U.S. ARMY CORPS OF ENGINEERS MEMPHIS DISTRICT MEMPHIS, TENNESSEE Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 259 Charging Party	Case No. AT-CA-40698

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(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 30, 1995**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 26, 1995
Washington, DC

MEMORANDUM DATE: September 26, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. ARMY CORPS OF ENGINEERS
MEMPHIS DISTRICT
MEMPHIS, TENNESSEE

Respondent

and Case No. AT-CA-40698

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 259

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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. ARMY CORPS OF ENGINEERS MEMPHIS DISTRICT MEMPHIS, TENNESSEE Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 259 Charging Party	Case No. AT-CA-40698

Alvin C.W. Ellis, Esquire
For the Respondent

Sherrod G. Patterson, Esquire
For the General Counsel

Mr. Clark King
For the Charging Party

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 violated §§ 16(a)(5) and (1) of the Statute by its failure and refusal to bargain on its decision and/or the impact and implementation of its decision, not to "fill behind" the position of cook on the Motor Vessel Strong after its abolishment upon the

[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)".

retirement of the incumbent under the Voluntary Severance Incentive Program.

This case was initiated by a charge filed on June 6, 1994 (G.C. Exh. 1(a)), which alleged violation of §§ 16(a)(1), (2) and (5) of the Statute. The Complaint and Notice of Hearing issued on March 17, 1995 (G.C. Exh. 1(c)), alleged violation of §§ 16(a)(1) and (5) only, and set the hearing for May 24, 1995. By Order dated May 24, 1995 the hearing was rescheduled for July 19, 1995, pursuant to which, a hearing was duly held on July 19, 1995, in Memphis, Tennessee, before the under-signed. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, August 21, 1995, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a brief, received on, or before, August 25, 1995, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The National Federation of Federal Employees, Local 259 (hereinafter, "Union") is the exclusive representative of an appropriate unit of employees of the U.S. Army Corps of Engineers, Memphis District (hereinafter, "Respondent").

2. To reduce, or eliminate, the need for involuntary separation by reduction in force (RIF), Respondent was granted authority to offer Voluntary Separation Incentive Pay (VSIP) and Voluntary Early Retirement Authority (VERA) in the fall of 1993 and by memorandum dated November 4, 1993 (G.C. Exh. 7), Respondent gave notice to all permanent employees of the opportunity to apply. The application period for VSIP was: November 8-16, 1993; and the application period for VERA was November 8, 1993 - January 6, 1994 (G.C. Exh. 7). There is no dispute that the Union was given notice of the VSIP-VERA program (Tr. 56); that the Union, as well as representatives of the International Organization of Master, Mates and Pilots (MMP) and Marine Engineers Beneficial Association (MEBA), the exclusive representatives of Respondent's licensed maritime employees (Tr. 132, 159), attended a meeting on November 30, 1993, with Respondent concerning the program (Tr. 52-56; 132-138; 155-157; 159-163).

3. The Motor Vessel Strong (hereinafter, "M/V Strong") is a towboat and its function, in part, is to make reconnaissance trips up river one week and down river the next, from Cairo, Illinois, on the north, and Rosedale, Mississippi, on the south - a four-day trip up the river and a three-day trip down the river (Tr. 27) - to check changes in the river at different stages to determine where dredging needs to be done (Tr. 27-28). It has a crew of six to seven[2], normally operates about 9 to 10 months of the year and is in dock generally during December and January (Tr. 28). The M/V Strong has a galley (Tr. 49) and through the 1993 operating season its crew included a cook, a Mr. Gene S. Murray (Tr. 21, 40, 54). Mr. Murray, whose service computation date was March 4, 1953 (Agency Exh. 2), was eligible for VSIP/VERA and his name was on the list Respondent furnished the Union, as having applied for VISA/ VERA, in advance of the November 30, 1993, meeting in Memphis (Tr. 54, 65, 93). In addition, on November 24, 1993, the Union was furnished a list of positions which might become vacant as VSIP/VERA requests were approved which included the position of cook on the M/V Strong (G.C. Exh. 8, attachment, p. 2; Tr. 59-60).

Moreover, Mr. Clark King, President of the Union, fully understood that, ". . . They had to abolish a job somewhere to give somebody $25,000." (Tr. 95). Mr. King had no objection to Mr. Murray getting a buyout (Tr. 67) but the Union strongly opposed abolishment of the position of cook on the M/V Strong (Tr. 67, 71-72, 73), although Mr. King fully understood that when an employee was given a buyout his job was abolished and the position could be filled only by non-competitive action, i.e., "reassignment, change to lower grade, repromotion to a higher grade previously held on a permanent basis" (G.C. Exh. 8; Tr. 94, 95-96).[3]

Mr. King stated at the meeting on November 30, 1993, that the Union objected to, . . . doing away with the cook's

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[2] / Captain, pilot, chief engineer, two deck hands, cook and a striker (Tr. 28). [The striker works in the engine room under the chief engineer. Tr. 90.].

[3] In short, the whole purpose of incentive payments was to eliminate jobs by inducing eligible employees to accept the "carrot" [the buyout] so that those jobs could be abolished. By this voluntary action, of employees giving up their jobs, the work force was reduced thus reducing or eliminating the need for a RIF (G.C. Exh. 7, Encl. 2; Tr. 177-178, 179, 183-184).

job on the Strong." (Tr. 65).[4] Mr. King testified without contra-diction that he told the Commander, Colonel Theodore Fox, at the general meeting that there "absolutely" had been no agreement in 1987, ". . . that when Murray retired, that the job could be abolished . . . that this wasn't our position." (Tr. 66).[5] Mr. King further testified that he met privately with Colonel Fox in the Colonel's office and that he, King, told Colonel Fox, ". . . that I was concerned about abolishing the cook's job . . ." (Tr. 71-72). Colonel Fox was not called as a witness and Mr. King's testimony was, accordingly, wholly undenied and uncontradicted. At that time - November 30, 1993 - Mr. Murray's application had not been approved and Mr. King stated that Colonel Fox gave no indication whether he would approve elimination of that position. (Tr. 73).

4. On December 28, 1993, Mr. Murray's application for VSIP was approved (G.C. Exh. 10) and Mr. King received notice of the approval the same day (Tr. 74). On January 26, 1994, Mr. King wrote Respondent as follows:

> "The union has recently learned that Mr. Gene Murray, cook on the M/V Strong, has received approval for his retirement application. If the Memphis District intends to change the conditions

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Interestingly, Respondent's Answer states, in part, as follows:

> ". . . When Gene Murray's application VSIP was brought forward for consideration, Clark King objected. . . ." (G.C. Exh. 1(d), Answer, Par. 10).

Plainly, Respondent by its Answer fully corroborates Mr. King's testimony that he objected, although Respondent states that Mr. King's response to Colonel Fox was that he would ". . . like to see management positions abolished." (id.). Mr. King's testimony was to the contrary; Colonel Fox was not called as a witness; and, as Mr. King's testimony was credible and unrefuted is credited.

Significantly, Respondent's Chief of Personnel, Mr. Gibson, took an entirely different stance, and testified as follows:

> "Q. Did you hear any objection to the proposal that he [Murray] be allowed to take the VSIP and his position be abolished?
>
> "A. No. I did not." (Tr. 176).

5
See the wholly consistent testimony of Mr. Ronald O. Bonucchi concerning Respondent's July, 1987, proposal to abolish the cook's position on the M/V Strong; the Union's vigorous opposition; and Respondent's withdrawal of its proposal on September 30, 1987 (Tr. 39-40).

> of employment on this boat due to this retirement, we request appropriate bargaining. . . ." (G.C. Exh. 11).

The M/V Strong was "laid up" at the Ensley Yard with none of the seasonal employees (cook, deckhands, striker) on board before December 28, 1993, and Mr. King testified that when he sent his letter of January 26, 1994, he didn't know whether Respondent intended to do away with the cook's job, nor did the Captain, Pilot or Chief Engineer of the M/V Strong (Tr. 77-80); indeed, Respondent never made any reply to his letter of January 26, 1994 (Tr. 81), and Mr. King stated,

> ". . . I didn't know what they were going to do. So, it suited me. I mean, I had sent the request forward. And if their intention was not to do away with that cook's job, then I mean that was fine. That was what we were looking for.
>
> "Yes, I knew they were either ignoring the request to bargain or they were going to fill the job, but I didn't know which." (Tr. 82).

Not until mid-May 1994, when the M/V Strong returned to service[6] and the crew reported for duty, did Mr. King learn that there would be no cook aboard the M/V Strong (Tr. 85, 87, 88, 89).

Respondent admitted, ". . . that Clark King requested to bargain the abolishment of the cook's position on the Motor Vessel Strong . . . ." (G.C. Exh. 1(d) Answer, Par. 12); but asserts that Mr. King's request was, ". . . after the decision to abolish had been made, the employee holding the position was retired under the VSIP/VERA program and the position abolished. . . ." (id.)

Conclusions

I found Mr. King to be a wholly credible witness and his testimony concerning his conversation with Colonel Fox on November 30, 1993, was neither refuted nor contradicted. Accordingly, I find, as he testified, that on November 30, 1993, before Mr. Murray's application for retirement under the VSIP/VERA program had been approved, Mr. King made it clear to Respondent that the Union strongly objected to elimination of the position of cook on the M/V Strong. I further conclude that this constituted a demand to bargain if Respondent determined not to re-fill the position of cook

6 River conditions, i.e. flooding, delayed the beginning of the 1994 construction operations.

on the M/V Strong. I further find that on January 26, 1994, Mr. King submitted a written request to bargain, ". . . If the Memphis District intends to change the conditions of employment on this boat [M/V Strong] due to this retirement [Mr. Murray] . . . ." (G.C. Exh. 11). I specifically reject the inference of the testimony of Ms. Barbara Cook that Respondent did not receive Mr. King's letter of January 26, 1994. While her testimony, that she did not see the letter until July 8, 1995 (Tr. 214-215), is highly suspect, it is unnecessary to resolve the question of her credibility since it is clear that whether Ms. Cook received the letter in January 1994, someone acting on Respondent's behalf did. (See, Mr. Gibson's testimony, Tr. 198, lines 8-15). First, any such inference is contrary to the testimony of Mr. King which I found credible. Second, General Counsel Exhibit 11 was received in evidence without objection by Respondent. Third, Respondent in its Answer admitted that ". . . Clark King requested to bargain the abolishment of the cook's position on the Motor Vessel Strong . . ." (G.C. Exh. 1(d), Par. 12), although, as previously noted, Respondent asserted that this request was made after, ". . . the decision to abolish had been made, the employee holding the position was retired under the VSIP/VERA program and the position abolished." (id.). As Mr. Murray's application was not approved until December 28, 1993, and his retirement was effective December 31, 1993, the only request to bargain by Mr. King after December 28, 1993, was his January 26, 1994, request to bargain (G.C. Exh. 11). Fourth, Mr. Gibson testified that he was familiar with Mr. King's letter at the time, "Q. . . . in January 1994, were you familiar with it? A. There close, yes." (Tr. 198). Accordingly, I conclude that Respondent received Mr. King's January 26, 1994, request to bargain. As noted above, I found the testimony of Mr. King credible. Neither Colonel Fox nor Mr. Bobby G. Williams, Chief of Construction Operations ("Con Ops"), testified and I do not credit the inference of Mr. Gibson's testimony that Colonel Fox told Mr. King on November 30, 1993, that Mr. Murray's application had been approved (Tr. 186-189). Mr. Gibson studiously avoided saying that Colonel Fox made any such statement. Indeed, he said Mr. Williams said he was going to abolish the positions that were approved (Tr. 187, 193). Fully accepting that Mr. Williams said he was going to abolish positions that were approved, as to which there is no disagreement (Tr. 71), nevertheless, before Mr. Murray's application had been approved and before the cook's job had been abolished, Mr. King requested bargaining on the abolishment of the cook's position on the M/V Strong.

A. The Union's request to bargain about the elimination of the cook's position was made before the position was abolished.

Respondent's contention that the Union's demand to bargain was untimely because it was not made until after the decision to abolish the cook's position had been made; the employee [Mr. Murray] had retired under the VSIP/VERA program; and the position had been abolished, is without support in fact or law. At the outset, the record shows that when the parties met on November 30, 1993, Mr. Murray's application under the VSIP/VERA program had not been approved. Moreover, Respondent on November 24, 1993 (G.C. Exh. 8) had listed Mr. Murray's position, i.e., cook on the M/V Strong, as one which "may become vacant as VSIP/VERA requests are approved", and Respondent solicited employee interest in movement to these positions, which negates any concept that these positions are, in fact, abolished upon approval of the retirement under VSIP/VERA, although without doubt, such positions could only be filled by ". . . non-competitive actions (reassignment, change to lower grade, repromotion to a higher grade previously held on a permanent basis) . . ." (G.C. Exh. 8).

Semantics aside, Respondent and the Union seem to share a common understanding. The Union has used "slot" and "position" in its reference to abolishing and Respondent uses "position" in describing the effect of an employee taking VSIP/VERA: "The end result had to be the abolishment of a position." (Tr. 177). However, Mr. Charles D. Gibson, Chief Personnel Officer for Respondent (Tr. 170), made it clear that while payment of a retirement incentive abolished a position,

> "A. It could be the domino effect. When we got to the end, we could either abolish his [Murray's] or someone else's as long as it was occupied.
>
> "Q. And when was that position ultimately abolished?
>
> "A. I would have to say when he went out of it . . .
>
> "Q. When he went out of?
>
> "A. The position, when he retired on 12/31/93." (Tr. 178).

On cross-examination, Mr. Gibson further explained:

"A. If we want to fill behind the person, we could, if we abolish another occupied position. It would have to be an occupied position.

"Q. So, for instance if Mr. Murray's position, Mr. Murray took the $25,000 buyout and management wanted to retain that position, the cook position aboard the Strong, could that be done?

"A. Yes, sir. It could have been done had there been another occupied position that CON-OPS wanted to abolish to fill. But they (sic) had to be, the end result had to be one abolished that was occupied. . . ." (Tr. 183-184).

As noted above, Mr. Gibson was emphatic that Mr. Murray's position was not abolished until he retired on December 31, 1993 (Tr. 178). Consequently, a month before Mr. Murray had retired, the Union had objected to the elimination of the cook's position on the M/V Strong and by objecting to the elimination of the position, demanded to bargain on any decision to eliminate or, as Mr. Gibson denominated it, not to "fill behind" Mr. Murray (Tr. 183).

When the Union was notified on December 28, 1993, that Mr. Murray's application had been approved, Respondent gave no notice of its intention not to "fill behind" Mr. Murray. Indeed, as noted above, Respondent had given every indication that it intended to fill the cook's position on the M/V Strong by soliciting employee "bids" (G.C. Exh. 8). Mr. King, by his letter of January 26, 1994, again requested to bargain. Respondent did not respond to the Union's January 26, 1994, letter and the first notice the Union had that the cook's position on the M/V Strong would not be filled was in May 1994, when the crew of the M/V Strong was recalled for the beginning of its seasonal operation sans a cook. By its uni-lateral action in deciding not to "fill behind" Mr. Murray's retirement; by its failure and refusal to bargain with the Union on its demands to bargain about the issue; and by its failure and refusal to respond to the Union's January 26, 1994, written request to bargain, ". . . If the Memphis District intends to change the conditions of employment on . . . [the M/V Strong] due to this retirement [Mr. Murray's], Respondent violated §§ 16(a)(5) and (1) of the Statute.

B. There was no waiver of the right to bargain.

Respondent's assertion that the Union's admitted demand, ". . . to bargain the abolishment of the cook's position . . ." was barred because not made until after ". . . Mr. Murray's position as cook on the Motor Vessel Strong had been abolished." (G.C. Exh. 1(d), Answer, Pars. 10 and 12), is without basis. In the first place, as shown above, Mr. Murray's position was not "abolished" until he retired on December 31, 1993, and the Union's initial request to bargain, on November 30, 1993, was long prior to the abolishment of Mr. Murray's position. Inherent in Respondent's arguments is the apparent contention that because the Union did not object to Mr. Murray retiring under the VSIP/VERA program, it "waived" its right to bargain because the employee's position was abolished to pay the retirement incentive. As set forth above, the Union was not told on November 30, 1993, that Mr. Murray's application had been approved; but even if it had been, Mr. Gibson made it clear that Mr. Murray's position as cook was not abolished until, ". . . he went out of it . . . when he retired on 12/31/93." (Tr. 178). Accordingly, Mr. King's November 30, 1993, demand to bargain plainly was long before the cook's position had been abolished. Moreover, the fact that a position is "abolished" upon payment of a retirement incentive does not mean that the position held by the recipient of the retirement incentive (here, cook on the M/V Strong) necessarily will be eliminated. Quite to the contrary, any "abolished" position may be filled, ". . . if we abolish another occupied position." (Tr. 183); and/or, as stated in General Counsel Exhibit 8, by, ". . . non-competitive actions (reassignment, change to lower grade, repromotion to a higher grade previously held on a permanent basis) . . . ." Rather than extinguishing the right to bargain, "abolishment" of a position by payment of a retirement incentive triggers the decision to "fill behind" the retirement or not to do so.

To be sure, the initial question when Respondent presented the list of employees who had applied under the VSIP/VERA program was whether, in effect, the applicant could be spared or, as Respondent stated in its announcement, inter alia, ". . . [the vacancy] would make it difficult to perform our mission; whether the vacancy can be filled by current members of the District work force . . . ." (G.C. Exh. 7, p. 2). For example, as to licensed personnel, Mr. Bill Gates, Chief Engineer of the Dredge Hurley and representative of MEBA (Tr. 131-132), stated that a licensed engineer could not be approved for a retirement incentive unless, ". . . we could show a ladder where we could . . . fill it with a licensed personnel that you had on board . . . ." (Tr. 146) and Mr. Rick L. Niday, First Mate of the Dredge Hurley and representative of MMP

(Tr. 158, 159), testified to like effect as to licensed officers. ". . . those positions had to stay filled because that is regulatory . . . And if we couldn't find someone to go into that position, then that person was not going to be allowed to have a VSIP/VERA." (Tr. 167).

The position of cook was not one without which Respondent could not perform its mission and the vacancy could be filled by current members of the District work force[7], so Mr. King did not have any objection to approval of Mr. Murray's application. The effect of not objecting to approval of the application was the limitation that some other occupied position must be abolished in order to "fill behind" Mr. Murray. Respondent concedes it had discretion to retain the cook position aboard the M/V Strong (Tr. 183-184) and because this was a matter of discretion it was a negotiable bargaining demand and, in addition, the impact and imple-mentation of Respondent's decision not to "fill behind" Mr. Murray and retain the position of cook on to M/V Strong was negotiable.

Respondent's assertion that, ". . . the January 8, 1994 window closed for action on these matters . . ." (Respond-ent's Brief, p. 3), in context of Mr. Niday's testimony, that ". . . if we couldn't find somebody to go into that position, then that person was not going to be allowed to have a VSIP/VERA." (Tr. 167), is correct that that had to be done before the last day for VSIP retirement. (G.C. Exh. 7). However, Respondent's implied assertion that, "the January 8, 1994 window" closed the period for all negotiations is wholly without basis. As noted, a position is not "abolished" until the employee receiving the VSIP/ VERA incentive retires. As to Mr. Murray, this was December 31, 1993. Upon his retirement, the decision was whether to "fill behind" Mr. Murray. The Union had already demanded bargaining; Respondent had not informed the Union whether it intended to "fill behind" Mr. Murray; and, as the M/V Strong was out of service, Respondent neither bargained nor did it disclose its intention not to "fill behind" Mr. Murray until it recalled the crew of the M/V Strong in May, 1994, without a cook. Beyond doubt, to operate the M/ V Strong without a cook constituted a major and significant change in established conditions of employment. Payment to each employee of a meal allowance was a bit like giving parched wanderers in the Sahara a cup of sand to quench their thirst. Because there were few places along the river to eat (Tr. 29), it was necessary to prepare meals on board the M/V Strong (Tr. 33); but without a cook it invited chaos: who would buy the groceries, who would cook, who

[7] For example, there were cooks available (Tr. 98, 99, 100, 148).

would clean the galley? Would each crew member cook for himself? No one was qualified as a food handler (Tr. 88-89); etc. Mr. Murray's position having been abolished, the question then became, should the position of cook be retained and some other position be abolished? The Union had requested bargaining and Respondent neither bargained nor gave any indication whether or not it intended to "fill behind" Mr. Murray until it returned the M/V Strong to service in May, 1994, without a cook. By orally demanding to bargain on November 30, 1993, and by its written demand to bargain on January 26, 1994, the Union asserted its right to bargain "filling behind" Mr. Murray and/or the impact and implementation of not doing so, and, plainly, did not waive its right to bargain.

C. Remedy

General Counsel seeks a status quo ante remedy, stating that,

> "Where, as here, an agency has changed a condition of employment without fulfilling its obligation to bargain on its decision to effect that change, the Authority routinely grants a status quo ante remedy in the absence of special circumstances. Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 40 FLRA 244, 259 (1991); Department of the Navy, Naval Aviation Depot, Naval Air Station, Alameda, California, 36 FLRA 509, 511 (1990). General Counsel submits that no special circumstances are present here which would militate against the appropriateness of such a remedy. On the other hand there are special circumstances which mandate the imposition of a status quo ante remedy in these circumstances. In this regard, the District has relied on what Counsel for the General Counsel submits is a frivolous waiver argument in order to shield it from the consequences of its having ignored the Union's request to bargain. The District ignored the law and must deal with the consequences.
>
> "Only if a cook's position is returned to M.V. Strong will the Union be able to bargain on a level playing field. A status quo ante remedy will ensure that the Union, if the circumstances require, has a full range of options/proposals open to it should one or both of the parties eventually submit this matter to the FSIP. The District has presented no evidence that a status

quo remedy would disrupt its operations or impair its ability to perform its mission.

"A status quo ante remedy is appropriate in these circumstances given the District's unilateral elimination of the cook's position and the will- fulness of its ignoring the Union's request to negotiate. A lesser remedy will not effectuate the purposes and policies of the Statute." (General Counsel's Brief, pp. 23-24).

I fully agree with the General Counsel and I shall recommend a status quo ante remedy. All parties must understand that re-establishment of the cook's position assumes the elimination of some other occupied position.

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

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118,

it is hereby ordered that the U.S. Army Corps of Engineers,

Memphis District, Memphis, Tennessee, shall:

1. Cease and desist from:

(a) Unilaterally changing established conditions of employment concerning "filling behind" an employee who has retired under the VSIP/VERA program.

(b) Failing and refusing to bargain on the timely demand of the National Federation of Federal Employees, Local 259 (hereinafter, "Union"), the exclusive representative of certain of its employees, concerning retention of the position of cook on the M/V Strong.

(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) During the operating season, re-establish the position of cook on the M/V Strong.

(b) After re-establishment and operation of the M/V Strong with a cook, give the Union reasonable prior notice of any intent to eliminate the position of cook on the M/V Strong as the result of Mr. Gene S. Murray's retirement under the VSIP/VERA program.

(c) Upon request, bargain in good faith with the Union concerning any notice of intention to eliminate the position of cook on the M/V Strong.

(d) Post at its facilities in the Memphis District, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee, 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.

(e) Pursuant to § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, 1371 Peachtree Street, NE, Suite 122, Atlanta, Georgia

30309-3102, 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: September 26, 1995

Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change established conditions of employment concerning "filling behind" an employee who has retired under the VSIP/VERA program.

WE WILL NOT fail and refuse to bargain in good faith on the timely demand of the National Federation of Federal Employees, Local 259 (hereinafter, "Union"), the exclusive representative of certain of our employees, concerning retention of the position of cook on the M/V Strong.

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.

WE WILL during the operating season re-establish the position of cook on the M/V Strong.

WE WILL, after re-establishment and operation of the M/V Strong with a cook, give the Union reasonable prior notice of any intent to eliminate the position of cook on the M/V Strong as the result of Mr. Gene S. Murray's retirement under the VSIP/VERA program.

WE WILL upon request, bargain in good faith with the Union concerning any notice of intention to eliminate the position of cook on the M/V Strong.

(Activity)

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 of the Federal Labor Relations Authority, Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-40698, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Alvin C.W. Ellis, Esquire
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