UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 24, 1997

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND

Respondent

and Case No. CH-CA-70217

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, 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

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U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO Charging Party	Case No. CH-CA-70217

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 27, 1997**, and addressed to:

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

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: September 24, 1997
Washington, DC

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

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO Charging Party	Case No. CH-CA-70217

William P. Krueger, Esq.
For the Respondent

Mr. Richard Benge, Jr.
For the Charging Party

John F. Gallagher, Esq.
For the General Counsel

Before: SAMUEL A. CHAITOVITZ
Chief 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.* (the Statute).

Based upon an unfair labor practice charge filed by the Charging Party, American Federation of Government Employees, Council 214, AFL-CIO (the Union), a Complaint and Notice of Hearing was issued by the Regional Director for the Chicago Region of the Federal Labor Relations Authority. The complaint alleges that the U.S. Department of the Air Force, Air Force Materiel Command (the Respondent) violated section 7116(a)(1) and (5) of the Statute by implementing a change in the annual performance appraisal cycle for unit employees

without providing the Union an opportunity to negotiate to the extent required by the Statute. Respondent's answer denies that it failed to bargain to the extent required by the Statute.

A hearing was held in Chicago, Illinois. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Counsel for the Respondent and the General Counsel filed timely and helpful briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

A. The Parties' Relationship

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide unit of Respondent's employees which is appropriate for collective bargaining. The Union, AFGE Council 214, is AFGE's agent for the purpose of representing the employees in the nationwide unit. Although the parties' Master Labor Agreement (MLA) expired in 1992, its terms have continued in effect by mutual understanding. As applicable to this case, the MLA provides:

> ARTICLE 33--NEGOTIATIONS DURING THE TERM OF THE AGREEMENT
>
> . . . .
>
> SECTION 33.02: NEGOTIATIONS AT COMMAND LEVEL
>
> When a bargaining obligation is generated by a proposed directive at Command level or a directive issued above Command level, the following procedures will apply:
>
> a. The Labor Relations Office will notify the designated Union official in Section 33.01 above of the intended changes in conditions of employment. A reasonable time period/date following the notification will be identified as the implementation date. The Council President or designee

> may request and be granted a meeting to discuss the change.
>
> b. If the Union wishes to negotiate, in accordance with entitlements under CSRA, concerning proposed changes, the Union will submit written proposals to the Labor Relations Office not later than 15 workdays after receipt of Employer's notification. Negotiations will normally begin within five workdays after receipt by the Labor Relations Office of the timely Union proposals. If necessary, the identified implementation date may be postponed by the Employer to complete negotiations in good faith.

It is undisputed that, when management wanted to change conditions of employment under the foregoing procedures in the past and the Union had questions concerning the reasons for the proposed change, the parties would meet to discuss the matter; and if the Union wanted to negotiate, written proposals would be submitted to management within 15 workdays from receipt of notice of the proposed change.

B. Respondent's Proposed Change in the Evaluation Cycle

On November 12, 1996,[1] Respondent received an electronic (e-mail) message from Headquarters of the United States Air Force which stated in part as follows:

> 1. The appraisal period for the Air Force Civilian Performance Management Program will change in 1997 to 1 April through 31 March. The current period, which began on 1 July 1996, will be closed out on 31 March 1997 using all of the features of the current program. Ratings factor scores, and awards given for this "short" period will be effective 1 June 1997.

The e-mail message also stated that the Respondent should "[e]nsure local bargaining obligations have been met prior to implementation."

By memorandum dated November 13, the Respondent notified Union representative Richard Benge of the above-described change in the current performance appraisal period

[1] All references are to 1996 unless otherwise indicated.

and stated that the Union should submit any bargaining proposals on the matter, consistent with Section 33.02b of the MLA, to Michael Madges.[2] Benge responded with a letter to Madges dated December 4, expressing the Union's wish to negotiate over the change in the appraisal period, attaching the Union's "preliminary proposals," and stating that new issues might be raised in future proposals.[3]

C. Subsequent Communications Between the Parties

When Madges received Benge's December 4 letter, he interpreted it as a request for more information about the reasons why management wanted to move the dates of the appraisal period. Therefore, he telephoned Benge and they mutually agreed to meet on December 11 for a discussion of the matter. The meeting was attended by Madges and Timothy Wolfe for the Respondent, Benge and Walter Squires for the Union. Wolfe, a personnel specialist with primary responsibility for the civilian performance appraisal system and awards program, explained the reasons why management wanted to shorten the 1996-1997 appraisal period by three months and to start each succeeding annual appraisal period on April 1. The Union representatives asked a number of questions, some of which the Respondent could not answer but promised to follow up and get back to the Union sometime

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[2] Madges is a Labor Relations Specialist in the Respondent's Directorate of Civilian Personnel.

[3] Of the Union's four "preliminary proposals," the first identified the parties to a Memorandum of Agreement (MOA) and recognized their mutual interest in establishing "a process covering the matters at hand;" the third reserved the Union's right to modify or add proposals if deemed appropriate; and the fourth declared that no rights were waived by the MOA. The second proposal read as follows:

> Maintain status quo of the Appraisal Period/ Civilian Performance Management Program, i.e., civilian appraisal period will remain on a 1 July through 30 June cycle, until resolution of negotiations on this matter relative to the substantive change, the intended changes in conditions of employment, and the impact these changes will have on the bargaining unit members. This resolution shall be defined by the execution of a memorandum of agreement on this matter by the Union and management.

after the meeting.[4] Benge and Squires then indicated that the information provided by the Respondent would be shared with the Union's Executive Board. According to the undisputed testimony, which I credit, Madges asked when the Union would be able to get back to him and, when the Union representatives indicated that it would be sometime after the first of the year, Madges replied that such timing was unacceptable because the Respondent would need to get out guidance to its managers in time to allow them to complete the appraisal cycle three months earlier than expected for the 44,000 unit employees involved. At that point, Squires replied that the Union would give priority to the issue and get back to Madges before Christmas.

On December 16, Madges visited the Union office on unrelated business and was approached by Benge who wanted to discuss the proposed change in the appraisal cycle.[5] After Squires joined them, Benge stated that the Union would agree to accept management's change in the appraisal cycle if the Respondent would agree to either an additional full-time Union representative at each facility or the Union's previously submitted command-level parking proposal.[6] Madges promised to consider the offer and respond to the Union. The next day, Madges rejected the Union's offer in a memo to Benge. After summarizing the previous communications between the parties concerning the subject of a change in the civilian appraisal cycle and the Union's promise to respond with concerns before Christmas, Madges concluded:

> Your subsequent verbal suggestion of 16 Dec 96 to address other unrelated subjects is not acceptable. We look forward to implementing this change in cycle as proposed. Questions or concerns can be referred to the undersigned [.]

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4 It is undisputed that the Respondent telephoned the Union with the requested information on December 13.

5 Benge testified that he called Madges on December 16 and discussed the matter with him over the phone. I credit the testimony of Madges on this point, whose recollection of the meeting--including Squires's participation--appeared more precise and complete.

6 Benge described the Union's offer as "macro level," by which he meant that the Union's proposals were on issues unrelated to the Respondent's announced change in the appraisal cycle.

Benge replied to Madges by letter dated December 18 in which he acknowledged the Respondent's rejection of the Union's "attempt at macro level bargaining;" characterized the Respondent's reasons for changing the appraisal cycle as "unpersuasive" and apparently made only for the sake of change without comprehensive planning regarding the impact of the change; and concluded as follows:

> Your documentation to date has not provided a proposed implementation date for this effort. It is our assumption that such a date will be provided in your counter offer. If this assumption is in any way incorrect please advise in writing on or before close of business 23 December 1996.
>
> We look forward to your counter proposals and further bargaining on this issue. Questions or concerns can be referred to the undersigned [.]

By memorandum dated December 27, Madges notified Benge of the Respondent's intention to implement the change in the appraisal cycle as first announced in its memorandum to the Union dated November 13. In expressing the Respondent's position, Madges stated that the Union had an obligation to submit negotiable proposals consistent with Section 33.02b of the parties' MLA but failed to do so either within 15 workdays after receiving notice of the Respondent's proposed change in the appraisal cycle (as required by the MLA) or within the extension period agreed upon by the parties (i.e., before Christmas). Madges characterized the "preliminary" proposals submitted by the Union on December 4 as, in effect, requiring the status quo to be maintained while the parties completed negotiations, and acknowledged the Respondent's obligation to do so "if the union appropriately pursues negotiations." By not submitting proposals as required, Madges stated, the Union waived its statutory right to bargain on the matter and the Respondent therefore would implement the appraisal cycle change as originally indicated. Respondent ended the 1996-1997 appraisal year as of March 31, 1997, with no further communications between the parties on this subject.

Discussion and Conclusions

As previously stated, the complaint in this case alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a change in the annual civilian appraisal cycle without providing the Union an opportunity to negotiate to the extent required by the

Statute. For the reasons set forth below, I conclude that the complaint should be dismissed.

A. The Respondent's Statutory Bargaining Obligations

An agency must provide the exclusive representative of bargaining unit employees with notice of proposed changes in their conditions of employment and an opportunity to bargain over those aspects of the changes that are negotiable. *See 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, 1317 (1991); *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 33 FLRA 454, 458 (1988). It is undisputed that the Respondent gave the Union written notice on November 13, 1996, of its intention to change the appraisal cycle for bargaining unit employees by ending the 1996-1997 cycle on March 31, 1997 rather than on June 30, 1997, thereby reducing the current rating period from one year to nine months. Such notice to the Union clearly was timely, since it was given one day after the Respondent received an e-mail message from Headquarters of the U.S. Air Force announcing the proposed change.

The proposed 25% reduction in the established annual appraisal cycle in the middle of that rating period clearly affected the unit employees' conditions of employment. An employee's appraisal can affect everything from eligibility for a meritorious service award to removal from federal service for unacceptable performance. Changing the duration of the current performance cycle therefore could directly affect an employee's opportunity to qualify for an award or improve performance to an acceptable level. Accordingly, I conclude that the Respondent's proposed change in the appraisal cycle for all bargaining unit employees constituted a change in their conditions of employment which was fully negotiable. *See Social Security Administration and American Federation of Government Employees, Local 1760, AFL-CIO*, 21 FLRA 401, 403 (1986); *American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service*, 13 FLRA 697, 701 (1984); *American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York*, 5 FLRA 70, 73-76 (1981), *aff'd as to other matters sub nom. AFGE, Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983)(proposal requiring *annual* performance

appraisals is consistent with law and Government-wide rules and regulations and is within the duty to bargain).7

B. The Respondent Met Its Bargaining Obligations

The Respondent not only gave the Union immediate notice of the proposed change in the current appraisal year, it also reminded the Union of the requirement to submit written proposals within 15 workdays after receiving notice of the proposed change under the terms of the parties' negotiated MLA. The Union's timely "preliminary proposals" submitted on December 4 essentially sought to maintain the existing appraisal cycle until the parties could complete their negotiations on the proposed change. In my view, Respondent could reasonably have anticipated that the Union would submit substantive proposals for the parties to negotiate. It should be noted that the Union's proposal was *not* that the Respondent should retain the current appraisal year without change. Such a proposal would have brought the parties to an impasse that either or both of them could have submitted to the Federal Service Impasses Panel (FSIP) for resolution. Rather, the Union's proposal was merely for no change to be made *until the parties negotiated over the matter*. The latter proposal contemplates that some *future* bargaining by the parties will occur. As the Authority has held in a prior case involving these same parties and the same provision of their MLA, the Union's right to submit proposals for future bargaining was not open-ended but was properly limited by the 15-workday time limit agreed to by the parties unless mutually extended. *See Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536-38 (1996).

In my judgment, the parties did mutually agree to an extension for the Union to submit bargaining proposals. Thus, Madges and Benge agreed to meet on December 11 so that the Union could be briefed on management's reasons for proposing to change the appraisal cycle. At that meeting, after the Respondent explained its reasons and the Union

7 Since the Respondent's proposed change in conditions of employment was substantively negotiable, I find it unnecessary to determine whether the impact of the change was more than *de minimis*. *See U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 994 (1992); *National Weather Service Employees Organization and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service*, 37 FLRA 392, 396 (1990)(where an obligation to bargain over the substance of a change exists, the effect of the change on working conditions is not relevant).

representatives indicated that the information would be presented to its Executive Board, Madges extracted a promise from Squires that the matter would be given priority consideration by the Union and that the Union would respond concerning the matter before Christmas. The Union did respond verbally on December 16 that management's proposed change in the appraisal cycle was acceptable if the Respondent would make concessions on totally unrelated issues. Madges rejected the Union's suggestion as "not acceptable" in writing the next day; stated that the change in the appraisal cycle would be implemented as proposed; and advised Benge to refer the Union's questions or concerns to him.

At that point the Union had several options. It could have submitted additional proposals to the Respondent through Madges before Christmas, which was still over a week away; it could have telephoned Madges to protest the Respondent's summary rejection of the Union's suggested resolution of the matter; or it could have declared the parties at an impasse and referred the matter of the Respondent's proposed change in the appraisal cycle to the FSIP for assistance in resolving the impasse. A referral to the FSIP likely would have precluded the Respondent from implementing the change while the matter was pending before the FSIP. *See Department of Health and Human Services, Social Security Administration*, 44 FLRA 870, 881-83 (1992); *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466, 468 (1985)(once FSIP's impasse resolution services have been invoked, parties must maintain the status quo to the maximum extent possible, consistent with the necessary functioning of the agency; failure to do so constitutes a violation of section 7116(a)(1),(5) and (6)).

Instead, the Union responded by letter to Madges dated December 18 which merely confirmed the Respondent's rejection of "macro level bargaining;" articulated the Union's concern that management had no good reasons for changing the appraisal cycle and had not thought out the adverse impact of such a change; suggested that the Respondent had not identified the date on which the change would be implemented; and stated
the Union's expectation that the Respondent would furnish the implementation date along with counterproposals by December 23. As I interpret the Union's December 18 letter, it tacitly accepts the Respondent's rejection of "macro level bargaining." There is not a word of concern that the Respondent found the Union's macro proposals on unrelated issues "not acceptable." Moreover, the Union's letter contains no new proposals, but instead calls upon the

Respondent to proffer counterproposals by December 23. In my view, the Respondent was not required to come forward with counterproposals. The parties had mutually agreed to an extension of the 15-workday time limit contained in their MLA for *the Union* to submit proposals concerning management's announced intention to change the 1996-1997 appraisal cycle. That deadline was December 23. The Union could not properly shift the deadline for coming forward with proposals to the Respondent by saying, in effect, "If you don't like our macro proposals, come up with some of your own--the ball is in your court." Respondent did all that the Statute required by notifying the Union of a proposed change in conditions of employment and affording the Union an opportunity to submit bargaining proposals by the parties' contractual deadline as mutually extended. It did not have an obligation to modify the originally-announced change through counterproposals. If such a requirement existed, the Respondent would thereby be placed in the position of bargaining with itself--an absurd result which Congress surely could not have intended.

Accordingly, when the Respondent replied to the Union's December 18 letter on December 27, stating that, in view of the Union's failure to proffer bargaining proposals either within the 15-workday contractual deadline or by the agreed-upon extension date of December 23, management intended to implement the change in the appraisal cycle as indicated in its initial November 13 memo, the Respondent did not thereby violate section 7116(a)(1) and (5) of the Statute as alleged in the complaint.[8]

Having found that the Respondent did not violate the Statute as alleged, I recommend that the Authority adopt the following:

ORDER

The complaint in Case No. CH-CA-70217 be, and the same is hereby, dismissed.

Issued, Washington, D.C., September 24, 1997

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When the Union received the Respondent's December 27 letter, it was unmistakably placed on notice that the Respondent did not intend to make counterproposals or otherwise bargain further on the announced change in the appraisal cycle, and it knew or should have known when the change was going to be implemented. Nevertheless, the Union again took no action at this point to invoke the services of the FSIP even though it had ample time to do so.

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CHAITOVITZ
Law Judge

_____
SAMUEL A.
Chief Administrative

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. CH-CA-70217, were sent to the following parties in the manner indicated:

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Dated: September 24, 1997
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