

82 FLRR 1-1447

**Division of Military and Naval Affairs,
State of New York, Albany, NY and New
York State Council of Association of
Civilian Technicians**

Federal Labor Relations Authority

1-CA-16; 1-CA-103; 8 FLRA No. 71; 8

FLRA 307

March 26, 1982

Judge / Administrative Officer

**Before: Haughton, Chairman; Frazier,
Applewhaite, Members**

Related Index Numbers

**41.7 Collective Bargaining, Duty to Supply
Information**

**72.617 Employer Unfair Labor Practices,
Unilateral Change in Term or Condition of
Employment, Bargaining Over Impact and
Implementation of Change**

**72.77 Employer Unfair Labor Practices,
Miscellaneous Unfair Labor Practices, Refusal to
Supply Information**

Case Summary

THE EMPLOYER DID NOT REFUSE TO BARGAIN OR IMPROPERLY DENY THE UNION ACCESS TO INFORMATION. The employer did not implement the Conversion to Full-Time Military Program (CFTM) without affording the union an opportunity to bargain over impact and implementation. The record showed that the union received details of the Program on three different occasions. In response, the union demanded written proposals from the employer. The employer stated that it would entertain proposals from the union but that the details already supplied were adequate to apprise the union of the action it intended to take. Management's implementation of the Program when no union proposals were forthcoming after two weeks was not an unfair labor practice. The employer's failure to provide the union with information regarding the number and location of positions to be

affected by the implementation of the Conversion to Full-Time Military Program was not an unfair labor practice since information of the type sought was not then in existence. Under *IRS, Brooklyn*, 1 FLRA 796, 79 FLRR 1-1089, the agency is not obligated to supply the union with data that have not already been compiled.

Full Text

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Decision finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter the General Counsel filed exceptions to certain portions of the Administrative Law Judge's Decision, with a supporting memorandum.

Pursuant to section 2423.29 of the Authority's Rules and Regulations (5 CFR 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommendations.

IT IS HEREBY ORDERED that the complaints in Case Nos. 1-CA-16 and 1-CA-103 be, and they hereby are, dismissed.

Issued, Washington, D.C., March 26, 1982

Ronald W. Haughton, Chairman
Henry B. Frazier III, Member
Leon B. Applewhaite, Member
FEDERAL LABOR RELATIONS AUTHORITY

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. 7101, et seq., (hereinafter called

"the Statute") and the Rules and Regulations issued thereunder.

On February 20, 1980 an unfair labor practice complaint was filed by the Regional Director, First Region, Federal Labor Relations Authority, Boston, Massachusetts, against the Division of Military Affairs, State of New York, Albany, New York (Respondent), on behalf of the New York Council of Association of Civilian Technicians, Inc., (Union or ACT), the exclusive bargaining representative of all New York Army and Air National Guard technicians, excluding all supervisors, management officials and technicians engaged in non-clerical personnel work. The consolidated complaint alleged that the Respondent violated Sections 7116(a)(1) and (5) of the Statute.*1 The alleged violations in Case No. 1-CA-16 were based upon allegations that from on or about February 21, 1979, the Respondent failed to negotiate with the Union concerning the impact and implementation of a Congressionally mandated program designed to convert certain National Guard technician positions into full time military positions under a Conversion to Full Time Military (CFTM) Test Program;*2 that since on or about February 23, 1979, the Respondent refused to furnish, upon request, certain necessary and relevant information relating to the number of positions subject to the CFTM Program, and the location of such positions; and that on or about March 14, 1979, the Respondent bypassed the Union and bargained directly and individually with bargaining unit employees concerning terms and conditions of employment by disseminating directly to unit employees, certain information relating to the Program.

Alleged violations of Section 7116(a)(1) and (5) in Case No. 1-CA-103 were based upon allegations that the Respondent unilaterally determined, without notifying and bargaining with the Union, that a GS-5 technician in its Brooklyn, New York Armory "was an entry-level position and thus subject to conversion under the CFTM Test Program."

Counsel for the Respondent argues that the Respondent satisfied its obligation to bargain

concerning the impact and implementation of the Program; that the Respondent did not unlawfully refuse to provide to the Union, relevant and necessary information concerning the Program; that Respondent's publication of information relating to the Program and dissemination of such information to bargaining unit employees did not constitute a bypass of the exclusive representative or direct dealing with unit employees concerning the terms and conditions of employment; and lastly that the Respondent did not violate its obligation to bargain by unilaterally determining that a GS-5 technician position in its Brooklyn, New York Armory, was an entry level position, and subject to conversion under the CFTM Test Program.

The Respondent and the General Counsel, Federal Labor Relations Authority, were represented by counsel and the parties were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Post-hearing briefs were received from counsel representing the General Counsel and counsel representing the Respondent. These have been duly considered. Based upon the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing,*3 and the briefs, I make the following findings of fact, conclusions and recommendations.

Case No. 1-CA-16

Initial Notice of the CFTM Test Program and the Meeting of February 21, 1979

On February 13, 1979, Colonel Richard Beck, Respondent's Assistant Technician Personnel Officer, telephoned Frederick S. Tedesco, State Chairman of ACT.*4 Colonel Beck outlined the key features of the CFTM Test Program for Mr. Tedesco. Mr. Tedesco responded by advising that he would need to have something in writing, or that a meeting concerning the subject would be necessary. They agreed to meet and discuss the Program.

Colonel Beck's February 13, 1979 telephone call

was preceded by receipt, on or about February 8, 1979, of an electronic message (TWIX) from the National Guard Bureau, Washington, D.C. (Jt. Exh. 11). The message, a nine page document, outlined the proposed implementation of the CFTM Test Program in detail. A copy of the message was transmitted to the President of the Association of Civilian Technicians by the National Guard Bureau. The message included the caveat that exclusively recognized unions should be advised of the Program, and further that impact and implementation bargaining opportunities should be extended to such unions under the provisions of Section 7106(b)(2) and (3) of the Statute.

The meeting requested by Mr. Tedesco was held on February 21, 1979. The Union was represented by Mr. Tedesco, and John Giarrusso, National Representative of ACT. The Respondent was represented by Colonel Clarence C. Wallace, Respondent's Personnel Officer; and Colonel Beck. At the meeting the Union representatives acknowledged receipt of a copy of the February 8, 1979 TWIX. Colonel Beck outlined the elements of the proposed implementation of the CFTM Test Program, as these were set out in the TWIX, and advised Union representatives of his opinion that the terms and conditions of bargaining unit members would be affected.*5 With respect to the proposed implementation of the Program, Colonel Beck informed the Union that replacements for all entry level positions would be filled with military personnel; that any newly authorized position would have to be filled militarily, with the exception that non-military personnel affected by reductions in force could qualify for newly authorized positions; that any other position which could not be filled through a Merit Promotion Plan incorporated into the parties' collective bargaining agreement, would have to be filled militarily; and lastly that no new hirings would be permitted.*6

During the course of the meeting Mr. Tedesco delivered to the representatives of the Respondent, a letter dated February 21, 1979, addressed to Colonel

Wallace by Mr. Tedesco (Jt. Exh. 2). The letter requested that the Respondent engage in impact and implementation bargaining before effectuating the CFTM Test Program; requested "written proposals" concerning the CFTM Test Program; sought information concerning "the number of positions affected," and the areas wherein such "positions (were) located."*7 Mr. Tedesco also requested that negotiations be arranged 15 days "following receipt of your written proposals by ACT," and that "merit promotion and upward mobility of on-board technicians be given full consideration at all times."*8

The subjects raised in the letter delivered to the Respondent's representatives were discussed in detail at the February 21, 1979 meeting. Respondent's representatives advised that the briefing provided, and TWIX received, reflected the elements of the plan to implement the Program, and that the Union, not the Respondent, would have to supply appropriate proposals relating to the impact and implementation of the Program, in order to proceed with negotiations. (Tr. 72, 77, 166). With respect to merit promotion, Colonel Beck advised that the Merit Promotion Plan and upward mobility of technicians would not be disturbed. He informed that the number of positions which would be converted in New York State was not then in existence that no specific quota or number of positions had been allocated to the Respondent by the National Guard Bureau for conversion, and that it was then impossible to ascertain the geographic location of future conversions because specific vacancies were not then known to the Respondent.

It was established that the Respondent, as of February 21, 1979, could not have been aware of details of information relating to the number of prospective conversions which might be generated by resignations, terminations, or newly created job openings, as such information was not then in existence. Management did have information available as to certain existing vacancies at the time of the meeting, but did not know which positions would be left unfilled, and did not know the potential effect of the application of merit promotion

procedures to the filling of vacant non-entry level positions.

The Union made no further requests for information after the explanation outlined, nor was the original request modified in any way. The Union took the position that the CFTM Test Program could not be implemented in the absence of agreement (Tr. 166).

Although counsel for the General Counsel argues that there was a refusal to bargain at the February 21st meeting, careful consideration of the evidence relating to the alleged refusal, together with the testimony of Colonel Beck, convincingly shows that Respondent merely refused to bargain concerning the decision to initiate the CFTM Test Program, and not concerning the impact and implementation of the Program.

Correspondence Following February 21, 1979 Meeting and Effectuation of CFTM Test Program

On February 23, 1979, Colonel Wallace wrote to Mr. Tedesco and formally apprised him that his request for negotiations and demand for proposals, as articulated in the letter dated February 21, 1979, and "was appropriate" (Jt. Exh. 3). On March 3, 1979, Mr. Tedesco responded by mailgram and demanded that the Respondent state whether or not Respondent was refusing to negotiate concerning the impact and implementation of the CFTM Test Program. He demanded a "return to the table to receive (Respondent's) proposals" relative to the Program (Jt. Exh. 4).

On March 5, 1979, the Respondent militarily filled the first technician position in accordance with Program guidelines outlined. This position was supervisory in nature and was not included within the unit of recognition.*9 On March 7, 1979, the first bargaining unit position was converted as a result of an unsuccessful prior effort to fill the position through merit promotion procedures.*10 The Union was made aware of the vacancy as the announcement concerning the position had been distributed to the State Chairman some six to eight weeks prior to

conversion under the Program.

It was disclosed that the Union regularly received vacancy announcements issued under the provisions of the Merit Promotion Plan incorporated into the collective bargaining agreement governing the labor relations of the parties.*11 The Union received such announcements a day or two before posting, and six to eight weeks before the filling of the position, or determination that the position could not be filled. Thus, the Union would have been aware of possible conversions resulting from a failure to fill such positions through use of the Merit Promotion Plan in effect. Respondent's representatives regularly responded to Union inquiries concerning such conversions.

On March 8, 1979, Colonel Wallace responded to the March 3, 1979 mailgram (Jt. Exh. 5). He advised that the Respondent had adopted the procedures set out in the February 8, 1979 TWIX from the National Guard Bureau. The letter closed with the following paragraph:

Consequently, since we have not changed past practice or initiated any change on a unilateral basis beyond that required by the Congressional mandate, we consider that your request to be informed about a decision of non-negotiability is inapplicable. Essentially, we have not taken new initiatives which are appropriate for negotiations. If you disagree we request specific allegations of fact.

The Respondent subsequently disseminated a memorandum relating to the Program to all technicians in the New York Army National Guard (Jt. Exh. 6). The memorandum, dated March 14, 1979, and captioned "Technician Topic 79-3-(SPECIAL ISSUE - CFTM)," set forth details relating to the CFTM Test Program. The memorandum was issued to dispel false and misleading rumors regarding the nature of the CFTM Test Program implemented by explaining the nature of the Program. Information reflected in the memorandum, set out in a series of factual statements, was derived primarily from the February 8, 1979 TWIX, and the Federal Personnel Manual. Other

information reflected statements of long-standing existing personnel policies and practices already in place at that time.

The Union did not transmit impact and implementation bargaining proposals concerning the Program until May 15, 1979. On this date Mr. Tedesco forwarded to Colonel Wallace a series of eight specific proposals characterized as relating to the impact of the CFTM Test Program on bargaining unit members (Jt. Exh. 7). Between May 15, 1979 and June 5, 1979, Colonel Beck phoned Mr. Tedesco to request clarification of the proposals, as they did not, as phrased, appear to Colonel Beck to relate to the impact and implementation of the CFTM Test Program. Mr. Tedesco replied, "You have the proposals, you deal with those proposals, respond to those proposals," and advised that Colonel Beck would have to deal with the proposals as they were (Tr. 86, 155-156).^{*12}

On June 5, 1979, Colonel Wallace formally responded to the May 15, 1979 proposals (Jt. Exh. 9). The letter requested a meeting "to discuss proposals appropriate for negotiation," and suggested June 13, 1979 as a meeting date. Colonel Wallace expressed the view that proposals one, two, three and eight were non-negotiable because they involved reserved management rights which Respondent would not surrender; that proposal four was not negotiable because it sought to amend or modify required reduction in force procedures; that proposals five and six sought to restate federal law; and that proposal seven was inappropriate because it involved a matter then under review by the Federal Labor Relations Authority.^{*13}

A meeting was held on June 13, 1979. Respondent's representatives were advised that there was no room for discussion and that the Union would file a petition for a negotiability determination concerning Colonel Wallace's June 5, 1979 letter. The petition was filed and thereafter withdrawn by the Union in favor of prosecution of the unfair labor practice charges made the subject of a consolidated complaint in this case.

Information Supplied to Union Upon Receipt

In June or July of 1979 the CFTM Test Program was temporarily halted, and conversions to full time military were not allowed. On or about October 1, 1979, the start of fiscal year 1980, the Program was reactivated. At this time, the National Guard Bureau informed the Respondent concerning the number of positions which Respondent would be permitted to convert. The quota supplied, 143 positions, included positions previously converted in fiscal year 1979. Upon receipt of this information Colonel Beck apprised the Union of the number of positions remaining over the total converted in fiscal year 1979, and identified this figure as the number which could thereafter be converted in fiscal year 1980.^{*14} However, because information concerning the geographic location of future conversions did not exist, such information was not supplied to the Union.

On March 6, 1980, Colonel Wallace wrote to Mr. Tedesco to advise him that 129 individuals had been placed in the New York Army National Guard as a result of the CFTM Test Program (G.C. Exh. 10); Although no other similar communications were provided to the Union, the Union did, prior to the letter, receive communications by phone relative to positions converted.

Case No. 1-CA-103

In March of 1979 Colonel Beck became aware of a request to fill a GS-5 administrative supply technician vacancy at the Brooklyn, New York Armory (G.C. Exh. 13). The position was classified as entry level by the Respondent. This classification had the effect of precluding the filling of the position except under the CFTM Test Program. Under the terms of the Program, entry level positions throughout the State, that became vacant for whatever reason, were subject to conversion under the Program as the only means of filling such positions (Joint Exhibit 11 at page 9, Tr. 124, 136-137). In such cases Colonel Beck was required to determine whether or not conversion would be effectuated.^{*15}

A few days prior to March 20, 1979, Colonel

Beck decided to convert the GS-5 administrative supply technician position to full-time military.*16 Counsel for the General Counsel argued that this position was not entry level, that it should have been advertised under the Merit Promotion Plan, and that there was a GS-4 Data Transcriber in the New York City area who could have bid on the GS-5 position had the vacancy been processed under the Merit Promotion Plan. The Respondent administratively defined an "entry level" position as "the lowest position within a particular occupational series or occupational code for which the minimal requirements are mandated" (Tr. 116-117). The determination was based upon Respondent's past policy regarding the subject, and the provisions of the Merit Promotion Plan.

Section 1 of Article 14 of the collective bargaining agreement provides:

All promotions will be made in accordance with the Agency Merit Promotion Plan. No changes will be made by the Employer to any provisions of the Plan which affect technicians in the unit without first consulting with the Union. The Employer and the Union agree that the purpose of the Promotion Plan is to ensure that technicians are given full and fair consideration for advancement and that selections are made among the best qualified candidates (R. Exh. 3).

The agreement also contains arbitration provisions which operate to include disagreements concerning the interpretation or application of the agreement. These provisions encompass disputes concerning the interpretation and application of the Merit Promotion Plan.*17 The Merit Promotion Plan in effect during relevant periods herein provided in part:

3. POLICY -

....

d. All vacancies, GS-06/WG-06 and above will be advertised by the Technician Personnel Office as specified in Appendix "A." Additionally, vacancies for GS-05 positions in Headquarters New York Army National Guard and in the United States Property and

Fiscal Office will be advertised Vacancy announcements will be placed on each organization or installation bulletin board where information of interest to all members is customarily displayed. (R. Exh. 7).

On the basis of the Merit Promotion Plan, particularly Section 3(d) quoted above, the Respondent concluded that the provisions of the Plan were inapplicable to the GS-5 administrative supply technician position vacancy at the Brooklyn, New York Armory. That is, it was classified as entry level and was not otherwise deemed subject to the Merit Promotion Plan. It was not a GS-5 position in Headquarters New York Army National Guard, nor one in the United States Property and Fiscal Office. The Plan was considered as not being applicable to GS-5 positions other than those specifically described in Section 3(d) (Tr. 156-158).

Discussion and Conclusions

Case No. 1-CA-16

Bargaining Obligation Concerning Impact and Implementation of the Program

Under the provisions of Section 7106(a)(2)(A) of the Statute, management officials have the right "to hire, assign, direct," and take certain other specified personnel actions. Section 7106(a)(2)(B) provides that management has the right "to determine the personnel by which agency operations shall be conducted." However, under the provisions of Section 7106(b)(2) and (3) of the Statute, bargaining is mandatory on procedures designed for exercising such rights, and on arrangements for employees adversely affected, that is, on the impact and implementation of such management decisions. The rule is subject to the proviso that negotiations on procedures and impact may not operate to prevent management from exercising management rights. In this case the Respondent acknowledges such a bargaining obligation.*18 In order to meet this obligation management has the duty to give the exclusive bargaining representative adequate advance notice of the proposed implementation of decisions and provide

the Union with an opportunity to participate in impact and implementation bargaining. Department of the Treasury, U.S. Customs Service, Region 1, Boston, Massachusetts, 1 FLRA No. 49 (June 6, 1979); Internal Revenue Service, Washington, D.C., 1 FLRA No. 91 (July 31, 1979); National Science Foundation, 1 FLRA No. 116 (September 24, 1979).

Here the record clearly establishes that the Union received notice of details of the Program on three different occasions. A copy of the February 8, 1979 TWIX was addressed to the Union. The TWIX represented complete documentation of available details of the CFTM Test Program, and was considered an adequate basis for future implementation. During the February 13, 1979, telephone conversation the Program was outlined for Mr. Tedesco by Colonel Beck, and lastly, the Program was explained in detail by Colonel Beck during the February 21, 1979 meeting with Union officials.

The first technician position conversion under the Program did not occur until March 7, 1979, approximately two weeks after the February 21, 1979 meeting. Although the Union did interpose a request to bargain on February 21, 1979, the request incorporated a demand for written proposals from the Respondent. Because the Respondent's proposals had previously been supplied to the Union in the form of the February 8, 1979 TWIX, and orally on February 21, 1979, the Union was apprised that the Union had the obligation to make proposals if changes were desired. This specific request for Union proposals was met with a repetition of a demand for management proposals. There was no specific criticism of the proposals which management had provided, nor was there any showing that the proposals articulated orally, and in the February 8, 1979 TWIX were unclear or otherwise inadequate.

Colonel Wallace's February 23, 1979 letter served to inform the Union further of the nature of the inappropriateness of the Union's response to the Respondent's presentation of the proposed CFTM Test Program. The February 23, 1979 letter, in the

light of events which occurred on February 21, 1979, may be construed as a reiteration of the position taken by the Respondent on February 21, 1979. In effect, it informed that the Union's request for bargaining proposals, was inappropriate. Although, it would have been helpful had the Respondent reiterated in detail the position taken by the Respondent at the February 21, 1979 meeting, it is clear that the text of the letter, when read in the light of events which occurred on February 21, 1979, reflects Respondent's reassertion of the February 21, 1979 position. Nevertheless, the Union on March 3, 1979, continued to demand proposals from the Respondent. Thereafter, on March 7, 1979, implementation occurred.

Although provided with the opportunity to bargain on impact and implementation, the Union elected not to bargain, in favor of a demand for written management proposals concerning the CFTM Program, and in favor of insistence that implementation not occur in the absence of agreement. This demand was made despite the Respondent's insistence that the Union should make known specific proposals in order for the Union to take advantage of the bargaining opportunity extended. This was the Union's choice; however, it did not operate to negate or attenuate Respondent's offer to bargain. It was, instead, tantamount to a refusal to bargain concerning impact and implementation. Internal Revenue Service, Washington, D.C., *supra*; Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 1065 (June 21, 1978). Under the circumstances it would have been reasonable for the Respondent to have assumed that the Union had decided not to submit proposals. The exclusive bargaining representative may not ignore a management request for specific proposals, await implementation of the proposed action, thereafter submit bargaining proposals, and then endeavor to perfect its request to negotiate on impact and implementation. Internal Revenue Service and Internal Revenue Service Richmond District Office, 2 FLRA No. 43 (December 31, 1979).

The Union had an obligation to either respond with appropriate proposals, request additional information, or request additional time in which to prepare to submit a Union position on impact and implementation. Here, there was no reason to believe that the Union intended to pursue any of these approaches. Instead, it was clear that the Union did not intend to submit a position on the issues. Thus the facts presented indicate that the Respondent met its statutory obligation to give timely notice concerning the CFTM Test Program, and the opportunity to bargain, but that the Union response effectively precluded the consummation of impact and implementation bargaining. Subsequent implementation after a two week interval may not be considered an unfair labor practice, as the facts indicate that the Respondent met its statutory obligation to bargain.*19

The Union's Request for Information

With respect to the alleged failure of Respondent to furnish necessary and relevant information, it is noted that an unfair labor practice may not be based upon a denial of access to non-existent data. Internal Revenue Service and Brooklyn District Office, IRS, 1 FLRA No. 89 (July 31, 1979); Veterans Administration Hospital, Lexington, Kentucky, and Veterans Administration Central Office, Washington, D.C., 3 FLRA No. 126 (July 31, 1980). The complaint alleges that since on or about February 23, 1979, the Union has requested the Respondent to furnish information "relating to the number of and location of CFTM positions and related matters." The record is clear that at the February 21, 1979 meeting the Union requested the Respondent to supply, as soon as possible, information relating to the number of positions affected by the CFTM Test Program, and the areas wherein such positions were located. Information of the type sought was not then in existence, and it was established that the production of such information was dependent upon future factors not under the control of the Respondent. Since the information requested by the Union was not then in existence, a violation of Section 7116 may not be

based on failure to supply such information.*20

The Alleged Bypass of the Union

The Federal Labor Relations Council in considering a case arising under Executive Order 11491, as amended, Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80, 3 FLRC 697 (1975) held that the following criteria should be used in determining whether a communication amounts to an attempt to bypass the exclusive representative:

In determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered. More specifically, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative. Rather communications which, for example, amount to an attempt to bypass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order.

The March 14, 1979 Technician Topic memorandum distributed to bargaining unit employees was based upon information disclosed to the Union in the February 8, 1979, TWIX, and long-standing personnel policies and practices. It may not be used as a basis for an unfair labor practice because it involved no attempt by the Respondent to bypass the exclusive bargaining representative and deal directly with employees; did not otherwise threaten or promise benefit to employees; and did not undermine the status of the exclusive representative. See also Department of the Treasury, Internal Revenue Service, St. Louis District Office, St. Louis, Missouri, A/SLMR No. 961 (January 6, 1978).

As noted the Union was, as of February 21, 1979, provided with the opportunity to bargain concerning the issues raised in the CFTM Test Program, but refused to respond with bargaining proposals. The memorandum in question was merely a segment of Respondent's implementation of the CFTM Test Program.*21

Case No. 1-CA-103

It is well settled that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Statute. In such cases the aggrieved party's remedy lies within the grievance and arbitration procedures in the negotiated agreement rather than through unfair labor practice procedures. Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA No. 82 (June 27, 1980); Social Security Administration District Offices in Denver, Pueblo and Greeley, Colorado, et al., 3 FLRA No. 10 (April 14, 1980); United States Department of Labor, 1 FLRA No. 107 (September 13, 1979); Department of Health, Education and Welfare, Social Security Administration, 1 FLRA No. 37 (May 9, 1979).

In case No. 1-CA-103, it was alleged that the Respondent unilaterally determined, without notifying and bargaining with the Union, that a GS-5 technician vacancy in Respondent's Brooklyn, New York Armory, "was an entry-level position and thus subject to conversion under the CFTM Test Program." The gravamen of this case involves a dispute as to whether the position was entry level, and therefore not subject to merit promotion procedures set out in the Merit Promotion Plan negotiated with the Union. Specifically, the Respondent's position is based on its interpretation of paragraph 3(d) of the Merit Promotion Plan. It is argued that the omission of the requirement that GS-5 vacancies in the New York City metropolitan area be advertised, establishes them as entry level positions not subject to the competitive placement procedures under the Merit Promotion

Plan. Counsel for the General Counsel contends that the provisions of the Plan should have been applied because the GS-5 was not an entry level position, and further that there was a GS-4 Data Transcriber in the New York City area who could have bid on the GS-5 position had the Respondent advertised it under the provisions of the Merit Promotion Plan. The arguable interpretation relied upon by the Respondent negates bad faith on the part of the Respondent, and raises issues of contract interpretation. Since the issues involve essentially differing interpretations of the parties' rights and obligations under the Merit Promotion Plan incorporated into the negotiated agreement, and since the Respondent's classification of the position as entry level did not constitute a clear and unilateral breach of that agreement, the aggrieved party's remedy in this case lies within the arbitration procedure of the negotiated agreement,*22 rather than the unfair labor practice procedure.

The entry level classification was actually a facet of the Respondent's implementation of the CFTM Test Program. The action was taken in accordance with the provisions of the Program outlined in the February 8, 1979 TWIX, and was in accordance with the terms of the Plan orally spelled out during the February 21, 1979 meeting. Since the Respondent met its obligation to bargain with respect to the CFTM Test Program, implementation in accordance with the Program presented to the Union, may not without more, be considered a sufficient basis for an unfair labor practice.

Conclusions

It is concluded that a preponderance of the evidence does not support allegations that Respondent violated Sections 7116(a)(1) and (5) of the Statute. Upon the basis of the foregoing, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. 2423.29(c).

It is hereby ordered that the consolidated complaint relating to Case No. 1-CA-16 and Case No. 1-CA-103, be, and hereby is, dismissed.

LOUIS SCALZO Administrative Law Judge

Dated: November 24, 1980 Washington, D.C.

1. Prior to the hearing the Regional Director consolidated Case Nos. 1-CA-16 and 1-CA-103, with Case Nos. 1-CA-195 and 1-CA-196. On the basis of a stipulation of the parties, the interests of the parties, and considerations relating to expeditious disposition of the proceeding, cases numbered 1-CA-16 and 1-CA-103 were severed and tried separately (Tr. 3 and 87). Nevertheless, counsel for the General Counsel filed a brief consolidating argument relating to the four cases. Portions of the consolidated brief relating to Case Nos. 1-CA-195 and 1-CA-196 have been given no consideration in connection with the disposition of Case Nos. 1-CA-16 and 1-CA-103.

2. National Guard technicians are employed pursuant to the National Guard Technicians Act of 1968 as amended, 32 U.S.C. 709, in full-time civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces. As a condition of their civilian employment under the Act, such technicians must become and remain members of the National Guard, and hold the military grade specified for the technician position pursuant to 32 U.S.C. 709(b) and (e).

The CFTM Test Program, authorized under the general provisions of 32 U.S.C. 503, was designed to determine the National Guard's capacity to attract personnel into military positions which had been filled with civilian members of the bargaining unit.

3. Hereinafter references to the transcript will be designated "Tr. __," and references to exhibits will be designated "G.C. Exh. __," "R. Exh. __," or "Jt. Exh. __."

4. The Union is comprised of 15 chapters located in the State of New York. The State Chairman heads the Union's State organization.

5. The parties stipulated that the Program had not been implemented as of the February 21, 1979 meeting. It was anticipated that implementation of the Program would occur at some indefinite date in the

future.

6. The record reflected that a total hiring freeze had been in effect since January 1, 1979.

7. The record disclosed that the Union was seeking information relating to the number of positions which would be affected in New York State.

8. The Union made no specific proposals at the February 21, 1979 meeting.

9. The record does not reflect exactly when this position was converted into a military position. It was specifically shown that the Respondent could not have known about it on February 21, 1979, as attempts were then being made to fill the position under the Merit Promotion Plan. These attempts proved to be unsuccessful. However, since an exclusive representative's obligations and correlative rights, under Section 7114(a)(1) of the Statute, extend only to employees in the unit, the scope of the obligation to bargain in good faith is restricted to matters affecting the conditions of employment of employees in an appropriate unit. National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO, 3 FLRA No. 44 (Amy 29, 1980); American Federation of Government Employees, National Council of EEOC Locals, No. 216, AFL-CIO, 3 FLRA No. 80 (June 27, 1980). Here the Respondent had no obligation to bargain over matters relating to non-bargaining unit positions referred to in the proposal. This being the case the proposal in question was not implemented by the conversion of this supervisory position.

10. On or about March 7, 1979, the Union executed the original unfair labor practice charge in Case No. 1-CA-16, alleging that the Respondent refused to bargain concerning the Program. The charge was served on or about March 15, 1979 (G.C. Exhs. 3 and 4).

11. The collective bargaining agreement, approved on October 3, 1975, expired after a term of two years (R. Exh. 3). However, the provisions of the agreement continued to govern the relationship between the parties pending the completion of

contract negotiations. During the periods involved herein efforts to complete these contract negotiations were continuing.

12. Mr. Tedesco testified that he had no telephone conversations with Colonel Beck as outlined; however, based upon the record, the demeanor of these witnesses, and apparent vagueness and uncertainty in key elements of Mr. Tedesco's testimony, Colonel Beck's testimony is credited on this factual issue.

13. Respondent also took the position that proposals numbered two, and four through eight, involved subject matter raised during contract negotiations, and that nothing precluded consideration of these proposals in connection with such negotiations.

14. The record revealed that the Respondent was not confined to a quota during fiscal year 1979.

15. As previously indicated, non-entry level positions were subject to the Merit Promotion Plan. In the event of failure to locate a suitable candidate through the Merit Promotion Plan, such positions were then also subject to conversion.

16. Colonel Beck testified that the position was converted sometime during the period March 16 through 20, 1979.

17. Certain exceptions to the applicability of the arbitration article are not relevant here.

18. This case does not involve issues relating to procedures to fill positions converted under the CFTM Test Program, nor the conditions under which military personnel would serve. These subject areas would be beyond the scope of bargaining under the Statute. Association of Civilian Technicians, Pennsylvania State Council, Case No. 3 FLRA No. 8 (April 14, 1980).

19. Receipt of Union proposals in May of 1979, after implementation of the Program, was followed up by the Respondent in an effort to clarify proposals received so that Respondent could make an informed response. However, this effort was frustrated by Mr. Tedesco's refusal to discuss the proposals for the

purpose of clarifying them. Thus, even at this late date meaningful bargaining concerning the subject was prevented by the Union.

20. The Respondent promptly explained that the specific information sought did not then exist. However, when a portion of this information was in fact developed at the end of fiscal year 1979, such data was immediately supplied to the Union.

21. It should be noted that the memorandum in question does not involve a questionnaire requesting bargaining unit employees to respond directly to the Respondent, and therefore does not fall within the purview of the rule enunciated in Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance, Northeastern Program Service Center, 1 FLRA No. 59 (June 14, 1979).

22. R. Exh. 3, Article 17.