

MEMORANDUM

DATE: July 31, 1996

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ  
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE  
647TH AIR BASE GROUP, HANSCOM AIR  
FORCE BASE MASSACHUSETTS

Respondent

and

Case No. BN-

CA-41011

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-8

Charging Party

Pursuant to section 2423.26(b) of the Final 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 is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

DEPARTMENT OF THE AIR FORCE 647TH AIR BASE GROUP, HANSCOM AIR FORCE BASE MASSACHUSETTS  Respondent	
and  NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-8  Charging Party	Case No. BN-CA-41011

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Final 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 **SEPTEMBER 3, 1996**, and addressed to:

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

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SAMUEL A. CHAITOVITZ  
Chief Administrative Law Judge

Dated: July 31, 1996  
Washington, DC

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

DEPARTMENT OF THE AIR FORCE 647TH AIR BASE GROUP, HANSCOM AIR FORCE BASE MASSACHUSETTS  Respondent	
and  NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-8  Charging Party	Case No. BN-CA-41011

Steven E. Sherwood, Esq.  
For the Respondent

Peter F. Dow, Esq.  
For the General Counsel

Before: Samuel A. Chaitovitz  
Chief Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

**Statement of the Case**

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (the Statute).

Based upon an unfair labor practice charge filed by the Charging Party, National Association of Government Employees, SEIU, AFL-CIO, Local R1-8 (the Union), a Complaint and Notice of Hearing was issued by the Regional Director for the Boston Region of the Federal Labor Relations Authority. The complaint alleges that the Department of the Air Force, 647th Air Base Group, Hanscom Air Force Base, Massachusetts (the Respondent) violated section 7116(a) (1) and (5) of the Statute by failing and refusing to negotiate upon request concerning matters covered under section 7106(b) (1) of the Statute.

More specifically, the complaint alleges that Executive Order 12871, entitled "Labor-Management Partnerships," issued on October 1, 1993 (58 Fed. Reg. 52201-52203), requires the Respondent to negotiate over the subjects set forth in section 7106(b)(1) of the Statute; that by issuing E.O. 12871, the President of the United States has exercised the Respondent's discretion under section 7106(b)(1) to negotiate over the subjects set forth therein, including the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, and concerning the technology, methods and means of performing work; that on or about February 1, 1994, the Union requested to negotiate over such matters but the Respondent has failed and refused to do so; that in May 1994, the Respondent announced its intention to fill approximately 86 vacant positions at the same time that it was absorbing a workforce reduction of about 457 civilian positions; that on May 17, 1994, the Union requested to bargain over such matters pursuant to section 7106(b)(1) of the Statute, but that the Respondent implemented its decision to fill the 86 vacant positions without providing the Union an opportunity to negotiate to the extent required by the Statute, thereby violating section 7116(a)(1) and (5) of the Statute.

The Respondent filed a Motion to Dismiss dated May 14, 1996, and a Motion for Summary Judgment on June 4, 1996, to both of which the General Counsel filed an opposition on July 9, 1996.<sup>1</sup> The positions of the parties are set forth immediately below.

## **Contentions of the Parties**

### **A. The Respondent**

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Respondent filed a Motion to Strike the General Counsel's Response in Opposition to the Respondent's Motion to Dismiss and Motion for Summary Judgment on the ground that the General Counsel's response was untimely under the Authority's Rules and Regulations. On July 12, 1996, the undersigned issued an Order indefinitely postponing the hearing in this case to permit the Respondent's Motion for Summary Judgment to be considered. As part of that Order, all parties were afforded the opportunity to file additional briefs, if they so desire, until July 23, 1996. The General Counsel then filed an Opposition to Respondent's Motion to Strike and refiled the Opposition to the Motion to Dismiss and for Summary Judgment. Accordingly, the Respondent's Motion to Strike the General Counsel's response as untimely is moot.

In its Motion for Summary Judgment, the Respondent assumes that all of the factual allegations of the complaint are as stated by the General Counsel, but contends that the, complaint must be dismissed because the Union's requests to bargain over the numbers, types and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty, or concerning the technology, methods and means of performing work are, by contract, subject to the election of management. More particularly, the Respondent refers to Article 6.C. of the parties' collective bargaining agreement--which essentially tracks the language of section 7106(b)(1) of the Statute--and contends that it is entitled to judgment as a matter of law because it has the right to exercise its discretion as negotiated in the contract to decline to bargain over such enumerated matters. In this regard, the Respondent relies on the Authority's decision in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993), that an agency has no duty to bargain over matters "covered by" the parties' negotiated agreement.

#### **B. The General Counsel**

In opposing the Respondent's Motion for Summary Judgment, the General Counsel contends that, "by issuing the Executive Order [12871], the President of the United States has exercised the Respondent's discretion under section 7106(b)(1) to negotiate section 7106(b)(1) subjects, including those at issue in this case." More specifically, the General Counsel quotes Section 2(d) of the Executive Order, which provides in part as follows:

Sec. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS

THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5, United States Code shall:

\* \* \* \* \*

(d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . . .

Accordingly, the General Counsel asserts, since the President has made the election for agencies at the level of

exclusive recognition to negotiate over section 7106(b) (1) subjects, the Respondent could not lawfully refuse to bargain over such matters in this case.<sup>2</sup>

## **Conclusions**

### **A. Appropriateness of Summary Judgment**

It has long been established that the purpose of summary judgment is to avoid useless, expensive, and time-consuming trials when there are no genuine issues of material fact to be tried. *State of California National Guard*, 8 FLRA 54, 60 (1982). Thus, section 2423.19(k) of the Authority's Rules and Regulations specifically authorizes Administrative Law Judges to grant motions for summary judgment in lieu of hearings when only legal issues are involved, so long as the parties have had an opportunity to present written argument. *Id.*; see also *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995). Inasmuch as there is no material issue of fact in dispute herein and the parties have been afforded full opportunity to present their legal arguments, I conclude that this case is appropriate for resolution on the Respondent's motion for summary judgment.

### **B. The Legal Issue**

The fundamental legal issue presented by the General Counsel's opposition to the Respondent's Motion to Dismiss and separate Motion for Summary Judgment is whether the President's promulgation of Executive Order 12871, especially Section 2(d) thereof, constitutes the blanket exercise of all executive agencies' discretion under section 7106(b) (1) of the Statute in favor of bargaining over all subjects enumerated in that provision. For the reasons stated below, I conclude that it does not.

In its *Order Denying Request for a General Ruling*, 51 FLRA 409, 410 (1995), the Authority had before it the General Counsel's explanation that his request for a general ruling concerning the relationship between section 7106(b)

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The General Counsel additionally disputes the Respondent's assertion that summary judgment is appropriate as a matter of law because the subject matter of this dispute is "covered by" Article 6.C. of the parties' agreement. In view of my disposition of the Motion for Summary Judgment herein, I find it unnecessary to discuss the contractual argument made by the Respondent and disputed by the General Counsel.

(1) and section 7106(a) of the Statute was prompted by Executive Order 12871, which provides, in Section 2(d), that agency heads shall "negotiate over subjects set forth in section 7106(b)(1) and instruct subordinate officials to do the same," and by the court's decision in *Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994), in which the District of Columbia Circuit held that where a matter falls within subsection (b)(1) of section 7106, even if the matter also affects a right under subsection (a), the matter is subject to negotiation at the election of the agency. The General Counsel's request for a general ruling stated that the mandate in the Executive Order to negotiate over section 7106(b)(1) matters, and the court's holding in *Montana ACT*, has rendered the relationship between subsections (a) and (b)(1) a major policy issue. 51 FLRA at 410-411. The Authority denied the General Counsel's request for a general ruling, stating that a negotiability case decided that same day "addresses the question raised by the General Counsel." *Id.* at 412.

The negotiability decision referred to by the Authority above is *National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky*, 51 FLRA 386 (1995) (*VA Medical Center*). In that decision, the Authority concluded (as applicable here) that where it finds a bargaining proposal governed by section 7106(b)(1), it will dismiss a union's petition for review pursuant to section 2424.10(b) of its Rules and Regulations without ordering the parties to bargain, notwithstanding the union's assertion that negotiation over the proposal is mandated by Executive Order 12871 which constitutes an election to negotiate within the meaning of section 7106(b)(1). *Id.* at 393-394 and n.12. As I interpret the Authority's decision in *VA Medical Center*, which the Authority's *Order Denying Request for a General Ruling* describes as addressing the issues raised by the General Counsel in his request, the Authority at least inferentially has determined that it will not order an agency to bargain over the substance of a section 7106(b)(1) matter unless such agency has elected to do so, notwithstanding the "mandate" in Section 2(d) of Executive Order 12871 that agencies covered by the Statute "shall negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1). . . ."

In my view, the foregoing conclusion is compelled by the language of the Statute and the Executive Order. Thus, as the General Counsel recognizes, Section 3 of Executive Order 12871 specifically states that the order "is intended only to improve the internal management of the executive



branch and is not intended to, and does not, create any right to administrative or judicial review, or any right . . . enforceable . . . against the United States, its agencies . . ., officers or employees . . . ." In other words, if an agency official failed to obey the President's directive in Section 2(d) of the Executive Order, the appropriate remedy would be determined internally within the executive branch rather than through administrative or judicial proceedings. In this manner, potential conflicts between the terms of an Executive Order and the provisions of an act of Congress are avoided.

I further note that two other Administrative Law Judges of the Authority have reached the same conclusion that I reach herein. See *Marine Corps Logistical Base*, Case No. SF-CA-41251, Feb. 15, 1996 (ALJD Report No. 123, Apr. 30, 1996); *U.S. Department of Commerce, Patent and Trademark Office*, Case No. WA-CA-40743, July 9, 1996. While such decisions of Judges Nash and Oliver are not precedential, I find it instructive that they both independently rejected the General Counsel's assertion that the President in Section 2(d) of Executive Order 12871 exercised every agency's discretion under section 7106(b)(1) of the Statute in favor of bargaining over the subjects set forth therein. No Judge has decided to the contrary.

For the reasons set forth above, I conclude that summary judgment in favor of the Respondent is warranted, and that the complaint in this case should be dismissed.

#### **ORDER**

The complaint in Case No. BN-CA-41011 is dismissed.

Issued, Washington, D.C., July 31, 1996.

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SAMUEL A. CHAITOVITZ  
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Administrative Law Judge, in Case No. BN-CA-41011, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Mr. Peter Dow, Esq.  
Counsel for the General Counsel  
Federal Labor Relations Authority  
99 Summer Street, Suite 1500  
Boston, MA 02110-1200

Mr. Steven E. Sherwood  
AFLSA/CLLO  
1501 Wilson Boulevard  
Arlington, VA 22209

Craig Mosher, President  
National Association of Government  
Employees, SEIU, AFL-CIO, Local R1-8  
P.O. Box 848  
Bedford, MA 01730

**REGULAR MAIL:**

Kenneth Lyons, President  
National Association of Government  
Employees, SEIU, AFL-CIO  
ATTN: Attorney Michael Manning  
159 Burgin Parkway  
Quincy, MA 02169-4213

Dated: July 31, 1996  
Washington, DC