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| U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, U.S. PENITENTIARY, MARION, ILLINOIS Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2343, AFL-CIO Charging Party | Case No. CH-CA-30849 |

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 **FEBRUARY 13, 1995**, and addressed to:

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

SALVATORE J. ARRIGO
 Administrative Law Judge

Dated: January 13, 1995

Washington, DC

MEMORANDUM

DATE: January 13, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS,
U.S. PENITENTIARY,
MARION, ILLINOIS

Respondent

and

Case No. CH-

CA-30849

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343, AFL-CIO

Charging Party

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

Enclosures

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

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| U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, U.S. PENITENTIARY, MARION, ILLINOIS Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2343, AFL-CIO Charging Party | Case No. CH-CA-30849 |

Phillis R. Morgan, Esq.
For the Respondent

Roland J. Beckman
For the Charging Party

John F. Gallagher, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

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. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Chicago Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing to provide the Union with data pertaining to an investigation by Respondent's Office of Internal Affairs.

A hearing on the Complaint was conducted in St. Louis, Missouri, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees and AFGE Local 2343 has been the agent of AFGE for the purpose of representing those employees.

The record reveals¹ that on February 18, 1993 it came to the attention of Correctional Officer Sablewski that an inmate named Baptiste had been released from segregated confinement and transferred to confinement with the general prison population. Baptiste was a disciplinary problem at the prison and apparently was disposed to fight with other prisoners. Officer Sablewski told Evening Watch Lieutenant Huffenburger, a supervisory officer, and another Lieutenant Miliara, that it was his opinion Baptiste would fight with the first person he came into contact with when released from segregation. Huffenburger acknowledged to Sablewski that they knew Baptiste was going to fight.

On the next morning, February 19, the guard unit team and management personnel discussed who they thought Baptiste was going to fight. During the course of the morning several day shift Lieutenants inquired if Baptiste had been released yet for recreation. The staff, beginning in the morning, warned unit managers, Associate Warden Booker when he came through the guard unit area on his morning rounds, and Captain Bezy that Baptiste should not be let out with the general prison population for recreation because he would cause a fight. When Bezy had arrived at the guard

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This account is from the unchallenged testimony of Correctional Officer Dennis Darter who is Vice President of the Union and was Union Secretary when the matters discussed herein occurred. Darter obtained the information in part from being at the prison during some of the events and in part from information he obtained while looking into the matter as a Union official.

unit area at 12:30 p.m. he was asked what he was doing there and replied, "To save myself the run."²

At approximately 1:00 p.m., 18 inmates, including Baptiste, were released into the recreation area. The first inmate Baptiste saw was an individual named Edwards. Baptiste went up to Edwards and "squared off" to begin to fight. Captain Bezy, who was observing the entire episode, ordered the alarm sounded and almost immediately approximately 50 correctional officers appeared on the scene before any fighting actually occurred. Baptiste and Edwards were subdued and the other 16 inmates were escorted back to their cells to assure that a mass fight did not break out.

After being apprehended, inmate Baptiste was restrained by handcuffs and leg-irons, and having refused to walk, was placed in a prone position and carried, face down, back to the segregation area by four correctional officers, including Officer Aubrey Francis. Apparently one officer was injured while Baptiste was being escorted back to segregation. On that same day a charge of excessive use of force against an inmate was made by Special Investigative Supervisor (SIS) Huffenburger that, upon arrival at the segregation area, Baptiste was dropped on the floor by the officers and that Officer Francis kicked Baptiste in the back while he was lying on the floor. The matter was referred to Respondent's Office of Internal Affairs (OIA) for investigation which immediately commenced an investigation of the Supervisor's allegations. Francis was placed on "home duty" in which status he was to remain at home during normal work hours, with full pay, while the allegations were being investigated.³

On March 9, 1993 the Union filed a grievance essentially alleging that the facts leading up to the incident, including Baptiste's known predisposition to fight and the warnings given to supervision, indicated:

. . . a systematic and calculated effort on the part of the above mentioned supervisors to violate the civil rights of these two inmates and force staff into a position of having to fight an inmate when there was no need. Because of this effort on

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When an emergency such as a fight among prisoners occurs, an alarm is sounded at a control center and all available correctional officers are directed to report to the affected area as quickly as possible.

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Another investigation was subsequently conducted by OIA regarding an allegation that a correctional officer lied during their investigation concerning Aubrey Francis.

these individuals part one Officer is at home on "home duty" because of a memo written by a supervisor and one Officer is hurt and may never work again trying to transport Baptiste back to 1 Unit.

The grievance alleged Respondent's conduct violated Section a, 1, of the "Health and Safety" provision of the parties' negotiated collective bargaining agreement. As a remedy, the Union sought a complete investigation by OIA of all supervisors involved in the incident and the transfer of various supervisory and managerial employees. The referenced Health and Safety article provides:

Section a. There are essentially 2 distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment

. . . .

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

The grievance was rejected by Respondent and the Union invoked arbitration. On July 7, 1993 the Union requested the Agency provide it "copies of any and all notes, memoranda, documentation, etc. of any internal investigation conducted regarding . . . Baptiste and the incident which occurred on February 19, 1993." The request indicated the information was being sought to prepare for the arbitration of the grievance then scheduled for August 4 and 5, 1993.

The data was not produced by the Agency and the Union again requested the data on July 23, 1993, which request included:

2. All documentation obtained by the S.I.S. department at USP., Marion, Ill. in connection with the investigation of Officer Aubrey Francis and the Baptiste incident.

3. All reports, documentation and memo's written by everyone who was interviewed by the S.I.S.

department at USP., Marion, Ill., concerning this incident.

4. Any final reports written by the S.I.S. department at USP., Marion, Ill., concerning this incident.

5. Any and all reports, findings, conclusions, memo's, affidavits and all concerned documents obtained by the Office of Inspection concerning the investigation of Officer Aubrey Francis.⁴

The request indicated the information was needed so the Union could "effectively present its case" to the arbitrator.

Respondent, on July 29, 1993 and at all times thereafter refused to furnish the Union with the information it requested: Respondent's reply of July 29 stated, in relevant part:

This is in response to your memorandum dated July 23, 1993. In your memorandum, you requested information under 5 USC 7114(b)(4). Specifically, you requested a copy of an Office of Internal Affairs investigation of Physical Abuse of an Inmate, (subject; Aubrey Francis, Correctional Officer), at USP Marion. No staff misconduct was found to have occurred at USP Marion and no action was taken on any employee.

Information requested must be necessary information. Necessary information is information that is adequate to resolve reasonably the grievance at hand. Justice, INS, Border Patrol, El Paso, TX v. FLRA, No. 92-4149 (5th Cir., May 26, 1993). Since none of the allegations of staff misconduct were substantiated by the investigation report you are requesting, none of its contents would be information to resolve reasonably any grievance. Therefore, no particularized need as of the date of this response has been provided by Local 2343 (See NLRB v. FLRA, 952 F2d 523 (D.C. Cir. 1992).

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After it completed its investigation, on April 30, 1993 OIA filed a investigative report on the allegations it had received that Officer Francis had physically abused inmate Baptiste. OIA also issued a report on July 9, 1993 concerning the alleged false statement given by a correctional officer during the Francis investigation.

At present, the information you request will not be released.

Attached, you will find a copy of the incident report written on [Baptiste], December 28, 1992, after assaulting [a] Correctional Officer, and [a] Lieutenant. This constitutes the last document in my possession pertaining to the upcoming arbitration case. Investigations on the Physical Abuse of an Inmate and the Release of an Inmate from Segregation, were both conducted by OIA, not at the local institution level.⁵ Therefore, OIA is in possession of all other related materials.

Despite repeated requests by the Union at various levels of Respondent, the data it requested has never been provided.

Additional Findings, Discussion and Conclusions

The General Counsel contends Respondent violated the Statute by not providing the Union with the information it requested on July 7 and July 23, 1993, above, alleging Respondent was required to furnish the data under section 7114(b)(4) of the Statute, which obligates the Agency:

"(4) . . . to furnish the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

Respondent acknowledges that the data sought by the Union was "normally maintained by the agency" and "does not constitute guidance, advice, counsel . . .", etc. within the meaning of section 7114(b)(4)(A) and (C) of the Statute

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The record herein gives no indication regarding an OIA investigation concerning "Release of an Inmate from Segregation" or the whereabouts of any document relating to that investigation.

respectively. However, Respondent contends the data sought is not "necessary for full and proper discussion, understanding, and negotiation" within the meaning of section 7114(b) (4) (B) of the Statute and argues Respondent is prohibited by the Freedom of Information Act from furnishing the data to the Union. Respondent also contends that it need not disclose the requested information since the underlying grievance is not arbitrable.

To begin, I reject Respondent's contention that the Freedom of Information Act prohibits it from providing the Union with the data it requested. To support its position Respondent states the reports "fall within the law enforcement exemption of the Freedom of Information Act" and, without further explication, concludes that the "investigations concerned possible criminal conduct and the disclosure of such information could reasonably be expected to constitute an unwarranted invasion of personal property." While section 552(b) (7) (C) of the Freedom of Information Act, 5 U.S.C. § 552, states that the general requirements for making records available do not apply to "records or information compiled for law enforcement purposes," that section goes on to state that such prohibition applies, inter alia:

only to the extent that such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings [.]

The record herein does not establish that the investigations herein were conducted for law enforcement purposes. Rather, the record establishes that when Respondent rejected the Union's request for the reports and back-up documentation, it had already been decided by the Agency that the matter under investigation would be resolved administratively. Indeed, the investigation by OIA did not commence until after Respondent reached this decision. Thus disclosure could not interfere with law enforcement proceedings since none were envisioned.

I also reject Respondent's contention that it is not required to produce the data sought by the Union because the underlying grievance is not arbitrable. It is well settled that the question of arbitrability is for determination by the arbitrator. See Department of the Air Force, Langley Air Force Base, Hampton, Virginia, 39 FLRA 966 (1991) and Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1983).

The Union sought generally all documents obtained or produced regarding the Baptiste incident of February 19, 1993 and the related investigation of Aubrey Francis' conduct. The Union's grievance concerned the facts and circumstances surrounding inmate Baptiste's release from segregation and eventual return to segregation, which, the Union alleged in its grievance, jeopardized the health and safety of correctional guards whom the Union represented. The grievance spelled out allegations regarding the action of Associate Warden Booker in releasing inmate Baptiste from segregation, Lieutenants Huffenburger and Miliara being notified that releasing Baptiste "was a bad move and was going to cause a fight", Captain Bezy's presence when Baptiste went into the recreation area and other specific acts of Respondent's Management and supervisors which, the Union alleged, led to its conclusion that Respondent essentially was irresponsible in its action. Indeed the Union suspected that Baptiste was released from segregation in full expectation that he would immediately get into a fight, which would be inherently dangerous to him, in retaliation for previously having thrown urine on Captain Bezy and the Segregation Lieutenant in Charge. In these circumstances the Union felt Respondent's conduct created a situation which endangered correctional officers who would be called upon to restrain Baptiste and whomever he fought as well as quelling any disturbances which might have occurred among other inmates who were in the vicinity of the Baptiste fight. Such conduct, the Union alleged, violated the parties' contractual health and safety provision.

In order to support its contention in this regard the Union wished to review any documents or reports which Respondent had, bearing on the incident and employee involvement, which in my view logically would include any investigation of officer Aubrey Francis' actions as well as the officer who was injured during the incident, and the officer who allegedly lied during the Francis investigation. It was reasonable to assume that such matters and their investigations would contain information concerning circumstances surrounding the release of Baptiste into the general prison population which would support the Union's allegation that the release from segregation imperiled the health and safety of correctional officers, and management and supervisors were culpable when placing staff in danger for improper reasons.

With specific regard to the OIA investigative report of SIS Huffenburger's charge concerning Francis, and the OIA investigative report concerning the allegation that a correctional officer provided a false statement during the Francis investigation, these documents were placed in

evidence under seal at the hearing before me. My review of these documents, in camera, reveals that the OIA investigative report of the charge that Aubrey Francis physically abused an inmate consists of 11 single-spaced typewritten pages and includes a brief digest of the allegations and a statement of ultimate conclusions, and sections titled "Background", "Introduction", "Summary of Investigative Findings" (seven pages), a brief "Summary of Factual Information" and a brief "Conclusion". The report reveals that the investigation file includes an affidavit from Baptiste and affidavits or inter-view reports from 11 members of Respondent's staff, four of whom including Francis were interviewed by OIA investigators apparently in the presence of their designated Union representative. The investigation covered the period beginning with Baptiste entering the recreation area and centered on Baptiste being carried to the segregation area and awaiting incarceration into a cell.

While the OIA Francis report did not focus specifically on supervisory activities and conversations which led up to the Baptiste--Edwards altercation, which was the subject of the Union's grievance, the Union did not know this, not having been privy to the contents of the document or scope of the investigation.⁶ However, in my view it was reasonable for the Union to assume such matters were encompassed by the investigation. Indeed, in its July 29, 1993 reply to the Union, wherein it refused to supply the data requested, Respondent contended the data was not "necessary" stating, "(s)ince none of the allegations of staff misconduct were substantiated by the investigation report you are requesting, none of its contents would be information to resolve reasonably any grievance." This can be read to infer that "staff misconduct" was a subject of the investigation. Therefore the Union should have such information available to it so that it could evaluate the evidence at hand which could assist it in at least determining whether to proceed to arbitration. The Union should also have access to the data to ascertain for itself whether "staff misconduct" on the part of supervisory staff

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Most likely a union frequently does not know what is in a management document in these situations but makes a reasonable guess that the document sought will be helpful, in one way or another, in proceeding on a grievance.

was in fact a subject of the investigation.⁷ Also the report reveals that statements obtained from staff during the OIA investigation, which were not produced at the hearing, support the Union's premise that Baptiste was a volatile individual, an essential element needed to prove its allegation that the "safety and well-being of employees" was affected by Respondent's release of Baptiste from segregation.

On the other hand, the OIA report on a correctional officer allegedly providing a false statement specifically covers issues concerning an incident wherein Baptiste was accused of throwing a liquid substance on a Captain and a Lieutenant less than two months before his release from segregation. This, the Union's Vice President testified was a possible motive for Respondent releasing Baptists from segregation. The report also covers an aspect of the period immediately prior to Baptiste appearing in the recreation area, which would tend to support the Union's allegation that Respondent was fully aware that Baptiste would start a fight. Such evidence would clearly be "necessary" within the meaning of section 7114(b)(4)(B) of the Statute when the Union presented its case to an arbitrator.

Accordingly, based upon the above, and all the circumstances herein, I conclude the information sought by the Union was "necessary" within the meaning of section 7116(b)(4)(B) of the Statute. See United States Border Patrol, Tucson Sector, Tucson, Arizona, 47 FLRA 684 (1993) and cases cited at 687 and U.S. Department of Labor, Washington, D.C., 39 FLRA 531 (1991) and cases cited at 537-38. However, I find that the reports and the supporting documentation sought by the Union in its request of July 7 and July 23, 1993 constituted managerial advice, guidance, or counsel to Respondent concerning the matters under investigation within the meaning of section 7116(b)(4)(B) of the Statute. See Department of Health and Human Services, Washington, D.C., 49 FLRA 61 (1994) (HHS Washington) (internal report concerning management and operations of an office); U.S. Army Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey, et al., 49 FLRA 77 (1994) (Picatinny Arsenal) (internal desk audit reports); and Department of the Air Force, Washington, D.C.

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From my review of the OIA Francis report it does not appear that "staff misconduct" on the part of supervisory staff with regard to releasing Baptiste was part of the investigation of the incident. However, as stated above the record is silent on the contents of the investigation concerning the "Release of an Inmate from Segregation" referred to in Respondent's July 29, 1993 reply to the Union above.

and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 49 FLRA 603 (1994) (Wright-Patterson) (Inspector General reports of safety programs at various agency facilities).

In HHS Washington, Picatinny Arsenal and Wright-Patterson the Authority inter alia, relied upon its decision in National Parks Service, National Capital Region, United States Park Police, 48 FLRA 1151 (1993) (Member Talkin concurring in part and dissenting in part) (National Park Service) wherein the Authority adopted the court's decision in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA), stating:

We adopt the court's decision in NLRB v. FLRA and conclude that an agency is not obligated to provide a union with requested documents containing advice, guidance, counsel, or training materials provided for management officials under section 7114(b)(4) of the Statute unless the union demonstrates a particularized need, as discussed by the court [in NLRB v. FLRA], for such information. Previous inconsistent Authority decisions will no longer be followed.

National Park Service, 48 FLRA at 1160. In NLRB v. FLRA the court held, at 533, n.6, that documents that are strictly intramanagement normally will not be discoverable under section 7114(b)(4)(B) of the Statute. The court also held that such documents would nevertheless be produceable if the union could establish a particularized need for advice, guidance, counsel, or training provided for management. The court further stated at, 533-34:

. . . where the union has no grievable complaint covering information on "guidance," "advice," "counsel" or "training," § 7114(b)(4)(B) normally will not require disclosure. If the union simply wants background information underlying some later decision, and the grievance only concerns objective constraints on agency action, then the predecisional test is probably "unnecessary"--indeed, it also may be irrelevant.

In HHS Washington the Authority, at 69, summarized the court's and its approach to resolving questions concerning the producibility of such documents, stating:

In [National Park Service] the Authority adopted the standard set forth in NLRB v. FLRA for determining when a union has demonstrated a sufficient need for information involving

managerial guidance, advice, counsel, or training to require disclosure of that information under section 7114(b)(4)(B) of the Statute. The court, and the Authority, require a union to establish a particularized need for such information. An assessment of that need involves a weighing of the union's asserted need with the "countervailing interest" raised by the agency against disclosure. 952 F.2d at 531-32. To aid in this inquiry, the court stated that a union might establish such a need "where the union has a grievable complaint covering the information." Id. at 532 (emphasis omitted). As an example of such a demonstration, the court posited a situation where a statute or a bargaining agreement "may impose a duty on the agency regarding predecisional deliberation, and the duty may then ground a grievable claim of right in the employee or union." Id. at 532-33. The court stated that information might also be disclosable "when the disputed document creates a grievable action." Id. at 533. With regard to the latter example, the court stated that there would be a "strong and valid claim to disclosure" if "the parties' agreement or existing practices make it clear" that requested predecisional materials are used "to determine subsequent disciplinary action"

Id. at 533. The Union's expressed need for the documents requested herein was to enable it to effectively present its case before an arbitrator. For various reasons, stated above, the information was useful and indeed needed by the Union in its preparation for arbitration and to make prudent decisions with regard thereto. However, as stated above, I find the investigation reports and supporting documents the Union sought from Respondent in its July 7 and July 23, 1993 requests constitute managerial advice, guidance, or counsel within the meaning of section 7114(b)(4)(B) of the Statute as delineated by the circuit court in NLRB v. FLRA and subsequently followed by the Authority. I am constrained to follow the circuit court's decision adopted by the Authority (Member Talkin dissenting) wherein the court engrafted onto section 7114(b)(4)(B), requirements not specifically contained in 7114(b)(4)(B) of the Statute regarding documents encompassing managerial advice, guidance, counsel, or training and imposed additional obligations upon the employees' collective bargaining representative seeking to obtain these documents.

Accordingly, since the Union has not established a "particularized need" for the documents, as defined by the circuit court and adopted by the Authority, I conclude the

documents the Union sought were not "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" within the meaning of section 7114(b)(4)(B) of the Statute, and therefore, Respondent's refusal to furnish these documents did not violate the Statute.

In view of the entire foregoing and the record herein I conclude that by its failure to provide the Union with the information it requested on July 7 and July 23, 1993, in the circumstances herein, Respondent did not violate section 7116(a)(1), (5) and (8) as alleged and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. CH-CA-30849 be, and hereby is, dismissed.

Issued, Washington, DC, January 13, 1995

SALVATORE J. ARRIGO
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. CH-CA-30849, were sent to the following parties in the manner indicated:

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Dated: January 13, 1995
Washington, DC