

93 FLRR 1-1148

**Department of Health and Human  
Services, Social Security Administration,  
Baltimore, MD and AFGE, National  
Council of SSA Field Office Locals  
Federal Labor Relations Authority**

5-CA-00495; 47 FLRA No. 96; 47 FLRA  
1004

**June 30, 1993**

**Judge / Administrative Officer**

**Before: McKee, Chairman, Talkin and  
Armendariz, Members**

**Related Index Numbers**

**44.141 Subjects of Bargaining, Compensation,  
Awards, Cash**

**72.511 Employer Unfair Labor Practices, Refusal  
to Bargain in Good Faith, Continuous Duty to  
Negotiate, Subjects Not Covered by Agreement**

**Case Summary**

THE FLRA ANNOUNCES A NEW TEST FOR WHETHER MATTERS ARE COVERED BY COLLECTIVE BARGAINING AGREEMENTS AND, THEREFORE, REMOVED FROM BARGAINING. The Authority reaffirmed the union's right to initiate mid-term bargaining over proposals not covered by the collective bargaining agreement. The Authority reexamined its test for whether a proposal was covered by the agreement in light of criticism by the D.C. Circuit. The Authority decided to abandon its policy requiring bargaining on union proposals unless the contract had clearly waived the right to bargain. The Authority now adopted a policy of determining first whether the matter was expressly contained in the parties' agreement. The test would not require an exact congruence of language. The Authority would find the requisite similarity if a reasonable reader would conclude that the provision settled the matter in dispute. If the contract did not expressly cover the matter, bargaining would still be precluded "if the subject matter of the proposal is so commonly considered to be an aspect of the matter set

forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter. . . ." Applying these criteria, the Authority found that proposals requiring the employer to notify the union about the availability of performance awards and to set aside money for performance awards where performance appraisals are subsequently raised as a result of appeals were covered by contract and not subject to bargaining.

**Full Text**

**DECISION AND ORDER**

**I. Statement of the Case**

This unfair Labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the General Counsel and the Union. The Respondent filed an opposition to the General Counsel's and Union's exceptions and cross-exceptions to the Judge's decision. The General Counsel filed an opposition to the Respondent's cross-exceptions.

The complaint alleges that the Respondent refused to negotiate with the Union regarding incentive awards for employees in the bargaining unit in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The Judge found that the Respondent did not violate the Statute as alleged and recommended that the complaint be dismissed.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. We affirm the rulings. Upon consideration of the entire record, we adopt the Judge's findings, conclusions, and recommended Order only to the extent consistent with this decision.

**II. Background**

The facts, which are set forth more fully in the Judge's decision, are summarized below.

The American Federation of Government Employees (AFGE) is the exclusive representative of

a consolidated nationwide bargaining unit of the Respondent's employees. The parties negotiated a master labor agreement (MLA) in 1982, which was superseded by another MLA that became effective on January 25, 1990, by order of the Federal Service Impasses Panel (the Panel).

In a letter to the Respondent's Commissioner dated April 11, 1988, AFGE delegated to its locals the right to initiate mid-term bargaining.\*1

On December 12, 1989, after having unsuccessfully attempted to bargain at the local level, the president of AFGE Local 1346 submitted the following request to negotiate and proposals concerning performance awards to the Respondent's commissioner:

This constitutes a Union initiated proposal(s) for mid-term bargaining on remedies for performance awards disputes. The authority for this action is NTEU v. FLRA, 810 F.2d 295 [87 FLRR 1-8003]. The Union proposal is as follows:

1. The Manager will notify the Union [p]resident immediately in writing when performance award money becomes available.
2. This notification will include total dollar amount designated for performance awards in the office.
3. Twenty percent of the award money shall be set aside for unit employees whose appraisals are subsequently raised later because of grievance or EEO complaint remedies.

Please notify us who your chief negotiator will be.

...

P.S. The AFGE General committee has delegated full [a]uthority to local presidents for this new statutory bargaining.

Judge's decision at 3. With the December 12, 1989, letter, the local president submitted ground rule proposals. In a letter dated January 25, 1990, the Respondent refused to negotiate, contending that it was not appropriate to bargain regarding performance

awards during the term of the collective bargaining agreement.

### III. Judge's Decision

Before the Judge, the General Counsel argued that the Respondent violated the Statute when it refused to bargain on January 25, 1990, following the local president's request to initiate bargaining over performance award matters. The General Counsel relied on Internal Revenue Service, 29 FLRA 162 (1987) [87 FLRR 1-1480] (IRS), in which the Authority held that a union has a statutory right to initiate mid-term bargaining "on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." Id. at 166. The General Counsel contended that the Respondent violated the Statute because: (1) the local Union submitted a request to negotiate concerning negotiable proposals on matters not contained in the agreement; (2) the Respondent refused to bargain; and (3) AFGE had not waived its right to bargain about performance awards.

The Respondent defended its acknowledged failure to engage in negotiations by claiming that: (1) AFGE had waived its right to initiate bargaining (2) there was no statutory right to initiate bargaining on matters unrelated to MLA issues when negotiations for a new MLA were ongoing and the parties to the MLA were at impasse before the Panel; and (3) the local president's request was not valid because he did not have the authority to initiate bargaining. In general, the Respondent argued that because the proposals were made during the term of the 1982 MLA, AFGE should have raised those issues at the national level when the parties were negotiating for a new MLA in 1988.

The Respondent also asserted that because no procedures existed in the MLA for union-initiated bargaining, such bargaining could occur only at the level of exclusive recognition unless otherwise mutually agreed to by the parties at the level of exclusive recognition. The Judge summarily rejected this contention, concluding that under IRS an agency

has the responsibility to bargain pursuant to union-initiated requests during the term of an agreement. The Judge noted, however, that Department of Health and Human Services, 6 FLRA 202 (1981) [81 FLRR 1-1140] (HHS) established that the level of exclusive recognition between the Respondent and AFGE, the exclusive representative of a consolidated unit of the Respondent's employees, is at the national level. The Judge also concluded that in the absence of agreement between the parties, or other appropriate delegation of authority, negotiations are required only at the level of exclusive recognition, citing Department of Defense Dependents Schools and Overseas Education Association, 12 FLRA 52, 53 (1983) [83 FLRR 1-1131].

The Judge made the following findings as to the local president's request to bargain: (1) the request was for "[m]id-term bargaining on remedies for performance awards disputes[.]" and therefore, was a mid-term bargaining request governed by MLA; (2) the request was made during the term of the 1982 MLA; (3) the record established that the local president was a properly designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition; and (4) the local president's request was made to the proper national level official of the Respondent. Judge's decision at 6.

However, notwithstanding his finding that the local president had been properly delegated authority to bargain, the Judge concluded that, under Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and Wright-Patterson Air Force Base, Ohio, 39 FLRA 1409 (1991) [91 FLRR 1-1151] (Wright-Patterson IV),\*2 a delegation of bargaining authority to local representatives is not effective unless the agency agrees to local level bargaining. Accordingly, the Judge concluded that, absent any evidence that the Respondent agreed to bargain with AFGE designees, the Respondent had no obligation to bargain with the local president over local proposals at the national level. In reaching this conclusion, the Judge rejected the General Counsel's premise that this case involves

the issue of whether an exclusive representative has the statutory right to designate its own representative. The Judge found that such a premise fails "because the issue goes beyond merely designating a representative and amounts to whether under the [Wright-Patterson IV and Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 39 FLRA 1381 (1991) [91 FLRR 1-1150] (Wright-Patterson III)] cases the parties must agree to bargain at a level other than the national level of recognition." Judge's decision at 8. According to the Judge, those cases "create a distinction which abrogates a union's right to designate its own representative in some circumstances." *Id.* at 9.

Assuming that the local president had effective authorization to negotiate, however, the Judge then proceeded to consider and reject the other defenses of the Respondent.

First, the Judge found that the record was insufficient to establish a waiver either by express agreement or bargaining history. The Judge noted that an agency must bargain in good faith during the term of a collective bargaining agreement on negotiable proposals concerning matters not included in that agreement unless the union has waived its right to bargain about the subject matter involved. Citing to *IRS*, the Judge further noted that the waiver may be either by express agreement or bargaining history, but must be "clear and unmistakable." The Judge concluded that neither the language in the 1982 MLA nor the language in the 1990 MLA waived the Union's right to bargain over the specific subject matter of the proposals submitted by the local president. In this regard, the Judge found that the mere fact that the parties had previously agreed on items arguably related to the general subject matter does not mean that the Union forfeited its right to initiate bargaining on a specific subject matter, citing in support Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060, 1066-68 (1991) [91 FLRR 1-1120] remanded, 962 F.2d 48 (D.C. Cir. 1992) [92 FLRR 1-8019] (order),

decision on remand, 45 FLRA 502 (1992) [92 FLRR 1-1221] (Marine Corps).<sup>\*3</sup>

The Judge also dismissed the Respondent's assertion that AFGE, similar to the union in Wright-Patterson IV, is foreclosed from further bargaining because it agreed in Article 5 of the 1981 MLA that "there will be no other supplemental agreements" except for seven designated topics, which do not include incentive awards. Judge's decision at 11. The Judge noted that in Social Security Administrative, 39 FLRA 633 (1991) [91 FLRR 1-1081] (SSA),<sup>\*4</sup> the Authority reviewed this particular provision of the parties' MLA and found that the provision "applies only to supplemental agreements negotiated by components of the organization[.]" Id. at 634. The Judge found that the proposals in this case did not involve negotiations at the component level. Further, the Judge concluded that AFGE had not expressly waived its right to initiate bargaining on the specific subject matter contained in the local president's proposals based upon the bargaining history of the parties.

Second, the Judge determined that Proposals 1 and 2 were negotiable, but did not make a specific finding regarding the negotiability of Proposal 3.

Finally, the Judge found unpersuasive the Respondent's argument that there is no statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing. In this regard, the Judge emphasized that the 1982 was in effect when the local president made his request. The Judge found that does not preclude a union from initiating bargaining on matters that it deems outside the scope of any ongoing negotiations. The Judge determined that because the 1982 MLA was effective until amended, modified or replaced, the Respondent would not be relieved of its duty to negotiate on that agreement until one of those conditions was fulfilled. Accordingly, the Judge concluded that the Respondent's argument lacked merit.

In sum, the Judge found that the Respondent had no obligation to bargain with the local president over

local proposals at the national level. However, assuming that the local president had effective authorization to negotiate, the Judge rejected the Respondent's contentions that: (1) the Union waived its right to bargain either by express agreement or bargaining history; (2) the union proposals were not negotiable; and (3) there was no statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing.

#### IV. Positions of the Parties

##### A. General Counsel's Exceptions

The General Counsel takes exception to the Judge's conclusion that "[a]bsent any evidence that Respondent agreed to bargain with AFGE designees, Respondent had no obligation to bargain with . . . [the Union] over the local proposals at the national level." General Counsel's Brief to exceptions at 2-3 (quoting Judge's decision at 8). The General Counsel also excepts to the Judge's conclusion that under Wright-Patterson III and Wright-Patterson IV the Authority found that an agency could abrogate a union's right to designate its own representative for bargaining purposes.

The General Counsel contends that the Judge correctly found that the local president was a properly designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition and that his request was made to the proper national level official of the Respondent. The General Counsel asserts that there was no need for the Judge to inquire further as to whether the Respondent agreed to negotiate at the local level or whether the local president was a properly authorized official at the local level. The General Counsel contends that by determining that issues involving local level negotiations were relevant, the Judge made a "critical error." General Counsel's Brief to exceptions at 7.

Further, the General Counsel contends that Wright-Patterson III and Wright-Patterson IV do not stand for the proposition that an agency has a right to abrogate a union's statutory right to designate its

representatives for the purpose of negotiations. The General Counsel argues that "[a] careful reading of both cases reveals only that an agency does not have to negotiate with a person who is not a properly authorized representative of the exclusive representative AS DESIGNATED BY THE EXCLUSIVE REPRESENTATIVE." General Counsel's Brief to exceptions at 9 (emphasis in original).

Accordingly, the General Counsel argues that because the Judge properly concluded that the Union did submit negotiable proposals and did not waive its right to initiate bargaining, the Respondent violated the Statute by refusing to bargain.

#### B. Union's Exceptions

The Union contends that the Judge incorrectly applied and failed to distinguish Wright-Patterson III and Wright-Patterson IV. The Union argues that the facts in this case are much more closely related to Wright-Patterson III. The Union notes that in this case the Judge made a specific finding that the local president had a bona fide delegation of authority to act on behalf of the Union, as did the union official in Wright-Patterson III. The Judge, according to the Union, should have turned his attention to the Respondent's previous delegation of authority to local managers for Union-initiated local level negotiations. The Union further contends that the Judge failed to distinguish the facts in HHS from the present case. The Union argues that HHS "focused on a local level contractual right," a mid-term reopener, while this case "involves a higher level pure statutory bargaining right flowing from [NTEU v. FLRA,] 810 F.2d 295 [(1987)] [87 FLRR 1-8003] in the D.C. Circuit Court." Union's exceptions at 3-4.

Accordingly, the Union contends that the Judge's decision should be overturned.

#### C. Respondent's Opposition and Cross-Exception

The Respondent contends that the local president had no statutory or contractual right to initiate mid-term bargaining or bind the Union at the national level on the subject of awards. The Respondent

argues that since 1979, when the consolidation of the bargaining unit was approved by the Authority, the Respondent has been obligated to bargain with the AFGE only at the level of exclusive recognition "unless OTHER PROCEDURES ARE MUTUALLY AGREED TO BY THE PARTIES." Respondent's opposition and cross-exception at 8 (emphasis in original). The Respondent contends that this determination was affirmed by the Authority in and that it has never agreed to and is not obligated to bargain at local levels within the consolidated unit.

The Respondent also contends that it has no obligation to conduct bargaining at the level of recognition while simultaneously bargaining over the same issue at a level below the level of exclusive recognition. The Respondent asserts that the bargaining request from the local president is inconsistent with and that consolidation would be rendered meaningless if duplicative bargaining on several levels were to occur.

Further, the Respondent argues that even if the local president was entitled to initiate negotiations, AFGE waived any further right to bargain on the topic of performance awards by negotiating language on that matter in the 1982 MLA. The Respondent also contends that the 1982 MLA precluded the Union from initiating any further bargaining except over seven issues, not in awards, which the parties agreed could be subjects for supplemental bargaining during the term of that agreement. Therefore, Respondent asserts that the MLA could not be reopened except by mutual consent.

As to the General Counsel's second exception, the Respondent contends that the Judge correctly concluded that in Wright-Patterson IV the issue went beyond merely designating a representative. The real issue in that case, it argues, was not whether the union representative was appropriately designated, but rather whether such authorization included acting on behalf of and binding the union at the national level. According to the Respondent, in Wright-Patterson IV the Authority found that the union's designee had no such authority beyond the local council. The

Respondent contends that based on that analysis the Judge in this case "correctly found that the Respondent had no obligation to bargain over mid-term initiatives concerning local incentive awards with a local president[.]" Respondent's opposition and cross-exception at 11.

In opposition to the Union's exceptions, the Respondent contends that the Union is attempting to cloud the real issue in this case through its misinterpretation of Wright-Patterson III and Wright-Patterson IV. The Respondent argues that in spite of the local president's alleged authorization, he did not have the authority to negotiate or act for the Union at the national level. The Respondent asserts that the local president was not a "duly authorized representative" of the Union within the meaning of section 7114(b)(2) of the Statute. *Id.* at 12.

The Respondent excepts to the Judge's finding and conclusion that the Respondent is obligated to bargain on mid-term proposals initiated by the Union. The Respondent submits that the Respondent is in the jurisdiction of the Fourth Circuit, which has determined that an agency is not obligated to bargain in the circumstances of this case. The Respondent contends that in *Social Security Administration v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) [92 FLRR 1-8006] (*SSA v. FLRA*), the court held "that other than negotiations leading to a basic collective bargaining agreement, there is no obligation to bargain over union-initiated proposals." Respondent's opposition and cross-exception at 13. The Respondent submits that the Authority should follow the decision of the Court of Appeals for the Fourth Circuit.

#### D. General Counsel's Opposition to Respondent's Cross-Exception

The General Counsel contends that the Authority should deny the Respondent's cross-exception because the Respondent's position regarding union-initiated mid-term bargaining is contrary to well-established Authority precedent affirming *IRS*.

#### V. Analysis and Conclusions

We conclude that the Respondent did not violate

the Statute when it failed to negotiate with the local president concerning performance awards.

#### A. Union's Right to Initiate Mid-term Bargaining

We reject the Respondent's contention that the Authority should adopt the 4th Circuit's decision in *SSA v. FLRA*, which held "that union-initiated midterm bargaining is not required by the [S]tatute and would undermine the [C]ongressional policies underlying the [S]tatute." 956 F.2d at 1281. We respectfully disagree with the 4th Circuit's decision, and we will continue to adhere to our holding in *IRS* that the duty to bargain in good faith that is imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters that are not contained in the collective bargaining agreement, unless the union has waived its right to bargain about the subject matter involved. See *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582 (1992) [92 FLRR 1-1373] (*Selfridge National Guard Base*).

#### B. The Local President's Bargaining Authority

For the reasons set forth in the Judge's decision, we agree that: (1) the local president made a mid-term bargaining request during the term of the parties' 1982 MLA; (2) the request was made to the properly designated management official at the level of exclusive recognition; (3) the local president was a properly designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition; and (4) the Union submitted at least two negotiable proposals. Thus, this case involves a request from a properly designated agent of the exclusive representative to bargain at the level of exclusive recognition concerning negotiable proposals of local interest. Based on these findings, we disagree with the Judge's ultimate conclusion that "[a]bsent any evidence that Respondent agreed to bargain with AFGE designees, it must be found that Respondent had no obligation to bargain with [the local president] over the local proposals at the national level." Judge's decision at 8.

As the Respondent points out, the Authority concluded in HHS that following certification for a consolidated unit, the level of exclusive recognition between the Respondent and AFGE was at the national level, and, therefore, the mutual obligation to bargain exists only at that level. In our view, the holding in HHS is fully consistent with a finding that the Respondent had an obligation to bargain at the national level with a properly authorized designee of AFGE. By contrast, the issue in HHS was whether local management had an obligation to bargain at the local level pursuant to a reopener clause contained in a local agreement. Similarly, both Wright-Patterson III and Wright-Patterson IV involved bargaining requests to local management by local union officials. Therefore, the Authority's analyses in those cases are not pertinent to the issues presented in this case.

In AFGE Council of Prisons Locals and Department of Justice, Bureau of Prisons and Federal Prison Industries, 5 FLRC 517 (1977) the Federal Labor Relations Council found that when "in a comprehensive bargaining unit . . . matters which pertain only to one or more facilities within the unit are proposed in negotiations at the level of recognition, such a proposal would not fall outside the obligation to bargain under section 11(a) [of Executive Order 11491, as amended] . . . simply by virtue of its less than unitwide applicability." 5 FLRC at 519 (footnote omitted). We see no reason to depart from this holding. See section 7135(b) of the Statute. Accordingly, we conclude that the Respondent was obligated to bargain with the local president, who was properly designated to act for the exclusive representative at the level of exclusive recognition, concerning mid-term bargaining proposals of local interest unless the Union waived that right through bargaining or by negotiating the terms of the 1982 MLA.\*5

#### C. The Respondent's Obligation to Bargain Over the Mid-Term Bargaining/Proposals

##### 1. Effect of the Supplemental Agreement Article of the MLA

We conclude that Article 5 of the parties' 1982

MLA, entitled "Supplemental Agreements," does not prevent the Union from initiating bargaining at the national level. In SSA the Authority found that the language at issue applied only to supplemental agreements negotiated by components of the organization, and not to agreements at the national or agency level. 39 FLRA at 634. As we have found that the local president's mid-term bargaining request was made at the national level, we conclude that Article 5 of the parties' 1982 does not preclude bargaining.\*6

##### 2. The Proposals Were Covered by the 1982 MLA

Having concluded that, in general, the Respondent had an obligation to bargain with the duly authorized agent of AFGE over matters of local concern and that AFGE had not waived its right to engage in such mid-term negotiations, we now turn to the question of whether the matters over which the Union sought to bargain were contained in or covered by provisions of the 1982 MLA so as to preclude further bargaining during the term of that agreement.

###### a. Test to Be Applied

In IRS, the Authority held that

the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved. Such a waiver of bargaining rights may be established by (1) express agreement, or (2) bargaining history. Further, any such waiver must be clear and unmistakable . . . .

29 FLRA at 166. With regard to clear and unmistakable waivers, the Authority held that "the determinative factor is whether the particular subject matter of the proposals offered during contract and mid-term negotiations is the same." *Id.* at 167. The Authority gave no guidance in IRS as to how to determine whether matters are contained in or covered by an agreement. Shortly thereafter, however, the Authority stated that it would apply the same test

to analyze whether a matter is covered by an agreement as set forth in IRS for determining a waiver by bargaining history. U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 31 FLRA 1231, 1235-36 (1988) [88 FLRR 1-1153] (Army Corps of Engineers). Thus, the Authority held that in determining whether a matter is covered by an agreement, "the determinative factor is whether the particular subject matter of the proposals . . . is the same." *Id.* at 1235, quoting at 167.

In Marine Corps the court criticized the Authority for changing the duty to bargain test set forth in IRS by "collapsing the 'contained in'/covered by' inquiry into the 'waiver' inquiry" without an adequate explanation for the new approach. 962 F.2d at 55. The court held that there is a distinct separation between the waiver that must occur before a union can relinquish its right to bargain about a matter and the union's consequent exercise of that right through negotiation. Although the court concluded that the matters at issue in the consolidated cases before it were clearly covered by provisions in the parties' collective bargaining agreements, it chose not to "establish a definitive test for determining when an otherwise bargainable matter is 'covered by' a public sector collective bargaining agreement . . . ." *Id.* at 62. Consistent with the court's decision, we will establish a definitive test for determining when a matter is contained in or covered by a collective bargaining agreement.\*7

In general, a bargaining relationship involves ongoing communication between the parties, unbroken by the existence of a collective bargaining agreement. It has long been acknowledged in the private sector that a contract does not create a static period in the relationship between the employer and the employees for the term of that agreement. See *National Labor Relations Board v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952) (*Jacobs Mfg.*). As the court stated in *Jacobs Mfg.*, the existence of a contract does not relieve an employer "of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of

the contract." In the Federal sector, the U.S. Court of Appeals for the District of Columbia Circuit has examined the "broad and unqualified" language of section 7114 of the Statute in light of the private sector law and has determined that the "duty to bargain extends also to mid-term proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement." *NTEU v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987) [87 FLRR 1-8003]. But see *SSA v. FLRA* (agencies have no statutory obligation to bargain over union-initiated mid-term proposals). The overriding concern of these cases is that although bargaining agreements are intended to promote stability in the bargaining relationship, employers and unions in both the private and Federal sectors should be relatively unrestricted in their ability to resolve their disputes through collective bargaining. See *Jacobs Mfg.*, 196 F.2d at 684; *NTEU v. FLRA*, 810 F.2d at 300-01.

On the other hand, we strongly agree with the court in *Marine Corps* that "[i]mplicit in [the] statutory purpose is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." 962 F.2d at 59. We also agree that to require an exact congruence between a provision of a contract and a proposal offered by a union in order for an agency to have no duty to engage in mid-term bargaining on the matter, would, in many cases, effectively nullify the terms of the parties' existing agreement. Accordingly, to the extent that any of our decisions require such congruence, they will no longer be followed. See, for example, *Army Corps of Engineers* (contract provisions involving procedures to be used in rating employees, including postponement when supervisor had less than 120 days to observe employee's performance against current requirements, did not cover proposal involving procedures to be used in rating employees who had not performed duties for 120 days due to extensive amounts of official time).

In sum, in examining whether a matter is

contained in or covered by an agreement, we must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining. If we meet these goals, we will have supported "the delicate balance of power between management and labor . . . ." *National Treasury Employees Union v. FLRA*, 856 F.2d 293, 301 (D.C. Cir. 1988) [88 FLRR 1-8048].

With these principles in mind, we will set forth a framework for determining whether a contract provision covers a matter in dispute. Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. See, for example, *National Labor Relations Board v. Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967).

If the provision does not expressly encompass the matter, we will next determine whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966), cited with approval in *Marine Corps*, 962 F.2d at 60. In this regard, we will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the

provision. If so, we will conclude that the subject matter is covered by the contract provision. For example, under this test, and on further reflection, we agree with the court in *Marine Corps* that the issues raised by the cons in that case involving the reassignment of four employees and the implementation of new performance standards were inseparably bound up with provisions of the extant contracts dealing with procedures and appropriate arrangements for, respectively, the detailing of employees and the establishment of performance appraisal systems.

We recognize that in some cases it will be difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated. For example, if the parties have negotiated procedures and appropriate arrangements to be operative when management decides to detail employees, as was the case in *Marine Corps*, it may not be self-evident that the contract provisions were intended to apply if management institutes a wholly new detail program, or decides during the term of the contract to detail employees who previously had never been subject to being detailed. To determine whether such matters are covered by an agreement, we will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. In this examination, we will, where possible or pertinent, examine all record evidence. See, for example, *Triangle PWC, Inc.*, 231 NLRB 492 (1977) (based on evidence of prior agreement and bargaining history, the Board determined that the subject of pension benefit levels was covered by the agreement). If the subject matter in dispute is only tangentially related to the provisions of the agreement and, on examination, we conclude that it was not a subject that should have been contemplated as within the intended scope of the provision, we will not find that it is covered by that provision. In such circumstances, there will be an obligation to bargain.

b. Application of the Test in This Case

The first two proposals submitted by the Union involve a requirement that the Agency notify the Union in writing about the availability of performance award money, including the total amount designated for such awards.

Article 17 of the parties' 1982 MLA is entitled "Incentive Awards" and discusses in some detail the Respondent's incentive awards program. Section 1 of that provision establishes that the program is intended in part to "provide incentive awards to employees whose performance is substantially in excess of normal expectation . . . ." Section 4, entitled "Awards Information," provides that the Union will be provided copies "of an annual report of incentive awards program." That provision further states that "[t]his report will show distribution of cash awards and high quality increases by grade and organization[al unit]." Thus, the parties have bargained over not only the general subject of performance awards, but also more specific matters regarding the disclosure of information relative to such awards. Applying the test discussed above, we conclude that the Union's mid-term proposals were unquestionably covered by the 1982 MIA for the reasons set forth more fully below.

Initially, we conclude that the provision of information about the availability of performance award money is an issue that is inseparably bound up with matters negotiated regarding the incentive awards program in the 1982 MLA. The parties expressly addressed issues regarding procedures for reporting awards information to the Union. Although the 1982 MLA does not provide for the provision of information about the awards program before the distribution of awards, that issue is sufficiently similar in focus that it is, in our view, inseparably bound up with the information provisions set forth in Section 4. Accordingly, the Respondent fulfilled its bargaining obligation with regard to such matters.\*8

We also conclude that the third proposal, which would require that a certain amount of the award money be set aside for employees whose appraisals are subsequently raised because they prevailed in a

grievance or EEO complaint, is covered by the 1982 MLA. Article 17, section 1 of the 1982 MLA reflects the agreement of the parties that "an effective incentive awards program should result in a more effective work force, higher productivity, and improved working environment." It describes the operation of the awards program "within the context of budgetary considerations and limitations[.]" Section 2A.4 of that provision states that the Respondent "will make reasonable efforts to allot awards in proportion to the number of bargaining unit employees within each component." It is reasonable to assume that the parties recognized that, in light of the budgetary limitations recognized by the provision, the effectiveness of the program could be diminished by the failure to retain sufficient funds to provide remedies ordered as a result of third-party proceedings. Accordingly, the Union should have contemplated that the negotiated provisions would foreclose further bargaining in such situations.\*9

Accordingly, we conclude that the Respondent was not obligated to bargain with the local president over any of the proposals submitted and did not violate the Statute by refusing to do so.\*10

#### VI. Order

The complaint is dismissed.

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1. AFGE Local 1346, as an agent of AFGE, represents unit employees in approximately 20 of the Respondent's field offices in Wisconsin.

2. The cases cited at 39 FLRA 1409 [91 FLRR 1-1151] and 39 FLRA 1381 [91 FLRR 1-1150] are two in a series of four cases involving similar issues. For ease of recognition, we have retained the short designations used by the Judge and the parties to refer to these cases.

3. In 45 FLRA 502 [92 FLRR 1-1221], the Authority dismissed the complaint in the case on instructions from the court.

4. In *Social Security Administration v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) [92 FLRR 1-8006] the court set aside, on other grounds, the Authority's

decision in this case.

5. Based on our finding that the local president was seeking mid-term negotiations to supplement the 1982 MLA, we reject the Respondent's argument that it was not obligated to bargain simultaneously with two representatives of the Union regarding "duplicative bargaining requests . . ." Respondent's opposition and cross-exception at 9. The fact that the Respondent was engaged in negotiations with AFGE representatives for the parties' 1990 MLA had no bearing on its obligations to respond to a properly authorized agent of AFGE who made a mid-term bargaining request under the terms of the 1982 MLA. We note that at the time the local president's request was made on December 12, 1989, the parties' dispute over the terms of the new MLA was before the Panel. During that period the parties had agreed to maintain the terms and conditions of the 1982 agreement and the Union had no way of knowing how long that period would be. Of course, any terms agreed on in mid-term bargaining would have ceased upon the termination of the 1982 MLA. Accordingly, we find that the bargaining requests were not duplicative.

6. We also conclude, for reasons stated by the Judge, that no waiver of the Union's right to bargain is evidenced by the collective bargaining history of the 1982 MLA. In particular, we note that the Judge credited testimony by AFGE's negotiator that matters related to the proposals were never fully discussed by the parties. See *Selfridge National Guard Base*, 46 FLRA at 585 (to establish waiver by bargaining history, the matter "must be fully discussed and consciously explored during negotiations and the union must have consciously yielded or otherwise clearly and unmistakably waived its interest in the matter.").

7. The framework we establish today is intended to apply only to cases in which an agency asserts that it has no obligation to bargain based on the terms of a negotiated agreement.

8. Our disposition of this matter has no bearing on the question of the Respondent's obligation to provide information regarding performance or

incentive awards pursuant to a valid request under section 7114(b)(4) of the Statute.

9. We note that in Article 24, Section 2C.1, the parties gave employees the right to file a grievance over "the effect or interpretation, or a claim of breach, of a collective bargaining agreement[.]" The Union framed its proposals as concerning "remedies for performance awards disputes." Judge's decision at 3. Thus, any issues involving failures to provide awards for employees whose appraisals are raised due to remedial actions would be subject to resolution through the contractual grievance procedure. See *Marine Corps*, 962 F.2d at 61-62.

10. In view of our disposition, we do not need to determine the negotiability of the third proposal.

#### DECISION

##### Statement of the Case

This a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on June 11, 1990 by the National Council of Social Security Administrative Field Office Locals Council 220, American Federation of Government Employees (hereinafter called AFGE or the Union). A Complaint and Notice of Hearing was issued on September 24, 1991 by the Regional Director for the Chicago, Illinois Region, Federal Labor Relations Authority. The Complaint alleges that Respondent refused to negotiate with the union regarding incentive awards for employees in an appropriate bargaining unit.

A hearing was held before the undersigned in Chicago, Illinois. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Both parties submitted timely briefs which have been fully considered. Thereafter, Respondent filed a motion to correct portions of its brief. The uncontested motion is granted.

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

#### Findings of Fact

1. The AFGE represents a nationwide bargaining unit of Respondent's employees. Local 1346, as an agent of AFGE represents approximately 20 Social Security offices in Wisconsin.

2. The first master labor agreement between the parties went into effect in 1982 and was succeeded by a new master agreement on January 25, 1990.

3. An April 11, 1988, letter directed to the Commissioner of SSA from Arthur Johnson, AFGE General Committee spokesperson, delegated AFGE's right to initiate bargaining to AFGE Locals:

As you know, the D.C. Circuit Court of Appeals in *FLRA v. IRS*, 810 F.2d 295 (1987) [87 FLRR 1-8003] upheld the union's right to initiate mid-term bargaining. The FLRA has adopted this ruling as well in *IRS*, 29 FLRA No. 12 (1987) [87 FLRR 1-1480].

It appears that some of your managers and supervisors have not received this information and are confused as to the delegation of authority AFGE has granted to the General Committee and its Councils and Locals in this matter.

While we believe that the delegations of authority communicate to your predecessor several times are clear, we take this opportunity to dispel any questions in this regard.

The right to initiate mid-term bargaining has been, and still is delegated to our councils and locals as well as the General Committee. This is in accord with the delegation of authority provided to the commissioner via letters dated October 18, 1979 and September 8, 1982 by National President Kenneth Blaylock.

Since we have received no delegation of authority from you concerning the appropriate management official to receive these union initiated mid-term bargaining matters, it would appear that

they should be addressed to you as per 6 FLRA No. 33 [81 FLRR 1-1140]. If you should delegate this authority to a subordinate, please let us know as soon as possible.

4. On December 12, 1989, after having submitted requests for bargaining and being rebuffed at the local level, AFGE Local 1346 President Wayne McKillen submitted the following request to negotiate and proposals concerning performance award money matters to Respondent's Commissioner:

This constitutes a Union initiated proposal(s) for Mid-term bargaining on remedies for performance awards disputes. The authority for this action is *NTEU v. FLRA*, 810 F.2d 295 [87 FLRR 1-8003]. The Union proposal is as follows:

1. The Manager will notify the Union President immediately in writing when performance award money becomes available.

2. This notification will include total dollar amount designated for performance awards in the office.

3. Twenty percent of the award money shall be set aside for unit employees whose appraisals are subsequently raised later because of grievance or EEO complaint remedies.

Please notify us who your chief negotiator will be.

...

PS: The AFGE General Committee has delegated full Authority to local presidents for this new statutory bargaining.

5. In addition, along with the December 12 letter, McKillen submitted ground rule proposals concerning several items inter alia, for official time for Union negotiators, time and place for negotiations, caucuses and distribution of the final agreement.

6. In a January 25, 1990, letter, Respondent, by Michael Grochowski, Associate Commissioner for Resource Management, refused to negotiate stating, in part:

We do not agree that it would be appropriate to

bargain in regard to aspects of performance awards during the term of the collective bargaining agreement in place between the American Federation of Government Employees and the Social Security Administration. Such proposals as those presented in your letter would have been appropriate for consideration during the spring and summer of 1988 when bargaining on a new term agreement was conducted.

During this process, Article 17 of the National Agreement (Incentive Awards) was modified by the parties. As a result of the Impasses Panel's decision of December 22, 1989 (Case No. 89 FSIP 132), the new National Agreement, including an expanded Article 17, will be implemented nationwide on January 25, 1990. In our view, any further changes in Article 17 should not be considered by the parties until the next round of term bargaining is conducted.

#### Discussion and Conclusions

##### A. Positions of the parties.

The General Counsel's position is, Respondent violated the Statute when it refused to bargain on January 25, 1990, following McKillen's request to initiate bargaining over performance award matters. It relies primarily on Internal Revenue Service, 29 FLRA 162, 166 (1987) [87 FLRR 1-1480] (IRS), where the Authority held that a union has the Statutory right to initiate bargaining "during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter." Therefore, the General Counsel argues that to establish a violation of the Statute in this case it need only demonstrate, as it did, by a preponderance of the evidence, that AFGE submitted a request to negotiate and negotiable proposals on matters not contained in the agreement, that the agency refused to bargain, and that AFGE did not waive its right to bargain about performance awards.

Respondent's posture is that it had no duty to bargain under the circumstances of this case, even if

the Union submitted a request along with negotiable proposals. Respondent defends its failure to engage in negotiations here by claiming (1) AFGE had waived its right to initiate bargaining; (2) that there is no Statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing; and, (3) McKillen's request was not valid since he did not have the authority to initiate bargaining.

In support of its position, Respondent submits that the proposals regarding performance awards were made during the term of the collective bargaining agreement, therefore AFGE should have raised these issues when the parties were bargaining for a new agreement in 1988. Respondent proposes the issues are as follows: (1) whether it has the obligation under the Statute to bargain with AFGE at levels below the level of recognition in a consolidated unit of recognition and while a national collective bargaining agreement between the parties exists; (2) whether it is obligated to bargain the same general issue of awards procedures simultaneously with AFGE at the national level and at a level below the national level while the parties are at impasse before the Federal Service Impasses Panel (hereinafter called the Panel), regarding the national level bargaining for a new term agreement which covered the general issue of performance award procedures, as AFGE requested to bargain at the national recognition level; (3) whether under either the 1982 collective bargaining agreement or the January 25, 1990 agreement, it has any further obligation to bargain with AFGE on awards since it waived its rights by contract to bargain over the three local level proposals submitted by McKillen, in December 1989.

Respondent thus asserts that since no procedures exist in the agreement for union initiated bargaining, such bargaining can only occur at the level of recognition unless otherwise mutually agreed to by the parties at the level of recognition. The answer to this contention is simply that (IRS) makes it clear that an agency has a responsibility to bargain pursuant to union-initiated requests "during the term of a

collective bargaining agreement." The case seems to make it clear that such procedures as suggested by Respondent need not be in place before it must honor its Statutory duty to bargain in good faith over properly raised mid-term initiatives. Accordingly, this argument is summarily rejected.

The parties rely, although for different reasons, on Department of Health and Human Services, 6 FLRA 202 (1981) [81 FLRR 1-1140] (SSA), as well they should, since it is the mother of this controversy. The case clearly establishes that the level of exclusive recognition between Respondent and AFGE as the exclusive representative of a consolidated unit of SSA employees, is at the national level. Respondent urges that the General Counsel's position that any of the 211 local AFGE presidents before consolidation could initiate bargaining would definitely render the SSA/AFGE consolidation meaningless. Since the exclusive recognition is at the national level, the Statute, in the absence of agreement between the parties, or other appropriate delegation of authority, does not require negotiations at any other level. Department of Defense Dependents Schools and Overseas Education Association, 12 FLRA 52, 53 (1983) [83 FLRR 1-1131]. This rationale has been confidentially applied by several of my colleagues. See, United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, OALJ 92-94 (July 13, 1992); Department of Treasury, U.S. Mint, OALJ 87-92 (August 19, 1992).

B. Was McKillen's request to bargain made at the proper level of recognition and was it sufficient to initiate mid-term bargaining at the national level of recognition?

At the outset it is necessary to reiterate that McKillen's request was for "Mid-term bargaining on remedies for performance awards disputes." This is, therefore a mid-term bargaining case governed by IRS and thus, the request for mid-term bargaining could only be made under the terms of the agreement which was effective at the time it was made. In my view, the date Respondent allegedly refused to bargain on this request is immaterial since the request

was made during the term of the 1982 agreement which contains a provision in Article 7 that it would automatically renew itself from year to year thereafter. Although unnecessary, because of the automatic renewal clause of Article 7 of the collective bargaining agreement, the parties agreed to continue the terms and conditions of the old agreement without a memorandum of understanding until a new agreement was negotiated. While it is true that the parties spent a considerable amount of time negotiating a new agreement, it is crystal clear that they did not abide by that new agreement until ordered to make it effective by the Panel some 10 days after McKillen's request to bargain. The Authority has already made it certain that an agency has a responsibility to bargain on a union initiated request "during the term of a collective bargaining agreement." (IRS) Despite all the maneuvering, in both briefs, to apply the 1990 agreement to redound to their benefit of course, the instant record establishes that the 1982 agreement remained in effect until the 1990 agreement became effective in January. Thus, the request to bargain was made under the 1982 agreement and any response to that request must be answered under that agreement. Moreover, Respondent's waiting until the new agreement went into effect on January 25, before answering McKillen's request to bargain has all the earmarks of bad faith bargaining. Waiting, in my view, neither changed nor mooted its obligation to bargain the mid-term proposals raised here. Accordingly, any claim that the relevant document in this case is the 1990 agreement because it was the agreement "in effect" at the time Respondent refused to negotiate, is rejected.

Moving to the principle established in (SSA) that the mutual obligation to bargain remains at the level of exclusive recognition in the absence of a mutual agreement by the parties, authorizing negotiations at a lower level. In this regard, Respondent resolutely contends that it is under no obligation to bargain below the national level of recognition absent mutual agreement to do so by contract or other means of

negotiations. Here there is no record evidence of any such mutual agreement. Nevertheless, the General Counsel does not view the (SSA) rationale as precluding a labor organization from initiating bargaining, but insists that it means only that bargaining must be initiated at the level of exclusive recognition. See Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, and Wright-Patterson Air Force Base, Ohio, (Wright-Patterson IV), 39 FLRA 1409 (1991) [91 FLRR 1-1151] and Ogden Air Logistics Center, Hill Air Force Base, Utah, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, (Wright-Patterson III), 39 FLRA 1381 (1991) [91 FLRR 1-1150]. Thus, McKillen's request to bargain made to the individual designated at the national level cannot be deemed as per se improper, but leaves open the question whether, in these circumstances McKillen could initiate mid-term bargaining in this consolidated bargaining unit at the national level.

McKillen testified that his attempts to bargain at the local level were "rebuffed" leading him to request bargaining at the level of recognition. Consistent with Authority guidance, the record establishes that McKillen was a properly designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition. SSA had been informed, at the commissioner level, by AFGE, that AFGE locals were so authorized. McKillen, as President of AFGE Local 1346, submitted the request to negotiate to the SSA commissioner, the level of exclusive recognition. It is noted, McKillen was not a member of the AFGE negotiation team and that he had never been engaged in national contract negotiations. In the letter however, he referred the commissioner to AFGE's prior delegation of authority. Finally, the General Counsel notes that Respondent in its January 25 "refusal" letter, never questioned the authority of McKillen to request bargaining on behalf of AFGE. Accordingly, it is found that McKillen was properly designated to initiate bargaining for AFGE and that his request was made to the proper national level official of Respondent.

McKillen's having been properly delegated authority to bargain notwithstanding, in Wright-Patterson IV it was found that the delegation to locals was not effective "unless AFLC agreed to local level bargaining." If that principle is applied in this case, the theory that a local president could effectively initiate bargaining at the national level for proposals which did not effect the nationwide unit fails. The evidence here reveals that while AFGE delegated authority to initiate mid-term bargaining to its councils, locals and General Committee and that it informed Respondent of those delegations on several occasions prior to McKillen's 1989 request to negotiate. It is totally silent concerning whether Respondent agreed to negotiations with the many AFGE designees. Nor does the General Counsel argue that Respondent agreed. Had Respondent agreed to the delegations, the request to negotiate with the ultimate agent of Respondent at the level of exclusive recognition, would have been appropriate. Absent any evidence that Respondent agreed to bargain with AFGE designees, it must be found that Respondent had no obligation to bargain with McKillen over the local proposals at the national level.

Also rejected is the General Counsel's premise that this case involves the issue whether an exclusive representative has the Statutory right to designate its own representative. American Federation of Government Employees, Local 1738, AFL-CIO, 29 FLRA 178, 188 (1987) [87 FLRR 1-1482] (AFGE). It is unsuccessful simply because the issue goes beyond merely designating a representative and amounts to whether under the Wright-Patterson cases the parties must agree to bargain at a level other than the national level of recognition. These cases, in my view create a distinction which abrogates a union's right to designate its own representative in some circumstances. When applied in cases such as this, the requirement that union delegations be approved by the agency allows an agency merely to remain silent, thereby restricting a union's ability to delegate its representatives. In my view, this is an undesirable result. Although the undersigned finds it difficult to

reconcile the Wright-Patterson distinctions with the AFGE case, I am constrained to follow Authority precedent. Accordingly, it is found that Respondent had no obligation to bargain over mid-term initiatives concerning local incentive awards at the national level with this local president, since it had never agreed to negotiate with delegates designated by AFGE, and absent agreement by Respondent were such delegations not effective.

C. Assuming *arguendo* that McKillen had been properly authorized to negotiate, did AFGE value its right to bargain over incentive awards at the local level or did it foreclose further bargaining on awards by its agreement to such provisions in the master labor agreement?

While the undersigned found above that AFGE delegations were not effective and Respondent had no obligation to bargain, were the delegations agreed to, the outcome of this matter would be different. For the foregoing reasons Respondent's other defenses are rejected.

An agency must bargain in good faith during the term of a collective bargaining agreement on negotiable union proposals concerning matters not included in the agreement unless the union has waived its right to bargain about the subject matter involved. The waiver may be either by express agreement or bargaining history but must be "clear and unmistakable." (IRS).

Respondent's approach here was to argue waiver from every angle. First, it asserts that because of contract language found in both the 1982 and 1990 agreements in Article 17, Section 4 concerning awards information and McKillen's December 1989 request prove that AFGE, at the national level, opted through that language to have Respondent provide such award information as McKillen was seeking on an annual basis. It is pointed out that, Part A of Section 4 of the 1982 and Section 6 of the 1990 contract agreements say that the award information will show distribution of case awards and Quality Step Increases by grade and organization for Headquarters, OHA Central Office, Regions by

components, DOCs and PSCs.

However, McKillen's proposals, on their face, requested information, not on an annual basis after awards were given, but for information prior to awards so that the Local would be able to deal with remedies for performance award disputes.

Secondly, it argues that the proposals submitted are not bargainable, in view of the fact that AFGE, at the national level compromised proposal numbers 1 and 2. It is asserted that AFGE at the national level agreed to a percent of the award money. (1) There would be pending litigation over the granting of awards: and (2) that an individual not given an award would or might be entitled to an award based on a third party proceeding. The fact that an employee might receive an award as a result of such litigation proceedings should not abrogate management's right to grant award amounts. Both of the above assertions can be answered in the same manner. On their face, proposals 1 and 2 call for management to provide monetary information prior to management making its award decisions. Article 17, Section 4, does not even mention specific money matters. In addition, it is obvious that the contractual provisions require that Respondent provide the information to the Union after Respondent has made its award decisions. The proposals would require that the monetary information be supplied to the Union management makes its award decisions. There is nothing inherently contradictory between a union wanting certain information before the awards are given and a union wanting other information after awards are given. Therefore, it is found that proposals 1 and 2 were negotiable proposals.

It is less clear that McKillen's third proposal is negotiable. What is clear is that at least 2 proposals submitted by McKillen were negotiable. Respondent argues that proposal 3 has the same affect as the union's proposals in *United States Department of the Navy, Navy Underwater Systems Center, Newport, Rhode Island v. FLRA*, No. 91-1045 (D.C. Cir. July 23, 1991); 43 FLRA No. 3, November 4, 1991) [91 FLRR 1-1491] pp. 51-53. In its decision on remand

the Authority rejected the agency's argument that two proposals dealing the payment of award were inconsistent with a Government-wide regulation issued by OPM that governed review and approval of performance awards. While the petition for review was pending in court, OPM issued interim regulations that included a provision addressing the review and approval of performance awards. Upon remand, the Authority directed the parties to file briefs concerning the effect of the interim regulations. Thereafter, the Authority concluded that the proposals would effectively preempt the authority of the reviewing official with respect to determining the amount of an award by prescribing a range within which the amount must fall. Accordingly, the proposals were found to be inconsistent with the Government-wide regulations. In view of this determination, Respondent urges that union proposal 3 in the instant case would preempt its authority to grant award amounts by requiring it to set aside 20 percent of the award money and is, therefore, nonnegotiable. Concerning the third proposal, while a question remains about its negotiability, there is no provision in the master labor agreement which is even remotely similar to the third proposal. Consequently, it cannot be argued that AFGE expressly waived its right to initiate bargaining on the subject matter of that proposal even if it is nonnegotiable.

Based on the foregoing, and having found that proposals 1 and 2 are negotiable, it is further found that the union did submit negotiable proposals in this matter.

#### 1. Express Waiver

Respondent asserts that AFGE, similar to the union in *Wright-Patterson IV*, is foreclosed from further bargaining by agreeing to a single supplement to the contract. Thus, it contends that AFGE foreclosed itself from bargaining over incentive awards during the term of the parties' 1982 contract by agreeing in the contract that outside of the seven (7) topics designated in Article 5, Supplemental Agreements, "there will be no other supplemental agreements." Article 5 of the 1982 contract authorized

each AFGE component to negotiate a Supplemental Agreement to this agreement with their respective SSA component. Thus, the parties agreed that there would be no "other supplemental agreements" other than seven enumerated supplementals which were as follows: Union rights; Employee rights; Health and Safety; Facilities; Parking and Transportation; Time and Leave; and, Flextime -including Data Operations Centers. Based on all of the above, the Respondent argues that it has been proven beyond a reasonable doubt that it fully disposed of its obligation during the negotiations of both the 1982 and 1990 show a conscious yielding of rights by the Union.

With respect to Respondent's claim that Article 5, Section 3 of the 1982 master labor agreement, acts as a waiver of the union's right to initiate bargaining on all issues except those identified in that section, such a claim ignores the Authority's holding that this very same master labor agreement provision "applies only to supplemental agreements negotiated by components of the organization." *Social Security Administration*, 39 FLRA 633, 634 (1991) [91 FLRR 1-1081]. Further, there is no evidence in the record establishing that the negotiations in this case were to involve the component levels of Respondent, but establishes only that McKillen intended that any negotiated agreement which resulted would apply only to the approximate 20 offices of Respondent in Wisconsin, not for an entire component.

Respondent also argues that AFGE waived its rights to negotiate over the subject matter of the December 12 proposals because the parties had negotiated similar provisions in the master labor agreement. While a labor organization can waive its right to initiate bargaining under such circumstances, a proposal which relates to a general subject area covered in an agreement does not relieve an agency of its bargaining obligation. The mere fact that the parties had previously agreed on items arguably related to the general subject matter does not mean that the labor organization has forfeited its right to initiate bargaining on a specific subject matter. *Department of the Navy, Marine Corps Logistics*

Base, Albany, Georgia, 39 FLRA 1060, 1066-68 (1991) [91 FLRR 1-1120].\*

A comparison of the contractual provisions with the three proposals demonstrate that the specific subject matter of the proposals submitted by McKillen were not addressed in either of the master labor agreements. While Article 17 concerns incentive awards, it clearly does not address issues raised by McKillen concerning immediate notification when performance award money becomes available; dollar amounts of awards designated to the local office; or, set aside money. In other words, the McKillen request was over strictly local and not national issues.

## 2. Waiver Based Upon Collective Bargaining History

In the absence of an express waiver, the analysis must turn to examine whether the record contains "clear and unmistakable" evidence that AFGE waived its right to bargain on the subject matter at issue based upon the collective bargaining history. In my view, there is no such clear and unmistakable evidence on the record.

The testimony of Herbert Collender, a negotiator for both the 1982 and 1990 agreements, and the correspondence between the parties' chief negotiators firmly establish that AFGE never waived its Statutory right to initiate mid-term bargaining as the subjects were not discussed in the negotiations.

Concerning whether AFGE waived its right to initiate bargaining on the specific subject matter at issue, once again, there is no clear and unmistakable evidence of such a waiver. Respondent, through its witness, Paul Arca, claimed that the Union's proposals submitted during the 1982 negotiations are evidence of a waiver. However, as previously discussed, Arca admitted that those proposals concerned information that management would give the Union after management had made its decision. And as previously discussed, there is no bargaining history of any proposal which is even remotely similar to the third proposal in this case. Moreover, Collender who was

AFGE's negotiator for both agreements, testified that there never was a full discussion of matters related to the proposals at issue in this case during master labor agreement negotiations.

The record as a whole, is insufficient to establish a waiver either by express agreement or bargaining history. Thus, it appears that the proposals or like proposals were not specifically addressed in the master labor agreement. Therefore, it is found that there is insufficient evidence to establish, clearly and unmistakably that AFGE waived its Statutory right to initiate bargaining on the subject matter of the three proposals which were submitted to Respondent on December 12.

D. If Respondent had agreed to local level bargaining, could AFGE initiate bargaining on matters related to the 1982 agreement while negotiations for a new agreement were underway?

The record reveals that when the 1982 agreement expired on June 11, 1988 it was reopened by mutual consent of the parties under the terms of Article 7 and the parties commenced negotiations on a new agreement. Although Respondent argues otherwise, it is clear that the earlier agreement automatically renewed itself from year to year. Impasse was reached on the new agreement after the AFGE membership failed to ratify the agreement. The unratified agreement contained provisions on incentive awards, the subject matter of this case. Sometime in April 1989, the dispute was submitted to the Federal Service Impasses Panel (hereinafter called the Panel). Respondent's position there, in part, was that the agreement should be implemented as negotiated. AFGE submitted additional proposals. Thereafter, in late December 1989, the Panel ordered the agreement implemented as negotiated and it went into effect on January 25, 1990.

McKillen's December 12, 1989 bargaining request for the three proposals on incentive performance awards was made while the matter was pending before the Panel. There is no dispute that McKillen intended to bargain about award remedies within his Local's jurisdiction.

Based on those facts, Respondent argues that the parties' previous agreement had expired and therefore the total bargaining obligation was at the national level. In that regard it notes that ground rules had been framed and negotiation teams had been put together to specifically bargain at that level. In addition the parties' dispute was at the Panel when McKillen made his request to bargain. There is no quarrel about whether bargaining on the national agreement was taking place when the bargaining request was submitted. But, there is some question whether the McKillen request concerned a matter which was covered by the new agreement then before the Panel. Thus, it is asserted that McKillen's request was in fact a request to bargain over the very same matter for which bargaining had not been concluded since the entire new national agreement was pending before the Panel for resolution.

The General Counsel counters that the mere fact that the parties are engaged in negotiations for a master labor agreement and may have had certain matters before the Panel does not preclude AFGE from initiating bargaining on matters outside the scope of those master labor agreement negotiations. In its view, Respondent's reasoning that a union has no right to initiate bargaining as long as master labor agreement negotiations are in progress lacks validity because (IRS) requires bargaining pursuant to union-initiated requests "during the term of a collective bargaining agreement."

Respondent's argument that there is no Statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing is unpersuasive. As already found, the 1982 agreement remained in effect until January 1990, when a new agreement became effective. (IRS) certainly does not preclude a union from initiating bargaining on matters which it deems outside the scope of any ongoing negotiations. Since the parties indeed had an agreement which was effective until amended, modified or replaced, Respondent would not be relieved of its duty to negotiate on that agreement until one of those

conditions was fulfilled. Respondent waited, in this case until the date the new agreement became effective to answer the request made under the 1982 agreement. This wait whether conscious or not no doubt was an attempt by Respondent to moot the issue. Respondent's motivation notwithstanding this wait did not change its obligation to bargain this mid-term initiative: see *infra*, p. 7. In that regard, undersigned agrees with the General Counsel that not only would it be inherently unfair to preclude a labor organization from initiating bargaining during the period of time when an agency retains its Statutory right to change conditions of employment, such an outcome would be contrary to the intent of the Statute to assure equality in the positions of the unions and agencies when the parties are at the bargaining table. Therefore, it is found that Respondent's argument lacks merit.

Based on all of the foregoing it is recommended that the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 5-CA-00495 be, and it hereby is, dismissed.

Issued, Washington, DC, September 3, 1992

ELI NASH, JR.

Administrative Law Judge

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\* Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991) [91 FLRR 1-1120], Marine Corps Logistics Base, Albany, Georgia v. FLRA, Nos. 91-1211 and 91-1212 (D.C. Cir. Apr. 24, 1992) [92 FLRR 1-8019] contained issues very similar to those raised by Respondent herein. However, in 45 FLRA No. 42 (July 15, 1992) [92 FLRR 1-1221] the Authority dismissed the complaint in the case on instructions from the court. The court stated that under the Authority's test an "agency must engage in mid-term negotiations over an otherwise bargainable matter raised by the union, except when: (1) the matter is covered by the parties' collective bargaining

agreement: or (2) the union has 'clearly and unmistakably' waived its right to bargain, either by express agreement (e.g., a zipper clause), or through its bargaining history with the agency." The court also held that the Authority had improperly applied a waiver analysis to determine when a matter is "covered by" a negotiated agreement." Finally, the court concluded that impact and implementation of the subject matter of the complaint was "covered by" an article of the master labor agreement although that article did not specifically address the full range of impact and implementation issues that might arise. Thus, the court found the agency was not obligated to bargain with the union over matters which had already been bargained and were covered by the master labor agreement and because it had followed the negotiated procedures. In a nonprecedential decision Administrative Law Judge Etelson, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, OALJ 92-66, pp. 9-18, (June 4, 1992) offers a cogent discussion of this case and its history. To the extent it is applicable here, I will follow that approach. The dismissal at the courts direction does not necessarily mean that the Authority changed its approach in waiver cases or that the Authority has changed its policy in this area. Consequently, I am constrained to follow Authority law until changed.