

85 FLRR 1-1205

**Social Security Administration,
Northeastern Program Service Center
and American Federation of Government
Employees, Local 1760**

Federal Labor Relations Authority

2-CA-30144; 18 FLRA No. 60; 18 FLRA
437

May 24, 1985

Judge / Administrative Officer

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

Related Index Numbers

**72.52 Employer Unfair Labor Practices, Refusal to
Bargain in Good Faith, Bargaining Demand**

**72.521 Employer Unfair Labor Practices, Refusal
to Bargain in Good Faith, Bargaining Demand,
Introduction Subsequent to Fact-Finding**

**72.53 Employer Unfair Labor Practices, Refusal to
Bargain in Good Faith, Indicia of Good/Bad Faith
and Surface Bargaining**

Case Summary

THE AUTHORITY FOUND THAT THE AGENCY DID NOT REFUSE TO BARGAIN OVER UNION PROPOSALS SINCE THE UNION: (1) DID NOT REQUEST BARGAINING ON CERTAIN PROPOSALS; (2) DID NOT RESPOND TO THE AGENCY'S REQUEST FOR AN EXPLANATION REGARDING OTHER PROPOSALS; AND (3) SINCE CERTAIN OF THE PROPOSALS WERE OUTSIDE THE DUTY TO BARGAIN. The union had filed an unfair labor practice against the agency alleging that the respondent had violated 5 USC 7116(a)(1) and (5) by implementing changes and refusing to bargain over certain proposals. The Authority found that notwithstanding that the union knew of the changes beforehand, it did not request bargaining on its proposals. Under such circumstances it could not be concluded that the agency refused to bargain regarding those proposals. Regarding several other

union proposals, the Authority found that the agency did not claim that they were outside the duty to bargain. Instead, it asked for an explanation of the union's intent as to the proposals in order to make such a determination. Since the union did not respond to the agency's request, the agency cannot be said to have refused to bargain regarding those proposals. Lastly, concerning the agency's refusal to bargain over four separate union proposals, the Authority determined that the proposals were outside the duty to bargain since those particular proposals concerned the agency's right to direct and assign work under 5 USC 7106(a)(2)(A) and (B). The union's complaint was dismissed.

Full Text

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. The General Counsel and the Charging Party filed exceptions to the Judge's Decision, and the Respondent filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations 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 hereby adopts the Judge's findings, conclusions and recommendations, as modified herein.

As found by the Judge, in January 1982 the Respondent notified the Charging Party (the Union) of its plans to implement a new system for auditing employee performance and provided the Union with a memorandum which described the new system. The Union requested bargaining on the matter and the parties met several times for negotiations, exchanged proposals and counterproposals, and exchanged other

written communications on the matter from January through May 1982. These negotiations and communications gave rise to a set of proposals from the Union (numbered 1-11 by the Judge), a request by the Union for a written response, and a written response from the Respondent on or about May 5. In its response, the Respondent advised the Union that two of the proposals (3 and 6) were negotiable, that it needed an explanation of the Union's intent as to three others (4, 10 and 11) to determine whether they were within the duty to bargain, and that the remaining six proposals (1, 2, 5, 7, 8 and 9) were outside the duty to bargain.

There were further communications on the matter, but there was no further bargaining. In July 1982, the Union filed a petition for review with the Authority regarding the Respondent's determination that certain of its proposals on the new system were outside the duty to bargain, including the aforementioned six proposals and others. In September 1982, knowing of the Respondent's intent to implement the new system in October, the Union requested a delay pending the outcome of the negotiability appeal. The Respondent declined to delay and implemented in October 1982, as planned. In December, the Union filed the unfair labor practice charge against the Respondent that gave rise to the instant complaint. It alleges that the Respondent violated sections 7116(a)(1) and (5) of the Statute by implementing its changes and refusing to bargain over the proposals at issue herein.

The Authority agrees with the Judge that the resolution of this case depends upon an analysis of the Respondent's conduct regarding the proposals at issue, and not merely on whether the Respondent implemented in the face of a bargaining request. The Authority concurs with the Judge's reasoning and her conclusion that the Respondent cannot be held to have violated sections 7116(a)(1) and (5) of the Statute regarding proposals 3 and 6. Thus, the Respondent advised the Union in May that these proposals were negotiable. Notwithstanding the fact that the Union knew by May that the Respondent intended to

implement its new system in October, it did not request bargaining on these proposals. In these circumstances, it cannot be concluded that the Respondent refused to bargain regarding these proposals. See, e.g., General Services Administration, 15 FLRA No. 6 (1984); Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base, 13 FLRA 612 (1984).

In the Authority's view, an analogous conclusion, suggested by the reasoning in the latter part of the Judge's Decision, applies to proposals 4, 10 and 11. The Respondent did not claim that these proposals were outside the duty to bargain. Instead, it asked for an explanation of the Union's intent as to these proposals in order to make such a determination. The Union did not respond. Based on the Judge's conclusion that the Respondent's request was reasonable and that it acted responsibly under the circumstances, as well as our review of the record as a whole, we are unable to conclude that the General Counsel has shown that the Respondent refused to bargain with regard to proposals 4, 10 and 11. Cf. Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA 307, 320 (1982) (a union may not ignore a management request for specific proposals, await implementation, and then endeavor to perfect its request for negotiations).

We next turn to the Respondent's refusal to bargain concerning the remaining proposals at issue. Union proposals 1, 2, 5 and 7 would require the Respondent to sample employees' work in a particular way in order to audit the employees' ongoing work performance. The record before the Judge provided varying explanations of the Union's intent behind these proposals, including an explanation provided to the Respondent during the parties' negotiations prior to the Respondent's refusal to bargain, and a different explanation, provided by the Union in the context of the aforementioned negotiability appeal, after the negotiations had ceased. In the context of the parties' negotiations, the Union's explanation indicated that it intended to require the Respondent to use the Union's proposed methods to the exclusion of others, based on

its view that the Respondent's methods would be too onerous and burdensome for the employees. In the context of the later negotiability appeal, the Union indicated that these proposals were not intended to preclude the Respondent from using any other method.*1 The Judge concluded that the proposals made during negotiations were intended to preclude the Respondent from using other methods.*2 We agree, having concluded that this is the interpretation of the Union's intent for these proposals which is supported by the record as a whole.*3

In this regard, the Authority has previously determined that an agency's rights to "direct" and "assign work" to employees under sections 7106(a)(2)(A) and (B) of the Statute*4 encompass the right to determine the quantity, quality and timeliness of employees' work*5 and the right to determine the aspects of employees' work which will be evaluated in connection with the preparation of employee performance appraisals.*6 To determine the quantity, quality, and timeliness of employees' work and to be able to evaluate employees' work in these respects, management must also be free to audit employees' work by the methods it deems most appropriate for such purposes. As the Union's proposals were intended to proscribe the Respondent's use of other auditing methods, in favor of a particular sampling technique, we conclude that these proposals conflict with sections 7106(a)(2)(A) and (B) of the Statute and are outside the duty to bargain.

Proposal 8 is outside the duty to bargain for analogous reasons. It would limit the Respondent's authority to determine errors in employees' work and thereby limit the Respondent's authority to determine the quality of work to be expected from employees.*7 As explained by the Judge, proposal 9 is outside the duty to bargain because it would require the Respondent to assign particular work to particular employees and, on this basis, it conflicts with the Respondent's right to "assign work" under section 7106(a)(2)(B).*8

Accordingly, although the Respondent did refuse to bargain concerning proposals 1, 2, 5, 7, 8 and 9, we

conclude, in agreement with the Judge, that these proposals are outside the duty to bargain. Therefore, we adopt the Judge's conclusion that the Respondent did not violate sections 7116(a)(1) and (5) of the Statute by refusing to bargain concerning these proposals*9 and her recommendation that the complaint be dismissed in its entirety.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-30144 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 19, 1985

Henry B. Frazier III, Acting Chairman
William J. McGinnis, Jr., Member
FEDERAL LABOR RELATIONS AUTHORITY

1. The Authority, in *American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration*, 15 FLRA No. 172 (1984), determined that Union proposals 1, 2 and 7 were negotiable based upon this statement of the Union's intent, the only such statement of intent appearing in the record in that proceeding. However, on the basis of the more comprehensive record in this proceeding, the Authority has decided to reexamine its prior decision and, consistent herewith, today concludes, in its Decision and Order on Motion For Reconsideration, that such proposals are not negotiable.

2. We note that the Union has not excepted to the Judge's finding in this regard, but has argued only that its proposals are within the duty to bargain notwithstanding this finding.

3. In so concluding, we note particularly the contents of Exhibits 7 and 8 in the Stipulation referred to by the Judge in Finding 11 of her Decision.

4. Section 7106(a) provides in relevant part:

Sec. 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency --

.....

(2) in accordance with applicable laws --

(A) to hire, assign, direct, layoff, and retain employees . . .;

(B) to assign work . . . (.)

5. See, e.g., U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, 16 FLRA No. 105 (1984); American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Social Security Administration, 12 FLRA 17 (1983); National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), *aff'd sub nom. National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982).

6. See Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois, 16 FLRA No. 27 (1984); American Federation of Government Employees, AFL-CIO, Local 3004 and Department of the Air Force, Otis Air Force Base, Massachusetts, 9 FLRA 723, 724 (1982).

7. See cases cited at note 5, *supra*, and accompanying text; see also American Federation of Government Employees, Local 644, AFL-CIO and Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA No. 170 (1984) (proposal 5).

8. See, e.g., American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 17 FLRA No. 48 (1985); International Brotherhood of Electrical Workers, Local 570, AFL-CIO-CLC and Department of the Army, Yuma Proving Ground, Arizona, 14 FLRA 432, 432-34 (1984).

9. See, e.g., U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, 16 FLRA No. 105 (1984); Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 15 FLRA No. 15 (1984); Internal Revenue Service and Brookhaven Service Center, 14 FLRA 766 (1984).

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 (1982), commonly known as the Federal Service Labor-Management Relations Statute (hereinafter referred to as the "Statute") and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge filed by the Union on December 14, 1982, the General Counsel of the Federal Labor Relations Authority ("Authority") investigated and, on June 30, 1983, served the complaint initiating this proceeding. It alleges that, on or about October 1, 1982, Respondent unilaterally implemented a new system of auditing the work of claims and benefits authorizers and, since that time, has refused and continues to refuse to negotiate, "concerning certain of the Charging Party's proposals on the subject of 'random sample' of cases in Respondent's new audit system." See paragraph 7 of the Complaint and Notice of Hearing, which is Exhibit 2 to the Stipulation of Facts filed in this proceeding. It alleges that, by such acts, Respondent has engaged in and is engaging in unfair labor practices, in violation of Sections 7116(a)(1) and (5) of the Statute.*1

Respondent denies that it has violated the Statute.

A hearing was held in New York City on August 18, 1983. The parties appeared and submitted a Stipulation of Facts, which was received into evidence as Joint Exhibit A. Attached to the Stipulation are 25 exhibits.*2 In addition, evidence was received from Respondent's labor relations specialist, Julian Bergman, on the issue of the status quo ante remedy being requested by the General Counsel.

On October 28, 1983, briefs were received from the General Counsel and Respondent, pursuant to a September 8 order extending the briefing time, after a showing of good cause by Respondent.

Based upon my consideration of the record in

this case and the briefs, I make the following findings and conclusions of law, and recommend the entry of the following order.

Findings of Fact*3

1. At all times material herein, the Charging Party is and has been a labor organization within the meaning of Section 7103(a)(4) of the Statute.

2. At all times material herein, the Social Security Administration ("SSA") is and has been an agency, within the meaning of Section 7103(a)(3) of the Statute, and the Northeastern Program Service Center ("NEPSC") is and has been a constituent entity within SSA, and an agent acting on its behalf.

3. At all times material herein, the following named persons occupied the positions set forth below, opposite their names:

Robert Marinaro -- Director of Management

Julian Bergman -- Labor Relations Specialist

4. At all times material herein, the individuals named above in finding 3, have been and are now supervisors or management officials, as defined in Section 7103(a)(11) of the Statute, and have been, and are now, agents of Respondent acting on its behalf.

5a. At all times material herein, the American Federation of Government Employees ("AFGE"), AFL-CIO, has been the exclusive representative of employees in the unit consisting of all nonsupervisory employees (including professionals) in the SSA Program Service Centers, excluding all management officials and employees engaged in federal personnel work in other than a purely clerical capacity.

b. At all times material herein, AFGE has delegated to AFGE National Council of SSA Payment Centers ("Council") authority to act as its representative for the purpose of collective bargaining for certain of NEPSC's employees, and has been recognized by Respondent as such.

c. At all times material herein, AFGE's Local 1760, AFL-CIO ("Charging Party" or "Union") has acted as agent for the Council for the purpose of collective bargaining for certain of Respondent's

employees, including employees at NEPSC, and has been recognized by Respondent as such.

d. From December 8, 1978 to June 11, 1982 the parties operated under a Master Agreement between the Office of Program Service Centers of the SSA and the National Office of AFGE. See Exh. 24.

e. Since June 11, 1982 to present, the parties have been operating under a nationwide collective bargaining agreement between SSA and AFGE. See Exh. 25.

6a. There are 42 work units at NEPSC known as modules. Six modules comprise one process section. Each module is comprised of approximately 45 to 50 employees consisting of a manager, 2 assistant managers, 10 to 12 benefit authorizers, 5 to 7 claims authorizers, 1 benefit-authorizer technical assistant, 3 typists, and 10 to 12 record analysis clerks. Each section has three claims-authorizer-and-recovery-technical assistants.

b. For the period of October 1976 to October 1982, the method of auditing the work at NEPSC for the evaluation of the work of claims authorizers and benefit authorizers was a three day audit of all work performed by these employees. Such audits were administered by the technical assistants, twice every appraisal period (October 1 to September 30). Under this audit system, the employee would receive advance notice of the audit from the module manager or his designee, unless waived by the employee. There was no set procedure as to how many days' notice would be given to the audited employee. There was no formal or standardized definition of an error, concerning the employee's work, for the technical assistant to follow. In various modules, the second audit could be waived by the module manager at his or her discretion.

7. On October 1, 1982, NEPSC implemented a new audit system for the evaluation of claims and benefits authorizers. This system was composed of 3 parts: 1) Definition of Error; 2) Random Sample of Cases for Quality; and 3) Numeric Case Counts. In the Random Sample for Quality, the technical

assistant ("TA") must examine and audit at least 30 cases of each authorizer for each 6 month period in the 12 month appraisal period (October 1-September 30). These cases are selected at any time and are audited for qualitative standards, without notice to the audited employees. During each of these two periods the TA must examine various types of cases. The TA can examine these cases at once, or space them out over each of the two periods. There is a standard and formalized definition of error for the evaluation of cases. Regarding the case count, there is a numerical count of the number of cases that an authorizer works on a given day. This count of cases is conducted once per month. The employee is given notice of this quantitative examination of his or her work on the morning of the case count. Cases examined for this case count can be used as part of the random sample evaluation of the quality of the authorizer's work.

8. The audit system described in finding 7, above, is used in the performance evaluation of authorizers in their yearly appraisals. These appraisals are used to determine whether these unit employees receive within-grade increases, promotions, demotions, and performance counseling. Respondent does not deny that the change in audit procedure implemented on October 1, 1982 would have an adverse impact on unit employees.

9. On or about January 20, 1982, NEPSC provided the Union with its proposed changes from the three-day audit system to the random-sample audit system. This was done by giving the Union a December 10, 1981 Memorandum entitled Random Sampling -- Case Counts Recommendation. See Exh. 6. On January 20, 1982 the Union requested negotiations on the adverse impact on this proposed change in conditions of employment.

10. During the period of January to April, the parties met several times for negotiations. These meetings occurred on January 20 and 26, February 4 and 18, and April 12 and 14.

11. On February 4, the Union submitted its proposals to management of NEPSC. These proposals are contained in the Union's February 4 Union

Proposals for Random Review and a memorandum dated September 22, 1981 entitled Audit Recommendations. See Exhs. 7 and 8 to the Stipulation. The September 1981 memorandum was a memorandum from the Union to management in which the Union recommended the abolishment of three-day audit and substitution of a random audit.

12. The Respondent responded to the Union's proposals by a memorandum dated February 10. See Exh. 9.

13. By memorandum dated February 18 and February 19, the Union's responded to the Respondent's counter proposals of February 10. See Exh. 10 and 11.

14. By memorandum dated March 9, the Respondent submitted a new set of proposals for the new audit system. See Exh. 12.

15. By memorandum dated March 16, the Union responded to the Respondent's March 9 proposals with its counter proposals. See Exh. 13. The proposals were broken down into four areas: (1) Definition of Errors; (2) Random Sample of Cases; (3) Measuring Productivity; and (4) Miscellaneous Procedures. Under area (2), the following proposals were made by the Union:

1. A random sample of an employee's work will be conducted during a continuous six-month period during each appraisal period.

2. No cases performed on overtime (including religious compensatory time) will be subject to the random sample.

3. Prior to the sampling period, the employee will be told what is acceptable. He/she will be told when the sampling period begins and when it ends. When the sample for an employee has been concluded, he/she will be advised.

4. The work of all employees in the same job will be reviewed concurrently and at an even pace.

5. The random sample will consist of 20 cases to be selected by the technical assistant from the employee's "out" tray.

6. A method of ensuring that the random sample is randomly performed will be negotiated.

7. The following categories of work (and the number for each) will be sampled: BENEFIT AUTHORIZERS: Awards (5); AJS-3 (2); Students (2); District Office Inquiries (4); Exceptions (2); AERO (2); Cyclical (3). CLAIMS AUTHORIZERS: Awards (10); Earnings Discrepancy (5); Cyclical (5).

8. Errors will be weighed for their impact on the action taken (see "Definition of Errors"). (In its proposals on Definition of Errors, the Union excluded "technical inefficiencies," which the proposals defined, and set the following standards: (a) a payment error would render a case 80 percent incorrect; (b) a documentation error would render a case 20 percent incorrect; and an exception error would render a case 10 percent incorrect. See Exh. 13, page 4.)

9. For all cases that are defective, the technical assistant will note whether the defect is the result of an "oversight" or a genuine lack of understanding.

10. If deficiency trends are indicated, the employee will be given a reasonable period of time to improve in the deficient area(s). After that time, the employee will be reviewed for improvement only in the deficient area(s). If no improvement is noted, the employee will be offered refresher training in the deficient area(s) by EDTS. [EDTS is responsible for coordinating and conducting training for new and recently promoted employees.]

11. Should an employee conclude that he/she has a basic misunderstanding of the work in several areas that would preclude either self-improvement and/or improvement with the assistance of the technical assistant, the employee, upon request, will be offered formal re-training by EDTS.

16. On or about April 14, the Union orally requested that the Respondent provide a written response to its proposals.

17. On or about May 5, the Respondent, by Mr. Marinaro, sent to the Union a memorandum dated May 5, which set forth Respondent's position on the

negotiability of the Union's March 16 proposals. See Exh. 14. On the subject of the Random Sample of Cases, Respondent declared that proposals 1, 2, 5, 7, 8, and 9 were not negotiable as they concerned the means of performing work and were inconsistent with its authority to determine the methods of performing work and, as such, were negotiable only at its election, under 5 U.S.C. 7106(b)(1). Respondent declared proposals 3 and 6 to be negotiable. As to the rest, Respondent replied:

Proposals 4, 10, 11 -- Local 1760 is asked to provide us with the intent of these proposals so that we can determine whether or not they are negotiable.

Respondent further advised the Union that:

We are ready to meet with you to continue negotiating on those proposals we find negotiable.

At the present time we plan on implementing the audit system as previously outlined on October 1, 1982, the beginning of the new appraisal period.

If you are aware of any FLRA negotiability decision which are directly on point with your proposals and have been found by the FLRA to be negotiable, please provide me with the citation so that I may have them reviewed.

Thereafter, the parties did not conduct any further negotiations.

18. By memorandum dated June 25, the Union responded to the Respondent's May 5 memorandum. See Exh. 15, which makes some general statements, and then focuses on the Union's proposals as to defining errors and counting work, under areas (1) and (3) of its proposals. See finding 15, above. It cites cases dealing with the negotiability of proposals pertaining to performance standards for quantity of work to be performed (3 FLRA No. 119, 3 FLRA 769) and proposals concerning what aspects of an employee's job would constitute discrete units for counting purposes in determining quantity of work performed and who should perform certain work (7 FLRA No. 35, 7 FLRA 235). The June 25 memorandum makes no specific reference to proposals 4, 10, or 11, or to their intent. In the final

paragraph of this memorandum, the Union states:

In conclusion, the union urges that you review your assertions within the context described above. Should our proposals be CLEARLY and INDISPUTABLY prohibited subjects, we ought to mutually submit language to overcome these impediments to the collective bargaining process, rather than abort the process.

Please do not hesitate to contact me as soon as possible so that we may engage in fruitful negotiations on these matters.

See page 2 of Exhibit 15.

19. By memorandum dated July 15, Respondent responded to the Union's memorandum of June 25. See Exh. 16. It referred to the Union's positions on the negotiability of the proposals which Respondent had declared non-negotiable, and to the cases cited by the Union. The memorandum concludes with the statement:

Having reviewed your response and the cases cited by you, our memorandum of May 5, 1982 and the position set forth therein remains unchanged.

20. By a memorandum dated July 19, the President of the Union requested from Robert Marinaro, Respondent's Director of Management at NEPSC, written and specific allegations of non-negotiability. See Exhibit 17 to the Stipulation which reads:

I have reviewed the memorandum of July 15, 1982, authored by Mr. Julian Bergman, on the subject of employee audit procedures, asserting that the position set forth in your memorandum of May 5, 1982 "remains unchanged."

In light of that conclusion, I formally, and in writing, request written and specific allegations that the duty to bargain in good faith does not extend to the several particular matters proposed by the union on the subject of employees audit procedures.

21. By a memorandum also dated July 19, Mr. Marinaro replied to the Union's request, in the following language:

By memorandum dated May 5, 1982, addressed to you, from me, you were advised specifically of our allegation that the duty to bargain did not extend to certain proposals. You were advised specifically as to which of your proposals were not negotiable. You were served with the declaration of nonnegotiability on or about May 5, 1982. Further, at that time you were also advised as to the basis of the declaration of nonnegotiability.

See Exhibit 18 to the Stipulation.*4

22. By a letter dated July 30, the Union filed with the Authority a negotiability position to review its March 16 proposals held to be non-negotiable by Respondent. See Exh. 19. This petition is numbered 0-NG-720. See Exh. 23.

23. By a letter to the Chairman of the Authority, dated August 30, the Respondent replied to the Union's July 30, 1982 negotiability petition. See Exh. 20. Respondent addressed only the proposals it had declared to be non-negotiable.

24. By memorandum dated September 13, 1982 the Union suggested that Respondent defer the October 1 implementation of its new audit system until the Authority had rendered a decision on its negotiability petition. See Exh. 21. The concluding paragraph was:

Should you elect to ignore our reasonable requests, we will be compelled to seek relief under the law and any other legally acceptable modes of action to protect the jobs of bargaining unit members. Of course, we welcome any ideas or options that you may have. Please feel free to contact me in this regard.

This is the last communication of record between the parties. The Union never indicated to Respondent that it wanted to negotiate proposals 3 and 6, under its Random Sample of Cases proposals, apart from the other proposals.

25. By memorandum dated September 13, the Union submitted to the Authority a reply to the statement of Respondent's position that was submitted on August 30, 1982 in this case. See Exh. 22.

26. On October 1, Respondent implemented its new audit system, as set forth in finding 7, supra.

27. On December 14, the Union filed the charge initiating this proceeding. See Exh. 1. It alleges violations of 5 U.S.C. 7116(a)(1) and (5), in that Respondent conducted orientation on the new audit system, in September 1982, with TA's; held meetings with bargaining unit employees, on October 1, to explain the new system; and, on October 1, implemented the new system -- all during the pendency of the Union's petition to the Authority to review Respondent's allegations of non-negotiability. It is stipulated that, by the filing of this charge, the Union "elected the unfair labor practice procedure as opposed to the negotiability procedure in pursuing this matter." See Stip. 30.

28. On or about July 5, 1983, the Union notified the Authority that it had elected to pursue Case No. 0-NG-720 in accordance with the procedures contained in 5 CFR 2423, which sets forth the procedures for unfair labor practice proceedings.*5

29. At the hearing, Counsel for the General Counsel indicated that "at minimum" two proposals were at issue in this case, namely those numbered 10 and 11 and set forth in finding 11, above. See TR 5 and see also 6, 7, 8, 19. Mr. Collender, representing the Charging Party, and Mr. Green, representing the Respondent, gave no indication of disagreement.

30. The brief filed on behalf of the General Counsel frames the alleged violations only in terms of Respondent's actions concerning the Charging Party's proposals 10 and 11, and repeatedly refers to them as "the 2 proposals at issue" (GCBBr 10 and 11 and see also pages 9, 12, 13).

31. The Charging Party indicated that it would file a brief in this matter, but did not. See TR 32.

32. The brief filed on behalf of Respondent indicates Respondent's understanding that the proposals which form the basis of the petition filed with the Authority, in Case No. 0-NG-720 (see finding 22, above) are not made a part of this complaint. See RBr 9.

Stipulated Issues

I. Whether the Respondent violated Sections 7116(a)(1) and (5) of the Statute by unilaterally implementing a new system for auditing the work of Claims Authorizers and Benefit Authorizers, NEPSC.

II. Whether the Respondent, since May 5, 1982, has refused and continues to refuse to negotiate with the Charging Party concerning certain of the Union's proposals on the subject of the "random sample" of cases in Respondent's new audit system.

See Stips. 37 and 38.

Discussion and Conclusions

Although the complaint and the stipulated issues are broad enough to put in issue the negotiability of all the Union's proposals falling under the rubric of "random sample of cases," the record is unclear as to whether all, or only proposals 10 and 11, are at issue. See findings 27-32, above. Since Respondent took care, in its brief, to argue the negotiability of all, it will suffer no harm if all are dealt with, herein. Accordingly, this decision will treat all the "random sample of cases" proposals as at issue.

I. The preponderance of the evidence*6 does not demonstrate that Respondent violated Sections 7116(a)(1) and (5) of the Statute by unilaterally implementing a new system for auditing the work of bargaining unit employees, as alleged.

At the outset, it is noted that the General Counsel does not take the position that it is "a per se violation of the Statute to implement a change in an existing condition of employment or to establish a new condition of employment while bargaining proposals pertaining to such change are pending at the bargaining table, either prior to the expiration of the time for filing a negotiability appeal under section 2424.3 of the Regulations or during the pendency of a negotiability appeal before the Authority, regardless of whether the proposals are, in fact, within the scope of the statutory duty to bargain." See page 37 of the General Counsel's Report on Case Handling Developments of the Office of the General Counsel, July 1, 1981 through September 30, 1981 (hereinafter,

"the July 1981 Report"). The General Counsel concludes, rather, that "in order to establish a violation of the Statute in such cases a determination must be made as to whether any of the Union's bargaining proposals pending on the bargaining table when the proposed changes were implemented are, in fact, negotiable." See page 37 of the July 1981 Report.

This is a sound position, and one which is consonant with the statutory mandate that all its provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." See 5 U.S.C. 7101(b). It allows agencies to proceed with needed changes, without delay. Then, in the event of a later finding by the Authority that the agency should have bargained with the union over the change on new working condition, the bargaining-unit employees are protected by the broad remedial powers granted to the Authority in Section 7118(a)(7) of the Statute.*7 And, see, e.g., Internal Revenue Service (District, Region and National Office Unit) and Service Center Unit ("IRS"), 10 FLRA No. 61, 10 FLRA 326 at 328-330 (1982), invoking these broad remedies, including a return to the status quo ante.

Proposals 3 and 6

Respondent concedes that it unilaterally implemented the new audit system while proposals 3 and 6 were on the bargaining table, and considered even by it to be bargainable, as they clearly are. See findings 15, 17 and 26, above. However, Respondent advised the Union, on May 2, 1982, that it was "ready to meet with (it) to continue negotiating on those proposals (it) found to be negotiable" (finding 17, above). Thereafter, the Union focused only on the proposals held to be non-negotiable by Respondent (see findings 18, 20, 22 and 24). Finally, on September 13, the Union simply suggested that Respondent defer its October 1 implementation date until the Authority ruled on its negotiability petition. See finding 27, above. No mention was made of taking Respondent up on its May offer to continue negotiations on proposals which are admittedly

negotiable. Respondent never withdrew its offer to negotiate as to proposals 3 and 6; and the Union never accepted the offer to negotiate only as to these proposals. Respondent's implementation (five months later) cannot be characterized as an unfair labor practice, as to proposals 3 and 6.

Proposals 10 and 11

As to the "certain" proposals named in the complaint, "on the subject of the 'random sample' of cases" (par. 7(b)) of Exh. 2), proposals 10 and 11, on training, will be discussed first.*8 The General Counsel argues that these proposals were bargaining as "appropriate arrangements," under 5 U.S.C. 7106(b)(3),*9 for "employees adversely affected by management's exercise of its statutory right to assign employees and/or work," and that they "seek only to ameliorate [sic] any adverse impact on unit employees caused by the change in audit systems." (GCB 10 and 11).

Respondent argues that proposals 10 and 11 are not negotiable. As to these proposals, Respondent argues that both interfere with management's right to direct its work force and the right to assign work to it. Specifically, as to proposal 10, Respondent argues that it:

1. Prohibits management from reviewing the quality and quantity of work performance by an employee in areas other than those which are deficient and interferes with right to assign duties to specific employees who are responsible for reviewing the work of claims and benefits authorizers in the area of quantity and quality of work performed.

2. It requires Respondent to offer training in deficient areas.

See RBr 7. As to proposal 11, Respondent argues, specifically, that it:

1. Requires the Respondent to offer a deficient employee FORMAL retraining at the request of the employee thereby interfering with Respondent's right to assign work and direct the work force.

See RBr 7.

The Authority has reviewed a number of proposals relating to training programs. Recently, in IRS, 10 FLRA No. 61, 10 FLRA 326 (1982), where the agency discontinued a training program, the Authority relied upon an earlier decision, in National Association of Air Traffic Specialists and Federal Aviation Administration ("FAA"), 6 FLRA No. 106, 6 FLRA 588 (1981), in reiterating its position that "management's right to decide to provide or discontinue training for bargaining unit employees during duty hours is protected by section 7106(a)(2)(B)" (10 FLRA at 327, fn. 4), that is, the right "to assign work." See footnote 9, above. In IRS, the Authority held, that "IRS nevertheless had an obligation pursuant to sections 7106(b)(2) and (3) of the Statute**5 [footnote citation to this section, quoted herein in footnote 9] to afford [the Union] the opportunity to request negotiations over the procedures to be observed in implementing the decision and appropriate arrangements for adversely affected employees."

In another case, which involves the same parties as here (DHHS, SSA, NEPSC and Local 1760), reported at 9 FLRA No. 103, 9 FLRA 813 (1982) and hereinafter referred to as the "NEPSC" case, the Authority ruled on the following union proposal:

Management will afford the employees in Clause 5 (referring to employees who could not perform duties with greater physical effort), who do not qualify for other positions, the training necessary to do so.

See 9 FLRA at 814. In NEPSC, the Authority found no interference with rights reserved to management, but merely an "appropriate management, under Section 7106(b)(3), for employees adversely affected by management's exercise of its statutory authority to assign employees and/or work." (9 FLRA at 814). The Authority went on to say:

In this regard, the proposal in no way affects the Agency's authority to reassign or to take any other action with respect to its employees or positions.**2 (fn. cites 8 FLRA No. 35) Rather, it merely would

obligate the Agency to afford employees the opportunity for training which would enable them to qualify for jobs more compatible with their physical capabilities. There is nothing in the express language of the proposal which would mandate training during duty hours, or otherwise deprive the Agency of discretion concerning the methodology, scheduling, duration, type, content, and other characteristics of the training itself.

See 9 FLRA at 814. Thus, the Authority ordered the agency to bargain over the proposal, upon request. See 9 FLRA at 815.

The proposal found bargainable, in NEPSC, is distinguishable from those proposed here by Local 1760, in several respects. Proposal 10 does restrict management in choosing the "content" of training, by limiting it to areas in which the employee has been found deficient, and requiring it to offer training with that specific "content"; it restricts management to a particular "type" of training, by its EDTS activity rather than allowing Respondent the flexibility of assigning such training duties to, for example, the assistant manager; and it restricts management's right to assign review work to employees, limiting their review work to areas in which employee performance has been deficient.

Proposal 11 is also distinguishable from that found to be negotiable, in NEPSC, in that it mandates the "type" of training to be provided to authorizers, that it be "formal," and by EDTS, thus eliminating a choice by management to offer, for example, informal training by assistant managers. Both proposals 10 and 11 would also require Respondent to assign employees to EDTS, during the life of the agreement, even though it might decide that a reorganization and elimination of EDTS would be more efficient.

Another case cited, by both parties (GCB 10 and RBr 8), is International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and U.S. Government Printing Office, Washington, D.C. ("GPO") 8 FLRA No. 35, 8 FLRA 188 (1982), wherein proposals for training were found to infringe upon management's right "to assign work," in that they specified that the

training was to enable the employee to continue to perform their traditional and historical work. Another training proposal at issue, in GPO, was held to be negotiable. It provided that:

In the event of a reduction in force of bargaining unit employees, the GPO upon written request, will meet with the union to negotiate the establishment of retraining programs which would allow employees to meet qualification standards for the reassignment to other positions within the GPO.

See 8 FLRA at 189. Unlike proposals 10 and 11, here, the proposal held to be negotiable, in GPO, did not mandate content, or type of training, or otherwise infringe upon management's right to assign work to employees.

The final case relied upon by the General Counsel, in addition to those discussed above, and also cited by Respondent (GCB 10 and 11 and RBR 8) is the FAA case, 6 FLRA No. 106, 6 FLRA 588 (1981). In FAA, the Authority found that several union proposals relating to training were inconsistent with the agency's right to assign work. See 6 FLRA at 388-391. Like proposals 10 and 11 here, the union proposal in FAA described "the specific type of training to be provided" (9 FLRA at 590) and made "specific training assignments upon employee requests" (6 FLRA at 591), among other things. The Authority found these proposals "not merely procedural," but "a direct interference with the Agency's right to assign work" (6 FLRA at 591). The fact that the proposals "might concern training programs previously established by the Agency . . . (was held to be) without controlling significance." (6 FLRA at 591).

Respondent relies upon some additional precedence on this subject. In American Federation of Government Employees, AFL-CIO, Local 3004 and Department of the Air Force, Otis Air Force Base, Massachusetts, ("Otis"), 9 FLRA No. 87, 9 FLRA 723 (1982), the Authority considered and found nonnegotiable a union proposal requiring formal training on newly-added duties before the agency could evaluate the performance of employees to

whom the newly-added duties had been assigned. Among other objections to the proposal, the Authority found that:

Furthermore, proposals which would contractually obligate an agency to provide formal training, to periodically assign employees to specific types of training programs, and to make specific training assignments upon employee requests are outside the duty to bargain because the assignment of training under such circumstances constitutes an assignment of work the negotiation of which is inconsistent with management's right to assign work under section 7106(a)(2)(B).

See 9 FLRA 724. Proposals 10 and 11, here, can be faulted on the same grounds.

Another case relied upon by Respondent is American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Social Security Administration, ("SSA"), 9 FLRA No. 122, 9 FLRA 899 (1982), in which the Authority held nonnegotiable a union proposal that, among other things, required management "to provide 'formalized training' to all full time permanent employees who occupy replacement positions" (9 FLRA at 900). The Authority ruled, as to this proposal, that "(s)ince the proposal would require the Agency to assign specific work to bargaining unit employees (i.e., training) it is . . . not within the duty to bargain" (9 FLRA at 900). Likewise, proposals 10 and 11 require "formal" training for certain employees.

Applying the rationale of the above to proposals 10 and 11, I conclude that they do infringe upon management's right to assign employees and work, as set forth in 5 U.S.C. 7106(a)(2)(A) and (B), quoted in footnote 18, above.

Proposals 1, 2, 4, 5, 7, 8, and 9

The negotiability of these proposals, grouped under the union's proposals in its area (2), "Random Sample of Cases" (see finding 15, above) were not briefed by the General Counsel. Respondent makes a short statement about them, as well as about proposals

in the union's areas (1) and (3),*10 at pages 9 and 10 of its brief, and refers to its reply to the petition for review filed by the Union with the Authority. See Exh. 20, pages 3-6. The position of the Charging Party is stated in its statement made to the Authority in support of its petition for review. See Exh. 22, pages 5-6.

These proposals, as phrased, do infringe upon management's right to assign employees, to assign work, and/or to control the methods and means of performing work activities, as to which Respondent has not elected to bargain, as discussed infra. See Sections 7106(a)(2)(A) and (B) and 7106(b)(1), quoted in footnote 18, above.

Proposal 1 is that: "A random sample of an employee's work will be conducted during a continuous six-month period during each appraisal period" (finding 15, above). This proposal not only mandates what type of sample will be taken (a random one), but how long the sampling will last. Both factors control the methods and means of controlling work. Implicitly, it would prohibit management from instituting a 100 percent review, despite its possible necessity to ensure acceptable quality of work. The direct relationship of management's ability to audit an employee's work performance and management's right to assign work has been established by the Authority in National Treasury Employees Union and Internal Revenue Service ("NTEU"), 6 FLRA No. 98, 6 FLRA 522 at 530-531, a negotiability case which involved the telephone monitoring of conversations between employees and taxpayers.

Proposal 2 is that: "No case performed on overtime (including religious compensatory time) will be subject to the random sample" (see finding 15, above). The very nature and intent of sampling employee's work is to properly direct completion of that work by establishing accountability and providing feedback. To the extent that this proposal eliminates sampling of employee's work on overtime, it usurps management's Section 7106(a)(2) right to direct work performed on overtime. By specifically

eliminating random sampling on work performed on overtime, it interferes with management's right to determine the method and means of performing the work sampling activity, and hence is negotiable only at the election of the Agency under Section 7106(b)(1) of the Statute.

Proposal 4 is that: "The work of all employees in the same job will be reviewed concurrently and at an even pace" (see finding 15, above). This proposal would control the methods and means of performing the work sampling activity. It could so overload the reviewers that Respondent would be required to assign more employees to the work of review. Thus, this proposal also infringes upon management's right to determine the numbers of employees assigned to a work project. Respondent, under Section 7116(b)(1), has not elected to negotiate these matters.

Proposal 5 is that: "The random sample will consist of 20 cases to be selected by the technical assistant from the employee's 'out' tray" (finding 15, above). As held in NTEU, 6 FLRA at 524-525, a union proposal that requires management to assign duties to particular employees infringes upon management's right to assign work, including the discretion as to the particular employee to whom the work will be assigned. The Union claims that the proposal merely "describes and records the fact that technical assistants perform a duty set forth in their position description" and, therefore "does not assign work, but merely enumerates a function of the technical assistants position description" (Exh. 22, page 5). Position descriptions are not made a part of this record. And, in any event, the express language indicates that Respondent could not later substitute another, such as the assistant managers, to perform the selection. Also, by limiting the audit process to 20 cases, the proposal infringes upon management's right to audit adequately, the work of its employees, and thus its right to assign work. See NTEU, 6 FLRA at 530-531. The Union's reply to the 20-case sample aspect of its proposal is that a 20-case sample is "sufficiently large to ensure that quality is maintained" (Exh. 22, page 5). This, however, is a

decision management must make, as it gains experience with the new audit process. In addition, the proposal dictates the method and means of obtaining the sample -- randomly and from the employees "out" tray -- a subject matter negotiable only at the election of the agency under Section 7106(b)(1).

Proposal 7 is that:

The following categories of work (and the number for each) will be sampled:

BENEFIT AUTHORIZERS: Awards (5); AJS-3 (2); Students (2); District Office Inquiries (4); Exceptions (2); AERO (2); Cyclical (3).

CLAIMS AUTHORIZERS: Awards (10); Earnings Discrepancy (5); Cyclical (5).

See finding 15, above. This proposal prevents management from sampling more cases in a particular category than is specified in the proposal, and from sampling work in categories other than those delineated in the proposal. By preventing management from sampling, and hence auditing cases in work categories not listed in the union proposal, and from sampling a higher number of cases than specified in the listed categories, management is unable to effectively audit, and hence direct a large portion of the work assigned to its employees. See NTEU, 6 FLRA at 530-531. Also, by specifying a minimum number of cases to be sampled in certain work categories, the union proposal would require that benefit and claims authorizers be assigned work in all of these categories. The assignment of work is a non-permissive subject of bargaining under Section 7106(a)(2). In addition, this proposal dictates the method and means of work review and, for this reason alone, only would be negotiable at the agency's election under Section 7106(b)(1).

Proposal 8 is that: "Errors will be weighted for their impact on the action taken" (see Definition of Errors) (finding 15, above). The "Definition of Errors" subject of the Union's proposals requires Respondent to exclude technical insufficiencies, and sets percentage standards for how much an error

renders a case incorrect. See finding 15, paragraph 8, above. This proposal infringes upon management's Section 7106(a) right to assign work, in that it sets a definite limit on Respondent's ability to audit employees. See NTEU, 6 FLRA at 530-531. Respondent may find that technical insufficiencies are an important measure of an employee's worth, and that different percentages are needed to gauge, properly, the work of the employees.

Proposal 9 is that: "For all cases that are defective, the technical assistant will note whether the defect is the result of an "oversight" or genuine lack of understanding" (finding 15, above). For the reasons stated above, under proposal 5, this proposal violates management's Section 7106(a)(2) right to assign work by specifying the particular employee position (technical assistant) who will perform the stated duties.

II. The preponderance of the evidence does not establish that, since May 5, 1982, Respondent has refused, and continues to refuse, to negotiate with the Union concerning certain the Union's proposals on the subject of the "random of sample" of cases in its new audit system.

Of the 11 proposals under the subject "random of sample" of cases, numbers 1, 2, 4, 5, 7, 8, 9, 10 and 11, are not negotiable, as the Respondent claimed, and as already discussed. As to union proposals 3 and 6, Respondent advised the Union, as May 5, 1982, that it was "ready to meet with you to continue negotiating on those proposals (it found) to be negotiable" (finding 17, above), which included proposals 3 and 6. At this point, Respondent had already engaged in six negotiating sessions, from January through April 14. It never withdrew the May 5 offer to negotiate. It promptly replied to all proposals and correspondence initiated by the Union and that required a response. See findings 11-20.

The General Counsel attempts to make his case on the response of Respondent to proposals 10 and 11. As to these proposals, as well as to proposal 4, the Respondent, on May 2, 1982, asked the Union "to provide (it) with the intent of these proposals so that

(it) could determine whether or not they are negotiable" (finding 17, above). The General Counsel maintains that the Union did state its intent as to these proposals on June 25, 1982, in a memorandum. See GCB 12 and 14. As found in finding 18, above, the June 25 memorandum deals in generalities, and is specific only as to proposals which Respondent claimed were non-negotiable. Clearly, it does not state the intent of proposals 4, 10 and 11.

It is the General Counsel's position that, even assuming that Respondent was "truly uncertain" as to the intent of union proposals, "it should have then requested to meet and discuss these proposals at the bargaining table, rather than requiring the Charging Party to state the intent of its proposals as a condition precedent to its discussion of these proposals at the bargaining table." (GCB 11-12).

This position requires too much of an agency. After all, evidence of the intent of a proposal is considered by the Authority in rendering its decisions on negotiability issues. See, e.g., *Otis*, 9 FLRA at 723. Certainly, then, the benefit of such knowledge should not be denied to an agency attempting to make an intelligent and informed decision when a proposal is put to it. Requesting the intent of a proposal should only be deemed a refusal to bargain, if it could be shown to be a delaying tactic. This record reveals no evidence of delaying tactics on the part of Respondent.

The Statute requires the parties to a collective bargaining agreement to "meet a reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays" (5 U.S.C. 7114(b)(3)). See also *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA No. 2, 5 FLRA 9 (1981). The Statute defines "collective bargaining" as a "mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement . . ." (5 U.S.C. 7103(a)(12)). I do not read into this statutory mandate a requirement that the parties must meet in a face-to-face encounter

merely to seek clarification of a proposal. This would violate the statutory mandate that its provisions "be interpreted in a manner consistent with the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). Face-to-face meetings are time-consuming, expensive, and often difficult to arrange. Seeking clarification of a proposal can be as effectively, and more efficiently done by means of a phone call, or a memorandum. This is what Respondent sought to do here.

Why the Union did not communicate the intent of proposals 4, 10, and 11 to Respondent, as requested, cannot be ascertained on the record. Respondent made the request on May 5, 1982 and did not implement the new audit system until October 1. All during this five-month period, the Union knew that Respondent planned to implement the new system on October 1, the beginning of the new appraisal period. See finding 17, above. Yet the only communications from the Union to Respondent concerned the proposals declared by Respondent to be non-negotiable, and a suggestion that Respondent defer implementation of the change until the Authority ruled on its negotiability petition.

On this record, I can conclude only that Respondent acted responsibly, and in accord with its statutory responsibilities concerning the Union's proposals on random sample of cases.

In view of this conclusion, it is unnecessary to reach other issues raised by Respondent.

Ultimate Findings and Order

The General Counsel has not established, by a preponderance of the evidence, that the alleged violations occurred.

Accordingly, the complaint should be, and it hereby is **DISMISSED**.

ISABELLE R. CAPPELLO Administrative Law Judge

Dated: February 6, 1984 Washington, D.C.

1. Section 7116 provides, in pertinent part, that:

(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; . . . (or)

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

2. By agreement of the General Counsel and Respondent, the following changes have been made by me in the Stipulation. The date "July 11," in paragraph 24, first line, is changed to "July 19." Also, Exhibits 17 and 18 are redesignated to indicate that Exhibit 17 is Mr. Collender's memorandum of July 19, and Exhibit 18 is Mr. Marinaro's memorandum of July 19. See footnote 3 to the General Counsel's brief, at page 6.

3. The following abbreviations will be used in this decision. "TR" refers to the transcript. Corrections to it are in the appendix to this decision, and are made pursuant to 5 CFR 2423.19(r).

Other abbreviations to be used herein are as follows: "Jt" refers to Joint Exhibit A. "Stip" refers to the Stipulation of Facts. "Exh." refers to the exhibits to the Stipulation, to be followed by a page or paragraph number, as appropriate. The page numbers are those written in the lower right-hand side of the exhibit. "GCB" refers to the brief of the General Counsel, and "RBr" to that of Respondent.

Unless otherwise noted, all dates are in 1982.

4. The subject of the memorandum refers to the Union's request of "6*1982." This is apparently a typographical error, as the reference is obviously to the Union's request of July 19, not June 19.

5. 5 CFR 2423.5 provides as follows:

Sec. 2423.5 Selection of the unfair labor practice procedure or the negotiability procedure.

Where a labor organization files an unfair labor practice charge pursuant to this part which involves a negotiability issue, and the labor organization also files pursuant to Part 2424 of this subchapter a

petition for review of the same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Authority, the appropriate Regional Director and all parties to both the unfair labor practice cases and the negotiability case. Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under Part 2424 of this subchapter.

6. This is the Statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

7. This section provides:

If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order --

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with

the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraph (A) through (C) of this paragraph or such other actions as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

8. Proposal 10 is:

If deficiency trends are indicated, the employee will be given a reasonable period of time to improve in the deficient area(s). After that time, the employee will be reviewed for improvement only in the deficient area(s). If no improvement is noted, the employee will be offered refresher training in the deficient area(s) by EDTS.

Proposal 11 is:

Should an employee conclude that he/she has a basic misunderstanding of the work in several areas that would preclude either self-improvement and/or improvement with the assistance of the technical assistant, the employee, upon request, will be offered formal re-training by EDTS.

See finding 15, above.

9. Section 7106 provides:

7106. Management rights.

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency --

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws --

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

(C) with respect to filling positions, to make selections for appointments from --

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

10. Proposals that fall within areas (1), "Definition of Errors" and (3), "Measuring Productivity," (see finding 15, above) are beyond the scope of the complaint filed in this action. See paragraph 7(b) to Exhibit 2, which names only "the random sample" as the subject involved.