

86 FLRR 1-1786

**U.S. Department of Housing and Urban  
Development and HUD, and Kansas City  
Region, Kansas City, MO, and American  
Federation of Government Employees,  
National Council of HUD Locals, Council  
222.**

**Federal Labor Relations Authority**

3-CA-30726-1; 37-CA-30523;  
37-CA-30537(1); 23 FLRA No. 63; 23  
FLRA 435

**September 25, 1986**

**Judge / Administrative Officer**

**Before: Calhoun, Chairman; Frazier, McKee,  
Members**

**Related Index Numbers**

**55.4 Interest Arbitration, Procedure**

**72.75 Employer Unfair Labor Practices,  
Miscellaneous Unfair Labor Practices, Refusal to  
Cooperate With Impasse Procedures/Decisions**

**74.32 Unfair Labor Practice Remedies, Types of  
Orders, Status Quo Ante**

**Case Summary**

THE AGENCY FAILED TO MAINTAIN THE STATUS QUO TO THE MAXIMUM EXTENT POSSIBLE, WHILE AN IMPASSE CONCERNING THE ISSUANCE OF RIF NOTICES WAS PENDING BEFORE THE FSIP. The issue of the consolidated case was whether the agency, by issuing notices of transfer of function and of RIF actions to unit employees while the Federal Service Impasses Panel had before it the parties' impasse regarding ground rules matters, violated Section 7116(a)(1) and (6). It was held that the agency was in violation. Once the parties had reached an impasse in their negotiations and one party timely invoked the service of the Panel, the *status quo* had to be maintained to the maximum extent possible, consistent with the necessary functioning of the agency in order to allow the Panel to take whatever action was deemed necessary. Since the agency failed to maintain that

*status quo*, it was in violation and was ordered to return to the status quo that existed before it issued the notices.

**Full Text**

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority on exceptions filed by the Respondents to the attached Decision of the Administrative Law Judge. The Charging Party (the Union) filed cross-exceptions and an opposition to the Respondent's exceptions. The issue is whether the Respondents, by issuing notices of transfer of function and of reduction-in-force (RIF) actions to unit employees while the Federal Service Impasses Panel (the Panel) had before it the parties' impasse regarding ground rules matters, violated sections 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background and the Judge's Conclusion

Following an announcement by the Respondents in early 1983 of a proposed major field reorganization, the Union requested to negotiate concerning the impact and implementation of the reorganization. The parties met, but reached an impasse on certain ground rules. The services of the Panel were invoked, and the Panel asserted jurisdiction. The Judge found, and it is not disputed, that the Respondents issued notices of transfer of function and of RIF actions to unit employees while the Panel had before it the parties' impasse. The Panel, among other things, ordered the Respondents to extend the effective dates of certain RIF notices.

The Judge found that the Respondents violated the Statute as alleged. In so finding, he rejected the Respondents' argument that the costs of maintaining employees in their then current job functions justified the position that their action in issuing the notices was consistent with the necessary functioning of the agency.

III. Positions of the Parties

The Respondent argue first that the Panel was without jurisdiction to resolve a dispute over negotiation ground rules, and that the Judge therefore should not have found a violation in the Respondents' alleged failure to cooperate in the Panel's procedures. They point to the fact that the Judge did not find them to have bargained in bad faith, and to the fact that they complied with the Panel's final order.

As to the Judge's remaining findings, the Respondents take issue with his rejection of their argument as to cost justification. The Respondents argued before the Judge that maintenance of the status quo would cost approximately \$30,000 a day, plus approximately \$300,000 "to rerun the RIF." The Respondents also assert that the daily costs could have continued for a very long time because "[i]f the agency refused to comply" with a Panel decision, the process of resolving the noncompliance "would normally take several years[.]" Respondents Brief in Support of Exceptions at 3.

The Union argues generally in support of the Judge's findings and conclusions, pointing particularly to the fact that lack of good faith bargaining was not alleged and arguing that costs alone do not relieve the Respondents of their statutory duty to bargain.

#### IV. Analysis

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA No. 61 (1985), issued subsequent to the Judge's decision in this case, the Authority determined that once parties have reached an impasse in their negotiations and one party timely invokes the services of the Federal Service Impasses Panel (the Panel), the status quo must be maintained to the maximum extent possible, that is, to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. The Authority further found that, while the foregoing policy would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the agency, an agency taking such

action would be required to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency if its actions were subsequently contested in an unfair labor practice proceeding.

We agree with the Respondents that costs are a legitimate factor in deciding what is necessary for the efficient functioning of an agency. We find that in the circumstances of this case, however, the Judge was correct in rejecting the Respondents' specific argument that costs alone justified their actions. While the amount of the daily costs is not disputed, the length of time the costs would have continued, conditioned on an assumption of noncompliance with an unfavorable Panel order, is purely speculative. The daily costs of retaining the employees subject to the RIF were to continue at least until the RIF notices became effective. The record contains evidence that daily costs would have continued until Congressional approval was received, and therefore those daily costs may not be attributable solely to the maintenance of the status quo while awaiting Panel action. In this case, the matter was resolved by the Panel's designee prior to the original effective dates of the transfers of function and the RIFs. The Respondents, in complying with the Panel's final order, extended the effective dates of the RIF notices, thus actually continuing the daily personnel costs and also incurring the costs of issuing new notices of some transfers of function. The costs of rerunning the transfers of function and RIF actions could have been totally avoided by compliance with the Respondents' statutory obligation in the first instance. We also note that, prior to impasse, the Respondents had offered to postpone the transfers and RIFs and that among the impasse items originally submitted to the Panel were (1) the completion of bargaining prior to implementation of any part of the reorganization, and (2) the content and scope of the notices, particularly the RIF notices, that were to be sent to unit employees.

Thus, in agreement with the Judge, we find that the Respondents failed to maintain the status quo to

the maximum extent possible, while an impasse concerning the issuance of those very notices was pending before the Panel. Accordingly, we agree with the Judge's conclusion that the Respondents thereby unlawfully failed to cooperate in impasse procedures by issuing the notices while the dispute was pending.\*1 We shall therefore order, as did the Judge, that the Respondents not repeat such unlawful action in the future. In view of the fact that the Respondents have complied with the Panel's final order, and in the absence of exceptions to the Judge's order, we find it unnecessary to require that the Respondents take further action to rerun RIFs or issue further new notices, or otherwise return to the status quo that existed prior to the unlawful action taken.

#### V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed,\*2 and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions, the opposition and cross-exceptions, and the entire record, and adopts the Judge's findings, conclusions and recommended Order. We therefore conclude that the Respondents, by failing to cooperate in impasse procedures by issuing notices of transfer of function and notices of RIF while the dispute was pending before the Panel, violated sections 7116(a)(1) and (6) of the Statute.

#### ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the U.S. Department of Housing and Urban Development and the U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri shall:

##### 1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse proceedings by issuing notices of transfer of function and/or notices of reduction-in-force actions while an

impasse concerning the impact and implementation of that reorganization is pending before the Federal Service Impasses Panel.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at their facilities wherever bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary, Department of Housing and Urban Development, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 25, 1986

Jerry L. Calhoun, Chairman  
Henry B. Frazier III, Member  
Jean McKee, Member  
FEDERAL LABOR RELATIONS AUTHORITY

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1. In so concluding, it is noted that the Authority has previously found that ground rules negotiations are a part of the negotiation process leading to an agreement. Department of Defense Dependents Schools, 14 FLRA 191 (1984).

2. The Judge denied the Union the right to cross-examine one of the Respondents' witnesses, solely on the ground that the General Counsel had declined to cross-examine. The Union excepted to this ruling. While we find that the Judge was in error in so

ruling, in view of the disposition of these cases, the Authority concludes that such ruling has resulted in no prejudice to the Charging Party.

NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER OF THE  
FEDERAL LABOR RELATIONS  
AUTHORITY

AND IN ORDER TO EFFECTUATE THE  
POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE  
UNITED STATES CODE

FEDERAL SERVICE  
LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES  
THAT:

WE WILL NOT fail or refuse to cooperate in impasse proceedings by issuing notices of transfer of function and/or notices of reduction-in-force actions while an impasse concerning the impact and implementation of that reorganization is pending before the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

\_\_\_\_\_ (Agency  
or Activity)

Dated: \_\_\_\_\_

By: \_\_\_\_\_

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., Room 700, P.O.

Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

#### DECISION

##### Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.,\*1 and the Final Rules and Regulations issued thereunder, 5 C.F.R. 2423.1, et seq., concerns whether Respondent's issuance of notice of transfer of function and specific notices of RIF after the National Council of HUD Locals #222, American Federation of Government Employees, AFL-CIO (hereinafter referred to as the "Union") had filed a request for the assistance of the Federal Service Impasses Panel (hereinafter referred to as "FSIP"), violated sections 16(a)(6) and (1) of the Statute. This case was initiated by a charge filed on August 2, 1983, in Case No. 7-CA-30523 which alleged violations of sections 16(a)(1), (5) and (8) of the Statute (G.C. Exh. 1(a)); a first amended charge in Case No. 7-CA-30523 filed on November 21, 1983, which alleged violations only of sections 16(a)(1) and (6); a charge filed on August 15, 1983, in Case No. 7-CA-30537(1) (G.C. Exh. 1(c) (and a first amended charge in Case No. 7-CA-30537(1) filed on November 21, 1983 (G.C. Exh. 1(g)), each charge in Case No. 7-CA-30537(1) alleging violation of sections 16(a)(1) and (6) of the Statute; Order Consolidating Case Nos. 7-CA-30523 and 7-CA-30537(1), Consolidated Complaint and Notice of Hearing, for a hearing at a date and location to be determined, in Case Nos. 7-CA-30523 and 7-CA-30537(1) issued on November 30, 1983 (G.C. Exh. 1(1)); by a Charge filed in Case No. 3-CA-3072-1 on August 31, 1983, alleging violation of sections 16(a)(1) and (6) of the Statute; a Complaint and Notice of Hearing in Case No. 3-CA-30726-1 issued on November 28, 1983, for a hearing on February 1, 1984 (G.C. Exh. 1(j)); by Order dated November 30, 1983 (G.C. Exh. 1(m)) Case Nos. 7-CA-30523 and 7-CA-30537(1) were transferred to Region III; by Order dated December

16, 1983, Case Nos. 7-CA-30523, redesignated as Case No. 37-CA-30523, and 7-CA-30537(1), redesignated as Case No. 37-CA-30537(1), were Consolidated with Case No. 3-CA-30726-1 for hearing on February 1, 1984, pursuant to which a hearing was duly held on February 1, 1984, in Washington, D.C. before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, March 2, 1984, was fixed as the date for filing posthearing briefs, which time was subsequently extended, upon timely motion of Respondent, to which the other parties did not object, for good cause shown, to April 2, 1984. Respondent, the Union and the General Counsel each timely filed an excellent brief on April 2, 1984, which have been carefully considered. Upon the basis of the entire record,\*2 I make the following findings and conclusions:

#### Findings

1. At all times material, the Union was the designated agent of the American Federation of Government Employees, AFL-CIO, the exclusive representative of two consolidated units consisting of approximately 9,000 of Respondent's nonprofessional and professional employees. At all times material, Respondent and the Union have been parties to a collective bargaining agreement (Jt. Exh. 1), which expired on November 10, 1982, but which the parties agree continued to govern (Tr. 7-8).

2. On February 22, 1983, Respondent announced a proposed major field reorganization (46 F.R. 7562 (1983), Res. Exh. 5) pursuant to which Respondent's field organization would be restructured and the field staff reduced.

3. The union requested negotiations concerning the impact and implementation of the proposed reorganization and reduction-in-force and on, or about, June 17, 1983, the parties reached agreement

on ground rules to be used to negotiate the impact and implementation (Tr. 37, 105) and the ground rules agreement was executed on June 27, 1983 (Res. Exh. 1, Tr. 37, 105). The following day, June 28, 1983, the parties began negotiations.

4. Prior to agreeing to ground rules, the union's chief negotiator, Ms. Jane E. Newberry, had, inter alia, on June 17, demanded that Respondent pay travel and per diem expenses for the Union negotiators. Mr. Melvin S. Weinstein, Respondent's chief negotiator had responded, in essence, that the expired contract provided that payment of per diem and travel expenses was discretionary with management and that Respondent would not agree to payment of the Union negotiators' travel and per diem expenses (Tr. 44). Mr. Newberry first stated that she had been instructed to go to impasse on that issue; however, Ms. Newberry subsequently called Mr. Weinstein and informed him that payment by management of travel and per diem for Union negotiators was "not at issue"; that the Union agreed to the ground rules; and that she would see him on June 28 (Tr. 108).

5. Negotiations on the impact and implementation of the field reorganization and RIF began at 9:00 a.m. on June 28, 1983 (Tr. 37, 108-109). Mr. John Lynn, a member of Respondent's negotiating team, gave a briefing on the reorganization in which he highlighted information set forth in the February 22, 1983, Federal Register notice (Res. Exh. 5) and pointed out changes that had been made (Tr. 38). At the conclusion of the briefing, the parties caucused, at the Union's request, until about 1:00 p.m. During the caucus, the Union delivered a letter to Mr. Weinstein in which it requested the following information.

"1. Current staffing plans/new approved staffing plans.

"2. Current out-stationed positions and proposed out-stationed positions.

"3. All proposed transfers of function.

"4. FPM Chapter 351, as amended.

"5. Cost-benefit analysis of the field reorganization as required under the Dole Amendment." (Res. Exh. 3).

6. Negotiations resumed after lunch (Tr. 60) and the Union's request for information was discussed. Mr. Weinstein stated that Respondent had, in fact, already furnished the Union with current staffing data, proposed staffing plans (see, for example, Res. Exh. 2, Tr. 58), proposed out-stationed positions, FPM Chapter 351, and the cost benefit analysis required by the Dole Amendment (Tr. 113-115); however, he stated that Respondent could not provide the final, approved staffing plans because they were not yet available. Mr. Weinstein stated, however, that the proposed staffing plans should be 90-95% of what the final approved plans will reflect and that the only changes expected were in supervisory positions (Tr. 113). Mr. Weinstein suggested that, since one of the major things the Union was looking for was final approved staffing plans, the negotiations be recessed until the final approved staffing plans were available. The Union responded with "AFGE proposal #1" (G.C. Exh. 2) which provided, in part, as follows:

"1. . . . negotiations . . . be deferred until such time as the Employer furnishes the . . . information as outlined in UNION's letter of 6/28/83 . . . .

"2. Additionally, the negotiations shall be delayed for two weeks . . . .

"3. Employer agrees to pay travel, per diem and related expenses . . . .

"4. Employer agreed that implementation of any part of this reorganization will not take place without first fulfilling its obligation to bargain including the furnishing of requested information." (G.C. Exh. 2).

Thereafter, Respondent submitted a handwritten counter proposal, the first paragraph of which read: "Negotiations on the proposed field reorganization will be deferred until the employer furnish the following," and, at Respondent's request, the Union specified the items of information that it desired which Mr. Weinstein entered in the counter proposal as la. - e. (Tr. 117-118). The handwritten counter

proposal was then typed and given to the Union (Tr. 118). "Management's Counter Proposal - 6/28/83" (G.C. Exh. 3), provided as follows:

"1. Negotiations on the proposed Field reorganization will be deferred until the Employer furnish the following:

a. Current staffing plans to include PFT's and Staff years by account by Region by Office;

b. New approved staffing plans;

c. Proposed out-stationed positions by Region by Office;

d. All proposed functional transfers designated by physical or administrative moves; and

e. Copies of response(s) to Congress reflecting management's compliance with DOLE.

2. Negotiations shall be delayed 48 hours after the final documents are sent to Jane Newberry, Executive Vice President for Council.

3. Employer agrees to pay travel and per diem for . . . [four employees] NTE three workdays for negotiations. Per diem will not include weekends.

4. Employer agrees to meet its obligations under law, rules, regulations and contract with the Union prior to implementing the reorganization." (G.C. Exh. 3).

Upon receipt of Respondent's counter proposal, the Union gave Mr. Weinstein copies of two unfair labor practice charges and negotiations were adjourned for the day (Tr. 118).

7. A general RIF notice had been issued on June 9, 1983, which was subsequently rescinded. On June 28, 1983, Respondent "shared" with the Union a preliminary letter prior to the issuance of the general RIF notice (Res. Exh. 8, Tr. 97) and this "preliminary letter was issued to all HUD employees on, or about, June 29, 1983 (Tr. 97). The general RIF notice was dated June 28, 1983 (Jt. Exh. 3, Attachment); was shown to the Union "on or about the same day" it was actually issued which was, apparently, June 30, 1983 (Tr. 172).

8. Negotiations reconvened at 9:00 a.m. on June

29, 1983. Following a caucus, the Union submitted "AFGE Proposal #2" which provided, in part, as follows:

"1. (same as Respondent's Counterproposal - 6/28/83)

"2. Negotiations shall be delayed for 10 working days after the final documents are received by all UNION designated negotiators.

"3. Employer agrees to pay travel, per diem, and related travel expenses for UNION designated negotiators . . . UNION . . . negotiators shall be on official time and in travel status for negotiations and up to three working days preparation time prior to the resumption of bargaining.

"4. [Essentially the same as Respondent's Counterproposal 6/28/83].

"5. Employer shall not issue a General Notice of Reduction-in-Force until such time as negotiations with the UNION have been completed.

"6. Employer agrees to include the following in any General Notice of Reduction-in-Force:

'a. Notice to employees of the right to UNION representation.

'b. Written acknowledgment form for employee to request or decline UNION representation by signature.

'c. A statement that Employer has agreed with UNION to a minimum General Notice period of ninety days prior to the effective date of any Reduction-in-Force.'

"7. The parties to this agreement agree that any dispute over the application of this agreement shall be referred directly to arbitration . . . the prevailing party shall not be held liable for any expenses related to arbitration." (G.C. Exh. 4).

Subsequently, at about 4:30 p.m., Respondent gave the Union "Management's Counterproposal #2 - 6/29/83" which provided, in part, as follows:

"1. (Same as Respondent's Counterproposal - 6/28/83).

"2. Management will provide the information in

1 above to the union team of Jane Newberry, Dave Ronaldi, Sharon Turner, Ernestine Napue and Norris Crenshaw.

"3. Upon receipt of the above stated information, the union team will be allowed two consecutive workdays of official time at their duty stations to analyze the information. The Team will then be paid travel and per diem for two workdays to Washington, D.C. to prepare for negotiations. On the third workday in Washington, the Union team will present their proposals . . . . The negotiations shall be limited to three workdays for which the union will be paid travel and per diem. Per diem and travel will not apply for Norris Crenshaw.

"4. (Same as Respondent's Counterproposal - 6/28/83)."

Negotiations were adjourned for the day without discussion of Respondent's second counterproposal. During the day, the Union had contacted the Federal Mediation and Conciliation Service and requested the services of a mediator and a Mr. Emmett De Deyn, a FMCS mediator, had agreed to be present the following day.

9. Mr. De Deyn met with parties on June 30, 1983, and at his request the Union prepared and submitted a counter proposal to Respondent's second counterproposal. "AFGE Proposal #3," provided in part, as follows:

"1. (Same as Respondent's CounterProposal - 6/28/83).

"2. Employer shall provide the information in #1 above to five members of the UNION team designated by the Council President.

"3. The UNION team will be paid by Employer for travel, per diem and related travel expenses for five days in Washington, D.C. to prepare for negotiations. On the following day in Washington, the UNION team shall present their proposals . . . negotiations shall be limited to ten days for which the UNION team shall be paid travel, per diem and related expenses. Should negotiations continue beyond ten days the UNION will continue to be on

official time without entitlement to per diem.

"4. The parties shall not be bound by provisions #2 of the 6/27/83 ground rules."\*3

(5, 6, 7 and 8 same as Paragraphs 4, 5, 6 and 7 of AFGE Proposal #2.) (G.C. Exh. 6).

The parties then discussed each section of AFGE Proposal #3. Mr. Weinstein testified that Respondent would agree to Sections 1 and 2 but would not agree to Sections 4, 5, 6 and 7(c) (Tr. 133-137). With respect to Section 3, Mr. Weinstein stated that Respondent would agree to the concept of payment of travel and per diem but objected to the amount (Tr. 134). With respect to Section 7(a) and (b), Mr. Weinstein was agreeable to the concept but requested the specific language that the Union wanted to include in the General RIF notice which the Union did not provide (Tr. 135-136). Mr. Weinstein stated that Respondent would agree to Section 8, arbitration, if the Union agreed to insert a clause expressly waiving the applicability of the negotiated procedure contained in the expired agreement (Tr. 137).

Mr. De Deyn asked Respondent to prepare a counter proposal to AFGE Proposal #3 which Respondent did. "Management Proposal #3 - 6/30/83" provided as follows:

"The following options are presented to the Union for their choice as to a course of action:

'1. Proceed to negotiate the impact and implementation of the regional reorganization, or

'2. Recess the present negotiations and provide the desired information to the Union. Subsequently have the Union return to Washington, D.C. for negotiations in accordance with the June 27, 1983 Ground Rules.'"(G.C. Exh. 7).

Mr. Weinstein stated that the Union found this proposal unacceptable, because, as Ms. Newberry stated, ". . . it appeared to me that management pulled everything off the table they had previously given us and there was nowhere for me to try to negotiate with them cause they took all their proposals off the table." (Tr. 49). Mr. Weinstein conceded that "In our proposal of 6/30/83, we were no longer offered per

diem and travel." (Tr. 144). Although there is a dispute whether Mr. De Deyn stated that the parties were at impasse and that they should go to the FSIP (compare, Newberry Tr. 49, 73 and Weinstein Tr. 139-140), there is no dispute that Ms. Newberry asked Mr. Weinstein if he would like to "go on a joint submission" to FSIP (Tr. 49, 139) and Mr. Weinstein said he would not (Tr. 49). The Union served two more unfair labor practice charges and left (Tr. 140). No further meetings were requested (Tr. 140).

10. On July 6, 1983, the Union filed a request with FSIP for assistance (Jt. Exh. 3).

11. On July 18, 1983, Respondent issued notices to transfer of function (Consolidated Complaint, Pars. 8(a) and 9(a) (G.C. Exh. 1(1)); Answer (G.C. Exh. 1(q); G.C. Exh. 8)).

12. By letter dated July 28, 1983, Respondent advised FSIP that it rejected the Union's proposal of July 22 whereby the Union would withdraw their request for FSIP assistance in return for Respondent's agreeing to allow one day of preparation for negotiations, "Capping" negotiations at five days, and withdrawing the specific RIF notices [actually, transfer of function notices] issued in Region VII (Res. Exh. 11).

13. On, or about, August 2 and 3, 1983, Mr. Weinstein gave the Union negotiating team the final approved staffing plans (Tr. 85, 86; Res. Exh. 4).

14. On August 4, 1983, Respondent issued about 1565 specific RIF notices\*4 to its employees, 758 of whom were bargaining unit employees.

15. On August 4, 1983, FSIP asserted jurisdiction and referred "all issues in dispute" to FSIP Chairman Robert G. Howlett for mediation-arbitration.

16. At 9:00 a.m. on August 22, 1983, the parties met with Chairman Howlett. Mr. Harold W. Henry, Acting Deputy Director of Personnel and Respondent's spokesman, asserted that the parties were not at impasse, because the Union had never presented any "substantive" bargaining proposals and questioned the jurisdiction of FSIP. (Tr. 159 - 160)

Mr. Henry stated that the Union stated that ". . . they were there because management had refused to give it the information that it needed to develop substantive negotiating proposals dealing with the implementation of the reorganization." (Tr. 159 - 160). Mr. Henry stated that Chairman Howlett stated that ". . . he was serving as a mediator, that he was not interested on (sic) what took place prior to that date [August 22], that he was more interested in finding out what the Parties' positions were, and to see if he could not get the Parties to come to some agreement." (Tr. 161). After Mr. Henry, at Chairman Howlett's request, had explained the field reorganization, Chairman Howlett asked the Union if they had any bargaining proposals and the Union said they did not and requested two weeks to prepare them (Tr. 162). The Chairman gave the Union two days, until August 25, to develop their proposals (Tr. 162).

17. On August 25, 1983, the meetings with Chairman Howlett reconvened and the Union gave the Chairman its proposals (Jt. Exh. 5). Mr. Henry again ". . . raised the issue of whether or not he [Chairman Howlett] had jurisdiction, because these proposals had never been presented to management prior to that date; that had those same proposals been put on the negotiating table on June the 28, it was highly unlikely that we would be before the Impasses Panel; that most of those proposals simply could have been submitted on the 28th of June, without regard to the information that the Union was insisting on, that supposedly brought us before that impasses panel." (Tr. 164). Mr. Henry stated that ". . . the Chairman again reminded me that he was not interested on (sic) fault finding, that there were simply other avenues available for management to pursue or to use, if we wanted to find out who was at fault, that he was more concerned for the Parties trying to reach an agreement on those proposals and, therefore, asked me to go through each proposal, item by item, and state the management position, which I did." (Tr. 164). Thereafter, the session broke up and for the rest of the day Chairman Howlett conducted "shuttle negotiations" with the parties separately (Tr. 164 -

165).

18. The parties reconvened as a group on the morning of August 26. Chairman Howlett ". . . explained pretty much to the Parties where he was coming out on each of those proposals" (Tr. 165); Respondent agreed to some of the Union's proposals but did not agree to others (Tr. 165). Mr. Henry stated that Chairman Howlett then stated that, as there was not an agreement, ". . . he was going to put on his arbitrator's hat and arbitrate and issue an award, which he did." (Tr. 165).

19. Chairman Howlett's "Arbitrator's Opinion and Decision" (Jt. Exh. 6; 83 FSIP 115) was issued by the Executive Director of FSIP on September 2, 1983. It is conceded that Respondent complied with that decision in its entirety (Tr. 165, 153, 84-85).

20. The first, of 14, issues addressed in the decision was:

"1. Notification of Employees.

The Union requests that the general and specific reduction-in-force notices be withdrawn and that new ones be issued. It contends that the failure of the Agency to bargain with it prior to sending out the notices requires that such action be taken . . . ." (Jt. Exh. 6, Arbitrator's Opinion and Decision, pp. 2-3).

Chairman Howlett addressed each of the Union's 14 proposals and specifically ordered that as to employees assigned to position outside their commuting areas who had been directed to move to their new position on September 12, 1983,

". . . the notice period shall be extended to a date no later than November 7, 1983, or an earlier date if requested by the employee." (Jt. Exh. 6, Arbitrator's Opinion and Decision, p. 8).

#### Conclusions

The Union on July 6, 1983, filed a request with FSIP for assistance and on August 4, 1983, FSIP asserted jurisdiction. On July 18, 1983, Respondent issued notices of transfer of function and on August 4, 1983, Respondent issued specific RIF notices to some 758 employees in the bargaining unit (1565 specific

RIF notices were issued in total). Implementation of the reorganization by the issuance of notices of transfer of function\*5 and the specific notices of RIF while the dispute was pending before the FSIP, violated the Statute inasmuch as the law requires that parties maintain the status quo while a matter at impasse is pending before the FSIP. U.S. Army Corps of Engineers, Philadelphia District, *supra*; Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, A/SLMR No. 912, 7 A/SLMR 859 (1977); U.S. Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA No. 39, 5 FLRA 288 (1981); National Aeronautics and Space Administration, Headquarters, Washington, D.C., 12 FLRA No. 94, 12 FLRA 480 (1983). In concluding that Respondent violated section 16(a)(6) of the Statute, and derivatively section 16(a)(1) of the Statute, by issuing notices of transfer of function and the specific notices of RIF while the dispute was pending before the FSIP, and that a remedial order should issue, I have given long and thoughtful consideration to the fact that the FSIP took action on the notices issued by Respondent: *inter alia*, directed that a letter, to be prepared by the Union, be transmitted to the 758 employees in the bargaining unit, and that the notice period for employees being moved outside the commuting area be extended to November 7, 1983 (from September 12, 1983) unless the employee requests an earlier date; and the further fact that Respondent has fully complied with the decision of the FSIP. Because the FSIP took action with respect to the notices issued by Respondent and Respondent has complied with the decision of the FSIP, a compelling argument can be made that it would not effectuate the purposes and policies of the statute to find as an unfair labor practice that the same notices, as to which the FSIP has already acted, nevertheless violated the Statute. *Cf.*, Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA No. 95, 13 FLRA 571 (1984). I have, with considerable reluctance, rejected this argument for the reason that, although the FSIP acted with respect to the notices, it was Respondent's

implementation of the reorganization, while an impasse was pending before the FSIP, as to which the FSIP asserted jurisdiction, that impelled the FSIP to consider the substantive aspects of the impact and implementation of the reorganization, as to which there had been no negotiations, in light of Respondent's imposed time sequence. That is, but for Respondent's change of the status quo while an impasse matter was pending before the FSIP, the substantive issues of impact and implementation would not have been before the FSIP, the FSIP would have had jurisdiction only as to the issues at impasse,\*6 essentially in the nature of ground rules. By issuing the notices when, and as it did, Respondent interfered with the processes of the FSIP and interfered with and restrained the Union in the exercise of its statutory rights. The relief requested, an appropriate notice, will effectuate the purposes and policies of the Statute by protecting the integrity of the FSIP's processes.

In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976), the Assistant Secretary stated, in part, as follows:

" . . . should one of the parties involved in an impasse . . . request the services of the Panel, I believe that it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in conditions of employment can be effectuated." (6 A/SLMR at 341).

In Internal Revenue Service, Ogden Service Center, et al., 6 FLRC 310 (1978) the Counsel stated, in part, that in denying review of U.S. Army Corps of Engineers, Philadelphia District, *supra*, 5 FLRC 177 (1977), it,

". . . did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes

have run their course." (6 FLRC at 314, n. 3).

In Ogden Service Center, supra, the Council held, in part, that,

". . . once the Panel's processes are invoked . . . the parties must adhere to established personnel policies and practices . . . to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency." (6 FLRC at 322; see, also, 6 FLRC at 320 and n. 18).

While in substantial agreement with the Assistant Secretary (6 FLRA at 320), the Council adopted, "to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency" rather than the Assistant Secretary's "absent an overriding exigency," qualification. The Authority has not, so far as I am aware, specifically addressed this question. There is no doubt that the Council quite deliberately adopted language different than that employed by the Assistant Secretary from which I infer an even more stringent qualification, i.e., as the Council stated, "to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency," rather than "overriding exigency" as stated by the Assistant Secretary. Although Respondent showed substantial daily cost for salaries, Respondent showed no justification whatever for its failure to give the Union reasonable notice and opportunity to negotiate on impact and implementation prior to issuing the notices of transfer of function and the specific RIF notices to employees. Nor, having issued the notices unilaterally, does cost alone establish either that Respondent could not have maintained the status quo "to the extent consistent with the necessary functioning of the agency" or that cost alone was "an overriding exigency" such as would have justified Respondent not maintaining the status quo while a matter at impasse was pending before the FSIP.

I have considered Respondent's other arguments and find them without merit. The Complaints allege no refusal to bargain in good faith, either by the Union or by Respondent, and whether either the Union, or Respondent, or both, bargained in bad faith

is neither material nor relevant to this proceeding. The absence of good faith bargaining is no bar to invocation of the services of the FSIP. section 19(b) of the Statute provides, in part, only that,

"(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service . . . fail to resolve a negotiation impasse --

"(1) either party may request the Federal Service Impasses Panel to consider the matter . . . ." (5 U.S.C. 7119(b)(1))."

The Regulations of the FSIP, as noted in n. 6 above, define "impasse" as ". . . that point in the negotiations of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation . . . ." (5 C.F.R. 2470.2(e)), and, as noted above, the FSIP has broad discretion as how to resolve any particular negotiating impasse, the only limitation on its jurisdiction being that "the parties are unable to reach agreement . . . by direct negotiations and by the use of mediation . . . ." Moreover, FSIP does not decide questions of good faith bargaining, such jurisdiction being the exclusive province of the Authority pursuant to section 18 of the Statute. Consequently, in this proceeding, which concerns violation of section 16(a)(6) of the Statute by failure to cooperate in impasse procedures, whether any party bargained in bad faith prior to the FSIP's assertion of jurisdiction is immaterial.

Having found that Respondent violated sections 16(a)(6) and (1) of the Statute by its issuance of notices of transfer of function and notices of RIF while the dispute was pending before the FSIP, it is recommended that the Authority issue the following:

#### ORDER

Pursuant to section 18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7118, and Section 2423.29 of the Regulations, 5 C.F.R. 2423.29, it is hereby ordered that the U.S. Department of Housing and Urban Development shall:

1. Cease and desist from:

a. Failing and refusing to cooperate in impasse procedures by issuing notices of transfer of function and/or specific notices of RIF while a negotiating impasse concerning the impact and implementation of the reorganization is pending before the Federal Service Impasses Panel.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

a. Post at its facilities wherever bargaining unit employees are located,\*7 copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Secretary, Department of Housing and Urban Development, or his designee, and shall be posted and maintained for 60 consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

b. Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY Administrative Law Judge

Dated: September 24, 1984 Washington, DC

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1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., section 7116(a)(6) will be referred to, simply, as "section 16(a)(6)."

2. Respondent filed a Motion to Correct Transcript, to which no opposition was filed, and said motion is granted except as noted hereinafter: a) the

requested change on p. 18, 1.8 to change "evidence" to "evident" is denied; b) p. 18, 1. 17 to change "controls" to controlled" is denied and on my own motion the word "controls" is deleted; c) p. 138, 1. 25, to correct spelling is denied as the name does not appear at 1. 25; and on my own motion the same name at p. 139, 1. 25 is corrected from "DeDyn" to "De Deyn"; p. 20, 1. 3 the second correction, "insert 'the' after 'one' is denied, and on my own motion the word "one" is deleted and the word "the" is inserted. The transcript is hereby corrected as fully set forth in the Appendix hereto.

3. Section 2 of the Ground Rules agreement (Res. Exh. 1) provided for the daily schedule for negotiations. As Mr. Weinstein stated, this was a new item (Tr. 134) and Mr. Weinstein stated that the intent was not made clear (Tr. 134).

4. As far as separations, there were approximately 200 (Tr. 148), the balance involved transfers, reassignments, demotions, etc. (Tr. 148).

5. Where the FSIP asserts jurisdiction, here on August 4, 1983, the date of communication of the request to Respondent, here on, or about, July 6, 1983, was the beginning date that the matter was pending before the FSIP. This is consistent with U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 676, 6 A/SLMR 339 (1976) and effectuates the purpose and intent of sections 19(b)(1) and (5) of the Statute.

6. The record is clear that on July 6, 1983, when the Union requested the assistance of the FSIP, the parties were in disagreement over per diem, travel expenses, and time for preparation for negotiations and for negotiations. As I stated at the hearing, I will not go behind the FSIP's assertion of jurisdiction where, as here, it clearly appears that the parties have reached a deadlock in negotiations, albeit on essentially "ground rules," without reaching substantive negotiations on impact and implementation (the single exception had been the Union's proposal on arbitration to which Respondent agreed, provided only that the Union agree that that provision govern rather than the procedure under the

parties' expired agreement). The Statute gives the FSIP wide discretion to decide, where the parties have negotiated and remain at loggerheads, whether to decline jurisdiction because it determined that voluntary efforts to reach settlement had not been exhausted, National Aeronautics and Space Administration, Washington, D.C., Case No. 80 FSIP 24 (1980); Office of Personnel Management, Washington, D.C., Case No. 80 FSIP 72 (1980); to assert jurisdiction and order negotiations, Federal Deposit Insurance Corporation, Headquarters Office, Washington, D.C., Case No. 83 FSIP 63 (1983); or to resolve the impasse, Department of the Navy, Naval Air Propulsion Center, Trenton, New Jersey, Case No. 83 FSIP 93 (1983). Although orders of the FSIP are not subject to direct review, Council of Prison Locals v. Ronald Brewer, 735 F.2d 1497 (D.C. Cir. 1984), this does not mean that its actions are immune from review. To the contrary, orders of the FSIP are subject to review in unfair labor practice proceedings. By way of example, the FSIP's Regulations define "impasse" as follows:

"(e) The term 'impasse' means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." (5 C.F.R. 2470.2(e))

Quite obviously, the parties never negotiated over any substantive proposal concerning the impact and implementation of the reorganization, except the Union's proposal on arbitration as to which there was no apparent disagreement, and, never having negotiated, certainly had never reached a point at which they were unable to reach agreement. By the definition of "impasse" in its Regulations there was not "impasse" except as to the essentially (sic) ground rules disagreement, Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33, 9 FLRA 229, 241 (1982), and it is highly questionable that Chairman Howlett had jurisdiction to consider any other issue. If he had

jurisdiction over matters as to which there had been no negotiations and no impasse, on some theory of ancillary or pending jurisdiction, it was only because of Respondent's issuance of the notices of transfer of function and specific notices of RIF. While Chairman Howlett may or may not have had jurisdiction over the substantive issues, as to which there had been no negotiations, he recognized that Respondent's implementation of the reorganization by issuance of the notices of transfer of function and RIF cried for action. That he might have ordered the notices withdrawn and the parties to negotiate, rather than proceeding as he did, is beside the point as no party has challenged the procedure he followed (Respondent's challenge to jurisdiction was without basis as, clearly, the FSIP had jurisdiction as to the matters on which the parties had bargained and were at loggerheads.) To the contrary, the Union submitted proposals, Chairman Howlett conducted "shuttle negotiations," Chairman Howlett resolved the dispute by his Arbitrator's decision, and Respondent fully complied with that decision. Nor, indeed, is the propriety of that decision questioned or in issue.

Suffice it to say, in a proper case jurisdiction to the FSIP is subject to review in an unfair labor practice proceeding and, while the FSIP has wide discretion, it cannot with impunity disregard its own Regulations and the Statute.

7. The notices of transfer of function were issued in Respondent's Kansas City Region (Des Moines, Iowa, Service Office and Omaha, Nebraska Area Office); but the reorganization was nationwide and the notices of RIF were issued nationwide. Accordingly, the posting is ordered nationwide.

NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER OF THE  
FEDERAL LABOR RELATIONS  
AUTHORITY  
AND IN ORDER TO EFFECTUATE THE  
POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE  
UNITED STATES LABOR-MANAGEMENT  
RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES  
THAT:

WE WILL NOT fail or refuse to cooperate in  
impasse procedures by issuing notices of transfer of  
function and/or specific notices of RIF while a  
negotiating impasse concerning the impact and  
implementation of a reorganization is pending before  
the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner,  
interfere with, restrain, or coerce employees in the  
exercise of their rights assured by Federal Service  
Labor-Management Relations Statute.

\_\_\_\_\_ (Agency  
or Activity)

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for 60  
consecutive days from the date of posting and must  
not be altered, defaced or covered by any other  
material.

If employees have any questions concerning this  
Notice or compliance with any of its provisions, they  
may communicate with the Regional Director of the  
Federal Labor Relations Authority, Region III, whose  
address is: 1111 - 18th Street, NW., Suite 700, P.O.  
Box 33758, Washington, DC 20033-0758 and whose  
telephone number is: (202) 653-8507.