reports which provide FTE numbers by program area and region. These reports were provided by the Office of the Chief Financial Officer. Some of the information is considered to be quite sensitive, and is being provided to you in a spirit of labor-management partnership. Specifically, the FY 1998 figures are as reflected in the OMB Budget and may not under any circumstances be released outside the agency.

"We are offering this buyout opportunity to employees within extremely tight timeframes over which we have virtually no control. Immediately after November 15, the Declarations of Intent must be reviewed carefully, and management determinations must be made as to whether they may be accepted. Immediately thereafter the agency must prepare and submit a strategic plan to OMB and Congress on the positions and functions affected by the buyout and how the agency will operate without affected employees. We are required to allow

10 working days for the review of the strategic plan. After that, we must have sufficient time to notify employees as to whether their Declarations have been accepted and have employees sign separation agreements.

. . .

"Please call me . . . so that we may continue our discussions of this matter. It is our sincere hope that we can resolve any differences that may exist and permit bargaining unit employees to take advantage of this buyout opportunity." (G.C. Exh. 10; Tr. 20, 48, 51).

10. On November 14, 1996, Mr. Denney responded further to Mr. English as follows:

"This is in further response to your letter of November 7, 1996, concerning the Voluntary Separation Incentive Payment (Buyout).

"We do not agree to your groundrules proposals. Specifically with regard to your proposal that negotiations take place in Washington, DC, we believe that we can resolve any differences on this matter through a continued dialog using telephone and facsimile. We also do not agree to your substantive proposals that were included with your letter of November 7.

"It is still our hope that we can resolve our differences on this matter in order that bargaining unit employees can take advantage of this buyout opportunity." (G.C. Exh. 6; Tr. 21; Tr. 51, 52; 53).

11. On November 15, 1996, the Acting Administrator, Mr. Barram, notified all employees that the period for filing a "Declaration of Intent" was extended to the close of business on November 20, 1996 [from November 15](G.C. Exh. 8). Mr. Denney, also on November 15, 1996, advised Mr. English that the time to file Declarations of Intent had been extended to November 20, 1996, and enclosed a copy of Mr. Barram's November 15, 1996, memorandum to all employees (G.C. Exh. 7).

12. Mr. English never responded to Mr. Denney's November 14, 1996, letter (Tr. 53); nor does the record show that he made any response to Mr. Denney's November 8, 1996, letter.

13. Mr. English stated that about sixteen bargaining unit employees, nationwide, exercised this buyout opportunity (Tr. 25-26).

CONCLUSIONS

Unfunded buyouts[3] which, like those authorized by P.L. 104-208, "(B) shall be paid from appropriations or funds available for the payment of the basic pay of the employees;" (P.L. 104-208, Sec. 663(c)(2)(B), 110 STAT. 3009-384), may impose time constraints which mandate expedited negotiations rather than the slow, ponderous and, at times even lackadaisical, approach to negotiations which too often characterize negotiations in the federal sector where a sense of urgency seldom is found. Nevertheless, the agency's duty under the Statute, to give the Union notice and opportunity to negotiate and to bargain in good faith, is not changed one iota.

1. A Duty to Bargain Existed

Respondent asserts that, ". . . no duty to bargain existed . . . the buyout memorandum did not affect the working conditions of bargaining unit employees . . . the specific terms and conditions of the agency's buyout program were not negotiable. . . the buyout authority was structured in such a way that it gave Respondent virtually no leverage in the terms of its program . . . the terms of the buyout authority dictated the timeframes of the agency's buyout program. . . ." (Respondent's Brief, pp. 1-2). I do not agree.

(a) Buyouts changed condition of employment.

The Statute defines, "conditions of employment" as,

> ". . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." (5 U.S.C. § 7103(a)(14))

Two basic factors govern: "(1) Whether the matter . . . pertains to bargaining unit employees; and (2) The nature and extent of the effect of the matter . . . on working conditions of those employees." Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-237 (1986) (emphasis in original), (hereinafter, "Antilles"). The Authority in Antilles further explained,

> "As to the second factor . . . the question is whether . . . there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. . . ." (22 FLRA at 237).

When a Union seeks a benefit it does not have, there may be no direct connection to the work situation or employment relationship, e.g.,

hunting and fishing privileges, International Association of Fire Fighters, AFL-CIO, CLC, Local, F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981); exchange privileges, Antilles, supra, whereas a direct connection to the employment relationship exists as to the same, or similar benefit, which the employees have and which management seeks to change or terminate, e.g., revision of ration control policy, National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980); termination of exchange privileges, Department of Defense, Department of the Army, Fort Buchanan, San Juan, Puerto Rico, 24 FLRA 971 (1986) (I had found that Exchange privileges were, under the circumstances, a condition of employment, id. at 987, et seq. The Authority reversed), rev'd, sub nom., American Federation of Government Employees, Local 2761, AFL-CIO v. FLRA, 866 F.2d 1443 (D.C. Cir. 1989), adopted, 37 FLRA 919 (1990); American Federation of Government Employees, Local 1786 and U.S. Department of the Navy, Marine Corps Combat Development Command, Marine Corps Base, Quantico, Virginia, 49 FLRA 534 (1994).

Here, buyouts are to be offered to bargaining unit employees as inducements for their retirement. Obviously pertaining to bargaining unit employees, plainly there is a direct connection with the employment relationship, namely, inducement to terminate that employment relationship. It was an authorization by Congress and an option bargaining unit employees did not have absent Respondent's offer. Respondent, while asserting that buyouts would, ". . . not necessarily [be] a change, so to speak, in their working conditions" (Tr. 44), with alacrity conceded, that, ". . . we knew it would be of importance to the Union, of importance to the employees, . . . So we knew it would be of importance to employees . . . ." (Tr. 43). The direct relationship of buyouts to the employment relationship is shown by the Congressional authorization itself which requires the agency to submit a plan showing the positions and functions to be reduced or eliminated and a description of how the agency will operate without the eliminated positions and functions. (P.L. 104-208, Sec. 663(b)(2), 110 STAT. 3009-384).

Accordingly, buyouts had a significant effect on working conditions and, therefore, imposed a duty to bargain. Department of Veterans Affairs, Medical Center, St. Louis, Missouri, 50 FLRA 378 (1995) (award program); U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 792 (1990) (employees volunteered for cross-assignments; nevertheless cross-assignment was unilateral change of conditions of employment); Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844, 854 (1990) (issuance of specific RIF notices constituted change in conditions of employment even though the date of implementation was well in the future).

(b) Respondent had discretion

It long has been firmly established that,

> ". . . To the extent an agency has discretion with respect to a given matter . . . the agency must upon request negotiate with an exclusive representative over that matter. [footnote omitted] . . ." National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980); (Bureau of the Public Debt), aff'd, 691 F.2d 553 (D.C. Cir. 1982).

> ". . . the duty of an agency under the Statute is to negotiate with an exclusive representative . . . concerning conditions of employment affecting them, except as provided otherwise by Federal law and regulation, including Government-wide regulation . . . to the extent of their discretion . . . ." Harry Diamond Laboratories and Department of the Army and Department of Defense, 15 FLRA 216, 217 (1984)(4).

See, also, American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 et al., (Library of Congress), 7 FLRA 578 (1982) (even if "discretion" is only to recommend), enf'd sub nom., Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983); Department of Housing and Urban Development, 9 FLRA 136, 138 (1982); Boston District Recruiting Command, Boston, Massachusetts, et al., 15 FLRA 720, 722 (1984); National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco And Firearms, Washington, D.C., (Treasury, ATF), 43 FLRA 1442 (1992).

Respondent certainly is correct that the terms of buyouts are fixed by statute and that Respondent had little "leverage"; but Respondent was not without discretion and, whether its discretion was great or small, Respondent was obligated to bargain to the extent of its discretion. As Respondent conceded in its draft memorandum (G.C. Exh. 3, Attachment), which it submitted to the Union on October 31, 1996, the legislation authorizing buyouts extended through December, 1997, i.e., through the first quarter of Fiscal Year 1998, and, therefore, it had discretion as to when a buyout would be offered.(5) As further examples of its discretion: the date for soliciting employees interest; the date for employees to respond (Declaration of Intent), which Respondent first fixed as November 15, 1996, and later changed to November 20, 1996; the date for issuance of the notice (Draft memorandum G.C. Exh. 3, Attachment) to employees, etc. Because there were areas of discretion, Respondent was obligated to bargain, to the extent required by the Statute, to the extent of its discretion.

(c) Respondent bargained in bad faith

On October 31, 1996, Respondent delivered to the Washington, D.C. office

of Mr. English, President of the Union, a letter which,

> "Enclosed, in accordance with Article 9, Section 3, of the NFFE National Agreement, is a draft memorandum for employees concerning a limited opportunity . . . to apply for . . . [a buyout]" G.C. Exh. 3.

The attached draft (G.C. Exh. 3, Attachment) was undated and nothing, either in Mr. Denny's covering letter or in the draft memorandum, indicated when Respondent intended to issue the "draft" memorandum. Certainly, Mr. Denny's concluding sentence, "If you have any questions . . . ." (G.C. Exh. 3), stated an intent to permit the Union to respond.

(i) Unilateral issuance of memorandum to All Employees on Monday, November 4, 1996.

Mr. English was in Denver, Colorado, on October 31, 1996, and was uncertain that he received Mr. Denney's letter and attached draft on October 31 (Tr. 16). Without notice and without affording the Union a reasonable opportunity to respond, Respondent on Monday, November 4, the second working day after its October 31, 1996, letter submitting a draft, unilaterally disseminated to all employees its memorandum (G.C. Exh. 4).

Because Respondent was faced with very short time constrains if, as it desired, buyouts were to be offered in fiscal year 1997, i.e., by December 31, 1996, Respondent could have insisted upon expedited bargaining procedures, rather than the procedures set forth in Article 9, Section 3 of the parties' national Agreement[6]. If Respondent had made clear that buyouts must be self-financing (which it did not do until November 8 (G.C. Exh. 10); if Respondent had fixed a date for reply, even November 4, 1996; and if Respondent had said that, because of the short time remaining, it intended to release the Memorandum to all employees, with a statement, like the last paragraph on page 1 of the memorandum which it issued (G.C. Exh. 4), which advised, in essence, that in order to make buyouts available in fiscal year 1997, it must proceed immediately, that it had submitted its proposed plan to the Union but agreement on implementation had not been reached and, accordingly, implementation of this buyout is contingent upon completion of negotiation, I, certainly, would have found no violation by Respondent. But Respondent did none of these things. Accordingly, I find that Respondent failed to bargain in good faith, failed to give any notice of its intention to issue the memorandum to all employees, unilaterally modified in a significant manner its draft memorandum and unilaterally issued the revised memorandum (G.C. Exh. 4) in violation of §§ 16(a)(5) and (1) of the Statute.

(ii) Unilateral change of plan on November 15, 1996

Mr. English on November 6, 1996, from Denver, Colorado, transmitted by facsimile mail to his office a letter to Mr. Denney which was hand delivered to Mr. Denney on November 7, 1996 (Tr. 19): (1) demanding to negotiate, ". . . over the new proposed voluntary separation incentive program . . . ." (G.C. Exh. 5) and, together therewith, (2) a proposed groundrule agreement; (3) a request for information; and (4) Union proposals (G.C. Exh. 5).

Notwithstanding the demand to bargain, Respondent on November 15, 1996, without notice and without any opportunity to negotiate, issued a letter to all employees that the time for filing a "Declaration of Intent", i.e., intention to accept a buyout, had been extended to November 20, 1996. The Union was notified only after the fact (G.C. Exh. 7). By its unilateral issuance of a notice to all employees changing a critical but discretionary part of its proposed plan, about which the Union had demanded to bargain, Respondent violated §§ 16(a)(5) and (1) of the Statute.

(iii) Respondent's refusal to bargain

As noted above, the Union submitted its demand to bargain on November 6, 1996 (not actually received by Mr. Denney until November 7, 1996). As also noted above, the Union demanded negotiations over the proposed buyout program and one of its proposals, in part, was:

> "6. . . . bargaining unit employees will have two weeks after an agreement is reached with NFFE, to submit a signed 'Declaration of Intent' . . . to their servicing Personnel Office. . . . At that time, employees will be asked to sign a voluntary separation agreement with an effective date no earlier than the date the 'Declaration of Intent' and no later than (to be determined)." (G.C. Exh. 5, Attachment).

In its request for information, the Union sought, inter alia, "5. The specific reason(s) that employees must voluntarily separate from the Agency no later than January 3, 1997." (G.C. Exh. 5, Attachment). Further, the Union stated that it needed the requested information, inter alia, "c. To develop impact and implementation proposals as appropriate." (id.).

By letter dated November 14, 1996, Mr. Denney rejected Mr. English's proposals as follows:

". . . We do not agree to your groundrules proposals. Specifically with regard to your proposal that negotiations take place in Washington, DC, we believe that we can resolve any differences on this matter through a continued dialog using telephone and facsimile[7]. We also do not agree to your substantive proposals that were included with your letter of November 7.

. . . ." (G.C. Exh. 6)

By its, "We also do not agree to your substantive proposals . . . ." (G.C. Exh. 6), Respondent refused to bargain about the buyout proposal. As Mr. Denney testified,

"A We really didn't think we had a bargaining obligation . . . We thought this was something that the Agency could do unilaterally, and not just because it was a benefit to the employees but because it was something that, it's part of the management of the Agency, we feel, certainly part of the legislative authority that we were given.

"But for lack of a better term, as a courtesy to the Unions, we wanted to let them know what we were doing rather than just hearing about this initiative. In the final analysis, we didn't think we had the obligation to bargain the buyout with the Unions." (Tr. 72-73).

For reasons set forth above, Respondent was obligated to bargain and its refusal to entertain the Union's demand to bargain on the program violated §§ 16(a)(5) and (1) of the Statute.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended hat the Authority adopt the following:

ORDER

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, the General Services Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Unilaterally communicating with bargaining unit employees concerning implementation of proposed changes in conditions of employment subject to negotiation under the Statute.

(b) Unilaterally changing conditions of employment of bargaining unit employees by offering Voluntary Separation Incentive Payments

(Buyouts) without affording the National Federation of Federal Employees, Council of GSA Locals (hereinafter, "NFFE"), the exclusive representative of certain of its employees, a reasonable opportunity to negotiate over the change.

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

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

(a) Notify NFFE of any intended Buyout opportunities and, upon request, negotiate in good faith over the change.

(b) Advise NFFE concerning notification of bargaining unit employees of proposed implementation of negotiable changes in conditions of employment and negotiate with NFFE to the extent required by the Statute before notifying bargaining unit employees.

(c) Post nationwide, wherever employees represented by NFFE 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1255 22nd Street, N.W., Suite 400, Washington, D.C. 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: April 9, 1998

Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the General Services Administration 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 notify the National Federation of Federal Employees, Council of GSA Locals (hereinafter, "NFFE"), the exclusive representative of certain of our employees, of any proposed notification of bargaining unit employees of implementation of negotiable changes in conditions of employment and negotiate with NFFE to the extent required by the Statute before notifying the bargaining unit employees.

WE WILL notify NFFE of any intended offer of Voluntary Separation Incentive Payments (Buyouts) and, upon request, we will negotiate to the extent required by law over the proposed change.

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

_____

(Agency)

Date:_____ 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 any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, 1255 22nd Street, N.W., Suite 400, Washington, D.C. 20037-1206, and whose telephone number is: (202) 653-8500.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. The Union's fourth proposal was:

"4. Depending on the circumstance, bargaining unit employees who have received proposed notice of involuntary separation for non-felony misconduct or unacceptable performance, will be allowed to accept the buyout . . . ."

Such proposal was contrary to law. Section 663(2)(C) specifically excluded:

"(C) an employee who is in receipt of a specific notice of involuntary separation for misconduct or unacceptable performance." (P.L. 104-208, 110 STAT. 3009-383, Sec. 633(2)(C)).

Further, it is contrary to OMB Bulletin No. 97-02, Attachment A, which in paragraph 1., Definitions, states,

". . . Further, the Act disallows buyout payments to . . .

. . .

". . . an employee in receipt of a specific notice of involuntary separation for misconduct or unacceptable performance;

. . . ."

3. Buyouts frequently are misunderstood. A buyout may not exceed $25,000; but not everyone will receive that amount. To the contrary, the amount to be paid (Sec. 663(c)(2)(C) of P.L. 104-208), is the least of: (a) the amount the employee would be entitled if involuntarily separated from service, pursuant to 5 U.S.C. § 5595(c) [1 week's basic pay for each year of service up to and including 10 years; 2 weeks' basic pay for service beyond 10 years; age adjustment of 10% the total basic severance for each year by which the age of the recipient exceeds 40 years at the time of separation]; (b) one year's basic pay; or (c) $25,000.00.

4. The Authority's holding, ". . . that questions concerning the existence of a compelling need for regulations issued at the agency or primary national subdivision level so

as to bar negotiations . . . may appropriately be decided in an unfair labor practice proceeding . . . ." (id., at 218) subsequently was reversed in another case, FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988) [Aberdeen Proving Ground Department of the Army, 21 FLRA 814 (1986), rev'd, No. 86-2577 (4th Cir. Jan. 28, 1997)].

5. The Act, P.L. 104-208, and OMB Bulletin No. 97-02 (Oct. 24, 1996) authorized buyouts for separations by retirement or resignation after October 1, 1996, and before December 31, 1997, but did not direct buyouts. The decision as to whether it would offer buyouts, and to whom buyouts would be offered, was Respondent's, under § 6(a)(1) of the Statute. The Act, P.L. 104-208, Sec. 663(c)(2)(B), 110 STAT. 3009-384, mandates that buyouts, "(B) shall be paid from appropriations or funds available for the payment of the basic pay of the employees." Accepting Respondent's assertion, and there was no evidence or testimony to the contrary, that in order to pay for the cost of buyouts, employees must be off the payroll, by the end of the first quarter of the fiscal year; and further accepting, as I believe is the case and as to which there is no denial, that the Union can not "veto" Respondent offering buyouts; nevertheless, Respondent had discretion as to whether buyouts would be offered in the first quarter of FY 97 (i.e., through December 31, 1996) or in the first quarter of FY 98 (i.e., through

December 31, 1997), and, because it had this discretion, it was obligated to bargain to the extent of its discretion.

6. This was implicit in the parking cases, such as Harry Diamond Laboratories and Department of the Army and Department of Defense, 15 FLRA 216 (1984); Boston District Recruiting Command, Boston, Massachusetts, et al., 15 FLRA 720 (1984); Defense Logistics Agency (Cameron Station, Virginia) et al., 12 FLRA 412 (1983), where government-wide Directives and Regulations fixed the date for the beginning (implementa-tion) of the program and there was only a very short period from the issuance of the authorizing Regulations and the pre-ordained date of implementation for bargaining before implementation of the program.

7. Mr. Denney's response must be viewed with a jaundiced eye in view of the fact that: (a) Mr. English's office is in the same building as Mr. Denney's (Tr. 39); (b) Mr. Denney said, "There's hardly a day that goes by that I don't meet with or talk to Bill English." (Tr. 65); (c) Mr. Denney couldn't, ". . . recollect specific conversations . . . ." (Tr. 48); (d) the only facsimile, other than Acting Director Barram's unilateral memorandum to all employees on November 15, 1996 (G.C. Exh. 8), shown on the record was Mr. English's November 6 letter with attachments (G.C. Exh. 5).