

84 FLRR 1-1701

**U.S. Customs Service and NTEU
Federal Labor Relations Authority
3-CA-439; 16 FLRA No. 31; 16 FLRA 198
October 3, 1984**

Judge / Administrative Officer

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

Withdrawn, 84-1589 (D.C. Cir. closed 12/11/84)

Related Index Numbers

**55.33 Interest Arbitration, Duty to Proceed,
Refusal to Submit**

**72.586 Employer Unfair Labor Practices, Refusal
to Bargain in Good Faith, Defenses to Refusal to
Bargain Charge, Impasse**

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

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

Case Summary

THE UNION WAITED TOO LONG TO INVOKE FSIP SERVICES. The parties bargained to impasse over a Manual Supplement regarding overtime assignment procedures on 06/07/79. The employer informed the union that it was going to implement its last proposal as soon as possible. The union announced its intention to invoke the assistance of the FSIP, but gave no date. On 06/12 the employer notified the union by phone that the Manual Supplement would be issued at noon that day. The union representative responded: "I think it's improper, if not illegal for you to implement it while we are going to the Panel." The union had sent the employer notice of its intention to invoke Panel services, but it did not arrive until the Supplement had been issued. It actually invoked Panel services on 06/13/79. Since the union failed to inform the employer during the telephone conversation that its filing with the Panel

was imminent and since it delayed a day in making that filing, the Authority found that the union had been given a reasonable time, six days, to invoke FSIP jurisdiction and had not done so. The complaint was dismissed.

Full Text

DECISION AND ORDER

The Administrative Law Judge issued his 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 in its entirety. Exceptions to the Judge's Decision were filed by the General Counsel and the Charging Party.*1 The Respondent filed an opposition to the exceptions of the General Counsel and the Charging Party, and filed cross-exceptions to the Judge's Decision.*2

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 recommendation that the complaint be dismissed, for the reasons set forth below.

The complaint alleges that the Respondent's issuance of a Manual Supplement concerning procedures for the management of overtime assignments performed by Customs Inspectors violated sections 7116(a)(1), (5) and (6) of the Statute.*3 The record shows that the parties reached impasse on June 7, 1979, during impact and implementation negotiations concerning the Manual Supplement. The Respondent notified the Union that it would implement its last proposal as soon as possible, subject only to whatever delay might be caused by certain ministerial actions, such as having the Manual Supplement retyped in final form. The Union announced that it intended to invoke the

services of the Federal Service Impasses Panel (the Panel) concerning the impasse in negotiations, but gave no specific date as to when it would file such request. A letter dated June 11 was sent to the Respondent advising that the Union intended to file with the Panel for assistance as soon as possible. The Respondent, however, did not receive that letter until sometime after June 12. On the morning of June 12, the Respondent gave the Union notice over the telephone that the Commissioner was expected to sign the Manual Supplement by noon and that the Manual Supplement would be issued that day. The Authority notes particularly that, during this conversation, the Union's representative neither made any reference to the Union's letter dated June 11 indicating an intent to promptly file with the Panel, nor otherwise stated that the Union's submission to the Panel was nearing completion and that filing was imminent. Rather, the Union's representative merely stated that, "I think it's improper, if not illegal for you to implement it while we are going to the Panel." The Respondent in fact issued the Manual Supplement on June 12. The Union delivered its request for assistance to the Panel in the afternoon of the following day.

The Authority finds that the Union had a reasonable opportunity to invoke the services of the Panel after the parties reached impasse in their negotiations on June 7, and after receiving the Respondent's notice of its intent to implement its last proposal as soon as possible, and that, while the Respondent made clear to the Union on June 12 that the Manual Supplement would be issued that day, and did so issue it, the Union failed to advise the Respondent that its filing with the Panel was imminent. Moreover, while it could have done so immediately, the Union nevertheless delayed filing its request with the Panel until the afternoon of the following day. The Authority thus finds that the Respondent in these circumstances did not act unlawfully in implementing the Manual Supplement six days after the parties had reached impasse. Accordingly, we shall dismiss the sections 7116(a)(1) and (5) allegations of the complaint.*4 Further, as the

Panel declined to exercise jurisdiction over the matter in question, the Authority finds that the allegations in the complaint do not form the basis for finding a violation of section 7116(a)(6) of the Statute, and we shall therefore also dismiss the allegations of the complaint in this regard.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-439 be, and it hereby is, dismissed.

Issued, Washington, D.C., October 3, 1984

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

1. Among other matters, the Charging Party excepted to the Judge's refusal to consider its "Memorandum of Law." The Judge's action in this regard was correct, as the Memorandum was filed after the period set by the Judge (in accordance with section 2423.25 of the Authority's Rules and Regulations) for filing timely post-hearing briefs had passed.

2. The General Counsel filed a motion to strike the Respondent's cross-exceptions. However, the Authority granted an extension of time to the Respondent to file its opposition and cross-exceptions, and the Respondent's cross-exceptions were filed within the time allotted by the Authority. Accordingly, the General Counsel's motion to strike is denied.

3. Sections 7116(a)(1), (5) and (6) provides:

Sec. 7116. Unfair labor practices

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

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

.....

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

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter[.]

4. See U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 288 (1981) and Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA No. 32 (1984), also issued this date.

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. Sec. 7101, et seq.,*1 and the Final Rules and Regulations issued thereunder, 5 C.F.R. Sec. 2423.1, et. Seq., was initiated by a charge filed on August 23, 1979 (G.C. Exh. 1(a)), which alleged violation of Sections 16(a)(1), (5), (6) and (8) of the Statute; the Complaint, issued August 27, 1980, alleged violations of Sections 16(a)(1), (5) and (6) of the Statute. Pursuant to the Notice of Hearing, a hearing was duly held before the undersigned on November 5, 1980, in Washington, D.C.

All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which right each party waived. At the close of the hearing, December 5, 1980, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of Respondent joined in by the other party, for good cause shown to January 9, 1981. Each party timely mailed an excellent brief, received on or before January 13, 1981, which have been carefully considered. On May 21, 1981, Counsel for Charging Party filed a document entitled "Memorandum of Law" to which Counsel for General Counsel filed a Response, dated May 29, 1981, and received by this office on June 1, 1981. As no provision was made for the submission of any further

post-hearing memoranda, Charging Party's "Memorandum of Law" of May 21, 1981, has not been considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions.

Findings

1. The National Treasury Employees Union (hereinafter "NTEU") since 1978 has been the recognized exclusive representative of two units of Customs employees, one consisting of all professional employees assigned to the Office of Regulations and Rulings, the Headquarters Office, and to Region II and IX of the Customs Service; and the other consisting, inter alia, of all nonprofessional employees assigned to the Headquarters Office and to Regions I through IX of the Customs Service. Included are some 4,500 Customs Inspectors.

2. This case concerns overtime of the Customs Inspectors. There are five basic types of Customs overtime, "generally referred to as 'inspectional overtime', because their major purpose is to provide overtime compensation for Customs inspectors" (Res. Exh. 10) as follows: 1911 Act (19 U.S.C. Sec. 267); 1944 Act (19 U.S.C. Sec. 1451); Airport and Airway Development Act Amendments of 1976 (P.L. 94-353); F.E.P.A. Overtime (5 U.S.C. Sections 5542, 5546); and Administrative Uncontrollable Overtime (5 U.S.C. Sec. 5545(c)(2)). However, the 1911 Act, under which the Customs Service is reimbursed by the parties in interest for overtime inspectional services performed on Sundays and holidays as well as night duty between 5 p.m. and 8 a.m. if not part of regular duty hours, is the principal concern herein.

3. On February 12, 1979, Respondent delivered to Mr. John Bufe, Associate General Counsel, NTEU, its proposed Manual Supplement entitled "Management of Inspectional Overtime", which it stated would be implemented March 13, 1979 (Res. Exh. 1).

4. The proposed Manual Supplement was not, of course, the first document to address the subject of

inspectional overtime. The first such document, referred to by Respondent as "INS-2", was issued in the 1950's and was the basic procedural policy guidance for management of inspectional overtime, although entitled "Assignment of Personnel to Inspectional Activities", which as amended, most recently in 1978, was the policy and procedural guide regarding the assignment of personnel to inspectional activities. (Res. Exh. 1; Tr. 129-130).

5. The proposed Manual Supplement provided, inter alia, for the establishment of tours of duty, not on overtime, at seaports and at airports (Res. Exh. 2, Par. 5, 6 and 7). Although substantially more overtime accrues under the 1911 Act, and, accordingly, there was substantially greater impact on 1911 overtime, the proposals also, specifically, were directed at recurring assigned FEPA overtime. While the proposed Manual Supplement provided for tours of duty, not on overtime, it did not establish any such tours of duty or shifts.

6. Mr. Bufo recognized the far-reaching effect of the proposed changes on overtime of Inspectors, which under optimum circumstances Respondent had estimated might involve as much as \$10,000,000.00 per year (Res. Exh. 10, p. 9) and promptly met with NTEU National President, Mr. Vincent L. Connery, and with NTEU General Counsel, Mr. Robert M. Tobias, to discuss the proposal.

7. During February and March, 1979, Messrs. Connery and Bufo met with Mr. Robert E. Chasen, Commissioner of Customs, and exchanged correspondence concerning Respondent's proposal. Mr. Chasen agreed to defer the date of implementation (March 13, 1979) pending receipt of NTEU's comments which were to be submitted by March 13, and Mr. Connery did respond by letter dated March 13, 1979 (Res. Exh. 9).

8. On February 21, 1979, Mr. Bufo delivered to Mr. Geoffrey Spinks, Respondent's Director of Labor Relations, a written request to bargain over the proposed Manual Supplement (Res. Exh. 4).^{*2}

9. On April 16, 1979, NTEU's proposals were

submitted (Res. Exh. 15); additional proposals were submitted on May 16, 1979 (Res. Exhs. 16 and 17); Respondent submitted counter-proposals on May 25, 1979 (Res. Exh. 18) which, in part, adopted NTEU proposals; and on May 29, Respondent adopted, as modified, NTEU's proposal to establish an overtime abuse reporting system (Res. Exh. 19).

10. Negotiations began on May 16 and continued on seven subsequent dates, concluding on June 7, 1979. At the request of NTEU, mediators from the Federal Mediation and Conciliation Service assisted the parties during the final three negotiating sessions held on May 30, June 6 and June 7, 1979. On June 7, the mediators informed the parties that they believed that further bargaining would be fruitless and that the dispute would be certified to the Federal Service Impasses Panel (FSIP) as having reached impasse if the parties so desired (Tr. 167). The Complaint alleged that "On June 7, 1979, the Union and Respondent reached impasse in negotiations over the proposed manual supplement" (G.C. Exh. 1(c)), the Answer admitted that impasse had been reached (G.C. Exh. 1(d)) and, at the hearing, General Counsel and NTEU conceded that impasse had been reached on June 7, 1979.^{*3}

11. There is no question whatever that NTEU had stated its intention to take the matter to the FSIP. Mr. Bufo testified, in part, that,

". . . I had been telling him (Mr. Spinks) all along, that I was going to invoke their (FSIP) services." (Tr. 108).

Mr. Spinks fully agreed, stating, in part, as follows:

"Q. Mr. Spinks, do you recall any Union representative telling you at that meeting on June 7 that the Union would be going to the Federal Services Impasse Panel?

"A. I don't recall it specifically at that meeting, but almost every meeting we had Mr. Bufo mentioned at one time or another that the dispute would have to go to the Panel, that they would go to the FLRA, that they would go to the Panel, that they would go to the

FLRA, that they would go to the courts, that they would go to the UN, they would go any place they could to see that the supplement was not issued." (Tr. 168).^{*4}

12. It is equally clear that Respondent informed NTEU at the close of the June 7 meeting that it would take steps to issue the Manual Supplement as soon as it was redrafted to incorporate Respondent's last offer. Thus, Mr. Spinks testified, in part, as follows:

"A. When we were drawing to a close and we knew we were not going to meet, I informed Mr. Bufe that we would take steps to issue the manual supplement as expeditiously as we could.

"Q. What did you say to him about what was going to be in order to issue the manual supplement?

"A. I told him I couldn't give him a date or time because we had to go back, redraft the issuance itself to incorporate into the issuance our offers that were made, your last offers that were made in the bargaining session, and that would involve a complete retyping, redrafting. Once we got it through the bureaucratic approval mill, that Commissioner would sign it and issue it.

"Q. Did Mr. Bufe respond to your saying that the manual supplement would be implemented?

"A. Well, his remark that stands out the most was he told me, Well you do what you have to do and we will do what we have to do." (Tr. 167-168).

Mr. Bufe fully agreed, stating, in part, as follows:

"Q. How did that meeting on June 7, 1979 end?

"A. It ended with the parties, when I say the parties I mean myself on behalf of the Union, Mr. Spinks on behalf of Customs, and also the mediators, finally coming to the recognition in the afternoon that these were negotiations that were not going to result in agreement, at least at the mediation stage; that the differences were deep-rooted, and that as they understood it there was very little likelihood, no likelihood in mediation that agreement would be reached. Face to face Mr. Spinks said to me he was

going to do what he had to do and that was, as far as he was concerned he had negotiated with us and he was going to implement his issuance. My response to him was well, that is what he has to do and there are some things I have to do. I was speaking from these notes and I said number one, we are definitely going to be taking certain proposals to the Impasses Panel; number 2, the proposals he had declared non-negotiable we were going to appeal on a negotiability appeal; number 3, we intended to file unfair labor practices where appropriate; and number 4, should he make good on his promise to implement while we were going to the Impasses Panel, I was going to regard that as illegal and that an unfair labor practice would be filed to contest that action as well." (Tr. 77-78).

13. Mr. Bufe testified that he completed his draft of the appeal to the FSIP on Sunday, June 10, 1979, and had it typed. (Tr. 107).

14. On the morning of June 12, 1979, Mr. Spinks telephoned Mr. Bufe and informed him as follows:

"On the morning of the 12th, I called Mr. Bufe and told him that the revisions had been completed and that the proper people had given their approval, and that we had placed it before the Commissioner to sign it and that I expected him to sign it by noon." (Tr. 170).

"JUDGE DEVANEY: Mr. Spinks, let me ask you this: you were asked, and you told us you called Mr. Bufe on the 12th of June, and you told us what you said to him. Tell me what he said to you.

"THE WITNESS: He said, I think words to the effect, well, this means we are really going to go at it over this one.

"JUDGE DEVANEY: Is that all he said?

"THE WITNESS: I believe so. We had pretty well exhausted our comments with each other on this matter over a period of time. He may have used the words, 'This means war.' He uses that occasionally." (Tr. 172).

Mr. Bufe confirmed the fact that he had a conversation with Mr. Spinks on the morning of June

12, 1979, and testified, in part, as follows:

"A. Mr. Spinks and I had a conversation that I can recall, a telephone conversation on, I believe it was the 12th, the day that bears the date of the issuance. I don't recall whether I called him or he called me. I recall a conversation. I recall him saying to me 'Well, we are implementing this thing today.' I recall me saying in response 'I am not surprised but as you know I am in disagreement with it and we are going to the Panel and I think it's improper, if not illegal for you to implement it while we are going to the Panel.'" (Tr. 81).

15. Mr. Bufe further testified that on May 8, 1979, Chapter Presidents had been informed, in part, as follows:

"A. The five to seven days was simply our estimate. We had never been told by management when it would be implemented. You must realize that these meetings occurred before bargaining even began. We had just received the advance notice. Our proposals had been submitted as I remember at the time of the meeting, but we had not began bargaining. So there was no way for us to know when the manual supplement would be implemented. Bargaining might take a month, it might take three months, and it would also depend on, we knew we were going to the Panel if things weren't resolved. Then it would depend on whether management was going to defer implementation until we got to the Panel.

"The five to seven days' advance notice included in the memo, I would only say I was never told by management at any time to expect five to seven days' notice. That is a figure that we used for general memo purposes and for planning purposes, and for no other reason. In effect, we were saying to people we did not know when the manual supplement would be implemented; that we could predict to the best of our knowledge, not based on anything management told us but rather based on experience as labor relations professionals, that we would hope and expect to get approximately a week's notice, but no more than that" (Tr. 214-215).

16. Respondent issued the Manual Supplement on June 12, 1979. (Res. Exh. 23; Tr. 169).

17. On June 12, 1979, Mr. Bufe transmitted "an additional copy of the material I submitted to FMCS last week" to Commissioner John F. McDermott, Federal Mediation and Conciliation Service (G.C. Exh. 4) and stated that "NTEU expects to file its appeal with the Panel by June 15, 1979" (G.C. Exh. 4).

18. At 3:15 p.m. on June 13, 1979, Mr. Bufe delivered to FSIP its request for assistance (G.C. Exh. 5). Mr. Spinks testified that he was informed on June 14 or 15, that NTEU had contacted the FSIP (Tr. 169).

19. As noted above, while the Manual Supplement directed that "Commensurate with current levels of staffing and distribution of work load, tours of duty, not on overtime, will be established" (Res. Exh. 23, Par. 3(b)(6), (7) and (8), the Manual Supplement neither established nor created any such tours of duty, or shifts; but, to the contrary, the actual shift changes were negotiated locally (Tr. 177). Indeed, Paragraph 4(d) of the Manual Supplement provided, for example, that:

"(d) Where the implementation of this Manual Supplement results in the establishment of new shifts or other changes in matters affecting conditions of employment, NTEU shall be afforded the opportunity to negotiate over the implementation and/or impact of such changes. Such negotiations will be conducted at the Regional level, or, upon mutual agreement, at the District or local level as appropriate." (Res. Exh. 23, Par. 4(d)).

Mr. Fowler testified that where shifts were established NTEU was given the opportunity to bargain (Tr. 191-194).

20. It is conceded by all parties that Respondent's Manual Supplement as issued on June 12, 1979, did not exceed the scope of the proposals advanced by Respondent during negotiations and that it did faithfully reflect all matter agreed upon by the parties in negotiations.

Conclusions

The sole issue in this case is whether NTEU had a reasonable opportunity, after impasse in impact and implementation negotiations and Respondent's notice of intent to implement, to invoke the processes of FSIP prior to Respondent's issuance (implementation) of its Manual Supplement. NTEU did not invoke the processes of FSIP prior to Respondent's implementation of the Manual Supplement. Impasse was reached on June 7, 1979, at which time Respondent informed NTEU that it would implement (issue) the Manual Supplement, and Respondent implemented (issued) the Manual Supplement on June 12, 1979. If, under the particular circumstances of this case, NTEU had a reasonable opportunity to invoke the processes of FSIP prior to Respondent's implementation and failed or refused to do so, then, clearly, Respondent's implementation of its Manual Supplement on June 12, 1979, was lawful and proper and there would be no basis whatever for finding an unfair labor practice. U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA No. 39 (1980). On the other hand, if NTEU did not have a reasonable opportunity to invoke the processes of FSIP prior to Respondent's implementation of the Manual Supplement, then, equally clearly, Respondent's implementation of its Manual Supplement on June 12, 1979, was unlawful and improper. U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976).

The concept of "impasse" presupposes: a) that the parties have bargained in good faith; and b) that after good faith negotiations the parties have exhausted the prospects of concluding an agreement. Here, it is conceded that impasse was reached in negotiations on impact and implementation of Respondent's proposed Manual Supplement on June 7, 1979. Sec. 19 of the Statute, entitled "Negotiation impasses; Federal Service Impasses Panel", provides, in relevant part, as follows:*5

"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)).

As NTEU very correctly states in its Brief,

"Neither the statute nor the FSIP regulations, 5 C.F.R. Part 2471, provide a limitation for invoking the Panel's services. The statutory language requires only that a party file a request if the Panel's assistance is desired.

"The FSIP has not exercised its authority to establish a limitation period . . . The Panel's regulations address only the means of filing a request, 5 C.F.R. 2471.1. . . ." (NTEU Brief, pp. 8-9).

The decisions, under both the Executive Order and the Statute, have consistently held that, after impasse, changes of personnel policies and practices and matters affecting working conditions may unilaterally be implemented only if the agency "provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advanced by that party during prior negotiations) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Federal Service Impasses Panel." Internal Revenue Service, Ogden Service Center and Department of the Treasury, Internal Revenue Service., Brookhaven Service Center, FLRC Nos. 77A-40 and 77A-92, 6 FLRC 310, 320 (1978); U.S. Army Corps of Engineers, Philadelphia, District, supra; United States Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, A/SLMR No. 972, 8 A/SLMR 98 (1978); U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra. Nor can there be any doubt, however it may be stated, that notice of intent to implement must be given after impasse to permit lawful unilateral implementation, i.e., whether, as NTEU states, "The Union's opportunity to file its request with the Panel does not begin to run until the agency has given 'notice of its intent to implement'

unilateral changes" (NTEU Brief, p. 10), or whether, as the Assistant Secretary stated, "Respondent violated Sections 19(a)(1) and (6) of the Order by unilaterally instituting the change . . . without providing the Complainant with reasonable notice of its intended action", U.S. Army Corps of Engineers, Philadelphia District, supra, 6 A/SLMR at 341. In the U.S. Army Corps of Engineers case, supra, impasse had been reached on March 4, 1974, and neither party requested the services of the Panel. The Assistant Secretary stated, in part, as follows:

" . . . In the instant case, the evidence established that neither party had invoked the Panel's procedures at the time the Respondent implemented the changes in the working conditions . . . in May 1974. Consequently, the Respondent's conduct herein would be considered privileged if the evidence established that the Complaint was afforded appropriate notice of when the intended change was to be put into effect so as to provide the latter with an opportunity to invoke the services of the Panel. In the instant case, however, it is undisputed that the Complainant was not notified prior to the institution of the change . . . and was not given the opportunity to invoke the procedures of its Panel prior to the Respondent's instituting a change in existing terms or conditions of employment . . ." (6 A/SLMR at 341).

Obviously, neither the fact that an impasse in negotiations has been reached nor the passage of time after impasse permits a lawful unilateral implementation of the change, on which impasse has been reached, in the absence of notice "of when the intended change was to be put into effect" in order to provide the Union, AFTER NOTICE OF INTENDED IMPLEMENTATION of the change, "an opportunity to invoke the services of the Panel."

In the instant case, there is no dispute whatever that on June 7, 1979, after impasse, Respondent gave NTEU notice that it intended to implement its proposed Manual Supplement. Thus, for example, Mr. Spinks stated that he informed Mr. Bufe, ". . . that we would take steps to issue the manual supplement as expeditiously as we could" and Mr. Bufe stated that

Mr. Spinks, face to face, ". . . said to me he was going to do what he had to do and that was, as far as he was concerned he had negotiated with us and he was going to implement his issuance." It is true, that Mr. Spinks did not give Mr. Bufe a date or time certain for implementation for the reason that, ". . . we had to go back, redraft the issuance itself to incorporate into the issuance our offers that were made, your last offers that were made in the bargaining session, and that would involve a complete retyping, redrafting." Nevertheless, as Mr. Spinks made it clear that Respondent ". . . would take steps to issue the manual supplement as expeditiously as we could" and that ". . . Once we got it through the bureaucratic approval mill, that (sic) Commissioner would sign it and issue it", I conclude that Respondent's notice of June 7, 1979, did advise NTEU "of when the intended change was to be put into effect", i.e., as soon as we get it redrafted and signed by the Commissioner, to set in motion "The Union's opportunity to file its request with the Panel". Not only do I find that Mr. Spinks' notice "of when the intended change was to be put into effect" was sufficiently definite, but Mr. Bufe made it clear that he fully understood the implications of Mr. Spinks' notice. Thus, by way of example, after Mr. Spinks told him, ". . . he was going to implement his issuance", Mr. Bufe stated, "my response to him was well, that is what he had to do and there are some things I have to do . . . I said . . . we are definitely going to be taking certain proposals to the Impasses Panel. . . ."

The ultimate question is whether NTEU had a reasonable opportunity, after Respondent's notice of June 7, 1979, to request the FSIP to consider the matter prior to Respondent's implementation (issuance) of the Manual Supplement on June 12, 1979. For reasons set forth hereinafter, in view of the particular facts and circumstances of this case, I conclude that NTEU had a reasonable opportunity to invoke the services of the FSIP prior to Respondent's issuance (implementation) of its Manual Supplement and with full knowledge of Respondent's intent to issue (implement) the Manual Supplement on June

12, 1979, NTEU failed and refused to invoke the services of the FSIP prior to its issuance (implementation). Accordingly, Respondent was privileged to implement (issue) its Manual Supplement, as it did, on June 12, 1979, and Respondent did not thereby violate Secs. 16(a)(1), (5) or (6) of the Statute.

In the absence of a limitation fixed by Regulation between the time of notice of intent to implement and the time when a change lawfully may be implemented if the services or the FSIP are not requested, what constitutes a reasonable opportunity to invoke the services of the FSIP must be determined on a case by case basis in light of the circumstances of each case. What is eminently reasonable in one case may be wholly unreasonable in another. In U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, *supra*, eight days was held to be a reasonable opportunity. Under other circumstances, five days, which I find to have been a reasonable opportunity in this case, might very well be unreasonable. Indeed, in all candor, I would not have found five days to have given NTEU a reasonable opportunity to invoke the services of the FSIP if there had been any evidence whatever that indicated that NTEU, readily, could not have requested the services of the FSIP prior to Respondent's issuance (implementation) of its Manual Supplement. I have taken into consideration NTEU's prior experience in taking matters to the FSIP; the fact that NTEU is located in the same building as the FSIP; the fact that the same person, Mr. Bufe, was chief spokesman for NTEU in the negotiations and the person who handled the matter before the FSIP; the fact that Mr. Bufe stated that he completed his draft of the appeal to the FSIP on June 10, 1979, and had it typed; and that on the morning of June 12, 1979, Mr. Spinks called Mr. Bufe and told him that the revisions had been completed and that he expected the Commissioner to sign it by noon.

The record shows, *inter alia*, that:

a) Even before negotiations began, NTEU had advised its Chapter Presidents, on May 8, 1979, that it

anticipated no more than ". . . five to seven days' advance notice" in order to request the services of the FSIP.

b) On June 7, 1979, after the conceded impasse had been reached, Respondent gave NTEU notice that it intended to issue (implement) its proposed Manual Supplement "expeditiously"; that as quickly as it could be redrafted to reflect "our offers that were made" and "we got it through the bureaucratic approval mill" the Commissioner "would sign it and issue it."

c) Mr. Bufe fully agreed that on June 7, 1979, Mr. Spinks, face to face, told him that "he was going to implement his issuance". There is no possible doubt that Mr. Bufe understood fully the implications of Mr. Spinks' statement as he responded, "that is what he had to do and these are some things I have to do" which included "taking certain proposals to the Impasses Panel". I find nothing in the record that indicates that on June 7, 1979, Mr. Bufe asked Mr. Spinks to "defer implementation until we got to the Panel", a consideration Mr. Bufe had noted in the May 8, 1979, communication to Chapter Presidents; but, even if it were implied from his statement of things he, Bufe, had to do, obviously, Mr. Spinks did not agree to do so and Mr. Bufe well understood that Mr. Spinks did not agree to defer implementation.

d) With full awareness that Respondent intended to implement the Manual Supplement "expeditiously", Mr. Bufe "wrote the brief on the weekend and had it typed . . . I came in on Sunday and wrote the brief and had it typed." (Tr. 107).

e) Although Mr. Bufe had written his brief (appeal) "on Sunday" and "had it typed", NTEU did not file its request for assistance with FSIP either on June 11 or 12, 1979.

f) On the morning of June 12, 1979, Mr. Spinks called Mr. Bufe and told him that the revisions had been completed and that he expected the Commissioner to sign it by noon. Mr. Bufe stated that Mr. Spinks told him, "Well, we are implementing this thing today" and that he had responded, "I am not

surprised but as you know I am in disagreement with it and we are going to the Panel and I think it's improper, if not illegal for you to implement it while we are going to the Panel." Again, although Mr. Bufe repeated his prior intent to go to the Panel, Mr. Spinks, obviously, did not agree to defer implementation and Mr. Bufe fully understood that Respondent would not agree to defer implementation "while we are going to the Panel".

g) Notwithstanding the further notice on the morning of June 12 that Respondent expected to issue (implement) the Manual Supplement by noon, NTEU did not file its request for assistance with the FSIP.

h) Respondent issued (implemented) its Manual Supplement on June 12, 1979, and, of course, no request for the assistance of the FSIP had been filed.

i) At 3:15 p.m. on June 13, 1979, Mr. Bufe delivered NTEU's request for assistance to the FSIP.

j) I have found that Mr. Bufe's letter, dated June 11, 1979 (G.C. Exh. 3), addressed to Mr. Spinks, was not received by Respondent until June 13, 1979; nevertheless, it is clear that both on June 7, 1979, and on June 12, 1979, as noted above, Mr. Bufe had told Mr. Spinks that NTEU was "taking certain proposals to the Impasses Panel" and/or "we are going to the Panel".

Following impasse in negotiations on June 7, 1979, Respondent was privileged to implement its proposed Manual Supplement if NTEU did not invoke the services of the FSIP within a reasonable period of time after notice of its intent to implement. Respondent gave NTEU notice of intent to implement its proposed Manual Supplement on June 7, 1979. On June 12, 1979, Respondent, in the morning, advised NTEU that it expected to issue its proposed Manual Supplement at noon (June 12). NTEU had written its request for assistance on June 10 and "had it typed"; but NTEU did not invoke the services of the FSIP prior to Respondent's implementation of the Manual Supplement notwithstanding that it had a reasonable opportunity to do so after Respondent's notice of intent to implement given on June 7, 1979, nor did it

do so on June 12, 1979, after notification, in the morning, that Respondent intended to issue the Manual Supplement that day, even though its request had been prepared and NTEU was located in the same building as the FSIP.

The parties had correlative rights: Respondent had the right to implement (issue) its proposed Manual Supplement if NTEU did not invoke the services of the FSIP within a reasonable period after its notice of June 7, 1979, of intent to implement; NTEU had the right to invoke the services of the FSIP within a reasonable period after Respondent's notice of June 7, 1979, of intent to implement. NTEU, with full knowledge of Respondent's intent to implement; with reasonable opportunity to invoke the services of the FSIP; and with its request prepared, on June 10, 1979, chose not to invoke the services of the FSIP prior to Respondent's issuance (implementation) of its Manual Supplement, notwithstanding that Respondent on the morning of June 12 had informed NTEU that it intended to issue (implement) the Manual Supplement by noon that day and NTEU could readily have filed its request, which already had been prepared, with the FSIP, which was in the same building, but, again, chose not to do so. As NTEU had a reasonable opportunity to invoke the services of the FSIP after Respondent's notice of intent to implement, given on June 7, 1979, and failed or refused to do so, Respondent's implementation (issuance) of its Manual Supplement on June 12, 1979, was the lawful exercise of a privileged right and it did not violate Secs. 16(a)(1), (5) or (6) by its implementation (issuance) of the Manual Supplement.

General Counsel would engraft a further limitation on the right to implement following notice of intent to implement, namely, that NTEU's statement of intent to invoke the services of the FSIP precluded implementation pending NTEU's invocation of the services of the FSIP. I reject this assertion. From the Statute and from the decisions construing the provisions of Sec. 19 of the Statute, and the wholly like provisions of Section 17 of the Executive Order, the only limitation on any agency's

right to implement a proposed change in conditions of employment following impasse in negotiations and notice of intent to implement is the right of the union to a reasonable opportunity to invoke the services of the FSIP. NTEU was entitled to a reasonable opportunity to invoke the services of the FSIP; it has a reasonable opportunity to do so; however, it chose not to invoke the services of the FSIP prior to Respondent's implementation. Certainly, NTEU had the right not to invoke the services of the FSIP; but the conscious exercise of this right did not, and does not, render unlawful Respondent's exercise of its right to implement the Manual Supplement, after notice of intent to implement, since NTEU had a reasonable opportunity to invoke the services of the FSIP and chose not to do.

The importance NTEU attached to the Manual Supplement and the dispatch with which Mr. Bufe prepared his brief to the FSIP merely emphasize the deliberate and conscious election of NTEU not to invoke the services of the FSIP prior to Respondent's implementation. I do not question in the slightest NTEU's absolute right to "trade" the certainty of the assistance of the FSIP, had it desired to invoke the processes of the FSIP, for the vicissitudes of litigation. Whether NTEU hoped, or believed, that Respondent would delay implementation if it asserted it was going to the Panel; whether NTEU believed its stated intent to go "to the Panel" would prevent implementation; whether NTEU believed it could predetermine what it considered to be a reasonable opportunity within which to invoke the processes of the FSIP from which it declined to move; or whether it was motivated by other considerations need not be determined since the record shows, and I have found, that: a) NTEU had a reasonable opportunity to invoke the services of the FSIP prior to Respondent's implementation; and b) that NTEU consciously elected not to do so.

In view of my conclusions that Respondent lawfully implemented its Manual Supplement on June 12, 1979, it not only is unnecessary but would be inappropriate to comment on remedy since no unfair

labor practice occurred. I simply note that, as the record shows, the Manual Supplement implemented on June 12, 1979, did not establish any shifts or tours of duty; that Paragraph 4(d) of the Manual Supplement provided, *inter alia*, that "the establishment of new shifts or other changes in matters affecting conditions of employment" were subject to notice to NTEU and "the opportunity to negotiate over the implementation and/or impact of such changes"; and that such changes in shifts or tours of duty were negotiated locally.

Accordingly, having found that Respondent did not violate Secs. 16(a)(1), (5) or (6) of the Statute, 5 U.S.C. 7116(a)(1), (5) or (6), by its implementation of its proposed Manual Supplement on June 12, 1979, I recommend that the Authority issue the following:

ORDER

The Complaint in Case No. 3-CA-439 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY Administrative Law Judge

Dated: October 16, 1981 Washington, D.C.

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., 7116(a)(1) will be referred to, simply, as "16(a)(1)".

2. I am well aware that NTEU's demand was to negotiate "substance, impact and implementation" (Res. Exh. 4); that Respondent stated in its letter of March 5, 1979, that "the proposed Supplement was provided to you on February 12, in order to provide NTEU with an opportunity to seek negotiations over such substantive aspects . . . as may be negotiable and over the implementation and impact of those aspects which constitute reserved management rights." (Res. Exh. 7).

Nevertheless, General Counsel made it very clear that the bargaining was solely impact and implementation bargaining (Tr. 19) as asserted by

Respondent (Tr. 13). In view of General Counsel's position and theory of the case, I shall assume, although I do not decide, that the bargaining was solely bargaining on impact and implementation and, conversely that the proposed Manual Supplement constituted a reserved management right pursuant to Sec. 6(a) of the Statute.

3. Respondent, at the hearing, initially contended that because, it asserted, NTEU had not bargained in good faith, no impasse had been reached (Tr. 17). In view of the allegations of the Complaint (Par. 10), the Answer (Par. 10), and the agreement of all parties that impasse had been reached on June 7, 1979, the issue of good faith vis-a-vis the negotiations was not, and is not, before me and will not be decided.

4. Mr. Bufe wrote a letter, dated June 11, 1979, addressed to Mr. Spinks, in which he stated, in part,

"Please be advised that NTEU will be promptly filing its appeal of this impasse to the Federal Service Impasses Panel as soon as possible. Be further advised that any implementation of the proposed manual supplement during the pendency of the Impasse Panel proceeding will be regarded as unlawful by NTEU, and appropriate action will be taken." (G.C. Exh. 3).

Mr. Bufe stated that he gave the letter to a law clerk to deliver. He testified, ". . . I did not, for example, I did not talk to her afterwards. She never said to me that I delivered it. I don't remember that. It's possible that she didn't. I will have to say that." (Tr. 216).

Mr. Spinks testified that he had not received Mr. Bufe's letter as of June 12, 1979 (Tr. 169); that he received it, he thought, on June 13; that he believed it came in the mail and was postmarked June 12, 1979 (Tr. 169). Mr. Lawrence K. Fowler, a Labor Relations Specialist for Respondent, also testified that Mr. Bufe's letter was received sometime after June 12, probably June 13, perhaps the 14th (Tr. 194-196).

Under the circumstances, I conclude that G.C. Exh. 3 was not received by Respondent until after June 12, 1979.

5. Section 17 of the Executive Order 11491, as amended, was substantially the same and, in relevant part, provided:

"Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service . . . fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter . . ."