

84 FLRR 1-1689

**Immigration and Naturalization Service
and AFGE, National Council of INS**

Locals

Federal Labor Relations Authority

3-CA-1648; 16 FLRA No. 19; 16 FLRA 80

September 28, 1984

Judge / Administrative Officer

**Before: Frazier, Acting Chairman; Haughton,
Member**

Related Index Numbers

**46.16 Collective Bargaining Agreement, Type of
Agreement, Multi-Unit Agreement**

**72.5 Employer Unfair Labor Practices, Refusal to
Bargain in Good Faith**

**72.583 Employer Unfair Labor Practices, Refusal
to Bargain in Good Faith, Defenses to Refusal to
Bargain Charge, Change of Union**

**72.588 Employer Unfair Labor Practices, Refusal
to Bargain in Good Faith, Defenses to Refusal to
Bargain Charge, Loss of Majority Status of Union**

Case Summary

FLRA CLARIFIES DUTY TO BARGAIN WHERE A QCR ARISES AFTER COMMENCEMENT OF NEGOTIATIONS ON A MULTIUNIT BASIS. In 1978 the employer, the INS Council and the Border Patrol Council commenced negotiations for a multiunit agreement on merit promotion. The parties agreed to suspend these negotiations pending execution of a master agreement, also on a multiunit basis. During the latter bargaining, a question regarding representation (QCR) arose with regard to the Border Patrol Council. The agency suspended negotiations with latter union and bargained separately with the INS Council for a master agreement. Thereafter, the INS Council requested resumption of the merit promotion plan bargaining and the agency refused. The subject complaint was filed. The FLRA dismissed the complaint. During the pendency of a QCR, the agency was obligated to maintain existing working conditions

to the maximum extent possible. The Authority found that the proposed merit promotion plan inextricably intermingled the rights of employees represented by the INS Council with those of employees represented by the unit where the QCR existed. Therefore, the employer could not bargain with the INS Council and still fulfill its obligation to maintain existing working conditions in the unit with the QCR. Moreover, the negotiations were commenced as multiunit negotiations. After bargaining had commenced on this basis, the multiunit nature of the interaction could not be altered absent consent of all the parties, which was not obtained.

Full Text

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits,*1 and the parties' contentions, the Authority finds:

It is alleged the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)*2 when, by letter dated October 14, 1980, it refused and continues to refuse to enter into negotiations with the American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council (INS Council), the Charging Party, over a merit promotion and reassignment plan.

The INS Council has been the exclusively recognized collective bargaining representative since on or about April 26, 1968, for a unit consisting of all personnel of the Immigration and Naturalization Service, except those assigned to Border Patrol Sectors; professional employees; and those excluded from coverage by the Statute. There is a separately recognized unit of the Respondent's non-supervisory, non-professional Border Patrol personnel who have

been exclusively represented by the American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Border Patrol Council) since on or about June 12, 1967. Both unions were granted exclusive recognition by the Respondent in the separate units noted under the provisions of Executive Order 10988.*3 Currently, and at all times relevant herein, the Border Patrol unit is involved in a separate proceeding before the Authority which raises a question concerning representation (QCR) therein.*4

The American Federation of Government Employees, AFL-CIO (AFGE) and the Respondent have had a history of multi-unit negotiations since shortly after both of the aforementioned separate bargaining units were granted exclusive recognition. Based on a memorandum of understanding signed by the Respondent and the AFGE in 1970, the Respondent and the AFGE negotiated a merit promotion plan, also known as Administrative Manual 2265, covering both bargaining units. The merit promotion plan is an agreement separate from the parties' master collective bargaining agreement. This multi-unit merit promotion plan remains in effect. The plan presently encompasses the promotion and reassignment procedures for employees represented by the INS Council and the Border Patrol Council.

In November 1972, the Respondent and the AFGE signed a memorandum of understanding regarding the negotiation of a new merit promotion and reassignment plan. There have been various attempts since that time to negotiate changes in the plan, and, in December 1977, the parties negotiated changes in certain procedures of the plan. Those changes in the plan were signed by a representative of the Respondent and a representative of AFGE.

In April 1978, the Respondent and AFGE began negotiations for a new merit promotion and reassignment plan. In September 1978, separate negotiations began on a new master agreement, also historically negotiated on a multi-unit basis. The parties agreed to table negotiations over a new merit

promotion and reassignment plan until after completion of the negotiations for the master collective bargaining agreement. However, on December 15, 1978, the Respondent wrote AFGE requesting resumption of negotiations for a new merit promotion and reassignment plan.

During the continuation of negotiations over the master agreement in January 1979, the INS Council began negotiating for a master agreement which did not include the unit represented by the Border Patrol Council because a representation petition had been filed in the Border Patrol unit raising a QCR. Because of that petition, negotiations over a new master collective bargaining agreement with the Border Patrol Council ceased on January 22, 1979.

The INS Council and the Respondent reached agreement on a new master contract, to be in effect for a period of three years from its June 13, 1979 execution date. Only the employees in the INS Council's unit are covered by this contract. It superseded an expired multi-unit master agreement which had been executed on September 30, 1976 covering both units.

The June 13, 1979 agreement included mention of merit promotion:

Article 36 -- Merit Promotion Plan I

The Merit Promotion Plan presently in negotiation will become part of this agreement as Appendix I, when approved by both parties.

Appendix I Merit Promotion Plan I

Merit Promotion Plan I, when negotiated, will be published as Appendix I of this agreement, in accordance with Article 36.

By letter dated June 11, 1979, the AFGE requested that negotiations on a merit promotion plan be reconvened. The Respondent answered by letter dated June 25, 1979, stating that it was looking into its own proposals in light of the Civil Service Reform Act, and that it would contact AFGE when it was ready to resume negotiations. Thereafter, by letter dated September 24, 1980, the president of the INS Council requested that negotiations on merit

promotion be renewed as soon as possible, and that all correspondence regarding proposals be addressed to him. The Respondent, by letter to the INS Council president dated October 14, 1980, stated, in part, that:

Although we too would like to renegotiate the promotion plan provisions, we do not believe such negotiations are possible at this time. As you are aware, a question exists concerning the recognition of the American Federation of Government Employees, National Border Patrol Council, as the representative for eligible INS employees assigned to sectors; and we are unable to negotiate with the American Federation of Government Employees regarding the conditions of employment for the employees in the bargaining unit in question. The merit promotion plan in existence was negotiated by both the National INS Council and the National Border Patrol Council, and covers bargaining unit employees represented by both those organizations. Inasmuch as any changes initiated through negotiation with the National INS Council would also change the conditions of employment for employees represented by the National Border Patrol Council, we are unable to enter into such negotiations at this time.

Therefore, we plan to hold your request in abeyance pending resolution of the recognition dispute.

The October 14, 1980 letter was the last communication between the parties over negotiations on a merit promotion and reassignment plan for employees represented by the INS Council.

The General Counsel takes the position that the Respondent is obligated under the Statute to bargain with the INS Council, the employees' exclusively recognized bargaining representative, over terms and conditions of employment including, as here, the merit promotion plan. It argues that the INS Council unit is clearly a separate unit from that of the Border Patrol unit and, since there is no question concerning representation involving the INS Council unit, the Respondent cannot use a pending QCR over the Border Patrol unit to avoid or suspend its bargaining obligation in the INS Council unit. Further, the

General Counsel argues that an absolute status quo does not necessarily have to be maintained in the Border Patrol unit, but rather, that the Respondent's obligation to the Border Patrol unit is to "adhere to terms of the prior agreement to the maximum extent possible" until the QCR is resolved. Thus, the General Counsel argues that, if a new merit promotion plan which resulted from negotiations between the Respondent and the INS Council were to have an effect on the Border Patrol unit, the Respondent's obligation would be to continue to apply the old merit promotion plan to the Border Patrol unit "to the maximum extent possible," while enabling the INS Council and the Respondent to engage in the full scope of negotiations within the rights of an exclusive representative. The General Counsel also contends that the Respondent should at least have bargained with the INS Council regarding aspects and alternatives within the merit promotion plan which would not have affected employees in the Border Patrol unit.

The Respondent raises two defenses in support of its refusal to negotiate with the INS Council in separate negotiations over the merit promotion plan. It argues that since there was a QCR pending in the Border Patrol unit, it could not bargain separately with the INS Council because any change in the merit promotion plan resulting from negotiations with the INS Council would have changed the conditions of employment in the Border Patrol unit, having the potential of improperly changing conditions of employment in that unit during the pendency of a QCR. In support of this argument, the Respondent notes that the promotion and reassignment policies and practices for employees represented by both AFGE Councils are the same and/or intertwined in the areas of evaluation appraisals and ratings, area of consideration, selection procedures, union representation on promotion panels and audits and overseas rotation policy. Thus, it contends that any change in these areas necessarily would affect conditions of employment in the unit represented by the Border Patrol Council. Second, the Respondent

notes that the merit promotion plan historically has been a multi-unit agreement between it and the two AFGE Councils. It argues that since negotiation of the new multi-unit merit promotion plan already had commenced, the INS Council failed to withdraw from the multi-unit bargaining arrangement in a timely manner, and therefore the Respondent was not obligated to return to single unit bargaining.

Section 7101 of the Statute provides that "labor organizations and collective bargaining in the civil service are in the public interest." The Authority has previously determined that the level at which collective bargaining must take place is at the level of exclusive recognition.*5 In the Authority's view, the public interest is also served where, as here, an agency and two (or more) unions exclusively representing separate units of the agency's employees voluntarily enter into a multi-unit bargaining arrangement for purposes of negotiating over the conditions of employment affecting employees in their respective units. In this way, matters of common concern can be addressed in a setting which allows for a more efficient use of resources by all parties while at the same time promoting agreement on conditions of employment affecting larger numbers of employees.

The Authority has not previously addressed the circumstances under which a party to a multi-unit or multi-employer bargaining arrangement may withdraw from that arrangement. In our view, such withdrawal must be effected in a timely manner, i.e., prior to the commencement of multi-unit negotiations over the conditions of employment at issue. In the absence of such timely withdrawal, and after negotiations have commenced, the Authority concludes that withdrawal may occur only where there is mutual consent by the affected parties or where unusual circumstances exist. In this manner, the stability of such voluntarily established labor-management relations is preserved while ensuring that each of the parties at the level of exclusive recognition retains the right in appropriate circumstances to require negotiations at that level

with respect to conditions of employment affecting the bargaining unit employees.

In the instant case, the record indicates that the Respondent, the INS Council and the Border Patrol Council commenced negotiations over the merit promotion plan in April 1978. By mutual consent of the parties, negotiations were held in abeyance pending completion of master agreement negotiations which were also being conducted on a multi-unit basis. During the latter negotiations, a QCR arose in the Border Patrol unit. At that point, the Respondent ceased bargaining with the Border Patrol unit and continued to bargain separately with the INS Council for a master agreement. Upon completion of such negotiations, the INS Council requested that the Respondent resume bargaining with it concerning the plan, which the Respondent refused to do.

In the Authority's view, the Respondent's conduct herein was not violative of the Statute. As previously noted, following the commencement of negotiations over the plan, the Respondent, the INS Council and the Border Patrol Council mutually agreed to table negotiations pending completion of negotiations for the master agreement. Obviously, the parties intended to continue their multi-unit bargaining arrangement with respect to the plan and there is no evidence in the record that the INS Council sought to withdraw from the arrangement at any time prior to the commencement of negotiations. Similarly, there is no evidence that there was mutual consent as to the INS Council's withdrawal after negotiations had already commenced and, in the Authority's view, no unusual circumstances were argued or presented which could form the basis of a withdrawal not otherwise timely made. Accordingly with respect to whether the Respondent was obligated to bargain separately with the INS Council under these circumstances, the Authority concludes that no such obligation existed.

As previously noted, during the time that the parties mutually agreed to suspend negotiations over the plan, the QCR arose affecting the Border Patrol unit. The Authority has previously addressed the

obligation to adhere to existing conditions of employment during the pendency of a QCR. In United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), the Authority determined that the Respondent herein had committed several unfair labor practices by failing to maintain existing conditions of employment during the pendency of a question concerning representation in which the Border Patrol unit was involved. On appeal to the Fifth Circuit in U.S. Dept. of Justice, Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir. 1984), the court, while denying enforcement of two of the Authority's unfair labor practice findings, did not reverse the Authority's general rule that during the pendency of a question concerning representation, agency management must maintain existing conditions of employment to the maximum extent possible unless changes are required consistent with the necessary functioning of the agency. In the situation here, the merit promotion and reassignment plan generally constituted a negotiable matter.*6 Accordingly, the Respondent was required to maintain the plan, during the pendency of the question concerning representation, to the maximum extent possible. Inasmuch as the plan inextricably intermingled the rights of employees in both the INS Council unit and the Border Patrol unit with respect to such matters as position selection procedures, areas of consideration, and union representation on promotion panels and audits, the Authority finds that bargaining over changes in the plan with the INS Council would necessarily have led to changes in conditions of employment in the Border Patrol unit, which the Respondent was required to maintain to the maximum extent possible. Under these circumstances, the Authority concludes that the Respondent was not obligated to negotiate with the INS Council and shall order that the complaint be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-1648 be, and it hereby is, dismissed. Issued, Washington, D.C., September 28, 1984 Henry B.

Frazier III, Acting Chairman

Ronald W. Haughton, Member FEDERAL LABOR RELATIONS AUTHORITY

1. Respondent's motion to add two exhibits to the parties' stipulation of facts is granted. The General Counsel did not oppose the motion.

2. Sections 7116(a)(1) and (5) states in pertinent part:

Sec. 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency --

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

.....

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

3. These recognitions were granted under Executive Order 10988 which governed labor-management relations in the Executive branch of the Federal service at the time. (Executive Order 10988 was replaced in 1969 by Executive Order 11491, which was succeeded by the Statute.) Section 7135(a)(1) of the Statute authorizes the renewal or continuation of such units which came into existence prior to the effective date of the Statute.

Section 7135(a)(1) of the Statute provides:

Sec. 7135. Continuation of existing laws, recognitions, and procedures

(a) Nothing contained in this chapter shall preclude --

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter[.]

4. In United States Department of Justice, United States Immigration and Naturalization Service, 9

FLRA 253 (1982), petition dismissed sub nom. Int'l. Bhd. of Police Officers v. FLRA, 727 F.2d 481 (5th Cir. 1984), the Authority set aside the results of an election held between the Border Patrol Council and a rival petitioning labor organization and ordered that a second election be held. To date, the second election has not been held and the question concerning representation has not yet been resolved.

5. See Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981).

6. See, e.g., National Federation of Federal Employees Local 1332 and Headquarters, U.S. Army Materiel Development and Readiness Command, Alexandria, Virginia, 6 FLRA 361 (1981) (Union Proposals I, II, IV and V); American Federation of Government Employees, AFL-CIO, Local 909 and Department of the Army, Headquarters, Military Traffic Management Command, Washington, D.C., 6 FLRA 502 (1981); and National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275 (1981) (Union Proposals 2-4), for cases where various proposals involving merit promotion have been found to be negotiable.