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

MEMORANDUM DATE: June 18, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE NAVY,
NAVY EXCHANGE SERVICE CENTER
EUROPE, NAPLES, ITALY

Respondent

and Case No. CH-CA-50557

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3712, 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
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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE NAVY NAVY EXCHANGE SERVICE CENTER EUROPE, NAPLES, ITALY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3712, AFL-CIO Charging Party	Case No. CH-CA-50557

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 **JULY 22, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: June 18, 1996
Washington, DC

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

U.S. DEPARTMENT OF THE NAVY NAVY EXCHANGE SERVICE CENTER EUROPE, NAPLES, ITALY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3712, AFL-CIO Charging Party	Case No. CH-CA-50557

Rondy L. Waye, Labor Relations Specialist
For Respondent

Robert A. Hochberger, President
For Charging Party

John F. Gallagher, Esquire
For the General Counsel

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

Respondent changed the work assignment of an employee. The complaint in this case alleges that Respondent implemented that change without affording the Charging Party (the Union) an opportunity to negotiate over its impact and implementa-tion. By doing so, the complaint alleges, Respondent repudiated a memorandum of agreement (MOA) between it and the Union, and apart from that, refused to negotiate in good faith with the Union, thereby committing unfair labor practices in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations

Statute (the Statute).[1] Respondent's answer admits most of the factual allegations of the complaint but denies that it implemented the change without affording the Union an opportunity to negotiate, that it repudiated the MOA, and that it committed the alleged unfair labor practices.

A hearing was held in Naples, Italy. Counsel for the General Counsel and Respondent's representative filed post-hearing briefs. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.[2]

Findings of Fact

The Union is a labor organization and is the certified exclusive representative of a unit of employees of Respondent. One of the employees in the unit is Paolo Del Piano[3], who, at the time the events giving rise to this case began, was classified as a "Janitor Leader." Respondent occupies part of the Pelli Building in Naples. Mr. Del Piano was assigned to perform janitorial duties in the part of the Pelli Building occupied by Respondent. In June 1994 Respondent made Del Piano responsible for cleaning additional space in Respondent's part of the building. The Union filed an unfair labor practice charge over Respondent's action. That charge was settled by an MOA between Respondent and the Union providing that the additional space responsibility would be rescinded and that Del Piano's work duties would remain as they were before the

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[1] **§ 7116. Unfair Labor Practices**

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

[2] Agency Exhibits A and B, included in the bound volumes entitled "Transcript of Proceedings," were not admitted into evidence and have not been considered.

[3] The record contains several variations of this employee's surname, including "del Piano" and "DelPiano." Having neglected to establish through the employee himself the correct form and the appropriate capitalization, I have resorted to what appears to be the most common usage in the United States.

June change, until Respondent gave the Union notice and opportunity to bargain concerning the impact and implementation of any future determination to change Del Piano's "working conditions."

An attachment to the MOA detailed areas within the building for which Del Piano had been responsible before the June 1994 change and to which his duties would return. The attachment lists six categories of assigned areas, specifies the square footage of each, and indicates the total square footage of 8,099. The attachment also lists the areas included in the additional space that had been assigned to Del Piano in June, totaling 5,203 square feet.

On March 6, 1995, Del Piano's supervisor, Lieutenant George E. Christensen, sent the president of the Union, Robert Hochberger, a copy of a new "Janitorial Schedule" for cleaning in the Pelli Building, with a memorandum informing Hochberger that Christensen would be meeting with Del Piano on March 10 "to discuss this assignment of work and to answer any questions that he may have." The memorandum concludes by informing Hochberger that the work schedule "will go into effect on Monday, 13 March 1995[,]" and that Hochberger should feel free to contact Christensen if he had any questions.

Under the new "Janitorial Schedule," Del Piano again became responsible for substantially, if not identically, all of the Pelli Building areas to which he had been assigned when his responsibilities were increased in June 1994. Thus, the space he was required to clean increased from approximately 8,000 square feet to approximately 13,000 square feet.[4] The additional space had been assigned, during the period following rescission of the June 1994 change, to a part-time employee who worked 15 hours a week. However, the March 1995 "Janitorial Schedule" adjusted the cleaning specifications so that some of the operations were not required as often as they had been. For example, substantial areas that had been required to be vacuumed daily were now to be vacuumed only weekly.

Hochberger responded to this notification with a letter, also dated March 6, to Captain B.R. Bennett, the

4 While there was arguably a hearsay aspect to the source of the square footage figures presented in a Union-generated survey received as GC Exh. 5, the figures are corroborated, except for a deviation of 10 square feet (in additional bathroom space), by matching square footage figures in the attachment to the MOA. I deem Respondent's execution of the MOA to be an admission of accuracy of the figures.

official to whom Lt. Christensen reports. Capt. Bennett had represented Respondent in signing the MOA. Hochberger referred Bennett to the MOA and informed him that he believed that the announced change in Del Piano's duties was "illegal." Hochberger's final paragraph stated:

> Of course, you are changing his duties without allowing the Union to bargain. We are, hereby, invoking negotiations. The Union is giving you a 30-day notice pursuant to Article 27 of the Negotiated Agreement that we intend to file a ULP.

Respondent did not respond to Hochberger's letter.

Hochberger attended the May 10 meeting with Christensen and Del Piano for the purpose of representing the Union at a "formal discussion" as described in section 7114(a)(2)(A) of the Statute.[5] As may have been inevitable, however, Del Piano believed that Hochberger was there to represent him.

In any event, Hochberger did not go to the meeting prepared to negotiate over the impact and implementation of the new schedule, but reminded Christensen, at the meeting, that the Union had requested such negotiations. He also requested maintenance of the *status quo* during the negotiation process. Christensen did not respond verbally to Hochberger concerning negotiations. Instead he responded with what Hochberger characterized as "kind of [a] shrug [of his] shoulders."[6] Hochberger left the meeting understanding that the new schedule would be implemented, as indicated previously, on March 13. And so it was.

As a result of the new schedule, Del Piano perceived his work load to be heavier. The total space for which he was responsible increased by approximately 60-65 percent. Because the required frequency of certain cleaning operations within that increased space was reduced, the

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[5] "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment [.]"

[6] Only Hochberger testified about this aspect of the meeting, and I credit his testimony. Christensen did not testify.

total square footage Del Piano had to cover over the course of a week, in performing all of the required repetitions of all of the cleaning operations, increased by only about 26 percent. (GC Exh. 5.) In addition, because he believed that the scheduled cleanings would leave certain areas "filthy," and in response to complaints from users of the facilities, Del Piano voluntarily cleaned some areas more often than required by the schedule. Del Piano told Lt. Christensen that people were complaining. Christensen told him to do the best he could.

Del Piano's pay and hours remained the same. He continued to perform the same kinds of cleaning operations. The only change, from his perspective, was the "extra location" he had to cover. However, as he put it, "You have to work like a maniac to get the work done." This comment, while hyperbolic, is a credible expression of his perception of the change.

In November 1995 (after the unfair labor practice charge was filed in this case) Respondent reclassified Del Piano's position from "Janitor Leader" to "Janitor." His new job description eliminated the "working leader" functions included in the former job description, but there is no evidence that he had been performing them before the assignment change.

Discussion and Conclusions

The record and the briefs present essentially three issues with respect to the establishment of the alleged violations. The first is whether the change in Del Piano's work assignment generated an obligation to negotiate over its impact and implementation under section 7106(b)(2) and (3) of the Statute. The second is whether, assuming there was such an obligation, Respondent fulfilled it. Third is the issue, resolution of which is in this case closely related but not identical to the first and second, of whether Respondent repudiated the MOA.

A. Obligation to Bargain Over Impact and Implementation

1. Applicable Principles

Section 7106 of the Statute, subtitled "**Management rights**," provides, in pertinent part, that:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the

> authority of any management official of any agency--
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> * * * * *
>
> (2) in accordance with applicable laws--
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> * * * * *
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
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> * * * * *
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
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> * * * * *
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Negotiations over "procedures" as defined in subsection (b)(2) have come to be known as "implementation" bargaining (or negotiations) and those over "appropriate arrangements" as defined in subsection (b)(2) as "impact" bargaining. *See Department of the Air Force, Air Force Systems Command, Electronic Systems Division*, 14 FLRA 390, 402 (1984). However, they are collectively referred to in reverse order--"impact and implementation." This usage dates from pre-Statute interpretations of Executive Order 11491. *See Internal Revenue Service and IRS Richmond District Office*, 2 FLRA 333, 334 n.1, 341 (1979).

A duty to engage in "impact and implementation" bargaining arises when an agency has decided to exercise its management rights under section 7106(a) in a manner that effects a change in established conditions of employment, provided that the change is more than *de minimis. Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 405-08 (1986) (*SSA*). The Authority used *SSA* as an opportunity to reassess and modify its previous standard for determining whether a change in

conditions of employment was more than *de minimis* and thus required bargaining.[7]

The standard announced in *SSA* places "principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees.[8] Equitable considerations will also be taken into account in balancing the various interests involved." *Id.* at 408. The Authority also announced in *SSA* that the number of employees involved will not be a controlling consideration but "will be applied primarily to expand rather than limit the number of situations where bargaining will be required." *Id.*[9]

The direct "effect or reasonably foreseeable effect" of the change involved in the instant case pertains to Mr. Del Piano's workload. Increases or realignments in workload are changes in a condition of employment that may

[7] The examples provided in Respondent's brief of instances in which the Authority found that a change was *de minimis* all preceded *SSA*. Therefore those Authority findings provide uncertain guidance for the proper application of the "reassessed and modified" *de minimis* standard.

[8] My analysis of Authority cases applying this standard previously led me to believe that the "reasonably foreseeable effect" part of the test controlled over the actual "effect" part, so that an agency was not at risk in lacking 20-20 hindsight as to unanticipated but actual effects. The Authority appears to have disavowed that analysis and to have reaffirmed that the actual effect may serve independently as a sufficient basis for meeting the *SSA* test, that is, that the two parts are to be read disjunctively. *See Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 45 FLRA 574, 575 n.1, 582-583 (1992) (*Portsmouth*). But in *Veterans Administration Medical Center, Prescott, Arizona*, 46 FLRA 471, 476 (1992), the Authority stated that "[t]he inquiry does not focus primarily on the actual effects of a change in employees' conditions of employment." However, in more recent decisions, the Authority has again reaffirmed the actual "effects" part of the test. *See, for example, United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 47 FLRA 225, 230, 232 (1993).

[9] In each of the pre-*SSA* cases cited by Respondent in the instant case, the Authority had relied at least in part on the number of employees involved in finding that the changes were no more than *de minimis*.

give rise to obligations to bargain over their impact and implementation. *See, for example, United States Department of Veterans Affairs Regional Office, San Diego,* California, 44 FLRA 312, 320, 337 (1992) (*VA San Diego*); *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut*, 41 FLRA 1309, 1318 (1991); *United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 34 FLRA 1035, 1046, 1072-73 (1990) (*INS I*), *modified in other respects*, 39 FLRA 1431 (1991). In fact, the Authority exhibited what is perhaps the clearest illustration of this proposition in one of its earliest applications of the *SSA* revised standard. Thus, in *Internal Revenue Service*, 24 FLRA 999, 1001-02 (1986), the Authority, finding an impact on bargaining employees sufficient to require bargaining, assigned primary importance to the conclusion that the agency's new program, which removed certain employees from their normal duties for a period of months, "could have a foreseeable impact on the workload of remaining employees as well as on the selected employees' ability to perform their duties upon return to their bargaining unit duties." *See also Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, 39 FLRA 1325, 1331-32 (1991); *Overseas Education Association and Department of Defense Dependents Schools*, 39 FLRA 153, 159-160 (1991).

In determining whether the impact ("effect or reasonably foreseeable effect") of a change in workload is more than *de minimis*, the Authority looks not only to the direct effect on the difficulty of performing the job, but also to the potentiality for an indirect effect on employees' appraisals or other variables that could, in turn, affect their job security or opportunity for promotion. *See VA San Diego; INS I; U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 770, 783, 820 (1990).

On the other hand, the addition of some duties does not, by itself, require bargaining. The impact of the addition must still be examined to determine whether it reaches the level of significance that makes it more than *de minimis*. *See U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Chicago, Illinois*, 30 FLRA 572, 579-80 (1987); *Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 20 FLRA 481, 484 (1985) (*FAA)* (a pre-*SSA* decision that

may still have some vitality at least with respect to some factors in assessing the "impact" of an addition of duties).

2. Application to this Case

The 26 percent increase in the cumulative space to be covered by the combination of Del Piano's cleaning operations did not, by itself, necessarily increase his workload in a way that made his job more difficult or onerous. *See FAA* (no evidence "that the duties assigned would change to any measurable degree the amount of time required by the employees to complete all their assigned duties"). Each cleaning operation within a given area is not equivalent in difficulty or in the time it reasonably consumes. Vacuuming an area, for example, is not the same as disposing of its trash. Neverthe-less, Del Piano's credible impression of the impact supports the inference that, for him, at least, the change was one that made his job more difficult to perform successfully within his working hours. His testimony is supported by the empirical observation, reinforced by common sense, that there may be more involved in adequately cleaning (for example, vacuuming) an area that has accumulated a week's worth of dirt than performing the same operation in an area that was cleaned yesterday.

If this were not sufficient to establish an impact that is more than *de minimis*, I believe there is legally cognizable significance in the fact that Del Piano found it necessary to take it upon himself to exceed the scheduled cleaning operations. He did so, it would appear, not out of an obsessive regard for cleanliness, but because he and at least some users of the facilities found that acceptable standards of cleanliness could not be maintained by strict adherence to the schedule. Del Piano was therefore faced with the choice of adhering to the schedule and leaving the place in what he regarded as a substandard condition, or working harder to achieve a more acceptable result.

Whether or not management would have found the results of adherence to the schedule acceptable, I credit that there was a palpable difference in the results obtainable. While not all employees may take pride in their work product, especially when the product is as ephemeral as a clean facility, I am satisfied that Del Piano did. Nor was his feeling of the inadequacy of the schedule solely self-imposed. His receipt of complaints from facility users was both a confirmation of his reaction and, in itself, a further adverse effect of the change.

I believe that the conditions that affect an employee's ability to satisfy himself that he is performing his job adequately, and that affect the nature of the feedback he receives from his "customers," are as much "conditions of employment" as are the physical aspects of the work environment. Thus, these intangible effects of the new cleaning schedule changed Del Piano's conditions of employment and did so, I find, to an extent that was more than *de minimis.*

All of the above are what I have found to be the actual effects of the new schedule. They provide an independent basis for meeting the *SSA* test. Some of these actual effects may also have been reasonably foreseeable, and thus have also satisfied the other part of that disjunctive test. I conclude that the reasonably foreseeable effects of the change, by themselves, also establish an impact that is more than *de minimis*. Among the effects that I have found actually to have occurred, I conclude that it was reasonably foreseeable at least that the new schedule would require a significantly increased intensity of effort on Del Piano's part. Management is not chargeable with anticipating precisely the increase in intensity of effort necessary. However, management had or should have had sufficient knowledge of the situation at the time of the change (*Portsmouth* at 575), to make it reasonably foreseeable that the change would have a significant impact on the way Del Piano would have to go about his duties.[10] Also reasonably foreseeable, although not necessarily of overwhelming probability, was that the increase in Del Piano's duties would affect his ability to sustain the same performance level for appraisal purposes. *Cf. U.S. Equal Employment Opportunity Commission*, 40 FLRA 1147, 1155 (1991) (reasonably foreseeable that "increased workload will have ramifications in employees' performance appraisals").

Based on all of these considerations, I conclude that the effects *and* the reasonably foreseeable effects of the change in conditions of employment represented by the new cleaning schedule were, independently, more than *de minimis.* Thus the change engendered an obligation to bargain over its impact and implementation.

B. Failure to Fulfill the Bargaining Obligation

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[10] In using the phrase, "significant impact," I intend to be descriptive, not prescriptive. I do not mean to propose "significant" as a synonym for "more than *de minimis*". *Cf. Portsmouth* at 575 n.2 ("more than *de minimis*" is not the same as "substantial").

There is no sensible reason for impact and implementation bargaining not to have occurred between Hochberger and Christensen when they met, with Del Piano, just before the new cleaning schedule was implemented. In fact, Del Piano appeared to have been under the impression that something like that was occurring (Tr. 60). However, it did not. Why not?

Hochberger had requested the opportunity to negotiate and had even "invoke[d] negotiations." Having received no response, nor any indication that Christensen was authorized to negotiate, Hochberger presented no proposals at the meeting. It was reasonable for him to assume, in the circumstances, that any attempt to negotiate at that meeting would have been futile. Nor does Respondent argue otherwise. Rather, Respondent faults the Union for not demonstrating to it at or around that time how the new work assignment impacted on Del Piano's conditions of employment.

I reject the suggestion that the Union was obligated to accompany its bargaining request with a demonstration of why there was a duty to bargain. Hochberger's letter stated that Respondent was changing Del Piano's duties without allowing the Union to bargain. Implicitly, this was an assertion that there was a duty to bargain. Hochberger had no reason at that point to assume that Respondent needed any further information about the Union's reason to believe there was a bargaining obligation. Respondent was required at least to respond to the request. *See Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990). Not having done so, it is not in a position to insist retroactively on the Union's having demonstrated the impact.

There was a duty to bargain. Respondent failed and refused to give the Union the opportunity to do so. It therefore violated sections 7116(1) and (5) of the Statute.

C. Repudiation of the MOA

As the parties' MOA obligated Respondent to provide the Union with an opportunity to bargain concerning the impact and implementation of any change in Del Piano's working conditions, it follows from my findings with respect to Respondent's statutory bargaining obligation that Respondent breached the MOA. In some circumstances, the failure or refusal to honor an agreement arrived at through collective bargaining violates sections 7116(a)(1) of the Statute. Such agreements include those reached for the purpose of settling an unfair labor practice charge. *See Great Lakes Program Service Center, Social Security Administration,*

Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982). A statutory violation occurs when the breach amounts to a repudiation of an obligation imposed by the agreement's terms. *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218-19 (1991) (*Warner Robins*).

The Authority has identified two elements to be examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach (*i.e.*, was the breach clear and patent?) and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart of the parties' agreement?). *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 862 (1996).

In examining the first of these elements, the Authority has focused on whether, in explaining its actions, the respondent has relied on a reasonable interpretation, although not necessarily the only reasonable interpretation, of the provision in question. *Id.* at 863. However, the "clear and patent" issue is not presented in that form in the instant case. Respondent here does not present any interpretation of the provision concerning its obligation to furnish the Union with an opportunity to bargain that is at variance with the interpretation I have given it above. That is, the provision substantially approximates Respondent's statutory bargaining obligation. Whether there was a "clear and patent" breach here depends not on conflicting interpretations of the agreement, but on whether there was a change in Del Piano's working conditions. Having found that there was, and therefore that there was a breach, I conclude that the "clear and patent" standard cannot stand in the way of an ultimate conclusion that Respondent repudiated the agreement.

With regard to the second element, it cannot be disputed that the provision Respondent breached went to the heart of the parties' agreement. The opportunity to bargain was the essence of the agreement. In fact, that is the only subject it addressed in substance, as it formed the basis for the settlement of an unfair labor practice charge relating to Respondent's bargaining obligation. I therefore conclude that there was a repudiation here, within the meaning the Authority gives to that term, and that Respondent committed this additional unfair labor practice in violation of sections 7116(a)(1) and (5) of the Statute.

The Remedy

In connection with the usual bargaining order to remedy violations of section 7116(a)(5), Counsel for the General Counsel requests that the order include a requirement for restoration of the *status quo ante*. Such a requirement would rescind the change in Del Piano's schedule, pending negotiations. Respondent contends that a *status quo ante* remedy is inappropriate here, and that any bargaining order granted should be limited to prospective bargaining over the impact and implementation of the change. No request has been made for any kind of make-whole remedy, nor was there evidence of the necessity or appropriateness of such a remedy.

A *status quo ante* remedy is normally deemed appropriate where management changes a condition of employment without fulfilling its obligation to bargain on that change and the change is one that is "substantively" negotiable. In such cases, the Authority will grant such a remedy absent special circumstances. *Veterans Administration, West Los Angeles Medical Center, Los Angeles, California*, 23 FLRA 278, 281 (1986) (*VA Los Angeles*). Where the refusal to bargain was over a change that was subject to impact and implementation but not "substance" bargaining, a *status quo ante* remedy will be found appropriate only after a weighing of factors designed to balance "the nature and circumstances of the particular violations against the degree of disruption in government operations that would be caused by such a remedy." *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*). When a *status quo ante* remedy is not deemed appropriate in such a case, the usual bargaining order is prospective only.[11]

The rationale for making a *status quo ante* remedy presumptively appropriate in the case of a refusal to bargain over a substantively negotiable change is that such remedy is necessary "in order not to render meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." *VA Los Angeles*; *U.S. Customs Service, Region V, New Orleans, Louisiana*, 9 FLRA 116, 119 (1982). Such imperative, apparently not deemed to be applicable to cases where the bargaining involved will be limited to impact and implementation, makes it unnecessary in substantive bargaining cases to apply the

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[11] This is not the same as a determination as to whether the Authority should order that any agreement reached as a result of the mandated negotiations be made retroactive, a remedy that has not been sought here. *See generally Environmental Protection Agency and Environmental Protection Agency, Region II*, 25 FLRA 787, 790-91 (1987).

FCI criteria. *Long Beach Naval Shipyard, Long Beach, California*, 17 FLRA 511, 514 and n.6 (1985).[12]

In contrast to the distinction made between these types of refusal-to-bargain cases, the Authority has not had occasion to articulate a remedial standard for cases of unlawful repudiation. Examination of a number of repudiation cases reveals, nevertheless, a pattern of ordering restoration of conditions that were changed by virtue of the repudiation, without a separate analysis of whether the repudiated provision concerned matters subject to substance bargaining or impact and implementation bargaining. *See, for example, Department of Defense Dependents Schools*, 50 FLRA 424 (1995), *Panama Canal Commission, Balboa, Republic of Panama*, 43 FLRA 1483 (1992), *reconsideration denied*, 45 FLRA 1075 (1992); *Warner Robins; Rolla Research Center, U.S. Bureau of Mines, Rolla, Missouri*, 29 FLRA 107 (1987). *See also U.S. Department of the Interior, Bureau of Reclamation, Washington, D.C. and Bureau of Reclamation, Mid-Pacific Regional Office, Sacramento, California*, 46 FLRA 9, 28-30 (1992) (*status quo ante* ordered to remedy violations that included repudiation). *But cf. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 30 FLRA 697, 701 (1987) (*status quo ante* remedy warranted where management, by repudiating an agreement, unilaterally changed a negotiable term and condition of employment); *Department of Treasury, Internal Revenue Service, Memphis Service Center*, 15 FLRA 1984) (*status quo ante* remedy denied, based on *FCI* factors, although revocation of agreement based on assertion of its nonnegotiability was found to be an unlawful repudiation in addition to the unfair labor practice of refusing to negotiate concerning a proposal previously determined to be negotiable).

More generally, the Authority has provided the following guidance:

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[12] I presume that the basis for this distinction goes generally along the following lines. When the obligation to bargain is limited to the impact and implementation of a change management has a right to make under section 7106 of the Statute, it is virtually a foregone conclusion that, once the bargaining obligation has been satisfied, the change will either be made or, if already made, remain in place. The *FCI* formulation thus treats restoration of the *status quo ante* pending negotiations not as a prerequisite to meaningful bargaining, but as a remedy the advantages of which must be balanced, without any presumption of appropriateness, against factors that might render it inappropriate.

> We believe that remedies for unfair labor practices under the Statute should, like those under the NLRA, be "designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." Local 60, United Brotherhood of Carpenters & Joiners v. NLRB, 365 U.S. 651, 657 (1961) (Harlan, J., concurring). Remedies should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." NLRB v. J.H. Rutter-Rex Manufacturing Co., 396 U.S. 258, 265 (1969) citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Although not in itself a sufficiently justifying effect, deterrence is also certainly a desirable effect of a remedy. Carpenters v. NLRB, 365 U.S. at 659. However, remedies should not be punitive. Id. at 659.

United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 444-45 (1990). The Authority's approach to *status quo ante* remedies for unilateral changes in substantively negotiable conditions of employment, although predating the Authority's articulation of this broader policy, appears to reflect its spirit. On the other hand, the *FCI* approach applied to unilateral changes in conditions subject only to impact and implementation bargaining appears to stand as more in the nature of a pre-existing exception to that policy.

I believe that repudiations of the kind represented by the instant case fall more properly under the broader policy approach, and therefore, that a *status quo ante* remedy is presumptively appropriate. That is, it is warranted, absent special circumstances, where a party has repudiated an agreement by reneging on a promise to withhold action until certain conditions are met. A *status quo ante* remedy in those circumstances does nothing more than to direct a party to live up to its agreement.

I find no special circumstances in this case that would justify withholding such a remedy. Respondent merely asserts that such a remedy would be "unduly disruptive."

Beyond the putative merits of any general approach for remedies in repudiation cases, a *status quo ante* order seems particularly appropriate in the instant case. The parties settled an unfair labor practice charge in a manner that appears on the agreement's face to fix Respondent's obligation to bargain *before* changing Del Piano's working

conditions. To remedy Respondent's subsequent unfair labor practices, including its repudiation of that agreement, without giving the Union the opportunity to bargain before any changes are made, would truly "render meaningless" the negotiations leading to the settlement agreement. Such a result would remove much if not all incentive for a party in the Union's situation to settle an unfair labor practice charge on similar terms. That, in turn, would encourage otherwise avoidable litigation.

For all of the above reasons, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the U.S. Department of the Navy, Navy Exchange Service Center Europe, Naples, Italy, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of unit employees by implementing a new work schedule without ful-filling its obligation to bargain with the American Federation of Government Employees, Local 3712, AFL-CIO (Local 3712), the exclusive representative of certain of its employees, concerning the impact and implementation of such change.

(b) Repudiating the memorandum of agreement negotiated with Local 3712 for the resolution of an unfair labor practice charge filed in Case No. CH-CA-40847.

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

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

(a) Rescind the new work schedule for employee Paolo Del Piano that was implemented on or about March 13, 1995.

(b) Upon request, negotiate with Local 3712 over the impact and implementation of the new work schedule for Paolo Del Piano.

(c) Post at all its facilities where bargaining unit employees represented by Local 3712 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 Commanding Officer 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 section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Chicago Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 18, 1996

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations authority has found that Social Security Administration, Dallas Region, Dallas, Texas, 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 NOT unilaterally change working conditions of unit employees by implementing a new work schedule without fulfilling our obligation to bargain with the American Federation of Government Employees, Local 3712, AFL-CIO (Local 3712), the exclusive representative of certain of our employees, concerning the impact and implementation of such change.

WE WILL NOT repudiate the memorandum of agreement we negotiated with Local 3712 for the resolution of an unfair labor practice charge filed in Case No. CH-CA-40847.

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

WE WILL rescind the new work schedule for employee Paolo Del Piano that was implemented on or about March 13, 1995.

WE WILL, upon request, negotiate with Local 3712 over the impact and implementation of the new work schedule for Paolo Del Piano.

(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, Chicago Region, 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. CH-CA-50557, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Rondy L. Waye, Labor Relations Specialist
Department of the Navy
European Service Center
PSC 821, Box 121
FPO AE 09421

Robert A. Hochberger, President
American Federation of Government
Employees, AFL-CIO
PSC 810, Box 30
FPO AE 09619

John F. Gallagher, Esquire
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: June 18, 1996
Washington, DC