UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923 Charging Party	Case No. WA-CA-60297

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 **MAY 19, 1997**, 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: April 17, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 17, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. WA-CA-60297

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923

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

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923 Charging Party	Case No. WA-CA-60297

Thomas F. Bianco
For the General Counsel

Wilson Schuerholz
For Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case calls for some fine-tuning in that part of the labor-management spectrum where the respective rights and duties of unions, management, and individual employees intersect and potentially collide. It involves an agency's offer to an employee of an agreement in lieu of discipline, sometimes called a "last chance agreement," without first notifying the employee's exclusive bargaining representative.

The unfair labor practice complaint alleges that Respondent (SSA) violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by offering and implementing such an agreement with an employee and failing to notify the Charging Party (the Union) before the agreement was signed. The theory of this

alleged violation is twofold: (1) that SSA negotiated with a bargaining unit employee over a negotiable condition of employment and (2) that SSA failed to give the Union an opportunity to bargain before changing a bargaining unit employee's conditions of employment.

The complaint also alleges that SSA violated section 7116(a)(1) of the Statute when it presented the proposed agreement to the employee, refused to alter the proposed agreement, and, with the employee, signed the agreement on or about the same day it was presented to the employee. The theory of this violation is that SSA coerced the employee into waiving rights granted by the Statute.

The answer, as amended at the hearing, denies that the employee proposed and that SSA's representative refused to alter the proposed agreement, and denies that the agreement was signed on the same day that it was first presented to the employee. The answer further denies that any of its conduct violated the Statute as alleged.

A hearing was held in Washington, D.C. Counsel for the General Counsel and for SSA filed post-hearing briefs. On February 21, 1997, I invited Counsel for the General Counsel and for SSA to submit supplemental arguments on the applicability of certain Authority decisions that I thought might have controlling significance or at least might throw some light on the issue of SSA's bargaining obligation. Both counsel responded to this invitation with helpful supplements. Then, as Counsel for the General Counsel suggested that I should have done earlier, I made the same invitation to the Union. The Union did not respond.

The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence. The identity of the individual employee involved has no bearing on the outcome of the case. Although that employee testified at the hearing, he or she still arguably has some privacy interest in the information that will be disclosed here. I have therefore taken the liberty of giving him or her a fictitious name for purposes of this decision.

Findings of Fact

A. Material Evidentiary Facts and Disputed Evidence

Gabriella Church, an SSA employee for several years, was promoted to the position of claims representative in May 1994. SSA sent her to Pittsburgh, Pennsylvania, for approximately three months for training. Church used a government-issued American Express credit card to pay for

travel and living expenses. SSA also issued her travel advances.

When Church had completed her training and began her new assignment, she encountered some financial problems. Church was delinquent in her payment of American Express credit card bills. This came to the attention of SSA, and Church's branch manager, Lawrence Fishman, was asked to check into the matter. On Fishman's instructions, Church's first-line supervisor talked to her in March 1995. Church admitted that she had not made any payments, explained her difficulties, and agreed either to make regular payments of $150 a month (according to information the supervisor provided to SSA management) or to *try to* make such payments (according to Church).

Approximately three months later, Fishman's district manager called him and told him that Church had still not made any payments. Church's first-line supervisor had transferred to another office, so Fishman took the matter up directly with Church. He discussed the situation with her and memorialized their conversation in a memorandum he gave to her on June 8, 1995.[1]

Among other things, the memorandum indicates and Fishman testified, that Fishman had asked Church whether she had made any payments to American Express and that Church had said that she had made three monthly payments but had no receipts or any other evidence of the payments.[2] Fishman counseled Church that her failure to pay violated SSA standards of conduct, amounted to conversion of federal

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[1] Church testified, initially, that she did not meet with Fishman before she received the June 8 memorandum. However, she acknowledged the accuracy of references in the memorandum to a meeting with Fishman. I conclude that she misunderstood the question to which she gave the earlier answer, and that, as she testified, the memorandum accurately reflects a meeting that they had before Fishman presented the memorandum to Church.

[2] Church denied telling Fishman that she had made payments for March, April, and May, or even discussing those payments with him. However, she then testified that Fishman may have approached her about those payments, and that she had told him that she was "trying to make $150 payments." Having also acknowledged the accuracy of the June 8 memorandum's references to Fishman's meeting with her, Church tacitly concurred in Fishman's account in this respect, in my view.

funds to personal use, and could result in disciplinary action, including removal from federal service.

The memorandum concludes with Fishman's notice that he expected Church to pay $150 a month and to present Fishman with a receipt every month, and that "failure to repay your debt on a regular monthly basis will result in disciplinary action." Fishman testified, and Church ultimately acknowledged (Tr. 34), that she agreed to make such payments.

Church made a payment in July and gave Fishman a receipt for it. She also showed Fishman a check made out to American Express by someone else, purportedly for Church's August payment. Church testified that Fishman saw her mail the check in the office mailbox. Fishman testified that Church gave him a copy of the front of the check and of the envelope in which she said it was sent. These were received as evidence (R Exh. 1). The alleged payment was not credited, and Church had no knowledge of the issuer receiving it back as a canceled check.

In September, Fishman was again informed by the district manager that Church had made no payments. While this infor-mation appears to have been erroneous at least as to one payment, there is no dispute as to Church's failure to make the payments on a regular monthly basis. Fishman contacted his regional office for instructions and was informed that some type of action had to be taken. The regional office sent Fishman a "negotiated discipline agreement" (NDA) to present to Church. It contained a background of the matter, 11 "terms and conditions," and, at the end, several understandings about the nature of the agreement and the uses to which it may be put.

Significant provisions of the NDA (GC Exh 3), for purposes of this case, include the following, which, as summarized and sometimes paraphrased (and simplified where appropriate) below, do not follow the original enumeration:

(1) This agreement is entered into as an alternative to formal disciplinary procedures for the employee's misconduct.

(2) The employee admits committing the misconduct and agrees not to engage in any further misconduct.

(3) The employee fully understands that Agency management would have initiated proceedings proposing a 30-day suspension had he/she not entered into the agreement. (This paragraph then outlines the procedures that would have been followed in the event of a disciplinary proposal.)

(4) The employee agrees to accept the 30-day suspension.

(5) The employee agrees to satisfy the debt to American Express by authorizing direct payment from the employee's paycheck until the debt is satisfied (or a reduced amount is negotiated with American Express and paid off), and to take certain steps to insure the Agency of compliance with the repayment plan.

(6) The employee waives all rights to grieve, appeal, or otherwise contest any action the Agency takes consistent with the agreement. The waiver includes, but is not limited to the employee's right to grieve under the negotiated or Departmental grievance procedures, to file an equal employment opportunity complaint, to allege reprisal under the Whistle-blower Protection Act of 1989, to file an appeal with the MSPB, to bring any legal action against SSA or its officials or agents, and the right to solicit the assistance of, or complain to, any public official (including Federal, state, or local legislators, administrators, or executives) with respect to matters concerning or surrounding the agreement or any action taken pursuant to it.[3]

(7) The agency has determined that, although a 30-day suspension is appropriate, in consideration of the employee's commitment to fully meet all the terms of the agreement, the agency will:

a. suspend the employee for 10 days, which suspension will be served on consecutive weekends to prevent the employee from losing pay;

b. hold the remaining 20 days in abeyance until total restitution has been made to American Express.

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[3] Although the waiver of the right to solicit the assistance of, or complain to, any public official, has no apparent impact on the outcome of this case, its inclusion among the other waivers demanded of employees who are offered such agreements strikes me as a case of overreaching on SSA's part and, arguably, a violation of 5 U.S.C. § 7211 that warrants being brought to the attention of the appropriate SSA officials. With respect to equal employment opportunity complaints, see *EEOC Guidance on Waivers Under Civil Rights Laws*, April 10, 1997, reproduced in *Bureau of National Affairs, Daily Labor Reports*, April 14, 1997, E-4.

(Upon failure by the employee to fully adhere to all terms of this agreement, management will suspend the employee for the remaining 20 days, which will be work days, resulting in loss of pay.)

(8) The employee freely and voluntarily agrees to these conditions and "*has had sufficient time to consider the conditions and to seek advice from an attorney, a bargaining unit representative, or other counsel of choice*" (emphasis added).

(9) "The Parties will not make public or otherwise disclose to any person the facts or the terms of this Agreement, any of the particulars of this Agreement, any issues relating to this Agreement, or any negotiations regarding the Agreement, except as may be required to implement the Agreement or by law or in furtherance of a government investigation."

(10) "All Parties understand that this Agreement will not be made a part of the employee's Official Personnel Folder (OPF) but will be maintained until the current debt is resolved."

Fishman presented the proposed agreement to Church on September 20 or 21, and they both signed it on September 21. The circumstances surrounding the presentation are in dispute.

Church's Version

Church testified that Fishman told her on September 20, just before her shift was over, that he would be typing up a document regarding her American Express bill and would be giving it to her the next day. Fishman did not tell her that the document included discipline. He told her that he did not know what was in the document because he had not received all of the information from the regional office.

Fishman called her into his office approximately between 10 and 11 a.m. on September 21, gave her the document--the NDA. He told Church to read it and that they would discuss any questions after she did so. Church read it and asked Fishman to insert two additions explaining that the bank account to which she had deposited her travel advance checks had been attached by another creditor. She also asked him to remove the waivers with respect to grievances, EEO complaints, and legal actions. She also asked to delete the paragraph prohibiting disclosure of anything concerning the agreement.

Fishman told Church that he would have to call the regional office to find out whether he could make the requested changes. Church went back to her desk. The meeting she described had lasted about 15 minutes. Some 30 to 45 minutes later, Fishman called Church back to his office and told her that nothing could be removed from the agreement and that it had to be signed that day. This conversation took place at approximately 11:45 a.m. Fishman's workday ended at 3:45 and Church's at 4:00 p.m.

Church decided to sign the NDA. She was aware that there was a union representative in the office, but chose not to consult that representative or anyone else. On redirect examination, Church testified that she did not know any attorney, that she had two minor children, but otherwise lived alone, and that she did not believe that she had sufficient time to consult with anyone before she signed the NDA. She thought, based on Fishman's representation about having to sign the agreement that day, that she had either to sign or to suffer the suspension without pay. Church could not remember whether she had taken the agreement with her after the earlier September 21 conversation with Fishman.

Fishman's Version

Fishman testified that he presented the NDA to Church on the afternoon of September 20, at approximately 1 or 2 p.m. He read every word of the NDA to Church, but did not tell her to sign it. He asked Church whether she understood it. Church said that she did, but that she didn't know whether she should sign it.

Fishman then told her that it was a very important document, that she should think about it overnight, and that they would talk about it the following morning. Church took the document with her. The next day, at approximately 10 or 11 a.m., Fishman asked Church to come into his office, where he asked her whether or not she wanted to, or planned to, sign it. Church said that she did, and they both signed. At no time did Church say anything about any particular item of the agreement or suggest any changes.

B. Resolution of Disputes as to Material Facts

Determining the credibility of Church's and Fishman's testimony concerning the events surrounding the signing of the NDA is particularly difficult because each was a persuasive witness who appeared to be attempting to recount the events accurately. However, Church did not appear to be

completely reliable as to earlier conversations with Fishman about this matter. Moreover, as Disraeli advised Queen Victoria, what is earnest is not always the truth.

What I find to be the most probable approximation of the course of the September discussions about the NDA is based in part on each of the testimonial accounts. Thus, Fishman did present the NDA to Church on September 20, or at least informed her, either verbatim or in substance, of its terms. Whether or not, as Church testified, there was information still to be obtained from the regional office, it makes little sense for Fishman to have taken the trouble to alert her that a document would be forthcoming but to have withheld disclosure of its nature. Thus I credit Fishman in the essentials with regard to advising Church about what the NDA would require of her and stressing its importance. I also find it more probable than not that Fishman offered Church at least a prototype copy of the agreement to take with her overnight.

I find that Church probably inquired as to whether certain changes could be made in the event she decided that the agreement was otherwise acceptable to her, and that Fishman told her that he would have to check with the regional office for instructions as to whether such changes could be made. This may have occurred either during their September 20 conversation or the following morning, after Church had slept on the matter. While the precise timing of Church's inquiry does not affect my overall impression, I find a September 21 conversation more probable, followed by a third and final conversation later the same day. At that time, if not earlier, Fishman informed Church that the changes she requested were not acceptable. Then the two signed the agreement.

Although Fishman did not specifically deny that he told Church that the NDA had to signed "that day," I find such a stark demand inconsistent with what I perceive as Fishman's treatment of Church concerning this whole affair, and I do not credit Church in this regard. I do not doubt that certain things were said, such as the urging that Church think about it overnight, that gave her the impression that Fishman wanted her to make a decision without further delay. However, assuming that Church believed that Fishman actually imposed such a deadline, this was only her interpretation. Whether the circumstances were such that her likelihood of making such an interpretation created a coercive atmosphere remains for discussion below.

Discussion and Conclusions

I. Bypass of Union

In arguing that SSA unlawfully bypassed the Union by dealing directly with Church, Counsel for the General Counsel asserts that certain provisions in that NDA concern "conditions of employment" recognized under the Statute and that the right to bargain over these provisions was reserved to the Union as the exclusive bargaining representative. Because implementation of the NDA changed some of Church's conditions of employment, the General Counsel argues, SSA violated its statutory bargaining obligation by failing to give the Union the opportunity to bargain in advance of its implementation, a failure that inherently undermines the Union's status.

Counsel for the General Counsel acknowledges that the NDA offered to Church is a last chance agreement (LCA), which the Authority has described as a contract between an employee and an employer that gives the employee an opportunity to conform his or her conduct or performance to meet the employer's requirements in exchange for the retraction of disciplinary or adverse action. *American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 309 n.1 (1990) (*AFLC*), *aff'd sub nom. U.S. Department of the Air Force v. FLRA*, 949 F.2d 475 (D.C. Cir. 1991) (*Air Force v. FLRA*).

In *AFLC*, the Authority examined a series of union proposals concerning an agency's use of LCAs. It drew certain distinctions regarding (1) a union's statutory bargaining rights with respect to LCAs and (2) a union's right to seek, through negotiation, the contractual right to participate in contacts between agencies and employees with respect to such agreements, apart from any participation that is guaranteed by the Statute. Among other things, the Authority found within the agency's duty to bargain a proposal (Proposal 3) that would require the agency to give the union notice of, and an opportunity to be present at, meetings at which employees were offered LCAs. On the other hand, the Authority found nonnego-tiable a proposal (Proposal 4) that would give the union the right to "bargain the terms and conditions" of such agreements.

Although it found Proposal 3 to be negotiable, the Authority specifically rejected the union's contention that the LCA meetings are "formal discussions" or "Weingarten sessions." *AFLC* at 327, 329-32. The union also contended that "such meetings without Union representation could

constitute an unlawful bypass of the Union." *Id.* at 327. The Authority's analysis contains no express response to this contention. However, the Authority concluded that Proposal 3 was among those "contractual representational rights" that, although they "exceed those established under the Statute," a union may negotiate. *Id.* at 332.

The Authority found that Proposal 4 was inconsistent with sections 7114(a)(5)(A) and 7121(b)(3)(B) of the Statute "by prohibiting employees from exercising their rights to choose a representative other than the Union or to represent themselves *in the negotiation of the terms of a last chance agreement."* *Id.* at 329 (emphasis added). The Authority found such inconsistency in that "the negotiation of a last chance agreement may occur while the discipline is being challenged through the negotiated grievance procedure, or through the statutory appeals procedures[.]" *Id.* at 328. However, the Authority's holding is not necessarily limited, as Counsel for the General Counsel suggests (Br. at 9 n.5), to instances where an LCA is negotiated "in settling a grievance," or to instances in which a statutory appeal is pending. Although it may be argued that the Authority intended such a limitation, such an argument must be scrutinized.

The Authority did not express such a limitation. To infer it, or to conclude that its omission was an oversight, one would need to reach a greater degree of certainty as to the Authority's intentions than I am able to realize. While there is a certain logic to the limitation suggested by the General Counsel's argument, I find insufficient basis to attribute it to the Authority.

In support of the limitation, one might suppose that the Authority found Proposal 4 nonnegotiable only because it would have given the union the right to negotiate LCAs irrespective of whether there was a pending grievance or appeal. However, the Authority says nothing to suggest that Proposal 4 would have been negotiable if it had involved the right to participate only in the absence of a pending grievance or appeal. So it is possible that the Authority's intention was to insure the right of employees to forego union representa-tion by broadly insulating the process of negotiating such agreements from collective bargaining, at least if that is the wish of the employees whose discipline is involved. Thus, the Authority, as quoted above, described the employee right with which Proposal 4 conflicts as the right to forego union representation "in the negotiation of the terms of a last chance agreement[.]" Further, in *American Federation of Government Employees, Local 48 and U.S. Department of the Navy, Strategic Weapons*

Facility, Pacific, Bremerton, Washington, 38 FLRA 1055, 1061 (1990), holding nonnegotiable a proposal similar to Proposal 4, the Authority held that:

> Contrary to the Union's assertion, under the Statute, an exclusive representative does not have the right to negotiate "to *require* that a representative be provided whenever an employee is subject to discipline . . . ." Rather, the Statute protects an employee's right to choose not to be represented by an exclusive representative.

In either or both of these decisions, the Authority had the opportunity to qualify the employee right it so described. Its failure to do so cannot be dismissed lightly.

The Authority also treated the right of a union to attend LCA meetings (Proposal 3) as a right that it might negotiate but that would "exceed those established under the Statute." It would be peculiar, one might even say extraordinary, for the Authority to hold that a union has a statutory right to negotiate an LCA but not to attend the meeting at which it is offered.

What I have taken as the more literal reading of *AFLC* attributes to the Authority a rather expansive interpretation of the employee rights provided in sections 7114(a)(5)(A) and 7121(b)(3)(B) of the Statute. However, I am not persuaded that adherence to that reading leads to an absurd result. In affirming *AFLC*, the District of Columbia Circuit noted that "last chance agreements can be consummated only through bargaining with employees . . . ." *Air Force v. FLRA* at 481. At one level merely a restatement of the obvious, this observation may serve as a steppingstone to the realization that, where the application of general rules and procedures concerning discipline comes down to the fate of an individual employee, there is reason to regard the immediate interests of that employee as paramount, and therefore to leave with that employee the decision to negotiate with or without the union.

There are respectable policy considerations that might point one toward a different result, but I am not persuaded that the Authority has indicated that it intends to move in that direction. Thus, to the extent that negotiations excluding the union may constitute a bypass of the exclusive bargaining representative, it is not such a bypass as has

historically been considered to be unlawful.[4] Moreover, the Authority has cautioned judges about striking out too boldly on their own where the Authority has spoken to the issue under consideration. *U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia*, 37 FLRA 409, 416 (1990).

SSA asserted at the hearing and in its main brief that the Privacy Act precluded disclosure to the Union of any information about the NDA absent Church's prior consent. In my February 21 letter to counsel, I signified that, in *AFLC, at 332-34,* the Authority appeared to have rejected any Privacy Act defense that might cover this situation. However, in a more recent decision, *U.S. Department of Veterans Affairs Regional Office, St. Petersburg, Florida*, 51 FLRA 530 (1995), the Authority held that the Privacy Act precluded disclosure to a union of unsanitized LCAs because the public interest that would be served by disclosure is outweighed by the invasion of privacy that would result and therefore would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 537. This suggests, at the least, that the holding in *AFLC* with respect to the Privacy Act defense may require reexamination. I make no determination about the merits of the Privacy Act defense here because I have not found that the General Counsel has established a bargaining obligation as part of his affirmative case.

II. Contention that SSA Failed to Give the Union an Opportunity to Bargain before Changing Working Conditions

This second prong of the General Counsel's argument that SSA unlawfully refused to bargain has the same underlying basis as the first. It merely focuses on a corollary of the fundamental statutory bargaining

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[4] This case is substantially different from those where an agency has dealt directly with employees in disciplinary proceedings after the employees have designated the union as their representative. *See Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 43 FLRA 736, 745 (1991). *Cf. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington*, 39 FLRA 298, 312-13 (1991) (unlawful bypass and interference found when agency communicated directly with employee about his grievance although it "was aware that [he] was represented by the Union" by virtue of a letter in which the employee specifically identified his union representative).

obligation, as articulated by the Authority in *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981), that is, the duty to bargain before making changes in negotiable conditions of employment. In this part of his argument, however, the General Counsel directs our attention to an agency's obligation to negotiate over what is commonly referred to as the impact and implementation of changes, even if the decision to make such changes is a management right under section 7106 of the Statute.

The difficulty that both prongs of the refusal to bargain argument must confront is that, as I have read *AFLC*, the Authority has in effect carved out an exception to the general obligation to negotiate about changes in conditions of employment. That exception applies to changes made pursuant to an LCA, where the employee whose conditions are to be changed has elected not to have the union participate.5

Alleged Coercion to Waive Statutory Rights

With this allegation, the General Counsel seeks to show that SSA, by insisting on a decision within approximately four hours, traduced the provision of the NDA stating that the employee agreed to the conditions (including the waivers) freely and voluntarily, and the recitation that she had sufficient time to consider the conditions and to seek advice.

I have found that Fishman essentially gave Church at least overnight and part of the following day to consider her options. Whether or not, in the abstract, such leeway is sufficient to negate coercion based on insufficient time, other factors come into play here. I have found that Fishman made no firm demand for a decision "that day." I also find that any impression he gave that he wanted a prompt decision was insufficient to prevent Church from freely electing to seek advice from her union representative or elsewhere.

Church was placed under no undue pressure or intimidation, such as the Authority found in *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834, 838-41 (1991), to waive her rights. She knew that a union representative was in the office, but made no attempt to consult her. I find no basis

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Absent such an exception to the bargaining obligation, there might be no section 7106 defense to negotiating about the substance of the changes involved here, and SSA has not asserted such a defense.

on which to infer that anything Fishman said or did carried the kind of coercive tendency that would have interfered with her free choice with respect to exercising the options that were spelled out in the NDA itself. Thus, Church had no reason to believe that, had she told Fishman that she wanted to consult her union representative, or even that she wanted a little time to consult someone else, the offer of the NDA would have been summarily withdrawn. Having decided on her own to sign the NDA without seeking other advice, she took responsibility for that decision and for understanding the terms and conditions to which she consented.

SSA did not coerce her. *See Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990). I therefore conclude that the General Counsel has failed to establish that SSA violated section 7116(a)(1) of the Statute in presenting Church with a proposed agreement that included a waiver of statutory rights. Accordingly, I recommend that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, April 17, 1997

JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-60297, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: April 17, 1997
Washington, DC