

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-30677

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 MARCH 13, 1995, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 7, 1995
Washington, DC

MEMORANDUM

DATE: February 7, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, WASHINGTON, D.C.

Respondent

CA-30677 and Case No. WA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, 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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-30677

Susan Kane, Esquire
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For the General Counsel

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Mr. Steven R. Freedman
William C. Owen, Esquire
ON BRIEF
For the Respondent

Mr. T. J. Bonner
Deborah S. Wagner, Esquire
BY BRIEF
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.¹, and the Rules

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For convenience of reference, sections of the Statute hereinafter, are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "\$ 16(a)(5)."

and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent unlawfully refused to bargain over "impact and implementation proposals submitted by the Union." (G.C. Exh. 1(b), Par. 10). In October of 1991, Respondent gave the Union notice that it would convert from the Department of Justice Uniform Personnel/Payroll System to the Department of Agriculture's National Finance Center's (NFC) system of combined automated personnel and payroll processing, said conversion to be implemented a year hence, in October, 1992. The Union, thirty days after receipt of Respondent's notice, i.e., specifically on November 14, 1991,:

- a) requested information;
- b) submitted two "interim proposals"; and
- c) stated that it demanded, "to bargain to the fullest extent permissible . . . concerning the aforementioned changes in conditions of employment" and insisted that, "implementation of such changes to be held in abeyance pending the completion of bargaining" One of the Union's November 14, 1991, proposals was resolved and the other (electronic transfer of per capita taxes [AFGE and Council] and the balance to appropriate Locals) had been endorsed by Respondent but NFC had proclaimed the request "not-doable" at this time. On October 16, 1992, two days before the day of conversion, the Union advised Respondent that it:

- a) ". . . withdraws its earlier insistence that the implementation . . . be held in abeyance pending the completion of bargaining";
- b) renewed its request for electronic transfer of dues; and
- c) submitted two new bargaining proposals, actually a single demand -- that the Union be allowed to insert messages on the remarks section of the bi-weekly Earning Statement -- with two variants. Respondent rejected the demand to bargain on the Union's new proposals as untimely. The Agreement of the parties provides, ". . . The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions of this time limit may be granted on request" (Res. Exh. A, Article 3G). No request for extension of the 30 day time limit was submitted and no extension was made. Respondent further asserts that the Union's "Remarks" demand was not germane to I & I bargaining.

This case was initiated by a charge filed on May 25, 1993 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on November 23, 1993 (G.C. Exh. 1(b)) and set the hearing for a date to be determined. By Notice dated May 20, 1994 (G.C. Exh. 1(f)) the hearing was set for June 29, 1994; by Order dated June 14, 1994 (G.C. Exh. 1(g)), the hearing was rescheduled for July 21, 1994; and by Order dated July 7, 1994 (G.C. Exh. 1(h)), the hearing was

further rescheduled for August 10, 1994, pursuant to which a hearing was duly held on August 10, 1994, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce evidence bearing on the issues involved. At the conclusion of the hearing, September 12, 1994, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended on motion of the Charging Party, to which the other parties did not object, for good cause shown, to November 14, 1994. Charging Party, Respondent and General Counsel each timely mailed, or filed, an excellent brief, received on, or before, November 18, 1994, which have been carefully considered. On the basis on the entire record, I make the following findings and conclusions:

Findings

1. The National Border Patrol Council (hereinafter, "Union") is the certified exclusive representative of a nationwide unit of approximately 4,500 employees who are assigned to the U.S. Department of Justice, Immigration and Naturalization Service's (hereinafter, "Respondent" or "INS") Border Patrol Sectors (Tr. 11).

2. On September 30, 1976, the Union and INS entered into an Agreement (Res. Exh. A), which is still in effect (Tr. 20). Article 3, Section G, provides, in relevant part, as follows:

"G. The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing Agency regulations covering personnel policies, practices and/or working conditions not covered by this agreement. The Agency shall present the changes it wishes to make to existing rules, regulations and existing practices to the Union in writing. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions to this time limit may be granted on request. . . ." (Res. Exh. A, Art. 3 G).

3. By letter dated October 9, 1991, Respondent notified the Union that, pursuant to an agreement between the Department of Justice and the Department of Agriculture's National Finance Center (NFC), the processing of INS's payroll, as well as all other Department of Justice employee payrolls (Tr. 34), would in October, 1992, a year

hence, be converted² from the Department of Justice Uniform Personnel Payroll System (JUNIPER) to NFC's system of automated personnel and payroll processing (G.C. Exh. 2; Res. Exh. C) hereinafter, the NFC system of automated personnel and payroll processing will be referred to as "NFC", i.e., unless otherwise indicated, "NFC" will signify both the National Finance Center and its system of automated payroll processing).

The letter specifically advised the Union that, ". . . to comply with the practices of the NFC we will no longer be able to distribute pay checks at the work site. Accordingly, checks will either be distributed to an official residential mailing address or via the Direct Deposit/Electronic Funds Transfer (DD/EFT) process." (G.C. Exh. 2).³

4. By letter dated November 14, 1991, the Union requested, inter alia: a copy of the agreement between the Department of Justice and the Department of Agriculture, National Finance Center; and "Any documentation which supports the assertion that paychecks cannot be distributed at the worksite" (G.C. Exh. 3).

In additional, the Union, "Pending the receipt and review of the requested information . . ." submitted two "interim" proposals: First, that employees be allowed to use an INS office address to receive paychecks; and, Second,

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Mr. Steven R. Freedman, Personnel Management Specialist and Respondent's designated representative for implementation (Tr. 32), testified that,

"The conversion came about because it was determined that the systems, the automated personnel and payroll systems that the Department of Justice had were inadequate. In order to bring them up to speed, it would have cost somewhere around \$20 million, or so.

"By switching to those of the Department of Agriculture's Finance Center, it would have cost us only around \$13 million. So, it was a cost savings for us to go to someone who already had a proper automated system than try to fix our own." (Tr. 33).

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The only other significant change was that payday would move from Wednesday to Thursday. This was not called to the Union's attention until about February 6, 1992, when an advance copy of a proposed bulletin was sent to the Union (G.C. Exh. 5, Attachment).

that dues withholding be modified at the time of transition to NFC [essentially, that per capita taxes be electronically transferred to the AFGE and to the National Border Patrol Council, respectively, and that the remainder of dues withheld be electronically transferred to the appropriate Local] (G.C. Exh. 3).

The Union ended its letter with the following statements,

"The Union reserves the right to modify the foregoing proposals at any time prior to reaching final agreement. The Union at this time makes known its demand to bargain to the fullest extent permissible under law concerning the aforementioned changes in conditions of employment. The Union furthermore insists that the implementation of such changes be held in abeyance pending the completion of bargaining, including the resolution of all attendant third party procedures." (G.C. Exh. 3).

5. As noted above, n.3, Respondent informed the Union on February 6, 1992, that payday would be changed to Thursday. In its initial letter of October 9, 1991, Respondent had told the Union that the date of implementation would be "October" 1992. In late April or early May, 1992, Respondent faxed a copy of its May, 1992, "Personnel/Payroll Conversion Update" (Res. Exh. C; Tr. 45, 46) which expressly stated that the conversion would take place on October 18, 1992. The June, 1992, "Personnel/Payroll Conversion Update" (Res. Exh. D) and July, 1992, "Personnel/Payroll Conversion Update" (Res. Exh. E) also expressly stated that conversion to NFC would take place on October 18, 1992. Indeed, Mr. T. J. Bonner, President of the Union, stated that, ". . . the Union was on notice that the proposed implementation was October the 18th." (Tr. 24). The conversion date was set by the Department of Justice and applied throughout the Department.

6. The Union was given two briefings on the conversion -- the first was held in Washington, D.C., on April 15, 1992, and the second record was held in New Orleans, Louisiana on June 19, 1992, at the offices of NFC (Tr. 14, 25, 46; G.C. Exhs. 11, 13, 16). At the June 19, 1992, briefing, NFC representatives, ". . . let us know [Respondent and the Union] that their programmers [for a fee] could fine-tune who would get a particular remarks statement. So, if we wanted to get -- all law enforcement officers to get a particular statement . . . to isolate the law enforcement officers from the rest of the employees and

send them a message that no one else would receive." (Tr. 47; and, also, Tr. 25).

7. With respect to the Union's two proposals of November 14, 1991, Mr. Freedman testified that as to receipt of paychecks it had been determined that it was possible to have them delivered to a designated agent at the worksite and ". . . we informed Mr. Bonner that they could continue doing that and, as far as we were concerned, that issue died." (Tr. 48). Indeed, this was specifically addressed in Respondent's May, 1992, "Personnel/Payroll Conversion Update" (Res. Exh. C).

With respect to the Union's other 1991 proposal, Mr. Freedman testified that Respondent not only endorsed, but had joined with the Union, in requesting that NFC alter the dues computer tape to provide for the electronic transfer of dues receipts to AFGE, the Council and Locals as requested by the Union (Tr. 48). The joint proposal was discussed with NFC at the joint Council meeting (presumably the June 19, 1992, meeting in New Orleans (G.C. Exh. 16), although it may have been the April 15, 1992, meeting in Washington, D.C. (G.C. Exh. 11)), and Respondent in its letter of October 26, 1992 (G.C. Exh. 18), informed the Union that,

". . . While formal notification has yet to come . . . it is our understanding that the NFC will not satisfy the request at this time. When we receive a formal response to this effect, we will forward a copy to you and will investigate any other means available to accomplish this effort." (G.C. Exh. 18).

Mr. Freedman testified that, ". . . verbally we were told that the Finance Center would not do that. Subsequently, we have followed up and asked to get that in writing, but to date we have not received a formal response from the Finance Center." (Tr. 48). When asked if Respondent could have granted the Union's proposal on its own, Mr. Freedman testified as follows:

"Q Could INS have adopted those proposals, or granted those proposals on its own?

"A No. we were not in control. We could just act as a -- a facilitator.

"Q Whose decision would it have been to adopt these proposals?

"A The National Finance Center."

(Tr. 48).

8. The conversion was implemented on October 18, 1992, ". . . on schedule." (Tr. 50).

9. By letter dated October 16, 1992⁴, but not received until after implementation of the conversion to NFC, the Union belatedly stated,

". . . Inasmuch as most of the Union's major concerns have been addressed through cooperative measures, the Union withdraws its earlier insistence that the implementation of the program be held in abeyance pending the completion of bargaining." (G.C. Exh. 17).

The Union further stated that it, ". . . continues to press for the adoption of its proposal concerning the payroll deduction of Union dues . . . and repeats such proposal for your convenience" (G.C. Exh. 17). After repeating its dues distribution proposal, the Union then stated,

"At this time, the Union submits the following additional bargaining proposals:

"2. The 'REMARKS' section at the bottom of the bi-weekly Earnings Statements for bargaining unit employees shall be reserved for messages from the National Border Patrol Council on all odd-numbered pay periods. Such messages shall not violate any law or contain any libelous material.

"3. In the event the foregoing proposal is not implemented at the time of transition to the National Finance Center, the Union shall be allowed to formulate messages for three pay periods for each one formulated by the Service until such time as the ratio of messages

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The date of receipt was not shown; however, based on the receipt by the Union of all of Respondent's mailed correspondence from Washington, D.C. to California (G.C. Exh. 10 was hand delivered), the shortest delivery time was four days (G.C. Exhs. 2, 4, 9, 11, 13, 14, 15, 16, 18, 20, 21, 23 and 24). Except for G.C. Exhs. 18 and 20, which took four days, all other letters required 5 to 10 days for delivery. Accordingly, it is conclusively presumed that Respondent did not receive the Union's letter dated October 16, which was from California to Washington, D.C., until sometime after October 18, 1992, and the record does not show that the letter dated October 16, 1992, was sent by any means other than by Certified mail (G.C. Exh. 17).

outlined in the foregoing section has been achieved." (G.C. Exh. 17).

10. Respondent replied by letter dated October 26, 1992. As to the dues computer tape proposal, Respondent reminded the Union, as noted above, that, "This proposal was discussed in our joint Council meeting several months ago as being the desire of both Councils and the Immigration and Naturalization Service management." (G.C. Exh. 18). Respondent then advised the Union that, "While formal notification has yet to come . . . it is our understanding that NFC will not satisfy the request at this time. When we receive a formal response to this effect, we will forward a copy to you and will investigate any other means available to accomplish this effort." (G.C. Exh. 18).

With regard to the Union's new (additional) proposal concerning its use of the "Remarks" section Respondent stated,

"The "Remarks" section of the Statement of Earnings and Leave is for official use and is not designed for special interest use. The regular use of this section will be controlled by the NFC for the purpose of either explaining pay related changes or conducting data verification efforts. Any other agency designed use will result in an additional cost to the Service, due to the need for the NFC to assign their own programmers to perform the task. Accordingly, rather than utilizing the "Remarks" section on a regular basis, as you envision, we are more likely to use it on rare occasions to satisfy unusual circumstances." (G.C. Exh. 18).

11. The Union responded by letter dated November 9, 1992 (G.C. Exh. 19), in which it stated, in part,

". . . The Union appreciates the expressed willingness of your office to pursue a means of implementing the Union's proposal concerning the manner in which dues deductions and the accounting therefor shall be provided to the Union.

". . . In light of the Service's statement that it only intends to use the "remarks" section on a rare basis, however, the Union modifies its earlier proposals concerning this matter as follows:

"The "REMARKS" section at the bottom of the bi-weekly Earnings Statements for

bargaining unit employees shall be reserved for messages from the National Border Patrol Council on all pay periods during which said section is not utilized by the Agency and/or the National Finance Center, provided that the Agency and/or the National Finance Center do not formulate more than half of such messages. In no case shall less than half of such messages be reserved for the exclusive use of the National Border Patrol Council. Messages from both parties shall be rotated equitably. Messages supplied by the Union shall not violate any law or contain any libelous material.

"In the event the foregoing proposal is not implemented at the time of transition to the National Finance Center, the National Border Patrol Council shall be allowed to formulate messages for three pay periods for each one formulated by the Agency and/or the National Finance Center until such time as the National Border Patrol Council has formulated as many messages as the Agency and/or the National Finance Center since the transition occurred." (G.C. Exh. 19).

12. Respondent replied by letter dated November 23, 1992, in which it stated, in part, as follows:

"Since you were notified of the Service's intent to change the processing of payroll checks on October 15, 1991 and subsequently submitted proposals on November 14, 1991 in response to that notice, the submission of this additional proposal is now considered untimely. (footnote omitted) While we consider this an interesting proposal, it is inappropriate to consider it at this time." (G.C. Exh. 20).

13. The Union renewed its demand to bargain on its "Remarks" proposal by letter dated January 14, 1993 (G.C.

Exh. 22)⁵ and Respondent by letter dated February 3, 1993 (G.C. Exh. 24) again responded that, ". . . we consider this to be an untimely proposal and inappropriate to consider at this time." (G.C. Exh. 24).

14. The JUNIPER form, i.e., the employee's bi-weekly statement of Earnings and Deductions used by the Department of Justice prior to conversion to NFC, contained a wholly comparable "REMARKS" section to that of NFC (G.C. Exh. 5, Attachment), which was, ". . . used for messages such as 'buckle up for safety,' 'the Executive Order such and such requires that all employees use their seat belts,' 'contribute to the combined federal campaign,' 'buy U.S. Savings Bonds.' Just messages that the employer wanted to get out to its employees." (Tr. 16).

Conclusions

The Complaint is specific that, ". . . Respondent unlawfully refused to negotiate over . . . impact and implementation proposals submitted by the Union." (G.C. Exh. 1(b), Par. 10).

1. Union's "Remarks" proposal was not negotiable under § 6(b)(2) or (3).

Not only was the Union's "Remarks" proposal not received by Respondent until after implementation of the conversion to NFC, but it was neither a procedure which management officials would observe in exercising the management right to convert from JUNIPER to NFC (§ 6(b)(2)) nor an appropriate arrangement for employees adversely affected by the exercise of management's right to convert to NFC (§ 6(b)(3)). It is quite true, as General Counsel and the Charging Party assert, that the Authority held, in U.S. Department of Labor, Washington, D.C., 38 FLRA 1374, 1379 (1991) (hereinafter, "Department of Labor"), that a union's, ". . . proposal as to the content of messages printed on leave and earnings statements of unit employees concerns a condition of employment as defined in section 7103(a)(14) of the Statute"; but the fact that a matter is negotiable as a condition of employment does not

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Respondent notified the Union on January 13, 1993 (G.C. Exh. 21), of a change of the two digit code for the National Border Patrol Council; and on January 26, 1993 (G.C. Exh. 23) that NFC used a different form for transferring a union member's dues from one location to another upon an employee's reassignment; but directed continued use of pre-NFC forms since the form remains in the employee's payroll file and does not go to NFC.

make it a negotiable procedure or an appropriate arrangement under § 6(b)(2) or (3) of the Statute.

There was no change with regard to the "REMARKS" section of the Earning and Deductions statement.⁶ The Union's "Remarks" proposal was not,

"(2) procedures which management officials of the agency will observe in exercising any authority under this section;" (5 U.S.C. § 7106(b)(2)).

Indeed, the conversion did not affect the "REMARKS" section which, as noted, was the same before and after the conversion to NFC. Nor does the Union's "Remarks" proposal have any relation to, or constitute, procedures Respondent will observe in converting from JUNIPER to NFC. When an agency exercises a § 6(a) management right, as the Department of Justice did, to convert its payroll processing from JUNIPER to NFC, it is obligated to negotiate "procedures which management . . . will observe in exercising" that authority. The Statute is clear that management's duty to negotiate under § 6(b)(2) is limited to procedures that management will observe in exercising a management right under § 6(a) -- here, the conversion from JUNIPER to NFC. This is demonstrated by the litigated cases, for example: in American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange

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Although the inference is clear, from the testimony that NFC, ". . . let us know that their programmers could fine-tune who would get a particular remarks statement" (Tr. 47; see, also, Tr. 25), that JUNIPER could not be "fine-tuned" to direct, for example, a particular remarks statement to members of the bargaining unit only; nevertheless, the Authority had made clear in its Department of Labor decision, supra, ten months prior to Respondent's letter of October 9, 1991, notifying the Union of the planned conversion, in October, 1992, to NFC, that distribution to non-bargaining unit employees does not affect negotiability of such a proposal. Thus, the Authority stated, in part,

"Inasmuch as the proposal's effect on nonunit employees or positions is not a factor in making a negotiability determination, we reject the Respondent's argument that it need not bargain over the Union's proposal because the proposal would directly affect the working conditions of non-bargaining unit employees. Rather . . . we conclude that the proposal vitally affects the working conditions of unit employees" (38 FLRA at 1386).

Service, Dix-McGuire Exchange, Fort Dix, New Jersey (hereinafter, "Dix-McGuire"), 2 FLRA 153 (1979)⁷ the union had proposed, as material here, that in the event of a disciplinary suspension or removal, the grievant will exhaust the contractual review provisions before the suspension or removal is effectuated and the employees will remain in a pay status until a final determination is rendered. The Authority, in holding the proposal negotiable, stated, in part, that,

" . . . Section 7106(b)(2), however, provides that the enumeration of the specified management rights in subsection (a) does not preclude the negotiation of procedures which management will observe in exercising those rights, [there, taking disciplinary action] . . . Congress did not intend subsection (b)(2) to preclude negotiation on a proposal merely because it may impose on management which would delay implementation of a particular action involving the exercise of a specified management right. . . ." (2 FLRA at 154-155).

In American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (hereinafter, "Wright-Patterson"), the union's proposal XII⁸ provided that the agency would hold in abeyance implementation of any proposed change in conditions of employment pending decision of the Federal Service Impasses Panel except in circumstances involving an "overriding exigency," and the Authority found this to be, "a negotiable procedure under section 7106(b)(2) of the Statute." (2 FLRA at 626). The Authority further stated, ". . . Union Proposal XII establishes a negotiable procedure under section 7106(b)(2) of the Statute which management officials will observe in the exercise of management rights" (2 FLRA at 626).

It has been emphasized even more strongly with regard to the correlative provisions of § 6(b)(3). For example, in National Federation of Federal Employees, Local 1454, 26 FLRA 848, 852 (1987), the Authority stated,

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Enforcement granted sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981) (hereinafter, "DOD"), cert. denied sub nom. American Federation of Government Employees, v. FLRA, 455 U.S. 945 (1982).

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Wright-Patterson, supra, was appealed and that case was consolidated in the Court of Appeals with Dix-McGuire, supra; however, proposal XII was not in issue on appeal and was not addressed by the Court in DOD, supra, n.7.

"The threshold question in applying the Kansas Army National Guard analysis [21 FLRA 24 (1986)-- whether a proposal 'excessively interferes' with the exercise of management's rights] is whether the proposal is an 'arrangement' for adversely affected employees"

In Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 33 FLRA 454, 468-469 (1988), the Authority again stated in part,

". . . The threshold question is whether the proposal is an 'arrangement' for adversely affected employees . . .

. . .

"We need not reach the question of whether the proposal is an 'appropriate' arrangement, since it does not qualify for consideration under section 7106(b)(3) because it does not concern an 'arrangement' for adversely affected employees"

The Union's proposal that it be permitted to use the "Remarks" section to proselytize bargaining unit employees was not germane to the conversion to NFC and was not a procedure Respondent would follow in exercising its right to convert to NFC and, accordingly, was not a procedure within the meaning of § 6(b)(2) of the Statute. (See, AFGE, Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11, 1 FLRC 100, 104 (1971)). Nor was it an arrangement for employees adversely affected by Respondent's exercise of its right to convert to NFC. Accordingly, because it does not concern an "arrangement" for adversely affected employees it is not negotiable under § 6(b)(3) of the Statute.

But for its refusal to bargain about its Union's "Remarks" proposal, the record is clear that Respondent fully met its obligation to bargain about the impact and implementation of the conversion to NFC. Thus, as to the Union's other two proposals, one, receipt of pay at the worksite, was resolved, and the other, electronic division and distribution of dues by NFC, Respondent agreed, indeed,

joined with the Union in requesting that this be done.⁹ Although this matter had not been resolved, there had been no refusal to bargain. To the contrary, Respondent informed the Union that it would, ". . . investigate any other means available" (G.C. Exh. 18) to accomplish the mutually desired electronic division and distribution of dues. Having found that Respondent did not refuse to negotiate in violation of §§ 16(a)(5) or (1) inasmuch as the Union's "Remarks" proposal was neither a procedure, within the meaning of § 6(b)(2), nor an arrangement for employees adversely affected, within the meaning of § 6(b)(3) of the Statute, the Complaint should be dismissed.

2. Union's "Remarks" proposal was untimely.

The Union's initial "Remarks" proposal (G.C. Exh. 17), although dated two days before the conversion date, because it was mailed from California, was not received by Respondent until after conversion to NFC on October 18, 1992. Respondent in its letter of October 26, 1992 (G.C. Exh. 18) stated that, "The 'Remarks' section . . . is for official use and is not designed for special interest use. The regular use of this section will be controlled by NFC for . . . explaining pay related changes or . . . data verification Any other . . . use will result in an additional cost to the Service . . . Accordingly, we are more likely to use it on rare occasions" (G.C. Exh. 18). By letter dated November 9, 1992 (G.C. Exh. 19), the Union modified its "Remarks" proposal, to use the section at least one half the time, and Respondent by letter dated November 23, 1992 (G.C. Exh. 20) stated that the Union's proposal was untimely. The Union by letter dated January 14, 1993 (G.C. Exh. 22), renewed its demand to

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Respondent could not grant the Union's request because it did not control the system. As Mr. Freedman testified, wholly without contradiction,

"A . . . we were not in control. We could just act as a -- a facilitator.

"Q Whose decision would it have been to adopt these proposals?

"A The National Finance Center." (Tr. 48).

The Department of Justice had made the request, that NFC subdivide the Union dues computer tape, as the "desire of both Councils and the Immigration and Naturalization Service management", but, ". . . NFC will not satisfy the request at this time. When we receive a formal response to this effect, we will forward a copy" (G.C. Exh. 18).

bargain on its "Remarks" proposal and Respondent by letter dated February 3, 1993, again responded that, ". . . We consider this to be an untimely proposal and inappropriate to consider at this time." (G.C. Exh. 24).

There is no question that the Union's "Remarks" proposal¹⁰ was made as an "I & I" proposal and it was untimely. The Agreement of the parties' specifically provides that,

". . . The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions to this time limit may be granted on request. . . .

"If disagreement exists, either the Agency, or the Union may serve notice . . . to enter into formal negotiations on the subject matter" (Res. Exh. A, Art. 3, Sec. G).

General Counsel's assertion that, ". . . the contractual provision makes no reference to proposals but only to 'views,'" (General Counsel's Brief, p. 15), overlooks the timeframe of the Agreement, which was executed under Executive Order 11491. The Executive Order used the term "views", e.g. § 9(b)11, and both from the historical antecedent but more particularly from the language of subsection G, it is clear, and I so conclude, that "views" does, indeed, encompass proposals. The Union on November 14, 1991, did, inter alia, submit two proposals. As disagreement did exist, the parties did enter into negotiations by the repeated exchange of information; briefing sessions were held in Washington, D.C. and in New Orleans, Louisiana; one of the Union's proposals was

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As noted previously, the Union's initial proposal, while consisting of two variants, in reality was a single proposal, namely, that the Union be permitted to insert messages on the "Remarks" section of the bi-weekly Earnings Statement, as was its modified proposal of November 9, 1992, which again, consisted of two variants. Accordingly, I have referred to the Union's proposal in the singular inasmuch as, shorn of minutiae, it was a single proposal to use the "Remarks" section.

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". . . The labor organization may suggest changes in the Agency's personnel policies and have its views carefully considered. It may consult . . . on personnel policy matters, and at all times present its views thereon in writing" (E.O. 11491, Sec. 9(b)).

resolved and Respondent not only endorsed the other but joined with the Union in the request that NFC divide membership dues and electronically transfer the money to AFGE, the Councils and the Locals; agreement was reached on all of the Union's comments about information announcements to employees; and on the date of implementation -- October 18, 1992 -- no issue remained in dispute. Respondent had fully complied with its obligation to bargain concerning the "impact and implementation" of the conversion from JUNIPER to NFC. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, North Atlantic Region (New York, New York), 8 FLRA 296, 304 (1982); Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 15 FLRA 70, 72 (1984); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 217, 228-229 (1984). Article 3, Sec. G does not limit the duration of bargaining but, rather, the time for submission of the Union's proposals. Because the Union's "Remarks" proposal was not made within 30 days after receipt of Respondent's November 9, 1991, notification of the planned conversion, it was untimely. U.S. Immigration and Naturalization Service, 24 FLRA 786, 790 (1986)¹²; Department of Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. CH-CA-30438, OALJ 95-17 (December 20, 1994) (hereinafter, "Council 214"). I give no effect to the Union's designation of its November 14, 1991, proposals as "interim" proposals or to its statement of intent to, "bargain to the fullest extent permissible under law" as extending the time for it to submit proposals for, as well stated by Judge Arrigo in Council 214, supra,

"The Union may not unilaterally amend the procedural requirements set forth in their

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This case concerned a national agreement executed June 13, 1979. As Respondent represented, and President Bonner stated that Respondent Exhibit A, dated September 30, 1976, was the current agreement of the parties (Tr. 20), it would appear that Respondent Exhibit A applies to a different bargaining unit. Article 3, Section G, of the 1979 agreement, as set forth at 24 FLRA 787, n.1, is substantially identical to Article 3, Section G of the Agreement herein (Sept. 30, 1976), except that the time for the Union to present its views is not 30 calendar days but is:

"20 work Days at National Level
"10 work Days at Regional level
"10 work Days at District Level."
(24 FLRA 787, n.1)

bilateral agreement simply by stating it could proceed in the future without regard to the constraints imposed by their negotiated agreement." (p. 8)

Moreover, even apart from the Agreement of the parties, it has long been held that where the Union is given ample prior notification of a proposed change of a condition of employment [here of course, Respondent gave the Union notice one year in advance], a request to bargain made "at the last moment" is untimely. Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 960, 8 A/SLMR 33 (1978); United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston, Texas, 8 FLRA 623, 624 (1982); Internal Revenue Service (District, Region, National Office Unit), 14 FLRA 698, 700 (1984) (hereinafter, "IRS"); General Services Administration, 15 FLRA 22, 24 (1984); Small Business Administration, Washington, D.C. and Small Business Administration, Salt Lake City District Office, Salt Lake City, Utah, 15 FLRA 522, 524 (1984). As the Authority stated in IRS, supra, "When a union has adequate notice of when a change is to be implemented, it must make a timely request for impact bargaining." (Id. at 700).

Because the Union's "Remarks" proposal was not timely made, Respondent's refusal to bargain about it did not violate § 16(a)(5) or (1) of the Statute and the Complaint should be dismissed.

3. Use of "Remarks" section to communicate with unit employees is a substantive matter.

The Authority in Department of Labor, supra, held,

". . . the Union's proposal as to the content of messages printed on leave and earnings statements of unit employees concerns a condition of employment as defined in section 7103(a)(14) of the Statute" (38 FLRA at 1379).

The Authority further stated, in part, that,

". . . the proposal's effect on nonunit employees or positions is not a factor in making a negotiability determination . . . Rather . . . we conclude that the proposal vitally affects the working conditions of unit employees in that it is intended to facilitate the Union's communications with unit employees and 'improved communication between unions and employees can effectuate employees' rights under section 7102 of the Statute" (Id., at 1386).

The Union's "Remarks" proposal was not negotiable as a procedure pursuant to § 6(b)(2) of the Statute and if it were it was not timely made. The Union could have made a mid-term request to bargain, although it did not do so, and the record does not show the procedure for doing so (Tr. 52).¹³ General Counsel's suggestion (General Counsel's Brief, p. 11, n.4) that Respondent was obligated to bargain over the Union's "Remarks" proposal as ". . . mid-term bargaining proposals" is rejected. The Union never made a demand to bargain mid-term; the sole allegation of the Complaint is that Respondent refused to negotiate over, "impact and implementation proposals" (G.C. Exh. 1 (b), Par. 10); and the Complaint was never amended.

Having found that Respondent did not violate § 16(a)(5) or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-30677 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 7, 1995
Washington, DC

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Article 38 of the Agreement provides for renegotiation. Whether mid-term bargaining is governed by that Article or otherwise is not in issue here and no opinion whatever is expressed or is to be implied as to how the Union may make mid-term bargaining demands.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-30677, were sent to the following parties in the manner indicated:

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