

**DECISIONS AND REPORTS ON RULINGS  
OF THE ASSISTANT SECRETARY OF LABOR  
FOR LABOR-MANAGEMENT RELATIONS**  
Pursuant to Executive Order 11491, As Amended

**Volume 3**

**January 1, 1973, through December 31, 1973**

This Volume includes Assistant Secretary Decisions  
Nos. 235 - 334 and Reports on Rulings Nos. 53 - 55.

**U.S. DEPARTMENT OF LABOR**  
Peter J. Brennan, Secretary

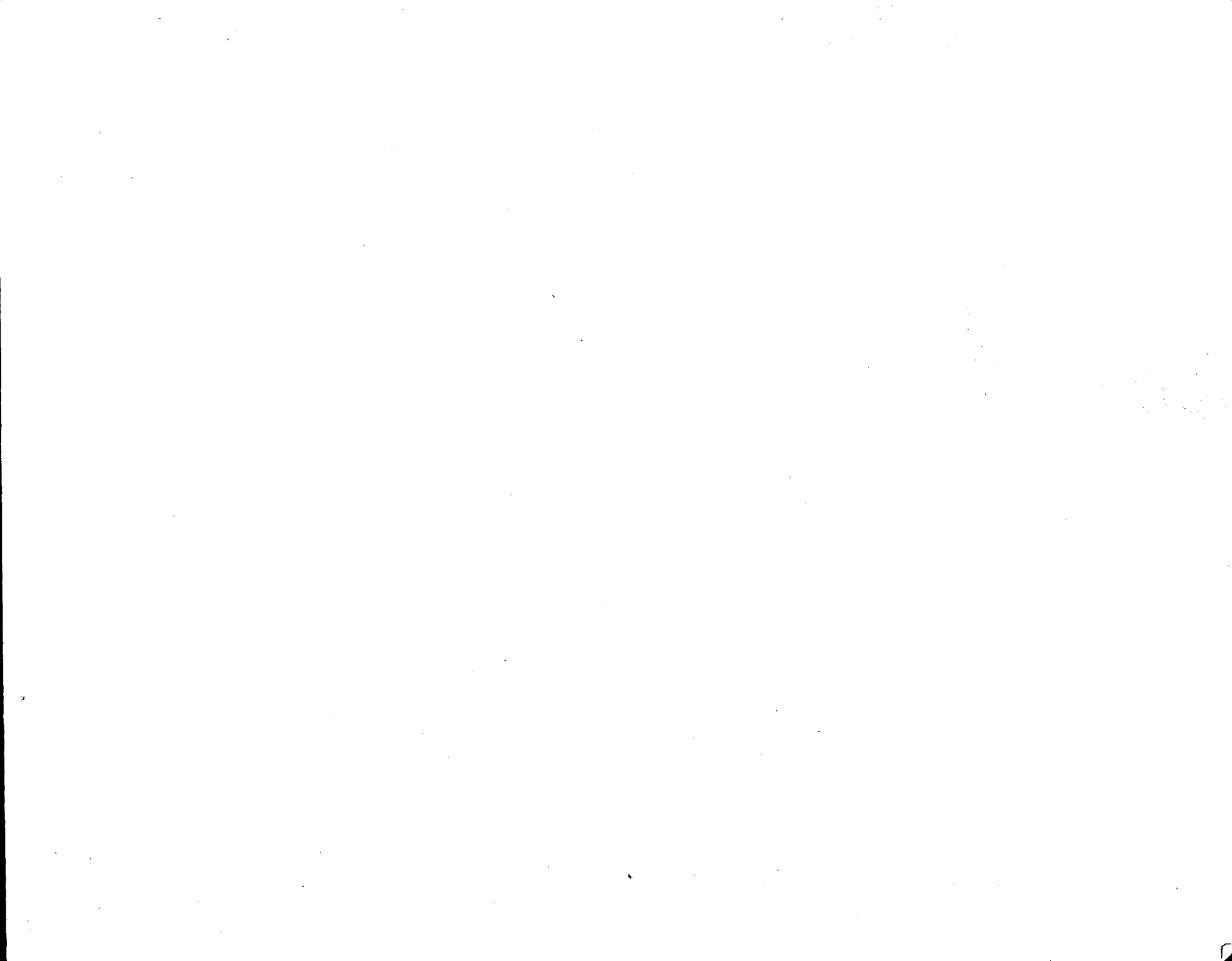
**LABOR-MANAGEMENT SERVICES ADMINISTRATION**  
Paul J. Fasser, Jr.,  
Assistant Secretary of Labor for Labor-Management Relations

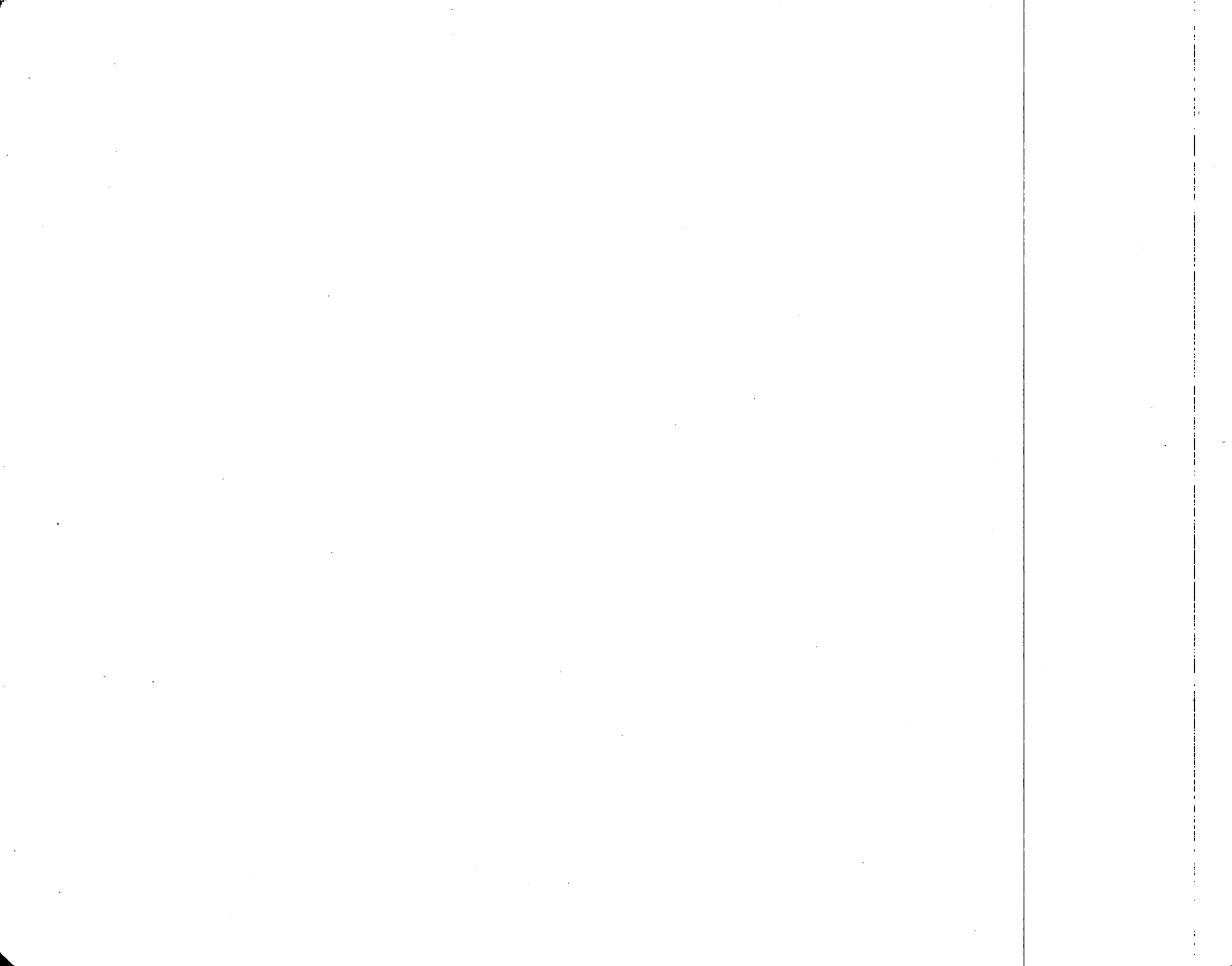
**OFFICE OF FEDERAL LABOR-MANAGEMENT RELATIONS**  
Louis S. Wallerstein, Director

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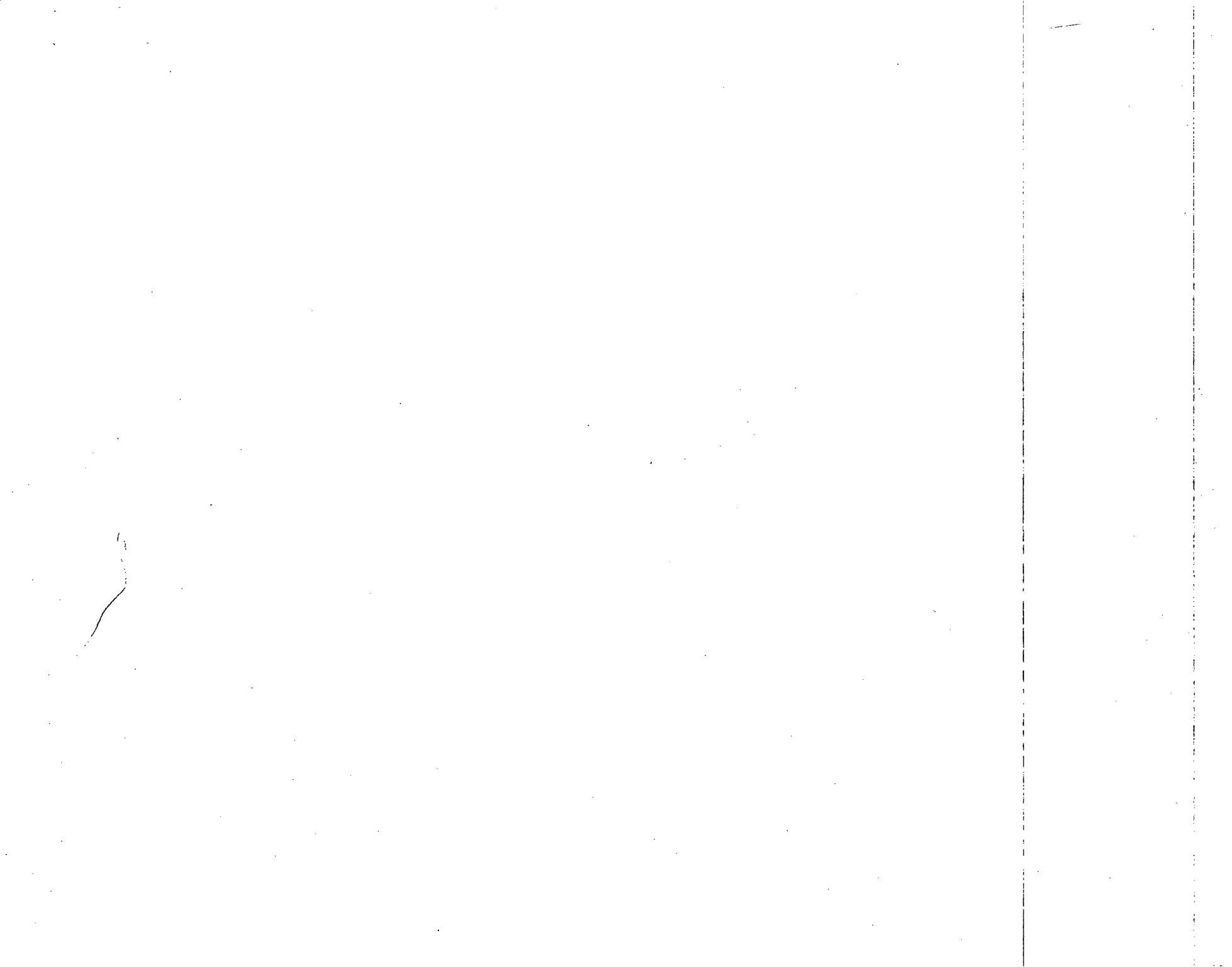






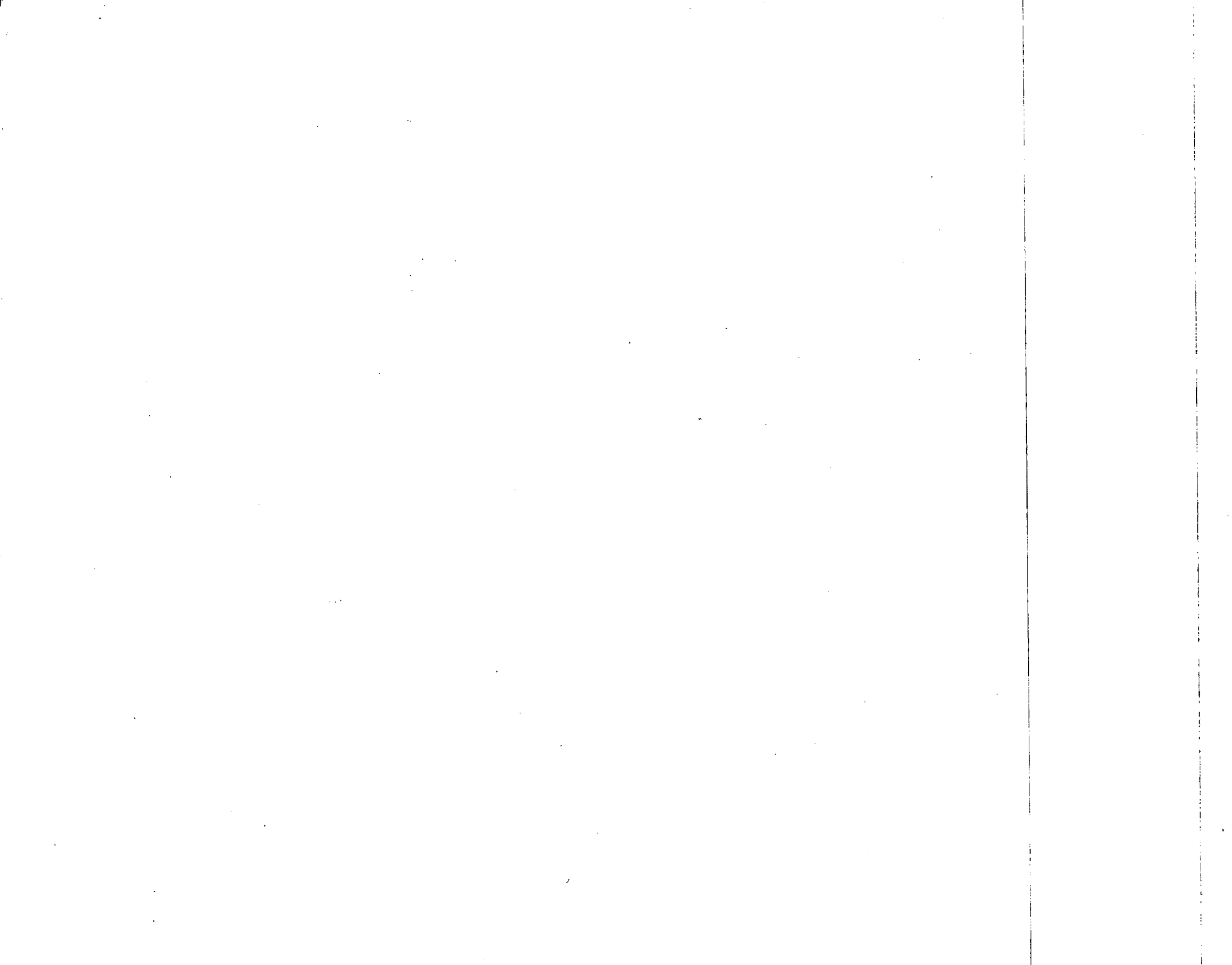
## PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, covers the period from January 1, 1973, through December 31, 1973. It includes: (1) Summaries of Decisions and the full text of Decisions of the Assistant Secretary after formal hearing or stipulated record (A/SLMR Nos. 235 - 334); and (2) Reports on Rulings of the Assistant Secretary (originally referred to as Reports on Decisions), which are published summaries of significant or precedent-setting rulings by the Assistant Secretary on requests for review of actions taken at the field level (R A/S Nos. 53 - 55).



T A B L E O F C O N T E N T S

	<u>PAGE</u>
Numerical Table of Decisions	3
Numerical Table of Reports on Rulings	13
Alphabetical Table of Decisions	15
Text of Summaries and Decisions	21
Text of Reports on Rulings	691



NUMERICAL TABLE OF DECISIONS OF THE ASSISTANT SECRETARY  
SHOWING DATE ISSUED, AREA OFFICE CASE NUMBER(S) AND TYPE OF CASE

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE */</u>	<u>PAGE</u>
235.	U.S. Department of the Air Force, Holloman Air Force Base, Alamogordo, New Mexico	1-02-73	63-3268	RO	23
236.	Army and Air Force Exchange Service, Fort Bliss Post Exchange, El Paso, Texas	1-02-73	63-2903	RO	30
237.	The Department of the Treasury, U.S. Savings Bonds Division, Wisconsin State Office, Milwaukee, Wisconsin	1-03-73	50-8240	RO	33
238.	National Alliance of Postal and Federal Employees	1-03-73	22-1965	S	36
239.	American Federation of Government Employees, AFL-CIO	1-03-73	63-2714	S	39
240.	Veterans Administration	1-15-73	22-2635 22-2692	RO	42
241.	Portsmouth Naval Shipyard, Portsmouth, New Hampshire	1-16-73	31-5456	OBJ	46
242.	U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina	1-17-73	40-3520	ULP	60
243.	Department of the Army, United States Army Base Command, Okinawa	1-22-73	22-2890	RO	77

\*/ TYPE OF CASE

CHALL = Challenged Ballots Resolution  
 CU = Clarification of Unit  
 DR = Decertification of Exclusive Representative  
 OBJ = Objections to Election  
 RA = Certification of Representative (Activity Petition)  
 RO = Certification of Representative (Labor Organization Petition)  
 S = Standards of Conduct  
 ULP = Unfair Labor Practice

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
244.	Fifth U.S. Army, Camp McCoy, Wisconsin, 86th Army Reserve Command (ARCOM), Area Organizational Maintenance Shop G-49	1-22-73	50-5569	RO	82
245.	Department of the Navy, Military Sealift Command	1-22-73	22-3048	RO	85
246.	National Labor Relations Board	1-24-73	22-1976	ULP	88
247.	Defense Supply Agency, Defense Contract Administration Services Region, SF Burlingame, California	2-13-73	70-2414	ULP	106
248.	U.S. Department of the Air Force, Air Force Communications Service (AFCS), 2024th Communication Squadron, Moody Air Force Base, Georgia	2-14-73	40-3564	ULP	116
249.	United States Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services-Animal Health Program, Madison, Wisconsin	2-14-73	50-5598	RO	119
250.	Federal Aviation Administration, Great Lakes Region, Chicago Airports District Office	3-02-73	50-5522 50-5529	RA CU	123
251.	Office of Economic Opportunity, Region V, Chicago, Illinois	3-02-73	50-5583	ULP	127
252.	California Air National Guard Headquarters, 163rd Fighter Group, Ontario International Airport, Ontario, California	3-02-73	72-3698	CU	135
253.	Department of Transportation, Federal Aviation Administration Aeronautical Center	3-05-73	63-2589	ULP	137
254.	Pennsylvania National Guard	3-13-73	20-3569	RO	139

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
255.	Department of the Air Force Headquarters, Air Force Flight Test Center, Edwards Air Force Base, California	3-14-73	72-2937	ULP	142
256.	Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri	3-14-73	62-3157	ULP	150
257.	United States Customs Service, Region IX, Chicago, Illinois	3-14-73	50-8235	ULP	160
258.	Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey	3-14-73	32-2468	RO	164
259.	California Air National Guard Headquarters, 146th Tactical Airlift Wing, Van Nuys, California	3-14-73	72-2829	RO	167
260.	Department of the Army, United States Dependents' Schools, European Area	3-28-73	22-3386	RO	171
261.	U.S. Department of Air Force, Norton Air Force Base	4-30-73	72-3121	ULP	175
262.	Department of the Treasury, Bureau of the Mint	5-16-73	22-3385	RO	186
263.	Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts	5-16-73	31-5568	ULP	193
264.	Western Division of Naval Facilities Engineering Command, San Bruno, California	5-31-73	70-1854	ULP	208
265.	General Services Administration, Region 5, Chicago, Illinois	5-31-73	51-2245	RO	222
266.	United States Department of Health, Education and Welfare, Regional Office VI	5-31-73	63-3933	RO	224

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
267.	Department of Health, Education and Welfare, U.S. Public Health Service Hospital, Boston-Brighton, Massachusetts	5-31-73	31-6107	RO	232
268.	United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois	5-31-73	50-5165	CHALL	235
269.	New Jersey Department of Defense	5-31-73	32-1984	CU	239
270.	Department of Housing and Urban Development, Region II	5-31-73	30-4700	RO	241
271.	Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Boston, Massachusetts	5-31-73	31-6092	RO	248
272.	United States Postal Service, Berwyn Post Office, Illinois	5-31-73	50-5531	ULP	251
273.	Federal Aviation Administration, Eastern Region, Boston ARTCC Nashua, New Hampshire	5-31-73	31-5570	ULP	266
274.	Department of the Interior, U.S. Geological Survey, Central Region, Publications Division	6-01-73	61-1968	RO	272
275.	Local 1858, American Federation of Government Employees, (Redstone Arsenal, Alabama)	6-15-73	40-4250	ULP	274
276.	Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon	6-22-73	71-2120	RO	283
277.	Department of Transportation, Federal Aviation Administration, Airway Facilities Sector (ARTCC), Albuquerque, New Mexico	6-22-73	63-4058	DR	287



<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
278.	U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska	6-25-73	71-2290	ULP	290
279.	Internal Revenue Service, Chicago District	6-25-73	50-8941	ULP	304
280.	U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah	6-25-73	61-1790	ULP	310
281.	U.S. Army Electronics Command, Fort Monmouth, New Jersey	6-27-73	32-2851	ULP	315
282.	Aberdeen Proving Ground Command, Department of the Army	6-29-73	22-3519	RA	323
283.	Los Angeles Air Route Traffic Control Center, Federal Aviation Administration	6-30-73	72-3014	ULP	325
284.	Non-Appropriated Fund Activities, XVIII Airborne Corps and Ft. Bragg, Ft. Bragg, North Carolina	7-18-73	40-4368	OBJ	346
285.	National Oceanic and Atmospheric Administration, National Ocean Survey	7-25-73	22-3709	ULP	352
286.	U.S. Department of the Army, Edgewood Arsenal, Aberdeen Proving Ground Command	7-25-73	22-3568	ULP	355
287.	Federal Aviation Administration Atlanta Airway Facility, Sector 12 Atlanta, Georgia	7-25-73	40-4593	ULP	366
288.	U.S. Army Safeguard Systems Command, P.O. Box 1500, Huntsville, Alabama	7-25-73	40-4660 40-4661 40-4662 40-4663	CU	373
289.	United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois	7-25-73	50-8247	ULP	375
290.	Norfolk Naval Shipyard	7-25-73	22-3025	ULP	388

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
291.	AMC Ammunition Center, Savanna, Illinois	7-25-73	50-8197	RO	404
292.	American Federation of Government Employees, AFL-CIO Clyde Webber, National President	7-25-73	63-3250	S	407
	Ninth District, American Federation of Government Employees, AFL-CIO Kermit I. Tull, National Vice-President				
	Local 916, American Federation of Government Employees, AFL-CIO Lowell Malloy, President				
293.	General Services Administration, PBS, FSS, ADTS, Fresno, California	7-31-73	70-2452	RO	414
294.	American Federation of Government Employees, Local 1650, Beeville, Texas and American Fed- eration of Government Employees, Washington, D.C. (Naval Air Station, Chase Field, Beeville, Texas)	7-31-73	63-4010 63-4006	ULP	416
295.	National Labor Relations Board, Region 17 and National Labor Relations Board	8-06-73	60-3035	ULP	427
296.	Veterans Administration, Veterans Benefits Office	8-15-73	22-3531 22-3532 22-3533	ULP	444
297.	Department of the Navy, United States Naval Weapons Center, China Lake, California	8-15-73	72-2238	CU	459
298.	Department of the Navy, Mare Island Naval Shipyard, Vallejo, California	8-15-73	70-1876	CU	464
299.	Atomic Energy Commission, Idaho Operations Office Idaho Falls, Idaho	8-15-73	71-2482	CU	468
300.	Federal Aviation Administration, Atlanta ATC Tower	8-15-73	40-3470	ULP	471

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
301.	Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma	8-15-73	63-4029	ULP	491
302.	Department of the Navy, Charleston Naval Shipyard	8-15-73	40-4621	CU	505
303.	United States Department of Agriculture, Forest Service, Mark Twain National Forest, Springfield, Missouri	8-20-73	62-3523	RO	507
304.	Charleston Naval Shipyard, Charleston, South Carolina	8-21-73	40-4301 40-4305	ULP	512
305.	Department of Interior, National Park Service, National Capital Parks, John F. Kennedy Center for the Performing Arts	9-12-73	22-3701	RO	520
306.	Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri	9-12-73	62-3157	ULP	524
307.	Department of the Navy and The U.S. Naval Weapons Station, Yorktown, Virginia	9-12-73	22-2334	ULP	526
308.	Veterans Administration Hospital, Portland, Oregon	9-12-73	71-2369	RO	530
309.	Department of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California	9-20-73	70-2448	ULP	533
310.	Defense Mapping Agency Topographic Center, Providence Office, West Warwick, Rhode Island	9-28-73	31-6113	CU	541

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
311.	Veterans Administration Hospital, East Orange, New Jersey	9-28-73	32-2583	RO	544
312.	Department of the Interior, Bureau of Mines, Western Administrative Office, Denver, Colorado	10-01-73	61-1972	RO	548
313.	Department of Transportation, Federal Aviation Administration, Flight Inspection District Office, Battle Creek, Michigan	10-01-73	52-4894	RO	551
314.	Small Business Administration, Miami District Office	10-05-73	42-2269	RO	555
315.	Department of the U.S. Army, U.S. Army Aviation Systems Command, St. Louis, Missouri	10-24-73	62-3092	OBJ	559
316.	National Science Foundation	10-24-73	22-3870	RO	564
317.	Veterans Administration Center, Togus, Maine	10-24-73	31-5587	DR	568
318.	United States Department of Interior, Bureau of Reclamation, Lower Colorado Region and Yuma Projects Office	10-24-73	72-3964 72-4067	RA DR	570
319.	United States Air Force 321st Combat Support Group, Grand Forks Air Force Base, North Dakota	10-24-73	60-3219	RO	573
320.	U.S. Army Electronics Command, Fort Monmouth, New Jersey	10-29-73	32-2851	ULP	575
321.	Department of the Navy, United States Naval Station, Adak, Alaska	11-05-73	71-2322	CU	578
322.	Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas	11-13-73	63-4218	ULP	582

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
323.	Department of Defense, State of New Jersey	11-16-73	32-2833	ULP	590
324.	Anaheim Post Office, U.S. Postal Service, Anaheim, California	11-16-73	72-2560	ULP	601
325.	United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado	11-27-73	61-2035	RO	614
326.	U.S. Naval Station, Newport, Rhode Island	11-27-73	31-6127	RO	618
327.	United States Air Force, Fort Snelling Officers Open Mess, Non-Commissioned Officers Club, Sleeping Quarters, Temporary Personnel and Fiscal Control Office, Fort Snelling, Minnesota	11-27-73	51-2360	RO	620
328.	Department of Army, Headquarters, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri	11-27-73	62-3655	RO	623
329.	Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey	11-28-73	32-3082	ULP	626
330.	Veterans Administration Hospital, Tampa, Florida	11-28-73	42-2273 42-2283 42-2284	RO	635
331.	Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region	11-28-73	60-3261 60-3262 60-3263 51-2501 51-2502	RO	642
332.	Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington	12-04-73	71-2260	ULP	647

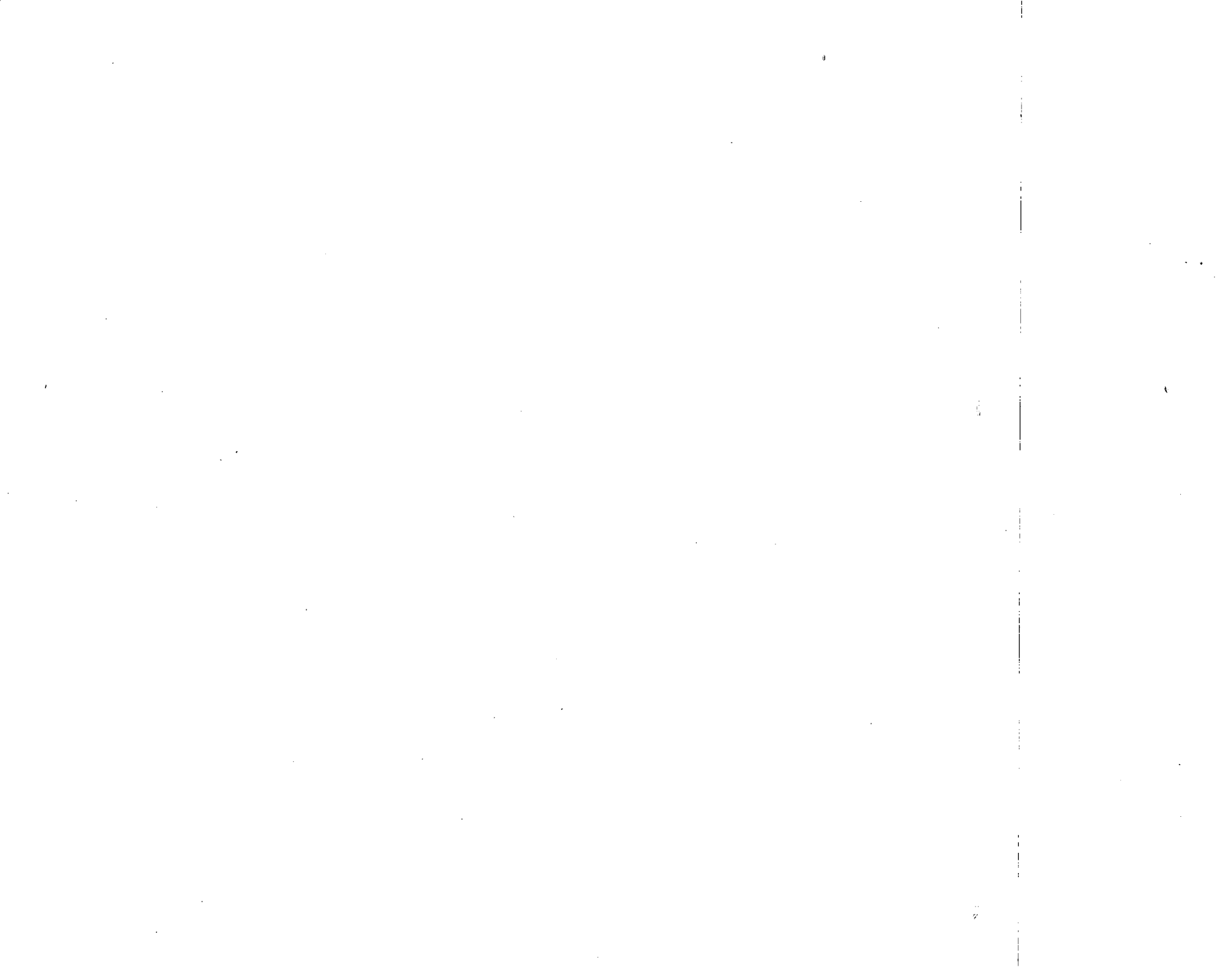
<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
333.	General Services Administration, Region 9, San Francisco, California	12-04-73	70-2486	RO	663
334.	Office of Economic Opportunity, Region V, Chicago, Illinois	12-04-73	50-5999 50-8198 50-8924	ULP	668

NUMERICAL TABLE OF REPORTS ON RULINGS OF THE ASSISTANT SECRETARY  
SHOWING DATE ISSUED AND TYPE OF CASE

<u>R A/S NO.</u>	<u>DATE ISSUED</u>	<u>TYPE OF CASE */</u>	<u>PAGE</u>
53	3-12-73	CHALL	693
54	6-22-73	AC/CU	693
55	9-06-73	ULP	694

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\*/      TYPE OF CASE  
AC     = Amendment of Certification.  
CHALL = Challenged Ballots Resolution  
CU     = Clarification of Unit  
ULP    = Unfair Labor Practice





ALPHABETICAL TABLE OF DECISIONS OF THE ASSISTANT SECRETARY 1/

<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Aberdeen Proving Ground Command, Army	282	American Federation of Government Employees, AFL-CIO	239,292,294
Adak, Alaska, U.S. Naval Station	321	-- Clyde Webber, National President, <u>et al.</u>	292
Agriculture, Department of		-- Local 1650, Beeville, Tex.	294
-- Animal and Plant Health Inspection Service, Veterinary Services-Animal Health Program, Madison, Wis.	249	-- Local 1858, (Redstone Arsenal, Ala)	275
-- Forest Service, Mark Twain National Forest, Springfield, Mo.	303	Anaheim, Calif., Post Office, United States Postal Service	324
-- Northern Marketing and Nutrition Research Division, Peoria, Ill.	268	Army, Department of	
Air Force, Department of		-- Aberdeen Proving Ground Command	282
-- Air Force Communications Service (AFCS), 2024th Communications Squadron, Moody Air Force Base, Ga.	248	-- Ammunition Center, AMC, Savanna, Ill.	291
-- Flight Test Center, Headquarters, Edwards Air Force Base, Calif.	255	-- Aviation Systems Command, St. Louis, Mo.	315
-- Fort Snelling Officers Open Mess, <u>et al.</u> , Fort Snelling, Minn.	327	-- Edgewood Arsenal, Aberdeen Proving Ground Command	286
-- Holloman Air Force Base, Alamogordo, N. Mex.	235	-- Electronics Command, Fort Monmouth, N.J.	258,281,320
-- Norton Air Force Base	261	-- Fifth U.S. Army, Camp McCoy, Wis., 86th Army Reserve Command (ARCOM), Area Organizational Maint. Shop G-49	244
-- 321st Combat Support Group, Grand Forks Air Force Base, N. Dak.	319	-- Fort (See: Fort)	
Albuquerque, N. Mex., Airway Facilities Sector (ARTCC), FAA	277	-- Natick Laboratories, Natick, Mass.	263
		-- Non-appropriated Fund Activities, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C.	284

1/ To facilitate reference, listings in this Table contain only key words in the case title. For complete and official case captions see Numerical Table of Cases

<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Army, Department of (cont.)		Atomic Energy Commission, Idaho Operations Office, Idaho Falls, Idaho	299
-- Norton Air Force Base	261	Battle Creek, Mich., FAA Flight Inspection District Office	313
-- Okinawa Base Command	243	Berwyn, Ill., Post Office, United States Postal Service	272
-- Reserve Command Headquarters, Camp McCoy, Sparta, Wis., 102nd Reserve Command, St. Louis, Mo.	256,306	Boston-Brighton, Mass. U.S. Public Health Service Hospital, HEW	267
-- Rocky Mountain Arsenal, Denver, Colo.	325	California Air National Guard (See: National Guard)	
-- Safeguard Systems Command, Huntsville, Ala.	288	Camp McCoy, Wis.	
-- Training Center Engineer and Fort Leonard Wood, Mo.	328	-- 86th Reserve Command, Fifth U.S. Army, Area Organizational Maint. Shop G-49	244
-- Training Center, Infantry, Laundry Facility, Fort Jackson, S.C.	242	-- 102nd Reserve Command, St. Louis, Mo., Reserve Command Headquarters	256,306
-- Transportation Motor Pool, Fort Wainwright, Alaska	278	Charleston Naval Shipyard, S.C.	302,304
-- U.S. Dependents' Schools, European Area	260	Chicago Airports District Office, Great Lakes Region, FAA	250
Army and Air Force Exchange Service		China Lake, Calif., U.S. Naval Weapons Center	297
-- Fort Bliss Post Exchange, El Paso, Tex.	236	Commerce, Department of	
Atlanta, Ga.		-- Nat'l. Oceanic and Atmospheric Admin.	
-- Airway Facility, Sector 12, FAA	287	-- National Ocean Survey	285
-- ATC Tower, FAA	300	-- Nat'l. Weather Serv., Central Region	331
Atlantic City, N.J., National Aviation Facilities Experimental Center, FAA	329	Customs Service Region IX, Chicago, Ill.	257

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Defense, Department of	
-- Defense Language Institute	322
-- Defense Supply Agency	
-- Defense Contract Administration Services Region (DCASR), Boston, Mass	271
-- Defense Contract Administration Services Region, SF, Burlingame, Calif.	247
-- Mapping Agency, Topographic Center, Providence Office, West Warwick, R.I.	310
Economic Opportunity, Office of Region V, Chicago, Ill.	251, 334
Edgewood Arsenal, Aberdeen Proving Ground Command, Army	286
Edwards Air Force Base, Calif., Air Force Flight Test Center, Headquarters	255
Federal Aviation Administration (See: Transportation)	
Forest Service, Mark Twain National Forest, Springfield, Mo.	303
Fort	
-- Bliss Post Exchange, El Paso, Tex.	236
-- Bragg, N.C., Non-appropriated Fund Activities, XVIII Airborne Corps and Fort Bragg	284
-- Jackson, S.C., Training Center, Infantry, Laundry Facility	242

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Fort (cont.)	
-- Leonard Wood, Mo., and U.S. Army Training Center	328
-- Monmouth, N.J. U.S. Army Electronics Command	258, 281, 320
-- Snelling, Minn., Air Force, Officers Open Mess, <u>et al.</u>	327
-- Wainwright, Alaska, Transportation Motor Pool, Army	278
General Services Administration	
-- PBS, FSS, ADTS, Fresno, Calif.	293
-- Region 5, Chicago, Ill.	265
-- Region 9, San Francisco, Calif.	333
Geological Survey, Central Region, Publications Division	274
Grand Forks Air Force Base, N. Dak., 321st Combat Support Group	319
Great Lakes Naval Hospital, Ill., Bureau of Medicine and Surgery, Navy	289
Health, Education and Welfare, Department of	
-- Regional Office VI	266
-- U.S. Public Health Service Hospital, Boston-Brighton, Mass.	267
Holloman Air Force Base, Alamogordo, N. Mex.	235
Housing and Urban Development, Department of Region II	270

<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Interior, Department of		Mines, Bureau of (See: Interior)	
-- Geological Survey, Central Region, Publications Division	274	Mint, Bureau of	262
-- Land Management, Bureau of District Office, Lakeview, Oreg.	276	Moody Air Force Base, G., Air Force Communications Service (AFCS), 2024th Communications Squadron	248
-- Mines, Bureau of Western Administrative Office, Denver, Colo.	312	Natick Army Laboratories	263
-- National Park Service National Capital Parks, John F. Kennedy Center for the Performing Arts	305	National Alliance of Postal and Federal Employees	238
-- Reclamation, Bureau of		National Guard	
-- Lower Colorado Region	318	-- California Air National Guard	
-- Yuma Projects Office	318	-- Ontario, Calif., Internat'l. Airport, Headquarters, 163rd Fighter Group	252
Internal Revenue Service (See: Treasury)		-- Van Nuys, Calif., Headquarters, 146th Tactical Airlift Wing	259
Kennedy, John F., Center for the Performing Arts, National Capital Parks	305	-- Pennsylvania National Guard	254
Land Management, Bureau of District Office, Lakeview, Oreg.	276	National Labor Relations Board	246,295
Los Angeles Air Route Traffic Control Center, FAA	283	-- Region 17 and NLRB	295
Mapping Agency (See: Defense)		National Oceanic and Atmospheric Admin. (See: Commerce)	
Mare Island Naval Shipyard, Vallejo, Calif.	298	National Park Service (See: Interior)	
Mark Twain National Forest, Springfield, Mo.	303	National Science Foundation	316
Military Sealift Command, Navy	245	Naval (See: Navy)	
		Navy, Department of	307
		-- Charleston Naval Shipyard, S.C.	302,304

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Navy, Department of (cont.)	
-- Mare Island Naval Shipyard Vallejo, Calif.	298
-- Medicine and Surgery, Bureau of Great Lakes Naval Hospital, Ill.	289
-- Military Sealift Command	245
-- Naval Facilities Engineering Command, Western Division, San Bruno, Calif.	264
-- Naval Station	
-- Adak, Alaska	321
-- Newport, R.I.	326
-- Naval Weapons Center, China Lake, Calif.	297
-- Naval Weapons Station, Yorktown, Va.	307
-- Norfolk Naval Shipyard	290
-- Portsmouth Naval Shipyard, Portsmouth, N.H.	241
-- Puget Sound Naval Shipyard, Bremerton, Washington	332
New Jersey Department of Defense	269,323
Newport, R.I., U.S. Naval Station	326
Norfolk Naval Shipyard	290
Norton Air Force Base	261
Office of Economic Opportunity Region V, Chicago, Ill.	251,334

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
Okinawa Army Base Command	243
Pennsylvania National Guard	254
Portsmouth Naval Shipyard, N.H.	241
Postal Service, U.S.	
-- Anaheim, Calif., Post Office	324
-- Berwyn, Ill., Post Office	272
Puget Sound Naval Shipyard, Bremerton, Washington	332
Reclamation, Bureau of (See: Interior)	
Rocky Mountain Arsenal, Army, Denver, Colo.	325
Safeguard Systems Command, U.S. Army, Huntsville, Ala.	288
Small Business Administration Miami District Office	314
Transportation, Department of	
-- Federal Aviation Administration	
-- Aeronautical Center	253
-- Airway Facilities Sector (ARTCC), Albuquerque, N. Mex.	277
-- Atlanta Airway Facility, Sector 12, Atlanta, Ga.	287
-- Atlanta ATC Tower	300

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
-- Federal Aviation Administration (cont.)	
-- Chicago Airports District Office, Great Lakes Region	250
-- Eastern Region, Boston ARTCC, Nashua, N.H.	273
-- Flight Inspection District Office, Battle Creek, Mich.	313
-- Los Angeles Air Route Traffic Control Center	283
-- National Aviation Facilities Experimental Center, Atlantic City, N.J.	329
Treasury, Department of	
-- Customs Service Region IX, Chicago, Ill.	257
-- Internal Revenue Service	
-- Chicago District	279
-- Fresno Service Center, Fresno, Calif.	309
-- Western Service Center, Ogden, Utah	280
-- Mint, Bureau of the	262
-- U.S. Savings Bond Division, Wisconsin State Office, Milwaukee, Wis.	237
U.S. Dependents' Schools, Army, European Area	260

<u>TITLE</u>	<u>A/SLMR NO(S).</u>
U.S. Public Health Service Hospital Boston-Brighton, Mass.	267
Veterans Administration	240
-- Benefits Office	296
-- Center, Togus, Maine	317
-- Hospital	
-- East Orange, N.J.	311
-- Muskogee, Okla.	301
-- Portland, Oreg.	308
-- Tampa, Fla.	330
Yorktown, Va., U.S. Naval Weapons Station	307

**DECISIONS**  
**OF THE**  
**ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS**

**Nos. 235 - 334**

**January 1, 1973, through December 31, 1973**





January 2, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

U. S. DEPARTMENT OF THE AIR FORCE,  
HOLLOMAN AIR FORCE BASE,  
ALAMOGORDO, NEW MEXICO  
A/SLMR No. 235

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The Petitioner, Holloman Air Force Base Fire Fighters Local F-164, International Association of Fire Fighters, AFL-CIO, (IAFF) sought to represent a unit of Fire Fighters including those classified as Supervisory Fire Fighters (General) (GS-7) and (GS-8), commonly referred to as Station Captains and Senior Station Captains respectively. The incumbent intervenor, Local 1031, National Federation of Federal Employees, Ind., (NFFE) asserted that an agreement bar existed at the time of IAFF's petition. Although the parties did not contest the appropriateness of the claimed unit, the Activity and NFFE contended, in opposition to IAFF, that the GS-7 and GS-8 Captains be excluded as supervisors.

With regard to the alleged agreement bar, the record revealed that IAFF filed its petition during the period of a 60-day extension of the basic agreement between NFFE and the Activity. Based on the fact that the record indicated that the 60-day extension agreement was intended to be an interim arrangement during the period of negotiations for a new overall agreement, the Assistant Secretary found IAFF's petition to be filed timely. In the opinion of the Assistant Secretary, such a temporary, stopgap arrangement did not constitute a final, fixed term agreement and lacked the stability sought to be achieved by the agreement bar principle.

With respect to the eligibility issue, the Assistant Secretary found the Station Captains and Senior Station Captains to be "supervisors" within the meaning of the Order and, therefore, excluded from the claimed unit. Based on the evidence in the record, he found that Captains possess and exercise authority, in the interest of the Activity involved, to evaluate effectively employees and select candidates to be promoted and that they use independent judgment in the exercise of that authority. In this connection, the evidence indicated that Captains used their own discretion in evaluating their subordinates; that their evaluation was a significant portion of the total input of criteria used to rank eligible employees as candidates for promotion; and that their independent selections from the list of candidates resulted in promotions.

Moreover, the Assistant Secretary noted that the record revealed that in 3 of the 4 stations, Captains were the highest ranking full-time employee at the station and that if the Captains were not excluded from the unit as supervisors, then the resulting supervisor-employee ratio would be 3 to approximately 133 which, in his view, would be unreasonable particularly in view of the distances between the stations and the offices of the Fire Chief and his assistants. On the other hand, if the seven Captains involved herein were excluded as supervisors, the resulting supervisor-employee ratio would result in a more reasonable ratio of 10 supervisors to approximately 126 employees or 1 supervisor for every 12.6 employees.

In these circumstances, the Assistant Secretary directed that an election be held in a unit of all civilian personnel, excluding, among others, employees classified as Supervisory Fire Fighters (General) (GS-7) and (GS-8).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE AIR FORCE,  
HOLLOMAN AIR FORCE BASE,  
ALAMOGORDO, NEW MEXICO

Activity

and

Case No. 63-3268 (RO)

HOLLOMAN AIR FORCE BASE  
FIRE FIGHTERS LOCAL F-164,  
INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS, AFL-CIO

Petitioner

and

LOCAL 1031,  
NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, IND.

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Hiram W. Johnson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner, Holloman Air Force Base Fire Fighters Local F-164, International Association of Fire Fighters, AFL-CIO, herein called IAFF, and the Intervenor, Local 1031, National Federation of Federal Employees, Ind., herein called NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The IAFF seeks an election in a unit of all civilian personnel employed in the Fire Department, Holloman Air Force Base, New Mexico, excluding managers, supervisors, guards, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and the clerical assistant to the Fire Chief, GS-301-6. 1/

While not contesting the appropriateness of the claimed unit, the Activity and the NFFE contend that employees classified as Supervisory Fire Fighter (General) (GS-8) and Supervisory Fire Fighter (General) (GS-7), commonly referred to as Senior Station Captains and Station Captains, respectively, are supervisors within the meaning of Section 2(c) of the Executive Order and should be excluded from the unit. Additionally, the NFFE contends that the IAFF's petition should be dismissed on the basis that an agreement bar existed at the time of filing.

Alleged Agreement Bar

The NFFE claims that the IAFF's petition was untimely in that it was not filed during the "open period" provided for in Section 202.3(c) of the Assistant Secretary's Regulations but, instead, was filed during the period of a 60-day extension of the basic agreement between the NFFE and the Activity. 2/ The IAFF argues that no valid bar to its petition existed inasmuch as (1) the basic agreement had terminated by its own terms, and (2) even if the basic agreement had been extended for 60 days, that extension expired and, thereafter, no new extension or basic agreement was executed by the parties. The Activity maintained a "neutral" position as to the existence of an agreement bar.

1/ The unit appears as amended at the hearing. The record indicates that the scope of the unit is the same as that represented currently by the incumbent exclusive representative, NFFE, except for the exclusion of the clerical assistant to the Fire Chief.

2/ Section 202.3(c) states, in pertinent part: "When there is a signed agreement covering a claimed unit, a petition for exclusive recognition or other election petition will not be considered timely...unless...the petition is filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of such agreement..." (The foregoing Regulation was in effect at the time the petition in this matter was filed.)

The evidence establishes that the Activity and the NFFE executed a negotiated agreement which became effective on December 8, 1969. By its terms, the agreement was to remain in effect for one year until December 7, 1970, and was subject to automatic renewal for "one additional" year if neither party gave written notice of its desire to terminate or modify the agreement. 3/

On November 12, 1971, the President of NFFE, Local 1031 wrote to the Activity requesting an extension of the agreement for 90 days for the purpose of renegotiation. Although the Activity rejected the proposed 90-day extension period on the basis that such extension raised a legal question, on December 2, 1971, a 60-day extension of the basic agreement was executed by the parties. The extension agreement provided, in part: "Negotiations have begun on a new contract... These negotiations will be completed and the new agreement forwarded to Hq USAF for approval prior to the end of the 60-day period." 4/ During this 60-day extension period the IAFF filed and amended its petition in the subject case on January 13 and 25, 1972, respectively.

I find, based on the foregoing circumstances, that the petition filed by the IAFF on January 13, and amended on January 25, 1972, was timely. Thus, the record indicates clearly that the 60-day extension agreement was intended to be an interim arrangement during the period of negotiations for a new overall agreement between the Activity and the NFFE. I reject the NFFE's contention that such an extension period should be treated as an "insulated" period thereby barring the IAFF's petition in this matter. In my view, where, as here, parties execute an extension agreement to serve merely as an interim arrangement during a period of further negotiations, such an agreement may not operate as an agreement bar to a petition which otherwise is filed timely. Thus, such a temporary, stopgap arrangement does not constitute a final, fixed term agreement and lacks the stability sought to be achieved by the agreement bar principle. Under these circumstances, I find that the IAFF's petition in this matter was filed timely.

3/ The record reveals that the parties entered into three supplemental agreements to the basic agreement during the two years in which the agreement was in effect. The first, effective December 31, 1970, concerned hours of work and tours of duty. The second, effective April 15, 1971, updated the basic agreement to conform with Executive Order 11491. The third, effective June 7, 1971, made four minor editorial changes.

4/ The evidence establishes that no new agreement was forwarded to "Hq USAF" and, in fact, there were no further negotiations for a new agreement. Thus, the extension agreement expired by its own terms; no additional extension was entered into; and no new agreement was executed subsequently.

#### Eligibility Issue

As stated above, the Activity and the NFFE contend that Senior Station Captains (GS-8) and Station Captains (GS-7) are supervisors within the meaning of Section 2(c) of Executive Order 11491 and should be excluded from the claimed unit. The NFFE asserts also that in November 1969, when the NFFE was granted exclusive recognition for the unit now sought by the IAFF, Captains were excluded as supervisors in accordance with Section 6(a) of Executive Order 10988 and that the duties and responsibilities of Captains at the Activity have not changed in the interim. The IAFF, on the other hand, seeks to include both Senior Station Captains and Station Captains in its claimed unit based upon the Assistant Secretary's determinations in prior decisions in which fire department employees classified as Station or "House" Captains (GS-7 and GS-6), Lieutenants (GS-6), and Crew Chiefs' (GS-6) were found not to be supervisors within the meaning of the Order. 5/

The Fire Department (or Fire Protection Branch) of the 49th Civil Engineering Squadron at Holloman Air Force Base is responsible for structural and aircraft fire prevention and protection. The Branch has a total complement of approximately 136 individuals of whom approximately 80 are civilians and the remaining are military personnel. 6/ It is headed by the Fire Chief (GS-12). Reporting directly to the Chief are two Assistant Chiefs (GS-10) and one clerical assistant (GS-6). The Branch is composed of the Technical Services Section and the Operations Section. The Technical Services Section has 7 Fire Protection Inspectors (GS-7) and the Operations Section has 2 Senior Station Captains (GS-8), 5 Station Captains (GS-7), 14 Crew Chiefs (GS-6), 30 Driver/Operators (GS-5), 16 Fire Fighters (GS-4), and 2 Alarm Room Operators (GS-4 and GS-3). Fire fighting personnel are divided into two shifts with each shift working a 72-hour week; 24 hours on and 24 hours off.

5/ In this regard, the following decisions were noted: United States Department of the Navy, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30; Federal Aviation Administration, Bureau of National Capital Airports, A/SLMR No. 91; Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128; Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129; and Department of the Army, Headquarters, U.S. Army Training Center Engineer, Fort Leonard Wood, Missouri, A/SLMR No. 183.

6/ The Fire Protection Branch has an authorized staffing pattern of 154 with a manning ratio of 60 percent civilian and 40 percent military.

There are four fire stations operating within the Fire Department. Station Nos. 1, 2, and 3 are physically located on the premises of Holloman Air Force Base and are separated by distances ranging from 3 to 8 miles. Station No. 4, referred to as the Sacramento Peak (or "Sac Peak") Station, is located 45 miles from the Activity at Sun Spot, New Mexico.

Station No. 1 is the largest of the fire stations and is housed in Building No. 304 which is located in the "Main Area" of the Activity. Its facilities consist of a bunk room, latrines and showers, kitchen, day room, dining room, alarm room, hose tower, storage areas, and two apparatus rooms. It also includes a separate office, latrine, and bunk room for the two Assistant Chiefs. The record reveals that while a separate office is maintained for the two Senior Captains at Station No. 1, they share the same eating, sleeping, shower, latrine, and locker facilities which are used by all personnel. The personnel complement for the "A" shift at Station No. 1 includes 1 Senior Captain (GS-8), 12 civilian personnel, and 6 military personnel. The "B" shift includes the other Senior Captain (GS-8) at Station No. 1, 10 civilian personnel, and 6 military personnel. 7/

Stations Nos. 2 and 3 are physically comparable to Station No. 1 except that they each have only one apparatus room, and the alarm room and the Station Captain's office are combined. The "A" shift of Station No. 2 is headed by a military Noncommissioned Officer (NCO) and includes 11 civilian personnel and 6 military personnel. The "B" shift includes 1 Station Captain (GS-7), 10 civilian personnel, and 8 military personnel. The personnel complement for the "A" shift and the "B" shift at Station No. 3 each includes 1 Station Captain (GS-7), 6 civilian personnel and 4 military personnel. 8/ As in the case of Station No. 1, the Station Captains at Stations Nos. 2 and 3 share the same eating, sleeping, shower, latrine, and locker facilities which are used by all personnel.

Station No. 4, or the "Sac Peak" Station, is a one-stall facility with one fire truck. The Station's personnel complement for each shift includes one Station Captain (GS-7) and two civilians. The Station protects the Sacramento Peak Observatory, an Air Force facility engaged in the study of the sun. The record indicates that travel time between the Base and the Sac Peak Station averages approximately one hour during the summer and two hours during the winter months due to the heavy snowfalls

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7/ Two Alarm Room Operators also work at Station No. 1 and are responsible to the Assistant Chiefs.

8/ The record did not reveal where within the Fire Protection Branch the remaining military personnel were employed.

and mountainous terrain. The parties stipulated that because of the remoteness of the site, neither the Fire Chief nor the Assistant Chiefs can respond in time to an emergency at this location. Also, it was stipulated that the responsibilities of the Station Captains at Sac Peak are the same as those at Holloman Air Force Base for the Station Captains, GS-7.

The Fire Chief is the administrative and technical head of the Fire Protection Branch of the Activity and is charged with its overall management and responsibility. In this regard, he is responsible for obtaining the proper fire fighting equipment and personnel to man the equipment. He prepares and issues Branch Operating Instructions which set forth the duties and responsibilities of Branch personnel, the daily routines, and the established fire fighting procedures for responding to emergencies. The Chief works a 40-hour week, 8 hours per day, Monday through Friday. In carrying out his responsibilities, he visits each Fire Station on the Base once a month. His office is located in a building approximately two blocks away from Fire Station No. 1. Located in the same building are the Fire Chief's clerical assistant, personnel of the Technical Services Section, including the Fire Protection Inspectors, the ranking military NCO assigned to the Branch and the extinguisher maintenance facility.

The two Assistant Chiefs, housed at Station No. 1, rotate 24-hour shifts. The Assistant Chief on duty is responsible for the efficient operation of the fire stations and, in addition, assumes the duties of the Fire Chief in the latter's off-duty hours. Further, the Assistant Chief on duty is required to visit the Base fire stations once each 24-hour shift, and he responds to all emergencies and automatically becomes fire officer in charge upon his arrival at the scene of an emergency.

The evidence discloses that Senior Station Captains (GS-8) and Station Captains (GS-7) have exactly the same duties and responsibilities except for the former's added responsibility to act in the capacity of the Assistant Chief when he is off duty for any reason. 9/ Captains 10/ serve as the operational head of the fire station for the 24-hour shift they are on duty. In this connection, they are responsible for effectuating the policies and procedures applicable to their station as set forth in the Branch Operating Instructions.

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9/ The record indicates that the Assistant Chiefs are regularly off duty one full day every two weeks or pay period. Counting additional periods of annual leave and temporary duty, they are off duty an average of between 40 and 45 days each year.

10/ Senior Station Captains and Station Captains hereinafter will be referred to as "Captains."

On a daily basis, each Captain on duty prepares the work and crew assignments which are posted on the station bulletin board and cover that particular 24-hour shift. These assignments include in-house details required for the maintenance and cleaning of the station, position assignments to particular equipment, and standby duty. In making such assignments, the Captain takes into account such factors as the need to rotate personnel, absences due to sickness or emergency leave, or whether a full crew is required. Based on his assessment of these factors, the Captain may "cross-man" personnel on apparatus in order to balance manpower needs.

In responding to emergencies, fire fighting personnel follow published instructions which indicate the apparatus that is to respond to a given alarm and how the attack on the fire is to be conducted. 11/ Each Captain involved in an emergency rides whatever equipment is called out. His responsibility as senior officer at the scene of the emergency is to oversee operations until the Assistant Chief arrives, and if deemed necessary, to call out additional apparatus. Once the Assistant Chief arrives, he is briefed by the Captain on what has occurred, what equipment is on the scene, and what, if any, apparatus has been ordered and is on the way. Thereafter, the Captain takes orders from the Assistant Chief and transmits such orders to the Crew Chiefs. 12/

The record reveals that a daily training schedule is prepared by the Branch's NCO Training Officer and is distributed over the Chief's signature to all stations on a semi-monthly basis. The schedule is based upon minimum requirements established by the Air Force and Tactical Air Command for developing fire fighting proficiency. It designates the subject to be covered, specifies whether the instruction is to be given by the Assistant Chief, or Captain, or Crew Chief, and sets forth training manual references to be used. However, it appears that Captains may exercise their own discretion and substitute other manuals. In addition, the record reveals that Captains in each station schedule training and training exercises for station personnel which they may conduct personally or delegate to Crew Chiefs, Driver/Operators, or Fire Fighters as the occasion requires.

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11/ These instructions are known as "response cards" and "Pre-Fire Plans." They are maintained in all stations and are available to all fire fighter personnel.

12/ One Captain testified that he has never handled the hoses or otherwise helped directly to put out fires. Another Captain testified that on several occasions he handled the hoses and participated directly in putting out fires.

The evidence discloses that Captains, together with Assistant Chiefs, attend weekly staff meetings held by the Chief. These meetings serve to inform the Chief of operational, policy or personnel problems which have arisen. At such meetings the Chief, on occasion, delegates certain authority to the Captains in the absence of a prescribed delegation of authority.

The uniforms of Captains in certain instances, are distinguishable from those worn by personnel of higher and lower rank. The Chief and Assistant Chiefs wear white hats. Captains wear blue hats, as do other personnel, but their hats have silver braid. All personnel, except the Chief and Assistants, wear the same badge. For summer dress, all personnel wear dark blue pants. The Chief, Assistants and Captains wear white shirts, while the remaining personnel wear blue shirts. Assistant Chiefs and Captains wear khaki work uniforms, while other subordinate personnel wear a blue or gray uniform.

The record indicates that Captains have no authority to hire, transfer, layoff, recall or discharge employees. Nor do they have authority to grant overtime, certify job descriptions of subordinates or handle formal written grievances. While it appears that Captains have authority to delay or deny step increases, there is no evidence that such authority has been exercised. On the other hand, Captains have authority to recommend personnel for awards and have exercised such authority. 13/ Further, they have exercised their authority to detail Fire Fighters from one station to another for one 24-hour shift to meet manpower requirements. With regard to disciplinary matters, while the testimony indicates that Captains have authority to make oral admonishments, issue written reprimands, and order suspensions of up to five days, it appears that only letters of reprimand concerning employee indebtedness have been issued by Captains.

The testimony reveals that Captains assist the Assistant Chief in preparing the overall leave schedule for the year based upon employee leave requests submitted at the start of each year and consistent with Activity's regulations regarding the number of station personnel per shift who may be on annual leave at the same time. Also, Captains may recommend approval or disapproval of leave request forms, but the Assistant Chief must sign the form. Conflicting employee preferences generally are resolved mutually, with Captains serving as "mediators." The record reveals that Captains have authorized emergency leave whenever requested.

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13/ Of the two individuals recommended by a Captain for Outstanding Performance Awards, one received the award.

The evidence indicates that Captains are involved in evaluating the performance of Fire Fighters assigned to their respective shifts. Thus, the Captains are required to complete a "Supervisor's Appraisal of Employee's Current Performance." This appraisal form lists 15 different elements on which the employee may be evaluated (e.g., productivity, acceptability of work, willingness to follow instructions and carry out decisions, effectiveness of skills, working relationships, practical judgment in meeting work problems, ability to understand, develop and motivate people, ability to plan ahead and anticipate needs, etc.). Before executing the form, the Captain reviews all elements and selects those which best describe the duties performed by the employee whose performance he is appraising. A minimum of 7 elements must be selected although as many as are relevant should be used, according to the form's instructions. In executing this form, the evidence establishes that the Captain must grade an employee on a point scale ranging from 0 to 5. Upon completion of the form, the Captain signs off as "immediate supervisor" and sends the form to the Assistant Chief for review and signature. The form's instructions indicate that if the Assistant Chief wishes to make a change, he must discuss it with the Captain and it must be agreed to by the latter. However, record testimony indicates there have been no instances when the Assistant Chief discussed an appraisal with the Captain. Moreover, the evidence establishes that the Assistant Chief does not have the authority to tell the Captain how the form is to be filled out. After the Assistant Chief signs the appraisal he returns it to the Captain who discusses the contents of the appraisal with the employee. Thereafter, the form is sent to the Civilian Personnel Office where required computations are made and the form is then placed in the employee's personnel folder. The evidence shows that, generally, employees are graded at points 2, 3, or 4.

When a vacancy occurs in the Branch, the Chief's secretary initiates the promotion process to fill the vacancy by sending a "Request for Personnel Action" to the Civilian Personnel Office. That office prepares a "Merit Promotion Certificate" which is a ranked listing of the top five individuals (or six in case of tie rankings) eligible for promotions to the vacancy, any one of whom the Captain may select. The rankings are based on an evaluation of each eligible employee's background and experience translated into points, using a scale of a possible 105 points. Of this total, a maximum of 50 points may be assigned to an employee's training and experience and another 50 points to his "Supervisor's Appraisal of Employee's Current Performance." 14/ The remaining five points are assigned to such matters as awards, suggestions, educational background, self-development, and community activities.

14/ The importance given the Supervisor's Appraisal has increased significantly within the past year. Previously it was given a 5-point weight in a total scale of 100. Since January 15, 1972, the testimony reveals the 50-point weight has been assigned to it. The record reveals that the 50-point weight is derived from prescribed calculations based upon particular ratings and particular categories involved.

The prepared "Merit Promotion Certificate" is sent to the Captains who have vacancies within their stations. Upon receipt of the Certificate they interview each of the candidates and review the personnel information on the "Supervisor's Record of Employee." 15/ Each Captain's selection is designated in writing on the Certificate which is returned then to the Civilian Personnel Office where the promotion is certified. 16/ The evidence establishes that Captains are not required to consult with either the Chief or his Assistants in making their selection, nor is the approval of their superiors required prior to certification of the promotion by the Civilian Personnel Office.

Based on the evidence presented in this case, I find that Captains possess and exercise authority, in the interest of the Activity involved, to evaluate effectively employees and select candidates to be promoted and that they use independent judgment in the exercise of such authority. 17/ Thus, the evidence indicates that Captains use their own discretion in evaluating their subordinates; that their evaluation is a significant portion of the total input of criteria used to rank eligible employees as candidates for promotion; and that their independent selections from the list of candidates result in the promotion of the individual the particular captain has selected. 18/ Moreover, the record in this case reflects that

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15/ This report, referred to as Form 971, is maintained by each Captain on each Fire Fighter on his shift. It is a confidential record which summarizes such data as positions held, training, awards, promotions, salary increases and disciplinary actions, if any.

16/ If a Captain does not select an eligible candidate from the list he must justify in writing his reason therefor. Moreover, if a Captain is not satisfied with the list of candidates after interviewing them, he may request the Personnel Office to prepare a new one. It was noted that because of the number of vacancies which occur and the limited supply of eligible candidates, most candidates ultimately will be selected for promotion.


17/ As noted above at footnote 5, in several decisions I have found certain disputed Fire Department employee classifications, including Captains, not to be supervisors within the meaning of Section 2(c) of the Order. As distinguished from the subject case, in those cases the evidence did not support the finding that employees in the disputed classifications effectively evaluated the performance of employees and selected candidates for promotion.

18/ While, as noted above, most candidates ultimately will be selected for promotion because of the number of vacancies and the limited supply of eligible candidates, this does not detract from the fact that a particular Captain has the authority to select for promotion the individual candidate who he decides is best qualified to work at his station.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but no later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Holloman Air Force Base Fire Fighters Local F-164, International Association of Fire Fighters, AFL-CIO; or by Local 1031, National Federation of Federal Employees, Independent; or by neither.

Dated, Washington, D.C.  
January 2, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

in 3 of the 4 stations Captains are the highest ranking full-time employees at the station and that if the Captains were not excluded from the unit as supervisors, then the resulting supervisor-employee ratio, including civilian and military personnel, would be 3 to approximately 133, which, in my view, would be unreasonable, particularly in view of the distances between the stations and the offices of the Fire Chief and his Assistants. On the other hand, the exclusion of the Captains from the petitioned for unit on the basis that they are supervisors results in a more reasonable supervisor-employee ratio of 10 supervisors to approximately 126 employees, or 1 supervisor for every 12.6 employees. 19/

Under all the circumstances, I find that Senior Station Captains (Supervisory Fire Fighter, General, GS-8) and Station Captains (Supervisory Fire Fighter, General, GS-7) are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the unit found appropriate for the purpose of exclusive recognition.

Based on the foregoing and noting the agreement of the parties with respect to the appropriateness of the claimed unit and the fact that such unit has been in existence for a substantial period of time and has been covered by a negotiated agreement, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All civilian personnel employed in the Fire Protection Branch of the 49th Civil Engineering Squadron, Holloman Air Force Base, New Mexico, excluding the Fire Chief, Assistant Chiefs, Senior Station Captains, Station Captains, employees engaged in Federal Personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 20/

19/ Compare United States Department of the Navy, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30.

20/ Inasmuch as the record does not set forth any facts concerning "the clerical assistant to the Fire Chief, GS-301-6," I will make no eligibility findings regarding this classification.

January 2, 1973

A/SLMR No. 236

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

ARMY AND AIR FORCE EXCHANGE SERVICE,  
FORT BLISS POST EXCHANGE,  
EL PASO, TEXAS

ARMY AND AIR FORCE EXCHANGE SERVICE,  
FORT BLISS POST EXCHANGE,  
EL PASO, TEXAS  
A/SLMR No. 236

Activity

and

Case No. 63-2903(R0)

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES, LOCAL R 14-22 1/

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 174, a subsequent hearing was held in this case for the purpose of securing additional evidence concerning the appropriateness of the unit sought. In the subject case, the Petitioner, National Association of Government Employees, Local R 14-22 (NAGE), petitioned for a unit consisting of employees of the Army and Air Force Exchange Service employed at the Fort Bliss Exchange at Fort Bliss, Texas, including its satellite exchanges at MacGregor Range, Dona Ana Range, Oro Grande Range, New Mexico, and the William Beaumont General Hospital, Fort Bliss, Texas.

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held in the subject case. Thereafter, on July 27, 1972, I issued a Decision and Remand, 2/ in which I ordered that the subject case be remanded to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the unit sought. On September 21, 1972, a further hearing was held before Hearing Officer James J. Lemming. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

As a result of a reorganization in June, 1972, White Sands Missile Range, which was involved in the original hearing, was made a separate command entity from the Fort Bliss Exchange.

Upon the entire record in this case, including the facts developed at the hearings held both prior and subsequent to the remand, and a brief submitted by the Activity, I find:

The Assistant Secretary found that the unit sought by the NAGE, as amended at the remand hearing, was appropriate for the purpose of exclusive recognition. In this regard, he noted the unit includes all employees of the Fort Bliss Exchange, including its satellites; the close geographic proximity of the satellites and Fort Bliss; the effective day-to-day decision making authority of the Resident Manager at the Fort Bliss Exchange; and all employees of the claimed unit are subject to similar personnel policies, wage rates, fringe benefits and working conditions. The Assistant Secretary also noted particularly that in addition to his authority over employee and personnel practices at the Fort Bliss Exchange, the Resident Manager is responsible for labor relations for his Exchange and satellites; and that this authority is exercised in an autonomous manner. In addition, the parties agreed on the appropriateness of the unit and no labor organization sought to represent the employees in a more comprehensive unit. As the unit found appropriate substantially differed from the unit petitioned for originally, the Assistant Secretary directed that the election be held upon completion of the posting of a Notice of Unit Determination to permit intervention by a labor organization for the sole purpose of appearing on the ballot.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Association of Government Employees, Local R 14-22, herein called NAGE, seeks an election in the following unit: "All regular full-time and regular part-time hourly pay plan (HPP) and commission pay plan (CPP) employees, including all off duty military personnel in either of the foregoing categories, employed by

1/ The name of the labor organization appears as amended at the hearing.

2/ A/SLMR No. 174.



the Fort Bliss Exchange at Fort Bliss, Texas, MacGregor Range, Dona Ana Range, Oro Grande Range, New Mexico, and William Beaumont General Hospital, Fort Bliss, Texas, excluding temporary full-time and temporary part-time employees employed for a period of 180 days or less, on-call and casual employees, managerial and supervisory employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, guards and employees of the El Paso Area Exchange. 3/

The record reveals that prior to June 1972, the Fort Bliss Area Exchange functioned as a part of the Southwest Exchange Region of the worldwide Army and Air Force Exchange Service. The White Sands Missile Range Exchange was a component of the Fort Bliss Area Exchange. As a result of a reorganization in June 1972, the Southwest Exchange Region was abolished, White Sands Missile Range Exchange was made a separate entity from the Fort Bliss Exchange 4/ and it, together with the Fort Bliss Exchange, the Holloman Air Force Base Exchange, and the Kirtland Air Force Base Exchange now comprise what is known as the El Paso Area Exchange. The El Paso Area Exchange, in turn, reports directly to the Alamo Exchange Region in San Antonio, Texas. Attached to, and part of, the Fort Bliss Exchange are its satellites; the MacGregor Range, Dona Ana Range, Oro Grande Range and the William Beaumont General Hospital. 5/

The El Paso Area Exchange is one of many installations operated all over the world by the Army and Air Force Exchange Service, whose function is to provide military personnel and other authorized patrons with certain merchandise and services. The El Paso Area Exchange is directed by a General Manager who, in addition to Fort Bliss, is responsible for the Holloman, White Sands, Cannon, and Kirtland Exchanges. The Fort Bliss Exchange is under the overall supervision of a Resident Manager who reports to the El Paso Area Exchange General Manager.

3/ The unit description appears as amended at the remand hearing. The unit as petitioned for initially did not include employees at MacGregor Range, Dona Ana Range, Oro Grande Range and the William Beaumont General Hospital.

4/ Stallion Range, a satellite of the White Sands Missile Range Exchange at the time of original hearing, has, since the remand, been closed down.

5/ The record reveals that Fort Bliss is located near El Paso, Texas, as is the William Beaumont General Hospital, which is a tenant facility on the Fort Bliss grounds, employing, among others, six individuals in a retail and food operation. MacGregor Range, New Mexico, a year round installation employing eight individuals, is located about twenty-five miles northeast of Fort Bliss. Dona Ana Range, New Mexico, a seasonal operation (summer only), is located about fifteen miles west of MacGregor Range. Oro Grande Range, New Mexico, is a year-round installation staffed by a single employee detailed from MacGregor Range and is located twenty miles north of MacGregor Range.

The Fort Bliss Exchange and its satellites employ a total of approximately 330 individuals who are engaged in retail, food and service operations. The Fort Bliss Exchange at Fort Bliss employs approximately 315 employees in its various facilities, such as the Main Store, "Toyland," and the Main Cafeteria. The scope of activities by the satellites named above appears to be limited and, as indicated above, they employ a total of approximately 15 employees.

The Resident Manager at Fort Bliss is responsible primarily for the operation of the Fort Bliss Exchange, but is charged also with the supervision and management of its satellites. Thus, while the day-to-day operation of the satellites is conducted under the direction of an employee detailed from Fort Bliss, this latter employee reports directly to the Resident Manager at Fort Bliss, receives instructions and guidance from the Resident Manager, and has only limited authority in directing the activities of satellite employees. The record reveals also that inspection teams from Fort Bliss periodically visit the satellites for purposes of training as well as supervision, and that the close geographic location of the satellites and Fort Bliss results in substantial control of the satellites being exercised by the Resident Manager of the Fort Bliss Exchange. Further, the Resident Manager has authority to review the performance evaluations of employees assigned to the Fort Bliss Exchange and its satellites as well as any disciplinary actions taken by the various levels of supervision. In this connection, while employees may discuss grievances on an informal basis with their immediate supervisors, the Resident Manager exercises substantial authority with respect to the adjustment of such grievances. 6/ The record reveals that the recommendations of the Resident Manager at Fort Bliss with respect to such matters as hiring, promotions, discharges, and leave are invariably approved by the General Manager of the El Paso Area Exchange. Moreover, the record reveals the Resident Manager is responsible for labor relations for his Exchange as well as the satellites; is empowered with the authority to enter into labor-management negotiations without prior approval by the General Manager of the El Paso Area Exchange; and is authorized to sign negotiated agreements.

Based on the foregoing circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Thus, the unit includes all employees of the Fort Bliss Exchange, including its satellites; all of the employees in the claimed unit are located within close geographic proximity to each other; the Resident Manager at the Fort Bliss Exchange has effective day-to-day decision making authority at that location as well as at the satellites; and all employees in the claimed unit are subject to similar personnel policies, wage rates, fringe benefits, and

6/ When grievances reach a formal stage they must be directed to the General Manager at the El Paso Area Exchange.

other working conditions. Furthermore, it is noted particularly that, in addition to his authority over employee and personnel practices at the Fort Bliss Exchange, the Resident Manager at Fort Bliss is responsible for the labor relations at his Exchange as well as all its satellites and this authority is exercised, for the most part, in an autonomous manner. Accordingly, and noting also the parties' agreement on the appropriateness of the claimed unit, as amended, and the fact that no labor organization is seeking to represent the claimed employees on a more comprehensive basis, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

All regular full-time and regular part-time Hourly Pay Plan and Commission Pay Plan employees, including all off-duty military personnel in either of the foregoing categories, 7/ employed by the Fort Bliss Exchange at Fort Bliss, Texas, including MacGregor Range, Dona Ana Range, Oro Grande Range, New Mexico, and the William Beaumont General Hospital, Fort Bliss, Texas, excluding other employees of the El Paso Area Exchange, temporary full-time and temporary part-time employees, on-call employees 8/, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 9/

7/ The record reveals that there are off-duty military personnel working as regular part-time employees at the Fort Bliss Exchange. As I stated in Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167, off-duty military personnel who otherwise qualify for inclusion in a unit found appropriate and who work a sufficient number of hours to be classified as either regular full-time or regular part-time may not be excluded from the unit on the basis of agency regulations which would automatically exclude them from bargaining units.

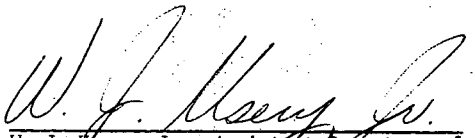
8/ The record does not indicate whether the Activity employs or utilizes "casual" employees. Accordingly, I shall make no finding as to whether such employees properly should be excluded from the unit. Cf. Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33; Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, cited above.

9/ I am advised administratively that the NAGE has submitted a showing of interest which is in excess of thirty percent in the unit found appropriate.

In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any intervention in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military services who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and were not rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by National Association of Government Employees, Local R 14-22, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

Inasmuch as the unit found appropriate is substantially different from that which was petitioned for initially, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have found appropriate. Such Notice shall conform in all respect to the requirements of Section 202.4 (b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any intervention, otherwise timely, will be granted solely for the purpose of appearing on the ballot in the election among all the employees in the unit found appropriate.

Dated, Washington, D. C.  
January 2, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

January 3, 1973

A/SLMR No. 237

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

THE DEPARTMENT OF THE TREASURY,  
U. S. SAVINGS BONDS DIVISION,  
WISCONSIN STATE OFFICE,  
MILWAUKEE, WISCONSIN  
A/SLMR No. 237

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

THE DEPARTMENT OF THE TREASURY,  
U. S. SAVINGS BONDS DIVISION,  
WISCONSIN STATE OFFICE,  
MILWAUKEE, WISCONSIN 1/

Activity

and

Case No. 50-8240(25)

LOCAL 2230, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

The Petitioner, Local 2230, American Federation of Government Employees, AFL-CIO, (AFGE), sought an election in a unit of all non-supervisory employees in the Wisconsin State Office of the U. S. Savings Bonds Division of the U. S. Department of the Treasury (Division). The Wisconsin State Office reports, together with state offices in Illinois and Indiana, to the North Central Market Office, headquartered in Chicago, Illinois. The Activity took the position that the proposed unit was inappropriate and that the appropriate unit would be one which included all elements of its nationwide field operations.

The Assistant Secretary determined that the employees in the petitioned for unit did not possess a clear and identifiable community of interest separate and apart from certain other employees of the field operations of the Division. In this connection, he noted that all of the Division's field employees had a common mission, that the claimed employees in the Wisconsin State Office were, together with employees of the State Offices in Illinois and Indiana, under the authority of the same market office and market director, that the Division's market offices had a functional interrelationship in connection with the accomplishment of their individual goals, and that there was coordination and cooperation among Bond Sales Promotional Representatives (BSPR's) assigned to different state offices. He noted also that BSPR's engaged in training at the national level, the Division had centralized personnel policies, and the area of consideration for promotions was nationwide for BSPR's. On the basis of the foregoing, the Assistant Secretary was of the opinion that a fragmented unit limited to one state office could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, he found that the petitioned for unit was not appropriate for the purpose of exclusive recognition and ordered that the petition be dismissed.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer B. W. Hogancamp. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Local 2230, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all nonsupervisory employees in the Wisconsin State Office of the U. S. Savings Bonds Division of the U. S. Department of the Treasury, excluding

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1/ The name of the Activity appears as corrected at the hearing.

employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professionals, and supervisors and guards as defined in the Executive Order.

The Activity takes the position that the proposed unit is inappropriate because (1) the employees in question do not possess a separate and distinct community of interest as contrasted with the clear and identifiable commonality among all employees in the Activity's field operations; (2) recognition of such a fragmented grouping would not promote effective dealings and efficiency of agency operations; and (3) the AFGE's petition is based solely on the extent of organization. The Activity maintains that the appropriate unit is one which would include all elements of its nationwide field operations. 2/

The mission of the U. S. Savings Bonds Division is to promote the sale and retention of savings bonds. Its overall policies and programs are developed at the national level and are implemented at the local level by a field organization operating throughout the United States.

Overall administration and management of the Division is vested in a National Director, located in the Division's headquarters in Washington, D. C. Reporting to the National Director at the headquarters level is the Director of Marketing, charged with the responsibility for the Division's field staff of more than 260 employees. At the next level of organization are 11 geographically dispersed market offices 3/ headed by market directors. Each market director is responsible for a segment of 42 marketing entities (called state offices), some covering individual states and others crossing state lines. The directors of the state offices report to their respective market directors. The Wisconsin State Office - the petitioned for unit herein - reports, together with the state offices in Illinois and Indiana, to the North Central Market Office, headquartered in Chicago, Illinois.

2/ In The Department of the Treasury, U. S. Savings Bonds Division, A/SLMR No. 185, I found that a unit of all employees in the Headquarters Office of the U. S. Savings Bonds Division, Washington, D. C., was appropriate for the purpose of exclusive recognition under the Order.

3/ Subsequent to the decision in The Department of the Treasury, U. S. Savings Bonds Division, cited above, two of the Activity's market offices were consolidated, thereby reducing the total number from 12 to 11.

The Wisconsin State Office consists of eight employees. Six of the Office's employees are located at the Office's primary situs of operations in Milwaukee, Wisconsin. These employees include the State Director, his Administrative Assistant, two Bond Sales Promotion Representatives (BSPR's) 4/, and two clericals. Two additional BSPR's, (who are termed "Area Managers"), are situated in field locations within the State; namely, Kenosha and Madison, Wisconsin.

As in the case with each of the Division's other state offices, the Wisconsin State Office is responsible for carrying out national policies and programs at a local level. The record reveals that an important element of this function is the fulfillment of an annually assigned goal for bond sales. In this connection, the National Office determines the specific dollar goal for each market and state office as well as a budget within which such goal must be reached; each may be changed solely upon authorization by the appropriate officials at the National Office. Subsequent to the National Office's assignment of a particular goal to the market and state directors, the market directors, with the aid of their state directors, develop a detailed market sales plan to meet the needs of the areas within their jurisdiction. State directors then allocate individual sales goals to BSPR's in their state. In this connection, the evidence shows that the realization of the North Central Market Office's assigned dollar objective depends upon the degree of achievement attained by the State Offices in Illinois, Indiana, and Wisconsin, and the State Offices, in turn, depend on the success of their individual BSPR's. Further, the record reflects that there is a degree of interrelationship among different market offices. Thus, the record in the instant case reveals that two of Wisconsin's northern counties are serviced by BSPR's from Minnesota, a state which is in a separate market office area, and that any sales in these counties are credited not only to the Wisconsin sales goal and the individual goals of the Minnesota BSPR's, but also to the two distinct market office goals.

4/ Most of the Division's employees are within the same Civil Service series classification, GS-011. Field personnel within this series classification are termed BSPR's and are given additional job titles in accordance with their specific duties and responsibilities. In The Department of the Treasury, U. S. Savings Bonds Division, cited above, I found that the BSPR's, in certain job classifications, located at the Activity's headquarters in Washington, D. C., were not professional employees within the meaning of the Order.

To accomplish their assigned task, field personnel establish initial contacts with local elements of business, labor, schools, and banks with the objective of establishing sales campaigns and organizing the volunteers who engage in the actual bond selling. In the performance of their job functions, all of the Division's BSPR's are in travel status approximately 85 percent of the time and are required to make at least five calls to clients per day, a minimum established at the national level. BSPR's are aided in their work by guidance materials and directives which are distributed to market and state offices by the Division's National Office. The record reveals that any requests by Wisconsin BSPR's for sales campaign supplies are directed to their state director, who submits such requisitions to the North Central Market Office headquarters where they are completed and sent out.

Although BSPR's work independently in creating and carrying out an effective sales campaign in their area, coordinated efforts with BSPR's in other states and markets are sometimes required. Thus, a BSPR in a state where a large national corporation is headquartered will establish a savings bonds campaign with the corporate headquarters, which then distributes the program to the corporation's facilities throughout the United States. Information as to this program is distributed simultaneously by the initiating BSPR to BSPR's in the states involved, their respective state directors, and their respective market directors, with the credit for sales which occur applied both to the BSPR who established the campaign and to the state where the sale is made.

The Division has a central personnel office located at the Washington headquarters. Personnel policies are established and administered at the national level by the Director of Personnel, who also possesses authority to act in all matters concerning labor relations. Personnel records are located centrally in the National Office, and any personnel actions are approved or disapproved by this Office. Also, any occasional temporary assignment of BSPR's to cover unfilled vacancies are made at the national level. The area of consideration for promotions is nationwide for BSPR's and the commuting area for clericals, who may also apply for positions anywhere in the United States. While state directors interview for hiring, perform standard performance evaluations on employees, and recommend promotions, transfers, discipline, and in-grade increases, the evidence establishes that such actions and recommendations are reviewed thoroughly by their market directors and then are transmitted to the National Office for final decision.

-4-

To standardize the method by which the work of the Division is carried out, each BSPR is required to take the "Principles of Professional Salesmanship" training course which is administered by a training officer in the Division's headquarters. Those BSPR's with little or no sales experience are required also to participate in a more extensive training program involving 90 days of rotational assignment to several state offices. In addition, all BSPR's meet annually for a training program which is held nationally in Washington, D. C. every other year. In those years when the training is not conducted in Washington, D. C., it is held on a regional basis.

Under all the circumstances, I find that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and apart from certain other employees of the field operations of the Division. Thus, as noted above, the evidence establishes that all of the Division's field employees have a common mission, that the claimed employees in the Wisconsin State Office are, together with employees of the State Offices in Illinois and Indiana, under the authority of the same market office and market director, that the Division's market offices have a functional interrelationship in connection with the accomplishment of their individual goals, and that there is coordination and cooperation among BSPR's assigned to different state offices. Further, BSPR's engage in training at the national level, the Division has centralized personnel policies, and the area of consideration for promotions is nationwide for BSPR's. In my opinion, the foregoing evidence shows that a fragmented unit limited to one state office could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition, and I shall order that the petition herein be dismissed. 5/

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5/ In view of the disposition of this case, I find it unnecessary to reach issues on the status and eligibility of certain alleged professional and confidential employees, management officials, and supervisors.

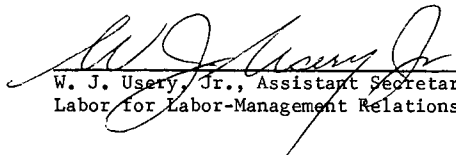
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January 3, 1973

IT IS HEREBY ORDERED that the petition in Case No. 50-8240(25) be, and it hereby is, dismissed.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D. C.  
January 3, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

NATIONAL ALLIANCE OF POSTAL AND  
FEDERAL EMPLOYEES

and

DIRECTOR, OFFICE OF LABOR-MANAGEMENT  
AND WELFARE-PENSION REPORTS,  
UNITED STATES DEPARTMENT OF LABOR  
A/SLMR No. 238

In the subject case an Administrative Law Judge issued his Report and Recommendations recommending that the persons named in the Certification of Election, issued by the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor (Director), be declared the duly elected President, First Vice-President, Second Vice-President, Secretary, Treasurer-Comptroller and Editor of the National Alliance of Postal and Federal Employees (NAPFE) for a full constitutional term of office, and that the proceeding be dismissed.

This proceeding, instituted at the direction of the Director, concerned a Notice of Hearing in which the Director alleged, among other things, that in connection with an election of officers of the NAPFE, which election was subject to the provisions of Executive Order 11491, the Assistant Secretary's Regulations, and Sections 401(a) through 401(g) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), there was probable cause to believe that violations of the Assistant Secretary's Regulations and the LMRDA had occurred. Specifically, the Director alleged the NAPFE violated the Assistant Secretary's Regulations and the LMRDA, by denying members a reasonable opportunity to nominate candidates for office by the imposition of a self-nomination rule; by the imposition of a fifteen (\$15.00) dollar filing fee; by denying members the right to vote for or otherwise support candidates of their choice by failing to mail ballots to a substantial number of members; by failing to preserve for one year the ballots and all other records pertaining to the election; and in the conduct of the election in that moneys received by way of dues, assessment, or similar levy by the Washington, D.C. branch of the NAPFE were contributed to promote the candidacy of one of the candidates for the office of National President.

Thereafter, the NAPFE and counsels for the Director entered into a stipulation, which was approved by an Administrative Law Judge. In the stipulation the NAPFE, without conceding that the previously held election was in violation of the Order, agreed to conduct its next regular election with representatives of the Director present to advise and insure that the election was conducted in accordance with the provisions of the Order, the Assistant Secretary's Regulations and its own Constitution. The election subsequently was held and the Director issued a Certification of Election.

Upon consideration of the foregoing, the Assistant Secretary found that the persons named in the Certification of Election had been duly elected President, First Vice-President, Second Vice-President, Secretary, Treasurer-Comptroller and Editor of the Respondent for a full constitutional term of office. Accordingly, he adopted the recommendation of the Administrative Law Judge and dismissed the proceeding.

A/SLMR No. 238

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL ALLIANCE OF POSTAL  
AND FEDERAL EMPLOYEES

Respondent

and

Case No. S-E-1  
(22-1965)

DIRECTOR, OFFICE OF  
LABOR-MANAGEMENT AND  
WELFARE-PENSION REPORTS,  
UNITED STATES DEPARTMENT OF LABOR

Complainant

DECISION AND ORDER

On November 10, 1972, Administrative Law Judge E. West Parkinson issued his Report and Recommendations in the above-entitled proceeding recommending that the persons named in the Certification of Election (dated August 11, 1972), filed by the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor, (herein called the Director), be declared the duly elected President, First Vice-President, Second Vice-President, Secretary, Treasurer-Comptroller, and Editor of the Respondent for a full constitutional term of office and that this proceeding be dismissed.

This proceeding was instituted by a Notice of Hearing issued at the direction of the Director on August 30, 1971, through Regional Administrator Overath, in accordance with Sections 204.66 and 204.67 of the Assistant Secretary's Regulations in force at that time, and Executive Order 11491. In the Notice of Hearing, the Director alleged that, pursuant to an investigation of a complaint in connection with an election of officers conducted by the Respondent between June 16 and July 17, 1970, which election was subject to the provisions of the Order, the Assistant Secretary's Regulations, and the provisions of Sections 401(a) through 401(g) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), there was probable cause to believe that violations of Section 204.29 of the Assistant Secretary's Regulations and corresponding violations of the LMRDA had occurred and had not been corrected at the time of the institution of this proceeding. Specifically, the Director alleged, among other things, that the Respondent violated the Assistant Secretary's Regulations and corresponding provisions of the LMRDA (1) by denying members in good

standing a reasonable opportunity to nominate candidates of their choice by the imposition of a self-nomination rule; (2) by denying members in good standing a reasonable opportunity to nominate candidates of their choice by the imposition of a fifteen (\$15.00) dollar filing fee for all candidates; (3) by denying members in good standing the right to vote for or otherwise support candidates of their choice by failing to mail ballots to a substantial number of members; (4) by failing to preserve for one year the ballots and all other records pertaining to the election; and (5) in the conduct of the election in that moneys received by way of dues, assessment, or similar levy by the Washington, D.C. Branch of the Respondent were contributed to promote the candidacy of one of the candidates for the office of National President.

Thereafter, on December 14, 1971, the Respondent entered into a Stipulation with the counsels for the Director, in which, without conceding that the previously held election was in violation of the Order, it agreed to conduct its next regular election with representatives of the Director present to advise and insure that the election was conducted in accordance with the provisions of the Order, the Assistant Secretary's Regulations, and so far as lawful and practicable, in accordance with the provisions of its own Constitution. On December 27, 1971, Administrative Law Judge Parkinson issued an Order approving the Stipulation.

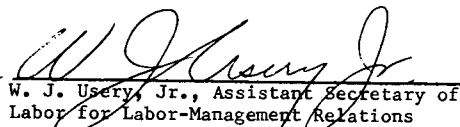
Thereafter, an election was conducted and, on August 11, 1972, the Director issued a Certification of Election in which he stated that the election, conducted under his supervision, was in accordance with the provisions of the Order, the Assistant Secretary's Regulations, and so far as lawful and practicable, in accordance with the provisions of the Respondent's Constitution.

Upon consideration of the Administrative Law Judge's Report and Recommendations, the Stipulation and Order upon which it is based, and the entire record in the subject case, I hereby find that Robert L. (Bob) White, Wesley Young, Cherry Brown, Votie D. Dixon, Enormel Clark and Snow F. Grigsby, the persons named in the Certification of Election issued by the Director on August 11, 1972, have been duly elected, respectively, as the President, First Vice-President, Second Vice-President, Secretary, Treasurer-Comptroller and Editor of the Respondent for a full constitutional term of office. Accordingly, I hereby adopt the recommendation of the Administrative Law Judge that this proceeding be dismissed.

ORDER

IT IS HEREBY ORDERED that Case No. S-E-1 (22-1965) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
January 3, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

In the Matter of )  
 )  
NATIONAL ALLIANCE OF POSTAL )  
AND FEDERAL EMPLOYEES, ) CASE NO. S-E-1  
 )  
Respondent )

REPORT AND RECOMMENDATIONS

It appearing to the Administrative Law Judge that, pursuant to a Stipulation and Order approved by the Hearing Examiner<sup>1/</sup> on December 27, 1971, the respondent has conducted an election for the offices of President, First Vice President, Second Vice President, Secretary, Treasurer-Comptroller and Editor under the supervision of the Director; and that the Director has filed a Certification of Election, certifying the names of the persons who were elected in such election, and further certifying that such new election was conducted in accordance with the provisions of Executive Order 11491 and the Rules and Regulations issued pursuant thereto by the Assistant Secretary for Labor-Management Relations, and in conformity with the Constitution of the respondent so far as lawful and practicable; and the Administrative Law Judge having considered said Certification and being fully advised, it is upon motion of the Director hereby:

<sup>1/</sup> Title of Hearing Examiner changed to Administrative Law Judge effective in August 1972.



RECOMMENDED: That the persons named in the Certification of Election filed as aforesaid by the Director, be declared the duly elected officers of the respondent for a full constitutional term of office, and that this proceeding be dismissed.

January 3, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

/s/ E. West Parkinson  
E. WEST PARKINSON  
Administrative Law Judge

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO  
and  
DIRECTOR, OFFICE OF LABOR-  
MANAGEMENT AND WELFARE-PENSION  
REPORTS, UNITED STATES DEPARTMENT  
OF LABOR  
A/SLMR No. 239

Dated at Washington, D. C.  
this 10th day of November, 1972.

In the subject case an Administrative Law Judge issued his Report and Recommendation recommending that the person named in the Certification of Election, issued by the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor (Director), be declared the duly elected National Vice-President for the Tenth District of the American Federation of Government Employees, AFL-CIO, (AFGE) for a full constitutional term of office, and that the proceeding be dismissed.

This proceeding, instituted at the direction of the Director, concerned a Notice of Hearing in which the Director alleged, among other things, that the AFGE violated the Order by denying a member the right to be a candidate for office, by denying members a reasonable opportunity for the nomination of candidates for office, and in the conduct of an election in that moneys received by way of dues, assessments or similar levy were used in an improper manner. It was also alleged that the AFGE violated the Order and provisions of its own Constitution in the conduct of an election.

Thereafter, the AFGE and the Director entered into a stipulation, which was approved by an Administrative Law Judge. In the stipulation, the AFGE, without conceding that the previously held election was in violation of the Order, agreed to conduct its next regular election under the supervision of the Director and in accordance with the provisions of the Order and its Constitution. The election subsequently was held and the Director issued a Certification of Election.

Upon consideration of the foregoing, the Assistant Secretary found that the person named in the Certification of Election had been duly elected as National Vice-President for the Tenth District of the Respondent for a full constitutional term of office. Accordingly, he adopted the recommendation of the Administrative Law Judge and dismissed the proceeding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
AFL-CIO

Respondent

and

Case No. 63-2714

DIRECTOR, OFFICE OF  
LABOR-MANAGEMENT AND  
WELFARE-PENSION REPORTS,  
UNITED STATES DEPARTMENT OF LABOR

Complainant

DECISION AND ORDER

On August 8, 1972, Administrative Law Judge E. West Parkinson issued his Report and Recommendation in the above-entitled proceeding recommending that the person named in the Certification of Election (dated June 21, 1972), filed by the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor, (herein called the Director), be declared the duly elected National Vice-President for the Tenth District of the Respondent for a full constitutional term of office and that this proceeding be dismissed.

This proceeding was instituted by a Notice of Hearing issued at the direction of the Director on August 17, 1971, through Acting Regional Administrator Zeldich, in accordance with Section 204.66 and 204.67 of the Assistant Secretary's Regulations in force at that time and Executive Order 11491. In the Notice of Hearing, the Director alleged, among other things, that the Respondent violated the Order (1) by denying a member in good standing the right to be a candidate for the office of National Vice-President for Respondent's Tenth District; (2) by denying members in good standing a reasonable opportunity for the nomination of candidates for the office of National Vice-President for the Respondent's Tenth District, and

the right to vote for and otherwise support candidates of their choice; and (3) in the conduct of the election for a National Vice-President for the Respondent's Tenth District, in that moneys received by way of dues, assessments or similar levy were used to promote the candidacy of particular individuals in an improper manner. The Director further alleged that the Respondent violated the Order and provisions of its own Constitution in the conduct of the election.

Thereafter, on September 23, 1971, the Respondent entered into a Stipulation with the counsel for the Director, in which, without conceding that the previously held election for the office of National Vice-President for the Respondent's Tenth District was in violation of the Order, it agreed to conduct its next regular election for that office under the supervision of the Director, in accordance with the provisions of the Order, the Assistant Secretary's Regulations, and so far as lawful and practicable, in accordance with the provisions of its Constitution. On September 27, 1971, Administrative Law Judge Parkinson issued an Order approving the Stipulation.

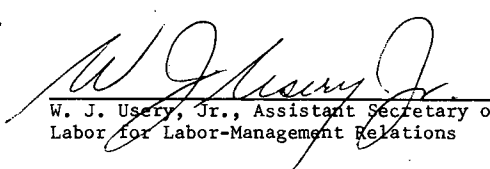
Thereafter, an election was conducted on April 18, 1972, and on June 21, 1972, the Director issued a Certification of Election, in which he certified that the election, conducted under his supervision, was in accordance with the provisions of the Order, the Assistant Secretary's Regulations, and so far as lawful and practicable, in accordance with the provisions of the Respondent's Constitution.

Upon consideration of the Administrative Law Judge's Report and Recommendation, the Stipulation and Order upon which it is based, and the entire record in the subject case, I hereby find that Tom Swain, the person named in the Certification of Election issued by the Director on June 21, 1972, has been duly elected as National Vice-President for the Tenth District of the Respondent for a full constitutional term of office. Accordingly, I hereby adopt the recommendation of the Administrative Law Judge that this proceeding be dismissed.

ORDER

IT IS HEREBY ORDERED that Case No. 63-2714 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
January 3, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

In the Matter of

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO,

Respondent.

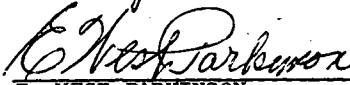
CASE NO. 63-2714

REPORT AND RECOMMENDATION

It appearing to the Hearing Examiner, that, pursuant to a Stipulation and Order entered on September 27, 1971, the respondent has conducted an election for the office of National Vice President for the Tenth District under the supervision of the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor and of the Civil Service Commission; and that the Director has filed a Certification of the Election, certifying the name of the person who was elected in such election, and further certifying that such election was conducted in accordance with the provisions of Executive Order No. 11491 and the Rules and Regulations issued pursuant thereto by the Assistant Secretary of Labor for Labor-Management Relations, and so far as lawful and practicable, in accordance with the provisions of respondent's Constitution; and the Hearing Examiner having considered such Certification and being fully advised, it is upon motion for the Director hereby:

RECOMMENDED that the person named in the Certification of Election filed as aforesaid by the Director, be declared the duly elected National Vice President for the Tenth District of the respondent for a full constitutional term of office and that this proceeding be dismissed.

Entered this 8<sup>th</sup> day of August, 1972.

  
E. WEST PARKINSON  
Hearing Examiner

January 15, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

VETERANS ADMINISTRATION  
A/SLMR No. 240

This case involved representation petitions filed by the Council of AFGE Veterans Administration Locals and other AFL-CIO Affiliates (the Council), and the American Nurses Association (Nurses). The National Alliance of Postal and Federal Employees (NAFFE); National Federation of Federal Employees (NFFE); Veterans Administration and Independent Service Employees Union; National Association of Government Employees (NAGE) and the Nurses intervened in the petition filed by the Council. The Council and the NFFE intervened in the petition filed by the Nurses. The Council sought a unit which encompassed all of the Activity's employees, including professionals, whereas the Nurses' petition, as amended, sought a unit which consisted of all professional registered nurses employed in the Department of Medicine and Surgery of the Activity.

The Council contended that the two-phase hearing procedure adopted for this case, which would first involve a consideration of the adequacy of the Petitioners' showing of interest and then a consideration of the appropriateness of the units sought, was erroneous because only by a full unit determination hearing could a proper determination be reached by the Assistant Secretary. The Council, therefore, requested that the case be remanded. Moreover, the Council alleged that it was improper to make determinations with respect to possible procedural bars without litigating the unit question. The Council also argued that for purposes of national exclusive recognition, the Assistant Secretary's decisions concerning less comprehensive units should not be applied.

The Nurses contended that the two-phase hearing procedure was improper, and that because of the restrictions imposed on its cross-examination by the Hearing Officer, the case should be remanded for further hearing. The Nurses also contended that the agreements placed in evidence by the Activity would not constitute bars to its petition because of various defects and, therefore, those previously covered units could be included for purposes of showing of interest.

The Activity contended that the rationale of the U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, which held that a negotiated agreement may not be waived unilaterally by one of the parties, should be applied in these cases. It asserted that it does not waive its agreements with the constituents of the Council or the Nurses. In these circumstances, the Activity contended that the showing of interest in this matter be recomputed in view of the fact that the removal of all employees excluded by the asserted bars would cause such showing to fall short of the 30 percent requirement in the unit which would remain after removing all employees excluded by the asserted bars.

The Assistant Secretary concluded that both petitions should be dismissed, and in so doing set forth the following principles:

A. The agreement bar principles as set forth in Section 202.3(c) of the Assistant Secretary's Regulations will be deemed applicable irrespective of whether the unit sought is nationwide in scope. Thus, where a petition for a broad unit seeks to include employees who are already represented exclusively in existing less comprehensive units and who are covered by existing negotiated agreements, absent unusual circumstances, the Assistant Secretary will not permit those units covered by negotiated agreements to be included in the broad petitioned for unit. Moreover, a petitioning labor organization may not utilize in its showing of interest for a broad unit, employees in an existing unit covered by a signed agreement which constitutes a bar to an election.

B. Where an agreement bar exists, such bar may not be waived unilaterally. In the absence of a mutual waiver of an agreement bar, a petitioning labor organization may not utilize a showing of interest from a unit in which the bar exists.

C. Where a petitioner seeks a unit which encompasses a unit or units in which it already holds exclusive recognition (but no negotiated agreement exists), in order to permit the employees in such unit or units to be counted for purposes of the petitioner's showing of interest, the petitioner will be required to waive its exclusive recognition status in such unit or units and agree, in effect, to risk that recognition in the event that it proceeds to an election in the broad unit and loses.

D. Where there are agreements which are terminable at will or which contain other defects causing such agreements not to constitute bars to an election sought by a third party, the Assistant Secretary found that the parties to such agreements are bound by their terms absent an affirmative act of termination. In these circumstances, the Assistant Secretary concluded that in order to utilize employee members covered by such an agreement for the purpose of showing of interest, a labor organization which is party to an agreement must affirmatively indicate a willingness (1) to terminate that agreement prior to the election, and (2) to waive its exclusive recognition status and, in effect, put such status "on the line" at the election.

Based on the principles set forth above, the Assistant Secretary found that neither of the Petitioners supported their petitions with an adequate showing of interest. Accordingly, as the showing of interest in each of the subject cases was inadequate with respect to any residual unit herein not subject to procedural bars, the Assistant Secretary ordered that the Council's and the Nurses' petitions be dismissed..

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION

Activity

and

Case No. 22-2635(RO)

COUNCIL OF AFGE VETERANS  
ADMINISTRATION LOCALS AND OTHER  
AFL-CIO AFFILIATES, CARPENTERS  
AND JOINERS OF AMERICA (CJA);  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS (IBEW); INTERNATIONAL  
ASSOCIATION OF FIREFIGHTERS (IAFF);  
LABORERS INTERNATIONAL UNION OF  
NORTH AMERICA (LIUNA); SERVICE  
EMPLOYEES INTERNATIONAL UNION (SEIU)

Petitioner

and

NATIONAL ALLIANCE OF POSTAL AND  
FEDERAL EMPLOYEES; NATIONAL  
FEDERATION OF FEDERAL EMPLOYEES;  
VETERANS ADMINISTRATION AND IN-  
DEPENDENT SERVICE EMPLOYEES UNION;  
NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES; AMERICAN NURSES ASSOCIATION

Intervenors

VETERANS ADMINISTRATION

Activity

and

Case No. 22-2692(RO)

AMERICAN NURSES ASSOCIATION

Petitioner

and

COUNCIL OF AFGE VETERANS  
ADMINISTRATION LOCAL AND  
OTHER AFL-CIO AFFILIATES,  
CARPENTERS AND JOINERS OF  
AMERICA; INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS;  
INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS; LABORERS INTER-  
NATIONAL UNION OF NORTH AMERICA;  
SERVICE EMPLOYEES INTERNATIONAL  
UNION; AND NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES (NFFE)

Intervenors

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer Andrew B. Beath, for the limited purpose of ascertaining whether, and to what extent, the existence of agreement bars which have not been waived by all parties to the agreement would effect the adequacy of the Petitioners' showing of interest in view of the Assistant Secretary's decision in U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, and the fact that the Petitioners included in support of their showing of interest employees covered by current negotiated agreements between themselves and the Activity, the Veterans Administration (VA). 1/

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. In Case No. 22-2635(RO) the Petitioner, Council of AFGE Veterans Administration Locals and other AFL-CIO Affiliates, namely, Carpenters and Joiners of America (CJA); International Brotherhood of Electrical Workers (IBEW); International Association of Firefighters (IAFF); Laborers International Union of North America (LIUNA); and Service Employees International Union (SEIU), herein called the Council, seeks an election in the following unit: All employees including professionals, (to be included in

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1/ In U.S. Department of Defense, DOD Overseas Dependent Schools, cited above, I found that a party to a negotiated agreement may not waive an agreement bar unilaterally. Thus, unless parties to an agreement agree to waive the agreement bar, the timeliness of a petition with respect to a unit covered by an agreement necessarily would be dependent upon its timeliness under Section 202.3(c) of the Assistant Secretary's Regulations.

the unit providing they vote for inclusion), employed by the VA, excluding management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity and guards as defined in the Order.

In Case No. 22-2692(RO) the Petitioner, American Nurses Association, herein called the Nurses, seeks an election in a unit of all professional registered nurses employed in the Department of Medicine and Surgery of the VA, excluding all management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards as defined in the Order and all other employees. 2/

#### Positions of the Parties

##### A. Case No. 22-2635(RO)

The Council contends that the case handling procedure adopted in the subject case is inappropriate. 3/ It contends that there is insufficient evidence on which the Assistant Secretary can base a decision as to whether or not the unit petitioned for by the Council is appropriate for the purpose of exclusive recognition and, further, that it is improper to hear evidence on, and make determinations as to the effectiveness of, the alleged agreement, certification, election and hearing bars asserted by the Activity without also hearing evidence as to the appropriateness of the unit petitioned for by the Council. The Council, therefore, requests that the case be remanded for a full and complete hearing on the issue of the appropriateness of the units sought. It argues additionally that a petition for national exclusive recognition must be given special consideration if the national exclusive concept is to be viable. In support of this contention, it urges that the Assistant Secretary's prior decisions concerning procedural bars, as they relate to smaller units, not be uniformly applied to a petition for national exclusive recognition.

The Activity asserts that the negotiated agreements it was party to with the Council are prima facie bars to an election. It alleges that evidence of the various bars had been furnished to the Labor-Management

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2/ The unit appears as amended. The unit petitioned for originally would have excluded registered nurses included in existing units represented by other labor organizations and covered by negotiated agreements.

3/ The procedure involved two possible phases - the first phase to determine whether each of the Petitioners had an adequate showing of interest in its petitioned for unit; and the effect, if any, of U.S. Department of Defense, DOD Overseas Dependent Schools, cited above, upon the adequacy of their showing of interest, and the second phase to determine the appropriate unit question.

Services Administration Area Office handling this matter, and that under recent Assistant Secretary decisions 4/ the employees covered by such bars should not be included in the proposed unit. In this connection, the Activity maintains that with respect to U.S. Department of Defense, DOD Overseas Dependent Schools, cited above, it does not waive any of its negotiated agreements with the constituents of the Council which would bar an election in the units covered by such agreements. 5/ The Activity contends that the existence of these bars requires that the Council's showing of interest be recomputed to establish whether it has the required 30 percent in the unit which would remain after removing all employees excluded by the asserted bars. 6/

The Intervenor, National Federation of Federal Employees, herein called NFFE, contrary to the Council, contends that any units covered by procedural bars should be excluded from the petitioned for unit, and that the Council's showing of interest should be recomputed. The NFFE also urges that dismissal is warranted in this matter based on the applicability of the Assistant Secretary's decision in U.S. Department of Defense, DOD Overseas Dependent Schools, cited above.

The Intervenor, National Association of Government Employees, herein called NAGE, agrees with the NFFE that the Council's showing of interest herein must be recomputed due to the exclusion of those facilities where valid agreement or certification bars exist.

##### B. Case No. 22-2692(RO)

The Nurses contend that the purpose of the hearing in this matter was not to litigate its showing of interest, and that it assumes the Assistant Secretary would find its amended unit presumptively appropriate. 7/

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4/ Federal Aviation Administration, Department of Transportation, A/SLMR No. 122; U.S. Department of Defense, DOD Overseas Dependent Schools, cited above; Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99.

5/ The record reveals further that neither the Council, nor the Nurses, waived their negotiated agreements with the Activity which constituted bars to elections in the units covered by such agreements.

6/ Section 202.2(a)(9) of the Assistant Secretary's Regulations requires that a petition be accompanied by a showing of interest of not less than thirty (30%) percent of the employees in the unit claimed to be appropriate.

7/ The Nurses take the alternative position that it will participate in an election in its originally petitioned for unit, or in any unit the Assistant Secretary finds appropriate.

However, it maintains that an examination of the negotiated agreements proffered by the Activity and alleged to be bars to the Nurses' petition, is crucial. In this respect, the Nurses argue that it was denied due process at the hearing by virtue of the limits placed by the Hearing Officer on its cross-examination of the Activity's witnesses. It argues that because the Activity alleged each negotiated agreement admitted into evidence to constitute a bar to the petitions herein, it had a right to examine such documents at the hearing in order to support its contention that they are not bars. Because of this denial of cross-examination, the Nurses contend that only a remand for an additional hearing would afford the Assistant Secretary the necessary information upon which to render a decision. 8/ Finally, the Nurses argue that the agreements entered into evidence by the Activity would not constitute bars because, among other things, certain of them are terminable at will; were amended, modified, revised, or terminated 9/; or have not been properly signed. Also, as asserted by the Council, the Nurses contend that different procedural considerations should be applied where, as here, a unit national in scope is sought.

The Activity asserts that the principles established in U.S. Department of Defense, DOD Overseas Dependent Schools, cited above, are applicable also to the Nurses' petition. It contends that the existence of procedural bars requires that the Nurses' showing of interest be recomputed. Finally, in view of the Nurses' amended petition which now includes nurses in existing exclusively recognized units, and substantially enlarges the number of employees covered by the petition, the Activity contends that the Nurses' original showing of interest should be recomputed.

The NFFE, in addition to the contentions made with respect to the Council's petition, argues that any and all units covered by negotiated agreements at the time of the filing of the Nurses' petition should be barred from inclusion in the petitioned for unit and, therefore, any contribution to the showing of interest arising from these units must be excluded from the Nurses' showing of interest.

The NAGE contends that the showing of interest in this matter must be reevaluated in view of the Nurses' amended petition.

#### Adequacy of Showing of Interest

The VA administers laws covering a wide range of benefits for former members and dependents and beneficiaries of deceased former members of the

8/ In view of the disposition herein, I hereby deny the Nurses' motion to remand for further proceedings.

9/ The Nurses argue also for a policy decision that no bar would exist where a negotiated agreement has been reopened for "midterm" modification. It contends that this issue has not been considered by the Assistant Secretary in prior decisions.

Armed Forces. It also administers laws which provide certain benefits to current members of the Armed Forces and to dependent children of seriously disabled veterans. The VA is directed by the Administrator of Veterans Affairs and employs some 186,000 employees at approximately 240 installations.

As indicated above, the hearing in the instant case was held essentially to determine the effect, if any, the rationale in U.S. Department of Defense, DOD Overseas Dependent Schools, cited above, had on the Petitioners' showing of interest in this matter. In that case, I found that an agreement bar may not be waived unilaterally by one of the parties to the negotiated agreement. The evidence in the subject cases establishes clearly that the Petitioners included in support of their showing of interest, employees covered by negotiated agreements between the Petitioners and the Activity and that the Activity did not agree to waive such agreements to the extent that they constituted procedural bars to an election.

In these circumstances, I believe that the following principles are applicable:

A. The agreement bar principles as set forth in Section 202.3(c) of the Assistant Secretary's Regulations will be deemed applicable irrespective of whether the unit sought is nationwide in scope. Thus, as I stated in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, and Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, which involved claimed units which were nationwide in scope, where a petition for a broad unit seeks to include employees who are already represented exclusively by other labor organizations in existing less comprehensive units and who are covered by existing negotiated agreements which constitute bars at the time the petition is filed, I will not, absent unusual circumstances, permit those units covered by negotiated agreements to be included in the broad petitioned for unit. Nor will I permit a petitioning labor organization to utilize in its showing of interest for a petitioned for broad unit, employees encompassed by the petition who are in an existing less comprehensive unit represented by another labor organization and covered by a signed agreement which constitutes a bar to an election.

B. Where an agreement bar exists, such bar may not be waived unilaterally. See U.S. Department of Defense, DOD Overseas Dependent Schools, cited above. In the absence of a mutual waiver of an agreement bar, a petitioning labor organization may not utilize a showing of interest from a unit in which the bar exists.

C. Where a petitioner seeks a unit which encompasses a unit or units in which it already holds exclusive recognition (but no negotiated agreement exists), in order to permit the employees in such unit or units to be counted for purposes of the petitioner's showing of interest, the petitioner will be required to waive its exclusive recognition status in

January 16, 1973

such unit or units and agree, in effect, to risk that recognition in the event that it proceeds to an election in the broad unit and loses. Cf. Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, footnote 2.

D. Where there is an otherwise valid agreement which is terminable at will, or which contains other defects which would cause such agreement not to constitute a bar to an election sought by a third party, I find that the parties to such agreement are bound by its terms absent an affirmative act of termination. Thus, in my view, in order to utilize employee members covered by such an agreement for the purpose of showing of interest, a labor organization which is party to the agreement must affirmatively indicate a willingness (1) to terminate its agreement prior to the election, and (2) to waive its exclusive recognition status and, in effect, put such status "on the line" at the election. 10/

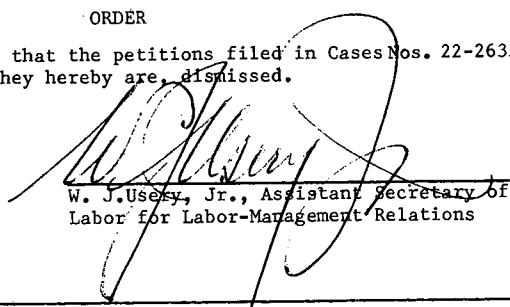
As noted above, the Activity has indicated that it would not waive existing agreement bars. Further, as to negotiated agreements which, because of certain defects, would not constitute bars as to third parties, the Petitioners have neither taken action to terminate such agreements, nor indicated an intent to waive their exclusive recognition status in the units encompassed by their petitions in this matter. In the event that they proceed to an election in their broad petitioned for units and lose. Under all these circumstances, such existing units may not be included in any unit found appropriate and the employees in such units may not be utilized for the purpose of establishing the Petitioners' showing of interest in any residual unit I might find appropriate.

Accordingly, as I am advised administratively that the showing of interest of each of the Petitioners in the subject cases is inadequate with respect to any residual units herein not subject to procedural bars, I shall dismiss the petitions.

ORDER

IT IS HEREBY ORDERED that the petitions filed in Cases Nos. 22-2635(RO) and 22-2692(RO) be, and they hereby are, dismissed.

Dated, Washington, D.C.  
January 15, 1973

  
W. J. Usey, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

10/ Cf. Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, cited above.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION ON OBJECTIONS  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PORTSMOUTH NAVAL SHIPYARD,  
PORTSMOUTH, NEW HAMPSHIRE  
A/SLMR No. 241

The subject case involved a hearing on objections to an election filed by the Petitioner, National Federation of Federal Employees, Local Union 90 (NFFE), to an election between it and the Intervenor, Federal Employees Metal Trades Council, AFL-CIO, Portsmouth, New Hampshire (MTC). The objection by the NFFE which was the subject of the hearing was that the Activity was aware that several employees took leave without pay to work full time for the MTC campaign, and that these employees conducted a full-scale campaign during working hours in the industrial areas of the Shipyard.

The Hearing Examiner concluded that the NFFE did not meet the necessary burden of proof to establish its allegations of objectionable conduct. Thus, he found that any employee, including members of NFFE, could have requested to be placed on leave without pay status, that no NFFE adherent requested leave without pay, that they were not inhibited from doing so, and that if they had made such a request, it would have been granted. In these circumstances, he found no improper or disparate treatment in granting such status to the employees who sought it. The Hearing Examiner further found no verified violations of the election ground rules by MTC of which the Activity was aware, and thus no discriminatory application of such rules.

Upon review of the Hearing Examiner's Report and Recommendations and the entire record in the case, and noting particularly the absence of exceptions, the Assistant Secretary adopted the Hearing Examiner's conclusion and recommendation that the objection be overruled. Accordingly, he returned the case to the Regional Administrator for final action.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PORTSMOUTH NAVAL SHIPYARD,  
PORTSMOUTH, NEW HAMPSHIRE

Activity

and

Case No. 31-5456 E.O.

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL UNION 90

Petitioner

and

FEDERAL EMPLOYEES METAL TRADES  
COUNCIL, AFL-CIO,  
PORTSMOUTH, NEW HAMPSHIRE

Intervenor

DECISION ON OBJECTIONS

On September 11, 1972, Hearing Examiner Milton Kramer issued his Report and Recommendations in the above-entitled proceeding, concluding that the Petitioner, National Federation of Federal Employees, Local Union 90, had not met its burden of establishing the matters constituting the grounds of its objection. Accordingly, he recommended that the objection be overruled, the election be confirmed, and that the Intervenor, Federal Employees Metal Trades Council, AFL-CIO, Portsmouth, New Hampshire, be certified as the continuing choice of the majority of the employees involved.

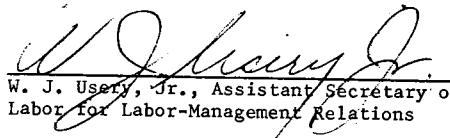
The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed to the Report and Recommendations, I hereby adopt the Hearing

Examiner's conclusion and recommendation that the objection to the election in the subject case be overruled.

ORDER

IT IS HEREBY ORDERED that the objection to the election in the above-entitled proceeding be, and it hereby is, overruled and the case is returned to the appropriate Regional Administrator for final action.

Dated, Washington, D.C.  
January 16, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF HEARING EXAMINERS  
BEFORE THE  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

REPORT AND RECOMMENDATIONS

Statement of the Case

Portsmouth Naval Shipyard  
Portsmouth, New Hampshire

Activity

and

National Federation of Federal  
Employees, Local Union 90

Case No. 31-5456 E.O.

Petitioner

and

Federal Employees Metal Trades  
Council, AFL-CIO  
Portsmouth, New Hampshire

Intervenor

George Margolies, esq., Staff Counsel and  
James C. Guyett, National Representative,  
for the Petitioner.

A. Gene Niro, esq., Labor-Management Relations  
Specialist and  
Joseph E. Kieta, Employee Relations Division,  
for the Activity.

Douglas L. Leslie, esq., O'Donoghue & O'Donoghue,  
for the Intervenor.

Before: Milton Kramer, Hearing Examiner

Pursuant to an Agreement for Consent Election by ungraded employees of the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, an election for an exclusive representative was conducted under the supervision of the Area Administration, Labor-Management Services Administration, Boston, Massachusetts, on November 9, 1971. A recount <sup>1/</sup> on November 11, 1971 of the Tally of Ballots showed:

Approximate number of eligible voters	3,442
Votes for National Federation of Federal Employees <sup>2/</sup>	987
Votes for Metal Trades Council, AFL- CIO <sup>3/</sup>	1,286
Votes against exclusive recognition	98
Void Ballots	3
Challenged Ballots	0
Total valid votes cast	2,371

On November 15, 1971, the Petitioner filed eleven timely objections to the election with the Area Administrator and asked that the election be set aside. In accordance with Section 202.20(c) and (d) of the Regulations (29 CFR Chapter II), the Area Administrator investigated the objections and reported thereon to the Regional Administrator.

The Regional Administrator, on March 15, 1972, issued his Report and Findings on objections. He found ten of the eleven objections to be without merit. He found that

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<sup>1/</sup> The recount did not differ from the original Tally of Ballots in any material respect.

<sup>2/</sup> The Petitioner for the election and in this proceeding.

<sup>3/</sup> The Metal Trades Council was the incumbent representative and is the Intervenor in this proceeding.

Objection #4 raised "a relevant question of fact which may have affected the results of the election and that a substantial question of interpretation and policy exists." The Regional Administrator announced his intention to issue a Notice of Hearing. No review was sought of the Administrator's findings. He issued a Notice of Hearing on April 18, 1972. The hearing was held on May 2 and 3, 1972, at the Portsmouth Naval Shipyard. The Petitioner, the Activity, and the Intervenor were each represented by counsel, examined and cross-examined witnesses, introduced exhibits, and made closing agreements at the hearing, and submitted post-hearing briefs.

Objection #4, on which the hearing was held, was:

"The NFFE, Local 90, charge that top management officials were aware that during the electioneering, several employees, employed at the Shipyard, took leave to work full time for the Metal Trades Council campaign in the Shipyard. These employees who were on leave from their Shipyard jobs, conducted a full-scale campaign during the working hours in the Industrial Areas; docks, shops, etc. at the Portsmouth Naval Shipyard."

#### The Contentions of the Parties

The legal and factual disagreements of the parties center around the seven employees who obtained leave without pay for two weeks before the election. These employees were stewards for the various crafts composing the Metal Trades Council. The ground rules for the election provided that non-employee representatives of the competing unions could not go to security areas of the shipyard without a guard escort and that no electioneering could be conducted in work areas or during working hours. These seven LWOP employees were regarded by the Activity as employees and permitted to move about the yard without escort. The ground rules provided also that not more than one non-employee representative of either side would be permitted to campaign in the yard at the same time; these seven men were not considered as non-employee representatives for such purpose.

The Petitioner contends that these seven employees engaged in electioneering in work areas and during working hours of the men with whom they electioneered; that during their period of leave without pay they should have been treated as non-employee representatives of their unions; that permitting them to move about the shipyard without escort while non-employee representatives of NFFE were required to have an escort was disparate treatment of the competing unions; and that not treating the LWOP men as non-employee representatives for the purpose of the ground rule of not-more-than-one in the yard at the same time was also disparate treatment. The Petitioner contends also that the seven LWOP men repeatedly violated the ground rules, that the Activity had the obligation and failed to fulfill the obligation of policing the ground rules, that the Activity took no action concerning numerous MTC violations of the ground rules reported to the Activity, and that these circumstances gave an unfair advantage to the Metal Trades Council. It contends that all this was in violation of Sections 1 and 19(a)(3) of Executive Order 11491.

The Activity contends that it imposed the limitation of not more than one non-employee representative at a time on its premises because of security reasons and its limited ability to furnish escort guards for non-employee representatives; that it did not apply such limitation to the LWOP employees because (1) they had security clearance, (2) they were employees for all purposes except the obligation to render services for the temporary period, and (3) it was the long-standing practice of the Shipyard to permit LWOP employees their usual access to the yard when on LWOP status for not more than ninety days; that of the alleged violations of the ground rules by the MTC men only two were reported to it and neither of them could be corroborated; that NFFE could have had a reasonable number of its employee-supporters on LWOP status with the same freedom of movement as the MTC-LWOP men because such status was a contractual right under the collective bargaining agreement except when it would unduly impede operations; that if there were violations of the ground rules of MTC it was without the Activity's knowledge or consent; that

the Petitioner engaged in corroborated violations of the ground rules without sanction; and that the ground rules were self-enforcing and it did not have the obligations to police them in the absence of verified information of their violation.

The Intervenor endorses the position of the Activity and emphasizes that no MTC violations of the ground rules were established; that the Activity's interpretations and applications of the ground rules were not arbitrary, discriminatory, or in bad faith and hence should not be overturned; that the conflicts in testimony must be resolved against the Petitioner; and that setting aside an election on the evidence presented by the Petitioner would subject every election to being set aside. It argues also that misconduct by MTC is not an issue in this case unless the Activity knew of and condoned the misconduct, because Objection #4 is addressed solely to disparate treatment of the unions by management and does not complain of MTC violations of the election rules.

#### The Evidence and Findings of Fact

An election by secret ballot for exclusive representative of ungraded employees (approximately 3,442 were eligible to vote) was held on the premises of the Activity on November 9, 1971, with the result shown above. A swing of 150 votes from MTC to NFFE would have reversed the result of the election.

The parties, including the Activity, had a series of meetings to discuss ground rules for the election. The first meeting was on October 7, 1971. At that meeting several points were agreed on but no agreement could be reached on the number of non-employee representatives who would be permitted to have access to the Shipyard during the campaign period. The Shipyard is a Navy installation where atomic submarines are repaired and overhauled and hence presents security problems. Because of such considerations, and solely for that reason, the Activity insisted on restrictions on the number of non-employee representatives who would be permitted to have access to the security areas of the Shipyard. The security areas in the Yard are identified by painted white lines around them and by large signs at entrances to buildings.

A second meeting on the ground rules was held on October 12. Joseph E. Kieta, Head of the Labor Relations Office of the Activity, had cleared with the security office that non-employee representatives could have access to the two main cafeterias even though they were located in security areas. James C. Guyett, a National Representative of NFFE and the chief official of that organization for the election campaign, was dissatisfied and asked for and was given meetings with Kieta's superiors and finally with the Commander of the Shipyard. The Commander tentatively decided, because of the limited availability of escort guards, that the competing parties would each be permitted to have only one national (non-employee) representative at a time with access to the yard, but only with an escort. Mr. Guyett then asked for only one non-employee representative at a time with access to the yard, and said he would be satisfied with such limitation.

At a meeting on October 13 the Activity said that the national (non-employee) representatives could go to security areas and even inside the buildings but only if escorted. Mr. John F. Meese, Grand Lodge Representative of the International Association of Machinists and Aerospace Workers (one of the components of the Metal Trades Council), suggested that each side be permitted to have eight non-employee representatives, with escorts, with access to the yard. Guyett objected to such arrangement on the ground that it would disadvantage the Petitioner. The Commander objected on the ground that he could not furnish that many escorts; the Security Officer had determined that he could not furnish more than three escorts for the purpose. Meese then suggested that the unions divide the cost of furnishing the additional escorts. Guyett testified that he thought such suggestion was made in jest but in any event objected to such an arrangement. I find that the suggestion was not made in jest. The Activity took the position that it could not furnish that many escorts regardless of who paid for them and that there was some legal question about its authority to obtain additional escorts with the cost to be reimbursed by the unions. Meese complained about the final decision of the Activity that only one national representative from each side would be permitted in the yard at the same time, and only with an escort, on the ground that that would not

### Electioneering and Distribution of Literature

The labor organizations involved may engage in the distribution of literature and any other kind of legitimate electioneering activities, including solicitation ... provided it is done during the non-duty hours of employees involved and in non-work areas.

\* \* \*

### Use of Activity Facilities

... the Activity will make available facilities for the holding of union meetings outside of the work hours of employees invited to attend. Each labor organization may be allowed a maximum of three such meetings ... one of which may be held in the Auditorium (Building 22).

Requests for such meetings will be submitted in writing to the Head, Employees Relations Division, at least 48 hours prior to the date sought....

### Use of Activity Bulletin Boards

The labor organizations involved will be permitted the use of Activity Bulletin Boards [with limitations]..."

Seven employees who were shop stewards of MTC for its various crafts applied for and were granted leave without pay for the period October 26, 1971 through November 5, 1971. The latter date was the Friday before the election. The reason given was to spend time on "union business." The collective bargaining agreement between the Activity and MTC provided that the Activity would authorize leave without pay upon an employee's request "provided ... approval would not unduly interrupt or prohibit meeting work schedule requirements." 4/

4/ Exh. A-7, Art. XVI, Sec. 1.

be enough for effective campaigning, and filed a charge of an unfair labor practice based on such decision. The record does not indicate what disposition or other processing of that charge has been had. A set of ground rules was issued on an interim basis at the conclusion of the meeting.

The following day, October 14, 1971, the Activity issued a revised set of ground rules as the final governing rules which it stated it considered to be the best compromise for the purposes of maintaining security, keeping the costs to the Shipyard within reasonable bounds, and providing both organizations with a reasonable opportunity to make personal contact with the employees. So far as here pertinent these rules provided:

#### "Observers

\* \* \*

#### Access to Shipyard Premises by Non-Employee Representatives

\* \* \*

2. ....
  - a. Non-employee representatives will, upon arrival or prior to arrival, advise the Employee Relations Division ... of the names of the representatives, the destination, the times of arrival and departure intended.
  - b. Non-employee representatives may proceed without escort to non-work areas in non-security areas.
  - c. Not more than one non-employee representative at one time will be allowed to proceed, under Shipyard escort, to the cafeterias in Building 18 and Building 174 and to the entrances to designated shop buildings in the Security area, for the purpose of campaigning, during specified hours .... The non-employee representatives of each party desiring to campaign in these areas will appear personally at Gate 1 to request an escort.
  - d. ....
3. Alleged violations of the above will be reported to the Employee Relations Division immediately. Violation of any of the above may result in immediate termination of the party's privileges of access to the premises.

The agreement provided also:

"Time away from the job ...will be authorized without loss of pay ... to permit ... stewards to properly and expeditiously discuss appropriate matters directly related to general working conditions .... It is agreed that such time ... shall not be used for the discussion of any matters connected with union business such as the collection of dues, assessments, solicitation of memberships ... the distribution of literature or authorization cards..." <sup>5/</sup>

Stewards in the past had sometimes used this provision to obtain time off to conduct union business and had sometimes taken leave without pay for that purpose. They had not in the past taken as much as two weeks LWOP to conduct union business.

When Mr. Kieta (the Activity's Head of Labor Relations) learned that the seven stewards had requested and been granted LWOP for two weeks preceding the election it occurred to him that they might spend the time electioneering. He sent a letter on October 21, 1971 addressed jointly to the President of the local MTC and the President of the local NFFE, with copies to each of the seven stewards and their supervisors, pointing out the restrictions on campaigning of employees in a non-duty status. In the periodical "Management Newsletter" of October 25, 1971, distributed to supervisors, he also mentioned some of the rights and restrictions concerning campaigning, and instructed those who received the publications that they should report to the Employee Relations Division any violations observed by or reported to them.

It was the practice of the Shipyard to permit employees who took time off for less than ninety days to retain their identification badges and to have their usual access to the Shipyard for legitimate purposes. The seven LWOP retained their badges and were permitted their usual access to the yard.

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<sup>5/</sup> Exh. A-7, Art. VII, Sec. 3.

Mr. Meese, the IAM Grand Lodge Representative detailed to the election as the coordinator of the campaign for MTC, testified that the seven stewards took leave without pay to perform several functions for their unions. These included discussing with the employees numerous problems arising from a change in parking regulations and a shift change, concerning which more than two hundred complaints were made, to engage in electioneering in non-work areas during non-work time, to prepare handbills, to meet from time to time to decide on strategy in the campaign, and the like. The seven volunteered for the work, and were not paid for their union work except for out-of-pocket expenses. He testified that he instructed the seven not to engage in electioneering with employees during their working hours even if accosted by the employees.

Three of the seven (Simpson, Moorenovich, and O'Brien) testified and corroborated Meese's testimony. O'Brien spent most of his time during the two-week period on another election.

None of the employees who were officers or adherents of NFFE sought leave without pay, and of course the Activity did not deny such leave to any of them. Guyett testified that at a meeting with Kieta, at which they were the only people present, Kieta said that if any NFFE adherents should ask for LWOP they would have to give a reason, time would be required to investigate the request, and the request might not be granted. He testified that this conversation took place two days after the seven MTC men had been granted LWOP. <sup>6/</sup> Kieta denied that he told Guyett that he would have to investigate such requests and that it would take time. He testified that under the collective agreement all employees had a right to leave without pay as described above, and had NFFE adherents asked for such leave and stated they wanted it for union business they would have been granted the leave.

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<sup>6/</sup> The record does not show when these leave requests were granted, but it must have been before October 21, 1971, the date of Kieta's letter on the subject to the Presidents of the competing organizations. That letter was written a week before the leave periods began.

Guyett did not ask for LWOP for any specific employees, and I find that if any NFFE adherents had asked for LWOP to work on the campaign such leave would have been granted reasonably promptly. I find, based upon the greater creditability of Kieta's testimony, that the Activity did not inhibit such requests.

Objection #4 charges that the Activity was aware that the seven MTC men took LWOP to work full time for the campaign in the Shipyard and conducted a full scale campaign during working hours in the industrial areas of the yard. The evidence does not support the contentions that the Activity was aware that the LWOP was requested for the seven men to work full time on the campaign in the Shipyard, nor does it establish that the seven men in fact so spent their full time. The evidence does establish, and I find, that some of the seven spent some of their time on the campaign, and that the Activity suspected they might do so and cautioned them and their supervisors on the limitations on campaigning prescribed by the ground rules.

There was considerable evidence, much of it conflicting, on the activities of the seven during their LWOP period, particularly concerning their alleged violations of the ground rules.

John F. Meese, the coordinator of the election campaign for MTC who was a non-employee of the Activity, testified on the purpose of the requests for LWOP and the activities of the men who took LWOP. He testified that he familiarized himself with the ground rules and knew that violations of the rules could result in successful objections to an election, that he went over the ground rules with the seven men and advised them that they were bound by the rules even though they had not agreed to them, and that other national representatives assigned to assist Meese did not enter the Shipyard at all. He testified that he needed the men to assist in preparing and editing newsletters and having them printed and mailing them to the employees within the bargaining unit both members and non-members of MTC; that he wanted their assistance to ascertain what questions were important to the employees in the bargaining unit and to prepare hand-bills on such matters; that MTC had been criticized by NFFE

- 11 -

for failing to represent the employees in problems arising from a shift change and a change in parking policy and he wanted those problems, about which more than two hundred complaints had been made, handled; and that he wanted the normal servicing of the collective bargaining agreement to continue during the campaign. He testified that the seven campaigned in non-work areas with men during their non-work time, and met with each other from time to time during the day to discuss progress and decide what to do.

He testified also that Messrs Moorenovich and Simpson, two of the seven, were assigned two or three times a day to make a tour of the Yard to check the bulletin boards, to replace any material that had improperly or mistakenly been removed, and to be sure NFFE material was not on MTC bulletin boards.

Freeman Linscott testified that he had been told by some unidentified men that Simpson (one of the seven) had been electioneering during a coffee break. <sup>1/</sup> He testified that he reported this to Mr. La Rochelle (a Labor-Management Relations Specialist on Kieta's staff) by telephone, that La Rochelle said that such activity would be improper and that he would investigate, and that Linscott heard nothing further about it. La Rochelle testified that he had no record or recollection of such communication and that it was his practice during the campaign to prepare a memorandum of all telephone calls concerning the campaign. Linscott testified that he observed or had reported to him other activities of Simpson, Moorenovich, and O'Brien that might have been violations of the ground rules (some of them involved conversations the subject of which he did not know or did not testify), but did not report them because nothing had happened as a result of his first complaint. I find, based upon the shaky nature of Linscott's testimony, his unstable background of union sympathy, and La Rochelle's positive testimony of record keeping together with lack of recollection of such telephone call, that the Activity was not aware

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<sup>1/</sup> There were no official coffee breaks but the men were permitted to take them; hence, coffee breaks were officially on-duty time.

- 12 -

of any of these alleged violations, including the first one. It is noted that Linscott testified that he had belonged to a union (not the Petitioner) that was a rival of MTC, that he had tried to have MTC decertified as representative, that he then joined MTC and became a steward and grievance committee chairman and resigned because he heard rumors that MTC and management were colluding to get rid of him as a union official, that he then tried to revive his old union and again tried to have MTC decertified, and that he does not dislike any of the present MTC officers.

Arvid Gustafson had been a member of MTC but had resigned and joined NFFE. He testified he saw several of the LWOP men and one other MTC steward engaging in violations of the ground rules by campaigning during working hours and reported them to Guyett. He testified that Guyett reported the violations to Kieta by telephone and that he was present on at least one occasion when Guyett discussed such violations with Kieta in Kieta's office. He testified that Guyett complained of the violations in general terms and that neither he nor Guyett described the specific violations. I find, upon the basis of Kieta's testimony and the partial corroboration by Gustafson, an NFFE sympathizer, that the evidence does not establish that if these violations occurred that management was informed of them.

Harry C. Latterbush testified that on one occasion he saw Simpson in a security area with two or three workers shortly before quitting time and reported it to his shop supervisor. He did not know whether his supervisor reported it in turn to the General Foreman. On another occasion he found MTC campaign literature on the tables in a cafeteria which must have been placed there before the cafeteria was open to the shift. He did not know when or by whom the literature had been distributed. There is no evidence that either of these incidents, if either of them involved an infraction of the ground rules, was reported to top management or that management otherwise knew about them.

Kenneth E. Thompson was president of the NFFE local and an employee of the Shipyard. He testified that he saw some LWOP men distributing campaign literature in work areas during work time. He told this by telephone to

Mr. LaRoche, a Labor-Management Relations Specialist of the Activity, and reported it to Mr. Katsanos, a Personnel Assistant. Mr. Katsanos went to the area with Mr. Thompson, but when they arrived Simpson and Liberty, the two LWOP men, were leaving the building. Mr. Katsanos (who had been President of MTC before taking the personnel job) testified that he later saw Liberty and asked him about the incident and Liberty said he knew the ground rules and had not passed out literature during working hours. Katsanos tried to find the literature that Thompson had told him had been passed out during working hours but could not find any. Thompson testified that he reported another similar incident to security guards who did nothing about it. I find that management was not aware of the second of these incidents, if it occurred, and was unable to confirm the first, although it tried.

Thompson testified also that on one occasion when he entered the Yard with Mr. Guyett to go to the cafeteria area with a guard that Thompson wanted to go elsewhere in the security area to give literature to someone who called to him for it but the guard told him he was not permitted to do so. He and Guyett complained about this some days later to Kieta who said it was a misunderstanding by the guard because Thompson, unlike Guyett, was not required to have a guard in the security area. There is no evidence that such incident recurred. I find that this was an isolated incident of one NFFE adherent being improperly restricted in his effort to give campaign literature to one worker on one occasion and that it was due to a misunderstanding by a security guard.

Henry N. Simpson, John P. O'Brien, and William C. Moorenovich were three of the MTC men on LWOP. They were the second, third, and fourth witnesses called by the Petitioner. Each of them testified that he did not engage in electioneering during work time or in work areas and the conduct they described that they did engage in was not in contravention of the ground rules. When later witnesses called by Petitioner testified that one or more of these three did engage in conduct in violation of the ground rules counsel for the Intervenor repeatedly objected on the ground that the above three witnesses had been called as Petitioner witnesses, that Petitioner was bound by their testimony, and that Petitioner should not be permitted to impeach its own witnesses. The objections were consistently overruled.



James C. Guyett is a National Representative of NFFE, was the chief official of that organization for the election campaign, and was the only national officer of that organization assigned to the campaign. He had been an employee of the Shipyard for eighteen years but had left that employment some time before the election and no longer had security clearance.

As a non-employee of the Shipyard his movements into and around the Yard were substantially more limited than the seven LWOP men of MTC. He could go to the shops, which were of course within security restrictions, but was not permitted to enter them. Some of the buildings had more than one entrance, and so by campaigning at an entrance he would miss employees who used other entrances. Some of the buildings had lunch areas consisting of vending machines and spaces around them, but Guyett did not have access to such areas. MTC national representatives also did not have access to those areas, but the seven LWOP men did have such access.

He testified, and Kieta denied, that Kieta required him to have an escort even to go into non-security areas; I find that the evidence does not substantiate his contention that such limitation was imposed on him. He complained to Kieta that some MTC national representatives were permitted to come into the Yard without escorts. Kieta explained that as exclusive bargaining representative MTC could send its men into the Yard without escort. There is no complaint or evidence that the MTC national representatives who entered the yard without escort engaged in campaigning or in anything other than activities of the normal administration of the collective agreement. There is affirmative evidence, the testimony of Meese, that the MTC national representatives assigned to the campaign did not do any campaigning within the Yard. The evidence does not establish that any MTC national representatives engaged in any campaigning within the Yard.

MTC, as exclusive representative, had an office in the Yard. It was located in a security area. Guyett requested that the office be closed on the day of the election, but that request was denied. There is no evidence that NFFE complained about that office being used by MTC during the campaign to further the campaign.

- 15 -

Guyett testified that he complained repeatedly, at least six times, about MTC violations of the ground rules. Kieta testified, and I find, that NFFE only twice made specific complaints; the remainder were only generalizations that the rules had been violated. The two specific complaints are described below. On the remaining complaints, Kieta testified, Guyett made only generalizations that could not be investigated, and when asked for specifics stated to Kieta that he would give them to the Department of Labor. This was not denied by Guyett, and is partially confirmed by Gustafson, an NFFE adherent, who testified that when he was present when Guyett protested to Kieta about alleged violations by MTC, Guyett protested only in general terms and did not describe specific violations.

The two specific alleged violations reported to Kieta both involved charges that MTC distributed campaign literature in work areas, once by Simpson and the other by Simpson and Liberty. Both reports were promptly investigated. On the first one no one recalled seeing Simpson in the area, and the second was the same incident testified to as described above by Thompson. I find that if either violation occurred management was not aware of it nor did it condone it.

At the hearing the Petitioner complained repeatedly of denial of access to the Yard by its chief counsel Geller. Since he was not an employee, Geller was subject to the ground rule of not-more-than-one non-employee representative but Guyett conceded that on one occasion both he and Geller were permitted in the Yard together.

On November 5, 1972 Guyett called La Rochelle and asked for the use of the auditorium by him and Geller together on November 8, the day before the election. La Rochelle told him that that would mean the presence of two non-employees at the same time, and that Guyett should call him back later the same day for a final answer. Guyett did not call back on that matter until November 8 about 11:30 A.M. or a few minutes later, and asked for the use of the auditorium by him and Geller for a meeting during the day shift lunch period which was 11:30 A.M. to 12:10 P.M. La Rochelle advised Guyett that permission was given for both Guyett and Geller to go to the auditorium with one escort but told

- 16 -

Guyett that MTC might object to such departure from the ground rules. La Rochelle had opened the auditorium at about 11:20 A.M. La Rochelle remained there, he testified, about twenty minutes, and the only employees he saw there were a few MTC officers. He testified that after he returned to his office about 11:40 he received the call from Guyett. After their conversation Guyett and Geller went into the Yard but did not go to the auditorium. Robert Hurley, another Labor-Management Relations Specialist, testified that he was in the auditorium from 11:15 A.M. to 12:15 P.M., after the lunch period expired, and the only people he saw there were some MTC representatives.

Guyett testified that the meeting in the auditorium to be addressed by him and Geller had been planned on November 5 and notice of it passed around by word of mouth and by announcements in the cafeterias and elsewhere. (About 25% of the employees eat in the cafeteria). There were no handbills or notices on the bulletin boards announcing the meeting Guyett said had been planned and word of which had been circulated by oral communication. Guyett testified that after his telephone conversation with La Rochelle sometime between 11:30 A.M. and shortly before noon he sent two men to the auditorium to tell those who had come for the meeting that he and Geller would not be appearing. There is no evidence that any employees other than a few MTC officers were at the auditorium for the meeting Guyett testified had been planned and word of which had been circulated.

In its brief, the Activity argues that Guyett's testimony of the planned meeting which was frustrated was a fabrication designed to create a basis for an objection to the election if Petitioner lost. It is unnecessary to decide whether the meeting was in fact planned and announced and then called off. If such are the facts the frustration of the meeting cannot be attributed to any misconduct of the Activity or MTC. The Activity did give permission to hold the meeting with both Guyett and Geller present. That it was not given promptly when asked for on November 5 is without significance; it would have been at least superficially a violation of the ground rules (the auditorium was in a security area) and La Rochelle's request that Guyett call him back later that day for a final answer was reasonable. Guyett did not call

back until the meeting was supposed to have begun, and was promptly given permission. The fact that La Rochelle added a caution that MTC might object was simply gratuitous advice not entirely without basis. And even if the gratuitous advice was unsound or unwise, and even if that was the cause of calling off the meeting, that was so late, and the planning and notice of the meeting so poorly arranged, that the deleterious effect must have been de minimis if there was any at all.

In addition to Kieta's testimony referred to above, he testified, and I find, that he did not receive any complaints or reports that any MTC non-employee representatives were in a security area without an escort, confirming Meese's testimony that none of the MTC non-employee representatives campaigned in the Shipyard, or that MTC representatives otherwise violated the ground rules. He testified also that he did not deny any NFFE representative access to a non-security area, and since there is no evidence to the contrary I so find. Guyett and Provost, another non-employee representative, were frequently in the Yard at the same time, which was consistent with the ground rules so long as they were in non-security areas. Kieta testified also to some alleged violations of the ground rules by NFFE, some of which were confirmed, but Kieta did not as a consequence terminate NFFE's access to the Yard because he thought those violations not of sufficient importance to invoke such sanction. His overall impartiality, or lack of bias against NFFE or in favor of MTC in his treatment of them, is thus confirmed. Whatever advantage MTC enjoyed during the campaign, it resulted not from disparate treatment or misconduct but from the greater ability or willingness of MTC to take advantage of the opportunities available to both contestants and perhaps to a slight extent to the natural advantages of being the incumbent. 8/

#### Discussion and Conclusions

Objection #4, the sole subject for which the hearing was designated by the Regional Administrator, charged that top management officials of the Activity were aware that

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8/ cf. Westinghouse Electric Corp., 91 NLRB No. 150, 26 LRRM 1602, 1604-5 (1950).

during the election campaign several employees of the shipyard took leave without pay to devote full time to the MTC campaign in the shipyard and conducted a "full-scale campaign" during working hours in the yard's industrial areas. On the surface, the bare bones of such charge allege no inherent impropriety on the part of the Activity or the Intervenor. At the hearing and in its brief, the Petitioner argued that such conduct by MTC and knowledge of it by the Activity, and the treatment by the Activity of the LWOP men other than as non-employee representatives of the Intervenor while imposing greater restrictions on the activities of non-employee representatives of the Petitioner, constitutes disparate treatment of the contestants in violation of Section 19(a) (3) of Executive Order 11491 and argues that it thereby vitiates the election which resulted in a vote of a majority of the voters in favor of the incumbent Intervenor. Such argument is here considered as merely fleshing out the bare bones of the charge and as included within the charge. We should not hold complaints under the Executive Order, which expectedly are often framed by laymen, to the strictissimi juris of an English strict settlement.

Ideally, of course, it would be desirable for elections to be conducted under the septic conditions of a meticulously conducted laboratory experiment to determine the "free and untrammelled choice" of the employees for a bargaining representative. <sup>9/</sup> Of course, when a record shows conduct "so glaring that it is almost certain to have impaired employees' freedom of choice", <sup>10/</sup> the election should be set aside, whether conducted under the Executive Order or comparable labor legislation. Without losing sight of the ideal, the practicalities of administration in regulating human conduct inhibit insistence on achieving the ideal in every election conducted by the Department. For the purposes of the present case, it is enough to sustain the election to hold that it will not be set aside in the absence of discernible biased conduct by the Activity.

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<sup>9/</sup> Cf. General Shoe Corporation, 77 NLRB 124 (1948).

<sup>10/</sup> Idem, at 126

A substantial body of law has evolved in the private sector concerning the validity of elections over the years of administration of legislation protecting the right of collective bargaining. There are only a few such decisions under the Executive Order, but the Assistant Secretary has said that no less rigorous standards for the conduct of elections among federal employees should be applied than in the private sector. <sup>11/</sup>

But whatever the standards, it should be borne in mind that the purpose of such standards and their application is to preserve the integrity of the employees' expression of their choice of representative. The purpose of an inquiry into the conduct of an election is not simply to determine whether there have been technical violations of rules, but to determine whether there is substantial risk that the employees' expression of their choice of representation has been unfairly influenced by misconduct. And the objecting party has the burden of proof concerning the matters alleged to have improperly affected the results of the election. 29 C.F.R. §202.20(d). A showing of a mere deviation from the rules, without more, does not sustain that burden of proof sufficient to warrant setting aside an election. <sup>12/</sup>

We have seen above that, with a trivial exception discussed below, there is no corroborated instance of departure from the ground rules by the MTC or the Activity, while there were instances of violations by Petitioner, confirmed by Kieta, concerning which he took no action because he considered them of no moment. In the private sector, where the incumbent union violated the election rules and the objecting petitioner also violated the rules but less extensively, and the employer stopped all violations of which it was aware, the election was sustained on the ground that the rules had not been discriminatorily applied. <sup>13/</sup> In this case we have no verified violations of the rules by MTC of which the Activity was aware, and hence no discriminatory application of the rules.

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<sup>11/</sup> Norfolk Naval Shipyard, A/SLMR No. 31 (1971).

<sup>12/</sup> U.S. Army Transportation Center, A/SLMR No. 157 (1972), a case in which the result of the voting was far closer than in this case.

<sup>13/</sup> Western Electric Company, Inc., 87 NLRB 183, 25 LRRM 1099 (1949).

There was one isolated incident of an NFFE adherent, Thompson, who was an employee of the Shipyard, being stopped by a security guard from leaving the guard to give campaign literature to an employee who asked for it. Thompson was accompanying Guyett to a security area and thus had a guard with him because Guyett could go to a security area only with a guard. This isolated incident was due simply to a misunderstanding by the guard. Such an isolated incident, innocent in purpose and not shown to have had any effect on the election, cannot be the basis for upsetting an election unless substance is to be ignored. In the private sector, where the employer barred an employee, who was a key organizer for the outside union, from the company's premises while he was off duty although permitting a non-employee representative of the incumbent union to electioneer on company property, the National Labor Relations Board refused to set aside the election because "we do not believe this single limitation on the Teamster's campaign prevented the employees from receiving an adequate presentation of the Teamsters' position and arriving at a true and uncoerced expression of their choice." <sup>14/</sup> A fortiori, this isolated incident did not prevent the employees from arriving at a true and uncoerced expression of their choice.

The gravamen of Petitioner's objection is the Activity's treatment of the seven MTC LWOP men in contrast to the restrictions it imposed on non-employee representatives of NFFE.

There was nothing disparate or otherwise improper in the Activity granting LWOP status to those seven employees. Indeed, to have denied it to them would probably have been a violation of the collective bargaining agreement. That agreement provided that such leave would be granted an employee upon his request unless it would unduly interrupt the yard's work schedule. There is no indication the leave should have been denied for such reason. Nor was such grant disparate treatment. No NFFE adherent asked for such leave,

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<sup>14/</sup> G&H Towing Co., 168 NLRB 589, 66 LRRM 1343, 1346 (1967).

and I have found that they were not inhibited by the Activity from doing so and that if they had requested it their request would have been granted.

Nor was there anything improper in the Activity treating the LWOP men as employees, with freedom of the Shipyard, during their temporary leave without pay while imposing restrictions on non-employee representatives of NFFE. While such treatment was disparate, the disparity was based on solid differences in status. The function of the Shipyard, the repair and overhauling of atomic submarines, was obviously highly sensitive from a security point of view. The seven LWOP men had security clearance. It was the practice of the shipyard to permit employees who took LWOP for less than ninety days to retain their security badges and to have access to the Yard for legitimate purposes. Campaigning, so long as within the ground rules, was a legitimate purpose. I have found no creditable evidence that the campaigning of the LWOP men transgressed the ground rules, and much of their time was not spent in campaigning in the Shipyard. Indeed, to have denied the LWOP men their usual access to the Shipyard might well have been disparate treatment adverse to them and MTC. The Assistant Secretary has held, in accord with court decisions in the private sector, that where campaigning on non-work time would not interfere with production, it may not be prohibited.<sup>15/</sup> Had NFFE adherents who were employees sought LWOP, they would have had the same privileges. Non-employees, on the other hand, were reasonably restricted in their movements in this sensitive area.

There is a plethora of cases in the private sector to the effect that an election will not be set aside upon the basis of an employer's non-discriminatory application of reasonable ground rules, although such application may have adversely affected one of the contestants, as here. The Assistant Secretary has concurred in such principle.<sup>16/</sup> Let us look at a couple of NLRB cases on this point.

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<sup>15/</sup> Charleston Naval Shipyard, A/SLMR No. 1, (1970).

<sup>16/</sup> Norfolk Naval Shipyard, A/SLMR No. 31, (1971).

In Electric Auto-Lite Co., 89 NLRB 1407, 26 LRRM 1126, (1950), the Board held that permitting the petitioner to have some of its adherents take time off to campaign and to transport employees to the polls was not improper if the same privilege was not denied to the competing union. In LaPointe Machine Tool Co., 113 NLRB 171, 173, 36 LRRM 1273 (1955), the Board said that it had "consistently held" that permitting one union to solicit on company property and on company time was not interference with an election where there was no showing that the competing union had requested and been denied the same privilege. Such conclusions are sound and should be applied in the federal sector. Where there is no disparity of treatment or purpose, and none has been shown here, an election should not be set aside because of disparity in effect because the competing union could not or did not avail itself of non-discriminatory ground rules or employee privileges.

We have seen that there was no creditable showing of MTC violations of the ground rules and of course no showing that the Activity condoned any that occurred. Petitioner's Objection #4 does not in substance ground the objection on MTC's misconduct but only on the Activity's disparate treatment of the contestants. But an employer is not guilty of disparate treatment or of condoning violations of ground rules when it does not know of such violations. In Superior Sleeprite Corp., 117 NLRB 430, 39 LRRM 1264 (1957), the Board held that meetings held by the intervenor on company property were not improper interference with an election when the employer did not know about them and did not deny the petitioner the opportunity to hold such meetings. In Eastern Metal Products, 114 NLRB 239 36 LRRM 1546 (1955) an employer-prescribed ground rule prohibited campaigning on company property during working hours. The prevailing union violated that rule. An objection to the election was overruled in the absence of a showing that the employer knew of the violations. And in Fischer Radio Corp., 123 NLRB 879, 881, 44 LRRM 1015 (1959), the prevailing union posted a sign inside the plant in violation of the employer's electioneering rule. This was not authorized by the employer and was removed by the employer when it learned of the presence of the sign. It was held that the election should not be set aside.

- 23 -

Although these precedents are not binding, the general principle to be deduced from them is salutary and realistic. Not every violation of the rules by the prevailing union, not amounting to fraud or coercion, is grounds for setting aside an election if unknown to the employer. The Intervenor argues that the Activity had the obligation to police the ground rules. It does not say whence this obligation arose. Nor does the Assistant Secretary have such obligation.<sup>17/</sup> Furthermore, in this case, with the exception of two alleged violations that were not confirmed, the Petitioner complained to the Activity of alleged violations only in general terms and refused to be specific, stating that it would give the facts to the Department of Labor if it lost the election. This of course was before the election, when the Activity could still have taken remedial action if the violations had been established. Even if these additional alleged violations had been established at the hearing, they were not known to the Activity and Petitioner's attitude of heads I win and tails I get another chance to win should not be encouraged.

In conclusion, the Petitioner has not met its burden of establishing the matters constituting the grounds of its objection.

#### Recommendation

The Objection should be overruled, the election confirmed, and the Metal Trades Council certified as the continuing choice of the majority of the employees involved.



Milton Kramer  
Hearing Examiner

Dated, Washington, D. C.  
SEPTEMBER 11, 1972

<sup>17/</sup> Report No. 20, A/SLMR, (1970); Army and Air Force Exchange Service, A/SLMR No. 144, fn. 8, (1972).

- 24 -

January 17, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. ARMY HEADQUARTERS,  
U. S. ARMY TRAINING CENTER, INFANTRY,  
FORT JACKSON LAUNDRY FACILITY,  
FORT JACKSON, SOUTH CAROLINA  
A/SLMR No. 242

This unfair labor practice proceeding against the Respondent Activity involves alleged Section 19(a)(1) and (6) violations of the Executive Order charged by the Complainant, Local 1909, American Federation of Government Employees, AFL-CIO.

The Hearing Examiner found that a statement by the Respondent's laundry manager to a Union steward, to shut up until spoken to - in the presence of other employees at a meeting called by the laundry manager - constituted a violation of Section 19(a)(1) of the Order. The Hearing Examiner also found that the Respondent violated Section 19(a)(6) based on the latter's refusal to grant an employee's request to have the president of the Complainant present at a meeting which was called by management for the purpose of discussing a letter, sent by the laundry manager to the employee, on the subject of her extended sick leave.

The Assistant Secretary found a Section 19(a)(6) violation based on the laundry manager's holding of a formal discussion with unit employees without affording the Complainant's president the opportunity to attend such a meeting. He based his decision on the view that Section 10(e) of the Executive Order gives exclusively recognized labor organizations the "opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." He noted that the facts showed that the meeting was formal in nature and called by the laundry manager to discuss a management policy and practice which had caused the employee concern. When she and the steward were called into the meeting and asked to explain the employee's problem with the letter, the employee and the steward requested the presence of the Complainant president. The laundry manager was unwilling to accede to their request. The Assistant Secretary noted that it is not within the purview of management to decide who shall represent a labor organization at formal discussions with employees or employee representatives concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

A Section 19(a)(1) violation also was found by the Assistant Secretary on the basis of Respondent's remark to the Union steward at the meeting in the presence of another employee to shut her mouth unless spoken to. In this regard, he noted that such a remark tended to restrain employees such as the steward from exercising their right to act as a representative of a labor organization and also tended to indicate to unit employees that management viewed their exclusive bargaining representative with disdain and thereby discouraged them from exercising their rights granted under Section 1(a) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY HEADQUARTERS,  
U. S. ARMY TRAINING CENTER, INFANTRY,  
FORT JACKSON LAUNDRY FACILITY,  
FORT JACKSON, SOUTH CAROLINA

Respondent

and

Case No. 40-3520(CA 26)

LOCAL 1909,  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

Complainant

DECISION AND ORDER

On July 28, 1972, Hearing Examiner William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Hearing Examiner's Report and Recommendations. The Hearing Examiner found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case, including the Respondent's exceptions and brief, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner as modified below.

The complaint, which was filed on December 9, 1971, alleged that the Respondent violated Section 19(a)(1) and (6) of the Order. The essential facts of the case, which are not in dispute, are set forth in detail in

the Hearing Examiner's Report and Recommendations and I shall repeat them only to the extent necessary.

The Complainant, Local 1909, American Federation of Government Employees, AFL-CIO, is the exclusively recognized bargaining representative for all non-temporary Wage Grade employees at Fort Jackson, South Carolina. On February 15, 1971, the parties executed a collective-bargaining agreement which by its terms was effective from July 16, 1971 until July 16, 1973. On September 2, 1971, the Respondent, through Laundry Manager Wallace Day, sent a letter to Lucille Gibson, an employee of the Respondent in its laundry facility who had been on sick leave since August 4, which requested a doctor's certificate by September 9 setting forth Gibson's physical condition as well as the date on which she was expected to return to work fully capable of performing her duties. The letter concluded with the statement, "Failure to comply with instructions in paragraph 2 may be the basis for disciplinary or adverse action." In fact, Gibson returned to work on September 8 with a doctor's certificate attesting to her illness.

As found by the Hearing Examiner, the record reflects that Gibson was disturbed at receiving the Respondent's letter and, as a result, showed the letter to Emily Bennett, who she considered to be her steward. She requested that Bennett show the letter to Woodrow Peterson, the Complainant's president. The Hearing Examiner found that on September 23 Peterson sought by telephone to arrange a meeting with Day, Gibson, and himself to discuss Gibson's concern over the letter and that Day denied Peterson's request.

The evidence established that shortly after his telephone conversation with Peterson, Day called a meeting at which several management representatives were present, including Mrs. Bell, Gibson's supervisor. Both Gibson and Bennett were summoned to attend. At the commencement of the meeting, Bennett and Gibson requested that Peterson be present and they were told by Day he would not be there. The Hearing Examiner found that when Bennett remarked that she and Gibson would not discuss the matter in the absence of the Complainant's president, Day told her to shut her mouth unless he spoke to her. Although Day advised Gibson she had representation at the meeting as a steward of the Complainant with the management representatives outside the presence of the Complainant's president. Thereupon, Day dismissed Gibson but asked Bennett to stay. During the course of their subsequent conversation, Bennett informed Day that because the Complainant was under trusteeship she doubted that she was a steward. Day replied that he wanted a steward he could talk to and that if he caught her doing steward work until he was notified she was, in fact, an official steward, he knew the "procedure to go through." 1/

1/ In agreement with the Hearing Examiner, I find that this statement was not violative of the Order.

The Hearing Examiner found that the Respondent violated Section 19(a)(6) of the Order based on Laundry Manager Day's refusal to permit Complainant President Peterson's attendance at the September 23 meeting called by Day for the purpose of discussing with two unit employees, Bennett and Gibson, the management letter sent to Gibson on the subject of extended sick leave.

In this regard, the pertinent language of the Executive Order, which I find is applicable to the instant factual situation, appears in the last sentence of Section 10(e) of the Order. Thus, the Order states that:

The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. [Emphasis supplied.]

In my view, the right flowing to a labor organization from this section of the Order (i.e., "to be represented at formal discussions") is one that flows directly to a labor organization which has been accorded exclusive recognition. <sup>2/</sup> The circumstances in this case present a clear example of the practical application of this Section 10(e) right. Thus, it is clear that the meeting on September 23 would not have taken place but for Peterson's telephone call to Day alerting him to the fact that Gibson was disturbed by the sick leave letter she had received. It is clear, also, that at this point in time Day was of the view that no formal grievance had been filed in accordance with the terms of the parties' collective-bargaining agreement, and that Day, after rejecting Peterson's request for a meeting with Day, Gibson, and Peterson, held a meeting in order to attempt to resolve the matter in the absence of the Complainant's president. In this latter regard, the evidence establishes that shortly after Peterson's call, Day instructed Gibson's immediate supervisor to summon Gibson and Bennett to his office. When the two employees arrived, they did not know why Day wanted to see them, and they were confronted with not only Day and their immediate supervisor but also with three other management officials, one of whom, according to Bennett, was there to take notes of the meeting. Day began the meeting by showing Gibson a copy of the sick leave letter and obtaining her affirmation that she had received such a letter. He stated that the purpose of the meeting was to discuss Gibson's problems with respect to the letter. As noted above, both Bennett and Gibson stated that they wanted Peterson present before the discussion proceeded further. The evidence establishes that Day denied this request

<sup>2/</sup> This right should not be confused with the possible right of an exclusive representative to represent employees vis-a-vis management in similar situations.

and advised Gibson that she was represented adequately by Bennett, who he considered to be the Complainant's steward. <sup>3/</sup> Gibson and Bennett adhered to their position that they would not talk about the letter without Peterson being present.

Under the foregoing circumstances, I find that the September 23 meeting constituted a "formal" discussion within the meaning of Section 10(e) of the Order and that such discussion clearly involved matters relating to "personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Thus, in my view, the "formal" nature of the meeting was shown by Day's attempt to resolve the matter in the presence of an individual who he believed represented the Complainant's interests, by Day's requiring the presence at the meeting of four additional management representatives including Gibson's immediate supervisor, and by the apparent fact that a record of the meeting was to be made by one of the management representatives. Further, as the subject of the meeting related to personnel policies and practices in the area of employee sick leave requirements, which had ramifications for all unit employees, I find that the September 23 discussion clearly fell within the scope of Section 10(e) of the Order.

Under Section 10(e) of the Order the exclusive representative must be given the opportunity to be represented at formal discussions between management and employees concerning grievances, personnel policies and procedures, or other matters affecting general working conditions of employees in the unit, and agencies and activities have the corresponding obligation to afford the exclusive representative such an opportunity. <sup>4/</sup> It is not within the purview of management to decide who fulfills that aspect of Section 10(e) which requires that "labor organization(s) shall be given the opportunity to be represented at formal discussions" of this nature. The right to choose its representative at such discussions must be left to the discretion of the exclusive bargaining representative and not to the whim of management. It is clear that Bennett, who was requested by management to attend the meeting in her capacity of steward, was not

<sup>3/</sup> An ambiguity with respect to Bennett's status as a steward arose because the Complainant apparently was in trusteeship during the period of these events. The Hearing Examiner found that the Respondent and all parties concerned treated Bennett as if she were the Complainant's steward at the time of the meeting.

<sup>4/</sup> It was noted that Article VI of the parties' collective-bargaining agreement sets forth the "Rights of the Union" which almost mirrors the language of Section 10(e) of the Order. In quoting this provision at page 4 of the Report and Recommendations, the Hearing Examiner inadvertently used the term "personal discussions" rather than "formal discussions" which is found in the above-mentioned provision.



fulfilling the role of the chosen representative of the exclusively recognized labor organization as contemplated by Section 10(e). Thus, as noted above, Peterson, by requesting a meeting with Day at the outset, drew the latter's attention to the fact that he, Peterson, was the Complainant's representative for purposes of any meeting concerning the sick leave letter. 5/ However, Day took it upon himself to hold the above-noted discussion denying Peterson knowledge of its occurrence or access to it. It is based upon this aspect of Section 10(e) and Day's conduct in calling such a meeting without giving the Complainant an opportunity to be represented by an individual of its own choice and, thus, precluding the Complainant's chosen representative from attendance, that I find the Respondent to have refused improperly to consult, confer, or negotiate with its employees' exclusive bargaining representative in violation of the Executive Order. 6/

The Hearing Examiner further found a violation of Section 19(a)(1) based on Laundry Manager Day's statement to Bennett at the September 23 meeting to the effect that Bennett should shut her mouth unless spoken to. Under the circumstances involved herein, I agree with the Hearing Examiner's finding. In reaching this result, I note particularly the Hearing Examiner's conclusion that despite the doubt subsequently raised by Bennett regarding her official capacity as steward, at the time Day made such remark to Bennett "management as well as other employees viewed her as the steward and she was treated as a union representative by the employees." Moreover, Respondent's refusal to permit Peterson to be present at the discussion was, in part, predicated on its assertion that the Complainant's steward's presence was sufficient. 7/ Such an

5/ Despite the apparent trusteeship in this matter, throughout the proceeding Peterson was referred to as the "acting president"; the Respondent and all parties concerned treated Peterson at all times as though he were both the Complainant's acting president and official representative; and no record evidence was submitted to support a contrary finding as to his official status.

6/ In view of my decision herein, I find it unnecessary to pass upon the Hearing Examiner's finding that the dispute herein involved a grievance or an aspect of the parties' contractual grievance procedure. Further, I find it unnecessary to pass upon the Hearing Examiner's rationale in attempting to distinguish the right to union representation in situations where employers interrogate employees merely to investigate the facts of a particular incident as opposed to situations where an employer's purpose goes beyond the investigation stage and enters the area of potential disciplinary action.

7/ Respondent in its exceptions and brief states that Bennett was the Union steward and that Day "recognized Bennett as a Union representative and invited her to the meeting in that capacity."

-5-

admonishment to the Complainant's steward in the presence of other employees reasonably may be viewed as reflecting a disparagement of the Complainant and have a dual effect on unit employees. Thus, in my view, such conduct clearly would tend to restrain employees, such as Bennett, from exercising their right to act as a representative of a labor organization and present their views to management. Further, with knowledge that their steward has been advised by management not to express herself on their behalf, employees in the bargaining unit undoubtedly would tend to believe that management views their exclusive representative with disdain and thereby would be discouraged from exercising their rights granted under Section 1(a) of the Order. In all the circumstances, I find that Day's remark to Bennett to shut her mouth unless he spoke to her, in the presence of another employee at the September 23, 1971, meeting interfered with, restrained, or coerced employees in the exercise of their Section 1(a) rights in violation of Section 19(a)(1) of the Order.

#### CONCLUSIONS

By conducting a formal discussion on September 23, 1971, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the bargaining unit without affording the Complainant's chosen representative the opportunity to attend such discussion, the Respondent improperly refused to consult, confer, or negotiate with its employees' exclusive bargaining representative in violation of Section 19(a)(6) of the Executive Order. By advising the Complainant's steward to shut her mouth unless he spoke to her, in the presence of another employee at the September 23 meeting, the Respondent interfered with, restrained, or coerced employees in violation of Section 19(a)(1) of the Order.

#### REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, shall:

-6-

1. Cease and desist from:

(a) Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local 1909, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Interfering with, restraining, or coercing its employees by preventing a steward of Local 1909, American Federation of Government Employees, AFL-CIO, or any other individual acting as a representative of said labor organization, from speaking on behalf of any employee in the bargaining unit at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

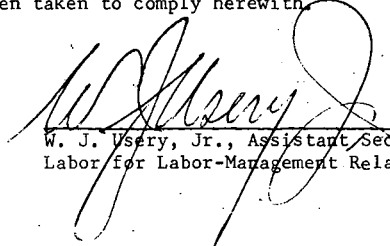
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Notify Local 1909, American Federation of Government Employees, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Post at its facility at United States Army Headquarters, United States Army Training Center, Infantry, Fort Jackson, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, United States Army Headquarters, United States Army Training Center, Infantry, Fort Jackson, South Carolina, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
January 17, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving Local 1909, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT interfere with, restrain, or coerce our employees by preventing a Union steward of Local 1909, American Federation of Government Employees, AFL-CIO, or any individual acting as a representative of said labor organization, from speaking on behalf of any employee in the bargaining unit at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature and 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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
WASHINGTON, D. C.

UNITED STATES ARMY HEADQUARTERS  
UNITED STATES ARMY TRAINING CENTER,  
INFANTRY, FORT JACKSON LAUNDRY FACILITY,  
FORT JACKSON, SOUTH CAROLINA

Respondent

CASE NO. 40-3520 (CA)

and

LOCAL 1909, AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Complainant


ERRATA

The undersigned Administrative Law Judge having issued his Report and Recommendation (hereincalled the Report) in this case on July 28, 1972, and

The said Report having incorrectly set forth in the third paragraph of the Notice to All Employees set forth in the Appendix the following language: "WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their."

IT IS HEREBY ORDERED that the above quoted lines in the third paragraph of the Notice to All Employees set forth in the Appendix be stricken.

Dated at Washington, D. C.,  
September 19, 1972

  
WILLIAM NAIMARK  
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY HEADQUARTERS  
UNITED STATES ARMY TRAINING CENTER,  
INFANTRY, FORT JACKSON LAUNDRY FACILITY,  
FORT JACKSON, SOUTH CAROLINA

RESPONDENT

CASE NO. 40-3520 (CA)

and

LOCAL 1909, AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Captain Charles A. Scarminach, U.S. Army,  
Staff Judge, Advocate Office, Headquarters,  
U.S. Army Training Center, Infantry,  
Fort Jackson, South Carolina 29207,  
and  
Kaufman E. Bell, Civilian Personnel Officer,  
Department of the Army, Fort Jackson,  
South Carolina 29207, on behalf of the  
Respondent.

Dolph D. Sand, Assistant to the Staff Counsel,  
American Federation of Government  
Employees, AFL-CIO, 400 First Street, N. W.,  
Washington, D. C. 20001, on behalf of the  
Complainant.

Before: William Naimark, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a Notice of Hearing issued on March 30, 1972, by the Regional Administrator of Labor-Management Services Administration, Atlanta Region,

a hearing was held in the above-entitled matter before the undersigned on May 3, 1972, at Columbia, South Carolina. A complaint was filed under Executive Order 11491 (herein called the Order) by American Federation of Government Employees, Local 1909, AFL-CIO, (herein called the Union) against United States Army Headquarters, United States Army Training Center, Infantry Fort Jackson Laundry Facility, (herein called the Respondent). The complaint alleged a violation by Respondent of Section 19(a)(1) and (6) of the Order by its (a) threatening Emily Bennett, employee, in the presence of other employees, (b) denying union representation to Lucille Gibson, employee, at a meeting called by management regarding a complaint filed by said employee.

At the hearing both parties were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. 1/ Both parties filed briefs which have been duly considered by the undersigned.

From the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions, and recommendations:

#### Findings of Fact

##### 1. Unfair Labor Practices

###### A. Introduction and Contentions

The parties herein negotiated a collective bargaining agreement which was executed on February 15, 1971, and was effective by its terms from

1/ On May 1, 1972, Complainant filed with the Area Administrator a complaint against the Respondent herein alleging violation of Section 19(a)(1), (2), (4) and (6) of the Order. At the hearing Complainant moved to consolidate said complaint with the present proceeding. The undersigned denied the motion since no investigation had been conducted, nor a determination made, as to the merits of the latest complaint. Further, the Notice of Hearing is limited to Case No. 40-3520(CA).

July 16, 1971 until July 16, 1973. Under this agreement the Union is the recognized bargaining agent for all non-temporary Wage Grade employees of Fort Jackson, South Carolina. The contract sets forth a grievance procedure providing for the processing of employees' complaints.

The Union contends management violated the Order when it refused employee Lucille Gibson's request to have the Union president be present at a meeting to which she was summoned. This meeting was called by Respondent to discuss a letter received by the employee which was a source of dissatisfaction and irritation to her. It is also contended that a statement made by management to Emily Bennett, an employee, amounted to a threat and constituted interference, restraint and coercion under the Order.

Respondent maintains that inasmuch as no grievance was initiated by Lucille Gibson with her immediate supervisor, as required under the grievance procedure in the contract, the employee was not entitled to have a union representative present at this meeting. It is further urged that management proposed no disciplinary action against Gibson, but was merely following the Civil Service Commission and Army regulations when it sent the letter to said employee. Since the meeting was explanatory in nature, there is no justification for requiring union representation thereat.

###### B. Issues

1. Whether the statement by Wallace Day, Respondent's laundry manager, to Emily Bennett, deemed to be acting as union steward, to shut up until spoken to - all in the presence of other employees and at a meeting called by Day - constituted interference, restraint, or coercion under Section 19(a)(1) of the Order.
2. Whether the further statement by Day to Bennett at the same meeting, after she expressed doubt as to her being union steward, that if he caught her doing union steward work he'd know what procedures to follow, constituted interference, restraint, or coercion under Section 19(a)(1) of the Order.

3. Whether the refusal by Respondent to grant the request of employee Lucille Gibson to have the president of the Union present at a meeting she attended with management constituted a violation of Section 19(a)(1) and/or 19(a)(6) of the Order.

C. Applicable Contract Provisions

Article V

RIGHTS OF EMPLOYEES

Section 3. Each employee has the right, regardless of whether he is a member of a labor organization, to bring matters of personal concern to the attention of appropriate officials under applicable law, rule, regulations, or established policy of the Department of the Army, or to choose his own representative in a grievance or appellate action. (Underscoring supplied.)

Article VI

RIGHTS OF THE UNION

Section 2. The Union shall be given the opportunity, subject to security regulations, to be represented at personal discussions between management and employees or employee representative concerning grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Article XV

SICK LEAVE

Section 6. Periods of absence on sick leave in excess of three consecutive workdays must be supported by a medical certificate to be filed within 7 calendar days after return to duty \* \* \*.

Article XXXIV

Grievance Procedure

Section 3. This grievance procedure is applicable to all types of grievances of employees in the unit normally considered under the

Department of the Army grievance procedures, such as:

- b. Expressions of dissatisfaction with working conditions and/or environment and relationships with supervisors or other employees.
- e. Dissatisfactions with the receipt of an official letter of reprimand.

Section 5. The following general standards and principles will be adhered to by employees, by the Employer and by Union representatives:

- a. Grievances can be initiated only by employees, either singly or jointly. Grievances cannot be initiated by the Union.

Section 6. It is agreed that the following procedures shall be used if the negotiated grievance procedure is elected by the aggrieved employee:

Step 1. A complaint shall first be taken up by the aggrieved employee and his representative, if any, with the immediate supervisor. The supervisor shall discuss the matter promptly and review the situation impartially. . . . The supervisor shall make the necessary investigation and shall give his answer orally to the aggrieved employee within seven calendar days after the date of the discussion. . . .

Step 2. If the complaint is not resolved as a result of the first step discussion, the supervisor will make arrangements within five calendar days for a discussion of the matter between the employee, the designated representative . . . appropriate supervisor . . .

- d. An employee has the right to request, and have in attendance, a representative of the Union who may act for and in his behalf during any meeting concerning his complaint or grievance . . .

Step 3. If an acceptable solution is not reached during the second step discussion, the complaint shall be reduced to writing, signed by the aggrieved employee . . . . The complaint then becomes a formal grievance . . .

D. Correspondence and discussions re Lucille Gibson's obligations while on sick leave

For approximately 12 or 13 years Lucille Gibson has been employed by Respondent in its laundry facility. On August 4, 1971, 2/ she went on sick leave. Thereafter, the personnel clerk, Mrs. Pace, reported to Wallace E. Day, chief of the laundry branch, that three employees were out sick for nearly thirty days. She suggested each employee be requested in writing to inform management as to the nature of his illness and the date of his expected return to work. Accordingly, a letter 3/ dated September 2 was sent to Gibson and the other two employees from manager Day. This letter in paragraph 2 requested a doctor's certificate by September 9 indicating the employee's physical condition as well as a date when said individual expects to return fully capable of performing her duties. The letter concluded with the following:

"3. You have failed to follow administrative regulations governing the use of sick leave and the proper notification regarding your intentions to return to duty.

"4. Failure to comply with instructions in paragraph 2 may be the basis for disciplinary or adverse action." [Underscoring supplied.]

The basis for Respondent's action, inquiring as to the status of an employee who is absent on sick leave, rests on several regulations promulgated by the Civil Service Commission and the Department of the Army. Thus, subchapter 4 (sick leave) of Federal Personnel Manual 630-11 4/ declares that an agency has the authority and responsibility to determine these facts when an employee is ill. Under CFR 990-2(C 1) 5/ are set forth responsibilities of the employees in respect to furnishing evidence in support of sick leave, as well as

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2/ All dates hereinafter mentioned will be in 1971 unless otherwise stated.

3/ Respondent's Exhibit 1.

4/ Respondent's Exhibit 3.

5/ Respondent's Exhibit 5.

the responsibility of activity commanders to require same to be furnished. Regulations of the Army governing civilian personnel designated TC REG 690-1 C 26 6/ provide under 27-5 that, in case of prolonged illnesses, supervisors may require employees to furnish medical certificates setting forth the information requested by Respondent herein. Moreover, this is included in a bulletin 7/ dated December 17, 1970, which was given to employees.

Gibson returned to work on September 8 with a doctor's certificate attesting to her illness. She testified, and I find, that she was aware of regulations governing sick leave, especially one requiring a doctor's certificate upon returning to duty. As a result of her moving, Gibson did not receive Day's letter until September 16. The record reflects she was disturbed at receiving the letter, particularly since others had been absent longer on sick leave and had not, according to her knowledge, received such a letter. Gibson testified she did not contact her immediate supervisor, Rebecca Bell, since the letter was written by Day. Moreover, she felt that discussing it with Day would be futile in view of past experience. However, Gibson did show the letter to Emily Bennett, a union steward, and told her to give it to Woodrow Peterson, the Union president.

The Gibson letter was turned over to Peterson who called Day on September 23. Peterson testified, and I find, that he attempted to arrange a meeting among Day, Gibson and himself because Gibson was upset and concerned at receiving the letter. Peterson commented to Day that Gibson had followed the contract by calling in when she returned to duty and bringing a doctor's certificate. Day replied that such action was insufficient as a statement from the doctor was required before the employee returned to work, stating the date when she would return and be able to perform her duties. He informed the Union president this was an official Army regulation. Further, Peterson's undenied testimony reflects that Day remarked if Gibson had not complied with the regulations, it formed the basis for adverse action by Respondent. Whereupon Peterson suggested the meeting would help to clarify the apparent conflict between the contract and the requirement set forth in the letter. He declared that Gibson had brought a doctor's statement after three days' absence for illness, and thus she did not believe any other action was required. In respect to his conversation with Peterson, Day testified that Peterson said he "constituted the letter as a grievance, to initiate a grievance, and he wanted me to set up a meeting with Mrs. Gibson, Mrs. Bennett and himself to discuss the letter." Respondent's official also told

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6/ Respondent's Exhibit 6.

7/ Respondent's Exhibit 7.

Peterson he could not initiate a grievance -- that if he had any questions as to the regulatory requirements, he should discuss it with Civilian Personnel. The record reveals Day refused to meet with both Peterson and Gibson, and the meeting requested by the Union President was denied.

E. Management's Meeting on September 23 with Lucille Gibson and Others

After refusing to meet with Peterson and Gibson, the laundry manager called a meeting that same day to explain the letter to Gibson and answer her questions. Several management representatives were present, including Mrs. Bell, and employees Gibson and Bennett who were summoned thereto. Day initiated the meeting by showing Gibson a copy of a letter and then asked her if she received one like it. Bennett asked for Peterson and was told he would not be there. When Bennett remarked they would not discuss the matter without the union president, Day told her to shut her mouth unless he spoke to her. This remark is undenied by Day, although Bell admits the manager admonished her to "hush" when she intervened. In view thereof, and since Gibson and Bennett confirm each other's testimony in this respect, I find that Day did tell Bennett to shut her mouth as hereinabove stated. Further, both Bennett and Gibson testified that the latter asked to have Peterson present. Although Day denies that she made this request, Respondent's own witness, Bell, corroborates the union witnesses. Accordingly, I find that Gibson did specifically request to have Peterson present at this meeting. The record further reveals that Day advised Gibson she was represented since the union steward was there. Day then dismissed Gibson, but asked Bennett to stay. He inquired of all management official whether they knew anything of the letter, but each replied negatively. Day asked Bennett if she were the official steward, and she said "not until Mr. Peterson tells me I am." Bennett informed Day that since the union was under a trusteeship she had doubts that she was a full steward. The manager replied that he wanted a steward he could talk to, and if he caught her doing steward work until he is notified she is an official steward, he knew the "procedure to go through." Day's testimony indicates he did not believe any union representative was entitled to be present, and he invited Bennett merely as a courtesy gesture.

CONCLUDING FINDINGS

1. Day's Statements to Bennett as Interference, Restraint or Coercion

Under Section 19(a)(1) of the Order agency management is prohibited from interfering with, restraining, or coercing an employee in the exercise of rights guaranteed by the Order itself. A violation thereof will constitute an unfair labor practice. The rights which are assured to employees under the Order are set forth as a "Policy" under Section 1 thereof. As recited in such section, employees are granted the right to form, join, and assist a labor organization. Further, the right to assist a union extends to participation in the management thereof, act as its organization representative and present its views to appropriate authority.

The union contends Respondent violated Section 19(a)(1) of the Order by Day's remarks to Bennett at the meeting on September 23. It urges that Respondent coerced and restrained its employees by (1) Day's telling Bennett to shut her mouth unless he spoke to her, this statement being made after Bennett said they would not discuss the letter without the union president being there, (2) Day's stating to Bennett if he caught her doing steward work until notified she was an official steward, he knew the procedure to follow.

In respect to the first remark, I am constrained to agree that telling Bennett to shut her mouth, under the particular circumstances herein, was restraining and coercive under the Order. Despite the fact that there is doubt whether Bennett acted in the official capacity of union steward, management as well as other employees viewed her as the steward and she was treated as a union representative by the employees. Respondent's refusal to permit Peterson to be present was, in part, predicated on its assertion that the union steward's (Bennett's) presence was sufficient. Moreover, Bennett continued to act as the de facto steward. Accordingly, this admonishment by Day to shut her mouth unless spoken to contravenes the very crux of the Order which grants to employees the right to act as representatives of a union and present views to management. Stifling Bennett when she spoke on behalf of Gibson constitutes, in my opinion, direct interference with such rights. Respondent has declared, in the presence of other employees as well, that efforts by a union steward to discuss



conditions of employment are a futility. 8/ It is tantamount to a disregard of the union as a representative of the employees, and indicates to the latter that management can ignore its obligations under the Order. Such conduct reflects a disparagement of the union, at least, and can scarcely be compatible with the rights extended to employees herein. Moreover, this "shut up" statement by Day must necessarily have a restraining influence upon employees. If their representative, as an employee, is forbidden to express herself in this particular manner, others will undoubtedly feel restrained in exercising rights guaranteed by the Order. In the particular frame of reference herein, Day's telling Bennett to shut up until spoken to has a coercive effect upon Respondent's employees.

The Union maintains that Respondent engaged in a threat when Day told Bennett he knew what procedure to follow if he caught her doing steward work. However, the undersigned does not agree that, in the posture of this discussion, it constituted a coercive threat under the Order. At this particular point in the meeting Day inquired of Bennett whether she was the official steward. Since she replied negatively, Day could well be concerned that she not perform steward functions in the future. While his stated restrictions on performing any steward's work may have been too broad, I am persuaded Day was attempting to confine steward's work to the official steward. His comment as to knowing the procedure to pursue if she did act as steward could well be referable to legitimate steps that could be taken by Respondent. I conclude it was not a threat to interfere with the performance of a union steward's duties, and, further, that such remark by Day did not constitute restraint or coercion under the Order.

2. Respondents' Refusal to Permit the Union President to be present at meeting with Gibson as refusal to Consult, Confer or Negotiate

The Order contemplates that, in certain discussions between employees and management, a union would have the right as well as the obligation to be present. Thus, under Section 10, dealing with "Exclusive

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8/ See Hicks-Ponder Company, 174 NLRB 51 where the National Labor Relations Board found Respondent violated Section 8(a)(1) of the Act (comparable to 19(a)(1) of the order) when it emphasized to employees the futility of bargaining with the union.

Recognition, it is provided in subsection (e) that a labor organization is responsible for representing the interests of all employees in the unit. It further provides as follows:

"The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

While Respondent urges that no grievance was initiated, as required by the contract, Section 10(e) of the Order does not limit the right of a union to be present at grievance meetings. This particular language of the Order is broader in scope, and, in the opinion of the undersigned, would entitle the union to appear at all discussions with employees involving working conditions. Unless it be found that the union herein was, in fact, represented on September 23 by the appearance of Bennett, I would conclude that it was not afforded the opportunity to be present as required by Section 10(e) of the Order. The difficulty with finding such union representation, however, is evidenced by the fact that there was some confusion as to whether she was still acting as the steward - in light of the union's being under trusteeship - and Bennett was not permitted to function as a union representative, in any event, at the meeting. Day refused to allow her to intercede, and, in truth, silenced her efforts to do so. Apart from the question as to whether Gibson had the right to select a particular union representative on September 23, I find that there was indeed no union representation at the meeting on that date. Further, in view of Bennett's uncertain status, as well as the conduct displayed by Day, I conclude that the request by Gibson to have the union president attend was most reasonable. Accordingly, I am convinced that the union herein was certainly not afforded the opportunity to be represented at the September 23 meeting.

In determining whether the refusal by Respondent to permit a union representative at the union meeting was an unfair labor practice, resort is had to the private sector's cases which frequently dealt with this issue. The National Labor Relations Board, in considering this question, has adopted a general rule which sanctions a refusal to permit union representation when an employer calls in an employee

to merely investigate the facts of a particular incident. Where potential discipline of the employee is remote, or no decision is made by management to adversely affect him, the employee is not entitled to have a representative present. Jacobe - Pearson Ford, Inc., 172 NLRB No. 84; Chevron Oil Co., 168 NLRB 574. This rule is likewise adopted when an employer interrogates an employee to gather information which will be submitted to supervisory officials who do have the authority to discipline an employee. In such an instance, no obligation is imposed upon an employer to accord union representation at such interrogation. Illinois Bell Telephone Co., 192 NLRB No. 138. Note is taken, however, that in the cited cases the employer is concerned with ascertaining the facts or events which occurred and gave rise to derelections on the part of an employee. These situations involve a confrontation absent any likely disciplinary action, and are usually an incipient investigation into the matter. In Texaco, Inc., 199 NLRB 976 an employee refused to drive certain equipment and the employer called a meeting to inquire as to the employee's version of the incident. In concluding no violation existed for refusing to allow the employee union representation at the meeting, the Board emphasized the fact that the employee did not anticipate, or have reason to expect, any possible discipline when called to the meeting.

Board cases supporting a violation turn on facts demonstrating that an employee's discussion with an employer goes beyond an investigation. Thus in Texaco, Inc., Houston Producing Division, 168 NLRB 360 the employee was accused of theft, and he requested the union be allowed to attend the meeting to which he was summoned. Refusal by the employer was found to be a refusal to bargain, the Board concluding the meeting was not called just to provide the company with information. While the employer sought to deal with the worker as to terms and conditions of employment, the employees had selected the union to deal with the employer as to such matters. It was also emphasized that, despite the contract and its grievance procedure neither the union nor the employee agreed to channel disputes concerning the right of representatives into grievance procedures. The Board's language, in part, states:

"Also, in view of Alaniz's (employee) request for union representation at the meeting, and the union's evident willingness to represent him - both conveyed to management - we find that Respondent's refusal to deal with the union on that occasion transgressed its statutory obligation to bargain with the Union concerning the terms and conditions of employment of the employees it represents."

Further, where an employee had reasonable grounds for believing disciplinary action might result from an employer's investigation, it was held that his request for union representation was justifiable. See Quality Manufacturing Co., 195 NLRB No. 42; Mobil Oil Corp., 196 NLRB No. 144. In the latter case the Board said the following:

"In the instant case, Burnett and Smith had reasonable grounds to fear that they were suspected of theft of company property and therefore that the interviews could adversely affect their employment status ... The requests of Burnett and Smith for union representation were consistent with Section 7 of the Act which guarantees employees the right to engage in concerted activities for their mutual aid and protection. By denying the requests, the Respondent interfered with, restrained and coerced Smith and Burnett in the exercise of their Section 7 rights, hereby violating Section 8(a)(1) of the Act."  
[Underscoring supplied.]

Application of the private sector law to the instant case would compel the undersigned to find that Respondent evaded its obligation to consult, confer or negotiate with the

Union, and interfered with, restrained and coerced its employees in the exercise of rights guaranteed them under the Order - all in violation of Sections 19(a) (1) and (6) thereof. Laundry Chief Day did not summon Gibson on September 23 to conduct an investigation regarding her failure to comply with the requirements in the September 2 letter. Although Day may have intended to merely explain the letter, Gibson could well have surmised that some adverse action against her was imminent. In truth, Respondent set the stage for Gibson to anticipate some reprimand or discipline when it recited in the said letter that failure to comply with the instructions may be the basis for disciplinary or adverse action. Moreover, Day informed Peterson prior to the meeting that if Gibson had not complied with the regulations a basis existed for some adverse action by Respondent. Consequently, I am persuaded that the meeting on September 23 was beyond a fact-finding gathering, and the previous oral and written statements by Respondent would tend to lead Gibson to conclude that she faced some adverse action by the Activity. In this posture, her request that the union president be present was reasonable, and Day's refusal constituted an evasion of its obligations under the Order. Apart from the Board cases, I am convinced that the Order's intentment is to assure unions the opportunity to represent employees at all formal discussions with employees regarding working conditions. As heretofore indicated, this is specifically provided for in the Order itself, and should be given considerable weight in determining the issue herein. The broadness of Section 10(e), when viewed in conjunction with the policy set forth in Section 1 of the Order, as well as Article VI, Section 2 of the contract which is almost identical to the language in Section 10(e), impels me to conclude the union has the right to represent employees at meetings to which employees as Gibson are called by the employer. Accordingly, a denial of a request by the employee for union representation in such runs afoul of the Order. It not only interferes with rights of employees guaranteed by the Order but disregards the "bargaining" obligations thereunder.

- 14 -

Respondent raises a specific defense to this proceeding based on Article XXXIV, Sections 5 and 6 of the contract, which deal with grievance procedure. Section 5 provides that only employees - and not the union - may initiate a grievance. Section 6 recites that, under step 1, a complaint shall be taken up by the aggrieved employee and his representative, if any, with the immediate supervisor. Therefore, the Activity argues, Gibson has no standing herein because she did not initiate the grievance - she failed to take the matter up with her immediate supervisor, Mrs. Bell. The Respondent thus contends no grievance existed.

The undersigned would reject this defense. Firstly, the broad grant of right to union representation under the Order would require explicit language in the contract if the parties intended to channel disputes as to such rights into the grievance procedures. Assuming arguendo, that Gibson had not initiated a grievance, her right to union representation at a meeting to which she is called is not extinguished. If management seeks to confront an employee under a cloud of possible disciplinary action, her need for a union representative is, at the moment, most vital. Conduct occurring at discussions between employer and employee, despite the absence of initiating a grievance, may likewise require representation on the employee's behalf.

Secondly, I am persuaded that a grievance was in fact initiated by Gibson in respect to her dissatisfaction with the receipt of said letter. At the September 23 meeting Day was aware that Peterson had, in her words, "constituted the letter as a grievance, to initiate a grievance, (sic)." Day also knew Peterson initiated the complaint on Gibson's behalf. Although Gibson did not discuss the matter with Mrs. Bell initially, Day summoned Gibson, Bell, and others to the meeting since he knew Gibson felt aggrieved. Such conduct, in my opinion, is equivalent to a waiver of this requirement set forth in the contract. Day's willingness

- 15 -

to meet regarding the letter, after Peterson had called him to complain about it, takes the matter beyond Step 1. It ill behooves Respondent to call a formal meeting in respect to the situation, and later contend the employee failed to discuss the matter with her immediate supervisor. The parties were, in reality, at Step 2, and at that stage the contract recites that an employee has the right to request, and have in attendance, a union representative to act on his behalf. Accordingly, pursuant to the grievance procedure in the agreement, I find that Gibson was entitled to have Peterson represent her at the meeting on September 23 regarding her complaint.

#### Conclusions

In sum, I find and conclude that Respondent violated Section 19(a)(1) of the Order by reason of Day's telling Bennett to shut up until spoken to at the meeting on September 23, 1971. Denying the acting union steward the right to speak on behalf of Gibson in the presence of other employees constituted interference, restraint or coercion under the Order. Moreover, I conclude that the refusal by Day to permit union president Peterson to be present at the September 23 meeting, upon the request of the aggrieved employee Gibson, was a violation of Respondent's obligation to consult, confer, or negotiate - all of which violated Section 19(a)(6) of the Order.

In respect to the statement made by Day to Bennett that if he caught her doing union steward work he knew what procedure to follow, I find and conclude this was not violative of the Order.

- 16 -

#### RECOMMENDATIONS

Having found that Respondent has engaged in conduct which is violative of Section 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491.

#### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that United States Army Headquarters, United States Army Training Center, Infantry, Fort Jackson Laundry Facility, shall:

1. Cease and desist from:

(a) Interfering with, or preventing, any union steward of American Federation of Government Employees, Local 1909, AFL-CIO, or any individual acting as a representative of said labor organization, from speaking on behalf of any employee at any meeting or formal discussion between management and such employee concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Refusing the request made by Lucille Gibson to be represented by the president of American Federation of Government Employees, Local 1909, AFL-CIO, at any meeting or formal discussion between management and Lucille

- 17 -

Gibson convened to discuss the contents of the letter dated September 2, 1971 sent from Wallace E. Day, Respondent's laundry manager, to Lucille Gibson.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Upon request, consult, confer, or negotiate in good faith with the president of American Federation of Government Employees, Local 1909, AFL-CIO, or any duly authorized representative thereof, if requested by any employee who is a member of the unit of which the said labor organization is the bargaining representative, at any meeting or formal discussion between management and any of its employees concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.


(b) Post at its facilities at United States Army Training Center, Infantry, Fort Jackson, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer, United States Army Training Center, Infantry, Fort Jackson, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all

places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.

JULY 28, 1972

  
William Naimark  
Hearing Examiner

- 19 -

- 18 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse any employee in the unit of which American Federation of Government Employees, Local 1909, AFL-CIO, or any other labor organization, is the bargaining representative, permission to be represented at any meeting or formal discussion between management and said employee by the president of the aforesaid labor organization, or any duly authorized representative, where the meeting or formal discussion concerns grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL NOT interfere with, restrain, or coerce our employees by interfering with, or preventing, any union steward of American Federation of Government Employees, Local 1909, AFL-CIO, or any individual acting as a representative of said labor organization, from speaking on behalf of any employee at any meeting or formal discussion between management and such employee concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Appendix 2

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

UNITED STATES ARMY TRAINING  
CENTER, INFANTRY, FORT  
JACKSON, SOUTH CAROLINA  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, Department of Labor whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

January 22, 1973

A/SLMR No. 243

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

DEPARTMENT OF THE ARMY,  
UNITED STATES ARMY BASE COMMAND,  
OKINAWA 1/

DEPARTMENT OF THE ARMY,  
UNITED STATES ARMY BASE COMMAND,  
OKINAWA  
A/SLMR No. 243

Activity

and

Case No. 22-2890

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 1678 (AFGE) seeking a unit of all U.S. citizen employees of the United States Army Base Command, Okinawa, irrespective of physical location. The Activity contended that the appropriate unit should be limited to employees located on Okinawa. Evidence also was adduced as to the supervisory status of nine employee job classifications.

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO,  
LOCAL 1678 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. In this connection, the Assistant Secretary noted that the employees covered by the petition generally are governed by common personnel policies and practices, that they share similar skills and backgrounds, that they perform similar job functions, and that no labor organization is seeking to represent off-island employees on a separate basis. Under these circumstances, the Assistant Secretary directed an election in the claimed Activity-wide unit which included professional employees.

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Henry C. Lee, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

Upon the entire record in this case, including briefs filed by both parties, the Assistant Secretary finds:

Determinations were made by the Assistant Secretary as to the supervisory status of employees in certain disputed classifications. Further, absent contrary evidence, the Assistant Secretary found that the parties' agreements concerning professional and confidential employees were proper. Accordingly, he accepted the parties' agreements in this regard.

1/ The name of the Activity appears as corrected at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

3/ At the close of the hearing, the Petitioner entered a formal protest concerning the Activity's alleged failure to grant administrative leave to its witnesses. The Hearing Officer referred this matter to the Assistant Secretary for decision. In my view, the proper forum to raise an issue concerning an alleged improper refusal to grant administrative leave to certain witnesses is through the unfair labor practice procedures. See Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139. Accordingly, I do not pass upon the Petitioner's contention in this respect.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner seeks an election in a unit of all nonsupervisory U.S. citizen employees of the United States Army Base Command, Okinawa, irrespective of physical location, but excluding supervisory personnel, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. 4/

The Activity contends that the petitioned for unit is too broad in that it includes employees stationed in locations other than Okinawa and its immediate vicinity. It is submitted by the Activity that such employees do not have a clear and identifiable community of interest with the employees on Okinawa and that to include such employees in the proposed unit would not promote effective dealings and efficiency of agency operations. Further, contrary to the view of the Petitioner, the Activity asserts that all employees whose supervisory authority is limited solely to foreign nationals and military personnel properly should be excluded from the unit.

#### Unit Determination

The United States Army Base Command, Okinawa (USARBCO) is charged with providing administrative and logistical support to United States Army units, bases and establishments in the Western Pacific. Formerly known as Headquarters, United States Army Ryukyu Islands, the Activity was redesignated USARBCO on May 15, 1972, concurrent with the reversion of Okinawa to Japan. 5/

The total complement of U.S. citizen employees of USARBCO is 1,388. With the exception of approximately 45 employees stationed at off-island locations, 6/ all of these U.S. citizen employees are located on Okinawa or in its immediate vicinity. The evidence establishes that off-island employees share similar skills and backgrounds and perform similar job functions as the employees stationed on Okinawa.

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4/ The unit description appears as amended at the hearing.

5/ The record reveals that the Petitioner was accorded formal recognition on September 17, 1962, for a unit of all nonsupervisors on Okinawa. This recognition was terminated on July 1, 1970, pursuant to Section 24(c) of Executive Order 11491. Additionally, exclusive recognition was accorded the Petitioner on July 8, 1964, for a unit of all U.S. citizen supervisory personnel. Subsequently, exclusive recognition for the unit of supervisors was terminated on December 31, 1970, pursuant to Section 24(d) of the Order.

6/ In this regard, the record reveals the following number of employees and their respective locations: 11 employees - Taiwan; 17 employees - Philippines; 4 employees - Korea; 7 employees - Japan; and 6 employees - Singapore.

The record reveals that all employees of USARBCO are engaged in the accomplishment of the same mission and are subject to the same general working conditions. Additionally, all employees utilize the same Army grievance procedure. With the exception of certain off-island employees located in Taiwan and the Philippines who are provided personnel services on the basis of cross-service agreements with the Air Force, 7/ all USARBCO employees are serviced by USARBCO personnel offices and are in a single competitive area for the purpose of reduction in force. Thus, off-island employees, other than those in Taiwan and the Philippines covered under cross-service agreements, could "bump" into a position on Okinawa in the event of a reduction in force, or transfer to Okinawa if a vacancy exists. Further, the record reveals that all USARBCO employees, with the exception of off-island employees operating under cross-service agreements, enjoy a common merit promotion program. 8/

I note the fact that the employees covered by the instant petition generally are governed by common personnel policies and practices and that they share similar skills and backgrounds and perform similar job functions. Further, no labor organization is seeking to represent the off-island employees on a separate basis. Thus, under all the circumstances, I find that the Activity-wide unit, as proposed by the Petitioner, is appropriate for the purpose of exclusive recognition under the Order. Accordingly, I shall direct an election in the unit found appropriate.

#### Eligibility Issues

As noted above, the parties disagreed as to the supervisory status of those employees whose supervisory authority is limited solely to foreign nationals and military personnel. In Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, I found that in determining the supervisory status of certain individuals, it was immaterial whether the supervisory authority involved was exercised over unit employees, non-unit employees, or over "persons," such as military personnel, who are not "employees" within the meaning of Section 2(b) of the Order. Rather, in determining the supervisory status of individuals, I stated that the determinative factors would be the duties performed by the alleged supervisor and not the type of personnel working under him. I find this rationale equally applicable in the instant case. Accordingly, all employees who, in fact, exercise supervisory authority over U.S. citizens, foreign nationals or military personnel will be excluded from the unit found appropriate herein.

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7/ The record shows that 8 of the 11 employees in Taiwan and all of the 17 employees in the Philippines operate under this type of arrangement.

8/ USARBCO personnel offices maintain limited personnel records for those off-island employees provided personnel functions through cross-service agreements.



At the hearing in this matter, the parties adduced evidence on the supervisory status of the nine employee classifications discussed below. 9/

Supervisory Accounting Technician (Chief of the Reimbursable Billing Section)

The record reveals that this position is located in the Stock Room Division of the Directorate for Comptroller Activities. The incumbent performs basic bookkeeping duties, such as posting accounts in ledgers and maintaining various other financial records. There are four military personnel and three foreign nationals currently assigned to the incumbent's section.

The record indicates that the incumbent can recommend the transfer of an employee if the latter's performance is unsatisfactory, approves leave for the foreign nationals in the section and initiates achievement awards. Moreover, the evidence establishes that the incumbent has the authority to issue written reprimands to the foreign nationals in the section when such action is deemed warranted.

I find that the foregoing evidence establishes that the Supervisory Accounting Technician, Chief of the Reimbursable Billing Section, is a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

Museum Curator

The Museum Curator, GS-11, is employed in the Directorate for Plans and Operations. The incumbent is responsible for the operation of the Armed Forces Museum located on Okinawa. The record reveals that the duties of the employee in this classification include, among other things, the presentation on a daily basis of a film to the public of the Battle of Okinawa, and the preparation and presentation of exhibits. In regard to his job functions, the record reveals that the Museum Curator has substantial independence and receives little supervision.

The Museum Curator is aided in his functions by two foreign nationals. The record indicates that the Museum Curator determines the priority of work to be performed in the museum and assigns work to the foreign nationals accordingly. Additionally, he signs the foreign nationals' attendance sheets and approves their leave.

9/ With the exception of the Marine Cargo Specialist classification, the record does not indicate the number of employees falling within each of these classifications. Moreover, it is apparent that the parties are in disagreement as to the supervisory status of a number of other employee classifications. However, as no testimony concerning these other classifications was adduced at the hearing, I am unable to make any findings with respect to such classifications and shall confine my findings to those classifications where evidence was adduced.

Based upon the foregoing, I find the Museum Curator to be a supervisor of the two foreign nationals within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

Supervisory Inventory Management Assistant

This position is located in the Data Systems Directorate. The incumbent monitors computer program tests and dates records. Working in the same room with the incumbent are six schedulers.

The record reveals that the employee in this classification has no authority to take disciplinary action against any employee. Moreover, while he works with certain schedulers and programmers, the evidence establishes that he neither directs these employees nor evaluates their performance. Further, the record reveals that personnel actions with regard to these employees must be initiated by the chief of the branch.

Based on the foregoing, I find that the Supervisory Inventory Management Assistant does not possess the indicia of supervisory authority as set forth in Section 2(c) of the Order. Accordingly, this employee will be included in the unit found appropriate.

Heating Mechanical Equipment Foreman

The position of Heating Mechanical Equipment Foreman, WBS-9, is located in the Directorate for Facilities Engineering. The incumbent is responsible for the maintenance of the heating system contained in hot water boilers and incinerators.

The record reveals that the incumbent works with ten foreign nationals in accomplishing his duties. In this regard, the evidence establishes that he effectively directs the work of these individuals, and determines how many foreign nationals to allocate to a particular project and what work they will perform. Moreover, he has the authority to recommend a foreign national for a sustained superior performance award.

In these circumstances, I find the Heating Mechanical Equipment Foreman to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

Marine Cargo Planner

The incumbent in this position is responsible for allocating tonnages of materials to a specific area in an empty vessel in order to render the vessel stable. Two foreign nationals, who are located in the same room as the Marine Cargo Planner, are assigned to assist him in this mission.

The record indicates that the incumbent assigns work to these foreign nationals. In this connection, he instructs and directs the foreign nationals as to the preparation of final stow plans and is responsible for reporting on the competency of their work. The record indicates also that the incumbent has rejected a job applicant.

In these circumstances, I find the Marine Cargo Planner to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

#### Automotive Equipment Maintenance General Foreman

This position is located in the Directorate for Transportation Operations. The incumbent inspects and repairs automotive equipment. Located in the same motor pool with the incumbent are five Department of Army civilians and 66 foreign nationals.

The record reveals that the incumbent interviews job applicants, recommends hiring, and makes a recommendation at the end of a probationary period as to whether to retain a new employee. The record further reveals that the incumbent prepares performance evaluations with respect to the five civilian employees in the motor pool which are subject to review at higher levels and that he directs the work of subordinate foremen who, in turn, direct the work of others.

Based on the foregoing evidence, I find the Automotive Equipment Maintenance General Foreman to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

#### Chief of the Inventory Cycle Unit

This position is located in the Directorate of Supply. The incumbent is responsible for reconciling the inventory of the depot from computer printouts. Eight foreign nationals are assigned to assist the Chief in performing this function.

The record shows that the incumbent is accountable for and directs the foreign nationals and, in this regard, effectuates their work assignments. Also, when a change in operating procedure occurs, the incumbent is responsible for implementing the change in his section. The record further shows that the employee in this job classification has interviewed applicants for temporary jobs and has effectively recommended that they be hired.

Based on the foregoing circumstances, I find the Chief of the Inventory Cycle Unit to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

#### Marine Cargo Specialist

The Marine Cargo Specialist position, GS-10, is located in the Directorate for Transportation Operations. An incumbent in this position is responsible for assisting a private stevedoring contractor in loading and unloading vessels.

Although the record reveals that there are approximately ten employees in this classification, it is unclear as to the number of foreign national employees assigned to each Marine Cargo Specialist for the purpose of assisting him in performing his job functions. Furthermore, the record is unclear as to the degree of direction exercised by these employees over foreign nationals or the nature of their duties.

In the absence of specific information concerning the incumbent's duties and the extent to which he provides direction to the foreign nationals, I shall make no determination at this time with respect to this category's inclusion in or exclusion from the unit found appropriate.

#### Assistant General Foreman and Master Diver

This position is located in the Marine Maintenance Shops Division of the Directorate of Marine Maintenance. The incumbent, WS-15, has a dual mission: (1) to repair ships for the Army and provide an in-depth maintenance program, and (2) to assist the general foreman in the operation of the various shops of the Division. 10/

The record indicates that the employee in this classification has held meetings with a Japanese labor organization representing foreign nationals on Okinawa pertaining to grievances filed by foreign national employees. Further, the incumbent has effectively requested various personnel actions, including 60-day details for employees and travel requests, effectively requested reassignment of an employee, and has initiated an incentive award. Moreover, it appears that in the general foreman's absence, the incumbent assumes the general foreman's overall responsibilities.

In these circumstances, I find the employee in this classification to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude this employee from the unit found appropriate.

The parties agreed that because the directors of the various directorates as well as higher level officials are involved in local labor relations policy determinations, their secretaries should be excluded from the unit as confidential employees. As the record supports the parties' agreement in this regard, I find the secretaries

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10/ There are eight shops in the Division - electric, marine electric, shipbuilding, machine, engine overhaul, boat building, drydock, and diving.

to the directors of the Activity's various directorates as well as to higher level officials to be confidential employees. Accordingly, I shall exclude such employees from the unit found appropriate. 11/

During the hearing, the parties also agreed that employees in the following categories and job series are professional employees within the meaning of the Order: (1) Accountants and Auditors - 510 series; (2) Medical Doctors - 602 series; (3) Nurses - 610 series; (4) General Engineers - 801 series; (5) Civil Engineers - 810 series; (6) Mechanical Engineers - 830 series; (7) Attorneys - 905 series; and (8) Physicists - 1310 series. As there is no evidence in the record to indicate that the parties' agreement is inconsistent with the purposes and policies of the Order, I find that the employees in the above categories are professional employees.

Based on all of the foregoing circumstances, I find that the following employees may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

All professional and nonprofessional employees of the United States Army Base Command, Okinawa, excluding confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professional unless the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desire of the professional employees as to inclusion in a unit with non-professional employees must be ascertained. I, therefore, shall direct separate elections in the following groups:

Voting Group (a): All professional employees of the United States Army Base Command, Okinawa, excluding all nonprofessional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

11/ With respect to the Petitioner's contention that secretaries to the chiefs at the branch and division levels should be excluded as confidential employees, I find that there is insufficient evidence as to the extent to which these chiefs are involved in the formulation and effectuation of management policies in the field of labor relations. Accordingly, I shall make no findings with respect to the secretaries of the branch and division chiefs.

Voting Group (b): All employees of the United States Army Base Command, Okinawa, excluding professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 1678.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented by the American Federation of Government Employees, AFL-CIO, Local 1678. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessionals, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the American Federation of Government Employees, AFL-CIO, Local 1678, was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon the results of the election among professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the United States Army Base Command, Okinawa, excluding confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the United States Army Base Command, Okinawa, excluding all nonprofessional employees, confidential employees, employees engaged in

Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined by the Order.

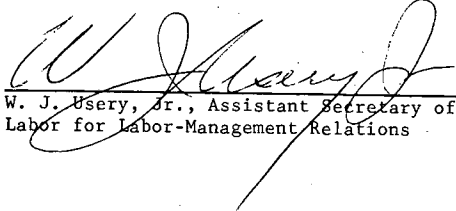
January 22, 1973

(b) All employees of the United States Army Base Command, Okinawa, excluding professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 1678.

Dated, Washington, D.C.  
January 22, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

FIFTH U. S. ARMY,  
CAMP MCCOY, WISCONSIN,  
86TH ARMY RESERVE COMMAND (ARCOM),  
AREA ORGANIZATIONAL MAINTENANCE  
SHOP G-49  
A/SLMR No. 244

This case involves a representation petition filed by Local 2144, American Federation of Government Employees, AFL-CIO, for a unit of all civilian employees assigned to Area Organizational Maintenance Shop G-49, Milwaukee, Wisconsin, one of 11 such shops in the 86th Army Reserve Command (ARCOM), Fifth U. S. Army, Camp McCoy, Wisconsin. The Petitioner contends that the petitioned for unit, standing alone, is appropriate, and alternatively, the claimed employees share a community of interest with an existing certified unit encompassing certain employees of the four ARCOMs of the Fifth U. S. Army located in Milwaukee which is represented exclusively by the Petitioner. The Activity asserts the petitioned for unit is inappropriate because it would fragmentize the 86th ARCOM.

The 11 Area Organizational Maintenance Shops, 6 in Illinois and 5 in Wisconsin, under the direction of the Chief of Maintenance, 86th ARCOM headquarters, Chicago, Illinois, have as their overall function the furnishing of equipment maintenance support for U. S. Army Reserve units. The civilian employee complement of Shop G-49 consists of one General Schedule (GS) and 14 Wage Grades(WG), and it appears that they perform essentially the same duties as are performed by other employees with similar skills and job classifications in the 86th ARCOM. On occasion, employees of Shop G-49 have been detailed to assist another shop at DePere, Wisconsin. Personnel activities for the ARCOM are centralized in the Fifth U. S. Army Civilian Personnel Office, Camp McCoy.

The Assistant Secretary found that the petitioned for unit does not constitute a distinct and homogenous grouping of the Activity's employees. He found that neither functionally nor administratively does the claimed unit reflect that the employees therein share a separate and distinct community of interest from certain other employees in the 86th ARCOM. Additionally, he found that such a unit would, in effect, further divide and fragment, solely on the basis of geographic location, the 86th ARCOM, and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FIFTH U. S. ARMY,  
CAMP MCCOY, WISCONSIN,  
86TH ARMY RESERVE COMMAND (ARCOM)  
AREA ORGANIZATIONAL MAINTENANCE  
SHOP G-49 1/

Activity

and

Case No. 50-5569(25)

LOCAL 2144,  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO 2/

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Patricia Roberts. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner seeks an election in a unit composed of all civilian employees of the Fifth U. S. Army, Camp McCoy, Wisconsin, 86th

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1/ The name of the Activity appears as amended at the hearing.  
2/ The name of the Petitioner appears as amended at the hearing.  
3/ At the hearing an issue was raised concerning the alleged refusal of the Activity to grant administrative leave to a Petitioner's witness. In my view, the proper forum to raise an issue concerning an alleged improper refusal to grant such leave is through the unfair labor practice procedures. See Department of the Navy and the U.S. Naval Weapons Station, A/SLMR No. 139. Accordingly, I will not pass upon this issue in this proceeding.

Army Reserve Command (ARCOM), assigned to Area Organizational Maintenance Shop G-49, herein called Shop G-49, at 5356 North Teutonia Avenue, Milwaukee, Wisconsin, excluding management officials, supervisors, guards, professional employees, and employees engaged in Federal personnel work in other than a purely clerical capacity.

The Petitioner contends that the petitioned for unit, standing alone, is appropriate, and alternatively, the claimed employees share a community of interest with an existing certified unit located in Milwaukee which is represented exclusively by the Petitioner. 4/ The Activity asserts the petitioned for unit is inappropriate because it would fragmentize the 86th ARCOM, and, as a consequence, would not promote effective dealings and efficiency of agency operations. It further is of the view that the employees in the claimed unit have the same community of interest as all employees of the 86th ARCOM and that prior decisions of the Assistant Secretary have found units appropriate on a command 5/ rather than a geographic basis. 6/

There are 13 major ARCOMs all of which report to the Commanding General, Fifth U. S. Army. Each ARCOM functions independently from other ARCOMs, and the Commanding General of one Command has no control over employees of another Command regardless of geographic location. The Civilian Personnel Office servicing the Fifth U. S. Army at Camp McCoy, has been delegated responsibility for personnel administration by the Commanding General, Fifth U. S. Army. It is the emanating source for most personnel actions in the 13 ARCOMs. In this connection, opportunities for promotion in each Command are posted throughout the 13 ARCOMs; the final authority for hiring and adverse actions rests with that Civilian Personnel Office; grievance and appeals procedures are uniform throughout the 13 ARCOMs; and the Civilian Personnel Officer, Camp McCoy, is the principal point of contact for conducting labor-management relations throughout the area he services. Also, while the competitive areas for reductions-in-force are the commuting areas, the Civilian Personnel Office prepares retention registers and maintains records of the employees' performance. 7/

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4/ The record reveals that the Petitioner is the certified exclusive representative of a unit of certain employees of the four Fifth U. S. Army ARCOMs which have Reserve units in five Reserve centers in Milwaukee: namely, the 416th Engineer Command, the 425th Transportation Brigade, and the 86th ARCOM, all headquartered in Chicago, Illinois, and the 84th Division (Training) headquartered in Milwaukee. Employees of Shop G-49 are not included in the unit.  
5/ See First U. S. Army, 83rd Army Reserve Command (ARCOM), U. S. Army Support Facility (Fort Hayes), Columbus, Ohio, A/SLMR No. 35.  
6/ See Department of the Army, Headquarters, Camp McCoy, Wisconsin, St. Louis Metropolitan Area, A/SLMR No. 166.  
7/ See Department of the Army, Headquarters, Camp McCoy, Wisconsin, St. Louis Metropolitan Area, cited above, which was introduced into evidence in this case by the Activity without objection by the Petitioner.

ORDER

The record reveals that the employees in the petitioned for unit herein are in Shop G-49, which is one of 11 Area Organizational Maintenance Shops in the 86th ARCOM, 6 of which are located in Illinois and 5 in Wisconsin. The overall function of these shops is to provide equipment maintenance support for U. S. Army Reserve units. All of the shops are under the direction of the Chief of Maintenance, 86th ARCOM, located in the 86th ARCOM headquarters at Chicago, Illinois. The record reveals that operating instructions and directives for the shops are established by the Fifth U. S. Army and are issued by the 86th ARCOM. These instructions and directives concern a shop's area of responsibility, the units to receive support, the degree and manner in which support is to be rendered, and the priority of maintenance to be accomplished.

IT IS HEREBY ORDERED that the petition in Case No. 50-5569(25) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
January 22, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor-Management Relations

Shop G-49 is the only Area Organizational Maintenance Shop located in the City of Milwaukee and has as its area of responsibility the servicing of all Fifth U. S. Army Reserve Units in the Milwaukee-Pewaukee, Wisconsin, area. The civilian employee complement of the shop consists of one General Schedule (GS) employee and 14 Wage Grade (WG) employees. In view of the Area Organizational Maintenance Shops' common mission and functions, it appears that the employees of Shop G-49 share similar skills and classifications with those employees of the other maintenance shops under the 86th ARCOM. Evidence adduced at the hearing further reveals that, on occasion, employees of Shop G-49 have been detailed to assist Shop G-51 at DePere, Wisconsin.

Under the circumstances, I find the petitioned for unit does not constitute a distinct and homogenous grouping of the Activity's employees. The record shows that the employees in the claimed unit are only some of those in the 86th ARCOM performing related functions. Thus, it appears that the employees in the unit sought perform essentially the same duties as are performed by other employees with similar skills and job classifications in the 86th ARCOM. Further, personnel activities for the 86th ARCOM are centralized in the Civilian Personnel Office, Camp McCoy, Wisconsin. Thus, neither functionally nor administratively does the claimed unit reflect that the employees therein share a separate and distinct community of interest from certain other employees in the 86th ARCOM. Moreover, in my view, the unit proposed by the Petitioner would, in effect, further divide and fragment, solely on the basis of geographic location, the 86th ARCOM serviced by the Civilian Personnel Office, Camp McCoy, and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, I shall dismiss the petition herein. 8/

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8/ In view of the disposition herein, I find it unnecessary to pass upon the Activity's request, set forth in its brief, that I accept as a post-hearing exhibit its letter of January 7, 1972, to the Chicago Labor-Management Services Administration Area Office setting forth its position with respect to the petitioned for unit.

January 22, 1973

A/SLMR No. 245

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND  
A/SLMR No. 245

The subject case involves a representation petition filed by the Marine Engineers' Beneficial Association, District No. 1, Pacific Coast District, AFL-CIO (MEBA). The MEBA sought a unit which encompasses all of the Activity's licensed marine engineers employed in its Atlantic, Pacific, and Far East Area Commands.

The Activity contended the already existing area-wide units of licensed marine engineers which are based on its command structure should remain intact and argued that an Activity-wide unit would not promote effective dealings or efficiency of agency operations. The parties stipulated and the record supported that the licensed marine engineers were supervisors within the meaning of the Order. Noting that the MEBA had traditionally represented exclusively units of licensed marine engineers of the Activity under Executive Order 10988 and in the private sector, the Assistant Secretary found that a unit consisting of supervisory licensed marine engineers was permissible and appropriate under Section 24(2) of the Order.

The Assistant Secretary further found that the claimed Activity-wide unit of such licensed marine engineers was appropriate. In this regard, he noted that all the licensed marine engineers shared the same basic skills, training, functions and responsibilities; and personnel and labor relations policies affecting the licensed marine engineers were promulgated at the national level. Under these circumstances, the Assistant Secretary concluded that the claimed unit would promote effective dealings and efficiency of agency operations. Accordingly, he directed an election in an Activity-wide unit of licensed marine engineers.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND

Activity

and

Case No. 22-3048(RO)

MARINE ENGINEERS' BENEFICIAL  
ASSOCIATION, DISTRICT NO. 1,  
PACIFIC COAST DISTRICT, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Howard S. Naiman. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the parties' briefs, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Marine Engineers' Beneficial Association, District No. 1, Pacific Coast District, AFL-CIO, herein called MEBA, seeks a unit of all licensed marine engineers in all areas of the Military Sealift Command, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, engineers on vessels operated by foreign nationals, guards and other supervisors as defined in Executive Order 11491. <sup>1/</sup>

The Activity agrees that licensed marine engineers share a clear and identifiable community of interest apart from other employees, but

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<sup>1/</sup> The unit description appears as amended at the hearing.

contends that the unit sought is inappropriate in that it includes existing units of licensed marine engineers in its Atlantic, Pacific and Far East Commands which it asserts should be allowed to remain intact. <sup>2/</sup>

#### Bargaining History

The history of collective bargaining on an exclusive basis involving the Activity's licensed marine engineers has been limited to three area-wide command units located in the Atlantic, Pacific and Far East. In all, the MEBA currently holds exclusive recognition, granted under Executive Order 10988, for approximately 519 licensed marine engineers on 68 vessels in the Activity's Atlantic, Pacific and Far East Area Commands. The record reveals that the negotiated agreements between the MEBA and the Activity covering the above three area commands have expired and would not constitute bars to the instant petition. Further, the evidence establishes that historically certain bargaining functions with respect to the area-wide command units have been assumed at the Activity's national headquarters level. Thus, in the past, headquarters personnel have met and dealt with MEBA representatives regarding area problems concerning personnel and manning requirements aboard vessels.

#### Appropriate Unit

The Activity contends that licensed marine engineers in an area-wide command unit share a clear and identifiable community of interest and that their inclusion in an overall, single Activity-wide unit would not promote effective dealings and efficiency of agency operations. In this regard, the Activity stresses its existing labor-management relations structure and the difficulties that an Activity-wide unit would cause with respect to such structure. In support of its petition for an Activity-wide unit, the MEBA argues that the authority allegedly delegated to area commands to negotiate agreements could easily be retained by the headquarters command, that the present wages and working conditions of unit employees are essentially the same in all areas, and that efficiency, effectiveness, and community of interest would be better served by the broader unit.

<sup>2/</sup> The MEBA and the Activity agree that licensed marine engineers on vessels which are operated by foreign nationals should be excluded from any unit found appropriate. In this connection, it appears from the record that negotiated agreements are in existence which may bar the inclusion of such employees in the unit sought. As the parties agree with respect to the exclusion of licensed marine engineers on vessels operated by the foreign nationals, I find it unnecessary to decide whether or not such negotiated agreements would constitute bars.

The Activity is a component of the operating forces of the United States Navy. Its Commanders hold co-equal status organizationally with the Commanders-in-Chief, U. S. Atlantic Fleet, U. S. Naval Forces Europe, and U. S. Pacific Fleet. The Activity provides logistic support to battle fleet elements and a system of ocean transportation for personnel and cargo of all elements of the Department of Defense. It also operates ships in support of scientific projects and other programs for Government agencies or departments. The primary mission of the Activity is to provide immediate sealift capability in case of an emergency. In order to perform its mission, the Activity operates approximately 113 Government owned ships and controls under charter an additional 135 privately owned commercial vessels. Approximately 100 of the ships of the former category are manned by direct hire, Civil Service seamen, who include, among others, licensed marine engineers.

The Activity has a headquarters facility in Washington, D. C., a European Area Command, an Atlantic Area Command, a Pacific Area Command, and a Far East Area Command. It employs over 8,000 employees at these various locations including approximately 519 licensed marine engineers located in the Atlantic, Pacific and Far East Area Commands. <sup>3/</sup> As in the case of other seagoing personnel employed by the Activity, licensed marine engineers serving on Activity vessels are members of the seagoing merchant marine and are required to meet all United States Coast Guard qualification requirements in their particular classification. All of the seagoing personnel employed by the Activity, including licensed marine engineers, are compensated in accordance with a section of the U. S. Code which provides that wages are to be "fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

The parties stipulated and the record supports the fact that the licensed marine engineers involved herein are supervisors within the meaning of Section 2(c) of the Order in that they have authority, in the interest of the agency, to assign, reward, or discipline other employees, or responsibly to direct them or effectively recommend such action, and that in the exercise of such authority they are required to use independent judgment. The record establishes also that units of licensed marine engineers are now and have been historically or traditionally represented by the MEBA both in the private sector and in the Activity. Thus, the MEBA currently holds exclusive recognition granted under Executive Order 10988 for units of certain of the Activity's licensed marine engineers located in the Atlantic, Pacific and Far East Area Commands. Under these circumstances, I find that recognition of a unit of such supervisors is permissible and appropriate under Section 24(2) of the Order.

<sup>3/</sup> This figure does not include those licensed marine engineers on vessels operated by foreign nationals. It was noted that the Activity does not employ licensed marine engineers in its European Area Command.



There are 269 licensed marine engineers serving on 31 ships in the Atlantic Area Command, 212 serving on 30 ships in the Pacific Area Command, and 38 serving on 7 ships in the Far East Area Command. The primary mission of these engineers is to perform maintenance and repair work on all of the machinery in the engine room and on deck which is related to the operation of the particular vessel to which they are assigned. The record reveals that all of the licensed marine engineers involved herein have had similar training and that although operating in different areas, their job functions, working conditions and duties are the same. Further, the benefits, leave, and pay scales, except for local variations, are the same for all licensed marine engineers.

The evidence establishes that the Activity's personnel, labor relations and operating policies are determined at the national headquarters level. In this regard, regulations established with respect to such matters as leave, merit promotion, and benefits are compiled, edited, and passed on to the various ships' commands in the form of Civilian Marine Personnel Instructions, herein called CMPI's, prepared at the headquarters level. These CMPI's are implemented on board ship in all area commands. While pay scales and other working conditions appear to be fixed by private sector guidelines, the record indicates that the national headquarters, through its compilation of CMPI's, has latitude in establishing what the ultimate guidelines will be, and, on occasion, headquarters personnel have met and dealt with MEBA representatives prior to establishing these guidelines or making changes in the CMPI's. Moreover, on occasion, headquarters personnel, after discussion with the MEBA representatives, have sought exceptions to Coast Guard, Department of Navy, Civil Service Commission and Department of Defense Regulations.

Although the Activity contends that each area command has been delegated, to the fullest extent possible, the authority to act upon personnel problems within its particular area, the evidence shows that the national headquarters aids the area commands in resolving day-to-day problems regarding the CMPI's. In this connection, the record indicates that there is frequent contact between the national headquarters and the area commands with regard to the interpretation of CMPI's. Further, while the national headquarters does not participate directly in the negotiation of agreements at the area command level, the evidence establishes that the national headquarters reviews negotiated agreements in order to determine whether they are in conformity with established CMPI's. Also, although there is no direct participation by the national headquarters in negotiations at an area command level, negotiated agreements are subject to approval by the national headquarters.

Under all the circumstances, I find that the unit sought by the MEBA constitutes an appropriate unit for the purpose of exclusive recognition under the Order. Thus, as noted above, the record establishes that all of the claimed licensed marine engineers have similar skills, training, and mission, and perform essentially the same kind

of work on a day-to-day basis. In addition, the labor relations and personnel policies of the Activity are established at the national level through the compilation of CMPI's. In this regard, the record indicates that headquarters personnel have met and dealt with the MEBA representatives regarding problems concerning manning and personnel requirements aboard ships, items which are the subject of existing CMPI's. Further, although there may be variations in labor relations and personnel policies to conform to area or local conditions, it is clear that such variations are subject to approval and modification at the national headquarters level. In view of the national headquarters' involvement in such matters in the past and the lack of any evidence that such involvement was on an ad hoc basis or will be discontinued in the future, in my opinion, the Activity has not demonstrated that granting the petitioned for unit would necessarily upset its existing bargaining situation and thereby hinder effective dealings and efficiency of agency operations. 4/

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 5/

---

4/ The evidence as to whether a requested unit "will promote effective dealings and efficiency of agency operations" is within the special knowledge of, and must be submitted by, the agency involved. See Department of the Navy, Alameda Naval Air Station, FLRC No. 71A-9. The Activity was accorded a full opportunity at the hearing to introduce any such evidence it desired as to whether the proposed unit would not promote effective dealings and efficiency of agency operations. The MEBA took exception to the Hearing Officer's allowing certain evidence with regard to the impact of the unit sought on efficiency of agency operations. In reaching the decision herein, I have considered the entire record, including the evidence excepted to by the MEBA, as I find that the Hearing Officer's acceptance of such evidence was proper.

5/ Although the record reveals that licensed marine engineers at the various area commands have limited work contacts with each other, on balance, this fact was not considered sufficient to warrant a contrary conclusion under the circumstances set forth above.

All licensed marine engineers in all areas of the Military Sealift Command, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, engineers on vessels operated by foreign nationals, management officials, other supervisors, and guards as defined in the Order. 6/


January 24, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Marine Engineers' Beneficial Association, District No. 1, Pacific Coast District, AFL-CIO.

Dated, Washington, D. C.  
January 22, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

6/ I find that by petitioning for exclusive recognition and proceeding to an election in the unit sought, the MEBA will have, in effect, waived its exclusive representation status with respect to licensed marine engineers in the exclusively recognized units encompassed by the petition herein. Accordingly, the MEBA may continue to represent those employees on an exclusive basis only in the event it is certified in the unit petitioned for in the subject case. See Department of the Army, U. S. Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83 at footnote 2.

NATIONAL LABOR RELATIONS BOARD  
A/SLMR No. 246

This case involves an unfair labor practice complaint filed by the National Labor Relations Board Professional Association (NLRBPA) against the National Labor Relations Board (NLRB) alleging that by unilaterally adopting and implementing a new case handling procedure the NLRB had violated Section 19(a)(6) and (1) of the Executive Order. The NLRB contended that it had no obligation to negotiate on the matters involved.

The evidence revealed that the NLRB employs for each of its five Board members a staff of legal assistants, who perform various tasks in the processing of cases which are before the Board. In what was termed a "New Case Assignment and Deadline Procedure," changes were made in the manner in which cases were assigned to specific legal assistants, time targets which in the past were for the most part ignored were reinstated, and a system of personal accountability for meeting those time targets was instituted.

In agreement with the Hearing Examiner, the Assistant Secretary found that the change in time schedules for the processing of cases set forth in Respondent's memorandum of July 22, 1970, was a matter affecting working conditions within the meaning of Section 11(a) of the Order. In this regard, the Assistant Secretary found the Respondent's actions with regard to time schedules were not privileged by virtue of the provisions contained in Sections 11(b) and 12 of the Order. Nor did he consider the existence of the parties' contractual grievance procedure to preclude his determination in the matter.

Accordingly, the Assistant Secretary found that Respondent, by changing the time schedules for the processing of cases by its legal assistants without affording the NLRBPA adequate notice and an opportunity to bargain prior to their institution, violated Section 19(a)(6) and (1) of Executive Order 11491.

With respect to the other aspects of the complaint, in agreement with the Hearing Examiner, the Assistant Secretary concluded that further proceedings were unwarranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD

Respondent

and

Case No. 22-1976

NATIONAL LABOR RELATIONS BOARD  
PROFESSIONAL ASSOCIATION

Complainant

DECISION AND ORDER

On October 19, 1971, Hearing Examiner John S. Patton issued his Report and Recommendations in the above-entitled proceedings, finding that the National Labor Relations Board, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Hearing Examiner's Report and Recommendations. Thereafter, the Respondent and National Labor Relations Board Professional Association, herein called Complainant, filed exceptions and supporting briefs with respect to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings of the Hearing Examiner are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, including the exceptions, statements of position and briefs, I hereby adopt the findings, conclusions, and the recommendations of the Hearing Examiner. 1/

1/ During the course of the proceeding in this case, a new Executive Order, No. 11616, was issued on August 26, 1971, effective November 24, 1971, amending portions of Executive Order 11491. Notwithstanding that the instant case is governed by Executive Order 11491, it should be noted that Executive Order 11491, as amended, contains no relevant revisions of any Executive Order sections applicable herein.

The complaint in the instant case alleged that the Respondent had violated Section 19(a)(6) and (1) of the Executive Order by adopting and implementing a new case handling procedure. 2/ The Hearing Examiner concluded that the Respondent violated Section 19(a)(6) and (1) of Executive Order 11491 by unilaterally changing employee conditions of employment, namely, time schedules for the processing of cases, without prior negotiations with the Complainant with respect to those changes. The Hearing Examiner also found that other disputed actions taken by the Respondent either did not constitute "changes" in conditions of employment of unit employees or were an exercise of "management's prerogative/s/." The Respondent, while acknowledging that it changed "facets of a long standing process by which cases . . . are assigned to professional staff members . . ." without first conferring, consulting, or negotiating with the Complainant, argued that it was not obligated to negotiate over such matters. Further, it contended that in certain other respects, its conduct did not result in any changes in working conditions. The Complainant excepted to the fact that the Hearing Examiner did not find additional incidents of alleged improper unilateral changes in conditions of employment and, further, excepted to the recommended remedy.

The essential facts of the case, which are not in dispute, are set forth, in detail, in the Hearing Examiner's Report and Recommendations, and I shall repeat them only to the extent necessary.

While there had existed for some ten years "time targets" governing the processing of cases before the Board, the application and enforcement of such deadlines varied among the several staffs. Thus, the range of application of time targets ran from general disregard of them to the establishment of deadlines granting less time than that provided in the time targets. While records were maintained on "overage cases" and there was stress on maintaining production, there was no formalized system whereby a legal assistant had to account for failing to meet time target dates. Under the "New Case Assignment and Deadline Procedure" instituted by the Respondent, completion of the case assignments at the initial or first stage was required to be effectuated in strict accordance with the previously existing time targets "and wherever possible should be a period of shorter duration." Extensions of the due date were to be given only on the basis of such factors described as "extraordinary," "emergency," and "truly unusual." Legal assistants

2/ The complaint additionally alleged that the Respondent had violated Section 19(a)(6) and (1) by refusing to consult, confer, or negotiate in good faith with respect to certain specific conditions of employment. As this allegation in the complaint was dismissed by the Regional Administrator and was not appealed by the Complainant, it is not before me and has not been considered in reaching my ultimate disposition herein.

were to be held strictly accountable for meeting time targets and a failure in this regard resulted in having to explain the delinquency to supervisory personnel. Additionally, previously existing time targets for the second, or "initial action to circulation" stage, were to be used only as a guide, with the sub-panel now having the discretion to make its own determination as to the deadline procedure in the second stage on an individual basis.

In agreement with the Hearing Examiner, I find that in the circumstances of this case, the Respondent's institution of changes in time schedules for the processing of cases as set forth in its memorandum of July 22, 1970, is a matter affecting working conditions within the meaning of Section 11(a) of the Order and a proper subject for collective bargaining. 3/ Thus, Section 11(a) of the Order requires that an agency and a labor organization that has been accorded exclusive recognition shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees. 4/ In my view, the right to engage in a dialogue with respect to a change in employee working conditions becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and ample opportunity to explore fully the matter prior to the implementation of such change. If, as here, a party to an exclusive bargaining relationship were free to make unilateral changes in established working conditions of unit employees, the obligation established under Section 11(a) to meet and confer on such working conditions with an exclusive representative would become meaningless. 5/ In addition, such unilateral conduct by an agency has the effect of undercutting the exclusive bargaining representative, thereby destroying its effectiveness in the eyes of those whom it represents.

3/ In this regard, it is noteworthy that in the parties' negotiated agreement, the Complainant is granted the right to present its views upon all matters of concern and to have such views considered in the formation, development and implementation of policies and practices affecting the terms and conditions of employment of all unit employees.

4/ The limitations on this requirement expressed in Section 11(a) were not deemed to be applicable in the circumstances of this case. Also, in agreement with the Hearing Examiner, the Respondent's conduct herein with regard to time schedules was not considered to be rendered privileged by virtue of the provisions contained in Sections 11(b) and 12 of the Order. Nor, in agreement with the Hearing Examiner, do I consider the existence of the parties' contractual grievance procedure to preclude my determination in the matter.

5/ Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

-3-

## CONCLUSION

Based on the foregoing, I find that by changing the time schedules for the processing of cases by its legal assistants without affording the Complainant adequate notice and an opportunity to bargain with respect to said changes prior to their institution, the Respondent violated Section 19(a)(6) and (1) of Executive Order 11491.

## THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(6) and (1) of Executive Order 11491, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order. 6/

## ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Labor Relations Board shall:

1. Cease and desist from:

Instituting changes in the time schedules for the processing of cases by unit employees without consulting, conferring, or negotiating with the National Labor Relations Board Professional Association, the exclusive representative of its unit employees.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Upon request, consult, confer, or negotiate with the National Labor Relations Board Professional Association with respect to changes in time schedules for the processing of cases by unit employees.

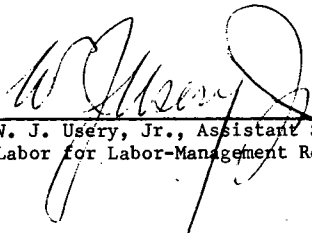
6/ The Complainant excepted to the Hearing Examiner's refusal to recommend a return to the status quo. Under all the circumstances, I agree with the Hearing Examiner's conclusion that a return to the status quo is not required to achieve a satisfactory remedy in this matter.

-4-

(b) Post at its Washington, D.C., office copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chairman of the National Labor Relations Board and they shall be posted and maintained by the National Labor Relations Board for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The National Labor Relations Board shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.

Dated, Washington, D.C.  
January 24, 1973

  
\_\_\_\_\_  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in the time schedules for the processing of cases by unit employees without consulting, conferring, or negotiating with the National Labor Relations Board Professional Association, the exclusive representative of our unit employees.

WE WILL, upon request, consult, confer, or negotiate with the National Labor Relations Board Professional Association, with respect to changes in time schedules for the processing of cases by unit employees.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor, whose address is Room 1012 Penn Square Building, 1317 Filbert St., Philadelphia, Pennsylvania 19107.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

In the matter of:

NATIONAL LABOR RELATIONS BOARD,  
Activity

and

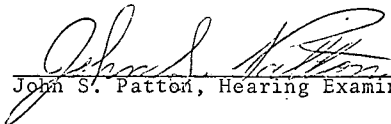
Case No. 22-1976

NATIONAL LABOR RELATIONS BOARD  
PROFESSIONAL ASSOCIATION,  
Complainant

AMENDMENT TO APPENDIX TO REPORT AND RECOMMENDATIONS

It appears to the Hearing Examiner that the first line in the Appendix to the REPORT AND RECOMMENDATIONS issued by the undersigned Hearing Examiner in this case erroneously read as follows: (Notice appended for adoption by the Executive Secretary); and that said sentence should have read: (Notice appended for adoption by the Assistant Secretary).

The first line to said Appendix to said REPORT AND RECOMMENDATIONS is, therefore, hereby amended to read: (Notice appended for adoption by the Assistant Secretary).

  
\_\_\_\_\_  
John S. Patton, Hearing Examiner

Date: October 19, 1971

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

In the matter of:

NATIONAL LABOR RELATIONS BOARD,  
Activity

and

Case No. 22-1976

NATIONAL LABOR RELATIONS BOARD  
PROFESSIONAL ASSOCIATION,  
Complainant

PATRICK HARDIN  
JOEL HARMATZ

Attorneys for the National  
Labor Relations Board

WILLIAM R. STEWART  
MARY GRIFFIN

Attorneys for the National  
Labor Relations Board  
Professional Association

Before: JOHN S. PATTON, HEARING EXAMINER

## Statement of the Case

This case is before the undersigned Hearing Examiner, John S. Patton, under Executive Order No. 11491, on the complaint of the National Labor Relations Board Professional Association filed September 3, 1970, alleging that the National Labor Relations Board on or about July 22, 1970, adopted and implemented a new case handling procedure in violation of Section 19(a)(6) and (a)(1) of Executive Order No. 14491. It was alleged by the National Labor Relations Board Professional Association, hereinafter referred to as the Association, that the National Labor Relations Board, hereinafter referred to as the Board, failed to consult, negotiate, and bargain in good faith with the Association prior to adopting and implementing said new case handling procedure. It is alleged that by these and other acts the Board has violated Section 19(a)(6) and (a)(1) of said Executive Order.

The issue was submitted to the Regional Administrator, who on August 8, 1971, dismissed the complaint and denied request for issuance of the notice of hearing. Said action was appealed by the Association to the Assistant Secretary of Labor and on May 20, 1971, said Assistant Secretary directed the Regional Director to issue a notice of hearing.

Complaint was initially also filed alleging that the National Labor Relations Board has refused to consult, negotiate, and bargain in good faith concerning the career development task force report, which action was alleged to be in violation of Section 19(a)(6) and (a)(1) of said executive order. Said prayers of the complaint were also denied. The Association, however, did not appeal ruling on the issue relating to the career development task force report, and that issue is not before the undersigned Hearing Examiner and will not be discussed in this report.

Pursuant to said direction to issue notice of hearing, notice of hearing was issued on June 16, 1971, setting hearing of said issues for August 2, 1971, in Washington, D.C. The case came on for hearing before John S. Patton, the undersigned Hearing Examiner, and was duly heard on August 2, 1971, and August 3, 1971, in Washington, D.C. Mr. William R. Stewart and Miss Mary L. Griffin appeared as counsel for the Association, and Mr. Patrick Hardin and Mr. Joel Harmatz appeared as counsel for the Board. At the hearing of the cause, counsel for both parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral arguments, and file briefs.<sup>1/</sup>

<sup>1/</sup> Errata has issued correcting a number of errors in the transcript.

All parties have filed written briefs in this cause. Permission was granted for the filing of reply briefs, following joint application for said permission, but no reply briefs have been received.

Upon the entire record in this matter, from observation of the witnesses, and due consideration of the briefs filed by the parties, I make the following

## FINDINGS AND CONCLUSIONS

Law and Issues of the Case

Section 10 of Executive Order 11491 provides, as follows:

(a) an agency shall accord exclusive recognition to a labor organization when the organization has been selected in a secret ballot election by a majority of the employees in an appropriate unit as their representative. \* \* \*

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interest of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented in formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices or other matters affecting general working conditions of employees in the unit.

Section 19 of Executive Order 11491 provides, as follows:

(a)(6) Agency management shall not refuse to consult, confer, or negotiate with the labor organization as required by this order.

The issue for decision in this cause is whether the National Labor Relations Board by adopting a new procedure for case handling by the attorneys represented by Association without prior consultation with the Association refused to bargain with the Association in violation of Section 19(a)(6) of Executive Order 11491.

### THE COMPLAINANT

It is conceded by all parties that the complainant, National Labor Relations Board Professional Association, has been granted recognition as bargaining representative for a unit consisting of the following employees:

All attorneys and other professional employees performing comparable legal work in the Washington Office of the Board, excluding (1) any managerial executive, (2) any employee engaged in Federal personnel work in other than purely clerical capacity, and (3) supervisors who officially evaluate the performance of employees, as stated in Section 6(a) of Executive Order 10988.

A collective bargaining contract, Association's Exhibit 3, was executed by the parties October 16, 1969, and has been operative at all times relevant hereto.

### EVIDENCE IN THE CASE

Most of the facts in the case are not in dispute. The National Labor Relations Board is the agency designated by Congress to administer and enforce the National Labor Relations Act. The matters for decision fall into two main categories, complaint cases referred to as C cases, and representation cases referred to as R cases. Representation cases represent determinations of whether a union shall be certified as the bargaining representative of the employees of their employer, and, if so, which union shall be so certified. Complaint cases involve determinations following the filing of a charge as to whether there has been a violation of the National Labor Relations Act. The initial hearing in complaint cases is conducted before a trial examiner and appeal may be made to a five-man body described as the Board. The Board also hears some appeals in representation cases. The Board consists of a chairman and four associate members. It was testified by the Executive Secretary of the Board, Mr. Ogden W. Fields, and Mr. Edward B. Miller, Chairman of the National Labor Relations Board, as well as other witnesses for both parties, that the Board structure and the relationship of the Board employees represented by the Association is as follows: The position of Executive Secretary, which has for a number of years been occupied by Mr. Ogden Fields, is a statutory position with the duties, as stated by Mr. Fields, of being basically a chief law clerk

of the Board. All documents that are filed with the Board are filed in the office of the Executive Secretary, and the office of the Executive Secretary keeps a record of cases, including the status of cases and motions until the cases are ultimately disposed of and closed. Everything forwarded to the Board, as well as everything issued by the Board, clears through the Executive Secretary's office. The Executive Secretary is appointed by the Board Chairman. Assignment of cases is made through the Executive Secretary's office. Each of the Board Members has under his direction a number of attorneys whose title is Legal Assistant. Each Board member has approximately 20 Legal Assistants under his direction. Each Board Member employs his own Assistants, and the Legal Assistants are ultimately answerable to the individual Board Member under whose direction they work.

As testified by Mr. Edward B. Miller, Chairman of the National Labor Relations Board, the function of a Legal Assistant is to assist the Board Member in his decision making function. They perform some record review for the Board Member. They help sort out the facts. They help to organize the case, so that the Board Member may better understand it. They may prepare a memo for the entire Board. They assist in drafting decisions. They assist in drafting dissents and perform other duties all relating to the decision making functions of the individual Board Member under whose direction they work.

On October 5, 1961, as described in a directive to all Legal Assistants from Ogden W. Fields, Executive Secretary, Association's Exhibit 1, time schedules were established for the processing of cases by Legal Assistants. The time schedules were divided into three stages. Stage 1 was defined as "initial action in a case consisting of circulation of a draft to a panel for signature without having the case considered at a sub-panel or action by a sub-panel or a panel". Stage 2 was defined as "initial action to circulation". It was stated that this stage took the case from Stage 1 to circulation of a draft of the decision. Thus, for example, the initial action of the sub-panel might be to refer it to a panel for action. Stage No. 3 was described as "circulation of draft of the decision". He stated this took the case from circulation of draft to panel signature and clearance or Board signature and full Board case. The time schedules set forth were as follows:



DEADLINE SCHEDULE

STAGE I - ASSIGNMENT TO INITIAL ACTION

Initial Action Consists of:

- Circulation of Draft to Board for signature (case not referred to sub-panel) . . . . . 3 weeks 1/  
or
- Sub-panel Action . . . . . 3 weeks  
or
- Panel Action . . . . . 3 weeks  
or
- Request to Executive Secretary for Placement on Board Agenda for oral report. (Request accompanied by one-page summary of facts for circulation to Board) . . 3 weeks  
or
- Submission of full memo (10 pages) or draft-in-lieu-of memo to Executive Secretary for Board Agenda. . 4 weeks

STAGE II - INITIAL ACTION TO CIRCULATION

- SUB-PANEL TO PANEL. . . . . 2 weeks
- SUB-PANEL OR PANEL TO REQUEST TO EXECUTIVE SECRETARY FOR PLACEMENT ON BOARD AGENDA FOR ORAL REPORT (with one-page summary) . . . . . 1 week
- SUB-PANEL OR PANEL ACTION TO CIRCULATION OF DRAFT FOR SIGNATURE . . . . . 2 weeks 2/
- SUB-PANEL OR PANEL ACTION TO SUBMISSION OF FULL MEMO (10 pages) OR DRAFT-IN-LIEU TO EXECUTIVE SECRETARY FOR BOARD AGENDA . . . . . 3 weeks
- BOARD AGENDA ACTION ON ORAL REPORT OR FULL MEMO TO CIRCULATION OF DRAFT. . . . . 3 weeks 3/
- BOARD AGENDA TO MODIFICATION OF DRAFT-IN-LIEU AND RECIRCULATION . . . . . 1 week 4/

STAGE III - CIRCULATION TO APPROVAL

- CIRCULATION OF DRAFT TO BOARD SIGNATURE (Whether draft emanates from Board Member, Sub-Panel, Panel or Full Board) . . . . . 2 weeks
- CIRCULATING DISSENT AFTER MAJORITY DRAFT IS APPROVED. 2 weeks
- REVISING APPROVED MAJORITY DRAFT AFTER APPROVED DISSENT DISSENT . . . . . 1 week

REVISING APPROVED DISSENT AFTER APPROVED REVISED

MAJORITY . . . . . 1 week

- 1/ Deadlines beyond 3 weeks or 4 weeks for abnormally long or complicated cases will be set by Executive Secretary upon negotiation.
- 2/ Unusual cases are subject to an additional week by authorization of the Sub-Panel or Panel.
- 3/ Unusual cases are subject to an additional week by authorization of Board.
- 4/ Where draft-in-lieu is substantially modified at Board Agenda, an additional week may be authorized by Board.

These time schedules were incorporated in the Work Manual issued to Legal Assistants.

Testimony of witnesses for both parties was rather uniformly to the effect that notwithstanding the specific time deadlines, as set forth in the directive of October 5, 1961, the actual procedure which had been followed for a number of years did not uniformly encompass adherence to these time schedules.

Legal Assistant Greco testified that in former Chairman McCulloch's unit the Legal Assistant would set the time for the sub-panel and the three week's deadlines were not observed. Legal Assistant Goldman testified that in Board Member Zagoria's staff the Legal Assistant decided when he could handle another case. The Legal Assistant also told the supervisor when he wanted the case put before a sub-panel. On the other hand, Legal Assistant Wilson stated that Board Member Brown's unit enforced a shorter time schedule than that set forth in the Manual and in the memorandum of October 5, 1961. Mr. Leff, who was Chief Legal Assistant of Board Member McCulloch for a period of seven years, testified that the assignment of cases for his particular division was normally made to a Legal Assistant through his immediate supervisor. He would read the record, report the case to the supervisor, and prepare the case for discussion at a sub-panel. A memorandum would be prepared for the sub-panel, and on some occasions the matter would be so simple that the sub-panel could be bypassed, and what was called a draft-in-lieu would be prepared, which would go to the Executive Secretary and be immediately circulated to the Board. Mr. Leff testified that there was some adherence to the time schedules as set forth in the Manual on Stage I. He stated that as to Stage III procedures were more honored in their breach than in their observance, and that this had always

been true even subsequent to the institution of the new procedures. He stated that under the old procedure when a Legal Assistant needed a new case the request would normally be made through his supervisor to the Associate Chief of the section, Mr. Cameron, or at times to Mr. Leff, as the Chief of the section, and Mr. Leff, in turn, would call the Executive Secretary's office and request that he assign a case to the Legal Assistant who had requested one. At times he would indicate the nature of the case that he thought the Legal Assistant should receive. The Legal Assistants, in testifying, stated that full consideration was given under the old procedure to their own request for a particular type of case. For example, if they wanted a case involving refusal to bargain or a secondary boycott or a particular subject matter, they would make the request and often this request would be honored.

Mr. Miller, upon taking office as Chairman of the Board, was of the opinion that this procedure could be improved. He testified that he was of the opinion that they needed to place responsibility for case processing directly under the line management, i.e., the Chief Counsels and their staffs, supervisors and some of their staffs, including the Deputy Chiefs, rather than to have the assignment of cases dependent upon assignment of an individual case by the Executive Secretary's office. Mr. Miller felt that rather than having the cases assigned out of the Executive Secretary's office sometimes in cooperation with a particular supervisor, the choice of assignment of cases ought to be vested in the head staff man who reported to each Board Member. He felt this would enable the Chief Counsel or Deputy Chief to match the ability and availability of each Legal Assistant and that said supervisors would be in a better position to have knowledge of the availability and talents of the Legal Assistants than would the Executive Secretary or someone immediately under his direction. He further felt that by making this change and meeting with the Chief Counsels and Deputy Chiefs there was a reiteration of the urgency of the case deadlines. Chairman Miller was further disturbed by the fact that the flow of cases throughout the year was uneven, with a very substantial increase in productivity in June, the last month of the fiscal year. This last month spurt was in order to meet the targets for the year, which had been testified to before Congress. Mr. Miller was hopeful that with a new and direct line of responsibility, as hereinabove set forth, it would be possible to avoid the so-called June rush and to have a more even flow of productivity.

After considering these factors, the Board adopted a new case handling procedure. On July 22, 1970, a memorandum from the Board's Executive Secretary, Mr. Fields, was directed to

Supervisory Personnel of the Board advising of a meeting to be held on July 23 at 1:00 p.m. for explanation of revised case assignment and deadline procedures "the Board has adopted and to discuss implementation". At approximately 11:30 a.m., Thursday, July 23, 1970, the Board submitted copies of the new procedure to the Association and requested that the Association should meet with it to discuss said procedures at 1:00 p.m. the same day. The Association at 1:00 p.m. met with the Board, and the Association advised the Board it was not able to make a complete analysis of the new procedure and unable to present any detailed or carefully considered opinion of the new procedure. Immediately following said meeting, announcement of said new procedure was made to the affected employees. The Board admits that the decision was made prior to consultation with the Association and does not allege that it bargained with the Association as to said matter.

The procedure was changed in the following respects. Each week the Executive Secretary would send to the various staffs a group of cases, and the assignment would be made by either the Chief of the section or his Deputy. The cases had to be disposed of by immediate assignment to the Legal Assistants, irrespective of what case load they might have had at the time the cases were assigned to the Secretary. This represented a change in that previously the cases were not assigned until a supervisor would advise the Section Chief that one of the Legal Assistants was in need of a case and then the Section Chief would request a case from the Executive Secretary. Chairman Miller testified that under the old practice a Legal Assistant would often, himself, directly approach the Executive Secretary with a request for a case to be assigned. Mr. Leff testified that, under the new procedure, in the section of which he was Chief, four or five cases a week would be assigned from the Executive Secretary's office to him for assignment. A Legal Assistant would have to take the "luck of the draw" and did not have the same opportunity to request a certain type of case that he had formerly enjoyed.

On July 22, 1970, a memorandum was prepared by Mr. Fields addressed to the Chairman of the Board and various supervisors setting forth the differences in the previous and the changed procedures. As to assignment of cases, it was stated that "the number of cases to be assigned to each staff would depend upon the number of cases available without regard to whether specific individual Legal Assistants have completed work on cases then on their desks". It was further stated "the cases shall be selected in the automatic rotation of date of receipt except that the Associate Executive Secretary in consultation with the Chief Counsel or Deputy Staff Director may depart from

strict rotation for reasons, such as, where necessary to maintain a mix of complexity of issues and length of record, to return a case to the staff from which it originated, to pair cases of like issues to save research time (although consideration should also be given to the desirability of a fresh point of view which a different staff might contribute or to expedite the exceptional case". As to Stage I, it was stated that, except in the abnormal case, due date for initial action should not exceed the current deadlines and wherever possible should be a period of shorter duration. As to Stage II, it was stated "at the time of initial action the sub-panel shall determine the allowable time in which the requested documents must be furnished with current deadlines serving as a guide". At that time, there was no specific change in time deadlines at Stage III. It was provided that in the event a report from a Legal Assistant was overdue the Legal Assistant should appear before a sub-panel and explain the reason that the schedule had not been met.

Legal Assistant Howard B. Johnson testified that he objected to the rigidity of the time system; that if he did not have a draft ready by the deadline, it was necessary to go to the sub-panel to explain why the case was overdue and that the sub-panel had no discretion whatsoever. He stated they had no authority to extend the time, which he described as a deviation from former procedures. He complained that to him this was very demeaning. He stated, however, that this practice had been amended and that now the sub-panels have the capacity to grant an extension to a Legal Assistant who has difficulty with a case.

EVALUATION OF THE EVIDENCE

It will be noted from the above stated history of the case that initially hearing was denied on the ground that Section 11(c) of the executive order covered the issues in this case and that the proper avenue of appeal was to the Federal Labor Relations Council, rather than to the hearing process before a Hearing Examiner. Section 11(c) provides in part:

"If in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulations, controlling agreement, or this order and, therefore, not negotiable, it shall be resolved as follows."

The Assistant Secretary overruled the dismissal of the request for hearing and referred the issue of whether or not it was a matter for the Federal Labor Relations Council to the Hearing Examiner as a part of his determination in the case. It appears to the Hearing Examiner that Section 11(c) does not deprive the Hearing Examiner of jurisdiction of this case. It will be noted that the first words of the above quoted provision are: "If in connection with negotiations". It will be noted that this entire case hinges on an allegation of refusal to negotiate, rather than constituting issues arising out of negotiations. The Hearing Examiner is, therefore, of the opinion that Section 11(c) does not govern this case and that the Association was entitled to a hearing before a Hearing Examiner.

The National Labor Relations Board concedes that it did not bargain with the Association prior to instituting the changes in the case handling procedure. The Board, however, takes the position that under the executive order it was not required to bargain, because the changes initiated by the Board all fall within the area of management prerogatives as set forth in the executive order. Section 19(a)(1) and (6) of the executive order makes it an unfair labor practice for an agency to "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order" and "refuse to consult, confer, or negotiate with the labor organization as required by this order". The National Labor Relations Board admits it did not bargain under the above provisions of the Act. Therefore, the issue for determination is whether the changes initiated by the National Labor Relations Board constitute subject matter concerning which the executive order requires an agency to bargain.

Section 11(b) of the executive order states in part:

However, the obligation to meet and confer does not include matters with respect to the mission of an agency, its budget, its organization, the number of employees, and the numbers, types, and grades of positions, or employees assigned to an organizational unit work project or tour of duty, the technology of performing its work, or its internal security practices. This does not preclude the parties from negotiating agreements, providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological changes.

Section 12 of the executive order provides:

Each agreement between an agency and a labor organization is subject to the following requirements:

(b) Management officials of the agency retain the right in accordance with the applicable law and regulations:

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign and retain employees to positions within the agency and to suspend, demote, or discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operation entrusted to them;
- (5) to determine the method, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever action as may be necessary to carry out the mission of the agency in situations of emergency.

Executive Order 11491 was issued October 29, 1969, and, therefore, is of comparative recent origin. The hearing process is too recent for a substantial body of precedent to have arisen. In the light of this fact, counsel for both parties have made a number of citations to the decisions of the National Labor Relations Board and to the courts in interpretations of the National Labor Relations Act. There is some analogy between some of the provisions of the National Labor Relations Act and the executive order; however, the analogy is not complete. The area of management prerogative, due to the nature of Federal employment, is much broader than management prerogative is under the National Labor Relations Act. In view of this fact, decisions of the National Labor Relations Board or of the courts in interpretations of the National Labor Relations Act may, under certain circumstances, be persuasive in this cause but are not binding upon the Hearing Examiner. The Assistant Secretary so held in the case of Charleston Naval Shipyard and Federal Employees Metal Trades Council, GERR 21:5003. In interpreting the executive order, the Hearing Examiner feels that he must resort to the well established principle of law that where a provision in a law is ambiguous if taken out of the context of the entire Act, it is necessary to examine said ambiguous provision in the light of the entire Act and the purposes therein set forth to make a proper interpretation of said ambiguity. Section 12(5) of the executive order states that an agency retains the right:

To determine the methods, means, and personnel by which such operations are to be conducted.

The Hearing Examiner is of the opinion that, if this clause is given its broadest possible interpretation, it would in large measure remove from the area of bargaining almost all conceivable subjects and that, therefore, such a wide interpretation is not justified. A similar approach must be made to Section 12(4) which reads:

To maintain the efficiency of the Government operations entrusted to them.

It could, of course, be insisted that any action of management is devised to maintain the efficiency of the Government operation, and it would not be presumed that those administering any act would initiate policies designed to bring about inefficiency in Government.

It would appear to the Hearing Examiner that in adopting the new case handling procedure the Board, in effect, made three changes, as follows:

- 1. The persons who made work assignments and supervised the enforcement of time schedules were in some respects changed.
- 2. Prior to institution of the new case handling procedure, the Legal Assistants' requests for a certain type of work assignment were on some occasions honored, but following adoption of the new case handling procedure, the Legal Assistants were required to take work assignments in a rotation order.
- 3. The time schedules for the handling of cases assigned were in some respects changed.

The Board's procedure prior to the adoption of the new procedure was to have the cases assigned to the Legal Assistants out of the Executive Secretary's office, sometimes in cooperation with a unit supervisor. The method of assignment was changed to have the Executive Secretary assign cases to the Chief Counsel or Deputy Chief Counsel of each unit. The Chief Counsel or Deputy Chief Counsel would, in turn, immediately assign the cases to the Legal Assistants rather than for a Legal Assistant to request a case. Chairman Miller stated that he was of the opinion the assignment and responsibility for supervision of deadlines should rest with the unit

supervisors who had more direct knowledge of the situation in the unit than did the Executive Secretary.

It is contemplated by the executive order that supervisors should be a part of management. Section 10(a)(1) provides that a unit shall not be established if it includes "any management official or supervisor". It is, therefore, apparent that supervisors are considered a part of management under management's direction and control with interest separate and identifiable from that of the employees in the unit. In this respect, the executive order is analogous to the National Labor Relations Act in which it has been repeatedly held that the employment, discharge, and assignment of duties to supervisors is exclusively within the area of management's prerogatives. The Hearing Examiner is, therefore, of the opinion that any shift in the channels of supervision under the new case handling provision was not a matter concerning which the Board was required to bargain with the Association. It also may be said that the determination of the method of supervision and case assignments could well fall under the provisions of Section 11(b) stating:

However, the obligation to meet and confer does not include matters with respect to . . . its organization.

The weight of the evidence establishes to the satisfaction of the Hearing Examiner that, prior to the institution of the new case handling procedure, the attorneys in the bargaining unit would on occasion make request for a certain type of case. For example, perhaps they desired a case involving the issue of refusal to bargain or a case involving secondary boycott, etc. The evidence would appear to establish that, while on some occasions these requests were honored, the supervisors were not required to honor such requests and only on occasion did they do so. It was a matter within the supervisor's discretion under all of the conditions and circumstances of the case load and circumstances of the attorneys able to process that case load. The Hearing Examiner is of the opinion that the Association does not have the right to insist that the employee of the Board, himself, has the privilege of determining the precise work which will be assigned to said employee. The changed case procedure did not constitute a change in basic duties of the employees nor in the nature of the cases handled nor in their basic job responsibilities. The attorneys in the unit have in the past handled, at one time or another, all types of cases; and, following the adoption of the new case handling procedure, they continued to do so. The fact that the supervisor, on occasion, honored a request of an employee for a particular type of work assignment did not mean that at any time the supervisors were required or obligated to

honor such a request. For the Hearing Examiner to hold that an employee of the Board has a right to demand a particular type of case be assigned to said employee and that management must yield to such dictation would be to require management to abdicate its management function and to turn said function over to its individual employees. Certainly, this Hearing Examiner does not feel qualified to substitute his judgment for that of the Board and to direct the circumstances under which the Board must give a particular type of case to an employee.

In the case of Little Rock Downtowner, Inc., 148 NLRB 717, the motel had had complaints made by customers that the maids were not leaving the room in a satisfactory condition. In order to alleviate this situation, the motel required the maids to wash the inside of windows daily. There was some evidence that this was required by working manual, but it was insisted the manual had been abandoned. The trial examiner held that this action having been taken without consultation with the union there had been a refusal to bargain. The Board, however, in reversing the trial examiner said:

"We are not persuaded in the first place that the record substantially supports the trial examiner's factual predicate for finding unlawful unilateral action; namely, that respondent effected a change in the maids' condition of employment . . . In any event even if we were to assume the validity of the trial examiner's factual premise that Painter's window washing instructions to the maid constituted in effect a reversal of an earlier abandoned manual rule, we would not be disposed simply because the work was affected unilaterally to base an 8(a)(5) violation finding thereon." 1/

This type of work order does not exceed the compass of the job duties the affected employees were hired to perform and falls within the normal area of detailed, day-to-day operating decisions relating to the manner in which work is to be performed. In our view it is not of such a character as to require under good faith bargaining standard prior notice to, and consultation with, the union."

1/ Section 8(a)(5) of the National Labor Relations Act is The provision requiring an employer to bargain in good faith with his employees' representative.

The Board further held that it might be a matter for processing under grievance procedures. In the case of Irvington Motors, Inc., and Retail Clerks, 147 NLRB 565, the National Labor Relations Board held:

"We do not believe that the requirement that salesmen make five truck telephone calls per day was so clearly beyond the normal management function as to require prior notice to, and consultation with, the union."

Notwithstanding the differences in the executive order and in the National Labor Relations Act, the Hearing Examiner is of the opinion that there is some analogy in the above decisions from the private sector to the case here at issue. The Hearing Examiner is of the opinion that in the instant case the determination of which cases to assign on which occasions to the attorneys is even more clearly a matter of management prerogative. In the cases cited, there were some additional work duties assigned. However, in the case at bar the same type work duties were previously assigned, and the only alteration was in the particular type of case that might be assigned under certain circumstances. It is inherent in the rights of management that it must make the work assignments, rather than to have an individual employee on a particular occasion himself dictate the work assignment. The Hearing Examiner is of the opinion that even under a narrow construction of Section 12(b)(5) this type of management prerogative is covered by said section:

To determine the method, means, and personnel by which such operations are to be conducted.  
(Emphasis supplied)

Such action also is reserved to management in Section 12(b)(1) which reserves to management the right to "direct employees of the agency".

The Hearing Examiner is of the opinion that the issue of whether or not the National Labor Relations Board was required to bargain with the Association as to any change in time deadlines presents a much more serious problem. It is insisted by the Board that no actual changes were made under the so-called new case handling procedures. The Hearing Examiner is of the opinion that the evidence rather consistently establishes to the contrary. Time schedules were in 1961 enunciated by the Board, and these time schedules were subsequently incorporated in the Board's Work Manual. It would appear, however, that these time deadlines

were for some years preceding the instituting of a new case handling procedure honored in their breach. Mr. Leff testified that there was some adherence to these time schedules. However, it will be noted that the attorneys who were in the bargaining unit who testified in the case uniformly testified that there was a wide variation in the expected time schedules as between the various Board units. Member Brown's unit was held to an even more stringent time schedule than that set forth in the Manual. On the other hand, testimony in the record establishes that former Chairman McCulloch's unit ignored the time schedules and that there was no specific deadline enforced for the members of the unit, the only check from a time standpoint being that if a case got unduly old inquiry would be made about it. The other three Board Members' units apparently, in varying degrees, ranged between the policy in former Chairman McCulloch's unit and in the unit of Board Member Brown. The Hearing Examiner is of the opinion that, whether the new case handling procedure be compared to the written instructions in the Manual or to the actual practice which had for some years been adopted, there were changes in time deadlines under the new procedure. The changes as described in Executive Secretary Fields' memorandum of July 22, 1970, reveal the following:

In Stage I "except in the abnormal case, the due date for initial action shall not exceed current deadlines and wherever possible shall be a period of shorter duration".

The attorneys in the bargaining unit, prior to the change in case handling procedures, had certain definite deadlines under the Manual, which under the new procedures would be a maximum. Under actual practice most of the employees did not have a definite hard and fast deadline prior to the adoption of the new procedure. The change above quoted under Stage I, while providing that in certain instances the attorney would have as much of a deadline as that set forth in the Manual, also provided that wherever possible he would be given a shorter deadline. This provision "wherever possible shall be a period of shorter duration" does in the opinion of the Hearing Examiner constitute a material change in the work requirements if compared to the Manual and the setting of a definite maximum with setting of a shorter maximum whenever possible does constitute a material change as to actual practice.

The said memorandum establishes that as to Stage II:

At the time of initial action the sub-panel shall determine the allowable time in which the requested document must be furnished with current deadline serving as a guide.

So far as the deadlines provided in the Manual are concerned, they were definite in the Manual, whereas in Stage II under the revised procedure they were to be only a guide with the sub-panel having the discretion to make its own determination as to the deadline procedure in Stage II on an individual basis. Again, it will be noted that, under the actual practice prior to the revision in procedures, there was a great variation between the various units as to deadlines with some units, such as, former Chairman McCulloch's unit, having operated without enforcement of specific overall deadlines. In the opinion of the Hearing Examiner whether the revised procedures be compared to the procedures set forth in the Manual or to actual operation, there was a change in the procedures brought about by the rules as set forth in the memorandum of July 22, 1970. No changes in deadlines appear to have been made as to Stage III.

There being a change in time deadlines for the members of the units, the issue for determination is whether the Board was authorized to make such change as a matter of management's prerogative without prior consultation with the Association or whether such action constituted a refusal to bargain in violation of the executive order. The Hearing Examiner is of the opinion that a change in time deadlines of the members of the bargaining unit is not protected by the management's prerogative provisions of the executive order but is a proper subject for collective bargaining. There was considerable evidence in the record, particularly from the testimony of Board Chairman Miller and Executive Secretary Fields, that the change in procedure has in the main accomplished its objective, that the case production has speeded up and generally improved, and that the public is being better served. It is not, however, for the Hearing Examiner to determine the wisdom or lack of wisdom of the action of the Board. To do so would be for the Hearing Examiner to substitute his own judgment for that of the Board, and the Board rather than the Hearing Examiner has been authorized by Congress to determine the wisdom of policy decisions. The only issue before the Hearing Examiner is one of the legality of the Board's action in the light of the requirement of the executive order. The Hearing Examiner, therefore, expresses no opinion as to the wisdom or lack of wisdom of the actions of the Board in this case. In the event, however, that there had been deadlines set, which were not practical or which were unduly restrictive, it is entirely possible that by discussing the matter with the representatives of those employees who would be operating under such schedules, the defects in the plan could have been pointed out by the employees and the Board adjusted its plan to whatever might have been the realities and the practicalities of the situation. This is one of the reasons that the executive

order was issued and this is inherent in a collective bargaining process. The employees performing the work tasks might very well be in a position due to their own experience in the matter to make suggestions to their bargaining representative which would not only be in the interests of the employees involved but also would be in the public interest and in the interest of a more efficient operation.

It is apparent to the Hearing Examiner that the issue of time schedules does not fall under the management function provisions of Section 11(b) insofar as they relate to mission of an agency, its budget, the number of employees, and the numbers, types, and grades of positions, or employees assigned to an organizational unit, work project, or tour of duty, or its internal security practices. The new case procedure did not increase or decrease the number of employees, nor change grades or types of positions. It did not change the basic type of work performed by the employees, nor change their tours of duty, and it in no way related to internal security. The Hearing Examiner is of the opinion that time schedules are not encompassed in the term "its organization". Extending or contracting the time that work must be performed does not change the basic structure of organization, which would consist of the number and type of employees referred to a particular unit or its supervision, etc. The organization could remain basically the same, irrespective of the precise time set for time schedules. The Hearing Examiner is further of the opinion that it is not covered by the phraseology "the technology of performing its work". The commonly accepted understanding of the word "technology" is that it would relate to the method of work, rather than the time required to perform the work. Therefore, the Hearing Examiner is of the opinion that there is nothing in the exclusions of Section 11(b) of the executive order which would excuse the Board from an obligation to bargain with the Association with reference to changes in time schedules.

The Hearing Examiner is also of the opinion that the broad language of Section 12 of the executive order, when construed in the light of the purpose of the executive order and the language of the entire order does not entitle the Board to treat the change in time schedules as a matter of management's prerogative. It does not restrict their right to direct employees of the agency. They retain this right. It does not relate to hiring, promotion, transfer, assignment, or relieving from duties because of lack of work, etc. There is no indication that it was an emergency of such great nature as to fall under the definition of Section 12(6) of the executive order, and the Hearing Examiner is of the opinion that Sections 4 and 5 of the executive order, when construed in the light of the

entire order, do not authorize the action taken by the Board in this regard without prior consultation with the bargaining representative. The Hearing Examiner cannot believe, for example, that he is called upon as Hearing Examiner to determine whether or not the action of the Board is efficient within the provisions of Section 12(b)(4). To do so would be for the Hearing Examiner to substitute his judgment for that of the Board and to make policy determinations as to wisdom or lack of wisdom of actions of management. As hereinabove stated the Hearing Examiner is of the opinion that he has no such authority. As to 12(b)(5) there was no change in personnel to perform the work. There was no change in basic methods by which the work was performed, and the Hearing Examiner is of the opinion that, while the matter is not entirely free from doubt, the word "means" is rather closely analogous to the word "methods". Of course, however, to say that a subject is a proper subject for bargaining is not to say that management may not, after good faith bargaining and an impasse has been reached, proceed to enunciate its management policies.

The position is taken, however, by the Board that, aside from other considerations, the worst fears of the Association as to problems which would be created for its members by the new case handling procedure were not realized, and that experience has established that the employees have been able without any substantial difficulty to meet the revised time schedules. There is substantial evidence in the record from members of the bargaining unit to the effect that their worst fears were not realized; that the time deadlines were not oppressive; and that they have been able in the main to meet said deadlines. The Hearing Examiner is of the opinion, however, that it cannot be said that there has been no impact upon the employees as a result of the change in operational methods; and even if the impact has not been great, the purposes of the executive order are, notwithstanding, defeated by a refusal to bargain. When management unilaterally bargains and ignores the bargaining representative of its employees, the effect of such action is to undercut the Association and to destroy its effectiveness in the eyes of those whom it represents.

The fact that unilateral change in working conditions is a refusal to bargain was decided in the case of District 50, United Mine Workers and the case of Veterans Administration Hospital, Charleston, South Carolina, and Service Employees International Union Local AFL-CIO, GERR 21:4071, in which case the Hearing Examiner said:

"In general where a unit of employees is represented by an exclusive representative and an agency unilaterally changes working conditions of employees

in the unit without proper consultation and negotiation with the exclusive representative, the agency would be in violation of Section 19(a)(6) of the order, which provides that agency management shall not refuse to consult or negotiate with the labor organization as required by the order."

Referring again to the private sector in the case of Russell Newton Manufacturing Company, Inc., 167 NLRB 1112, the National Labor Relations Board held that when the respondent instituted a change in the work point system, with 275 points as the minimum desirable point average of production to be maintained by employees and provided for disciplinary action to be taken against those not attaining that minimum and did not bargain with the bargaining representative with reference to said action, the refusal to bargain provisions of the National Labor Relations Act had been violated. In the absence, as hereinabove set forth, of a specific provision of the executive order making the speed of production a matter of management's prerogative, the Hearing Examiner is of the opinion that said decision in the private sector, while not binding upon the Hearing Examiner, is persuasive. There is an analogy in the requirement to bargain, and the Hearing Examiner is of the opinion that the Labor Board in the case here at issue was in error in taking the position that a change in time schedule for productivity was a matter exclusively of management's prerogative.

The Board in its brief, however, takes the position that a collective bargaining contract having been negotiated, the grievance procedure set forth in the contract should have been resorted to and that, inasmuch as the bargaining representative of the employees did not seek to process a grievance, the Board cannot be held to have violated the executive order. Article 5 of the Collective Bargaining Contract, which was introduced in evidence as Association's Exhibit 3, contains the following provision in Section 1:

A grievance is a matter of personal concern or dissatisfaction to an employee, the consideration of which is not covered by the other systems for agency review. Employee grievances do not include questions of policy but may include questions of the application of policy to an individual employee or to a group of employees.

The Hearing Examiner is of the opinion that said article of the contract does not provide that grievances shall be a substitute for an obligation to bargain as set forth in Section 19



of the executive order. It is stated that employee grievances may include questions of application of policy to an individual employee or to a group of employees relating to a matter of personal concern and dissatisfaction, the Hearing Examiner is of the opinion that it was not contemplated by the parties that a grievance would be a substitute for an obligation to bargain but rather that questions arising under the contract would be determined, where not provided for by other systems for agency review, by means of agreements and arbitration procedures. In the case of Veterans Administration Hospital, Charleston, South Carolina, and Service Employees International Union, Supra, the Hearing Examiner pointed out that there is a distinction between the executive order and the National Labor Relations Act in that the National Labor Relations Act provides for an appeal to the courts to enforce collective bargaining agreements, whereas the executive order does not provide for court action. He concluded that notwithstanding that conduct might constitute a breach of the negotiated agreement the matter may still properly be brought before the Secretary. This Hearing Examiner is of the opinion that, even if the matter constituted a breach of the collective bargaining contract, it would still be a matter for adjudication by the Assistant Secretary. The Hearing Examiner is further of the opinion that the obligation to bargain in this instance is not the same thing as a grievance. In the case of West Texas Utilities Company v. National Labor Relations Board, 206 Fed 2d 442, the Court of Appeals for the District of Columbia held:

Although any grievance may be a subject of collective bargaining, not all subjects of collective bargaining are grievances. As we view the word "grievances", it does not encompass, for example, the setting of wage rates for a large percentage of the employees in a certified bargaining unit. The word "grievances" in the field of industrial relations, particularly in unionized companies, usually refers to secondary disputes in contrast to disagreements concerning broad issues, such as, wage rates, hours, and working conditions. The Supreme Court, in construing the Railway Labor Act of 1934, noted that grievances are of a comparatively minor character and traditionally affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arrived incidentally in the course of an employment. The Fifth Circuit took a similar view in construing Section 9(a) of the National Labor Relations Act.

The Hearing Examiner is of the opinion that if, as this Hearing Examiner finds, the National Labor Relations Board was guilty of refusal to bargain, the Board cannot be heard to say that its action is excused due to the fact that the bargaining representative of the employees has refused to resort to the grievance remedy.

#### THE REMEDY

The Association in its brief takes the position that the only appropriate remedy would be to require the Board to, pending engaging in collective bargaining with the Association, return to its former procedure and abandon the new case handling procedure. The Hearing Examiner is of the opinion that such a remedy is not required under the findings of the Hearing Examiner in this case. The Hearing Examiner finds that the Board did not violate the executive order by changing its line of supervision and method of assignment of cases; nor did it violate the executive order by assigning its cases in rotation. It would not be proper for the Hearing Examiner to require the Board to refrain from engaging in legal acts merely because in some respects the Board has engaged in other acts in violation of the executive order.

The Hearing Examiner is further of the opinion that the public interest would not be served by requiring the Board to return to its prior method of operation with reference to time deadlines for the processing of cases. It would be rather difficult to determine what the Board would be required to return to. The Hearing Examiner is of the opinion that it would not be proper to require the Board to return to the written time limitations as set forth in the memorandum of the Executive Secretary of October 5, 1961, and subsequently incorporated in the Board's Work Manual. The evidence, as hereinabove set forth, clearly establishes that these time requirements have not been uniformly followed for a number of years. The Hearing Examiner feels that it would be improper to require the Board to go back to the operation under time schedules which had been abandoned long before the unfair labor practice was committed.

The Hearing Examiner is further of the opinion that there is no definite uniform method of operation to which the Board could be ordered to return insofar as its actual practice is concerned. Apparently in some units there were deadlines, in other units there were no specific deadlines, and in some units there were deadlines which were followed in part and

not followed in part. Aside, however, from the difficulty of ascertaining a specific procedure to which the Board could be ordered to return, the Hearing Examiner is of the opinion that, under the facts of this case, the public interest would not be served by such a remedy. It is true that in the private sector, as well as under the executive order, the usual remedy does require a return to the status quo which existed prior to the commission of the unfair labor practice. It will be noted, however, that the National Labor Relations Board has on various occasions due to the circumstances of the case not required such a remedy. The Board so held in General Motors Corporation, 171 NLRB No. 97. Of course, the executive order is remediable and not punitive. The Hearing Examiner is of the opinion that, although the Board had violated the executive order by engaging in unilateral actions, as hereinabove set forth, the Board has not been guilty of a general failure of subjective good faith. This fact does not, however, excuse the refusal to bargain. National Labor Relations Board v. Katz, 369 US 736. The hearing process under the executive order is of extremely recent origin. No large body of precedent has as yet evolved to give adequate guide and sign posts as to doubtful issues. The issue concerning which the Hearing Examiner in this decision finds that the Board has violated the executive order is one upon which reasonable legal minds may honestly differ. While the Hearing Examiner is of the opinion that the Board erroneously construed the management's prerogative sections in the executive order, the Hearing Examiner is not of the opinion that the Board has in any way attempted to flaunt the law. The Hearing Examiner is of the opinion that the record does not indicate that restitution to the former method of operation pending completion of bargaining is necessary in order to prevent future violations by the Board. Under these circumstances, the Hearing Examiner is of the opinion that it is not in the public interest to apply the remedy suggested by the Association. The Board has already gone from one procedure to a second procedure. Bargaining negotiations between the Association and the Board may quite possibly result in modifications in the present procedure or even the adoption of some third procedure. To require the Board to return to the first procedure pending bargaining would be merely to require still another change in method of operation. The Hearing Examiner is of the opinion that no public agency can operate at top efficiency with a constant change in procedure and method of operation. To inject still another change in time deadlines would be to unnecessarily further confuse Board processing of its work load and would, therefore, adversely affect the Board's ability to most efficiently serve the public. The Hearing Examiner does not by these comments in any way

express an opinion as to whether the prior method of operation or the current method of operation is preferable from the standpoint of service to the public. The Hearing Examiner is merely stating that the public would be better served to permit the present system to continue until bargaining in good faith has been engaged in with whatever result, insofar as any further changes being made, may occur from such bargaining. The Hearing Examiner is, therefore, of the opinion that the appropriate remedy is for an order to be entered by the Assistant Secretary requiring the Board to post a notice that it will bargain in good faith with reference to the issue of time schedules and requiring the Board to bargain in good faith with reference to the time schedules.

RECOMMENDATIONS

In view of my findings and conclusions above, I recommend that the Assistant Secretary find:

- (1) Respondent's, the National Labor Relations Board's, action in instituting a new method of assignment of cases without engaging in collective bargaining with the Association was an exercise of management's prerogative and was not a violation of Section 19(a)(1) of the executive order.
- (2) That Respondent by unilaterally changing the time schedules for the processing of cases by its Legal Assistants and by failing to bargain with respect to said changes with the Association, the representative of its Legal Assistants, has violated Sections 19(a)(1) and 19(a)(6) of Executive Order 11491.

It is my considered judgment that it would be appropriate for the Assistant Secretary to adopt the following order which is designed to effectuate the policies of Executive Order 11491.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203(25)(a) of the Regulations, the Assistant Secretary of Labor for labor management relations hereby orders that the National Labor Relations Board shall:

(1) Cease and desist from -

(a) Refusing to consult, confer, or negotiate with the National Labor Relations Board Professional Association as the exclusive representative of its employees in the following unit:

"All attorneys and other professional employees performing comparable legal work in the Washington office of the Board, excluding (1) any managerial executive, (2) any employee engaged in Federal personnel work in other than purely clerical capacity, and (3) supervisors who officially evaluate the performance of employees as stated in Section 6(a) of Executive Order 10988."


By at any future time unilaterally changing the time schedules for performance of work by the employees in said unit.

(2) Take the following affirmative action in order to effectuate the purposes of provisions of the order:

(a) Upon request, consult, confer, and negotiate with the National Labor Relations Board Professional Association with reference to time schedules for performance of work by its employees in said unit.

(b) Post at its Washington, D.C., office copies of the attached notice marked "Appendix". Copies of said notice shall be signed by the Chairman of the National Labor Relations Board and shall be posted and maintained by the National Labor Relations Board for 60 days thereafter in conspicuous places where notices to employees are customarily posted. The National Labor Relations Board shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 10 days from date of this order as to what steps have been taken to comply therewith.

  
\_\_\_\_\_  
John S. Patton, Hearing Examiner

Date: \_\_\_\_\_

OCT 19 1971

(Notice appended for adoption by the Executive Secretary)

## NOTICE TO ALL EMPLOYEES

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR  
LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, LABOR-MANAGEMENT  
RELATIONS in the FEDERAL SERVICE,

We hereby notify our employees that:

WE WILL NOT refuse to consult, confer, or negotiate with National Labor Relations Board Professional Association as exclusive representative of our employees in the following unit,

"all attorneys and other professional employees performing comparable legal work in the Washington office of the Board, excluding: (1) any managerial executive, (2) any employee engaged in Federal personnel work in other than purely clerical capacity, and (3) supervisors who officially evaluate the performance of employees as stated in Section 6(a) of the Executive Order 10988, by at any future time unilaterally changing the time schedules for performance of work by our employees in the above unit.

WE WILL upon request consult, confer, and negotiate with National Labor Relations Board Professional Association with reference to time schedules for performance of work by the employees in the above unit.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
REGION, SF,  
BURLINGAME, CALIFORNIA  
A/SLMR No. 247

This case involved an unfair labor practice complaint filed by National Federation of Federal Employees, Local 1 (Complainant) against Defense Contract Administration Services Region, SF, Burlingame, California (Respondent). The complaint alleged that the Respondent violated Section 19(a)(1) and (3) of the Executive Order by permitting the American Federation of Government Employees, AFL-CIO, Local 2723 (AFGE Local 2723) use of Respondent's facilities to undertake a membership solicitation campaign at a time when a question concerning representation, resulting from a representation petition filed by the Complainant seeking an election among certain of Respondent's employees, was pending before the Assistant Secretary. AFGE Local 2723 had not cross-petitioned or intervened in the Complainant's petition.

The Complainant contended that U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143 was controlling and dispositive of the issues in this case. In that case, which involved objections to an election, the Assistant Secretary set aside an election in a situation where a non-intervening labor organization was given equivalent status in electioneering to that enjoyed by a petitioning labor organization. The Respondent contended that Menlo Park was not applicable because the representation proceeding in the instant case had not reached the "election phase," and that, in any event, no harm was done the Complainant in allowing AFGE Local 2723 to use Respondent's facilities to conduct a membership drive because Respondent's representation petition eventually was dismissed by the Assistant Secretary in his decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112.

In his Report and Recommendations, the Hearing Examiner concluded that the Menlo Park case was not dispositive of the issues in the subject case and recommended that the complaint be dismissed. In this connection, the Hearing Examiner concluded that AFGE Local 2723 did not secure any special advantage by failing to intervene in the representation proceeding as no election ever was held, and that the facts herein presented a different situation from the Menlo Park case as there was no election pending in the instant case. Thus, the Hearing Examiner found that the Complainant and AFGE Local 2723 had equivalent status

and the use of the facilities by the latter did not inure to the detriment of the Complainant. Accordingly, he recommended that the complaint be dismissed.

The Assistant Secretary found that Respondent's action did, in fact, violate Section 19(a)(1) and (3) of the Order. He held that although Menlo Park involved objections to an election, the principles enunciated in that case were applicable to the instant case. Thus, in the present case, when the representation petition was filed by the Complainant, a question concerning representation was, in effect, raised, and when AFGE Local 2723 failed to intervene in that petition it could not be viewed as having equivalent status with the Complainant within the meaning of Section 19(a)(3) of the Order. The Assistant Secretary held further that the test whether the Respondent's assistance to AFGE Local 2723, which did not have equivalent status with Complainant, violated the Order, was dependent upon whether there existed a question concerning representation at the time when the permission to conduct a membership solicitation campaign was granted and not upon subsequent events. Thus, the fact that Complainant's petition was dismissed subsequently was not considered determinative.

Having found that Respondent violated Section 19(a)(1) and (3) of the Order, the Assistant Secretary issued a remedial order.

A/SLMR No. 247

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
REGION, SF,  
BURLINGAME, CALIFORNIA

Respondent

and

Case No. 70-2414(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1

Complainant

DECISION AND ORDER

On August 23, 1972, Hearing Examiner William Naimark issued his Report and Recommendations in the above-titled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, I hereby adopt the Hearing Examiner's findings, conclusions and recommendations to the extent consistent herewith. 1/

1/ The Hearing Examiner recommended denial of the Respondent's motion that the complaint be dismissed as being ambiguous because the Complainant had left blank on the complaint form the space provided with respect to the basis of the complaint, except for the statement, "see attached letter." In this regard, the Respondent contended that Report on a Ruling of the Assistant Secretary, No. 48, was controlling. This Report states, in part, that "the use of such phrases as 'see attached correspondence' renders an otherwise adequate complaint invalid." I agree with the Hearing Examiner that under the circumstances the complaint herein is not fatally defective. Thus, the statement of policy enunciated in Report No. 48 was designed solely to advise complainants that the Area Office should not be required to go through the parties' entire report of investigation to ascertain the basis of a complaint.

(Continued)

The complaint in the subject case alleges that the Respondent violated Section 19(a)(1) and (3) of Executive Order 11491 by permitting the American Federation of Government Employees, AFL-CIO, Local 2723, herein called AFGE Local 2723, use of its facilities to undertake a membership solicitation campaign at a time when a question concerning representation, resulting from a representation petition filed by the Complainant, which sought an election among certain of the Respondent's employees, was pending before the Assistant Secretary. 2/ In this regard, the Complainant asserts that the Assistant Secretary's decision in the U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143, is controlling and dispositive of the issues in this case. 3/

The Respondent contends that the above cited case is not applicable under the circumstances present herein in that, as distinguished from that case, the representation proceeding in the subject case had not reached the "election phase." Also, the Respondent argues that in the instant case the Assistant Secretary ultimately dismissed the Complainant's representation petition 4/ and that, therefore, no harm to the Complainant occurred as a result of the Respondent's allowing AFGE Local 2723 to conduct a membership drive while a representation petition was pending. Finally, the Respondent asserts that had it not permitted

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1/ However, where, as in the instant case, the complaint form states "see attached letter" in the space provided for the basis of the complaint and the attached letter, in fact, contains a clear and concise statement of the basis of the complaint, such complaint will not be considered to be defective. Accordingly, as recommended by the Hearing Examiner, I shall deny the Respondent's motion.

2/ AFGE Local 2723 did not cross-petition or intervene in the petition filed by the Complainant.

3/ In that decision an election was set aside where the facts revealed that a non-intervening labor organization had been given equivalent status in electioneering to that enjoyed by a petitioning labor organization. Although that case did not involve an unfair labor practice proceeding, I indicated that the disposition was based on the policy set forth in Section 19(a)(3) of the Order. Section 19(a)(3) provides that, "Agency management shall not -

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;"

4/ See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112.

AFGE Local 2723 to use its facilities to conduct a membership drive, it would have been subject to an unfair labor practice charge by AFGE Local 2723.

The record reveals that on December 7, 1970, the Complainant filed a petition seeking an election among Respondent's employees working in Northern California. AFGE Local 2723 neither cross-petitioned for all, or any portion, of the employees covered by the Complainant's petition, nor did it seek to intervene in the Complainant's petition. Thereafter, on July 20, 1971, a consolidated unit determination hearing was held on Complainant's representation petition as well as two other petitions involving employees of the Respondent. 5/ On November 30, 1971, the Assistant Secretary dismissed the three petitions involved in the consolidated unit determination hearing, finding each of the petitioned for units to be inappropriate for the purpose of exclusive recognition. 6/

The record reflects that on July 21, 1971, the day after the unit determination hearing closed, but prior to the issuance of any decision by the Assistant Secretary, the Respondent was contacted by a national representative of the American Federation of Government Employees, AFL-CIO, who requested that the Respondent permit AFGE Local 2723 to conduct a membership drive at the Activity. Following this request, the Respondent granted the use of certain of its facilities to representatives of AFGE Local 2723, including permitting the distribution of literature at its Burlingame, California, facility 7/ in the same manner and to the same extent as had been accorded the Complainant prior to the filing of its representation petition. On July 26, 1971, the Respondent advised the Complainant of this action. As a result, the Complainant filed a charge against the Respondent on July 27, 1971, and, after informal attempts to settle the matter had failed, the unfair labor practice complaint in the subject case was filed on August 30, 1971.

In his Report and Recommendations, the Hearing Examiner rejected the Complainant's contention that the decision in U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, cited above, was dispositive of the subject case. In his view, the failure of AFGE Local 2723 to intervene in the prior

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5/ Other petitions had been filed by Local 7, National Federation of Federal Employees and by Local 3204, American Federation of Government Employees, AFL-CIO. These petitions involved employees located outside of the Northern California area of Respondent's Region. AFGE Local 2723 did not intervene in either of these petitions.

6/ See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, cited above.

7/ There also was evidence that solicitation was carried on in the Salt Lake City office of the Respondent by representatives of the American Federation of Government Employees, AFL-CIO.

representation proceedings did not, in itself, secure any special advantages for AFGE Local 2723 because, unlike the situation in the Menlo Park case, no election was to be held in this case. While acknowledging that it would be unfair to permit a non-intervening labor organization to campaign against a petitioning labor organization in an "objection case" the Hearing Examiner noted that the facts herein presented a dissimilar situation in that there was an absence of a pending election. Thus, in his view, the Complainant and AFGE Local 2723 had equivalent status, and the use of the facilities by the latter did not inure to the detriment of the Complainant. Under these circumstances, the Hearing Examiner found that at the time it requested and obtained the use of Respondent's facilities, AFGE Local 2723 was entitled to treatment equivalent to that accorded the Complainant or any other labor organization, and, therefore, he recommended that the complaint in the subject case be dismissed.

In my view, the Hearing Examiner erred in finding that Respondent did not violate Section 19(a)(1) and (3) of the Order by permitting AFGE Local 2723 use of its facilities for solicitation purposes while the Complainant's representation petition was pending. Although the Menlo Park case involved objections to an election, I find that the principles enunciated in that decision are applicable to the instant unfair labor practice proceeding. In that decision, I stated that: "~~when the petitioner filed a petition raising a valid question concerning representation and the other labor organization, although notified of such petition, chose not to intervene in the proceedings, these two labor organizations could not be considered to have equivalent status.~~" Similarly, in the instant case, when a petition was filed, a question concerning representation was, in effect, raised. Under such circumstances, when AFGE Local 2723 failed to intervene in that petition, it could not be viewed as having equivalent status with the Complainant within the meaning of Section 19(a)(3) of the Order. In this connection, the test as to whether the Respondent violated the Order by assisting AFGE Local 2723, a labor organization not having equivalent status in the pending representation matter, is dependent upon whether there existed a question concerning representation in all or part of the unit in which the membership solicitation campaign was permitted, at the time when such permission was granted and not upon subsequent events. Thus, the fact that the Complainant's petition was dismissed subsequently is not considered to be determinative, where, as here, equivalent status was granted to a non-intervening labor organization during the pendency of a question concerning representation raised by the filing of a representation petition.

Under all the circumstances, therefore, I find that the Respondent, by granting to AFGE Local 2723 the use of certain of its facilities for a membership solicitation drive among employees covered by the Complainant's petition and before the resolution of a pending question concerning representation involving such employees, interfered with employee rights assured under Section 1(a) and provided improper

assistance to a labor organization in violation of Section 19(a)(1) and (3) of the Order, as amended. 8/

#### The Remedy

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (3) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Defense Supply Agency, Defense Contract Administration Services Region, SF, Burlingame, California, shall:

1. Cease and desist from:

(a) Assisting a labor organization, which is not a party to a pending representation proceeding which raises a question concerning representation, in the conducting of a membership solicitation campaign by permitting that labor organization the use of its facilities in the same manner as permitted a labor organization which is a party to the pending representation proceeding.

(b) Interfering with, restraining, or coercing employees by permitting a labor organization, which is not a party to a pending representation proceeding which raises a question concerning representation, the use of its facilities for a membership solicitation campaign in the same manner as permitted a labor organization which is a party to the pending representation proceeding.

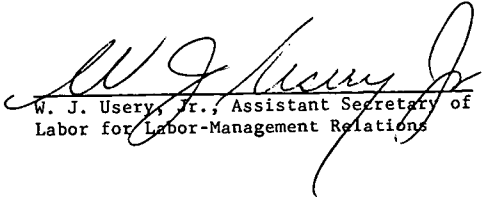
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

8/ My finding herein is based upon the fact that the solicitation privileges accorded were requested by a national representative of the AFGE and were granted by the Respondent to the labor organization as distinguished from solicitation by an individual employee or employees of the Respondent. As I have indicated previously, normally employees have the right to solicit on their non-work time and to distribute campaign material on their non-work time and in non-work areas even when a question concerning representation is pending. In this regard, see Federal Aviation Administration, New York Air Route Traffic Control Center, A/SLMR No. 184; and Charleston Naval Shipyard, A/SLMR No. 1.

(a) Post at its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander, DCAS Region and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commander, DCAS Region shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
February 13, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT assist a labor organization, which is not a party to a pending representation proceeding which raises a question concerning representation, in the conducting of a membership solicitation campaign by permitting that labor organization to use our facilities in the same manner as permitted a labor organization which is a party to the pending representation proceeding.

WE WILL NOT interfere with, restrain, or coerce our employees by permitting a labor organization, which is not a party to a pending representation proceeding which raises a question concerning representation, to use our facilities for a membership solicitation campaign in the same manner as permitted a labor organization which is a party to the pending representation proceeding.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor whose address is: Room 9061 Federal Office Building, 450 Golden Gate Ave., San Francisco, California 94102.



UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF HEARING EXAMINERS

DEPARTMENT OF DEFENSE  
DEFENSE SUPPLY AGENCY  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION, SF  
BURLINGAME, CALIFORNIA

Respondent

CASE NO. 70-2414

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES (IND.) LOCAL 1

J. Zukor, Esq.

866 Malcolm Road, Burlingame,  
California 94010, for the  
Respondent.

Homer R. Hosington, Esq.

Post Office Box 870,  
Rialto, California 92376, for  
the Complainant.

Before: William Naimark, Hearing Examiner

REPORT AND RECOMMENDATIONS\*

Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued

\*This reproduced copy reflects all of the corrections contained in the Hearing Examiner's Errata issued on August 28, 1972.

on May 19, 1972, by the Regional Administrator of Labor-Management Services Administration, San Francisco Region, based on a complaint filed by National Federation of Federal Employees, Local 1 (herein called the Complainant), against Defense Supply Agency, Defense Contract Administration Services Region, SF., (herein called the Respondent). The complaint alleged a violation by Respondent of Section 19(a)(1) and (3) of the Order by its granting a membership drive to Local 2723, American Federation of Government Employees (herein called Local 2723) despite the fact that Local 2723 failed to intervene in pending representation case No. 70-1860 which involved a unit determination of Respondent's employees.

On June 16, 1972, prior to the hearing, Respondent filed a motion 1/ to dismiss the complaint with the Regional Administrator. This motion was renewed at the hearing at which time no ruling had as yet been made by the regional office. 2/ Respondent contends, in support thereof, that the complaint is ambiguous, unintelligible, and not specific as to the charges leveled against it. Further, Respondent insists that since the basis of the complaint was set forth in an attached letter, instead of in the form itself, the complaint should be dismissed. In respect to the latter contention, Respondent cites Report No. 48 - Report on Ruling of the Assistant Secretary of Labor for Labor-Management Relations. This Report does require the complaint form to contain the particular acts complained of along with attendant details. It also states that using phrases such as "see attached correspondence," as was done in the instant complaint, renders an otherwise adequate complaint invalid.

1/ Respondent Exhibit 1.

2/ The Regional Administrator denied the motion to dismiss on August 3, 1972.

The undersigned rejects the argument that the complaint is ambiguous and does not apprise Respondent of the charges against it. The complaint not only alleges violations of Sections 19(a)(1) and (3) of the Order, but the charge, which is attached thereto, recites the specific conduct engaged in by Respondent which is allegedly violative of these sections. Nor does the use of the disjunctive in alleging violations of the Order render the complaint unintelligible, for said usage is merely a recitation of the language employed in the Order itself.

In respect to Report No. 48, the undersigned concludes that attaching supporting data, in lieu of setting forth such factual material on the complaint form, does not warrant dismissing the complaint. The obvious purpose of this ruling is to eliminate numerous and irrelevant attachments to the complaint. Nevertheless, though it may well be preferable to incorporate facts supporting the complaint in the form, Respondent is notified by the accompanying letter of the facts or basis for the complaint. It would scarcely serve the ends of justice to conclude that the failure to insert the facts in the form itself renders the complaint jurisdictionally defective. Federal policy calls for liberal construction of pleadings. See Sheet Metal Worker, Locals 99 and 150 (Associated Pipe and Fittings Manufacturers), 175 NLRB No. 116.

During the hearing Respondent moved further to dismiss the complaint on the grounds that (1) no violation exists based on the evidence adduced, (2) the testimony presented by Complainant is new, and Respondent is surprised by same as well as the exhibits introduced in evidence.

In respect to the first portion of this further motion, the undersigned will treat it later in this Report. This involves a consideration of the merits of this case.

In respect to the claim that new matter was introduced at the hearing, the undersigned finds no basis for this contention. Complainant's testimony adduced in the hearing was in support of its complaint against Respondent, namely, that permitting Local 2723 to conduct a membership, or signature-solicitation, campaign was violative of Section 19(a)(3) of the Order. The fliers 3/ distributed by Local 2723, and introduced in evidence at the hearing, were part and parcel of that campaign conducted by said union. Complainant's theory of an alleged violation was not altered at the hearing, and the claim of surprise by Respondent is rejected.

Accordingly, the undersigned recommends that the Assistant Secretary deny the motion to dismiss the complaint based on the contentions that (a) the complaint is ambiguous, unintelligible or not specific as to the charges against Respondent, (b) the basis for the complaint was attached to the instrument in place of being set forth in the complaint itself, (c) the Respondent was confronted with new matter at the hearing for which it was not prepared, and thus was surprised thereby.

A hearing was held before the undersigned on July 11, 1972 at San Francisco, California. Both parties were represented at the hearing, and their representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Although the parties were granted an opportunity to do so, neither has filed a brief with the undersigned.

From the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

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3/ Complainant's Exhibits 1A - 1H.

Findings of Fact

1. Unfair Labor Practices

A. Introduction and Contentions

Respondent's employees have been unrepresented by any labor organization as their exclusive bargaining representative. On December 7, 1970 the Complainant herein filed a representation petition in Case No. 70-1860 seeking an election among Respondent's employees in California. Its sister Local No. 7 also filed a petition seeking an election among employees of Respondent located at Portland, Oregon in Case No. 71-1813. A petition to represent Respondent's employees in the State of Washington, Oregon, and Montana was filed in Case No. 71-1681 by American Federation of Government Employees, AFL-CIO, Local 3204. These cases were consolidated for hearing which was held on July 20, 1971, and Local 2723 did not intervene therein. On November 30, 1971 all three petitions were dismissed by the Assistant Secretary. 4/ He found that none of the units constituted an appropriate unit for the purpose of exclusive recognition under Executive Order 11491.

Several days following the hearing on July 20, 1971 Respondent granted permission to Local 2723 to solicit signatures among Respondent's employees in order to file a representation petition for a regional wide unit. Complainant contends that since Local 2723 did not intervene in the representation hearing on July 20, 1971, it should not have been permitted to conduct a membership campaign on Respondent's premises. Moreover, that by granting it access to the premises, and aiding Local 2723 in contacting the employees, Respondent was assisting this union in violation of the Executive Order. In support of its contention, Complainant

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4/ A/SLMR No. 112.

cites U. S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143.

It is Respondent's position that the cited case is inapplicable to the facts of the present case. Respondent argues there was nothing illegal in allowing Local 2723 to solicit signatures since no election was involved. It urges the same accommodation was extended to Complainant, and the latter suffered no damage when Local 2723 was afforded the opportunity to conduct its drive.

B. Issue

Whether Respondent sponsored, controlled, or assisted Local 2723 by permitting it to solicit signatures for a representation petition, and allowing it the use of Respondent's facilities, in view of Local 2723 having failed to intervene in prior representation proceedings which involved Respondent's employees and were ultimately dismissed.

C. Unions' use of Respondent's Premises for Membership Drive or Signature-Solicitations

It is not disputed, and record facts show, that the employer herein permitted unions to solicit signatures preparatory to filing a representative petition. Thus, between November 16 and December 5, 1970 Complainant conducted a drive at Respondent's Burlingame location to obtain signatures authorizing it to seek an election. This drive was undertaken with the sanction and approval of Respondent, and the latter arranged with the Union for the use of display tables and the contacting of employees. The petition in Case No. 70-1860 was filed with the Department of Labor by Complainant on December 8, 1970.

Shortly after the representation hearing on July 20, 1971, George Carter, a national representative of American Federation of Government Employees, requested permission of Respondent, on behalf of Local 2723, to solicit signatures among its employees for a regional wide unit. The request was granted, and Local 2723 solicited signatures from about July 22 through August 31, 1971. During its campaign Local 2723 was granted access to the employees, as well as the privilege of distributing literature, in the same manner and to the same extent as was accorded Complainant. No contention is made by Complainant that the Activity granted access and accommodations to Local 2723 which were denied to it.

On July 26, 1971 Respondent notified Mike Gerondakis, national representative of National Federation of Federal Employees (herein called NFFE) that it had given permission to Local 2723 to commence a drive to obtain signatures for the filing of a regional wide representation petition. Since the representatives of NFFE felt this was an unfair labor practice, a meeting was arranged among Gerondakis, Derrel S. Fulwider, Special Representative for NFFE, Harry L. Tovani and J. Zukor, personnel officers for Respondent. The representatives of both parties met on August 19, 1971, but Gerondakis was unable to convince the employer that it had committed an unfair labor practice. Accordingly, a charge was filed which gave rise to the complaint herein.

#### CONCLUDING FINDINGS

Section 19(a)(3) of the Order, which Complainant alleges has been violated by Respondent, provides as follows:

"(a) Agency management shall not--

\* \* \*

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;"

An examination of the above-quoted section, together with section 23, reveals that the Order contemplates the use by a union of an activity's facilities and services to carry on organizational and union business under certain circumstances. Thus, if the activity complies with the modifying clause in Section 19(a)(3) it cannot be guilty of sponsoring, controlling, or assisting a labor organization when furnishing it certain routine services and facilities. However, where labor organizations do not enjoy equivalent status, an employer would be flouting the Order if it furnished services and facilities on an equivalent basis to both unions.

The case of U. S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, supra, is urged upon the undersigned by Complainant in support of its position. The cited case involved objections to an election filed by NFFE on the ground, inter alia, that the Activity granted permission to AFGE to conduct a membership campaign, including the distribution and posting of propaganda during a five week period prior to the election. There was no intervention by AFGE in the proceeding, and NFFE was the only union on the ballot. The Activity attempted to justify its aid to AFGE based on said union having been formally recognized under previous Executive

Order 10988. The Assistant Secretary found that by announcing to employees it was permitting AFGE to use the facilities on an equal footing with NFFE, and in fact granting AFGE access to the facilities to conduct a vote "no" campaign, the Activity interfered with the employees' freedom of choice to select a representative. He directed the election be set aside and directed a second election. The rationale of that decision rests on the unequal status of NFFE and AFGE, which does not allow for equal treatment. Thus, NFFE was to be on the ballot, whereas the other union would not be. Since AFGE chose not to intervene, the two labor organizations were not viewed as having equivalent status. Accordingly, the Assistant Secretary concluded AFGE was not entitled to enjoy the same electioneering privileges as NFFE.

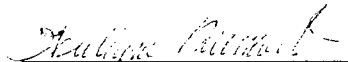
While Complainant urges that the Geological Survey Center case, supra, should control the disposition of the case herein, the undersigned rejects this position and considers the two cases distinguishable. Although it is true that Local 2723 did not intervene in the prior representation proceedings, its failure to do so did not secure any special advantages. No election was to be held in which Complainant would be on the ballot, and Local 2723 was therefore not favored with electioneering privileges as were accorded AFGE in the cited case. It would have been manifestly unfair to permit AFGE, which had not intervened, to campaign against NFFE in the objection case, and thus, in effect, urge the employees to vote against NFFE and thereby favor the Activity. In the instant case, however, allowing Local 2723 to conduct a signature-solicitation campaign in order to file a representative petition presents a dissimilar situation. The absence of a pending election results in Complainant and Local 2723 having equivalent status, and the use of the facilities by the latter union does not inure to the detriment of the Complainant. Respondent was according Local 2723 the same use of its facilities -- for a signature drive -- as it accorded Complainant previously. Since

Local 2723, by obtaining permission to use the facilities, was concerned solely with obtaining signatures sufficient to file a petition for election, it was entitled, under the Order, to treatment equivalent to that bestowed on Complainant and other labor organizations. Accordingly, I conclude that Respondent did not sponsor, control, or otherwise assist Local 2723 in violation of Section 19(a) (3) of the Order.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed.

Dated at Washington, D. C.  
AUGUST 23, 1972

  
WILLIAM NAIMARK  
HEARING EXAMINER

February 14, 1973

A/SLMR No. 248

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF THE AIR FORCE,  
AIR FORCE COMMUNICATIONS SERVICE (AFCS),  
2024th COMMUNICATIONS SQUADRON,  
MOODY AIR FORCE BASE, GEORGIA  
A/SLMR No. 248

This proceeding arose upon the filing of an unfair labor practice complaint by Mildred H. Spradley, an employee of the Respondent Activity. The Complainant alleged that the Respondent violated Section 19(a)(1) and (2) of the Order by harassing, intimidating, coercing, threatening, and discriminating against her and unfairly charging her with dereliction of assigned duties because of her union affiliation. Although a violation of Section 19(a)(4) of the Order was not alleged specifically by the Complainant, her complaint also alleged discrimination against her by the Respondent because she had filed a complaint under the Order. Under these circumstances, the Administrative Law Judge considered the complaint as including a 19(a)(4) allegation.

Upon completion of the hearing, the Administrative Law Judge issued his Report and Recommendation dismissing the complaint in its entirety. In this regard, he found no evidence that the Complainant's alleged mistreatment was prompted by her union membership or activities or because she filed a complaint.

Upon consideration of the entire record, including the exceptions filed by the Complainant, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation. Accordingly, he ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE AIR FORCE,  
AIR FORCE COMMUNICATIONS SERVICE (AFCS),  
2024th COMMUNICATIONS SQUADRON,  
MOODY AIR FORCE BASE, GEORGIA

Respondent

and

Case No. 40-3564(CA-26)

MILDRED H. SPRADLEY

Complainant

DECISION AND ORDER

On September 14, 1972, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceedings, 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. Thereafter, the Complainant filed timely exceptions to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

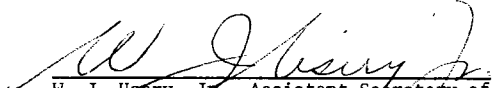
Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the exceptions filed by the Complainant, I hereby adopt the findings,<sup>1/</sup> conclusions and recommendation of the Administrative Law Judge.

<sup>1/</sup> In reaching the disposition of this matter, no weight was accorded to the Administrative Law Judge's finding that the office held by the Complainant in the local union -- i.e., secretary-treasurer -- "was a minor union office not likely to bring her into close or sharp contact with management." In the circumstances of this case, such finding was considered to be speculative and not supported by the record.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-3564(CA-26) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
February 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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2024th Communications Squadron	:	
Air Force Communications Service	:	
Moody Air Force Base, Georgia	:	CASE NO. 40-3564(CA-26)
	:	
Respondent	:	
	:	
and	:	
	:	
Mildred H. Spradley	:	
	:	
Complainant	:	
	:	

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Mildred Spradley,

Pro Se

Captain Mell J. Lacy,

For the Respondent

Before: Milton Kramer, Administrative Law Judge

REPORT AND RECOMMENDATION

STATEMENT OF THE CASE

This case was initiated by a complaint dated January 10, 1972 and filed January 11, 1972 by the Complainant under Executive Order 11491. It alleges that the Respondent violated and is violating Sections 19(a)(1) and 19(a)(2) of the Executive Order by harassing, intimidating, coercing, threatening, and discriminating against her in the tenure and conditions of her employment because of her union affiliation and because she filed a complaint with the Secretary, and by unfairly charging her with Dereliction of Assigned Duties. Although the complaint does not in terms charge a violation of Section 19(a)(4), the body of the complaint charges conduct that would be a violation of that subsection and the complaint is here treated as charging a violation of the three subsections.

Pursuant to §203.5 of the Regulations under the Executive Order (29 CFR §203.5), the Area Administrator made an investigation and reported to the Regional Administrator. The Report consisted of copies of the essential documents. On April 21, 1972 the Regional Administrator issued a Notice of Hearing to be held on June 13, 1972 in Valdosta, Georgia.

The hearing was held on the date and at the place specified in the Notice. At the hearing the Complainant appeared pro se. She stated that another person would appear later also to represent her but that other person did not appear. The Activity was represented by a Judge Advocate. Both parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. At the conclusion of the hearing, July 7, 1972 was fixed as the date for filing briefs. Neither party filed a brief or took other post-hearing action.

On the basis of the record, the demeanor of the witnesses, and my determinations of their credibility, I make the following Findings and Conclusions.

#### FINDINGS AND CONCLUSIONS

The Complainant is and at all relevant times was employed by Respondent as a civilian employee in Grade GS-5. In 1971 the International Brotherhood of Fireman and Oilers sought exclusive representation rights for the unit in which she was employed. An election was held on August 12, 1971, and the vote was against exclusive recognition. The complainant was Secretary-Treasurer of the local lodge of the Union.

The complaint charges action by the Activity inimical to Complainant's interest because of her union membership and because she filed a complaint under the Executive Order. If the charges had been sustained, such conduct by the Activity would have been in violation of Sections 19(a)(1), (2), and (4) of the Order.

The misconduct that Complainant complains of is based on administrative actions taken by the Activity with which Mrs. Spradley disagrees. She complains that the Activity failed to grade her position in accordance with appropriate standards and in violation of the Classification Act. She says that others doing the same work she does have a higher grade, and that she should be classified as a Funds Manager instead of her classification as a Funds Management Clerk. Mrs. Spradley's dissatisfaction with her classification long antedates any evidence of union activity by her or the Union. In 1970 she appealed her classification to the Regional Office of the Civil Service Commission. On June 29, 1970 that Office sustained the classification given her by the Activity, and on further appeal to the Washington Office the Commission on September 1, 1970 sustained the action of its Regional Office. I find that there is no persuasive evidence that Respondent's classification was motivated by union considerations.

On December 6, 1971, the Activity addressed a memorandum to her entitled "Dereliction of Assigned Duties". The Activity intimates, but does not offer direct affirmative evidence, that such nomenclature was

simply a mistake and was intended to be a "delineation" of assigned duties instead of a charge of dereliction. In fact, however, the body of the memorandum, unlike the title, simply sets forth duties to be performed by Mrs. Spradley and does not discuss dereliction in the performance of duties. The author of the memorandum, Lieutenant Hetzel, who was one of her supervisors, testified, and I find, that it was not intended as a reprimand. Mrs. Spradley had complained, as she did at the hearing, that she was assigned an excessive work load, and Lieutenant Hetzel wrote the memorandum to detail the approximate time Mrs. Spradley should devote to her several duties. That memorandum was never placed in her personnel file and after she filed the complaint was removed from the files of the squadron in an effort to satisfy her complaint.

After the complaint was filed, the Respondent was given a notice of reduction in force, the abolition of her position, and an offer of a lower-paid position. This notice was cancelled the next day. Mrs. Spradley says this RIF notice was given her in retaliation for filing the complaint, but she did not amend her complaint to charge this misconduct. The RIF notice was addressed to 33 squadrons. The Activity denies that there was any relationship between the notice and her filing of the complaint, and I find that there is no basis for imputing the notice to the filing of the complaint even assuming the complaint to be amended to charge this misconduct.

The Respondent complained at the hearing also of other mistreatment and discrimination against her because of her sex and because she was a civilian. She said that certain jobs were given only to military personnel, and that she was not the only civilian who was mistreated. She complained also that others, especially military personnel, were given credit for work she had done. Such misconduct of the Activity, if proven, might be remediable wrongs, but they were not charged in the complaint and even if they were they would not be remediable under Executive Order 11491.

Throughout the hearing Mrs. Spradley kept saying that she felt that these various mistreatments were inflicted on her because of her union membership, that she was sure that was the reason, that it was difficult to believe that that was not the reason, that there had to be a reason for such mistreatment and she could think of no other, and the like.

Such statements are not evidence of violations of the Executive Order. There was no evidence that her mistreatment, if it was such, was prompted by her union membership or activities. There was no evidence of what her union activities were other than that she was secretary-treasurer of a local lodge that was unsuccessful in its efforts to become the representative of the unit in which she was employed. This was minor union office not likely to bring her into close or sharp contact with management. There was no direct evidence that the conduct of which she complained was motivated by her union membership or office. There was no evidence, direct or indirect, that other union officers or members



February 14, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

were mistreated. She did say that other civilians were mistreated, but that was only a statement of conclusion and also irrelevant. There was no evidence that she was treated well before her union membership and badly after her union membership. In short, there was no evidence, other than Mrs. Spradley's feelings and her inability to think of another reason, to show that the Activity's treatment of her, assuming it to have been improper, was caused even in part by her union membership or activities. That is not enough. Of course, I make no determinations of whether her treatment was proper or improper; such conclusions would be relevant only if the conduct was motivated by her union membership or activities or by her having filed a complaint.

Section 203.14 of the Regulations imposes on the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. That burden has not been sustained.

RECOMMENDATION

I recommend that the complaint be dismissed for failure of proof.



Milton Kramer  
Judge

September 14, 1972

- 4 -

UNITED STATES DEPARTMENT OF  
AGRICULTURE, ANIMAL AND PLANT  
HEALTH INSPECTION SERVICE,  
VETERINARY SERVICES-ANIMAL  
HEALTH PROGRAM,  
MADISON, WISCONSIN  
A/SLMR No. 249

The Petitioner, Local 3289, American Federation of Government Employees, AFL-CIO (AFGE), sought an election in a unit of all nonsupervisory livestock inspectors employed by the United States Department of Agriculture, Animal and Plant Health Inspection Service in the State of Wisconsin. The Activity agreed with the AFGE that the unit sought was appropriate as the employees in the unit claimed have a clear and identifiable community of interest separate and apart from other employees of the Activity. It contended also that the establishment of such a unit would be consistent with the Agency's practice of recognizing bargaining units along functional lines where the employees are dispersed geographically and are expected to perform their duties in a relatively independent manner.

The Assistant Secretary found that the unit sought by the AFGE was appropriate for the purpose of exclusive recognition under the Order. He noted that the livestock inspectors are dispersed throughout the State of Wisconsin, each to an assigned territory, and that they have minimal contact with the other employees of the Wisconsin Division of Animal Health. Further, they possess specialized and technical skills different from those of other Activity employees; no progression exists from any of the other job classifications to that of livestock inspectors and vice versa; and livestock inspectors have working conditions that are different from the other employees in the Activity. Under these circumstances and noting that Section 10(b) permits the establishment of a unit on a functional basis and that the Activity and the AFGE agreed as to the appropriateness of the unit sought, the Assistant Secretary directed an election in the claimed unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF  
AGRICULTURE, ANIMAL AND PLANT  
HEALTH INSPECTION SERVICE,  
VETERINARY SERVICES-ANIMAL  
HEALTH PROGRAM,  
MADISON, WISCONSIN <sup>1/</sup>

Activity

and

Case No. 50-5598(25)

LOCAL 3289, AMERICAN  
FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Stephen F. Jeroutek. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Local 3289, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks a unit composed of all nonsupervisory livestock inspectors employed by the United States Department of Agriculture, Animal and Plant Health Inspection Service

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<sup>1/</sup> The name of the Activity appears as amended at the hearing.

in the State of Wisconsin, excluding supervisors, professionals, management officials, guards, laboratory technicians, clerical employees and employees engaged in Federal personnel work in other than a purely clerical capacity.<sup>2/</sup> The Activity agrees with the AFGE that the unit sought is appropriate. It takes the position that employees in the claimed unit share a clear and identifiable community of interest separate and apart from other employees of the Activity and that the establishment of such a unit would be consistent with the Agency's practice of recognizing bargaining units along functional lines where the employees are dispersed geographically and are expected to perform their duties in a relatively independent manner. The Activity asserts further that the functional unit petitioned for herein would promote effective dealings and efficiency of agency operations.

The mission of the United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) is the prevention, eradication and control of animal and plant diseases. Included among its functions is the inspection of meat and poultry prior to their sale to the consumer. APHIS also administers Federal animal and plant health programs in cooperation with State governments.

Overall administration and management of APHIS is vested in an Administrator located in a headquarters facility in Washington, D. C. Reporting to the Administrator at the headquarters level is the Associate Administrator for Animal and Plant Health Programs, who has responsibility for administration of the Veterinary Services Program and the Plant Protection and Quarantine Program. In order to administer the Animal Health Programs, which constitute a subdivision within the Veterinary Services Program, the following 4 regions have been established along geographic lines: Northeastern, North Central, Southeastern and Western. The mission of each region is to provide leadership and coordination within the regional area involved in regard to the protection of the health of livestock and poultry. The regions are under the supervision of regional directors, all of whom are located in Hyattsville, Maryland. In this regard, the record reveals that the regional directors are concerned primarily with meeting overall goals and objectives of the program rather than with the day-to-day operation of particular programs within a particular region.

Wisconsin is one of the 13 States which comprise the North Central Region. The Animal Health Program in Wisconsin is a joint State-Federal program and is located in the Division of Animal Health of the Wisconsin

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<sup>2/</sup> The proposed unit appears as amended at the hearing.

Animal Health Program. The Division is headed by an Administrator, assisted by an Associate Administrator, both of whom are employed jointly by the Wisconsin Department of Agriculture and the United States Department of Agriculture. It is made up of three basic entities: the Bureau of Field Services, the Bureau of Administrative Services, and the Bureau of Technical Services.

The evidence establishes that the Bureau of Technical Services includes laboratory technicians who work at either the Central Animal Health Disease Laboratory in Madison, Wisconsin or at the Regional Animal Health Disease Laboratory in Baron, Wisconsin. These employees perform the required testing and laboratory work needed to carry out the functions of various programs of the Division. Within the Bureau of Technical Services, both employees of the Federal government and the Wisconsin State government work side by side in the laboratories. The record reveals that their work is confined essentially to the laboratories.

The Bureau of Administrative Services contains clerical employees who account for a substantial proportion of the Bureau's total employment. These employees perform the clerical work required by the Division and are employed by either the State or Federal government. They are responsible for, among other things, typing the reports submitted by the livestock inspectors in the petitioned for unit.

The Bureau of Field Services encompasses all of the Division's field employees, including livestock inspectors and veterinarians. It consists of the Brucellosis Ring Test Unit and the Investigation Section consisting of 3 investigation units and 3 field section units. The employees in the unit petitioned for in the instant case are employed in the Investigation Section.

The record reveals that the Chief of the Investigation Section is a State employee who functions basically as a staff officer. He develops regulations from a State standpoint and when there are State prosecutions to be made, he signs the warrants and functions as the prosecutor in such cases. In performing his job functions, he has little or no direct supervision over the investigators in the field. The Assistant Chief of the Investigation Section, who is a Federal employee, is responsible for the performance of the State and Federal livestock inspectors employed by the Section. He makes the work assignments and is responsible for checking to ensure that such assignments are completed satisfactorily. The livestock inspectors under his supervision are assigned throughout the State to particular geographical areas. The record indicates that established qualifications for the job of livestock inspector include at least 3 years experience in the handling or raising of livestock or other

activities which would provide a basic familiarity with livestock and their diseases. Livestock inspectors are charged with the enforcement of various Federal and State laws and regulations pertaining to animal health. In this connection, the inspectors meet with livestock dealers, representatives of the livestock trucking industry, and also make inspections at packing plant establishments, livestock auctions and markets. In addition, they deal with individual farmers on various problems concerning livestock diseases and the illegal movement of animals. The livestock inspectors prepare written reports on their various cases which are sent to the Assistant Chief of the Investigation Section who, in turn, forwards them to the clericals in the Bureau of Administrative Services for final typing. Due to the nature of their work, the livestock inspectors' workweek consists of a "first 40 hours" tour of duty,<sup>3/</sup> while clericals and laboratory technicians in the other two Bureaus work a regular 8-hour day and 40-hour week. The livestock inspectors' irregular work schedule is required because they must attend sales and auctions which may last for more than eight hours each day requiring inspection of herds at odd times. The evidence establishes that there is virtually no interchange between livestock inspectors in one State with those of another except in emergencies when all available inspectors may be sent to a specific crisis area. However, when the particular crisis involved is over, the inspectors return to their home State. Except as noted above, they have no contact with the clericals of the Bureau of Administrative Services.<sup>4/</sup> Nor do they have significant job contacts with the laboratory technicians of the Bureau of Technical Services. Thus, the inspectors, for the most part, do their own laboratory work on test samples they have taken in the field. When such samples require more comprehensive testing, the inspectors contact the Assistant Chief who has a laboratory technician sent out to the field to perform such testing. However, the record indicates that the need for more comprehensive testing occurs on an infrequent basis. The record reveals also that because of the particular qualifications required for a livestock inspector position, there has been no progression from the laboratory technician or clerical positions into that of a livestock inspector or vice versa.

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<sup>3/</sup> Thus, during the course of a workweek, their duty is ended when they have worked 40 hours without regard to the day during the workweek in which the 40-hour limit is reached. For example, a livestock inspector could work 15 hours on Monday, 15 hours on Tuesday and 10 hours on Wednesday to satisfy his 40-hour week requirement.

<sup>4/</sup> As noted above, although the clericals type the final drafts of the inspectors' reports, they receive the rough drafts of such reports from the Assistant Chief. Consequently, inspectors and the clericals do not have direct job contacts.

Based on the foregoing, I find that the unit sought by the AFGE is appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, the record establishes that the livestock inspectors in the claimed unit are dispersed throughout the State of Wisconsin, each to an assigned territory, and that they have a minimal contact with the other employees of the Division or livestock inspectors in other States. It reveals also that they possess specialized and technical skills different from those of other Activity employees, that there is no progression from other job classifications to that of livestock inspector and vice versa, and that the livestock inspectors have working conditions which are different from the other employees of the Activity. Under these circumstances, and noting that Section 10(b) of the Order permits the establishment of a unit on a functional basis 5/ and the fact that the Activity and the AFGE agree as to the appropriateness of the unit sought, I find that the employees in the claimed unit share a clear and identifiable community of interest and that such unit will promote effective dealings and efficiency of agency operations.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All livestock inspectors employed by the United States Department of Agriculture, Animal and Plant Health Inspection Service in the State of Wisconsin, excluding professional employees, laboratory technicians, clerical employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

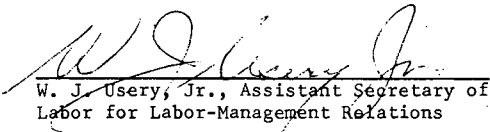
An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough,

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5/ Cf. Department of Health, Education and Welfare, Center for Disease Control, Atlanta, Georgia, A/SLMR No. 132.

including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 3289, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.  
February 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

March 2, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION, ORDER CLARIFYING UNIT,  
AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

FEDERAL AVIATION ADMINISTRATION,  
GREAT LAKES REGION,  
CHICAGO AIRPORTS DISTRICT OFFICE  
A/SLMR No. 250

The subject case involves (1) an RA petition filed by the Activity seeking an election in a unit currently represented exclusively by Local 1300, National Federation of Federal Employees, Independent (NFFE) on the grounds that it has a good faith doubt as to the NFFE's continuing majority status, and (2) a petition for clarification of unit (CU) filed by the NFFE seeking to reflect a change in the designation of the Activity resulting from a reorganization of the Activity's operations. The NFFE agreed that the unit involved was appropriate but contended that the RA petition should be dismissed because the Activity did not have sufficient grounds to support a good faith doubt as to its majority status. Both parties stipulated to the proposed change in the Activity's designation.

Regarding the RA petition, the Assistant Secretary determined that because Section 202.2(b) of the Assistant Secretary's Regulations, which was in effect at the time the RA petition was filed, provided that an agency or activity may petition for and obtain an election to determine if a labor organization should cease to be the exclusive representative of its employees where the agency or activity has a good faith doubt that such labor organization represents a majority of the employees in the unit, the issue as to whether an election should be held in the subject case was dependent upon an evaluation of the evidence presented in support of the Activity's alleged good faith doubt as to the NFFE's majority status in the unit. The Assistant Secretary determined that an evaluation of the evidence in the subject case established that the Activity had a good faith doubt as to the NFFE's continued majority status. In this regard, the Assistant Secretary noted that there were no employees on check-off; the NFFE had processed only one grievance after it achieved recognition; there were only four unit employees currently employed who were employed at the time the NFFE achieved its status as exclusive bargaining representative; and a unit employee, who was a vice-president of the NFFE and who had been designated by the NFFE as its official

representative in the unit, advised the Activity prior to the hearing that he did not know if the NFFE was still the bargaining agent for the unit employees. The Assistant Secretary further noted that the NFFE's representative conceded at the hearing in this matter that because of personnel changes which resulted from the reorganization of the Activity's operations, he was uncertain as to whether the NFFE represented a majority of employees in the unit after the reorganization. Under all of these circumstances, the Assistant Secretary directed an election in the appropriate unit.

Regarding the CU petition, noting the agreement of the parties and the absence of any evidence that such agreement was inconsistent with the purposes and policies of the Order, the Assistant Secretary issued an order clarifying the unit to reflect the current designation of the Activity. In his decision, the Assistant Secretary noted that under the current Regulations a petition for amendment of recognition or certification, rather than a CU petition, is the appropriate vehicle for seeking a change in the designation of an activity.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
GREAT LAKES REGION,  
CHICAGO AIRPORTS DISTRICT OFFICE

Activity-Petitioner 1/

and

Case No. 50-5522

LOCAL 1300, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, INDEPENDENT

Labor Organization

FEDERAL AVIATION ADMINISTRATION,  
GREAT LAKES REGION,  
CHICAGO AIRPORTS DISTRICT OFFICE

Activity

and

Case No. 50-5529

LOCAL 1300, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, INDEPENDENT

Petitioner

DECISION, ORDER CLARIFYING UNIT,  
AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer J. Edward Kasen. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

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1/ The name of the Activity-Petitioner appears as amended at the hearing.

The Activity-Petitioner in Case No. 50-5522 filed an RA petition seeking an election in a unit consisting of all of its professional engineers, excluding nonprofessional employees, clericals, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors and guards as defined in the Order.<sup>2/</sup> This unit currently is represented on an exclusive basis by Local 1300, National Federation of Federal Employees, Independent, herein called NFFE. The Activity contends that an election should be conducted because it has a good faith doubt that the NFFE currently represents a majority of the employees in the appropriate unit.<sup>3/</sup> The NFFE agrees that the unit involved herein is appropriate but contends that the RA petition should be dismissed because the Activity does not have sufficient grounds to support a good faith doubt as to the NFFE's majority status.

In Case No. 50-5529, the NFFE filed a petition for clarification of unit (CU) seeking to reflect a change in the designation of the Activity which resulted from a reorganization of the Activity's operations. In this connection, at the hearing the Activity agreed with the NFFE's position concerning the proposed change in the former's designation.<sup>4/</sup>

The Federal Aviation Administration (FAA), which is engaged in providing for the safe and expeditious flow of air traffic, accorded the NFFE recognition as exclusive bargaining agent of the employees in the unit involved herein on November 2, 1969, as the result of a representation election held under Executive Order 10988. At the time of the election, the FAA was divided into five regions which, in turn, were divided into geographic subdivisions administered by area offices. Each area office was responsible for all of the FAA activities within

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2/ The unit appears as amended at the hearing. The record reveals that the unit consists of civil engineers who are engaged in providing expert advice and assistance to the aviation industry and the general public on airport design and construction under Federal airport and development programs.

3/ Initially, the Activity contended the unit involved herein had been abolished as a result of a reorganization. However, at the hearing, the parties stipulated that the previously recognized unit remained in existence after the reorganization and that such unit is appropriate for the purpose of exclusive recognition under the Order.

4/ At the time the NFFE filed its petition it also sought a finding that the unit herein had not been abolished as a result of the Activity's reorganization. In view of the parties' stipulation at the hearing that the unit had not been abolished, I find that this matter was rendered moot. Further, it should be noted that under the Assistant Secretary's current Regulations a petition for amendment of recognition or certification, rather than a CU petition, is the appropriate vehicle for seeking a change in the designation of an activity.

the area under its jurisdiction. The area offices administered a number of branch offices, each of which was responsible for administering a particular facet of FAA activities within a specific geographic area.

The Chicago Airports Branch Office, the office in which the employees involved herein were employed, formerly was under the jurisdiction of the Chicago Area Office which was a subdivision of the FAA's Central Region. On April 1, 1971, the FAA effectuated a reorganization plan which increased the number of regions from five to nine and abolished the area offices. One of the new regions created by the reorganization was the Great Lakes Region. During the reorganization, which was completed on or about August 1, 1971, the Chicago Airports Branch Office became a District Office of the Great Lakes Region, and it was renamed the Chicago Airports District Office.<sup>5/</sup> The record reflects that the reorganization did not affect significantly the mission of this Office. Nor did it affect the duties and responsibilities of the unit employees employed therein. As noted above, the parties stipulated that the exclusive bargaining unit remained intact after the reorganization and that such unit continues to be appropriate for the purpose of exclusive recognition under the Order.

The evidence establishes that the reorganization resulted in a decrease in the number of employees in the unit from approximately 16 to 11. Of the 11 employees who were in the unit immediately after the reorganization was effectuated, 6 had been in the unit prior to the reorganization and 5 were transferred into the unit from other positions.<sup>6/</sup> Currently, there are only four employees in the unit who were employed at the time the representation election was held under Executive Order 10988. Further, the record reveals that a unit employee--who was a vice president of the NFFE and who had been designated by the NFFE as its official representative in the unit--advised the Activity approximately eight months prior to the hearing in this matter, but subsequent to the filing of the Activity's RA petition, that he did not know if the NFFE was still the bargaining agent for the unit employees, and that, in any event, he no longer believed there was a need for the NFFE's representation in the unit. In this connection, the evidence establishes that the last unit employee on check-off revoked his check-off authorization for the NFFE prior to April 1, 1971,

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<sup>5/</sup> The Chicago Airports District Office is one of four such district offices within the Great Lakes Region.

<sup>6/</sup> The employees who were removed from the unit were given other assignments in the Region, including assignments to the Regional Headquarters and other district offices.

and that the NFFE processed only one grievance since it became the exclusive bargaining representative of the unit employees in 1969. Moreover, while the NFFE contends, among other things, that it represented a majority of the unit employees prior to April 1971, as well as at the time the RA petition herein was filed on September 13, 1971, at the hearing the NFFE's representative conceded that the NFFE was uncertain as to whether it represented a majority of the unit employees after the effectuation of the reorganization because of the changes in the personnel in the unit. The NFFE's representative stated further that the NFFE did not have more than two or three members in the unit subsequent to the reorganization and that it was not aware as to whether it had any other supporters.

Under Section 202.2(b) of the Assistant Secretary's Regulations, in effect at the time the RA petition herein was filed, an agency or activity may petition for and obtain an election to determine if a labor organization should cease to be the exclusive representative where the agency or activity has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in the unit. Therefore, whether or not an election may be held in the subject case is dependent upon an evaluation of the evidence in support of the Activity's alleged good faith doubt as to the NFFE's majority status in the unit.<sup>7/</sup>

Under the circumstances set forth above, I find that the Activity had a good faith doubt with respect to the NFFE's continued majority status in the unit and that, therefore, an election is warranted in this matter. In this regard, particular note is taken of the facts that there are no unit employees currently on check-off; that the NFFE processed only one grievance after it achieved recognition in 1969; that there are only four unit employees currently employed who were employed at the time the representation election was held under Executive Order 10988; and that a unit employee, who was a vice-president of the NFFE and who had been designated by the NFFE as its official representative in the unit, advised the Activity prior to the hearing in this matter that he did not know if the NFFE was still the bargaining agent for the unit employees. It is noted further that at the hearing in this matter, the NFFE's representative conceded that because of personnel changes in the unit resulting from the reorganization, he was uncertain as to whether the NFFE represented a majority of the employees in the unit after the reorganization.

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<sup>7/</sup> Cf. Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

I find that, when viewed in their totality, the circumstances noted above are sufficient to support a good faith doubt by the Activity as to the NFFE's majority status and that it will effectuate policies and purposes of the Executive Order to accord the unit employees an opportunity to express their desires with respect to continued exclusive representation. Accordingly, I shall direct an election in the appropriate unit. Further, in accord with the agreement of the parties, and in the absence of any evidence that such agreement is inconsistent with the purposes and policies of the Order, I shall order that the unit herein be clarified to reflect the current designation of the Activity.

ORDER

IT IS HEREBY ORDERED that the unit for which recognition was granted under Executive Order 10988 in behalf of Local 1300, National Federation of Federal Employees, Independent, be, and it hereby is, clarified by changing the designation of the Activity from the Chicago Airports Branch Office to the Chicago Airports District Office.

Based on the foregoing, I find the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

All professional engineers of the Federal Aviation Administration, Great Lakes Region, Chicago Airports District Office, excluding all nonprofessional employees, clericals, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.<sup>8/</sup>

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are

<sup>8/</sup> The parties stipulated and the record supports that employees in the appropriate unit are professional employees within the meaning of the Order.

employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 1300, National Federation of Federal Employees, Independent.

Dated, Washington, D.C.  
March 2, 1973

W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations



March 2, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS  
A/SLMR No. 251

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This case involves an unfair labor practice complaint filed by Local 2816, American Federation of Government Employees, AFL-CIO (Complainant) against the Office of Economic Opportunity, Region V, Chicago, Illinois (Respondent), alleging that the Respondent violated Section 19(a)(6) of Executive Order 11491 by failing to negotiate with the Complainant concerning working conditions at the Respondent's new location.

The Complainant had represented exclusively the employees of the Respondent since 1968. On April 13, 1971, the Complainant and other locals of the American Federation of Government Employees, AFL-CIO (AFGE) requested to meet with the "Regional Council Directors" to negotiate certain matters in connection with the move of several agencies to a new location. On April 27, 1971, the Respondent offered to meet and confer with the Complainant on matters involved in the move. The following day, April 28, 1971, the parent organization of the Complainant was certified as the exclusive representative for a nationwide unit of employees of the Office of Economic Opportunity (OEO), including employees in the unit represented by the Complainant.

The Administrative Law Judge found that the Respondent did meet and confer with representatives of the Complainant on a continuing basis prior to the move, and that, in these circumstances, the Respondent fulfilled its obligation to negotiate under Section 19(a)(6) of the Order. In arriving at his decision, the Administrative Law Judge found it unnecessary to consider the Respondent's motion to dismiss the complaint on the grounds that the Respondent had no obligation to negotiate with the Complainant as the latter was not the exclusive bargaining representative of the unit employees after April 28, 1971, when the certification of the nationwide unit, including the unit represented by the Complainant, occurred.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the case, the Assistant Secretary concluded that when a labor organization acquires exclusive recognition in a nationwide unit that encompasses previously recognized, less comprehensive units, such less comprehensive units cease to exist. In this connection, he noted that the Study Committee, in its Report and Recommendations (1969), stated that when national exclusive recognition

has been granted, ".....no recognition should be granted to any other labor organization for employees within the national exclusive unit." The Assistant Secretary held, therefore, that under the circumstances of the case, once the parent organization was certified on April 28, 1971, as the exclusive representative of a nationwide unit, including the unit represented by the Complainant, the Complainant's recognitional status was, in effect, terminated and the Respondent was not obligated to meet and confer with the Complainant absent evidence that the Complainant or its representatives had been authorized by the national exclusive bargaining representative to bargain on its behalf. Accordingly, the Assistant Secretary sustained the Respondent's motion to dismiss the complaint.

Moreover, the Assistant Secretary found, in agreement with the Administrative Law Judge, that even if there was an obligation to negotiate with the Complainant, the Respondent had fulfilled such obligation during numerous sessions held between the parties prior to the move into the new quarters.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-5583

LOCAL 2816, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On November 8, 1972, Administrative Law Judge Arthur M. Goldberg issued his Report and Recommendation in the above-entitled proceeding, finding that the Office of Economic Opportunity, Region V, Chicago, Illinois, herein called Respondent, had not engaged in the unfair labor practice alleged, and recommending that the complaint be dismissed. Thereafter, Local 2816, American Federation of Government Employees, AFL-CIO, herein called Complainant, filed exceptions to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation to the extent consistent herewith.

The complaint in the instant case alleged, in effect, that the Respondent violated Section 19(a)(6) of Executive Order 11491 by failing to negotiate concerning working conditions at the Respondent's new location.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendation, and I shall repeat them only to the extent necessary.

The Complainant had represented exclusively the employees of the Respondent since 1968. On April 13, 1971, the Complainant, along with

three other locals of American Federation of Government Employees, AFL-CIO (AFGE) representing employees of other agencies in the Chicago area, sent a joint telegram requesting to meet with all "Regional Council Directors" 1/ to negotiate certain matters in connection with an upcoming move of several agencies to a new location. It appears that, thereafter, the Regional Council indicated that the individual agencies would meet with those labor organizations which had been accorded exclusive recognition by the particular agency involved. Accordingly, on April 27, 1971, the Respondent offered to meet and confer with the Complainant on matters involved in the move. The following day, April 28, 1971, the parent organization of the Complainant was certified as the exclusive representative for a nationwide unit of employees of the Office of Economic Opportunity (OEO), including employees in the unit represented by the Complainant.

The record shows, and the Administrative Law Judge found, that between late April or early May 1971 and continuing sometime in October 1971, just prior to the move, the Respondent met and conferred with representatives of the Complainant on a number of occasions. In this regard, the Administrative Law Judge found that during this period of the several months prior to the move, representatives of the Respondent met on a continuing basis with representatives of the Complainant and discussed all matters raised between them regarding conditions of employment to be established in the new offices. He concluded that in these circumstances the Respondent had fulfilled its obligation to negotiate under Section 19(a)(6) of the Order.

In arriving at his conclusion, the Administrative Law Judge found it unnecessary to consider, among other things, 2/ the Respondent's motion to dismiss the complaint on the grounds that it had no obligation to negotiate with the Complainant as the latter was not the exclusive bargaining representative of the unit employees after April 28, 1971, when the parent organization of the Complainant was certified as the exclusive representative for a nationwide unit encompassing the unit represented by the Complainant. In its exceptions to the Administrative Law Judge's Report and Recommendation, the Complainant noted the failure of the Administrative Law Judge to reach this issue, and restated its position that it did not lose its exclusive representative status even though the parent organization of the Complainant received certification for a nationwide unit.

1/ The Regional Council is composed of the Regional Directors or Administrators of the Department of Health, Education and Welfare, the Office of Economic Opportunity, the Department of Labor, the Department of Housing and Urban Development and the Department of Transportation.

2/ In view of the disposition herein, I find it unnecessary to pass upon the Respondent's motion to dismiss on the grounds that the request to negotiate in this matter was for meetings with a multi-employer group and multi-employer bargaining is not required by the Executive Order.

In my view, when a labor organization acquires exclusive recognition in a nationwide unit that encompasses previously recognized, less comprehensive exclusive bargaining units, such less comprehensive units cease to exist. Thus, the Study Committee, in its Report and Recommendations (1969), stated:

When national exclusive recognition has been granted in an appropriate national unit, no recognition should be granted to any other labor organization for employees within the national exclusive unit. This does not preclude consultation or negotiation at any level with representatives of the nationally recognized exclusive union.

Under the circumstances of the instant case, therefore, once the parent organization of the Complainant was certified on April 28, 1971, as the exclusive representative in a nationwide unit, including the unit represented by the Complainant, the latter's recognitional status was, in effect, terminated. Thus, thereafter, the Respondent was not obligated to meet and confer with the Complainant absent evidence that the latter or its representatives had been authorized by the national exclusive bargaining representative to bargain on its behalf. 3/ In these circumstances, I sustain the Respondent's motion to dismiss on the basis that at all times material herein there was no bargaining obligation owed to the Complainant. 4/

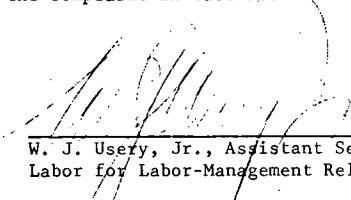
Moreover, in agreement with the Administrative Law Judge, I find that even assuming an obligation to negotiate with the Complainant existed, under the circumstances of this case the Respondent fulfilled such obligation during the numerous sessions held between the parties prior to the move into the new quarters.

Accordingly, in accordance with the recommendation of the Administrative Law Judge, I shall order that the complaint herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-5583 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
March 2, 1973

  
\_\_\_\_\_  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

3/ There was no evidence in the instant case that such an authorization was granted to the Complainant or its representatives.

4/ I find it unnecessary to decide whether, under other circumstances, negotiations with individuals who were not designated as agents or representatives of the certified exclusive bargaining representative may constitute a violation of the Order.

-3-

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

OFFICE OF ECONOMIC OPPORTUNITY  
REGION V, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-5583

LOCAL 2816, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

Mr. Wayne Kennedy, Chicago, Ill.  
For the Complainant

Eugene Ring, Esq., Office of the  
Regional Director, Office of  
Economic Opportunity, Region  
V, Chicago, Ill.  
For the Respondent

Before: Arthur M. Goldberg  
Administrative Law Judge

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATION

This proceeding was heard in Chicago, Illinois, on July 18, 1972, pursuant to an Order Rescheduling Hearing issued on June 28, 1972, 1/ by the Regional Administrator for the Chicago Region. This matter arises under Executive Order 11491

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1/ The original Notice of Hearing issued on May 19, 1972.

(hereinafter called the Order) pursuant to Section 203.8 of the Rules and Regulations of the Assistant Secretary for Labor-Management Relations (hereinafter called the Assistant Secretary). It was initiated by a Complaint filed on October 29, 1971, 2/ by Local 2816, American Federation of Government Employees, AFL-CIO (hereinafter called the Union or the Complainant) alleging that the Office of Economic Opportunity, Region V, Chicago, Illinois (hereinafter called the Respondent or OEO) had violated Section 19(a)(6) of the Order by failing to negotiate concerning working conditions at the Respondent's new location.

At the opening of the hearing the Respondent moved to dismiss the complaint on a number of grounds. First, Respondent contended that the request to negotiate was for meetings with a multi-employer group including, in addition to Respondent, the Department of Health, Education and Welfare, Department of Transportation, Department of Labor and the Department of Housing and Urban Development. Respondent moved to dismiss on the ground that multi-employer bargaining is not required by Executive Order 11491. Second, the motion to dismiss was based on the displacement of the Complainant as bargaining representative of the unit employees by a Certification as exclusive representative issued on April 28, 1971, to the American Federation of Government Employees, AFL-CIO, the Complainant's parent body. Ergo, Respondent argued it had no duty to negotiate with Complainant after certification of the parent body.

Respondent's motion to dismiss was denied with the observation that "these are not matters which I believe should be decided orally from the bench."

All parties were represented at and participated in the hearing and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. Oral argument was waived, Respondent filed a brief and the Complainant filed a lengthy telegram in support of its position.

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2/ Unless otherwise noted all dates hereinafter were in 1971.

Upon the entire record in the case, from my reading of the post-hearing statements of position, and from my observation of the witnesses and their demeanor, I make the following:

#### FINDINGS OF FACT

##### I. Background

The Union was the exclusive bargaining representative of the employees in Region V of the Office of Economic Opportunity until its parent body was certified on April 28, 1971, for a unit of "All non-supervisory GS and WG employees including professionals of the Office of Economic Opportunity, Nationwide." 3/ Pursuant to that certification a collective bargaining agreement was entered into on March 31, 1972 between OEO and "the American Federation of Government Employees AFL-CIO representing the National Council of OEO Locals for OEO employees."

A move of OEO's Chicago office to 300 South Wacker had been under consideration for some time when, on April 13, 1971, 4/ the following telegram was addressed to Wendell Verduin, Regional Director of OEO's Region V in Chicago:

Pursuant to Executive Order 11491 the undersigned requests to meet with all Regional Council Directors to negotiate the following items for the 300 South Wacker building (1) day care (2) health clinic (3) credit union (4) vending machines (5) union offices (6) office landscaping (7) non-profit cafeteria (8) shuttle service to commuter lines (9) reduced parking (10) rest and recreation facilities including physical fitness (11) flexible working hours (12) career development training institute (13) consolidated personnel offices (14) comprehensive library service. We further request to meet with all directors to negotiate implementation of our affirmative action survey request in order to jointly mount high impact social programs to enable low income and minority

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3/ Case No. 22-2299(RO).

4/ Unless otherwise noted all dates hereinafter were in 1971.

citizens to qualify for federal employment and upward mobility. The Chicago Federal system must be reformed in order to respond to pressing social needs and to serve as a responsible employer. We look forward to meeting with you in order to place the five socioeconomic agencies and the entire Chicago Federal system into the main stream of social change.

/s/ Wayne Kennedy, Co-Chairman  
Chicago Council AFGE Locals

Jack Riordan, President  
FGHUD Local 911

Manuel Juarez, President  
FGEO Local 2816

George Anderson, President  
FGDOL Local 648

Donald Jones, President  
FGHEW Local 1395

Allen Kaplan, FG National  
Vice-President

Stanley Stern, a witness for Respondent, 5/ testified that the Regional Council is a coordinating body of the various government agencies occupying the office space involved in these proceedings. After receipt of the telegram set forth above the several agencies determined that they would meet individually with the local unions authorized to represent their employees. Further, some of the agencies dealt with their employees' representatives through their Washington headquarters and the employees of certain of the agencies

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5/ During the events herein Stern was Deputy Regional Director for Administration for OEO. At the time of the hearing herein Stern occupied the position of Special Assistant to the Regional Director for Regional Council.

- 4 -

were not represented by unions. Accordingly, on April 27 Stern sent the following telegram to Manuel Juarez, the Complainant's president:

This is in response to the telegram of April 13, 1971, from you and Messrs. Kennedy, Riordan, Anderson, Jones, and Kaplan to me, wherein you requested all Regional Council Directors to negotiate certain listed items for the 300 South Wacker Building and to negotiate implementation of your affirmative action survey request.

We are advised that the Regional Council has responded to the telegram by suggesting that negotiations of the various items pertaining to the 300 South Wacker Building be undertaken between each individual agency and the particular labor organization that has been accorded recognition by that agency.

The Regional Office is willing to meet with Local 2816 and confer with respect to those items in your list which can be dealt with by our agency. Please advise with regard to a meeting time. We will attempt to define the fourteen items and discuss the progress.

On April 28 the Area Administrator acting for the Assistant Secretary issued a certification to the American Federation of Government Employees, AFL-CIO, for a unit of all OEO non-supervisory GS and WG employees including professionals, nationwide, including Respondent's employees. Thus, the bargaining unit represented by the Complainant merged into the AFGE's nationwide unit.

Sometime in April or May the Union elected a three member building committee to meet with OEO management about conditions to pertain in the new quarters. 6/

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6/ Testimony of Michael Kane, chairman of the Union's building committee.

- 5 -

II. Negotiations Between Respondent  
and the Union

Union Office

The following account of the meetings and negotiations between the Union and Respondent is based on a synthesis of the testimony of Michael Kane, a Union witness, and that of Stanley Stern, the Respondent's only witness. Because I find that the record evidence establishes that over a period of months OEO met and negotiated with the Union concerning conditions in the new office quarters, irrespective of any legal defenses raised by Respondent's motion to dismiss the complaint, I shall recommend dismissal of the complaint herein.

Between late April or early May and continuing sometime in October, just prior to the move into the new quarters, the Union's building committee met between six and ten times with OEO management. Certain of these meetings were formal in nature, others were more casual. In addition, there were other discussions about the subject of the negotiations between Stern and Kane when they chanced upon each other in the office. By subject matter the following negotiations took place.

Floor plans for the new building

Floor plans and the placement of employees in the new office space was discussed from the time management and the building committee first met in April or May until the last meeting in October. From the start the union representatives expressed their displeasure with the placement of the employees, the lack of private offices and the pressure on them to approve the proposed plans. Stern testified that OEO was under pressure from the General Services Administration (hereinafter called GSA) to submit final plans. The Union agreed to the assignment of offices to supervisors and employees at grade GS-13 and above. During the meetings the Union noted that one supervisor had been omitted from the list of those assigned to private offices and management modified the plans accordingly. Stern pointed out to the building committee that they had to work within GSA rules on the assignment of space and offices on the basis of grade and responsibility and that neither management nor the Union was free to operate outside of GSA guidelines.

Despite GSA regulations against assignment of office space to the employees' representative OEO did so, setting aside an inside office for the Union's use and marking the space on the plan submitted to GSA as an "inspector's" office. During the course of the meetings the Union's building committee asked for a window office for the Union. The inside office initially assigned to the Union by OEO is presently used for that purpose.

Office Furniture

Kane testified that the Union's building committee was advised by OEO management that new furniture was to be purchased for employees in Grades 1 through 12. He recalled that this matter came up early in the meetings, probably at the first session in May. At that time Respondent solicited the committee's "input" in looking for new furniture. The committee was shown a furniture catalogue and in June arrangements were made for the committee to visit the supplier's showroom.

In addition to concern about the cost of the new furniture, after the visit to the showroom, the Union building committee was troubled by an apparent failure by the furniture supplier to comply with minority hiring requirements. Subsequently, a charge was filed alleging that the supplier was violating equal employment standards.

Kane testified that sometime before July 1 he attended a meeting with Stern and top level representatives of the Department of Health, Education and Welfare, Labor and Housing and Urban Development at which the decision on ordering furniture was made. 7/

Vending Machines and Cafeteria

The issues of profits from the vending machines in the new building and the operation of a non-profit cafeteria by a

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7/ In this instance, in effect, the Union's representatives participated in discussions with the members of the Regional Council.

minority firm became intertwined during the meetings. The Union building committee asked that the vending machine profits be used for an employee benefit club. Respondent was advised by GSA that such profits had to flow to the blind. OEO passed on this information to the Union representatives. As to the cafeteria the building committee suggested that it be operated by a minority business firm to provide minority employment. Here again, although Respondent agreed with the Union's goal as it had in the case of vending machine profits, GSA requirements as to capital investment in the cafeteria operation precluded carrying out the purpose agreed to by the Union and Respondent.

The contract finally let by GSA for operation of the vending machines and the cafeteria was to a private firm and the profits from both operations were for the benefit of the private contractor.

#### Health Clinic

Stern and Kane agreed that the subject of a health clinic arose early in the meetings. However, neither could testify with any particularity about the discussions.

Stern testified that a health clinic was scheduled to open in the new building a week after the date of the hearing herein.

#### Day Care Center

Kane recalled that the building committee had asked about the manner in which a union representative had been selected to serve on a committee investigating the possibility of day care facilities in the new building. The building committee took the position that it was the union which should select its representative.

Stern testified that he had tried to raise the issue of day care facilities with the building committee but they had disclaimed authority to negotiate on the subject. Thereafter, Stern conducted his own survey among Respondent's employees as to their interest in such a service.

#### Office Landscaping

Office landscaping played a prominent role throughout the discussions between Respondent and the Union building committee. Office landscaping is a technique of partitioning open office space by the use of sound deadening screens and noise absorbing furniture.

The Union representatives were concerned about the noise level in the office. Stern testified that management supplied the building committee with catalogues of the office landscaping equipment, arranged for the Union representatives to see the furniture which would be used and finally gave the Union a commitment in writing that if the noise factor exceeded stated limits additional acoustical screens would be added.

#### Flexible Working Hours and Additional Commuter Services

The Union building committee expressed its concern early in the meetings about the large number of employees leaving the building at the same time.

Stern testified that he discussed the idea of staggered working hours with Kennedy of the Union and thereafter learned through the Regional Council that HEW, the largest employer in the building, would be arriving and leaving 15 minutes earlier than the other tenants and thus the anticipated problem would not arise. Accordingly, OEO did not change its own schedule of hours.

Stern also testified that with the building committee he studied the schedules of available bus routes and agreed to look into the possibility of arranging for the Chicago Transit Authority to provide additional bus service after the move into the new building.

Stern testified without contradiction that there was at the time of the hearing a shuttle service provided by the transit authority.

Credit Union

Stern testified that he had discussed a detailed suggestion for a building credit union with LeRoy King, who was at that time president of the Union. Stern stated that at the time of the hearing a credit union had been opened in the building and was available for all employees.

Reduced Rate Parking

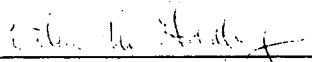
Stern testified that in August or September he discussed with the building committee an investigation of the possibility of securing reduced rate parking for employees to be housed in the new building. However, despite these efforts they were unsuccessful in locating such reduced rate parking space.

CONCLUSIONS

As noted above, although the Respondent raised several legal defenses going to its duty to negotiate with the Union following certification of AFGE for a nationwide unit of OEO employees, I find it unnecessary in deciding this case to reach those legal defenses. Although the testimony offered by Kane and Stern, the only two witnesses who participated in the meetings between Respondent and the Union's building committee, differs in some respects, this variance arises primarily from failure of memory rather than divergent accounts of the discussions which were held. Viewed as a whole I find that their testimony establishes that during the period commencing late in April or early in May and continuing until Respondent moved into its new quarters in October, OEO met on a continuing basis with the Union's representatives, discussed without limitation all matters raised by the building committee and indeed on its own raised matters pertaining to the employment conditions in the new premises and within the strictures laid down by GSA sought to accommodate its own views as to the conditions of employment to be established in the new offices with those of the Union. Thus, I find that the Respondent fulfilled its obligations to negotiate with the Union set forth in Section 19(a)(6) of the Order.

RECOMMENDATIONS

Upon the basis of the foregoing findings and conclusions it is recommended that the Complaint against the Respondent, Office of Economic Opportunity, Region V, Chicago, Illinois, Case No. 50-5583, be dismissed.

  
\_\_\_\_\_  
Arthur M. Goldberg  
Associate Chief Administrative  
Law Judge

Dated at Washington, D. C.  
November 1, 1972



March 2, 1973

A/SLMR No. 252

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT OF THE ASSISTANT  
SECRETARY PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

CALIFORNIA AIR NATIONAL GUARD  
HEADQUARTERS, 163rd FIGHTER GROUP,  
ONTARIO INTERNATIONAL AIRPORT,  
ONTARIO, CALIFORNIA  
A/SLMR No. 252

This case involved a petition for clarification of unit (CU) filed by the National Association of Government Employees (NAGE) seeking to include 46 civilian technicians of the Augmented Security Police Force, who were originally excluded as "guards" from the certified unit of civilian technicians employed by the Activity, in which NAGE was certified as exclusive representative on April 14, 1972. The Activity contends that the civilian technicians of the Augmented Security Police Force are "guards" within the meaning of the Order and should be excluded from the unit.

Under all the circumstances, including the fact that members of the Augmented Security Police Force spent an average of only 40-60 hours per year engaged in security activities, that they received only limited security guard training, that they wore no special uniforms and did not issue traffic tickets or write guard reports, and that even when performing security duties they continued to report to their regular supervisors, the Assistant Secretary found that the civilian technicians of the Augmented Security Police Force were not "guards" as defined in Section 2(d) of the Order.

Inasmuch as the Assistant Secretary found that the civilian technicians of the Augmented Security Police Force were not "guards" as defined in Section 2(d) of the Order and as the record reflected that these employees performed essentially the same duties as the employees in the certified unit and shared a clear and identifiable community of interest with such employees, he ordered that the unit be clarified to include civilian technicians of the Activity's Augmented Security Police Force.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CALIFORNIA AIR NATIONAL GUARD  
HEADQUARTERS, 163rd FIGHTER GROUP,  
ONTARIO INTERNATIONAL AIRPORT,  
ONTARIO, CALIFORNIA 1/

Activity

and

Case No. 72-CU-3698(25)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES 2/

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Patrick A. Lavin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, National Association of Government Employees, herein called NAGE, is the exclusive representative of certain employees of the Activity. 3/ In this proceeding, the NAGE seeks to clarify the status of 46 civilian technicians who are members of the Activity's Augmented Security Police Force. These employees were excluded initially from the certified unit because it was felt that they were engaged in security duty and, therefore, were excludable as "guards" within the

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

3/ On April 14, 1972, the NAGE was certified as the exclusive representative in a unit of "All civilian technicians employed by the California Air National Guard, 163rd Fighter Group (ADC), Ontario International Airport, Ontario, California. Excluding managers, supervisors, guards, persons performing Federal personnel work except in a purely clerical capacity and professional employees."

meaning of Section 2(d) of the Order. However, the record reveals that following the issuance by the Assistant Secretary of the decision in California Air National Guard Headquarters, 146th Tactical Airlift Wing, Van Nuys, California, A/SLMR No. 147, which involved employees who allegedly were similarly situated to those involved in the subject case, the NAGE concluded that the previously excluded civilian technicians of the Augmented Security Police Force were not guards as defined in the Order and, therefore, should be included in the certified unit. Consequently, on June 14, 1972, the NAGE filed the petition for clarification of unit (CU) in the subject case seeking to include the 46 civilian technicians of the Augmented Security Police Force in the certified unit which consisted of civilian technicians. The Activity takes the position that the requirements, training and utilization of the technicians involved in the subject case differ from those of the air technicians involved in A/SLMR No. 147 because of differences in the mission of the Activity in that case and the mission of the Activity in the subject case.

The Activity herein is located at the Ontario Air National Guard Base. Its mission is to provide an active armed air defense alert for the protection of the Southern California area on a 24-hour basis. In connection with the performance of its mission, the Activity is required to provide a specified degree of security on the Base as required in the Air Defense Command Supplement to the Air Force Manual. To achieve the required degree of security, a security force of 45 to 50 individuals is required. The Activity has an authorized full-time security force of six employees, including a supervisor. The record establishes that in order to qualify for a position as a full-time security guard, an individual must have two years previous experience in civil or military law enforcement security functions and must be assigned currently in a similar position with an Air National Guard unit with a current security clearance of "secret." Further, the majority of the members of the full-time security force have completed a basic Security Police course at an Air Force Technical School. In performing their duties, full-time security guards wear uniforms and badges and are responsible for writing guard reports. The record reveals that the primary functions performed by the security force are related to "entry control" and "sabotage alert" which require a minimum of three to four men on each shift. 4/

The Augmented Security Police Force was established to fill the gap in manpower requirements between the six full-time security guards currently employed in the Activity and the 50-man security force required by the Air Defense Command for defense of the Base. To meet this requirement 46 "Augmentees" were chosen from among the civilian

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4/ Full-time security guards handle "entry control" on a 24-hour basis and "sabotage alert" on a 16-hour basis.

technicians at the Base and include personnel who are engaged in maintenance, supply, personnel and operations functions. The record reveals that the "Augmentees" are divided into two groups: 24 security police "Augmentees" used for the Sabotage Alert Team in support of "Priority A" resources; and 22 security police "Augmentees" used primarily for Base defense and employee security. These individuals are selected by their immediate supervisors and, in most cases, are chosen on the basis of their availability to perform the duties required. "Augmentees" receive between 16 and 18 hours of formal training and are required to qualify twice a year with certain firearms. Their training is primarily in the area of entry control and sabotage alert and they may be called upon in emergencies to perform such duties. The evidence establishes that the entire Augmented Security Police Force is called to active duty four times a year when there are attack evaluations or operations readiness inspections made by the Inspector General. Other than on these four occasions, the record reveals that the majority of the "Augmentees" are not called upon to perform security functions. In this regard, the average "Augmentee" spends approximately 40 to 60 hours per year engaged in security activities. 5/ When on duty, an "Augmentee" is required to wear a firearm and, in some cases, a badge. However, the record reveals that "Augmentees" do not wear uniforms, do not have the authority to issue traffic tickets and are not required to write guard reports.

Under all the circumstances, I find that the occasional and sporadic performance of certain limited security functions by the civilian technicians of the Augmented Security Police Force does not render them "guards" within the meaning of Section 2(d) of the Order. 6/ Thus, as noted above, members of the Augmented Security Police Force spend on the average only 40-60 hours per year engaged in security activities; they receive only limited security guard training; they wear no special uniforms; and they do not issue traffic tickets or write guard reports. Moreover, the record reveals that even when performing security duties "Augmentees" continue to report to their regular supervisors. As the record reflects that the employees in question perform essentially the same duties as the employees in the certified unit, are within many of the same job classifications, and share a clear and identifiable community of interest with such employees, I find that the existing exclusively recognized unit should be clarified to include the civilian technicians of the Activity's Augmented Security Police Force.

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5/ The record reveals that when an "Augmentee" is slated for duty on the Sabotage Alert Team, he continues to perform his regular job functions but is required to respond within five minutes after being called by the Combat Alert Center. Despite the fact that an "Augmentee" is called to duty by the Combat Alert Center, he continues to report to his immediate supervisor.

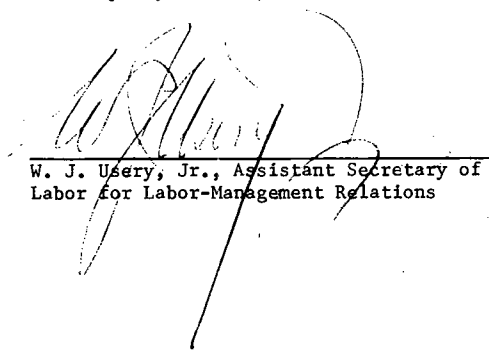
6/ Cf. General Services Administration, Region 2, New York, New York, A/SLMR No. 220; California Air National Guard Headquarters, 146th Tactical Airlift Wing, Van Nuys, California, cited above; and United States Department of the Air Force, 910th Tactical Air Support Group (AFRES), Youngstown Municipal Airport, Vienna, Ohio, A/SLMR No. 12.

ORDER

March 5, 1973

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the National Association of Government Employees (NAGE), 3300 West Olive Avenue, Suite A, Burbank, California 91505, on April 14, 1972, be, and it hereby is, clarified by including in said unit the civilian technicians of the Augmented Security Police Force employed by the California Air National Guard, 163rd Fighter Group (ADC), Ontario International Airport, Ontario, California.

Dated, Washington, D.C.  
March 2, 1973



W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION  
AERONAUTICAL CENTER  
A/SLMR No. 253

On December 17, 1971, the Assistant Secretary issued a Decision and Order in A/SLMR No. 117 in which he found that the Department of Transportation, Federal Aviation Administration Aeronautical Center (Respondent) had violated Section 19(a)(1) of the Order by promulgating and maintaining an order that prohibited instructors of the Federal Aviation Administration Academy from engaging in solicitation of students in behalf of a labor organization and from wearing union membership buttons. The Assistant Secretary ordered the Respondent to cease and desist from such conduct and to take certain affirmative action in order to effectuate the purposes and provisions of the Order.

On April 19, 1972, the Federal Labor Relations Council (Council) directed that the Assistant Secretary's Decision and Order be stayed pending disposition of the Respondent's appeal. Thereafter, on February 9, 1973, the Council issued its Decision on Appeal, setting aside the Assistant Secretary's finding that the promulgation or maintaining of an order prohibiting instructors from engaging in the solicitation of students in behalf of a labor organization violates Section 19(a)(1) of the Order; and sustaining the Assistant Secretary's finding that the prohibition against the wearing of union membership buttons violates Section 19(a)(1) of the Order. Pursuant to Section 2411.17(c) of its rules of procedure, the Council remanded the matter to the Assistant Secretary for purposes of compliance consistent with its decision.

Pursuant to the Council's Decision on Appeal, the Assistant Secretary issued a Supplemental Decision and Order in which he ordered that the Respondent cease and desist from promulgating or maintaining an order which prohibits instructors from wearing union buttons and that a notice to employees in this regard be distributed and posted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION  
AERONAUTICAL CENTER

Respondent

and

Case No. 63-2589(CA),  
A/SLMR No. 117,  
FLRC No. 72A-1

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL UNION 2282

Complainant

SUPPLEMENTAL DECISION AND ORDER

On December 17, 1971, I issued a Decision and Order in A/SLMR No. 117, ordering the Respondent herein to cease and desist from certain conduct and to take certain affirmative action in order to effectuate the purposes and provisions of the Order. Thereafter, on April 19, 1972, the Federal Labor Relations Council (Council) directed that the Decision and Order be stayed pending final disposition of the Respondent's appeal.

On February 9, 1973, the Council issued its Decision on Appeal in the subject case setting aside the Assistant Secretary's finding that the promulgation or maintaining of an order which prohibits instructors of the Federal Aviation Administration Academy from engaging in solicitation of students in behalf of a labor organization violates Section 19(a)(1) of the Order; and sustaining the Assistant Secretary's finding that the prohibition against wearing union membership buttons violates Section 19(a)(1) of the Order. In this regard, the Council vacated its stay of the Assistant Secretary's Decision and Order insofar as it affected the Order that the agency cease and desist from promulgating or maintaining an order which prohibits instructors from wearing union membership buttons and take affirmative action with respect thereto. Pursuant to Section 2411.17(c) of its rules of procedure, the Council remanded the matter to the Assistant Secretary for purposes of compliance consistent with its decision.

Pursuant to the Council's Decision on Appeal, and pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Assistant Secretary's Regulations, the Assistant Secretary for Labor-Management Relations hereby modifies the remedial order set forth in A/SLMR No. 117 and orders that the Department of Transportation, Federal Aviation Administration Aeronautical Center shall:

1. Cease and desist from:

(a) Promulgating or maintaining an order which prohibits instructors from wearing union membership buttons.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

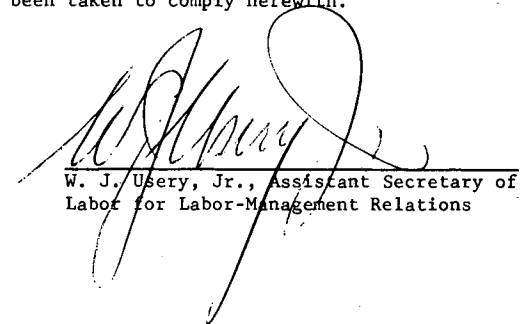
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Distribute to all instructors still assigned to the Federal Aviation Administration Academy the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Such forms shall be signed by the Superintendent of the Academy and also shall be posted and maintained by him for 60 days thereafter, in conspicuous places, including all places where notices to instructors are customarily posted. The Superintendent of the Academy shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Cancel Order No. AC 3710.10B to the extent that it is inconsistent with the above.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
March 5, 1973



W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

March 13, 1973

## NOTICE TO ALL EMPLOYEES

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND DIRECTION OF ELECTION  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE  
 ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT promulgate or maintain an order which prohibits instructors from wearing union membership buttons.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

To the extent that Order AC 3710.10B, dated August 5, 1970, is inconsistent herewith, it is hereby cancelled.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor whose address is: 2511 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

PENNSYLVANIA NATIONAL GUARD  
 A/SLMR No. 254

This case involved a representation petition by the Association of Civilian Technicians, Inc., Pennsylvania State Council (ACT) for a unit of all Pennsylvania Air National Guard technicians. The Activity took the position that the only appropriate unit was an overall unit of all Pennsylvania Army and Air National Guard technicians.

The Assistant Secretary found the petitioned for unit of Pennsylvania Air National Guard technicians to be appropriate for the purpose of exclusive recognition. In this regard, the following circumstances were noted particularly: transfer of technicians between the Army and Air National Guard in Pennsylvania requires resignation of membership from one and application in the other and there have been a minimal number of such transfers; there are separate competitive areas for purposes of promotion and reduction-in-force among Pennsylvania Army and Air National Guard technicians; and Army and Air National Guard technicians have separate immediate supervision and different job skills.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA NATIONAL GUARD 1/

Activity

and

Case No. 20-3569(RO)

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,  
PENNSYLVANIA STATE COUNCIL

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Franklin D. Green. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Association of Civilian Technicians, Inc., Pennsylvania State Council, herein called ACT, seeks an election in the following unit:

All Wage Board and General Schedule Air National Guard technicians employed in the Commonwealth of Pennsylvania, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 2/

1/ The name of the Activity appears as amended at the hearing.

2/ The unit appears as amended at the hearing.

The Activity contends that the only appropriate unit is a State-wide unit of all Army and Air National Guard technicians inasmuch as these employees have a community of interest and such a unit will promote effective dealings and efficiency of agency operations.

The ACT previously had been certified under Executive Order 11491 for a unit of all Wage Board and General Schedule Air National Guard technicians at the Willow Grove Naval Air Station and at the Philadelphia International Airport, and for a unit of all Army National Guard technicians in the Commonwealth of Pennsylvania. Further, under Executive Order 10988 the ACT had been granted exclusive recognition by the Activity for Air National Guard technicians at the Greater Pittsburgh Airport and the Harrisburg International Airport. In this regard, the evidence reveals that there have been no negotiated agreements covering any of the above Air National Guard units. 3/

All National Guard units in Pennsylvania are under the unified command of an adjutant general. He has ultimate control over and responsibility for the technicians' program and reports on the program to the Secretaries of the Army and the Air Force through the Chief of the National Guard Bureau. Overall policy and guidance relating to the civilian personnel administration and functions of the technicians are set forth in joint Army and Air National Guard Regulations. The Adjutant General of the Pennsylvania National Guard administers the technicians' personnel program on a State-wide basis within the above noted Regulations. Thus, he has final authority in the areas of assignment, promotion, discipline, or separation of technicians as well as the responsibility for establishing the basic workweek, prescribing hours of duty and the final resolution of any unresolved grievances. The technicians' Personnel Office operates on a centralized basis, performing the administrative and personnel functions of the Adjutant General.

There are approximately 1860 technicians employed by the Activity, about 760 of whom are in Air National Guard. While the Army National Guard technicians are located at 150 to 160 locations throughout the

3/ The ACT does not contend that the Pennsylvania Air National Guard technicians presently covered by exclusive recognition should be excluded from the petitioned for unit. I have held in prior decisions that where a party petitions for exclusive recognition and proceeds to an election in an overall unit encompassing units in which it already holds exclusive recognition it will, in effect, have waived its exclusive recognition status with respect to those units and may continue to represent the employees in such units on an exclusive basis only in the event that it is certified for the overall unit. See Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, at footnote 2, and Veterans Administration, A/SLMR No. 240.

State, the Air National Guard technicians are located at six locations 4/ with the majority located at Willow Grove Naval Air Station, Philadelphia International Airport, and Harrisburg International Airport.

The evidence establishes that the command relationship for the Army and Air National Guard technicians in Pennsylvania is separate and distinct even where they are located in the same geographical area. The record also reveals that Army and Air National Guard technicians in Pennsylvania do not work together; have no common supervision; and their leave requests are approved by their immediate supervisors. Although the Adjutant General can hear appeals with respect to grievances of both Army and Air National Guard technicians and the same grievance policies apply to all technicians, for the most part, such grievances are handled independently at the local Army or Air National Guard levels.

The evidence establishes further that uniforms for the Army and Air National Guard technicians are different and that they are paid from different funds. Moreover, the job descriptions for these technicians are different, their jobs require specialized skills, and each service operates its own service schools. In addition, for purposes of promotion and reduction-in-force, the Air and Army National Guard technicians in Pennsylvania have separate competitive areas. The record also reveals that as a condition of employment technicians must become members of the Army or Air National Guard. And thereafter, in order to effect a transfer between the Army and Air National Guard, a technician must resign from the National Guard service to which he is assigned and apply for membership in the other. In this connection, the incidence of such transfers by Pennsylvania National Guard technicians has been minimal.

Based on the foregoing, I find the petitioned for unit of Pennsylvania Air National Guard technicians to be appropriate for the purpose of exclusive recognition. In this regard, the following circumstances were noted particularly: transfer of technicians between the Army and Air National Guard in Pennsylvania requires resignation from membership in one and application in the other and there have been a minimal number of such transfers; there are separate competitive areas for purposes of promotion and reduction-in-force among Pennsylvania Army and Air National Guard technicians; and Army and Air National Guard technicians in Pennsylvania have separate immediate supervision and different job skills. Under these circumstances, I find that the employees in the claimed unit share a clear and identifiable community

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4/ The six locations are as follows: Willow Grove Naval Air Station; Philadelphia International Airport; Harrisburg International Airport; State College; Greater Pittsburgh Airport; and Indian-town Gap Military Reservation.

of interest and that such a unit will promote effective dealings and efficiency of agency operations. 5/

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Wage Board and General Schedule Air National Guard technicians employed in the Commonwealth of Pennsylvania, 6/ excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 7/

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5/ Cf. Pennsylvania Army National Guard, A/SLMR No. 9; Minnesota Army National Guard, A/SLMR No. 14; Department of Defense, National Guard Bureau, Florida Army National Guard, A/SLMR No. 37; and Department of Defense, National Guard Bureau, Adjutant General, State of Georgia, A/SLMR No. 74.

6/ The Activity contended that a certification bar existed with respect to the employees at the Willow Grove Naval Air Station and the employees at Philadelphia International Airport based on a May 3, 1971 certification of representative for that unit. However, as the subject petition was filed on June 5, 1972, more than 12 months after the certification of representative, I find that no certification bar existed as to the petition herein insofar as it encompassed the above noted unit. Accordingly, I shall include the eligible employees in the existing unit at the Willow Grove Naval Air Station and the employees at Philadelphia International Airport in the unit found appropriate.

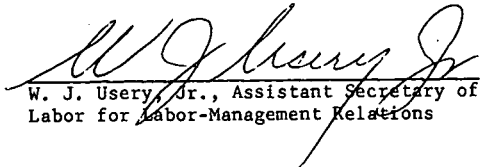
7/ The Activity raised eligibility questions pertaining to certain employees employed by the Pennsylvania Army National Guard. In view of the disposition of this case, I find it unnecessary to make a determination with respect to the status of such employees.

DIRECTION OF ELECTION

March 14, 1973

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Association of Civilian Technicians, Inc., Pennsylvania State Council.

Dated, Washington, D. C.  
March 13, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS, AIR FORCE FLIGHT TEST CENTER,  
EDWARDS AIR FORCE BASE, CALIFORNIA  
A/SLMR No. 255

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 1406 (Complainant). The Complainant alleged that the Respondent Activity violated Section 19(a)(1), (2), and (6) of the Order by disregarding an employee's expressed desire to be represented by the Complainant during the processing and presentation of a grievance and by making disparaging remarks to the grievant about the Complainant's handling of the grievance.

Upon completion of the hearing, the Administrative Law Judge issued his Report and Recommendations dismissing the complaint in its entirety. Although the Administrative Law Judge noted that it might have been better practice for the Respondent to have attempted to contact the Complainant concerning alternative dates for an upcoming grievance proceeding or concerning the Complainant's designating another representative, he found that such conduct did not violate Section 19(a)(6). Nor did he find a violation of the Order based on letters sent by the Respondent to the grievant, copies of which were sent to the Complainant, setting forth alternative dates for the grievance hearing. The Administrative Law Judge determined that the Respondent's conduct did not constitute an attempt to undermine or by-pass the Complainant. In this regard, he noted that at no time did Respondent attempt to discuss the merits of the grievance with the grievant alone and that the Complainant represented the grievant at the subsequent grievance proceeding. Moreover, he found the alleged disparaging remarks, in fact, were not made by the Respondent to the grievant.

Upon consideration of the entire record, including the exceptions and a supporting brief filed by the Complainant, the Assistant Secretary adopted the Administrative Law Judge's finding, conclusions, and recommendations. Although the Assistant Secretary noted it would have been better practice for the Respondent to have contacted the grievant's chosen representative, an officer of the Complainant, to discuss alternative dates for the upcoming grievance proceeding rather than discussing such matters directly with the grievant and suggesting that the latter choose another representative of the Complainant in the



event his chosen representative was not available to appear at the grievance proceeding, he found, in agreement with the Administrative Law Judge, that the evidence did not establish that this conduct was an attempt by the Respondent to undermine or by-pass the Complainant. Rather, he concluded that the Respondent was attempting merely to have the grievance hearing on the date recommended by its Appeal and Grievance Examiner, and at a time when the Examiner would be available. Nor did the Assistant Secretary consider the Respondent's letters of June 23 and June 28, copies of which were served on the grievant's chosen representative, to be violative of the Order.

A/SLMR No. 255

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS, AIR FORCE FLIGHT  
TEST CENTER, EDWARDS AIR FORCE BASE,  
CALIFORNIA

Respondent

and

Case No. 72-2937(26)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1406

Complainant

DECISION AND ORDER

On January 26, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, Department of the Air Force Headquarters, Air Force Flight Test Center, Edwards Air Force Base, California, had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions and a supporting brief filed by the Complainant, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

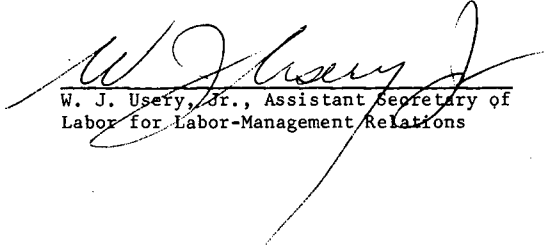
While, in my opinion, it would have been better practice for the Respondent to have contacted Mr. Wright's chosen representative, Mr. Smeltzer, an officer of the Complainant, to discuss alternative dates for the upcoming grievance proceeding, rather than discussing such matters directly with Wright and suggesting that the latter choose another representative of the Complainant in the event that Smeltzer was not available to appear at the grievance proceeding, the evidence did

not establish that this conduct was an attempt by the Respondent to undermine or by-pass the Complainant. Rather, it appears from the record that the Respondent was seeking, merely, to have the grievance hearing on the date recommended by its Appeal and Grievance Examiner, and at a time when the Examiner would be available. Under all the circumstances, I find in agreement with the Administrative Law Judge that the Respondent's conduct in this regard was not violative of Section 19(a)(6) of the Order. Nor do I consider the Respondent's letters of June 23 and June 28, copies of which were served on Mr. Smeltzer, to be violative of the Order in the circumstances of this case.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-2937(26) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
March 14, 1973.

  
W. J. Useery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS, AIR FORCE FLIGHT TEST CENTER  
EDWARDS AIR FORCE BASE, CALIFORNIA  
Respondent

and

CASE NO. 72-2937(26)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1406

Complainant

Captain Brendan M. Dixon, Department of the Air Force,  
Air Force Flight Test Center,  
Edwards Air Force Base, California 93523,  
For Respondent.

Neal Fine, Esq., American Federation of Government  
Employees, 1325 Massachusetts Avenue,  
Washington, D. C.  
For Complainant.

Before: Samuel A. Chaitovitz, Administrative Law Judge

## Statement of Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on August 10, 1972 by the Regional Administrator of Labor-Management Services Administration, San Francisco Region, based on an amended complaint filed by American Federation of Government Employees, Local 1406 (herein called the Union) against Department of the Air Force, Headquarters, Air Force Flight Test Center, Edwards Air Force Base, California (herein called the Activity). The amended complaint alleged that the Activity violated Section 19(a)(1), (2), and (6) of the Order by disregarding an employee's expressed desire to be represented by the Union during the processing and presenting of a grievance and by making disparaging remarks about the Union's handling of the grievance.

The parties stipulated that the Union served a "Proposed Complaint" (Resp. Exh. 2) on the Activity on October 6, 1971. This was in fact the Unfair Labor Practice Charge required by the Order and the Assistant Secretary's Rules and Regulations. The parties stipulated further that the Union served the "Complaint" on the Activity on November 5, 1971. The "Amended Complaint" was filed and served on or about May 26, 1972. That portion of the Complaint Form (LMSA 61(1/70)) entitled "2. Basis of the Complaint" was filled out virtually identically in the "Proposed Complaint," "Complaint" and "Amended Complaint" described above. The "Amended Complaint" differed from the prior two documents only insofar as it added under that portion of the Complaint Form numbered "1G" an allegation that the Activity violated Section 19(a)(2) of the Order, as well as the already alleged violations of Sections 19(a)(1) and (6) of the Order. No new facts or conduct were alleged to constitute this violation.

The Notice of Hearing issued by the Regional Administrator stated that the subject hearing would consider "...alleged violation of Section(s) 19(a)(1) and (6) of Executive Order 11491." When the omission of the allegation of the Section 19(a)(2) violation from the Notice of Hearing was brought to the attention of the undersigned, he communicated with the Area Administrator of Labor-Management Services Administration, Los Angeles area and was informed that the omission of the alleged Section 19(a)(2) violation was a clerical error

and that it should have been included in the Notice of Hearing. The undersigned, on the record, advised the parties that the Notice of Hearing would be considered as including the reference to the alleged violation of Section 19(a)(2) of the Order. 1/

The Activity then moved, at the hearing, that the allegation that Section 19(a)(2) of the Order had been violated be dismissed as untimely under the Assistant Secretary's Rules and Regulations, 2/ because the "Amended Complaint" which first mentioned this alleged violation, was filed and served May 26, 1972. The Activity alleges that with respect to the alleged Section 19(a)(2) violation that since the alleged unlawful conduct occurred on June 17 and 23, the requirements of Section 203.2 of the Rules and Regulations were not complied with and this allegation should therefore be dismissed. The undersigned reserved ruling on the motion.

There is no dispute that the "Proposed Complaint" (the Charge) and the "Complaint" were timely filed. Further, it is noted that the allegation that Section 19(a)(2) of the Order had been violated did not involve any facts or conduct that were not already described and set forth in the "Proposed Complaint" and in the "Complaint."

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1/ The Activity stated that since this additional allegation involved no new factual allegations, it did not anticipate needing any additional time to prepare or present its case. The Activity stated that in the event it needed any additional time it would so state before the close of the hearing. No such request was subsequently made.

2/ Section 203.2 of the Rules and Regulations, in effect during the times material herein, required that "Any charge of an alleged unfair labor practice...shall be filed directly with the party...against whom the charge is directed within six (6) months of the occurrence of the alleged unfair labor practice." Section 203.2 required further "...that a complaint to the Assistant Secretary shall not be considered timely unless filed within nine (9) months of the occurrence of the alleged unfair labor practice..."

Although not necessarily binding precedent in these proceedings, the policy of the National Labor Relations Board in interpreting and applying Section 10(b) of the National Labor Relations Act commends itself and is applicable. The Board seems to consider the Unfair Labor Practice Charge as merely the mechanism whereby it enters the controversy. Subsequent Amended Charges and the Complaint, are considered timely so long as they are, even rather remotely, encompassed by any of the language of the original charge, e.g., Freemont Hotel, Inc. 162 NLRB 820 and Lubank Co. 175 NLRB 213.

The purpose of Section 203.2 of the Rules and Regulations is to require the parties to attempt to deal with their disputes promptly and to prevent stale charges from being raised. In these circumstances, where the Activity was timely advised in the "Proposed Complaint" and "Complaint" of all of the conduct alleged to be violative of the Order, and the "Amended Complaint" only added the legal conclusion that an additional Section of the Order was violated, it is concluded that the allegation that Section 19(a)(2) was violated, is not barred by Section 203.2 of the Assistant Secretary's Rules and Regulations. To read Section 203.2 of the Rules and Regulations as technically as requested by the Activity would frustrate the very policies of the Order without in any way achieving the purpose of the Rule in question. In light of the foregoing, the Activity's motion to dismiss as untimely the allegation that Section 19(a)(2) of the Order had been violated is denied. 3/

A hearing was held before the undersigned on September 20, 1972 at Los Angeles, California. Both parties were represented at the hearing and their representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. Both parties filed briefs with the undersigned.

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3/ Although there is no evidence that this objection was made during the prehearing stages of this proceeding, it is not disposed of on the grounds set forth in Department of the Navy and the U. S. Naval Weapons Station, A/SLMR 139 and V.A. Hospital, A/SLMR No. 87, since the Notice of Hearing had omitted any mention that the hearing would consider the alleged Section 19(a)(2) violation.

From the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

#### Findings of Fact

##### A. Background

The Union has been exclusively recognized as the collective bargaining representative for all of the Activity's wage grade employees since 1968. At all times material herein, Mr. Clifford Wright was a wage grade employee in the described unit. During June 1971 when the subject dispute herein arose there was no collective bargaining agreement between the Union and the Activity in existence.

##### B. Grievance

During April 1971 Mr. Wright received a reprimand from the Activity. During very early June 1971, Mr. Wright met with Mr. Carson Smeltzer of the Union 4/ and as a result of their meeting two documents were prepared, dated and signed by Mr. Wright. The first was a power of attorney dated June 1, 1971 granting the Union Mr. Wright's Power of Attorney to act for and on his behalf "in all matters coincident to.. [his]..grievance and/or appeal." 5/ The second was a letter dated June 3, 1971 and signed by Mr. Wright whereby he advised the Activity's commanding officer that he was appealing the reprimand, requesting a hearing and designating Mr. Smeltzer of the Union as his representative. The letter requested the Commanding Officer to route all correspondence through Mr. Wright's representative. On June 4 Mr. Wright delivered the June 3rd letter and the Power of Attorney to Mr. Dennis Heins'

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4/ At the time of the meeting Mr. Smeltzer was the Union's Recording Secretary. Later in the month he became Union President.

5/ The parties stipulated that the grievance was to be processed pursuant to Air Force Regulation 40-771.

office. Mr. Heins is a Personnel Staffing and Employment Relations Specialist for the Activity. 6/

A memorandum transmitted on June 8 from the Activity's Chief of Civilian Personnel to the Sacramento Appellate Review Office, copies to Mr. Wright and Mr. Smeltzer, advised the Appellate Review Office of the pendency of the grievance, that Mr. Wright had designated Mr. Smeltzer of the Union as his representative and that Mr. Heins was the "grievance liaison representative for this grievance." By letter dated June 14, 1971, Mr. Smeltzer, President of the Union, advised the Commander of the Activity of the names of proposed witnesses to be called in conjunction with Mr. Wright's grievance.

C. June 17 Incidents

On June 17 Mr. Heins received a telephone call from Mr. Douglas Goodell, Appeal and Grievance Examiner of the Sacramento Appellate Review Office, requesting that Mr. Heins ascertain whether a date of June 29 for conducting a fact-finding proceeding would be acceptable with Mr. Wright and his representative. Later that day Mr. Smeltzer was in the base civilian personnel office making arrangements to conduct a membership drive at an Army installation located on the subject Ai Force facility. Mr. Heins saw Mr. Smeltzer and asked him to step into his office. Mr. Heins and Mr. Smeltzer discussed proposed dates for Mr. Wright's grievance hearing. 7/ Mr. Heins proposed June 29th as the desirable date. Mr. Smeltzer indicated, at least, that because of his organizing campaign a later date would be preferable. July 7 was agreed

6/ The record establishes that during the course of his normal duties Mr. Heins communicates with employees concerning personnel matters, on behalf of the Activity and statements made by him are attributable to the Activity. He is, therefore, an agent of the Activity and it is responsible for his statements.

7/ Although there is some difference in the testimony of Mr. Heins and Mr. Smeltzer as to precisely what was said, these variations seem attributable to differing recollections. In any event they are fairly minor and need not be resolved because the two versions agree enough to provide a sufficiently accurate description of the meeting.

upon, at least as a proposed date for the hearing. Mr. Smeltzer then left Mr. Heins' office.

Mr. Heins telephoned Mr. Goodell and advised him of the July 7 date. Mr. Goodell indicated that this date was unacceptable to him. He indicated that he wanted to get the grievance heard as quickly as possible and he instructed Mr. Heins to contact Mr. Smeltzer or Mr. Wright to ascertain if another representative would be available on June 29th. If this was not possible, they should choose either of two specific dates in July as a hearing date.

Mr. Heins admittedly made no attempt to contact Mr. Smeltzer to discuss possible hearing dates. Instead, he sent for Mr. Wright, who then came to Mr. Heins' office at approximately 2:15 p.m. Mr. Wright was apparently quite nervous and was not sure why he was sent for. 8/ Upon arriving at Mr. Heins' office they discussed possible dates. Mr. Heins apparently advised Mr. Wright that the June 29th date was the preferable date and that if Mr. Smeltzer could not make it that day perhaps another representative could be chosen. 9/ The Union contends in the complaint that Mr. Heins told Mr. Wright "...that if it was not for the Local's interference that his grievance would have been taken care of already.." Mr. Wright's testimony on this part of the conversation was confused. 10/

8/ Again the two versions of this meeting vary somewhat. The variations appear unintentional and are attributable to different recollections of the meeting. No resolution of the differences need be made because the two versions are similar enough to provide a sufficiently accurate picture of the discussion, except as to one specific part of the conversation, which will be discussed hereinafter.

9/ Although it was not precisely stated it appears clear that Mr. Heins was referring to a different person, i.e., other than Smeltzer, and not a different union.

10/ Mr. Wright first testified: "And then he informed me that I would be doing more harm--that it would be doing more harm than good for me by delaying this case so long." Then, after being led by his attorney's questions Mr. Wright's version changed. That part of the questioning was as follows: (Con't)

Mr. Heins denies making any such statement although he apparently did indicate that it would be desirable to hold the hearing as soon as possible and that any additional delay would not be helpful. Because of Mr. Wright's confusion I credit Mr. Heins' version and conclude no statement was made by Mr. Heins to the effect that the Union's method of handling the grievance was harmful to Mr. Wright. Mr. Wright indicated he wanted only Mr. Smeltzer to be the Union Representative and Mr. Heins then suggested some alternate hearing dates. Mr. Wright stated he did not want to make any decision or discuss the matter further, but rather wanted to consult Mr. Smeltzer. Mr. Heins then requested Mr. Wright get together with Mr. Smeltzer and see if a date could be chosen. The discussion then ended.

#### D. Later Events

By letter dated June 23 Richard Simmons, the Activity's Chief of Employee Management Selection requested on behalf of Mr. Goodell, that either the week of July 19 or July 26 be designated for the fact finding hearing and that a brief statement be submitted as to what will be the subject of the testimony of each witness listed in Mr. Smeltzer's June 14 letter. This letter was addressed to Mr. Wright and carbon copies were sent to Mr. Smeltzer and Mr. Goodell. Mr. Goodell, by letter dated June 28, addressed to Mr. Wright, advised him that since Mr. Smeltzer was not available for June 29 and since Mr. Wright did not wish to designate another representative, that he should advise Mr. Goodell of the earliest date they will be ready to proceed together with certain additional information. A copy of this letter was sent to Mr. Heins and Mr. Smeltzer.

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10/ (Con't) "Q. Okay. Now, in regard to this last statement that they were doing you more harm than good; what do you mean by they were doing you more harm than good?" "Did he say who 'they' was?" "A. The Union. And I informed him I would see my union people there--Mr. Smeltzer and them--because he was already supposed to have dates set up, as far as I knew." However, at a latter point Mr. Wright repeated the prior version: "Yes, I told him what he said--that he made a statement that it was doing more harm than good for me by delaying this case." (Emphasis indicated by underlining added)

Ultimately the grievance fact finding hearing was held and Mr. Wright was represented by Mr. Smeltzer.

#### Conclusions

##### A. Alleged Violations of Section 19(a)(6) of the Order.

It is contended by the Complainant that the meeting and discussion of June 17 between Mr. Heins and Mr. Wright concerning Mr. Wright's grievance was an attempt on the part of the Activity to bypass the Union, Mr. Wright's chosen representative, and therefore violated Section 19(a)(6) of the Order. The Complainant contends further that the June 23, 1971 letter addressed to Mr. Wright also constituted an attempt to bypass the Union in the processing of the grievance and therefore constitutes a violation of Section 19(a)(6) of the Order.

The Assistant Secretary of Labor for Labor-Management Relations has held that an attempt by an activity to bypass the exclusive representative designated by an employee to process her grievance, constituted a failure to consult, confer or negotiate in violation of Section 19(a)(6) of the Order. United States Army School Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

The subject case is factually distinguishable from the Army School Training Center Case, supra. In that case a letter advising the grievant that a reprimand was being withdrawn also informed her that the same result could have been obtained had she dealt directly with management. The Assistant Secretary concluded that the letter from the Army School Training Center clearly urged the bypassing of the Union. In the subject case Mr. Heins did not urge Mr. Wright to withdraw his designation of the Union as his representative nor did he indicate Mr. Wright would be as well or better off without the Union. The most he did at the request of Mr. Goodell was to discourage any delay and to urge Mr. Wright to have the hearing held on or about June 29th suggesting he consider having the Union designate someone other than Mr. Smeltzer as their representative. He did not attempt to undermine the Union and only made the suggestion because he believed that Mr. Smeltzer would be unavailable on June 29th. When Mr. Wright indicated he wished to have Mr. Smeltzer at the hearing, Mr. Heins advised him of alternative dates for the hearing.

When Mr. Wright indicated he did not want to discuss possible dates but rather he wished to leave that matter to Mr. Smeltzer, Mr. Heins acceded to his request. At no time did Mr. Heins attempt to discuss the merits of the grievance with Mr. Wright, nor, after Mr. Wright indicated he wished to have the matters raised considered by Mr. Smeltzer of the Union, did Mr. Heins refuse to allow him or discourage him from consulting with the Union. In fact Mr. Wright did consult with Mr. Smeltzer, the hearing was held, and he was represented by Mr. Smeltzer. In these circumstances, although it might have been better practice for Mr. Heins to have attempted to contact Mr. Smeltzer about alternate dates or the Union designating someone else, it was not conduct which constituted bypassing or undermining the Union so as to constitute a violation of Section 19(a)(6) of the Order.

Similarly the June 23 letter and the June 28 letter although addressed to Mr. Wright, were also sent to Mr. Smeltzer and could hardly be said to constitute bypassing the Union. Again, although it might have been poor form it did not constitute a violation of Section 19(a)(6) of the Act.

B. Alleged 19(a)(1) & (2) Violations.

The Complainant contends that Mr. Heins, during the June 17 meeting told Mr. Wright that the Union was "doing him more harm than good for him by delaying his case for so long," and that this statement constituted conduct that violated Section 19(a)(1) and 19(a)(2) of the Order.

With respect to the allegation that Section 19(a)(2) had been violated, there was no evidence offered or presented which established that Mr. Wright had in any way been discriminated against. Section 19(a)(2) provides that "Agency management shall not... (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment...." In the absence of any showing of such discrimination, a violation of Section 19(a)(2) cannot be maintained.

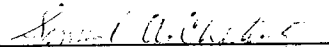
With respect to the alleged violation of Section 19(a)(1) of the Order the findings of fact indicate that the statement as alleged by the Union was not made. Although delay was discouraged by Mr. Heins and Mr. Wright was advised to see if the Union could designate someone who was available on June 29

or at his own request, to discuss with the Union possible alternative hearing dates, such statements can hardly be said to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Order.

In the circumstances herepresent therefore, I conclude that none of the statements made by Mr. Heins constituted conduct that violated Section 19(a)(1) of the Order.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary of Labor for Labor-Management Relations dismiss the complaint.

  
 SAMUEL A. CHAITOVITZ  
 Administrative Law Judge

Dated: Washington, D. C.  
 January 26, 1973

March 14, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,  
RESERVE COMMAND HEADQUARTERS,  
CAMP MCCOY, SPARTA, WISCONSIN,  
102ND RESERVE COMMAND,  
ST. LOUIS, MISSOURI  
A/SLMR No. 256

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This case involved a complaint filed by the American Federation of Government Employees, Local 3154, AFL-CIO (Complainant) against the Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri (Respondent) alleging a violation of Section 19(a)(1) of the Executive Order. Specifically, the complaint alleged that the Respondent violated Section 19(a)(1) by maintaining a policy under which an employee of the Respondent, who participated on behalf of the Complainant at a formal unit determination hearing being held pursuant to the Regulations of the Assistant Secretary, was not permitted to participate on official time. The Respondent contended, among other things, that the Department of Defense had established a policy of not granting official time status to employees appearing on behalf of labor organizations at such proceedings, and that as a component of the Department of Defense it had no authority to disregard this policy.

In agreement with the Administrative Law Judge and based on his decision in Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139, the Assistant Secretary found that the Respondent violated Section 19(a)(1) of the Order by refusing to maintain on official time status an employee who appeared as a witness at the unit determination hearing on behalf of the Complainant. He found also that the Respondent violated Section 19(a)(1) by its existing policy of refusing to maintain on official time status necessary witnesses who appear on behalf of a labor organization at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary. Further, in agreement with the Administrative Law Judge, the Assistant Secretary found that the employee involved should be placed on official time status for the entirety of both days of the two-day hearing. The Administrative Law Judge based his conclusion in this latter regard on, among other things, the fact that the employee was instructed by a representative of the Assistant Secretary to appear at the hearing; that he was called as a witness on both days of the hearing; that the

employee had not been advised of any change in policy with respect to leave; and that there was no showing of any inconvenience on the part of the Respondent.

Also, the Assistant Secretary noted that, in the future, in order to avoid misunderstandings as to the status of a witness testifying on behalf of a labor organization at a unit determination hearing held pursuant to the Regulations of the Assistant Secretary, the labor organization seeking the appearance of an employee witness should, prior to the hearing, make a request on the agency or activity involved for the appearance of the employee witness at the hearing. If the requesting labor organization desires that the employee witness be on official time status for the period of his participation in the hearing, this desire should be communicated clearly to the agency or activity involved. In this connection, after an employee witness has testified, an agency or activity may request that such witness return to work.



## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
RESERVE COMMAND HEADQUARTERS,  
CAMP MCCOY, SPARTA, WISCONSIN,  
102ND RESERVE COMMAND,  
ST. LOUIS, MISSOURI

Respondent

and

Case No. 62-3157(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3154, AFL-CIO

Complainant

## DECISION AND ORDER

On November 8, 1972, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist from such conduct and take certain affirmative action in order to effectuate the purposes and provisions of the Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the Respondent's exceptions and the parties' briefs, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

The Respondent excepted to the Administrative Law Judge's Recommended Order 1/ on the grounds that (a) as a component of the Department of Defense (DOD), the Department of the Army has no

1/ The Recommended Order required, in part, that the Respondent restore to Thomas all annual leave for which he was charged for both February 9 and 10, 1972, and take such action as is necessary to bring its regulations into compliance with the requirement that necessary union witnesses be made available on official time to participate in formal unit determination hearings.

authority to disregard the provisions of a DOD controlling regulation and, therefore, it properly complied with the regulations in denying official time status to employees representing or appearing on behalf of a labor organization in a hearing held pursuant to the Regulations of the Assistant Secretary; and (b) a case presenting a similar factual situation 2/ currently is pending before the Federal Labor Relations Council on appeal.

In Charleston Naval Shipyard, A/SLMR No. 1, I rejected a respondent's contention concerning the controlling effect of agency directives or policy guidance as a defense to allegedly violative conduct. With respect to the Respondent's second exception, noted above, in my view, the fact that a case presenting a similar factual situation currently is before the Federal Labor Relations Council does not warrant deferral of a decision in this matter by the Assistant Secretary.

In agreement with the Administrative Law Judge's recommendation, I find that in the circumstances of this case, the Respondent violated Section 19(a)(1) of the Order by placing Thomas on annual leave on February 9 and 10, 1972, rather than on official time status, and by its maintenance of a policy of refusing to maintain on official time status necessary witnesses who appear on behalf of a labor organization at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary. 3/

In the future, in order to avoid misunderstandings as to the status of a witness testifying on behalf of a labor organization at a unit determination hearing held pursuant to the Regulations of the Assistant Secretary, the labor organization seeking the appearance of an employee witness should, prior to the hearing, make a request on the agency or activity involved for the appearance of the employee witness at the hearing. If the requesting labor organization desires that the employee witness be on official time status for the period of his participation in the hearing, this desire should be communicated clearly to the agency or activity involved. In this connection, after an employee witness has testified, an agency or activity may request that such witness return to work.

## THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, set forth below, designed to effectuate the policies of the Order.

2/ Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139.

3/ Cf. Department of the Navy and the U. S. Naval Weapons Station, cited above.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, shall:

1. Cease and desist from:

Interfering with, restraining, or coercing employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:


a. Restore to Mr. Clifford Thomas all annual leave with which he was charged for both February 9 and 10, 1972, because of his attending and testifying at the formal unit determination hearing in Case No. 62-2361(RO).

b. Take such action as is necessary in order to bring its regulations into compliance with the requirement that necessary union witnesses be made available on official time to participate in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

c. Post at the Army Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
March 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

WE WILL restore to Mr. Clifford Thomas all annual leave with which he was charged for both February 9 and 10, 1972 because of his attending and testifying at the formal unit determination hearing in Case No. 62-2361(RO).

WE WILL take such action as is necessary in order to bring our Regulations into compliance with the requirement that necessary union witnesses be made available on official time for participation in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

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

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

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

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

REPORT AND RECOMMENDATIONS

Statement of Case

Department of the Army  
Reserve Command Headquarters  
Camp McCoy, Sparta, Wisconsin  
102nd Reserve Command  
St. Louis, Missouri

Case No. 62-3157(CA)

Respondent

and

American Federation of Government  
Employees, Local 3154

Complainant

George W. Lundy, Chief of Management  
Employees Relation Division,  
Civilian Personnel Office,  
Camp McCoy, Sparta, Wisconsin 54656, and  
Arthur R. Chandler, Personnel Management  
Specialist, Civilian Personnel Management,  
Camp McCoy, Sparta, Wisconsin 54656, on  
behalf of Respondent.

Glenn Peterson, Area Director of Organization,  
Post Office Box 5699, St. Louis, Missouri,  
63121, and

William Martin, Jr., National Representative,  
4830 Cupples Place, St. Louis, Missouri,  
63113, on behalf of Complainant.

Before: Samuel A. Chaitovitz, Administrative Law Judge

This is a proceeding under Executive Order 11491 (herein-  
called the Order). A Notice of Hearing thereunder was  
issued on June 22, 1972, by the Regional Administrator of  
Labor-Management Services Administration, Kansas City  
Region, based on a complaint filed by American Federation  
of Government Employees Local 3154 (herein called the Union),  
against Department of the Army Reserve Command Headquarters,  
Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, Saint  
Louis, Missouri (herein called the Activity). The complaint  
alleged that the Activity violated Section 19(a)(1) of the  
Order by placing Mr. Clifford Thomas, an employee, on  
annual leave rather than on duty status 1/ for both  
February 9 and 10, 1972, during which days he was allegedly  
a witness and testifying on behalf of the Union at a  
representation hearing conducted pursuant to the Order.

A hearing was held before the undersigned on August 29 and  
30, 1972 at St. Louis, Missouri. Both parties were  
represented at the hearing, and their representatives were  
afforded full opportunity to be heard, to examine and  
cross-examine witnesses, 2/ and to introduce evidence bearing

1/ "Duty status" herein means being paid for the time in  
question and not being required to take annual leave or leave  
without pay. It may hereinafter also be referred to as "pay  
status" and "official time."

2/ The Union asked the undersigned to request Mr. Thomas to  
appear and testify at the hearing. The undersigned concluded  
that Mr. Thomas's testimony would be helpful and the Union's  
request was granted. The Activity advised, however, that  
although Mr. Thomas would be allowed to attend and testify,  
he would not be maintained on pay status during this time.  
In these circumstances the Union withdrew its request and  
Mr. Thomas was not asked by the undersigned and he did not  
testify in the subject hearing.

on the issues involved herein. 3/ Both parties filed briefs with the undersigned.

From the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

#### Findings of Fact

A formal representation hearing was held before Hearing Officer Roger Schleuter in Case No. 62-2361(RO) on August 25, 1971 in the Federal Building. The purpose of the hearing was to determine if the unit petitioned for was appropriate. Mr. Clifford Thomas 4/ was present at the hearing for the entire day but actually took the witness stand and testified only during the afternoon and his testimony lasted approximately four hours. 5/ The Activity's representative at the August 25 hearing, Mr. Arthur Chandler, testified that he

3/ The following corrections have been noted and shall be made to the record:

Page 26, line 6 shall be corrected to read - "not testify, and that I cannot act and, at this time, overrule".

Page 26, line 24 - "24th" should be changed to "25th".

Page 60, line 22 should be corrected to read - "noted on his time and attendance card, this would not in and of".

4/Mr. Clifford Thomas, an employee of the Activity, worked at 6400 Stratford Avenue, approximately 12 miles from the place of the representation hearing.

5/Judicial notice is taken of the official transcript of the representation hearing held in Department of the Army Headquarters Camp McCoy, Sparta, Wisconsin, Case No.

62-2361(RO). In this regard the transcript indicates that 162 pages of transcript were taken on August 25, 1971 and that Mr. Thomas was called to the witness stand on page 106 and excused on page 146.

could not locate or recall any notices from the Department of Labor advising the Activity of the identity of the witnesses to be called on behalf of the Union. Mr. Thomas was maintained on pay status and not on leave status during that entire day. 6/

The representation case was remanded for further hearing and the reopened hearing was held on February 9 and 10 at the Army Center which is directly across the street from the place Mr. Thomas works. On February 3 or 4, at a pre-hearing meeting, American Federation of Government Employees' Area Director of Organization Glen J. Peterson, advised a Department of Labor representative that he wanted Mr. Thomas as a witness and inquired whether he should notify the Activity that Mr. Thomas would be a witness. The Department of Labor representative said that the Department of Labor would notify both the Activity and Mr. Thomas that Mr. Thomas would appear as a witness. 7/ The Union

6/ The Activity introduced no evidence that this was an error on their part or that Mr. Thomas was ever advised that it was an error.

7/ The Activity denies that it was ever notified by the Department of Labor, or anyone else, that Mr. Thomas would appear as a witness. Mr. Thomas, however, was so notified in writing by the Department of Labor. He was instructed by the Department of Labor to appear on February 9 at the opening of the hearing. The Activity knew in advance that Mr. Thomas would appear at the hearing, although not necessarily as a witness. Further it was clear the Activity knew or should have known that Mr. Thomas did not know he was on annual leave since he had not applied for any in advance, which was the practice at the Activity. Although a witness on behalf of the Activity testified that they did not know even after the hearing started the identity of the Union witnesses, in fact Mr. Thomas was the only employee called as a witness at the request of the Union and there was no evidence that there was a large number of employees present as spectators at the hearing who might have confused the Activity's representatives.

requested only two witnesses to be present, Mr. Thomas and Col. William B. Holaday; the latter is the Staff Administrative Assistant for the 102nd U.S. Army Reserve Command and was also requested by the Activity. In fact Mr. Holaday was called as a witness by the Activity. On both February 9 and 10 the hearing lasted from approximately 9 A.M. to 5:00 P.M. with a short lunch break and a couple of coffee breaks each day.

Mr. Thomas did take the stand on February 9 and the parties herein stipulated he testified in the afternoon for approximately 15 to 30 minutes. The February 9 transcript indicates that the hearing ran from page 163-375. The Record shows that Mr. Thomas was sworn in on page 317 and excused on page 321. At the beginning of the hearing Mr. Peterson stated that Mr. Thomas was appearing on behalf of the Union. This statement was made on page 166. The representative of the Respondent raised no objection on the record. At page 177, before any witnesses had been called and after an off the record discussion, the hearing officer stated that Mr. Thomas would only be an alternate representative if for any reason Mr. Peterson, the Union representative had to leave. He stated "other than that, he [Thomas] will not be the representative." Mr. Peterson testified that the Activity's representatives had objected to Mr. Thomas being a Union representative. This does not appear on the record of the representation hearing, although it might have occurred during off the record discussions. In any event a finding of whether or not Respondent objected to Mr. Thomas appearing as a Union representative is not necessary. 8/

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8/ It is noted that the front of the transcript for both February 9 and 10 lists Mr. Thomas as being, together with Mr. Peterson, a Union representative.

On February 10, Mr. Thomas took the stand as the last witness and testified for one and one-half to two hours. 9/ Mr. Thomas did also make some short comments on the record at various times during the hearing and participated in the off the record discussions. I conclude that during such times he was assisting the Union representative.

The Activity placed Mr. Thomas on annual leave, and not on pay status, for the entirety of both February 9 and 10. 10/ Mr. Thomas was not advised and did not learn, however, that he was not carried on pay status for February 9 and 10 until two to four weeks after the hearing closed. All witnesses that appeared at the representation hearing at the request of the Activity were on pay status and were not placed on annual leave.

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9/ The record for February 10 runs from page 376 to page 626. Mr. Thomas was sworn in on page 566 and excused on page 618. 10/ The Activity's policy was, at the time of the representation hearing on February 9 and 10, that witnesses appearing on behalf of labor organizations were not to be on pay status for the time they were witnesses. Although there is some question on the record as to what the Department of the Army's printed regulations were on February 9 and 10, it is clear that on April 26, 1972 the policy was that employees present on behalf of a labor organization at a hearing held pursuant to the regulations of the Assistant Secretary shall not be on official time when so engaged (see CPR 700 (Ch. 9) 711 ¶ VII A.3.b. dated April 26, 1972). In any event the Activity in its brief contends, and I do find, that this was, in fact, the policy followed by the Activity at the time of the representation hearing in question and further that it was applied to Mr. Thomas.

## Conclusions

The subject case is very similar to Department of the Navy and the U.S. Naval Weapons Station, A/SLMR No. 139. 11/ In the U.S. Naval Weapons Station case, supra, the Assistant Secretary of Labor for Labor-Management Relations stated on page 6 of his decision:

"In the Federal sector, Executive Order 11491 repeatedly recognizes that the well-being of employees and efficient administration of the Government are benefitted by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment. An application of the Executive Order philosophy of encouraging such relationships would, in my view, require necessarily that agency management make available on official time essential witnesses at nonadversary fact-finding proceedings held pursuant to the Regulations of the Assistant Secretary to assure a full and fair hearing based upon which I can fulfil the responsibility assigned me by the President under Section 6(a)(1) of Executive Order 11491."

The Assistant Secretary went on to conclude:

"By the implementation and effectuation of a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary, the Respondent violated Section 19(a)(1) of Executive Order 11491." 12/

11/ It should be noted that an appeal from the decision is being considered by the Federal Labor Relations Council and the Council has directed that the Order and Decision be stayed pending final disposition of the appeal.

12/ Ibid at page 11.

The subject case presents a similar factual situation to the one present in the Naval Weapons Station case, supra. Mr. Thomas was on pay status for his August 25 appearance but not for his February 9 and 10 appearances. 13/ It is undisputed that Mr. Thomas was instructed by the Department of Labor to appear on February 9 as a witness at the representation hearing and that he did take the witness stand and testify on both February 9 and 10. At no time did the Activity protest his presence as a witness, nor has it at any time contend that his presence during the two days of hearing, February 9 or 10, unduly inconvenienced the Activity or was an abuse of any kind.

The Activity contends, however, that it had not been advised in advance that Mr. Thomas was to be called as a witness for two days and had it been so advised it would have taken exception. The Naval Weapons Station case, supra at page 10, specifically does not require all requests for witnesses to be channeled through the Assistant Secretary's representatives, but merely when notice is given to agency management, it make its objections known. In the instant case, the Union did, however, attempt to follow the procedures described in the Naval Weapons Station case, supra, and did notify the Assistant Secretary's representative. The Activity does not contend Mr. Thomas was not an essential witness, it did not present any reasons as to why Mr. Thomas should not have been permitted to testify or on what grounds it would have protested or opposed his being called as a witness in the representation case. Further it must be noted that Mr. Thomas was the only employee to testify at the unit determination hearing at the request of the Union and therefore it cannot be urged that calling him as a witness was an abuse on the Union's part.

13/ In the subject case, Mr. Thomas was at no time prior to or during the February 9 and 10 hearing advised as to this policy change, where as in the Navy Weapons Station case, supra, the Navy did advise the prospective witnesses that the Navy was changing policy and would no longer pay witnesses.

It is quite clear that when he was not actually testifying at the representation hearing Mr. Thomas aided and assisted the Union representative. 14/ The Activity urges therefore that because Mr. Thomas acted "preponderantly" as a representative of the Union they are not required to maintain such personnel on pay status, even though he testifies at the representation hearing. The Assistant Secretary held in the Naval Weapons Station case, supra, at page 7: "Further, I find that agencies are not obligated to make available on official time any employees who appear solely as union representatives. Thus, in my view, an employee who represents a union at a unit determination hearing is, in effect, working for that union and agencies should not be obligated to grant official time to such an employee." To expand this principal to exclude from pay status any employee-witness solely because he may also favor or assist the Union while he is not on the witness stand would be inconsistent with the reasoning of the Naval Weapons Station case, supra, and would constitute interference with employee rights as protected by the Order.

Therefore, in the circumstances here present and for reasons set forth by the Assistant Secretary in Department of the Navy and the U.S. Naval Weapons Station, supra, I find that the Activity violated Section 19(a)(1) of the Order when it placed Mr. Thomas on annual leave on February 9 and 10 rather

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14/ I conclude that Mr. Thomas' participation in the hearing, both on and off the record, when he was not actually a sworn witness on the witness stand did not constitute being a witness as envisioned by the Assistant Secretary in the Naval Weapons Station case. Such participation was rather in his capacity as a Union representative and adherent.

- 9 -

than on pay status 15/ and further that its admitted policy as set forth in its regulations particularly CPR 700 (Ch.9) 711 ¶ VII A.3.b., dated April 26, 1972, of refusing to maintain on duty status witnesses who appear on behalf of labor organizations at formal unit determination hearings also violates Section 19(a)(1) of the Order.

The next question presented is whether Mr. Thomas should be on pay status for the entirety of both days, February 9 and 10, or merely for the precise time he was actually testifying. Again, in the circumstances here present noting particularly that he was a witness on both days, that he was at the hearing at the instruction of the Hearing Officer, that he had not been advised of any change in policy with respect to leave, 16/ that there was no showing of any

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15/ The Activity urges that because the Assistant Secretary's decision in the U.S. Naval Weapons Station case, supra, issued after February 9 and 10 hearing, to apply it to the Activity and Mr. Thomas would be a retroactive application. I reject this contention because I am merely deciding whether certain conduct was prohibited by Section 19(a)(1) of the Order, which was promulgated long before February 9 and 10, 1972. It is further noted that this is not a change of any official interpretation of the Order and was precisely the situation presented to the Assistant Secretary in the U.S. Naval Weapons Station case, supra.

16/ The Activity contends that had it known Mr. Thomas would be a witness and be present for two days they would have objected. This argument is rejected because the Activity knew Mr. Thomas would be present, although not in what capacity, and also knew that he had not requested annual leave to be present. The Activity did not advise him, in advance of the change of leave policy and made no attempt to find out who the Union witnesses would be. Further, the Union took all reasonable precaution on Mr. Thomas' behalf, by notifying the Department of Labor that they intended to call Mr. Thomas as a witness and Mr. Thomas was the only employee called as a witness by the Union.

- 10 -

inconvenience on the part of the Activity and also because of the difficulty present in conducting such a formal unit determination hearing and scheduling witnesses, to conclude that Mr. Thomas should be on pay status only for the precise time he appeared on the witness stand would frustrate the policies of the Order for the reasons set forth in U. S. Naval Weapons Station case, supra. I conclude therefore that he should be on pay status for the entirety of both days and that the Activity's placing of Mr. Thomas on annual leave for February 9 and 10, 1972, was conduct prohibited by Section 19(a) (1) of the Order.

The Union requests a finding, based on the record in the instant proceeding, that the Activity violated Section 19(a) (1) of the Act by refusing to allow Mr. Thomas to remain on duty status while testifying in the instant unfair labor practice hearing. Because no new unfair labor practice charge was filed, the Complaint was not amended and this raises new and distinct matters not encompassed by the Complaint and Notice of Hearing in the instant case, I conclude that whether the Activity violated the Order by refusing to allow Mr. Thomas to testify in the hearing in the instant case while on duty status, is not properly before me.

#### RECOMMENDATION

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

1. That the Union's request that the Assistant Secretary find that the Activity violated Executive Order 11491 by refusing to allow Mr. Thomas to remain on pay status while testifying in the subject unfair labor practice hearing be denied;
2. That in light of the conclusion that Respondent engaged in conduct proscribed by

Section 19(a) (1) of the Executive Order 11491, he adopt the following Order which is designed to effectuate the policies of Executive Order 11491.

#### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102 Reserve Command Saint Louis Missouri shall:

1. Cease and desist from:

Interfering with, restraining or coercing employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

- a) Restore to Mr. Clifford Thomas all annual leave with which he was charged for both February 9 and 10, 1972, because of his attending and testifying at the formal unit determination hearing in Case No. 62-2361(RO).
- b) Take such action as is necessary in order to bring its regulations, particularly CPR 700 (Ch. 9) 711 ¶ VII A.3.b.,



into compliance with the requirement that necessary Union witnesses be made available on official time to participate in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

c) Post at its facility at the 102nd Reserve Command, Saint Louis Missouri, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated at Washington, D. C.

NOVEMBER 8, 1972

- 13 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

WE WILL restore to Mr. Clifford Thomas all annual leave with which he was charged for both February 9 & 10, 1972 because of his attending and testifying at the formal unit determination hearing in Case No. 62-2361(RO).

WE WILL take such action as is necessary in order to bring our Regulations, particularly CFR 700 (Ch 9) 711 ¶VII A.3.b., into compliance with the requirement that necessary union witnesses be made available on official time for participation in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

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

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

By \_\_\_\_\_

(Signature)

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

March 14, 1973

A/SLMR No. 257

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR MANAGEMENT-RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES CUSTOMS SERVICE,  
REGION IX,  
CHICAGO, ILLINOIS  
A/SLMR No. 257

UNITED STATES CUSTOMS SERVICE,  
REGION IX,  
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-8235

This proceeding arose upon the filing of an unfair labor practice complaint by Locals 111, 176 and 2946, American Federation of Government Employees, AFL-CIO (AFGE). The Complainants alleged that the Respondent violated Section 19(a)(1), (2), (3) and (6) of the Executive Order by refusing to pay per diem and travel expenses from Detroit to Chicago for four AFGE employee representatives to attend a pre-election meeting with representatives of the Respondent Activity and a competing union.

The Respondent contended that the employees participating in the pre-election meeting were not entitled to per diem and travel expenses as they were acting as representatives of a labor organization seeking recognition and, in effect, were engaged in union business. Further, it asserted that under existing agency regulations, they were not entitled to be paid travel expenses and per diem.

The Administrative Law Judge recommended that the complaint be dismissed. He noted that in Department of the Navy and U. S. Naval Weapons Station, A/SLMR No. 139, the Assistant Secretary held that the Executive Order requires agency management to make available on official time essential witnesses at nonadversary fact finding proceedings to enable him to perform his functions under the Order, but that "...agencies are not obligated to make available on official time any employees who appear solely as union representatives." The Administrative Law Judge concluded that the four AFGE representatives appeared at the meeting as union representatives and, therefore, were not entitled to be paid by the agency for their time and travel expenses.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

LOCALS 111, 176 and 2946,  
AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Complainants

DECISION AND ORDER

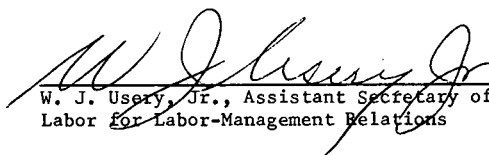
On January 9, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled proceedings, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-8235 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
March 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8235

United States Custom Service,  
Region IX, Chicago, Illinois,  
Respondent

and

Locals 111, 176, and 2946, American Federation  
of Government Employees, AFL-CIO,  
Complainants

REPORT AND RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Carmen J. Iodice  
Regional Counsel of Customs, Region IX  
Chicago, Illinois  
For the Respondent

Allen J. Kaplan  
National Vice-President, American Federation of Government Employees  
Northfield, Illinois  
For the Complainants

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8235

United States Custom Service,  
Region IX, Chicago, Illinois,  
Respondent

and

Locals 111, 176, and 2946, American Federation  
of Government Employees, AFL-CIO,  
Complainants

REPORT AND RECOMMENDATIONS

Statement of the Case

This case was initiated by a complaint dated March 20, 1972 and filed March 21, 1972 under Executive Order 11491. It was filed by American Federation of Government Employees for Locals 111, 176, and 2946. It alleges that a pre-election meeting was held in Chicago on December 22, 1971 at which were present four named employees of Respondent representing AFGE, Department of Labor officials, management officials, and officials of a competing union. It is alleged that the purpose of the meeting was to review the job classifications in the Region for the purpose of defining the appropriate unit. It complains that the Bureau of Customs refused to pay the transportation costs and two days per diem expenses and refused to grant two days administrative leave to the four employees representing AFGE. It claims that this was in violation of Sections 19(a)(1), (2), (3) and (6) of Executive Order 11491.

The Area Administrator and the Regional Administrator made investigations. On October 13, 1972 the Regional Administrator issued a Notice of Hearing to be held November 7, 1972 (later changed to November 8) in Chicago, Illinois. Hearings were held on November 8, 1972 in Chicago at which Complainants were represented by a national vice-president of AFGE and Respondent was represented by its Regional Counsel. All parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. December 8, 1972 was fixed as the date by which briefs were to be filed, all parties consenting. The Respondent filed a brief on December 6, 1972. The Complainants did not file a brief.

Statement of Facts

The facts originally arose out of a representation petition filed by National Customs Service Association covering a Regionwide unit. 1/ American Federation of Government Employees was the Intervenor and Respondent was the Activity.

A meeting was held on November 15, 1971 in Detroit, Michigan at which some of the details of the election were agreed upon. It was agreed also that a further meeting would be held on December 22, 1972 in Chicago, Illinois, where the Respondent's central records were kept, to determine what employees were included in the agreed-upon bargaining unit.

At the meeting in Chicago on December 22, the AFGE was represented by four employees of Respondent, Messrs. Cook, Seech, Patten, and Poklodek, 2/ who were employed in Detroit. (The meeting was not successful and resulted in a hearing and a unit determination by the Assistant Secretary. 3/) Respondent granted the four AFGE representative's administrative leave for December 22 but refused to pay them for their travel costs 4/ to and from Chicago and refused to pay them per diem for their subsistence expenses. It also refused to grant them administrative leave for December 21 and December 23 when the four representatives also were on leave.

At the hearing, and in the negotiations attempting to resolve their differences resulting in this proceeding, the Respondent offered to grant the four men an additional day of administrative leave (four hours for travel to Chicago and four hours for returning) without acknowledging that it would be in lieu of transportation and per diem. The Complainants rejected the offer, insisting the men be granted either two additional days administrative leave or their transportation costs and per diem. It was agreed at the hearing that the four representatives could have gone to Chicago and attended the meeting and returned to Detroit all in one day.

The Treasury Personnel Manual, adopted by the Bureau of Customs, provides:

"All representation proceedings will be conducted pursuant to Department of Labor Regulations.\*\*\*"

"At no stage of the representation process should official time be granted to employees to participate as union representatives in representation

1/ Case No. 52-2743(25).

2/ These individuals were not identified at the hearing, but they are named in Respondent's brief.

3/ United States Customs Service, A/SLMR No. 210.

4/ There was no evidence of such costs.

proceedings. Representation proceedings are defined to include all meetings, conferences, hearings, elections or other proceedings which take place in relation to petitions for exclusive recognition or decertification."

At the representation hearing in Case No. 52-2743(25) eventuating in A/SLMR No. 210, employees of Respondent, who were called as potential witnesses, were given administrative leave and travel and per diem, whether they testified or not.

Discussion and Conclusions

In Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139, the Assistant Secretary held that the Executive Order requires agency management to:

"...make available on official time essential witnesses at non-adversary fact finding proceedings held pursuant to the Regulations...based upon which I can fulfill the responsibility assigned me...." (Page 6.)

to decide questions, under Section 6(a)(1) of the Order, of the appropriate unit and related issues.

Accordingly, he found a violation of Section 19(a)(1) of the Executive Order in the application of a policy of refusing to grant administrative leave to necessary witnesses:

"...for the purpose of participating in a unit determination hearing held pursuant to the Regulations...." (Page 7.)

However, he stated that:

"...agencies are not obligated to make available on official time employees who appear solely as union representatives." (Page 7.)

He stated also that if in the future an agency should refuse to grant administrative leave, "which would include payment of any necessary transportation and per diem expenses," to necessary union witnesses to testify at a unit-determination hearing, such refusal "may" be considered violative of Section 19(a)(4) of the Order, which prohibits discipline or other discrimination against an employee for giving testimony under the Order.

It is the question of the proper application of those holdings and that language in Decision No. 139, and the question of their logical extension, that gives rise to this controversy. The Complainant's contend that the December 22 meeting was held for the purpose of accomplishing the purpose of Executive Order 11491, that such a meeting is necessary to accomplish that purpose, and therefore it comes within the

ambit of Decision No. 139. They argue that for the Assistant Secretary to determine an appropriate unit and its composition, such meetings are necessary with union participation. And they conclude that for the union to have equal participation, it is necessary for the agency to pay the costs of the union representatives to attend the meeting since it pays the costs of the agency representatives, and that therefore the Treasury regulation and the Bureau of Customs policy on the subject are violative of the Executive Order. The Respondent argues that union representatives who participate in pre-election meetings participate simply as union representatives engaged in union business working for the union and their time and expenses do not fall within Decision No. 139. They argue that the Treasury regulation and Bureau of Customs policy precluding the granting of administrative leave to union representatives in representation proceedings are not violative of the Executive Order.

I do not read Decision No. 139 to require, as Complainant appears to contend, that an agency must pay for the time and expenses of its employees when they are engaged in effectuating the purpose of the Executive Order or in effectuating the administration of the Executive Order. I read it to require that an agency must so recompense its employees when they testify at representation hearings, and perhaps when they perform other functions, to enable the Assistant Secretary adequately to perform his functions under the Order. I do not read it to require such recompense by the agency when the employee engages in activities to enable the union to perform its functions. Sometimes the same activities may enable both the union to perform its functions and the Assistant Secretary to perform his functions, such as was present in Decision No. 139; testifying in a non-adversary representation hearing enabled the union to present to the Assistant Secretary what it considered the pertinent facts relating to the appropriate unit, and enabled the Assistant Secretary to ascertain the facts necessary to a proper determination. So long as the proceeding is not adversary in nature and is conducted to enable the Assistant Secretary to perform his function in a matter pending before him, I would consider Decision No. 139 to require the agency to compensate its employees for their time and necessary travel expenses.

It should be noted that in Decision No. 139, the statement on page 7 that the agency is obligated to pay for the time of employee-witnesses in a unit-determination hearing is followed immediately by the statement that an agency is not obligated to pay for the time of its employees who appear at the hearing solely as union representatives. Thus, those who attended the same hearing to present and examine the witnesses on behalf of the union are expressly excluded from the requirement of agency reimbursement. Thus it is not only the nature of the proceeding but the function performed at the proceeding that governs. To be entitled to official time, the employee must appear not only in an investigatory, non-adversary proceeding, but must appear also in a non-adversary capacity as a supplier of information.

The record is quite meager on the function of the four employees at the December 22 meeting. We know only that the purpose was to try to

determine who was included and who excluded from the agreed-upon unit because of questions of the supervisory or confidential nature of their functions, to try to agree upon the proper scope of the unit. The part played by the four employees in question is nowhere clearly spelled out. The one witness called by Complainant, a representative of the agency who happened to be present at the hearing, was unable to say that the four AFGE men who attended the December 22 meeting were there to give evidence. <sup>5/</sup> No other witnesses were offered. Almost all the facts I have found were obtained by stipulation at the hearing, although both sides were given full opportunity to present witnesses. There was no stipulation concerning the function performed by the four men. They are referred to in the complaint <sup>6/</sup> as representing AFGE, and Complainant's representative at the hearing before me repeatedly referred to them as union representatives. <sup>7/</sup> I thus cannot conclude that they served in any other capacity, and therefore conclude they were not entitled under the Executive Order to be paid by the agency for their time and travel expenses.

Nor can I conclude, from the fact that the Respondent granted the four men administrative leave for December 22 for the purpose of attending the meeting, that they were there to enable the Assistant Secretary to perform his function. I do not know by what authority Respondent granted such leave, nor is it my function to determine whether it was required or proper. The fact that Respondent may have been lenient in granting such leave does not mean that it must be more lenient and grant also travel expenses.

The Complainant asks also that the Treasury regulation and the Customs policy prohibiting administrative leave to union representatives in representation proceedings be declared invalid.

Determinations of the validity of agency regulations should not be made by us in a factual vacuum. The application of that regulation and policy has arisen, so far as we are informed, only twice. Once was the incident involved in this proceeding in which I have found the position of the Activity to be valid. The other was in the hearing preceding Decision No. 210 involving the same parties. With respect to that hearing the agency paid for the time and expenses of employees called as witnesses. Surely the Complainant is not complaining of that. So far as we are informed, the regulation and policy have never been invalidly applied. And it is noted that the regulation and policy, literally, prohibit administrative leave to employees to participate as union representatives in representation proceedings. This does not contravene anything held or said in Decision No. 139.

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<sup>5/</sup> Tr. 19.

<sup>6/</sup> Section 2 of the complaint.

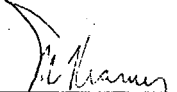
<sup>7/</sup> On page 35, three times on page 36, and twice on page 37.

March 14, 1973

I conclude that there is nothing in the record to sustain the charged violations of Section 19(a) of Executive Order 11491.

Recommendation

I recommend that the complaint be dismissed.

  
MILTON KRAMER  
Administrative Law Judge

January 9, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

DEPARTMENT OF THE ARMY,  
U. S. ARMY ELECTRONICS COMMAND (ECOM),  
FORT MONMOUTH, NEW JERSEY  
A/SLMR No. 258

This case involved a representation petition filed by the National Federation of Federal Employees, Local 476, Independent, seeking an election in a unit of all professional and nonprofessional employees of the Army Aviation Detachment physically located in Lakehurst, New Jersey and vicinity.

The Assistant Secretary concluded that under all the circumstances the petitioned for unit was not appropriate for the purpose of exclusive recognition. In reaching this determination, the Assistant Secretary noted, among other things, that Army Aviation Detachment employees are subject to the same centrally administered personnel policies and procedures as all other ECOM employees at Fort Monmouth; the area of consideration for promotions is on an Activity-wide basis; there have been a number of transfers between the Army Aviation Detachment and ECOM employees at Fort Monmouth; it appears that there are common job classifications in both the Army Aviation Detachment and the ECOM laboratories at Fort Monmouth; and there is substantial contact between Army Aviation Detachment employees and ECOM employees at Fort Monmouth.

Based on these factors, the Assistant Secretary concluded that the employees in the requested unit did not possess a clear and identifiable community of interest and that such a fragmented unit would not promote effective dealings or efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
U. S. ARMY ELECTRONICS COMMAND,  
FORT MONMOUTH, NEW JERSEY

Activity

and

Case No. 32-2468 E.O.

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 476, INDEPENDENT

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1904

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Louis A. Schneider. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ At the commencement of the hearing, the Intervenor, American Federation of Government Employees, AFL-CIO, Local 1904, herein called AFGE, moved to dismiss the petition on the basis of a hearing bar. In this regard, it was alleged that a prior consolidated hearing involving four separate petitions for units at Fort Monmouth constituted a bar to the subject petition under Section 202.3(f) of the Assistant Secretary's Regulations in effect at the time the petition was filed. The AFGE's motion was referred by the Hearing Officer to the Assistant Secretary for ruling. Inasmuch as the unit sought by the subject petition was not encompassed by any of the four petitions involved in the prior consolidated hearing, I find the hearing bar rule is inapplicable herein. Accordingly, I hereby deny the AFGE's motion to dismiss the subject petition.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, National Federation of Federal Employees, Local 476, Independent, herein called NFFE, seeks an election in a unit of all professional and nonprofessional employees of the Army Aviation Detachment physically located in Lakehurst, New Jersey and vicinity, excluding management officials, supervisors, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity. The Activity contends that the claimed unit is inappropriate and asserts that the only appropriate unit would encompass all eligible employees of the U. S. Army Electronics Command (ECOM) at Fort Monmouth, New Jersey and vicinity, which would include the employees sought by the petition herein. The AFGE is in essential agreement with the Activity's position. 2/

The Army Aviation Detachment is one of approximately 12 organizational subdivisions of the Headquarters and Installation Support Activity (HISA), which provides overall maintenance support to all elements of ECOM. At its location in Lakehurst, New Jersey, some 35-40 miles from Fort Monmouth, the Army Aviation Detachment is engaged primarily in providing flight support for the testing and evaluation of various devices developed at ECOM laboratories. Additionally, the Army Aviation Detachment transports passengers and equipment to other bases across the country from Fort Monmouth.

There are 38 civilian employees in the Army Aviation Detachment. With the exception of eight employees assigned to Fort Belvoir, Virginia, 3/ all Army Aviation Detachment employees work in the same area at Lakehurst, New Jersey, and occupy such job classifications as aircraft pilot, quality assurance specialist, air traffic control specialist, electronic technician, equipment specialist, budget analyst, tool stock and parts keeper, travel clerk, accounts maintenance clerk, supply clerk, and secretary.

The record reflects that there is a single, centralized civilian personnel office located at Fort Monmouth which provides personnel services for all ECOM employees at Fort Monmouth, including the Army Aviation Detachment employees. In this regard, such matters as hiring and firing, job classification, merit and career promotions, grievances, and disciplinary actions are handled by this office. Further, the

2/ In this connection, however, the AFGE would include also in an Activity-wide unit the tenant organizations located at Fort Monmouth.

3/ The NFFE indicated that it would exclude these eight employees from the claimed unit.

Activity has a central payroll office, operated by its financial management personnel, which services all ECOM employees, including the Army Aviation Detachment employees.

The area of consideration for promotional opportunities for all HISA employees, including employees of the Army Aviation Detachment, is on an Activity-wide basis. Also, the record reveals that the Army Aviation Detachment employees are included in the same competitive area for reductions-in-force as all other employees of HISA. <sup>4/</sup> Thus, in the event of a reduction-in-force action, an employee of the Army Aviation Detachment would be able to "bump" into another subdivision of HISA. The record shows further that over the past ten years there have been numerous instances of transfer between Army Aviation Detachment personnel and personnel of ECOM located at Fort Monmouth. Moreover, it appears that the Army Aviation Detachment and the ECOM laboratories located at Fort Monmouth have a number of similar job classifications such as budget analyst, tool stock and parts keeper, electronics technician, equipment specialist, travel clerk, and accounts maintenance clerk.

With respect to daily operations of the Army Aviation Detachment, the record discloses that there is a significant amount of on-the-job contact between Army Aviation Detachment employees and employees of the ECOM laboratories at Fort Monmouth. In this regard, the record reveals that it is not uncommon for as many as 50 ECOM laboratory employees to go to Lakehurst in order to work on a project in conjunction with Army Aviation Detachment personnel. Also, aircraft pilots and quality assurance specialists from the Army Aviation Detachment frequently go to Fort Monmouth to provide ECOM laboratory employees with technical assistance on various projects.

Based on the foregoing, I find that the unit sought by the NFFE does not constitute an appropriate unit for the purpose of exclusive recognition under Executive Order 11491. Thus, as noted above, employees of the Army Aviation Detachment are subject to the same centrally administered personnel policies and procedures as all other ECOM employees at Fort Monmouth; the area of consideration for promotions is on an Activity-wide basis; Army Aviation Detachment employees are included in the same competitive area for reductions-in-force as all other HISA employees; there is substantial contact between Army Aviation Detachment employees and ECOM employees at Fort Monmouth; there have been a number of transfers between Army Aviation Detachment personnel and other ECOM personnel located at Fort Monmouth; and it appears that there are common job classifications at the Army Aviation Detachment and the ECOM laboratories located at Fort Monmouth.

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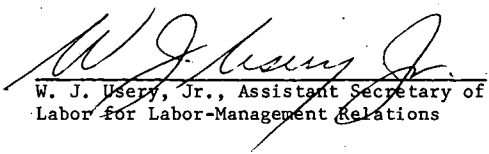
<sup>4/</sup> HISA includes approximately 1400-1500 employees.

Under all of these circumstances, I find that employees of the Army Aviation Detachment do not share a clear and identifiable community of interest separate and distinct from other ECOM employees located at Fort Monmouth and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NFFE's petition herein be dismissed. <sup>5/</sup>

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 32-2468 E.O. be, and it hereby is, dismissed.

Dated, Washington, D.C.  
March 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

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<sup>5/</sup> In view of the disposition herein, I find it unnecessary to make determinations concerning either the eligibility or the professional status of certain disputed employee classifications.



March 14, 1973

A/SLMR NO. 259

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CALIFORNIA AIR NATIONAL GUARD HEADQUARTERS,  
146th TACTICAL AIRLIFT WING,  
VAN NUYS, CALIFORNIA

CALIFORNIA AIR NATIONAL GUARD HEADQUARTERS,  
146TH TACTICAL AIRLIFT WING,  
VAN NUYS, CALIFORNIA  
A/SLMR No. 259

Activity

and

Case No. 72-RO-2829(25)

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 147, a subsequent hearing was held in this case for the purpose of securing additional evidence concerning the appropriateness of the unit sought. The Petitioner, National Association of Government Employees (NAGE) had petitioned for a unit consisting of all civilian technicians of the 146th Tactical Airlift Wing, California Air National Guard, employed at the Van Nuys Air National Guard Base, Van Nuys, California. The Activity was of the view that the claimed unit was appropriate.

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held in the subject case. Thereafter, on April 25, 1972, I issued a Decision and Remand 1/, in which I ordered that the subject case be remanded to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the unit sought. On October 3, 1972, a further hearing was held before Hearing Officer Alfred C. Potter. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

The record reflected that within the California Air National Guard, four squadrons of the 162nd Mobile Communications Group, two of which were tenant organizations on the Van Nuys Air National Guard Base, and the petitioned for unit, the 146th Tactical Airlift Wing, were the only unrepresented components.

Upon the entire record in this case, including the facts developed at the hearings held both prior and subsequent to the remand, and a brief submitted by the Activity, I find:

The Assistant Secretary found that the petitioned for unit, limited solely to the employees of the 146th Tactical Airlift Wing, was inappropriate for the purpose of exclusive recognition in that employees covered by the petition did not possess a community of interest separate and distinct from the remaining unrepresented employees of the Activity. However, noting in particular the common mission, personnel policies and procedures, employment requirements, and ultimate supervision of the California Air National Guard civilian technicians, as well as the facts that there had been transfers of employees between components of the Activity situated at the Van Nuys Air National Guard Base; transfers from other locations into the 146th Tactical Airlift Wing; some degree of interchange among the employees of the different components on the Van Nuys Base; and employees from Van Nuys were sent out on temporary details to other bases within the State, the Assistant Secretary found that a residual Statewide unit of all unrepresented California Air National Guard Civilian technicians was appropriate for the purpose of exclusive recognition. As the unit found appropriate differed substantially from the unit petitioned for originally, the Assistant Secretary directed that the election in the residual unit be held upon completion of the posting of a Notice of Unit Determination to permit possible intervention by labor organizations for the sole purpose of appearing on the ballot.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Association of Government Employees, herein called NAGE, seeks an election in a unit of all civilian technicians of the 146th Tactical Airlift Wing, California Air National Guard, employed at the Van Nuys Air National Guard Base, Van Nuys, California, excluding managers, supervisors, guards, and persons engaged in Federal personnel work in other than a purely clerical capacity. The Activity agrees that the petitioned for unit is appropriate.

The California Air National Guard is a State-administrated component of the California Military Department, whose mission is to organize,

1/ A/SLMR No. 147.

equip, and train forces to the point of readiness in the event of a State or Federal mobilization.

The Chief of Staff of the California Air National Guard is headquartered in Sacramento, California and reports directly to the Commanding General of State Military Forces who also is located in Sacramento. Under the Chief of Staff are Base Detachment Commanders of the California Air National Guard's primary organizational components: (1) the 146th Tactical Airlift Wing, Van Nuys Air National Guard Base, Van Nuys, California; (2) the 129th Special Operations Group, Hayward Air National Guard Base, Hayward, California; (3) the 144th Air Defense Wing, Fresno Air National Guard Base, Fresno, California; (4) the 163rd Fighter Group, Ontario Air National Guard Base, Ontario, California; and (5) the 162nd Mobile Communications Group, headquartered at the North Highlands Air National Guard Base, North Highlands, California. In addition, a number of sub-components of the 162nd Mobile Communications Group, located throughout California, report to the Base Detachment Commander in North Highlands, through Group Communications Station Detachment Commanders (Station Commanders). Such sub-components include: (1) the 149th Mobile Communications Squadron, North Highlands; (2) the 216th Electronic Installations Squadron, Hayward; (3) the 234th Mobile Communications Squadron, Hayward; (4) the 148th Mobile Communications Squadron, Compton; (5) the 222nd Mobile Communications Squadron, Costa Mesa; (6) the 147th Mobile Communications Squadron, Van Nuys; and (7) the 261st Mobile Communications Squadron, Van Nuys.

Bargaining history within the State reveals that the Activity has accorded exclusive recognition to various locals of the NAGE in each of the following units: the 129th Special Operations Group; the 144th Air Defense Wing; the 163rd Fighter Group; the 162nd Mobile Communications Group (Headquarters) and the 149th Mobile Communications Squadron; and the 216th Electronic Installations Squadron and the 234th Mobile Communications Squadron. Unrepresented among the Activity's employees are those of the 146th Tactical Airlift Wing, the petitioned for unit, herein, and four squadrons of the 162nd Mobile Communications Group, i.e., the 147th, 261st, 148th, and 222nd Mobile Communications Squadrons.

The record reflects there are approximately 275 Air Reserve Technicians (ART's) in the 146th Tactical Airlift Wing, Van Nuys Air National Guard Base. The particular assignment of the 146th Tactical Airlift Wing is to perform those tasks essential to tactical airlifts. More precisely, the claimed employees are engaged in activities pertaining to administration and supply, in addition to those duties required for maintenance or repair of aircraft and actual air operations. These employees hold diverse grades 2/ and classifications, but join all

2/ The record reveals that the structure and range of grades within the 146th Tactical Airlift Wing is as follows: GS-3 through GS-14; WG-8 through WG-12; WL-8 through WL-11; and WS-9 through WS-11.

other ART's within the State in meeting certain employment requirements, as established by Air National Guard regulations. In this latter regard, for example, they must be members of the Air National Guard and hold military grades therein, and they must meet the physical standards for the military positions they fill.

As indicated above, two of the unrepresented squadrons of the 162nd Mobile Communications Group, the 147th and the 261st Mobile Communications Squadrons, are located at the same base as the employees in the claimed unit. Each of these squadrons employs approximately 14 ART's to accomplish its particular communications mission. 3/ By direction of the Air Division, Office of the Commanding General, State Military Forces, the host 146th Tactical Airlift Wing provides support services to these tenant squadrons which include maintenance of both civilian and military personnel records, all base supply functions, financial services, and civil engineering support.

With respect to employment and other related personnel matters affecting the ART's in the primary organizational components of the California Air National Guard, the record reveals that the Commanding General of the California Military Department, in Sacramento, has designated each of the five Base Detachment Commanders of the California Air National Guard an "Appointing Officer." As a result, the 146th Tactical Airlift Wing's Base Detachment Commander has the authority to hire, reduce rank or compensation, suspend, furlough, or separate ART's in the 146th Tactical Airlift Wing in conformance with requirements established by the Federal Personnel Manual, National Guard Bureau personnel regulations and other controlling directives. The "Appointing Officer" authority possessed by Base Detachment Commanders is limited to their particular command and does not extend to other components of the California Air National Guard, despite the physical presence of segments of such components as tenant organizations on their particular base. Thus, the Base Detachment Commander of the 146th Tactical Airlift Wing does not have "Appointing Officer" authority over the ART's of the two tenant organizations on the Van Nuys Air National Guard Base; rather, the "Appointing Officer" authority over these units resides with the Base Detachment Commander of the 162nd Mobile Communications Group at North Highlands. 4/

The record establishes that all employees of the California Air National Guard are under certain uniform policies which have been

3/ The record reveals that the two other unrepresented squadrons of the 162nd Mobile Communications Group, the 148th in Compton and the 222nd in Costa Mesa, have employee complements of some 14 ART's each.

4/ However, in this regard, the Station Commanders of the two tenant squadrons at the Van Nuys Air National Guard Base have been given "Nominating Officer" authority, by means of which they can make recommendations to the Base Detachment Commander at North Highlands.

established at the State level. Thus, there is a merit promotion plan which applies to all California Air National Guard ART's and which provides the procedures for filling technician vacancies on the basis of merit. In this connection, certain minimum areas of consideration have been established within each of the major components for the filling of vacancies. However, under this system, while the minimum area of consideration for all Wage Board positions and for those General Schedule positions below GS-12 in the 146th Tactical Airlift Wing is the Wing itself, for positions GS-12 and above, the area of consideration is Statewide within the California Air National Guard. Similarly, the minimum area of consideration for the tenant squadrons at the Van Nuys Air National Guard Base includes all seven sub-components of the 162nd Mobile Communications Group for Wage Board positions and those General Schedule positions below GS-12, but it is Statewide for positions GS-12 and above. 5/

The Chief of Staff of the California Air National Guard, or his designated representative, performs the function of selecting official for all positions GS-12 and above. When the selecting official is other than the Chief of Staff all such applications are forwarded to him for concurrence. In this connection, the record indicates that for all positions GS-12 and above within the State, the Technician Personnel Branch (Office of the Commanding General) is utilized to perform various personnel functions such as preparation of vacancy announcements and certificates of eligibility.

The record reveals that several employees of the 146th Tactical Airlift Wing have been sent temporarily to other bases of the California Air National Guard to perform certain necessary inspections and, at such times, they work with personnel of the particular base involved to complete their assigned task. The evidence establishes, further, that there have been five permanent transfers involving employees of the 146th Tactical Airlift Wing and the tenant squadrons on the Van Nuys Base since January 1, 1969. Also, the ART's non-duty hour security guard program 6/ is effected by an interchange of employees from all three units on the Base.

The record reflects that all technicians of the California Air National Guard are subject to a uniform Statewide grievance procedure. In this procedure, the Base Detachment Commanders are the deciding officials at the first formal step of grievances. However, appeals from decisions made in any of the Activity's components are heard, in subsequent steps of the formal procedure, by the Chief of Staff, Air, of the California Air National Guard and a Hearing Examiner, with all

5/ The record indicates that the same areas of consideration would apply during a reduction in force.

6/ In A/SLMR No. 147 it was determined that the nature and extent of the ART's duties associated with the security guard program did not render them "guards" within the meaning of Section 2(d) of the Order.

final decisions resting with the Commanding General, State Military Forces. Also, in connection with other labor-management relations matters, the Commanding General appoints negotiating teams which may include Base Detachment Commanders. 7/

Based on the foregoing, I find that the petitioned for unit, limited solely to the employees of the 146th Tactical Airlift Wing, is inappropriate for the purpose of exclusive recognition under Executive Order 11491, as the employees do not possess a community of interest separate and distinct from the remaining unrepresented employees of the Activity. Thus, as noted above, the evidence establishes that there is substantial commonality among all of the technicians of the California Air National Guard in areas such as mission, personnel policies and procedures, employment requirements, and ultimate supervision. Moreover, the record reveals that there have been transfers of employees between components of the California Air National Guard situated at the Van Nuys Base, as well as transfers from other locations into the 146th Tactical Airlift Wing; that there is some degree of interchange among the employees of the different components at the Van Nuys Base; and that employees from Van Nuys are sent out on temporary details to other bases within the State. Thus, in my view, if I were to find the claimed unit appropriate there would remain four unrepresented squadrons of the 162nd Mobile Communications Group, including two tenant squadrons at the Van Nuys Base, containing employees who share a clear and identifiable community of interest with the petitioned for employees. Under these circumstances, I find that a residual Statewide unit of all the remaining unrepresented ART's in the California Air National Guard would be appropriate for the purpose of exclusive recognition. Moreover, in my opinion, such a residual Statewide unit of all unrepresented employees of the Activity will promote effective dealings and efficiency of agency operations.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491: 8/

All Air Reserve Technicians in the California Air National Guard employed by the 146th Tactical Airlift Wing, the 147th Mobile Communications Squadron, the 261st Mobile Communications Squadron, the 148th Mobile Communications Squadron, and the 222nd Mobile Communications Squadron; excluding employees engaged in Federal personnel work in other than a purely clerical capacity,

7/ Any negotiated agreements, however, must meet with the final approval of the National Guard Bureau.

8/ I am advised administratively that the NAGE has submitted a showing of interest which is in excess of thirty percent in the unit found appropriate.

professional employees, 9/, management officials,  
and supervisors and guards as defined in the Order. 10/

#### DIRECTION OF ELECTION

In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any interventions in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

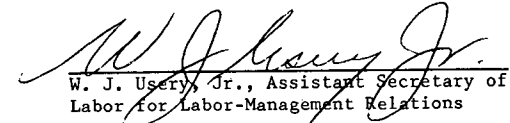
Because the above Direction of Election is in a unit substantially different than that sought by the NACE, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision.

9/ Although not specifically excluded in the petition, the record indicates that the NACE did not contemplate the inclusion of professional employees, if any, in the petitioned for unit.

10/ During the hearing, the parties agreed that the following positions should be excluded from any unit found appropriate because the employees involved were supervisors: Medical Services Technician, GS-8; Aircraft Propeller Mechanic Leader, WL-10; Flight Line Mechanic Foreman, WS-11; Sheet Metal Mechanic Leader, WL-10; Electronic Equipment Foreman, WS-10; Powered Ground Equipment Leader, WL-10; Aircraft Jet Engine Mechanic Foreman, WS-10; Aircraft Mechanic Leader, WG-12; Aircraft Instrument and Control Systems Leader, WL-10; and Aircraft Electrician Leader, WL-10. As there is no evidence in the record that would require a contrary conclusion, I find that the employees in these positions should be excluded from the unit found appropriate. While the parties maintained that employees in a number of other classifications were either supervisors or management officials and, therefore, should be excluded from the unit, I find that the evidence submitted in support of their agreement is insufficient to enable me to make eligibility determinations with respect to such positions.

If the NACE desires to proceed to an election, because the unit found appropriate is substantially different than the unit it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot in the election among the employees in the unit found appropriate.

Dated, Washington, D.C.  
March 14, 1973

  
W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

March 28, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,  
UNITED STATES DEPENDENTS' SCHOOLS,  
EUROPEAN AREA  
A/SLMR No. 260

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The subject case involves a representation petition filed by the Overseas Education Association, National Education Association, Independent (OEA) seeking a residual unit of all nonsupervisory professional school personnel who are employed in the Department of Defense Overseas Dependents' Schools, European Area, excluding, among others, employees who otherwise would be included but who currently are represented by an exclusive representative under collective-bargaining agreements in effect as of March 17, 1972, the date of the petition. The Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO (OFT) intervened in the petition filed by the OEA and agreed that the claimed residual unit was appropriate. The Activity contended, among other things, that the claimed residual unit was inappropriate and that the appropriate unit should be Area-wide in scope. The OEA requested that the claimed employees should be given an opportunity to determine whether or not they desired to be represented in the existing overall unit currently represented by OEA.

The Assistant Secretary concluded that the residual unit petitioned for by OEA, which included all nonsupervisory professional school personnel in approximately 32 schools in the European Area, was appropriate. This number included five schools established after the petition was filed. In reaching this conclusion, the Assistant Secretary noted that the same personnel and merit policies, and grievance and adverse action procedures are applicable to all school personnel in all schools in the European Area, and that the Area Superintendent arranges for logistical support for the school program and its personnel and has authority to assign and transfer all school personnel within the European Area, including the employees in the unit sought.

Also, the Assistant Secretary found that by its intervention in the instant case and by proceeding to an election in the unit sought, the OFT, in effect, will have waived its exclusive representation status as to those employees in existing units encompassed in the OEA's petition and may continue to represent those employees on an exclusive basis only in the event that it is certified in the petitioned for unit. Further, the Assistant Secretary found that the OEA's request, that employees in the unit sought be given the opportunity to determine whether or not they desire to be represented in the existing overall

unit currently represented by OEA rather than in the claimed residual unit, was consistent with the purposes and policies of the Order. In granting OEA's request, the Assistant Secretary noted that a vote for OEA would indicate the particular employee's desire to be included in the existing overall unit currently represented by the OEA and that a vote for OFT would indicate a desire for representation in a separate residual unit.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
UNITED STATES DEPENDENTS' SCHOOLS,  
EUROPEAN AREA 1/

Activity

and

Case No. 22-3386(R0)

OVERSEAS EDUCATION ASSOCIATION,  
NATIONAL EDUCATION ASSOCIATION,  
INDEPENDENT

Petitioner

and

OVERSEAS FEDERATION OF TEACHERS,  
AMERICAN FEDERATION OF TEACHERS,  
AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Earl T. Hart. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the case, including briefs filed by all of the parties, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

1/ The name of the Activity appears as amended at the hearing.

2. The Petitioner, Overseas Education Association, National Education Association, Independent, herein called OEA, seeks an election in a unit of all nonsupervisory professional school personnel who are employed in the Department of Defense Overseas Dependents' Schools, European Area, including those with "Not to Exceed" appointments (NTE's), but excluding nonprofessionals, substitute teachers, management officials, supervisors, employees engaged in Federal personnel work in other than a clerical capacity, guards and all other employees who would otherwise be included but who are currently represented by an exclusive representative under collective-bargaining agreements in effect as of the date of the filing of the petition. 2/ The OEA asserts that the petitioned for residual unit is appropriate and that an election in such a unit would be proper. 3/

At the hearing and in its brief the OEA requested that the claimed employees be given the opportunity to determine whether or not they desired to be represented in the existing overall unit currently represented by the OEA.

The Department of the Army, United States Dependents' Schools, European Area, herein called the Activity, contends that the claimed residual unit is inappropriate and that the appropriate unit should be Area-wide in scope. It argues, further, that certain of the petitioned for schools are accretions to the existing OEA bargaining unit and that

2/ The unit description appears as amended at the hearing. The following list of schools initially was agreed to by the parties as appropriately included in the unit sought: Ankara High School, Athens Elementary School, Avellino Elementary School, Bahrain Elementary School, Brunssum Elementary School, Brunssum High School, David Glasgow Farragut Junior/Senior High School (Rota), Forrest Sherman Elementary School (Naples), Forrest Sherman High School (Naples), Heidelberg High School, Hopstein Elementary School, Izmir Elementary School, Izmir High School, Kaiserslautern High School, Kaiserslautern Junior High School, Leipheim Elementary School, Memmingen Elementary School, Ramstein Elementary School (North), Ramstein Elementary School (South), Ramstein Junior High School, Sculthorpe Elementary School, Todendorf Elementary School, Verona Elementary School, Vicenza High School, Vicenza Elementary School, Zaragoza Elementary School, Zaragoza Junior/Senior High School, and Zweibrucken High School. Subsequently, the parties agreed that because Hopstein Elementary School was no longer in existence it should be stricken from the agreed upon list.

3/ The Intervenor, Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO, herein called OFT, was in agreement with this position of the OEA.

other existing units, limited in scope to individual schools, in which OFT holds exclusive recognition, in effect, have been found to be inappropriate by the Assistant Secretary in U. S. Department of Defense, DOD, Overseas Dependent Schools, A/SLMR No. 110.

#### BACKGROUND

The Overseas Dependents' Schools System, established in 1964 by the Department of Defense, provides elementary and secondary education for minor dependents of Department of Defense military and civilian personnel stationed overseas. Policy direction over the school system has been delegated to the Assistant Secretary of Defense (Manpower and Reserve Affairs). In 1966, through an administrative change, each military department, i.e., Navy, Army, and Air Force, was given jurisdiction in the Atlantic, European, and Pacific Areas, respectively, for the academic administration of the Dependents' Schools System in its particular Area as well as the responsibility for all personnel employed by the Overseas Dependents' Schools in such Area. As a result of this administrative change, the Secretary of the Army was assigned responsibility for the operation and administration of all Department of Defense schools in the European Area, as well as in Africa and Asia to 90° East Longitude.

Currently, the OEA represents exclusively all nonsupervisory professional school personnel in the European Area, except for certain unrepresented individual schools in the European Area and certain individual schools where the nonsupervisory professional school personnel are represented by the OFT. The record reveals that the OEA and the Activity were parties to a negotiated agreement which covered approximately 183 of the approximate 222 schools in the European Area in existence at the time of the hearing. The OEA's European negotiated agreement, which had a two-year duration, expired on April 1, 1971, and a subsequent agreement was negotiated with an expiration date of June 9, 1972. 4/

The evidence establishes that the OFT was granted exclusive recognition under Executive Order 10988 in approximately 16 individual school units in the European Area. At the time of the filing of the petition in the subject case, the record reveals that the OFT had negotiated agreements covering four schools: Frankfurt American High School, Torrejon Elementary School, Torrejon Middle School, and Torrejon High School. 5/ The remaining units represented exclusively by the OFT were not covered by negotiated agreements at the time the OEA filed its petition in the instant case.

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4/ There is no evidence that the agreement has been extended.

5/ As the OEA petition herein was for a residual unit and expressly did not include schools covered by existing negotiated agreements, no agreement bar issue was considered to exist in this case.

#### FACTS

As noted above, the responsibility for the operation and the administration of the Overseas Dependents' Schools System in the European Area has been delegated to the Secretary of the Army. The European Area consists of approximately 222 schools employing over 5,000 teachers. 6/ The Chief Administrative Officer of the European Area's school system is the Area Superintendent who is responsible for the organization, administration and supervision of the Dependents Schools' education program within the Area. Under the Area Superintendent are several District Superintendents, each of whom supervises an unspecified number of individual school principals who, in turn, supervise the teachers employed in the individual schools. The Area Superintendent implements basic guidelines issued by the Department of the Army and prepares and issues documents designed to provide uniform administration within the Area. The record reveals also that the Area Superintendent establishes the general educational goals for the schools in the Area and, through the execution of agreements with individual local United States military installations, arranges for logistical support for the program and its personnel.

The record establishes that the mission and goals of all Army school personnel in the European Area are the same and that all school personnel are hired by the European Area Superintendent who makes the final decision on the assignment of school personnel within the European Area. Further, the Area Superintendent has authority to transfer school personnel within the European Area pursuant to applicable Army regulations. Teacher training programs, personnel policies, a merit promotion system, a leave program and grievance and adverse action procedures are established by the Department of the Army and are administered by the Area Superintendent with respect to all school personnel within the European Area.

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6/ In addition to the 218 schools in existence at the time the instant petition was filed by the OEA, five new schools were opened in the European Area around August 1972 and the Hopstein school was closed, bringing the total number of schools in the Area to 222. The five new schools were Athens Elementary #2, Bahrain High, Bichester Elementary, Naples Elementary #2, and Javer Elementary. In view of the fact that the Bahrain Elementary School was included on the list of unrepresented schools agreed to by the parties at the hearing to be included within the residual unit, in the circumstances of this case it was considered unnecessary to pass on the issue raised by the OEA as to whether the Bahrain High School was an accretion to the Bahrain Elementary School. Also, the evidence was not sufficient to support the Activity's contention that certain of the petitioned for schools are accretions to the existing OEA bargaining unit. Further, I find that the five new schools, noted above, are encompassed by the petition herein which seeks an overall, residual unit.

The petitioned for residual unit encompasses approximately 32 schools and approximately 705 nonsupervisory professional school personnel. Employees in the following categories are covered by the petition herein: counselor, school psychologist, social worker, elementary teacher, secondary teacher, specialty teacher and guidance counselor. 7/ These employee classifications are found throughout the Overseas Dependents' Schools System in the European Area.

Under all the circumstances, and in the absence of any other labor organization seeking to represent the remaining unrepresented non-supervisory professional school personnel of the European Area on any other basis, I find that there is a clear and identifiable community of interest among all of the remaining unrepresented nonsupervisory professional school personnel in the European Area, and that such a residual unit will promote effective dealings and efficiency of agency operations. 8/ Thus, it is clear that the Area Superintendent establishes the general educational goals for all schools in the European Area; provides for the uniform administration of the Area's education program; arranges for the logistical support for the program and its personnel; and has authority to assign and transfer teacher personnel within the Area. In addition, the same personnel and merit promotion policies, and

7/ The parties stipulated and the record supports that "NTE's" should be included in the unit sought because they are employed on a year-to-year basis and have a reasonable expectancy of continued employment. In addition, the parties stipulated that all personnel defined in Public Law 86-91 as teachers, who are neither supervisory nor managerial, should be included in the unit sought.

8/ It was noted that under Executive Order 10988 the Activity accorded exclusive recognition to the OEA in a less than Area-wide unit and to the OFT in units limited in scope to individual schools. Other than mere conclusionary statements, the Activity presented no evidence that such relationships had hampered the Activity's operations or precluded effective dealings between the parties. In this regard, cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9, where the Federal Labor Relations Council stated that "evidence as to whether a requested unit will promote effective dealings and efficiency of agency operations is within the special knowledge of, and must be submitted by, the agency involved." With respect to the Activity's contention that the claimed residual unit is inappropriate, see Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6; Federal Aviation Administration, Department of Transportation, A/SLMR No. 122; and Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, where residual units were found to be appropriate.

grievance and adverse action procedures are applicable to all school personnel in all schools within the Area. 9/

In its brief, the OFT acknowledges that by its intervention in the subject case and by proceeding to an election in the unit sought it will waive its exclusive representation status with respect to the non-supervisory professional school personnel in the exclusively recognized units represented by the OFT encompassed by the petition herein. In this connection, the OFT takes the position that it desires that such units be included within the petitioned for residual unit. Under these circumstances, I find that by proceeding to an election in the unit sought, the OFT will, in effect, have waived its exclusive representation status as to those employees in its existing units encompassed by the petition herein and may continue to represent those employees on an exclusive basis only in the event that it is certified in the unit petitioned for in the subject case. 10/

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional school personnel employed in the Department of Defense Overseas Dependents' Schools, European Area, including those with "Not to Exceed" appointments, excluding all school personnel covered by negotiated agreements, in effect as of March 17, 1972, nonprofessional employees, substitute teachers, 11/ employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 12/

9/ As noted above, approximately 12 units represented by the OFT were not covered by negotiated agreements at the time the OEA filed its petition in the instant case. Under the circumstances described above, I find that the employees in these units share a clear and identifiable community of interest with the remaining unrepresented employees in the residual unit.

10/ Cf. Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83 at footnote 2; Department of the Navy, Military Sealift Command, A/SLMR No. 245.

11/ The parties stipulated and the record supports a finding that substitute teachers should be excluded from the unit as they do not have a reasonable expectation of permanent employment.

12/ I am administratively advised that the inclusion of the five new schools in the unit found appropriate does not render inadequate the showing of interest submitted by the OEA and OFT.



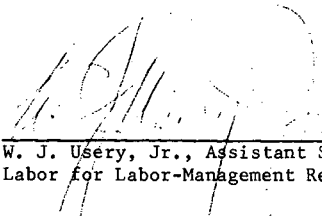
April 30, 1973

As noted above, the OEA requested that the claimed employees be given the opportunity to determine whether or not they desire to be represented in the existing overall unit currently represented by the OEA. I view such request to be consistent with the purposes and policies of the Order. Accordingly, if a majority of the employees in the unit found appropriate votes for the OEA, they will be taken to have indicated their desire to be included in the existing unit currently represented by the OEA and the appropriate Area Administrator will issue a certification to that effect. If, on the other hand, a majority of the employees in the unit found appropriate votes for the OFT, they will be taken to have indicated their desire to be represented in a separate residual unit and the appropriate Area Administrator will issue a certification to that effect.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Overseas Education Association, National Education Association, Independent; or Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO; or by neither.

Dated, Washington, D.C.  
March 28, 1973

  
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W. J. Usery, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF AIR FORCE,  
NORTON AIR FORCE BASE  
A/SLMR No. 261

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1485 (Complainant) against the U. S. Department of Air Force, Norton Air Force Base (Respondent). The Complainant alleged that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by refusing to consult, confer, or negotiate with the Complainant over the impact of a change in the tour of duty of civilian guards assigned to the "graveyard" shift.

In agreement with the Administrative Law Judge, the Assistant Secretary found that while under Section 11(b) of the Order there was no obligation to meet and confer on the Respondent's decision to eliminate the civilian guards' "graveyard" shift, the impact of such a change was subject to negotiations. In this latter regard, the Assistant Secretary adopted the Administrative Law Judge's determination that subsequent to the date the Complainant received notification of the Respondent's intent to change the graveyard shift, but prior to the actual implementation of the change, the Complainant had ample opportunity to request bargaining on the impact but failed to do so. In these circumstances, the Assistant Secretary agreed with the Administrative Law Judge's determination that the complaint herein be dismissed.

With a view toward fostering and affording an atmosphere conducive to the settlement of unfair labor practice allegations, the Assistant Secretary found that the Administrative Law Judge erroneously admitted into evidence an offer of settlement by the Respondent which allegedly contained an admission against interest. Accordingly, the Assistant Secretary did not consider such offer in reaching a decision in this matter.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF AIR FORCE,  
NORTON AIR FORCE BASE

Respondent

and

Case No. 72-3121(26)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1485

Complainant

DECISION AND ORDER

On January 24, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation 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. Thereafter, both parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. Except as modified below, the rulings of the Administrative Law Judge are hereby affirmed. 1/ Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire

1/ The Respondent excepted to the Administrative Law Judge's ruling admitting into evidence an offer of settlement by the Respondent, set forth in an August 30, 1972, letter to a representative of the Complainant, which allegedly contained an admission against interest. Contrary to the ruling of the Administrative Law Judge, I find that the Respondent's offer of settlement in this matter should not have been admitted into evidence. Thus, in order to foster and afford an atmosphere conducive to the settlement of unfair labor practice allegations, it is considered beneficial and necessary to assure to the parties involved in settlement discussions that matters raised in connection with their deliberations ultimately will not be admitted into evidence. In my view, a contrary policy necessarily

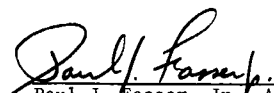
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record in the subject case, including the exceptions and supporting briefs, I hereby adopt the findings, conclusions, and recommendation of the Administrative Law Judge. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3121(26) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
April 30, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

1/ would inhibit the settlement of unfair labor practice allegations and thereby possibly encourage needless litigation. Such a result would be inconsistent with the purposes and policies of the Order. Under these circumstances, in reaching a decision in this matter no consideration has been given to the offer of settlement and the alleged admission against interest contained in the Respondent's letter of August 30, 1972.

2/ Cf. United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106.

Preliminary Statement

U. S. DEPARTMENT OF AIR FORCE  
NORTON AIR FORCE BASE

Respondent

and

CASE NO. 72-3121 (26)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 1485

Complainant

Joseph L. Fuller, Major, USAF

Office of the Staff Judge Advocate  
Norton Air Force Base, California  
and

Nolan Skulte, Captain, USAF

Office of the Judge Advocate General  
Washington, D. C., on the  
brief for Respondent.

Neal H. Fine, Esquire

Assistant to the Staff Counsel  
American Federation of Government  
Employees, Washington, D. C.,  
for Complainant.

Before: Salvatore J. Arriago  
Administrative Law Judge

This proceeding, heard in Los Angeles, California, on September 13, 1972, arises under Executive Order 11491, as amended (hereafter called the Order) pursuant to a Notice of Hearing on Complaint issued on July 10, 1972, by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, San Francisco Region, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (hereinafter called the Assistant Secretary). The Complaint, filed on February 7, 1972 by American Federation of Government Employees on behalf of Local 1485, American Federation of Government Employees (both hereinafter jointly called Complainant) alleges that the United States Department of Air Force facility at Norton Air Force Base, San Bernardino, California (hereinafter called Respondent or the Facility) violated Sections 19(a)(6) and (1) of the Order by removing six policemen from the "graveyard" shift without proper negotiation and consultation with Local 1485, American Federation of Government Employees (hereinafter called the Union), which was the exclusive collection bargaining representative of the employees involved. At the opening of the hearing Counsel for Complainant narrowed the scope of the Complaint by acknowledging that Respondent was under no duty to negotiate with the Union on the change of the tour of duty of the "graveyard" shift employees but maintained, nevertheless, that Respondent was under an obligation to negotiate with the Union on the impact of the change on the employees involved. Complainant does not allege any independent violation of Section 19(a)(1) of the Order but contends that a violation of Section 19(a)(1) derives from the alleged violation of Section 19(a)(6).

At the hearing all parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Oral argument was waived and briefs were filed by both parties.

Upon the entire record 1/ in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

#### Findings of Fact

##### I. Introduction

Since August 6, 1968, the Union has been the exclusive collective bargaining representative for all civilian employees in the 63rd Security Police Squadron at Norton Air Force Base. At the time of the hearing a collective bargaining contract had not been negotiated.

Prior to November, 1971, the unit employees included a total of approximately 23 to 25 guards who worked on three flights or shifts. The "graveyard" shift tour of duty consisted of one GS-7 supervisor and five GS-5 patrolmen. It began at approximately 11:00 p.m. and continued to 7:00 a.m. the following day. "Graveyard" shift employees received a 10% night differential and 25% premium pay for Saturday-Sunday shifts. Thus the "graveyard" shift employees earned approximately \$40 to \$50 a pay check more than those guards working on other tours of duty.

##### II. The Alleged Unfair Labor Practice

Early in September, 1971, 2/ Eugene N. Stites, Operations Officer for the 63rd Security Squadron, was notified by the Base Comptroller that the civilian payroll in the security group was excessive. At that time, the civilian payroll was only 95% "funded" and accordingly had to be reduced by 5%

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1/ Page 4, line 25, of the hearing transcript is hereby corrected to reflect that Assistant Secretary Exhibit 1(a) consists of the Complaint in this proceeding and an "8-page" attachment rather than a "7-page" attachment as stated in the transcript.

2/ Unless otherwise noted all dates hereafter were in 1971.

- 3 -

to meet the 95% allocation. In order to achieve this objective the Base Comptroller directed that the 25% Saturday-Sunday premium being paid to the "graveyard" shift guards be reduced.

Thereafter, around September 17, Stites met with Security Police Squadron Commander Lt. Colonel R.S. Espiritu and discussed the matter of reducing premium pay. At this meeting Stites proposed that the "graveyard" shift be discontinued. On September 17, Stites sent a letter 3/ to Glenn D. Rahr, President of the Union, requesting that a "Management-Union Consultation Meeting" be scheduled for September 24. The letter, received by Rahr on September 21, stated:

1. We propose to conduct a consultation meeting at 1500 hours, 24 September 1971, at Bldg. 608. You and one elected official are invited to attend.
2. Topic proposed for consultation is working hours for the civilian Security Policemen.
3. If the above date and time are not convenient, please contact the undersigned.

On September 24, the scheduled meeting was held. Various representatives of the Facility and the Union were present including Stites, Capt. Kewin, JAG Officer, and Mr. George N. Pierce of the Civilian Personnel Office, all of whom represented the Facility. Rahr and Mr. Werner Schaller, a day shift guard and steward for Local 1485, represented the Union. Stites and Rahr were the chief spokesmen. The meeting lasted approximately forty minutes. Except for Respondent's letter to the Union of September-17, the Union representatives had no prior information as to the matters to be discussed at the meeting.

While some differences exist in the evidence as to what was said at the meeting of September 24, there is substantial agreement in the essentials of the discussion. I believe that many of the variances arise primarily from failure of memory in attempting to reconstruct a discussion which took place approximately one year prior to the time of the hearing. In any event, viewed as a whole, I find

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3/ Complainant Exhibit No. 1.

- 4 -

that the evidence establishes that at the meeting 4/ the Union was informed by Stites that the "graveyard" shift was being eliminated effective October 16, since the civilian payroll was only 95% funded. 5/ A saving would be realized through the elimination of the night shift differential and the Saturday-Sunday premium pay. Of the seven guards comprising the "graveyard" shift, three were to be transferred to the day shift and three to the "swing" shift. The seventh employee, a grade GS-7 sergeant, would also be transferred to another shift and his transfer would possibly result in his or another GS-7 sergeant with less seniority being reduced to a GS-5 patrolman. Rahr, who previously worked as a "graveyard" shift guard, asked how it would be determined to which shift the individuals would be transferred and raised the question of seniority. Stites replied that he would ask first for volunteers and if that did not resolve the matter, the guards would be given their choice by seniority. A letter to the individuals explaining the necessity for the change was going to be sent to the affected employees explaining the necessity for the change. Rahr asked whether this was to be handled as a reduction in force (RIF). The management representatives informed Rahr that they were not sure but would check into the matter. When Rahr questioned Stites as to what he thought would be the biggest complaint of the employees being transferred, Stites replied "the loss of premium pay." Rahr asked where the specific "authority" for the action came from and was told by Stites, after repeated questioning, that it was a decision of the Base Comptroller or his office. 6/ Rahr announced he would send a letter

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4/ This account of the meeting is based upon a synthesis of the testimony of Rahr, Stites, Pierce, and Schaller, as well as the Facilities minutes of the meeting recorded by a secretary, which were admitted into the record without objection as Respondent Exhibit No. 1.

5/ I specifically do not credit Stites' testimony that the elimination of the shift was conveyed to the Union as a "proposal" which would be put into effect "if everybody agreed including the Union."

6/ I specifically do not credit Stites' testimony that he told Rahr that the "authority" for the action was "management's prerogative."

requesting the information with regard to the "authority" for the action in writing so he could "check this out." Rahr also reminded the Facility representatives that in a situation such as this, the employees were normally given a two-week notice prior to the change. Stites said he would look into the matter and commented that the Facility was sending out notices immediately or within a week. One of the Facility representatives remarked that supervisors had informally talked to the employees involved and they had not received any objections during the discussions. Rahr stated that unless the employees objected, he didn't see any trouble as far as the Union was concerned. Rahr asked if patrolmen would be paid overtime if they were relieved late and was told that the guards were being relieved on time, so this would not be a problem. When Rahr questioned whether the positions to be eliminated would be converted to military positions Stites replied in the negative. As the meeting concluded, Rahr voiced personal disapproval of the President's policy of cutting back of civilian employment by 5% which he understood to be related to the elimination of the "graveyard" shift. After expressing his disagreement with the "President's wage-price freeze" Rahr explained the AFGE National Union's opposition to the freeze and what it was doing in Congress.

Immediately after the conclusion of the meeting, Schaller contacted "swing" shift guards and asked them to notify "graveyard" shift guards of the Facility's intention to eliminate the shift. Thereafter, beginning on September 26, the Union began receiving complaints from the individuals involved in the removal.

One or two days after the meeting of September 24 Stites met with Lt. Colonel Espiritu and discussed what had transpired in the meeting. Colonel Espiritu decided that if there was no strong objection made by the Union or employees, the Facility would proceed with the elimination of the "graveyard" shift.

In a letter dated September 28, 7/ to Jack V. Compton, Chief, Civilian Personnel Office, Norton AFB, Rahr reviewed various matters discussed at the September 24 meeting and sought documentation of the authority for the elimination. The letter stated inter alia:

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7/ Complainant Exhibit 2.

"The main topic discussed was the discontinuance of the civilian graveyard GS-7 and five civilian patrolmen in grade of GS-5's. These six employees would be divided up and three GS-5's being placed on the Day Shift and three GS-5's being placed on the Swing Shift. The GS-7 Sgt Supervisor being placed in a RIF status and reduced to the grade of GS-5 patrolman. The future graveyard shift to be all military in order that the squadron could save 10 per cent night differential on six civilian employees, also would save Saturday and Sunday premium pay.

"I am at this time requesting a copy of the letter or letters from higher authority which request this action be taken within the 63rd Security Police Squadron. A request was made to Mr. Eugene N. Stites at the consultation meeting but he refused to give the authority and/or a copy of the letter directing such actions."

Compton, by letter dated October 12, 8/ which Complainant received on that same day, replied to Rahr as follows:

1. Reference your letter of 28 Sep 1971, subject as above.
2. The action to discontinue the civilian graveyard shift was initiated by the Squadron Commander and prompted by the fact that the budget for the 63rd Military Airlift Wing is not sufficient to provide funding for all civilian authorizations. As discussed in our quarterly consultation meeting of 26 Aug 1971, funds allocated by Hq MAC for direct hire of civilian man-years within the O&M fund area have suffered a five per cent reduction during this fiscal year.

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8/ Complainant Exhibit 3.

3. The discontinuance of the civilian graveyard shift operation will not affect the Squadron's overall civilian-military manning mix. Additionally, all proposed individual personnel changes, with the exception of a supervisory position, will be effected through absorption of the individuals into other shift operations. In the instance of the supervisory position, every reasonable effort possible will be exerted to retain the grade of the individual. 9/

On or about October 12, a letter 10/ signed by Lt. Colonel Espiritu was sent to the "graveyard" shift employees notifying them of their reassignment to day and swing shift operations commencing during the week of October 24. 11/ The letter stated as follows:

1. As a result of recent reductions in O&M fund allocations for 63rd Military Airlift Wing operations, it has become necessary to explore all possible methods for conserving funds. A review of our present shift operation arrangements indicates that a more efficient and economical arrangement can be effected within the Squadron.

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9/ While there appears to be a discrepancy between what was said at the meeting of September 24 and what is contained in Compton's letter to Rahr with regard to who authorized the abolishment of the shift, resolution of the discrepancy is not necessary to resolve the underlying issues in this case.

10/ Respondent Exhibit 3.

11/ The reassignment actually occurred on or about November 15, 1971. Stites explained that the delay was occasioned by his being assigned to jury duty during that period and also to give the Facility extra time to give the employees an opportunity to adjust to the change and to give management time so they "could look longer at the impact."

2. Accordingly, during the week of 24 Oct 1971, personnel presently assigned to graveyard shift will be reassigned to day and swing shift operations. Three individuals will be assigned to day shift and three to swing shift. Excluding an emergency situation, no graveyard shift comprised of civilian personnel will be established. With the exception of a supervisory position, all changes in shift assignments will be effected without any change in present grade levels.

3. You are requested to submit a first and second choice of assignment. First choices will be selected on a seniority basis. Second choice will be assigned to complete the above ratio.

4. I recognize that the change in shift operations may create some temporary inconveniences but am certain that you will understand and support the necessity for living within the reduced fund ceiling.

On October 14 the Union filed an unfair labor practice with the Commander of the 63rd Police Squadron alleging violation of Sections 19(a)(1), (2), (3), (4), (5), and (6) and Section 11 of the Order. 12/ However, the allegations of violation of Sections 19(a)(2), (3), (4), and (5) were subsequently withdrawn. The original charge, as it applies to the elimination of the "graveyard" shift speaks only in terms of removal of the employees and does not mention in any respect the Facility's alleged refusal to bargain with regard to the impact of the elimination on these employees.

Representatives of the Facility and the Union met on November 3 in an unsuccessful attempt to informally resolve the dispute. The Union's overriding concern at this meeting was to have the Facility withdraw its decision to eliminate the "graveyard" shift. Respondent refused, Lt. Colonel Espiritu taking the position that

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12/ Assistant Secretary Exhibit 1(a).

he would not reverse his decision because he didn't want to show that the Facility had been wrong. Thus the testimony of Rahr, 13/ the only witness who testified about this meeting, reveals the following:

Q. What was said now. You have characterized it as we discussed. What was said? Who said what, what the responses were, et cetera.

A. I don't remember exactly who brought out any specific items at that meeting other than -- I recall the general discussion of what took place at that meeting.

Q. All right. Would you give us your recollection as to what the Union people were saying and what the facility was saying.

A. The Union people were saying if we should have been given a prior notice of management's intent so that we could sit down and come up with the views of the Union and submit to management our position of why these people should not have been removed from the graveyard shift, we would meet the word "consulting,"

Q. All right. Continue.

A. The only other major topic that I remember --

Q. What was the position of the facility?

A. I don't remember what their answer was. Just how they put it at this time.

Q. All right. What else was discussed?

A. The other part discussed -- we called Colonel Espiritu to the meeting for the purpose of going over this with him to try to get the Commander to reconsider to put these people back on the graveyard shift.

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13/ Hearing transcript pp. 68-69.

Q. Who was Espiritu now?

A. He was the Commander of the 63rd Police Squadron, Lt. Colonel.

Q. Did Colonel Espiritu finally come to the meeting?

A. Yes, sir.

Q. What took place when the meeting resumed?

A. We discussed with the Colonel our views of why these people should be put back and at this time the Colonel made a statement that he was going to stand on their decision and that he did not -- let's see. How did he word it? Something to the effect that he didn't want to show that they had been wrong in taking this action. His exact words, I don't remember just how it was.

Q. Do you recall anything else?

A. Not any other specific items, no, sir.

Thereafter, on February 7, 1972, the Union filed the Complaint in the instant matter against Respondent alleging inter alia "...it is charged that at the time of this meeting [September 24, 1971] management had already made up its decision in regard to removing these employees from this shift and was only informing the local of the completed action..." and "...By refusing to properly consult with Local 1485 management has violated Section 10(e) and Section 11 of the Executive Order by failing to confer in good faith with respect to working conditions, personnel policies and practices of the employees in the exclusive unit with the exclusive bargaining agent. Consultation and good faith require consultation before a decision is made and not after a decision is made..."

- 11 -

### III. Positions of the Parties

At the hearing Complainant conceded that the decision of the Federal Labor Relations Council in the Plum Island case 14/ was controlling insofar as Respondent was not obligated to negotiate with the Union on the change itself. However, Complainant takes the position that Respondent was obliged to "negotiate" and at the very least to "consult" with the Union on the impact of the realignment of the work force caused by the removal of civilian police from the "graveyard" shift. Complainant further alleges such negotiation or consultation did not occur.

Respondent takes the position that it was not required to negotiate on the decision to eliminate the shift nor was it required to "meet, confer and negotiate" with Complainant concerning the impact of that decision. Respondent acknowledges a duty to "consult" with Complainant concerning impact and maintains that it in fact did so.

### IV. Discussion and Conclusions

It is readily apparent that the elimination of a shift of guards is a matter "affecting working conditions" within the meaning of Section 11(a) of the Order. However, Section 11(b) of the Order relieves an agency from the obligation to "meet and confer" in "matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types and grades of positions or employees assigned to an organization or unit, work project or tour of duty;..." I find that the elimination of the "graveyard" shift was privileged under Section 11(b) of the Order 15/ and therefore, Respondent was under no obligation to meet and confer or otherwise bargain with the Union on its decision to eliminate the shift. 16/ Accordingly, I make no findings or conclusions as to whether

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14/ AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (July 9, 1971).

15/ Ibid.

16/ Compare Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972).

- 12 -



Respondent's manner of dealing with the Union on the change would, if not privileged, have constituted a violation of Section 19(a) (6) of the Order.

In agreement with the Parties I further find that Respondent was under a duty to bargain with the Union in some form (be it to meet, negotiate, consult or confer) over the impact of its decision to eliminate the "graveyard" shift. 17/ However, I also find that the Union never requested to bargain on impact in any manner after it was timely notified of Respondent's plans. Accordingly, no refusal to bargain in any form has been established.

At the meeting of September 24, Respondent freely discussed with the Union the pending elimination including the criteria for placing "graveyard" shift employees on other shifts; giving sufficient notification to "graveyard" shift employees; the question of overtime if employees were relieved late and whether the civilian guard positions would be converted to military. It is significant that at this meeting Rahr stated that he didn't see any trouble with the elimination as far as the Union was concerned. During and after this meeting Respondent did nothing by word or deed to preclude further discussion on the matter. 18/

Between the date the Union received notification of Respondent's intentions to eliminate the "graveyard" shift and November 15, the date that the shift was actually eliminated, the Union had ample opportunity to request bargaining on impact but failed to do so. It had 17 days prior to October 12, the date when Respondent notified the employees of their reassignment and almost five additional weeks before the reassignment occurred in which to come forward with any

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17/ Plum Island, supra.

18/ I find that further requests or discussions by the Union were not prevented merely because the "authority" for the elimination of the shift was not clear, as the Union contends. Lack of such knowledge did not deter the Union from discussing the matter during the September 24 meeting nor could it have impeded a request to bargain or for discussion on impact after the Union received the letter setting forth the authority (Complainant Exhibit 3).

requests, suggestions or proposals regarding impact. The record is void of any evidence of any desire or attempt on the part of the Union to discuss impact after being notified of Respondent's decision in September. Rather the record reveals and I find that the Union's concern after the September meeting was to protest the decision having been made without prior consultation and to convince Respondent to reverse its decision. Indeed the following testimony of Rahr 19/ and that cited on pages 10 and 11 of this report clearly supports this finding.

Question: And your main objection was that there was going to be an elimination or that no one would tell you who made the decision to eliminate the graveyard shift?

Answer: That's false. That's wrong. That wasn't my objection.

Question: What was your objection?

Answer: My objection is and still is that we were not consulted with or asked for our advice prior to any action being taken, or what the decision was that was made. A decision had been made. We were told what was being done. We were not asked in any way. 20/

This finding is further supported by an analysis of the language of the Union's charge against Respondent filed October 12 and the language of the Complaint filed February 7, 1972, both of which documents addressed themselves to the removal of employees from the "graveyard" shift and Respondent's alleged failure to properly consult with the Union thereon as opposed to an allegation that Respondent failed to fulfill its obligations with regard to bargaining on impact.

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19/ Hearing transcript pp. 40-41.

20/ I have previously found that Respondent was privileged to eliminate the "graveyard" shift without bargaining with the Union. Accordingly prior notification or consultation with the Union before reaching that decision is a moot question.

While they are not controlling, it is useful to consider decisions of the National Labor Relations Board in cases involving similar issues. 21/ The Board has frequently found that where prior notice of a change in working conditions is given a union and the union does not avail itself to the opportunity afforded it to meet for the purpose of discussing the change, a refusal to bargain, cognizable under the National Labor Relations Act is not established. 22/ In Triplex Oil Refining Division of Pentalic Corporation, 194 NLRB No. 86, 78 LRRM 1711, the employer closed its plant for economic reasons. Thereafter the employer asked an official of the union to come to the plant to make sure the terminated employees were satisfied with the benefits each received under the contract which the union had with the employer. The union official did so. The Board held that the union "thus had an opportunity to seek negotiations on the effects of the closing." The Board further held "As the Respondent fulfilled its bargaining obligation by affording the union this opportunity, it cannot be faulted for the union's failure to present any demands."

During the hearing of this matter, a letter dated August 30, 1972, 23/ from Colonel Ralph W. Mistrot, Norton Air Force Base Commander to Mr. James Neustadt, Staff Counsel for Complainant, was received into evidence over the objection of Respondent. 24/ The letter recites, inter alia, that discussions between counsel for Complainant and representatives of Air Force Headquarters had occurred and the Union's position was clarified "that the issue in contention was the failure to consult on the criteria or impact of moving employees from one shift to another as a

21/ See Charleston Naval Shipyard, A/SLMR No. 1, p.3 (1970).

22/ Holiday Inn Central, 181 NLRB 997; Durfees Television Cable Company, 174 NLRB 611; Burns Ford, Inc., 182 NLRB 753.

23/ Complainant Exhibit 4.

24/ Counsel for Respondent did not object to the authenticity of the document or that the letter was a "valid offer of settlement" but did object to the receipt of the letter if it was to be used to show that Respondent was admitting guilt.

result of a change of tour of duty." The letter further states:

"3. As a result of the aforementioned discussions and further review at this base, we agree that there was failure on our part to consult with the Union concerning the impact of the action on the employees and the criteria for the assignment of individuals to particular shifts. You may be assured that this was unintentional, and that every effort will be made to insure that such oversights are not repeated."

After indicating a desire to meet with representatives of the Union "to engage in bonafide consultation on the impact issue" the letter concludes:

"We sincerely believe this letter to be a satisfactory offer of settlement for the complaint which will permit the base and union to resolve the differences between them. If there are any questions on the foregoing, we will be pleased to discuss them with your designee."

Complainant contends that Respondent's letter constitutes an admission that it failed to consult on the question of impact. Respondent contends that it was error to admit the letter into evidence since the alleged admission was intended to effectuate a settlement and not meant to constitute an admission. Respondent argues:

"The apparent policy and purpose of the informal settlement procedures enunciated in Section 203.2 of the Rules and Regulations of the Assistant Secretary are to foster and promote settlements between the parties without the necessity of formal hearings. Informal settlements will promote a better working relationship between the parties and enhance labor-management relations. If settlement offers are admissible as admissions against interest at an unfair labor practice hearing, informal settlement attempts will be discouraged."

While Respondent's argument that settlement offers should not be admissible as admissions against interests has merit, the letter in question is more than merely an offer of settlement. It contains a statement which arguably can be construed as an admission against interest. Therefore the issue to be resolved is whether an admission against interest which arises in the context of an offer of settlement should be admitted in evidence and considered accordingly.

The credited testimony reveals that sometime early in August, 1972, Neal Fine, Esq., counsel for Complainant, received a telephone call from Harold Lerner, a labor relations employee of Air Force Headquarters. Lerner wished to define the issues to be litigable at the hearing in this matter. Fine informed Lerner that as he saw it, the issue of the case was not that there was a failure to consult on the change of duty hours, but whether there was a failure to consult on the impact of the change in duty hours. Fine told Lerner that he couldn't discuss settlement since he had not been able to contact the Local Union's President. No settlement offer was made at that time and there were no further settlement discussions between Lerner and Fine.

Thereafter the letter was composed at Air Force Headquarters for signature by the Base Commander. George N. Pierce, Labor Relations Manager for Civilian Personnel at the Facility received the text of the letter during a telephone conversation with Robert Thomas, an employee of Military Headquarters Command in Illinois. Thomas explained to Pierce that the letter was an attempt to settle the case before hearing and was a result of a conversation between Lerner and Fine. During this conversation, Pierce told Thomas that he thought the Facility had "consulted" but nevertheless was told to prepare the letter for signature by the Base Commander. Pierce then prepared the letter and after showing it to Stites, presented the letter to Colonel Mistrot and informed him of the circumstances giving rise to the letter. Pierce did not tell Mistrot that he disagreed with the contents of the letter but did tell him that he was "unhappy with the language" of the letter and that Military Headquarters Command had directed that the letter was to be signed by the Base Commander. Thereupon Mistrot signed the letter and sent it to Neustadt.

- 17 -

Settlements which preclude the necessity of formal litigation are acknowledged to be of substantial value to sound and stable labor relations and should be encouraged. However, I am not prepared to say that any admission against interest if made in a context of settlement discussions is or should be inadmissible as evidence. <sup>25/</sup> To so hold would permit the descent of an impenetrable veil against disclosure simply because the hope of settlement is envisioned in a discussion or communication. <sup>26/</sup> This, it seems to me, is too far reaching a holding even though, to some degree, disclosure might impede candid and fruitful discussions while attempting settlement of a matter. Different findings as to admissibility may be warranted depending upon many factors including the nature of the communications giving rise to the alleged admission, the person making the statement and whether the alleged admission is one of fact or the expression of a legal opinion.

Considering the limited nature of the discussion giving rise to the letter of August 30, 1972, the fact that its contents were voluntary and in no way solicited and in all the circumstances I reaffirm my ruling made during the hearing that the letter is admissible as evidence. Nevertheless, the probative value and the weight to be given to this evidence is another matter.

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<sup>25/</sup> See 4 Wigmore on Evidence (3rd ed.) Sec.1061(c); But see, Local 18, Bricklayers, Masons and Plasterers' International Union of America, AFL-CIO, and Jesse Bulle and Union County Building Contractors Association and the Johansen Company, Parties to the Contract, 170 NLRB 8 fn. 7 where the National Labor Relations Board held in a situation substantially different than that in the instant case, "We agree that statements made by the parties during attempted settlement discussions are inadmissible, and may not be relied upon, as evidence of wrongdoing in an unfair labor practice proceeding."

<sup>26/</sup> Section 203.9(c) of the Regulations of the Assistant Secretary provides that the report of investigation is to be furnished to the Administrative Law Judge. That report frequently discloses settlement attempts by the parties.

- 18 -

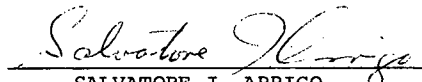
May 16, 1973

Regardless of a party's expression of opinion as to whether it fulfilled its legal bargaining obligation, it is for the Administrative Law Judge, the Assistant Secretary (and possibly the Federal Labor Relations Council) to make this determination based upon all the evidence. In paragraph 3 of the letter of August 30, 1972, Respondent clearly admits a failure to consult with the Union concerning the impact of the action taken. However, there is no admission by Respondent that it refused to bargain on impact. The evidence establishes and I have found, supra, that Respondent did not refuse to bargain with the Union on this matter. Rather if bargaining did not occur it was because the Union, after adequate notification and sufficient opportunity, made no timely demand for bargaining on impact. Accordingly, in the circumstances of this case, I have given little weight to the subject letter.

In view of the entire foregoing, I conclude that Complainant has not met its burden of proving by a preponderance of the evidence that Respondent violated Sections 19(a)(6) and (1) of the Order, as alleged.

#### V. Recommendation

Upon the basis of the above findings and conclusions I recommend that the complaint herein against Respondent be dismissed.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated at Washington, D. C.  
January 24, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED.

DEPARTMENT OF THE TREASURY,  
BUREAU OF THE MINT  
A/SLMR No. 262

The subject case involves a representation petition filed by the American Federation of Government Employees, AFL-CIO, (AFGE), for an election in an Activity-wide unit of all nonsupervisory professional and nonprofessional employees of the Activity. The Activity contended that the AFGE petition was barred because it included improperly employees covered by current negotiated agreements between the Activity and the AFGE. The AFGE, however, asserted that only the agreement covering employees at the Activity's San Francisco Assay Office currently is in effect. In this connection, it indicated its willingness to waive such agreement insofar as it constituted a bar to the processing of the petition. The AFGE further contended that the negotiated agreement covering employees at the Denver Mint could not operate as a bar because it did not contain a clearly enunciated fixed term or duration and that the negotiated agreements covering employees employed in the New York Assay Office and in the Philadelphia Mint were not bars as they were not signed at the time the petition herein was filed and could not become effective until approved at higher level of management.

The Assistant Secretary found that the Activity had not indicated a clear and unequivocal intention to waive the agreement bar in existence at the San Francisco Assay Office. Under these circumstances and in accordance with the policy set forth in U. S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, that an agreement bar may not be waived unilaterally by one of the parties to the agreement, he concluded that the agreement covering the employees at the San Francisco Assay Office constituted a bar to the processing of the AFGE petition insofar as it encompassed that facility.

With respect to the agreement covering employees employed at the Denver Mint, the Assistant Secretary concluded that such agreement constituted a bar based on the decision in Veterans Administration, A/SLMR No. 240, which held, among other things, that parties to a valid agreement, which may be terminable at will or contains other defects which would not constitute a bar to an election sought by a third party, are bound by its terms absent an affirmative act of termination. In this regard, he found that the record did not support a finding of an affirmative act of termination by the AFGE.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,  
BUREAU OF THE MINT

Activity

and

Case No. 22-3385(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Petitioner

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Michael B. Cahir. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

1/ At the hearing in this matter, the Hearing Officer rejected an exhibit offered by the Activity which contained minutes of various meetings between the Activity and representatives of certain locals of the American Federation of Government Employees, AFL-CIO, herein called AFGE. Such meetings were held at four of the Activity's installations where the AFGE is the exclusive bargaining representative. The exhibit was offered by the Activity in connection with its contention that the Activity-wide unit sought is inappropriate because, among other reasons, there is a history of effective collective bargaining at the installation level. In all the circumstances, I conclude that the exhibit in question is relevant to the issues in the subject case. Accordingly, I reverse the Hearing Officer's ruling and receive the exhibit into the record. Because, in reaching the decision in this case, I have considered the entire record, including the exhibit in question, the Hearing Officer's rejection of the exhibit at the hearing is not found to constitute prejudicial error.

2. The Petitioner, AFGE, seeks a unit of all eligible nonsupervisory employees, including all professionals if they vote for inclusion,<sup>2/</sup> of the Bureau of the Mint, excluding all management officials, supervisors, confidential employees, employees engaged in Federal personnel work in other than a clerical capacity, guards, and temporary employees.<sup>3/</sup>

The Activity contends that the petition in the instant case improperly includes employees covered by negotiated agreements at four installations: the San Francisco Assay Office, the Denver Mint, the Philadelphia Mint and the New York Assay Office. The AFGE argues that only the negotiated agreement covering employees at the San Francisco Assay Office is in effect currently and that it is willing to waive such agreement insofar as it constitutes a bar to the petition herein.<sup>4/</sup>

The Activity also asserts that the requested unit is not appropriate inasmuch as it contains employees who do not share a community of interest. In this regard, the Activity notes that four installation-wide units represented by the AFGE, mentioned above, already have been established and that the Activity and the AFGE have enjoyed a satisfactory bargaining relationship on this basis for as long as nine years. Under these circumstances, the Activity contends that the claimed unit would not promote effective dealings and efficiency of agency operations.<sup>5/</sup>

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<sup>2/</sup> While the claimed unit includes professional employees, the record does not set forth sufficient facts with respect to their duties, training, educational background, etc., so as to provide a basis for a finding that employees in particular classifications are professionals. Accordingly, I shall make no findings as to which employee classifications herein constitute professional employees within the meaning of the Order.

<sup>3/</sup> The unit description appears as amended at the hearing. Temporary employees were defined as those employed for up to 700 hours with no reasonable expectation of reappointment.

<sup>4/</sup> At the hearing, the AFGE took the alternative position that in the event that the Assistant Secretary should find the negotiated agreement covering employees at the San Francisco Assay Office to constitute a bar, and in the event the Activity should refuse to waive such agreement bar, the AFGE would move to amend its petition to exclude the employees covered by such agreement from the claimed unit.

<sup>5/</sup> The Activity moved that the AFGE petition be dismissed on the grounds that there was no evidence adduced that the existing installation-wide units were inappropriate or that they did not lend themselves to effective dealings or efficiency of agency operations. Under the circumstances described below, the Activity's motion is hereby denied.

The AFGE argues that the unit sought is appropriate because, among other things, there is a similarity of skills among the claimed employees and they share common working conditions.

#### I. Alleged Bars to the Petition

The record reveals that under Executive Order 10988 certain AFGE locals were granted exclusive recognition by the Activity and subsequently negotiated collective-bargaining agreements at the following four installations: U. S. Assay Office, San Francisco; U. S. Mint, Denver; U. S. Mint, Philadelphia; and U. S. Assay Office, New York.

With respect to the San Francisco Assay Office, the evidence establishes that the negotiated agreement covering employees at that installation currently is in effect.<sup>6/</sup> The record reveals that while the AFGE is willing to waive such agreement insofar as it constitutes a bar to its petition in this matter, the Activity has not stated unequivocally its willingness to join in such a waiver with the AFGE. Under these circumstances, and for the reasons enunciated in U. S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, in which it was found that an agreement bar may not be waived unilaterally by one of the parties to the agreement, I find that the agreement covering the employees at the San Francisco Assay Office constitutes a bar to their inclusion in the claimed unit.<sup>7/</sup>

As to the negotiated agreement covering employees at the Activity's Denver installation, the latter asserts that this agreement currently is in effect and, therefore, constitutes a bar to the petition for an Activity-wide unit. The AFGE, relying on the decision in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, maintains that the agreement at the Denver facility cannot operate as a bar to the instant petition because such agreement does

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<sup>6/</sup> The agreement was executed on September 17, 1971, and provided for a duration of two years from the date of execution.

<sup>7/</sup> At the hearing, the Activity stated that in the event that the Assistant Secretary should find the claimed unit appropriate and that the negotiated agreements covering employees at the Denver Mint and the New York Assay Office did not constitute bars to an election, "...the Agency would give serious consideration, and would go as far as to say it probably would agree to waive this bar in San Francisco if such an agreement is found appropriate." In my view, this statement by the Activity does not demonstrate a clear and unequivocal intention to waive the agreement bar in existence at the San Francisco Assay Office.

not contain a clearly enunciated fixed term or duration. <sup>8/</sup> However, the circumstances herein differ substantially from those present in the Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above. In that case, the petitioner was a third party seeking an election, and the language in the existing agreement with respect to its duration was found to be unclear to the extent that employees and labor organizations could not ascertain from the agreement the appropriate time for the filing of representation petitions. In the subject case, however, the petitioner is the incumbent labor organization which is seeking an election in a broader unit which would include the employees covered by its existing negotiated agreement at the Denver Mint. In Veterans Administration, A/SLMR No. 240, it was found that, "Where there is an otherwise valid agreement which is terminable at will, or which contains other defects which would cause such agreement not to constitute a bar to an election sought by a third party, ...the parties to such agreement are bound by its terms absent an affirmative act of termination." While the Veterans Administration decision involved issues related to adequacy of showing of interest, I find that its rationale noted above is applicable to the subject case which presents essentially the same factual situation. Thus, in my view, in order for the unit of employees covered by the existing agreement at the Denver Mint to be included in the unit petitioned for herein, the AFGE (1) must have acted affirmatively to terminate its existing agreement and (2) must have indicated affirmatively its willingness to waive its exclusive recognition status at the Denver facility, and, in effect, put such status "on the line" at the election. <sup>9/</sup> The record indicates clearly that the first requirement was not met by the AFGE. Under these circumstances, I find that the existing negotiated agreement covering the Activity's Denver facility constitutes a bar to the inclusion of the employees at that facility in the claimed unit.

With respect to the exclusively recognized units of employees at the Philadelphia and New York installations, the Activity contends that the negotiated agreements covering such employees were awaiting approval in the Office of the Director of the Activity at the time

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<sup>8/</sup> Article XXII of the agreement states, in part: "The agreement will be subject to review annually and any proposed changes must be announced in writing not less than sixty (60) days prior to the anniversary date. Such notice must be acknowledged by the other party within ten (10) days of receipt." It was noted that this language is identical to that contained in the parties' negotiated agreement covering employees of the Philadelphia Mint which agreement was found not to constitute a bar to an election sought by a third party in Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above.

<sup>9/</sup> Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, at footnote 2.

the petition herein was filed and, therefore, in accordance with Section 202.3(c) of the Assistant Secretary's Regulations,<sup>10/</sup> such petition was barred at those facilities. However, the record reveals that negotiations at the local level for an agreement covering employees at the Philadelphia Mint were not completed and there was no signed agreement in existence at the time the petition in the subject case was filed.<sup>11/</sup> Further, the record indicates that while negotiations for an agreement had been completed prior to the filing of the petition herein with respect to the New York Assay Office, the parties at the local level had not signed an agreement. In this connection, it should be noted that Section 202.3(c) of the Assistant Secretary's Regulations, cited above, provides for an agreement bar only in situations where there is "a signed agreement." Under all of these circumstances, I find that no agreement bar exists with respect to the subject petition insofar as it encompasses employees of the Philadelphia Mint and the New York Assay Office.

## II. Appropriate Unit

The Activity is composed of the Office of the Director and six field installations located throughout the country, namely: the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Mint, Denver, Colorado; the U. S. Assay Office, San Francisco, California; the U. S. Assay Office, New York, New York; the U. S. Bullion Depository, West Point, New York; and the U. S. Bullion Depository, Fort Knox, Kentucky. It appears from the record that the Activity is engaged in such functions as the production of coins and medals, assaying of metals, custody, processing and movement of bullion, and the distribution of coins from mints to banks.

The headquarters of the Activity--the Office of the Director in Washington, D.C.--has responsibility for the overall management and administration of the Activity. In this connection, it directs Activity operations and establishes rules and regulations which are

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<sup>10/</sup> Section 202.3(c) of the Assistant Secretary's Regulations, effective on the date of the filing of the petition in the subject case, provides, in part: "When there is a signed agreement covering a claimed unit, a petition for exclusive recognition or other election petition will not be considered timely if filed during the period within which that agreement is in force or awaiting approval at a higher management level..."

<sup>11/</sup> In this connection, I find that by entering into negotiations for a new agreement with respect to the Philadelphia facility, the parties indicated a clear intention to terminate their existing agreement. Compare Veterans Administration, cited above.

applicable throughout the entire Activity.<sup>12/</sup> The Philadelphia Mint manufactures coins, medals, and dies; the Denver Mint manufactures foreign coins; the San Francisco Assay Office manufactures proof coins and engages in some regular coinage production; the New York Assay Office operates a gold and silver refinery, with assay facilities, and is responsible for packaging proof and uncirculated coins; the West Point Depository stores silver bullion and some coins; and the Fort Knox Depository stores gold bullion. It is clear that several of the Activity's basic operations--e.g., production of coins and medals, assaying of metals, storage of bullion--are common to more than one installation. Thus, the Philadelphia and Denver Mints have produced the same types of coins for circulation through similar methods <sup>13/</sup> and the packaging of proof and uncirculated coins, previously performed at the San Francisco Assay Office, was transferred recently to the New York Assay Office. Similarly, prior to the reactivation of the San Francisco Assay Office in 1965, the manufacture of proof coins was performed at the Philadelphia Mint.<sup>14/</sup> The numismatic program, which the evidence establishes is an important segment of the Activity's operations, involves all installations with the exception of the Fort Knox Depository. Certain types of equipment are manufactured by the building and maintenance divisions of the Denver, Philadelphia and San Francisco facilities for shipment to the various installations for use at their particular operations. In this regard, the record reveals instances where one facility has taken over the manufacture of certain machinery in situations where another facility was unable to complete the job because of an overload of work. Although the record establishes that the manufacture of the dies and coin bags is carried out exclusively in the Philadelphia Mint, such materials are shipped to the other installations.

<sup>12/</sup> Included among its functions are accounting and physical audits; review of operating procedures; implementation of the safety program and direction of the security program; production programs; the scheduling of distribution of coins to the Federal Reserve Banks; medal distribution; an assay program; financial management; procurement; program management and evaluation; management analysis work; and the administration of personnel policies and procedures.

<sup>13/</sup> The record reveals that the equipment in the Philadelphia Mint plant is more modern and sophisticated than that at the Denver Mint.

<sup>14/</sup> The record discloses that equipment at the Philadelphia Mint is being readied in anticipation of the possible reinstatement of this operation at that location. While the record establishes that the method of producing proof coins requires more care and additional steps than that required in the manufacture of domestic coins, it also discloses that with 30 to 90 days training, employees from other installations engaged in the manufacture of domestic coins are able to attain the necessary skill level to perform such work satisfactorily.

Each installation head is responsible for the day-to-day operations of his facility and has been delegated authority by the Activity in certain limited areas. The record reveals that the latitude of such delegated authority is defined clearly in detailed instructions and any differences which may exist between particular facilities result from the demands of particular local conditions.<sup>15/</sup> Further, the record reveals that much of the delegated authority is subject to review and audit by the Office of the Director. Also, the evidence establishes that the Office of the Director has been called upon to aid in the resolution of labor problems at certain of the field installations.

The evidence establishes that personnel, labor relations and operating policies of the Activity are determined at the national level in the Office of the Director. In this connection, regulations covering such matters as promotion, leave and benefits are prepared at headquarters and disseminated throughout the Activity. Pay scales for all the Activity's Wage Grade employees are established in accordance with the government-wide wage system. Similarly, salaries of General Schedule employees are fixed under the government-wide General Schedule pay system. The record indicates also instances where unresolved local level labor relations problems have been submitted to headquarters for resolution and where headquarters officials have met with AFGE National Office representatives to discuss field installation problems to attempt to arrive at satisfactory resolutions. Also, there have been instances where officials of the Office of the Director visited field installations to work out difficult labor relations problems.

While the Activity's headquarters does not participate in negotiations at the local level, the evidence establishes that negotiated agreements are forwarded, unsigned and undated, to headquarters for review and approval. And, only after approval at headquarters, is the agreement signed by the parties at the facility level.

The employees in the claimed unit frequently are engaged in similar duties requiring similar skills, training, functions and interests. For example, there are pressmen, machine operators, weighers, coin reviewers, sorters and packers, mechanics, laborers, stenographers, clerk-typists, administrative assistants and

<sup>15/</sup> The Activity's Personnel Officer indicated that there is an overall promotion plan for the Activity, but that agreements supplementing such plan may vary from installation to installation.



administrative officers employed at several of the Activity's installations performing essentially the same kind of work.<sup>16/</sup>

Based on the foregoing circumstances, and noting the procedural agreement bar matters discussed under Item I above, I find that a residual, Activity-wide unit of all nonsupervisory employees, including professional employees, of the Bureau of the Mint is appropriate for the purpose of exclusive recognition. Thus, the record establishes that the Activity's employees have a similar mission and that many of such employees are engaged in similar duties requiring similar skills, training, functions and interests. Moreover, the evidence indicates that there is an interchange of work and materials among the installations and that accomplishment of the mission of the Activity requires coordinated efforts on the part of each of the installations. In addition, the record indicates that labor relations, personnel policies and basic regulations governing working conditions and employees' benefits are established at the headquarters level. And while there are some variations with respect to local conditions, the record shows that such differences are subject to review and approval or modification by the Office of the Director. In view of the extent of headquarters involvement in the above noted matters, in my opinion, the Activity has not demonstrated that a residual, Activity-wide unit would adversely affect effective dealings and efficiency of agency operations or inhibit the parties from negotiating local supplements to any Activity-wide agreement. Under these circumstances, I find that the employees in the claimed unit, as modified by the agreement bar findings set forth above under Item I, share a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:<sup>17/</sup>

<sup>17/</sup> It was noted that when the San Francisco Assay Office was reactivated, the Activity found it necessary to recruit on an Activity-wide basis in order to acquire experienced personnel, and certain employees transferred to San Francisco from other installations.

<sup>17/</sup> At the outset of the hearing, the parties stipulated that certain employees should be excluded from the unit on the basis that they are confidential employees, supervisory employees, management officials or temporary employees. As there is no evidence in the record to indicate that the parties' stipulation was improper, I find that such employees should be excluded from the unit found to be appropriate.

All professional and nonprofessional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees employed in the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.<sup>18/</sup>

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with non-professional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting Group (a): All professional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees employed in the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, nonprofessional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the

<sup>18/</sup> I find that by petitioning for exclusive recognition and proceeding to an election in the unit found appropriate, the AFGE will have, in effect, waived its exclusive representation status with respect to employees in the exclusively recognized units encompassed by the unit found appropriate herein. Accordingly, the AFGE may continue to represent those employees on an exclusive basis only in the event it is certified in the unit found appropriate in the subject case. See Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83 at footnote 2.

U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees employed in the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, professional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the AFGE.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented by the AFGE. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessionals, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the AFGE was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

All professional and nonprofessional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees

employed in the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

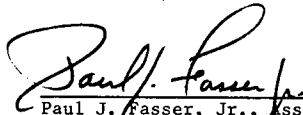
2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

- (a) All nonprofessional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees employed at the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, professional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.
- (b) All professional employees of the Department of the Treasury, Bureau of the Mint, employed in the U. S. Assay Office, New York, New York; the U. S. Mint, Philadelphia, Pennsylvania; the U. S. Depository, West Point, New York; the U. S. Depository, Fort Knox, Kentucky; and the Office of the Director of the Bureau of the Mint, Washington, D.C., excluding employees employed in the U. S. Assay Office, San Francisco, California, and in the U. S. Mint, Denver, Colorado, nonprofessional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

May 16, 1973

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.  
May 16, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,  
U.S. ARMY NATICK LABORATORIES,  
NATICK, MASSACHUSETTS  
A/SLMR No. 263

This proceeding arose upon the filing of an unfair labor practice complaint by the National Association of Government Employees, Local R1-34 (Complainant) against Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts (Respondent), alleging that the Respondent violated Section 19(a)(3) of Executive Order 11491 by permitting the American Federation of Government Employees, AFL-CIO, (AFGE) access to its premises for the purpose of conducting an organizational campaign at a time when the Complainant was the exclusive representative of the Respondent's employees.

The Complainant had represented exclusively the employees of the Respondent since 1965. A negotiated agreement between the parties expired on December 1, 1971, and subsequent thereto, the parties entered into negotiations for a new agreement. During the period when negotiations were occurring, nonemployee representatives of the AFGE requested access to the Respondent's premises for the purpose of conducting an organizational campaign. Respondent granted the request and permitted access to the AFGE from January 3, 1972 to January 28, 1972, providing space at various locations on the premises and also a list of names of eligible employees.

The Administrative Law Judge found that while the Complainant and the AFGE were not in equivalent status within the meaning of Section 19(a)(3) of the Order, the Respondent's actions in granting the AFGE access on terms equal to the Complainant did not violate Section 19(a)(3). Thus, the Administrative Law Judge concluded that although Section 19(a)(3) provides that services and facilities furnished to labor organizations having equivalent status must be furnished on an impartial basis, that Section did not compel a finding that labor organizations having unequal status may not be treated equally in terms of access to agency services and facilities. The Administrative Law Judge noted, however, that where employees are reasonably accessible to a rival labor organization there was no obligation by the Government to provide access or use of its facilities to such rival labor organization. Based upon the facts presented, the Administrative Law Judge found further that Respondent's employees were not reasonably accessible to the AFGE through normal means of communication and, therefore, the Respondent was justified in granting access to its premises to the AFGE. In this connection, the Administrative Law Judge determined that the restrictive standards applied in the private sector to granting of

access by nonemployee union organizers to privately owned property were not necessarily appropriate to the public sector where the Government is obligated to remain neutral regarding employee desires concerning union representation. The Administrative Law Judge found also that under the circumstances certain alleged additional acts of improper assistance, including the posting by a supervisor of an AFGE recruiting poster on a portion of a bulletin board reserved for the Complainant, did not violate Section 19(a)(3).

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct in permitting nonemployee representatives of the AFGE access to its premises violated Section 19(a)(3) of the Order. Based on the principles set forth in U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143 and Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247, the Assistant Secretary found that a labor organization, such as AFGE in the instant case, which had not raised a question concerning representation and which clearly did not have equivalent status with the incumbent exclusively recognized representative, could not be furnished with the use of an agency's or activity's services and facilities. The Assistant Secretary noted, however, that there might be special circumstances which would warrant a departure from the principle stated above. Thus, where no question concerning representation exists, nonemployee representatives of a labor organization that does not have equivalent status nevertheless may be furnished with agency or activity services and facilities for the purpose of an organizational campaign only where it can be established that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility. Under the circumstances of the case, however, the Assistant Secretary concluded that no such special circumstances had been demonstrated by the Respondent.

The Assistant Secretary found also that the conduct of a supervisor, in posting AFGE literature on the bulletin board reserved for the Complainant, constituted a further violation of Section 19(a)(3) of the Order.

Having found that Respondent violated Section 19(a)(3) of the Order, the Assistant Secretary issued a remedial Order.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
U.S. ARMY NATICK LABORATORIES,  
NATICK, MASSACHUSETTS

Respondent

and

Case No. 31-5568(CA)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R1-34

Complainant

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Party

DECISION AND ORDER

On January 10, 1973, Administrative Law Judge John H. Fenton issued his Report and Recommendations in the above-entitled proceeding, finding that the Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, herein called Respondent, had not engaged in the unfair labor practices alleged, and recommending that the complaint be dismissed. Thereafter, the National Association of Government Employees, Local R1-34, herein called Complainant, filed exceptions to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations to the extent consistent herewith.

The complaint in the instant case alleged, in effect, that the Respondent violated Section 19(a)(3) of Executive Order 11491 by permitting nonemployee representatives of the American Federation of Government Employees, AFL-CIO, herein called AFGE, to conduct an

organizational campaign on the Respondent's premises at a time when the Complainant was the exclusive representative of the Respondent's employees.

The essential facts in the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

The Complainant has represented exclusively the employees of the Respondent since 1965. In December 1970, the parties executed a negotiated agreement which expired on December 1, 1971. Thereafter, pursuant to a timely request made by the Complainant, the parties entered into negotiations for a new agreement.

On December 20, 1971, while negotiations for a new agreement were being conducted between the Respondent and the Complainant, representatives of the AFGE requested permission from the Respondent to conduct an organizational campaign on the Respondent's premises for the period from January 3, 1972, to January 28, 1972. This request was granted by the Respondent. During this period, three representatives of the AFGE, who were not employees of the Respondent, were provided space at various locations on the Respondent's premises and were provided with a list of names of eligible employees. Thereafter, on February 7, 1972, the AFGE filed a representation petition which is presently pending.

In addition to the overall factual situation noted above, the Complainant presented evidence regarding certain alleged specific events which occurred during the period when the AFGE was conducting its organizational campaign, and which the Complainant asserts further showed that the Respondent had assisted improperly the AFGE in connection with the latter's organizational campaign.

The Administrative Law Judge found that while the Complainant, and the AFGE were not in equivalent status within the meaning of Section 19(a)(3) of the Order, <sup>1/</sup> the Respondent did not sponsor, control, or otherwise assist the AFGE, in violation of Section 19(a)(3), by granting that labor organization, for a limited time, access to its employees on terms equal to those that existed for the Complainant, the exclusively recognized representative of the employees. In this connection, he concluded that while under Section 19(a)(3) services and facilities furnished to labor organizations having equivalent status must be furnished on an impartial basis, Section 19(a)(3) did not compel the conclusion that labor organizations having unequal status may not be treated equally in terms of access to agency services and facilities.

<sup>1/</sup> Section 19(a)(3) of the Order provides that, Agency management shall not "sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;"

The Administrative Law Judge noted, however, that if the employees involved are easily accessible to a rival labor organization there is no obligation on the Government's part to provide access or use of its facilities to such rival labor organization. The Administrative Law Judge found further that the evidence in the subject case supported the finding that the Respondent's employees were not reasonably accessible to the AFGE through the normal means of communication and that, therefore, in the circumstances of this case, the Respondent's grant to the AFGE of access to its premises was justified. In this regard, the Administrative Law Judge determined that the restrictive standards applied in the private sector to the granting of access by nonemployee union organizers to privately owned property were not necessarily appropriate to the public sector where the premises were publicly owned, and where the Government is to be a neutral regarding its employees' decision concerning union representation. Thus, he concluded that the circumstances in which the Government as an employer may legitimately bar nonemployee organizers from its property or restrict the scope of their activity must be far more circumscribed than in the private sector. The Administrative Law Judge found also that certain alleged additional acts of improper assistance, including the posting by a supervisor of an AFGE recruiting poster on a portion of a bulletin board reserved for the Complainant, did not, in the circumstances of this case, violate Section 19(a)(3) of the Order.

In two prior decisions, <sup>2/</sup> it has been indicated clearly that under the Order, when a question concerning representation has been raised and is as yet not resolved, an agency or activity may furnish services and facilities on an impartial basis only to labor organizations having equivalent status, and that labor organizations which fail to petition or intervene timely in representation proceedings may not be considered to have equivalent status with those petitioners or intervenors which have effected timely interventions. Thus, in U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, cited above, which involved objections to an election, the Assistant Secretary determined that in an election situation, the unfair labor practice principles set forth in Section 19(a)(3) were applicable and that a labor organization which had failed to intervene in a petition could not be considered to have equivalent status with a petitioner. In these circumstances, it was concluded that the Activity had engaged in improper pre-election conduct by allowing a non-intervening labor organization to use its facilities in the same manner as the petitioner. Further, in Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, cited above, the Assistant Secretary held that when a petition was filed a question concerning representation was raised, and that a labor organization which did not intervene in the proceedings did not have equivalent

<sup>2/</sup> U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143 and Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247.

status with the petitioner for purposes of campaigning on the Activity's premises, notwithstanding the fact that a question as to the appropriateness of the claimed unit had not been resolved at the time the non-intervening labor organization was granted access to the Activity's premises. Accordingly, it was found that the Activity violated Section 19(a)(3) of the Order by granting the non-intervening labor organization equivalent status with respect to the use of its facilities for the purpose of conducting a solicitation campaign. 3/

In my view, the principles enunciated in the Menlo Park and the Defense Supply Agency, Burlingame decisions are, except in the special circumstances noted below, applicable in the subject case. Thus, I find that in the absence of special circumstances, a labor organization, such as AFGE in the instant case, which has not raised a question concerning representation and which clearly does not have equivalent status with an incumbent exclusively recognized representative, such as the Complainant herein, may not be furnished, at the discretion of an agency or activity, with the use of the latter's services and facilities. To hold otherwise would, in my opinion, be inconsistent with the purposes and policies of the Order as expressed in Section 19(a)(3). Thus, a contrary result, in effect could grant to an agency or activity the power to pick and choose the particular rival labor organization it desires to unseat an incumbent, rather than leaving such a choice where it belongs - in the hands of the unit employees. 4/ Moreover, the labor-management relations stability sought to be achieved through a meaningful bargaining relationship constantly could be placed in jeopardy by an agency or activity using as leverage in the bargaining relationship the power to permit representatives of a rival labor organization on its premises at any time for campaigning purposes.

With regard to possible special circumstances which may warrant a departure from the foregoing principle, I find that where no question concerning representation exists, such as in the instant case, non-employee representatives of a labor organization which does not have equivalent status nevertheless may be furnished with agency or activity services and facilities for the purpose of an organizational campaign only in circumstances where it can be established that the employees involved are inaccessible to reasonable attempts by the labor organization

3/ The fact that the representation petition ultimately was dismissed was not considered to be controlling in such a situation.

4/ The fact that the preamble to the Order, as well as Section 1, indicate an intent to establish meaningful relationships among labor organizations, employees and management in the Federal sector, was not considered to warrant the assumption that in no instance would agencies or activities improperly attempt to sponsor, control, or otherwise assist a particular labor organization. Thus, the possibility of a lack of neutrality, in certain situations, clearly was anticipated by the express prohibitions contained in Section 19(a)(3) of the Order.

to communicate with them outside the agency's or activity's premises. 5/ It is my view that in such limited circumstances the policies of the Order as set forth in Section 19(a)(3) must be balanced with the overall policy of affording employees the right to obtain relevant information which will assist them in exercising their rights assured under Section 1(a) of the Order. It should be noted, however, that before an agency or activity grants access to its facility by nonemployee representatives of a labor organization in these circumstances, it must ascertain that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility. 6/ In the instant case, it appears that no such diligent effort was made by the AFGE prior to its obtaining access to the Respondent's premises. Further, under all of the circumstances, I find that the evidence herein did not support the contention that the employees involved, in fact, were inaccessible outside the Respondent's premises. Thus, the record reveals that the AFGE did reach some of the employees by mail, that others were accessible, that only one major location was involved rather than numerous locations scattered over a wide area and that there is no evidence that the AFGE requested employees to distribute literature during their non-work times in non-work areas on the Respondent's premises.

Based on the foregoing, I find that it has not been established that the employees involved herein were beyond the reach of reasonable efforts of the AFGE to communicate with them other than by access to the premises of the Respondent by nonemployee organizers. Accordingly, I conclude that the Respondent violated Section 19(a)(3) of the Order by permitting the AFGE to conduct an organizational campaign on its premises at a time when the Complainant was the exclusive bargaining representative of the employees involved. 7/

5/ Cf. Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169, in which the Assistant Secretary set forth the criteria for permitting access to nonemployee representatives of labor organizations in a situation involving parties to an election.

6/ In this connection, I reject the Administrative Law Judge's conclusion that because of different property rights in the public and private sectors, the circumstances in which Government as an employer can legitimately bar nonemployees from its property or restrict the scope of their activities must be far more circumscribed than in the private sector.

7/ As to the Respondent's contention that it was following directives of its headquarters in granting access to the AFGE, in Charleston Naval Shipyard, A/SLMR No. 1, a similar contention was rejected as a  
(continued)

In addition, I find that the undisputed evidence concerning the conduct of Lieutenant Margand, an acknowledged supervisor of the Respondent, in posting AFGE literature on the bulletin board reserved for the Complainant, where it remained for at least three days, which conduct as found by the Administrative Law Judge is directly attributable to the Respondent, constituted a further violation of Section 19(a)(3) of the Order.

#### Conclusion

By permitting nonemployee representatives of the AFGE access to its premises for the purpose of conducting an organizational campaign among its employees at a time when the Complainant, National Association of Government Employees, Local R1-34, was the exclusive representative, and by the conduct of Lieutenant Margand, an acknowledged supervisor of the Respondent, in posting AFGE literature on a bulletin board reserved for the Complainant, the Respondent violated Section 19(a)(3) of the Order.

#### The Remedy

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(3) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, shall:

1. Cease and desist from:

(a) Assisting the AFGE or any other labor organization, by permitting nonemployee representatives of any such organizations access to its premises for the purpose of conducting an organizational campaign among its employees at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented exclusively by the National Association of Government Employees, Local R1-34.

7/ defense to allegedly violative conduct. Cf. also in this regard, Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, et al., A/SLMR No. 256.

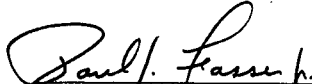
(b) Assisting the AFGE or any other labor organization, by virtue of a supervisor's posting literature of any such labor organizations on a facility bulletin board.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 16, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT assist the American Federation of Government Employees, AFL-CIO, or any other labor organization, by permitting non-employee representatives of any such organizations access to our premises for the purpose of conducting an organizational campaign among our employees at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when our employees are represented exclusively by the National Association of Government Employees, Local RI-34.

WE WILL NOT assist the American Federation of Government Employees, AFL-CIO, or any other labor organization, by virtue of our supervisors' posting literature on behalf of any such labor organizations on our bulletin boards.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor Management Services Administration, U.S. Department of Labor whose address is: 1515 Broadway, Rm. 3515, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY  
U. S. ARMY NATICK LABORATORIES  
NATICK, MASSACHUSETTS

Respondent

and

CASE NO. 31-5568 CA

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES  
LOCAL RI-34

Complainant

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES

Party

John Mulvihill, Esq., Chief Counsel  
U. S. Army Natick Laboratories  
Natick, Massachusetts, for the Respondent

Roger P. Kaplan, Esq., General Counsel  
National Association of Government  
Employees, Suite 512, Colorado Building  
1341 G Street, N. W.  
Washington, D. C., for the Complainant

Before: John H. Fenton, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. It was heard in Natick, Massachusetts, on July 20, 1972, pursuant to a Notice of Hearing issued on July 6, 1972, by the Regional



Administrator, New York Region, Labor Management Services Administration. The case was initiated by a complaint filed by the National Association of Government Employees (NAGE) on February 16, 1972, and amended on May 26, 1972, alleging, in substance, that Respondent violated Section 19(a)(1) and (3) by permitting the American Federation of Government Employees (AFGE) to conduct an organizing drive on the premises of the U. S. Army Natick Laboratories at a time when NAGE was the exclusive bargaining representative of the Laboratories' employees. The 19(a)(1) allegation was dismissed by the LMSA Regional Office for want of a pre-complaint charge addressed to this allegation (Section 203.2, Rules and Regulations of the Assistant Secretary).

At the hearing NAGE and Respondent were represented by counsel and afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and file briefs. AFGE failed to appear, although served with Notice of Hearing as a Party in Interest.

Based upon the entire record in this case, including all the testimony adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations.

#### Finding of Fact

##### Introduction

The essential facts are largely undisputed, <sup>1/</sup> and unless noted to the contrary it may be assumed that there is no issue concerning the following matters.

The U. S. Army operates the Natick Laboratories on a military reservation which is enclosed by a fence. Tight security prevails, and it is necessary to pass security guards in order to enter the premises. Approximately 1250 civilian personnel are employed of whom 900 to 1000 are in the unit represented by NAGE.

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<sup>1/</sup> See Joint Exhibit 1.

NAGE was granted exclusive recognition on March 29, 1965, under Executive Order 10988. It and Respondent entered into a collective bargaining agreement which was approved by the Department of the Army on June 1, 1971. That agreement was terminated on December 1, 1971, as a result of NAGE's timely request that it be renegotiated. Throughout the events in issue the parties were engaged in negotiations looking toward a new contract.

On December 20, 1971, AFGE National Representative Pat Conte requested a list of all eligible employees and permission to conduct an organizational campaign on the premises from January 3 to January 28, 1972. Respondent made available the list of employees, and authorized Mr. Conte, Mr. Guy Colletti, and Mr. Arthur LaBelle, all union representatives and nonemployees, to enter the reservation and solicit memberships in AFGE during that period. Space was provided in the main lobby and the cafeteria in the Administration Building, and the AFGE representatives were permitted to visit the vending machine areas in the Research Building, the Development Building, and the Engineering Building. AFGE was also given access to the Shop Areas in the Shop Building and the Services Building during the 30-minute break when those Shop Areas shut down for lunch. Solicitation in the other areas described above was allowed during normal duty hours - 7:15 a.m., to 4:14 p.m. The only reservations were that employees were not to be approached at their worksites during duty hours and AFGE literature was not to be placed at their desks or work stations during duty hours. <sup>2/</sup> AFGE's organizational effort was apparently successful. On February 7 it filed a petition for an election with the Boston Area Administrator of LMSA, and the petition is still pending before that office.

At the hearing NAGE called three witnesses to establish alleged acts of unlawful assistance to AFGE. Thus, it is undisputed that Lieutenant Margand of the Security Guards, a supervisor, placed an AFGE recruiting leaflet on that part of the Security Office bulletin board which had been reserved

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<sup>2/</sup> This grant of permission is set forth in Respondent's Exhibits 2 and 7.

for NAGE's use. This occurred between January 20 and 22, and the leaflet remained posted until it was removed by him on January 24. On that day Civilian Personnel Officer John R. Mullen received a complaint from a NAGE official, and he instructed Mr. Nicholas J. Morana, Chief, Employee Management Relations Branch, to remove the leaflet. Thereafter, Lieutenant Margand was ordered to, and did, remove the leaflet on the same day the matter was brought to the attention of Respondent's management officials.

Employee Ray Berghaus testified that, on January 4, he met AFGE representative Pat Conte in the sheet metal shop at approximately 11:00 a.m., and that Conte gave him an AFGE flyer and asked him to sign a "sheet." Berghaus stated that he saw several AFGE representatives, including Conte, passing through the shop area, that he approached them and introduced himself, and that a 15 to 20 minute conversation about the competing unions then ensued. He also said that the union representatives came back during the lunch break (which they were privileged to do under the ground rules laid down by Respondent) and that there was no repetition of this incident. Civilian Personnel Officer Mullen testified that he received a complaint about the Berghaus incident and that he instructed Mr. Morana to investigate the incident and, if appropriate, to warn Mr. Conte that any further contact with employees during working hours would result in withdrawal of the permission granted AFGE. Mr. Morana testified that upon hearing of the complaint from Mr. Mullen, he contacted Mr. Berghaus and asked whether he had been approached during working time by AFGE officials. He asserted that Mr. Berghaus reported that he had approached the union representatives and engaged them in conversation. According to Mr. Morana, he learned that the AFGE officials were in that building in order to set up a time when they could speak to the Facilities Engineering employees during their lunch break, that arrangements were made to meet at noon, and that Mr. Berghaus confronted them as they were leaving the building. Mr. Morana further reported that he spoke to Mr. Conte about the complaint, reminding him that the authority granted AFGE did not extend to contacts made during employees' working hours. According to Mr. Morana, Mr. Conte said he was well aware of the prohibition against such contacts, that it had not happened, and that it would not happen.

- 4 -

Thus, the evidence indicates that AFGE officials were involved in a single instance of organizing effort during working hours, in contravention of the ground rules attached to the access authorization. From Respondent's witnesses it appears that on January 3 NAGE made a similar complaint of an organizing approach to an employee during working hours, and that it led to a discussion with Mr. Conte and a warning that such conduct would lead to a revocation of permission to campaign on the premises. At most, two of the more than 900 unit employees were contacted during working hours on the first and second day of the 26-day open season permitted by Respondent. There is no claim that such conduct was repeated, and it is clear that Respondent promptly and vigorously investigated the reports and warned AFGE that the permission granted it would be revoked if such conduct should occur. 3/

It is now necessary to make findings concerning the accessibility of the Laboratories' employees to the efforts of an outside union desiring to communicate with them. As noted above, there are between 900 and 1000 employees in the bargaining unit, of a total civilian complement of about 1250. Respondent provides 996 parking spaces for all personnel, of which about 950 are used on an average day. In addition, about 60 employees use the walk-in gate. The facility is guarded and is enclosed by a high fence. It is located approximately 18 miles west of Boston, and its employees reside throughout

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3/ The only other evidence of AFGE conduct violating the ground rules was elicited from NAGE Vice President John V. DeSalvo. He testified that on occasion he would leave his work station and return to find AFGE literature had been placed there. He also testified that he saw two NAGE officials carrying literature past his work station into the welders shop at about 11:30 a.m., 30 minutes before the lunch break, at which time distribution of such literature was permissible. Respondent objected to such testimony on the ground that neither the charge nor the complaint was addressed to the distribution of literature described by Mr. DeSalvo, that Respondent was thereby deprived of an opportunity to adjust the matter, and that it ought not be called upon to defend against such new matter. I find it unnecessary to rule on Respondent's contentions, as Mr. DeSalvo's testimony clearly fails to establish that AFGE officials in fact distributed literature in violation of the ground rules.

- 5 -

eastern Massachusetts. Some even commute from Rhode Island and southern New Hampshire. It is evident from a comparison of the Personnel Roster (Respondent's Exhibit 4) and a map that the employees' residences are scattered among many small towns and, as Respondent asserts, that no single newspaper, radio station or television station would reach all or even a substantial number of them. Access to them through the media is wholly dissimilar to the problem of thus reaching employees who live in a single town and its environs, and who are serviced by a small number of newspapers and radio or television stations. There are approximately 23 towns within a 15 mile radius of Natick, and it appears that about one-third of the employees live even farther away. They are thus divided, in terms of the big-city media, among Boston and Worcester, Massachusetts, Providence, Rhode Island and Manchester, New Hampshire. Without attempting to subject this issue to some kind of rigorous and extended analysis, I think it fair to conclude that employees whose residences are as scattered as are these, in this particular geographical setting, cannot be reached by reasonable effort through the news media, or through visits to their homes. Likewise, it appears clear that an effort to sift the various telephone directories for purposes of contacting so large and so dispersed a group of people would have been a considerable chore.

AFGE did not request the addresses or telephone numbers of unit employees, and Respondent's witnesses stated such a request would have been refused pursuant to outstanding regulations (Respondent's Exhibit 4 - Appendix C, Federal Personnel Manual). Nor is there any indication that AFGE requested that Respondent permit the use of its internal mailing system as an alternative method which would achieve effective communication with unit employees without disclosing addresses or telephone numbers. Mr. Nicholas J. Morana testified that, while he was not sure that AFGE had requested permission to use the internal mailing system, such a request would likewise have been refused.

There was considerable testimony and some dispute concerning the efficacy of any effort to reach employees through the distribution of leaflets at the gate. The pedestrian entrance at the west end of Kansas Street (see Joint Exhibit 1 E) lends itself readily to leafleting. However, only about

60 employees can be reached in this fashion. Thus, almost all of the unit employees enter and leave the premises in some of the 950 cars which regularly park within the reservation. The main gate is off of Kansas Street some several hundred yards west of its intersection with Route 27. The security guards stationed at the gates have no authority to interfere with anyone who wishes to hand out leaflets from the roadway adjacent to the installation. However, it is highly questionable whether this can be done in a safe and effective way. Both George Hoerner, a Security Guard called by (and President of) NAGE Local 21-34, and Chief Edward C. Kennedy of the Security Guards called by Respondent, testified that the approximately 950 automobiles are cleared into or out of the gate in about 20 minutes. Such traffic occupies two of the three lanes on Kansas Street, and is controlled as it leaves or enters Route 27 by a Natick policeman who is assigned to that intersection for approximately 30 minutes. Mr. Hoerner conceded on cross-examination that it would be dangerous to stand in the road in an effort to hand literature to drivers. It is clear that the drivers would be on the opposite side of the car from anyone attempting to distribute literature from the edge of the road when cars were leaving the gate, and that cars occupying the middle lane of Kansas Street would be inaccessible to those distributing literature at all times unless distribution took place in the street between the lanes of morning traffic or in the third lane which is apparently not much used. 4/ While the evidence is far from clear with respect to how often and for how long cars may be stopped as they proceed along Kansas Street to or from Route 27, it is clear that the Natick policeman makes every effort to move the traffic from the Laboratories, and to have it out of the way before the heavy traffic along Route 27 begins. In order to move the number of cars involved in the 20 minutes generally agreed upon as par for that course, it would be necessary

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4/ The record is not clear on the question whether most automobile occupants could be reached from the side of the road after several days of distribution. It appears unlikely that they could, as the traffic in the south lane proceeds to or from the lower ramp leading to the lower parking lot and the traffic in the north lane proceeds to or from the upper ramp leading to the upper parking lot.

## Contentions

for about 47 per minute to enter or exit the base. It is also relevant to note that the open period in this contract, and the rival organizational drive happened to occur in midwinter, under conditions which Mr. Hoerner conceded would make distribution of leaflets both difficult and dangerous.

## Issues

The central issue posed by this controversy may be stated as follows: Did Respondent "sponsor, control or otherwise assist" AFGE in violation of Section 19(a)(3) by permitting its nonemployee representatives to conduct an organizational campaign, in nonwork areas of the installation on nonwork time, for the purpose of securing the 30% showing of interest required as a prerequisite to the filing of a petition challenging the status of NAGE as the exclusively recognized collective bargaining representative?

A subsidiary issue will become critical should the Assistant Secretary decide that the scope of the access granted the rival AFGE would in ordinary circumstances be overbroad and hence a form of assistance violative of the Order. The possibility of such a holding requires a resolution of the question whether there existed in the particular facts of this case obstacles to the rival union's effective communication with the employees through other means which were so great as to justify the degree of access permitted here.

Several peripheral issues exist --

- (1) Did Respondent violate Section 19(a)(3) when a supervisor posted AFGE campaign literature on the Security Office bulletin board?
- (2) Did the solicitation of an employee's membership by AFGE officials "on the clock" and in a work area, in violation of the campaign ground rules, constitute a violation of Section 19(a)(3) by Respondent? 5/

5/ Complainant's Brief asserts that Respondent further violated Section 19(a)(3) through its disparate treatment of the competing unions - allowing AFGE to campaign on the premises while "not affording the same right" to NAGE. Aside from the fact that no such allegation appears in

NAGE's essential argument is simply that Section 19(a)(3) prohibits an Agency from granting nonemployee union representatives access to its property for organizational (as distinguished from electioneering) purposes where there is an exclusively recognized labor organization in the unit. It argues that an exclusive representative's status, under the scheme of the Order, operates to preclude access to an activity's premises by nonemployee representatives of another organization until the rival has filed a petition with LMSA. It points out that Section 19(a)(3), in condemning assistances to labor organizations, as an exception permits an agency to "furnish customary and routine services and facilities under section 23 \* \* \* when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status." The basic thrust of this argument, as I read it, is that the two unions here involved did not enjoy equivalent status (in fact could not until both were on the ballot pursuant to an agreement for, or direction of, an election), and that it was therefore unlawful for the Activity to furnish its services and facilities to AFGE. Thus NAGE appears to raise the issue which was before the Assistant Secretary, in a somewhat different context, in U. S. Department of Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143.

A second argument advanced by NAGE is that, even if Section 19(a)(3) does not absolutely prohibit an agency from granting an outside union access to its premises in all circumstances, the employees here were not so "inaccessible" under the Babcock & Wilcox doctrine 6/ as to justify the

- 5/ (cont.) the complaint, no such evidence was offered by NAGE. The only evidence on the issue is the undisputed testimony of management official Nicholas J. Morana that he offered NAGE precisely the same access granted AFGE in Respondent's Exhibit 2. There is no evidence that the modifications of this permission reflected in Respondent's Exhibit 7 were ever offered NAGE, nor is there any evidence that NAGE ever requested same.
- 6/ NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956).

- 9 -

degree of access granted here. It asserts that the Assistant Secretary dealt directly with this issue in Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169, in which he sustained the Agency's refusal to permit nonemployee organizers to electioneer on the premises. The Assistant Secretary held that, in order "to support a contention that non-employee organizers should be accorded personal access (as distinguished from access through the mail) to employees on Activity premises for the purpose of campaigning, it must be shown that the employees at whom the campaigning is directed are inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the activity's premises ineffective." In this respect, NAGE contends that the record herein will not support a finding that the employees were so inaccessible as to render ineffective the existing alternative methods of communication. It points to AFGE's failure even to request use of the internal mailing system, the claimed availability (and use) of the confidential list of employee names and addresses, and the lack of persuasive evidence that employees could not be reached by leafleting or other traditional methods outside the premises.

A third and final argument on this issue appears to be that the development of a uniform and hence stabilizing policy in this important area of labor relations in the federal sector requires a finding that Respondent violated Section 19(a)(3) in the circumstances presented here. Thus, it is argued that the Assistant Secretary, in the Bureau of Customs case, made it clear that he will compel an agency to permit nonemployee union organizers to campaign on its premises only in the rare case of employee inaccessibility to other modes of communication. From this premise NAGE argues that, in the ordinary case where effective channels of communication off the premises do exist, thus rendering personal visitations unnecessary and unnecessarily disruptive, the grant of such access should as a matter of policy be found to constitute unlawful assistance, for the failure to do so will, in effect, delegate to agencies the unpoliced power to grant or withhold permission, and thereby to create in the federal sector an unpredictable and unstabilizing atmosphere.

- 10 -

Respondent's argument may be briefly summarized. The general rule in the private sector is that an employer need not open up his private property to nonemployee organizers if the union otherwise has adequate access to his employees. The rule set forth by the Supreme Court in Babcock & Wilcox has in effect been adopted by the Assistant Secretary in the Bureau of Customs case. If it is appropriate to require a private employer to open his private property where employees are not reasonably accessible to a union desiring to communicate with them, a fortiori it is appropriate to require a public employer to open his public property in similar circumstances. Here the size of the unit, the geographical dispersal of the employees' residences, and the difficulties and dangers which would attend any effort to distribute leaflets left no effective means of communication reasonably available except access to the premises. More limited means, such as home addresses and/or phone numbers, or use of the internal mailing system were prohibited by regulation. Hence the refusal to permit the outside union to enter and organize on the premises would have deprived the employees of their right to be informed of the programs of a rival union, deprived the rival union of the right to mount a challenge to the incumbent's status, and would have constituted, in effect, a grant of exclusive recognition in perpetuity to the incumbent. With respect to the several incidents in which AFGE exceeded the permission granted, Respondent asserts that there is no evidence it was aware of such activity when it occurred, nor that it approved, sponsored or condoned such conduct. On the contrary, it took prompt and positive steps to stop such activity, and succeeded in doing so, for the record shows that no complaints of misconduct occurred after the first few days of the open period. As for the posting of AFGE literature by Lt. Margand, Respondent claims that it was a mere mistake, and that it was immediately corrected when brought to the attention of higher management. All such incidents, it contends, were, in any event, too trivial in nature to support a finding of unlawful assistance to AFGE.

#### Analysis and Conclusions

The Assistant Secretary has never been squarely faced with the issue presented herein. As noted, in the Geological

- 11 -

Survey 7/ case he was confronted with the question whether the agency interfered with its employees' freedom of choice in selecting an exclusive bargaining representative by announcing that it was permitted a non-intervening labor organization to use its facilities on an equal footing with the petitioner and thereafter granting the non-intervenor access to its facilities and permission to distribute and to post election propaganda. In holding such conduct interfered with the election, the Assistant Secretary noted that Section 19(a)(3) of the Order prohibits agency assistance to a labor organization except in circumstances where it may desire to furnish customary and routine services and facilities under Section 23, and contains a proviso that any such services and facilities must be furnished "on an impartial basis to organizations having equivalent status." (Emphasis his.) He concluded that the underscored language clearly "establishes a general policy of permitting equal treatment by agencies to those labor organizations having equivalent status." He further concluded that where labor organizations do not enjoy equivalent status, equivalent treatment may be improper." (Emphasis mine.) Working from this expression of policy in the unfair labor practice area, he held that an incumbent union's failure to intervene in the proceeding which arose upon its rival's filing of a petition which raised a valid question concerning representation operates to preclude it from having equivalent status with petitioner and requires a finding that it is not entitled to equivalent treatment with respect to electioneering privileges.

There is a superficial appeal to the assertion that this holding is dispositive here. Obviously AFGE, an outside organization, does not enjoy equivalent status with NAGE, the exclusively recognized representative. From this disparity in status it can persuasively be argued that Respondent unlawfully assisted AFGE by permitting it to wage an organizational effort on the premises on an equal 8/ footing with NAGE. At least in the absence of factors supporting

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7/ A/SLMR No. 143.

8/ AFGE was not given all the facilities available to NAGE. Thus, it did not request and was not offered use of the bulletin boards used by NAGE. However, NAGE was offered the same campaigning privileges extended to AFGE.

a finding that the employees were not reasonably accessible to other methods of organization, such a rationale would have the advantages of uniformity and ease of application. However, it is far from clear to me that the scheme of the Executive Order calls for such a result.

Looking to the Order's language, I read in Section 19(a)(3) the purpose of compelling agencies to implement Section 23's directive that, by April 1, 1970, they issue policies and regulations with respect to the use of agency facilities by labor organizations in a manner which does not discriminate as between unions of equivalent status. As indicated above, I am aware of the fact that the Assistant Secretary, in the Geological Survey Center case, found the language under examination to establish a general policy of permitting equal treatment of labor organizations having equivalent status, whereas I read the text as requiring parity in any proffer of facilities. I see no necessary conflict, however, as the Assistant Secretary did not have to reach this precise issue in that representation proceeding. He was called upon to address the issue whether an activity interfered with an election by permitting a union not on the ballot to contend on an equal footing with the union which was seeking exclusive representative status. He reasoned that a union which fails successfully to intervene in a representation proceeding cannot enjoy equal status with a union which is on the ballot, and that granting such a union electioneering privileges equivalent to those granted the latter union constitutes interference with the freedom of choice of the employees. Although obviously bound by the holding, I feel constrained to note that I do not think its basis has ever been fully explicated. Thus, I fail to see why a union unable (or unwilling at the moment for some strategic reason) to participate in an election should not have the same avenues of communication to the electorate as the union on the ballot, if only to solicit a vote rejecting the petitioner, thereby preserving its right to bid for representation rights a year or more later. I see no command in the Order that employees be protected from making such a choice in an atmosphere conducive to a full and fair exchange of the opposing views. If anything, the need for so interpreting the Order seems to be strengthened

by the fact that in the public sector there is no explicit provision (as in Section 8(c) of the Taft-Hartley Act) for the the expression of anti-union views by management. Robert E. Hampton, Chairman, U. S. Civil Service Commission, has observed that Government officials do not mount "vote no" campaigns. 9/ In this connection he noted that a "significant difference between the federal sector and the private sector is the positive approach the Government, as employer, has taken toward union organizing." He also noted that the federal government has taken a position of neutrality as far as union representation of its employees is concerned, a position which derives from the preamble to, and Section 1 of, the Order. Given this rather authoritative statement of the Order's purposes, it seems to me the more important that the rights of organizations as well as individuals who oppose the union or unions on a ballot should be generously respected.

Nevertheless, the Assistant Secretary has made it quite clear, at least in an election context, that a nonparticipating union may not be given equal status for electioneering purposes with the participating organization. Thus, in Federal Aviation Administration, New York Air Route Traffic Control Center, A/SLMR No. 184, he ruled that the Activity did not interfere with the election by permitting certain employees, including officials of the formally recognized PATCO local union which could not participate in the election, to conduct a "Vote No" campaign during nonwork time in nonwork areas. He reasoned that the pro-PATCO employees were merely exercising their rights, recognized in Charleston Naval Shipyard, A/SLMR No. 1, to engage in campaign activity during nonwork time in nonwork areas without interference from the Activity and further, that these rights, which derived from their status as employees in the bargaining unit in which the election was held, were not diminished by the fact that some of them happened also to be officials of the PATCO local. In the absence of any evidence that they were aided or abetted in this effort by

9/ See his article, "Federal Labor-Management Relations: A Program in Evolution," The Catholic University Law Review, Volume 21, Number 3, Spring 1972.

nonemployee PATCO officials, he concluded that the Activity had not accorded PATCO equivalent status with the petitioning labor organization and hence did not interfere with the election. He distinguished the Geological Survey Center case, noting that there the Activity "formally sanctioned a campaign by a labor organization which was not a party to the election and accorded it the same status as that accorded the labor organization which was a party to the election." It is therefore clear that a labor organization which is not on the ballot may not be accorded use of Activity facilities in its electioneering effort.

The question remains whether this holding, by analogy, applies in the unfair labor practice area to prohibit the furnishing of services and facilities, in advance of any representation proceeding, to a challenging labor organization which desires to unseat an incumbent. Again, a textual analysis of the Order seems only to require that such "assistance" be furnished on an impartial basis to organizations having equivalent status, i.e., to forbid disparity in treatment as among equals. I do not read Section 19(a)(3) as compelling the converse--that an agency may not treat unequals equally in terms of granting access to the employees. I am unaware of any "legislative history" of the Order or its predecessor which throws light on this inquiry. Executive Order 10988 (by a Presidential Memorandum issued May 21, 1963) contained a counterpart to Section 19(a)(3). Section 3.2(a)(3) prohibited assistance to employee organizations, except that an agency could furnish "customary and routine services and facilities \* \* \*, if requested, on an impartial basis." The additional phrase providing that such facilities shall be furnished on an impartial basis to organizations having equivalent status was apparently added to Executive Order 11491. I have found nothing in the several committee reports leading to the 1963 additions to Executive Order 10988 and the 1969 issuance of Executive Order 11491 which touches upon the purpose of the changes. Nor do I think their purpose is self-evident from a simple reading of the text. As indicated above, I do not think the plain requirement that unions of equivalent status must be given, upon request, equal use of Agency services and facilities compels the conclusion that unions of different status must in all circumstances be granted different degrees of access to such services and facilities. Thus, where, as here, a union

which is a stranger to the premises attempts to secure a showing of interest for purposes of challenging an exclusive representative's status in a representation proceeding, I see nothing in the Order which clearly precludes an Agency's grant of the use of its services and facilities to that union on terms equal to those enjoyed by the incumbent organization. If the employees involved are easily accessible to a rival union I see no obligation on Government's part to open up its premises, furnish its mailing services or make available its bulletin boards. On the other hand, I see no legal restraint on an agency's decision to open up the channels of communication on a completely equal basis to the competing unions, despite their difference in status, where it does not display favoritism toward one. Stated otherwise, I cannot conclude that an Agency sponsors, controls or assists a rival organization simply and solely because it grants that organization, for a limited period of time, access to its employees on terms equal to those that exist for the incumbent organization. I therefore find that Respondent's grant of access to AFGE did not violate Section 19(a) (3).

Apart from the foregoing analysis, I would in any event find that the Laboratories' employees are not reasonably accessible through the normal means of communication, and that the difficulties faced by an outside union seeking to reach them justified in the circumstances Respondent's grant of access. As described above, there are almost 1000 employees in the unit, and their residences are so dispersed as to make the effort to secure their home addresses and/or telephone numbers from various directories, or to visit their homes both difficult and time consuming. Likewise, the number of cities and townships within their residential area would require the use of many newspapers, radio or television stations in order successfully to reach them with the AFGE message. The security prevailing at the work place, including the parking lot, and the traffic pattern, make contact adjacent to the reservation very difficult indeed. While I am mindful that there is no requirement that Agency management make such communication convenient for a union, 10/

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10/ See Internal Revenue Service, Office of the District Director, Jacksonville District, A/SLMR No. 214.

I think the difficulties which would attend any effort to reach these particular employees off the premises are so great as to warrant access to them on-the-job. The Activity might, of course, have chosen a less disruptive method, as, for example, agreeing to deliver mail at work, or to address envelopes provided by AFGE. However, the fact that it chose to grant access to nonemployee organizers does not, in my judgement, render the form of "aid" chosen a species of unlawful assistance.

I doubt that a detailed analysis of the circumstances of cases applying the Babcock & Wilcox doctrine 11/ would be very helpful. There, the Supreme Court held that an employer need not permit nonemployee organizers the use of its property where other available and effective channels of communication exist. I think it important to note that the Court was confronted with the need to balance the rights of nonemployee union organizers (as opposed to employee adherents) against the private property rights of management. In striking the balance, the Court declared that the distinction between the rules of law applicable to employees and those applicable to nonemployees is one of substance, and that while federally preserved property rights must be required to yield to federally guaranteed self-organizational rights of employees except in situations where restriction of the latter is demonstrably necessary to maintain production or discipline, such property rights need not yield in the case of nonemployee organizers unless in the circumstances the employees are beyond the reach of reasonable union efforts to communicate with them off the premises. The Court noted that in each of the cases before it the plants were close to small well-settled communities where a large percentage of the employees lived and the usual methods of imparting information were available.

It is questionable whether the accommodation struck between property rights and organizational rights in Babcock & Wilcox is appropriate in the federal sector. As noted above, while the Government is to be neutral regarding its employees'

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11/ NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956).



decisions concerning union representation, the scheme of the Order contemplates that the Government be hospitable to the concept of collective bargaining. There is no explicit provision for management "vote no" campaigns, and, as a corollary, it would seem to me there is no justification for Government management to place unnecessary impediments on the freedom of communication essential to the exercise of its employees' right to self-organization. Put another way, there is no constitutionally secured property right, as prevails in the private sector, to be weighed against a statutory policy of promoting collective bargaining. Although I recognize that the Assistant Secretary has distinguished as between the direct exercise of self-organizational rights by employees on the premises and the rights of employees to learn the advantages of organization from nonemployee organizers, it nevertheless seems to me that the distinction must be grounded on Government's right to avoid unnecessary interference with production or discipline rather than the assertion of property rights. Hence, I would conclude that the circumstances in which Government as an employer can legitimately bar nonemployees from its property, or restrict the scope of their activities, must be far more circumscribed than is the case in the private sector. It would follow that the burden of establishing that degree "of inaccessibility of employees (which) makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels" and thus demonstrating that exclusion from the property (or denial of services) is unjustifiable, is a lesser one in the public than in the private sector.

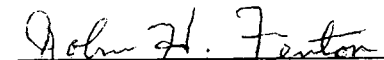
I conclude that the difficulties of reaching the Laboratories' employees through such channels of communication as exist off the premises were great enough to justify the action taken by the Army, even though such action might, in other circumstances, be found to constitute unlawful assistance.

Two issues remain: whether the Activity violated Section 19(a) (3) by virtue of Lt. Margand's conduct in posting AFGE campaign literature on the bulletin board, or because the NAGE officers violated the ground rules attached to the access granted them by discussing union matters with employee Ray Berghaus in a work area during working time. These are the only two such incidents during the 26-day "open season" provided by the Activity in a unit of almost 1000 employees. There is no evidence the Activity was aware of either incident

until after it had occurred, and in each case the Activity acted very promptly and effectively to correct such action and to see that it did not reoccur. Thus, these acts were isolated and would not in my judgment warrant remedial action if found to be violations. Lt. Margand's conduct is, of course, directly attributable to the Activity. However, there is no evidence that the posting of the literature was anything but an innocent error, it lasted only for a few days, and it occurred in the Security Office where normally only the approximately 30 guards would have occasion to read it. I find no violation of Section 19(a) (3) in such circumstances. The conduct of the AFGE officials is not attributable to the Activity, absent a showing that the Activity condoned it by failure to police its ground rules. The single such incident occurred on January 4, the second day of the open season, and was apparently initiated by the employee. Respondent warned NAGE official Conte, promptly upon learning of the incident, that such conduct would lead to revocation of the permission granted AFGE. There is therefore no basis upon which to predicate management responsibility for the conduct of the NAGE officials, and hence no foundation for finding a violation of Section 19(a) (3).

#### RECOMMENDATION

In view of the findings and conclusions made above, I recommend that the Assistant Secretary dismiss the complaint.

  
John H. Fenton  
Administrative Law Judge

DATED: January 10, 1973

May 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

WESTERN DIVISION OF NAVAL  
FACILITIES ENGINEERING COMMAND,  
SAN BRUNO, CALIFORNIA  
A/SLMR No. 264

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This unfair labor practice proceeding against the Respondent Activity involves a complaint filed by American Federation of Government Employees, Local 2633, AFL-CIO, alleging violations of Section 19(a)(1), (2) and (4) of the Executive Order, as amended. Specifically, the complaint alleged that the Respondent had interfered with, restrained, or coerced its employees by the action of its supervisor, Joel Thurston, in inserting in an appraisal form of employee Joseph Gorgone the remark "active in the union." Further, it was alleged, among other things, that this action constituted a "blacklisting" of Gorgone which resulted in other facilities refusing to hire him and that also the Respondent had discriminatorily refused to rehire Joseph Gorgone and William Rhodes, based on their union activities and also based on their filing of a complaint against the Respondent.

The Administrative Law Judge found that, despite the unavailability of the appraisal form concerning employee Gorgone, the evidence established that the Respondent's supervisor, Joel Thurston, had, in fact, inserted the remark "active in the union" on Gorgone's appraisal form. He found further that this action constituted interference, restraint, or coercion by the Respondent in violation of Section 19(a)(1) of the Order. The Administrative Law Judge found further that the Complainant had failed to sustain its burden of proof in establishing that Respondent had violated the Order in any other respect as alleged in the complaint. No exceptions were filed to the Report and Recommendations of the Administrative Law Judge.

Upon review of the entire record in this proceeding, including the Report and Recommendations of the Administrative Law Judge, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, but noted that, in his view, the Administrative Law Judge's recommended Order and Notice to Employees did not provide a sufficient remedy under the circumstances of this case. Accordingly, the Assistant Secretary issued a modified Order and Notice to Employees.

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Service Administration, U. S. Department of Labor, whose address is: Room 9061 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

WESTERN DIVISION OF  
NAVAL FACILITIES ENGINEERING  
COMMAND,  
SAN BRUNO, CALIFORNIA

Respondent

and

Case No. 70-1854

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 2623, AFL-CIO

Complainant

DECISION AND ORDER

On February 26, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above entitled proceeding, finding that the Respondent had violated Section 19(a)(1) of Executive Order 11491, as amended, by virtue of the action of its supervisor, Joel Thurston, having inserted in an appraisal form of one of its employees, Joseph Gorgone, the remark "active in the union." The Administrative Law Judge further found that the Complainant had failed to meet its burden of proof with respect to other Section 19(a)(1) allegations and Section 19(a)(2) and Section 19(a)(4) allegations contained in the complaint. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, as modified below.

THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate

the policies of the Order. However, under the circumstances of this case, involving what I consider to be conduct which clearly is inconsistent with the purposes and policies of the Order, I find that the Administrative Law Judge's recommended Order and Notice to Employees does not sufficiently remedy the Respondent's improper conduct. Accordingly, the recommended Order and Notice to Employees have been modified, as described below.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Western Division of Naval Facilities Engineering Command, San Bruno, California, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Joseph Gorgone, or any other employee, by inserting any remark or comment in any appraisal form or reference letter regarding the union activities of Joseph Gorgone or any other employee.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Require and instruct its supervisors not to insert any remark or comment in any appraisal form or reference letter regarding the union activities of Joseph Gorgone or any of its employees.

(b) Expunge any reference to union activities made by the Respondent, if such reference exists, from the personnel file of Joseph Gorgone or any other of its employees.

(c) Request the Consolidated Civilian Personnel Office located at San Diego, California, to expunge the remark "active in the union" from Joseph Gorgone's appraisal form, if such form is located, and to expunge similar references, if they exist, from the appraisal forms of any other of its employees.


(d) Post at its facility at the Naval Facilities Engineering Command, San Bruno, California, and at its ROICC facility in San Diego, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be

posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges other violations of Section 19(a)(1) and violations of Section 19(a)(2) and 19(a)(4) of Executive Order 11491, as amended, be, and it hereby is, dismissed.

Dated, Washington, D.C.  
May 31, 1973

  
\_\_\_\_\_  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Joseph Gorgone, or any other employee, by inserting any remark or comment in any appraisal form or reference letter regarding the union activities of Joseph Gorgone or any other employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL require and instruct all of our supervisors that they shall not insert any remark or comment in any appraisal form or reference letter regarding the union activities of Joseph Gorgone or any other employee.

WE WILL expunge any reference to union activities made by this Activity, if such reference exists, from the personnel file of Joseph Gorgone or any other employee.

WE WILL request the Consolidated Civilian Personnel Office, San Diego, California, to expunge the remark "active in the union" from Joseph Gorgone's appraisal form, if such form is located, and to expunge similar references, if they exist, from the appraisal forms of any other employees.

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

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Signature and Title)

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
WASHINGTON, D. C.

alleged that Respondent violated Sections 19(a)(1), (2) and (4) of the Order by failing and refusing to rehire Joseph Gorgone and William Rhodes, former officers of Local 2623, because of their union activity on its behalf.

WESTERN DIVISION OF  
NAVAL FACILITIES  
ENGINEERING COMMAND,  
SAN BRUNO, CALIFORNIA,

Respondent

and

CASE NO. 70-1854

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 2623, AFL-CIO,

Complainant

Complainant was permitted, over Respondent's objections, to amend its complaint in several respects. In respect to Gorgone, the amendment specified (1) another position, in addition to the one mentioned in the complaint, allegedly denied him by Respondent due to his unionism, (2) Respondent's placing of a remark, "active in the union" in an appraisal form sent to it in connection with Gorgone's application for employment elsewhere, (3) the aforesaid remark constituted a blacklisting by Respondent which resulted in other facilities refusing to hire Gorgone. In respect to Rhodes, the amendment specified another position, in addition to the one mentioned in the complaint, allegedly denied him by Respondent due to his union activities. All of the foregoing is likewise alleged to be violative of Section 19(a)(2) of the Order.

A hearing was held before the undersigned on September 26 and 27, October 25 and 26, 1972 at San Diego, California. Both parties were represented by counsel 1/ and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, both Complainant and Respondent filed briefs which have been duly considered by the undersigned.

Upon the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

Richard C. Wells, Esq.  
United States Department of the Navy,  
760 Market Street,  
San Francisco, California 94102,  
on behalf of the Respondent

Bruce I. Waxman, Esq., and  
Dolph David Sand, Esq.  
American Federation of Government  
Employees,  
1325 Massachusetts Avenue, N. W.  
Washington, D. C. 20009  
on behalf of the Complainant

Findings of Fact

I. Unfair Labor Practices

A. Background.

Prior to July, 1970 there existed three divisions of the Naval Facilities Engineering Command in the western section of the United States. The Southwest division was located in San Diego, California; the Western division was situated at San Bruno, California; and in Seattle, Washington was based the Northwest division.

In 1969 there was a substantial reduction in the budget allocated for the Naval Facilities Air Command FY1971, which supports the Field Engineering Divisions. In order to effect economies, a letter 2/ dated October 26, 1969 was sent to all divisions announcing the consolidation

Before: William Naimark, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on July 21, 1972 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region.

American Federation of Government Employees, Local 2623, AFL-CIO (herein called the Complainant) initiated the matter by filing a complaint on January 26, 1971 against Western Division of Naval Facilities Engineering Command, San Bruno, California (herein called the Respondent). The complaint

1/ During the hearing Dolph D. Sand Esq. replaced Bruce I. Waxman, Esq. as counsel for Complainant, after the latter resigned as staff counsel for the American Federation of Government Employees.

2/ Respondent's Exhibit 7(a).

of 13 field engineering divisions into six large ones. Both Southwest and Northwest were merged into the existing Western Division, and the functions of the former two divisions were transferred to the latter on July 1, 1970. The consolidation itself was completed by October, 1970.

Complainant has been the bargaining representative of the employees in the Southwest Division at San Diego since 1966. The union was organized by employees Joseph Gorgone and William Rhodes, who, at the time of the base termination, were vice-president and president thereof respectively. Both individuals, as will be hereinafter detailed, were actively engaged in representing other employees during grievance sessions with management. Although Gorgone and Rhodes were offered transfers to San Bruno - the site of the consolidated Western Division - upon the closing of the Southwest section in San Diego, each refused to accept the transfer.

In January, 1970, Supervisor Joel Thurston filled out an appraisal form which he received from the Consolidated Civilian Personnel Office <sup>3/</sup> (herein called CCPO) in connection with Gorgone's employment record at the Southwest Division. CCPO acts as a recruiting office for various Naval commands, and the form was sent as a result of Gorgone's seeking employment with other facilities in the San Diego area. In addition to filling out information in regard to Gorgone's capabilities and characteristics, Thurston inserted the comment "active in the union" in the space allotted for remarks. The form was returned to CCPO where it remained for a time in its files, as will be hereinafter discussed.

In October, 1970 Gorgone applied for a position as Mechanical Engineer with the Resident Office in Charge of Construction (herein called ROICC) for Respondent at San Diego. Between January 27, 1971 and February 28, 1971, he applied for a job as general engineer in the Civil Defense Support Section of Respondent's San Diego branch. He received neither position. Gorgone also applied personally, or through CCPO, for six or seven positions with other Naval commands facilities in the San Diego area. He was not hired for any of these.

In November or December, 1970 Rhodes applied for a job as Civil Engineer, supervisory, with Respondent's ROICC branch in San Diego. He also applied in December, 1970 with Respondent for the position of Civil Engineer in San Diego. Both jobs were filled by individuals other than Rhodes.

B. Contentions of the Parties.

Complainant contends that Gorgone and Rhodes were denied employment, as aforesaid, because of their active roles as union officers, and especially in the presentation of grievances to management. It is also maintained that the remarks by Thurston, regarding Gorgone being active in

<sup>3/</sup> Referred to at times as the "Thurston appraisal."

the union, were violative of the Order. Moreover, urges Complainant, Gorgone was blacklisted with other facilities, and the failure by them to hire him was directly attributable to Respondent. Accordingly, it is contended that such blacklisting was discriminatory under the Order. Complainant takes the position that such conduct by Respondent was violative of Sections 19(a)(1), (2) and (4) of the Order, <sup>4/</sup> and requests reimbursement to both employees for the period of time they remained unemployed.

Respondent denies it discriminated against either employee. In regard to Gorgone, Respondent asserts the Mechanical Engineer GS-12 position was not filled due to business reasons; further, that Gorgone did not receive the job of General Engineer GS-801, 11 or 12, Civil Defense Support Section since more qualified men were selected. Respondent denies responsibility for, or knowledge of, the remark "active in the union" placed in his personnel record with CCPO; and also maintains it did not blacklist Gorgone as to other employment. Respondent further contends Rhodes was not hired for either Civil Engineer's job because each was filled by lateral transfer of on-board employees pursuant to regulations.

C. Issues.

1. Whether the remark "active in the union," which was written by Respondent's supervisor Joel Thurston, concerning employee Gorgone on his appraisal form (Thurston appraisal), constitutes interference, restraint or coercion under Section 19(a)(1) of the Order.

2. Whether the failure and refusal by Respondent to hire Gorgone for the positions of Mechanical Engineer GS-12, and General Engineer GS-801-11 or 12, Civil Defense Support Section, was due to his former union activities, and thus discriminatory and violative of Section 19(a)(2) of the Order.

3. Whether the failure and refusal by other facilities or naval commands to hire Gorgone for positions which he was qualified to fill

<sup>4/</sup> At the close of the hearing counsel for Complainant moved to withdraw the 19(a)(4) portion of the complaint. The undersigned indicated he had no authority to rule upon the motion, and suggested to counsel that he make his request to the Regional Administrator upon the close of the hearing. No such motion or request was thereafter made by Complainant. The alleged violation of 19(a)(4) is found to have no merit. The undersigned has been administratively advised that no other complaint was filed with the Area or Regional Office by Complainant against Respondent. For the reasons given in the "Concluding Findings," which fail to establish discriminatory motivation by Respondent toward Gorgone and Rhodes, it is also concluded there was no discrimination by Respondent against these individuals because they filed the within complaint.

was due to the Thurston appraisal, constituting a blacklisting of Gorgone because of his union activities during his employment with Respondent, and thus discriminatory and violative of Sections 19(a)(1) and/or 19(a)(2) of the Order.

4. Whether the failure and refusal by Respondent to hire Rhodes for the positions of Civil Engineer GS-12, supervisory, and Civil Engineer GS-12, was due to his former union activities, and thus discriminatory and violative of Section 19(a)(2) of the Order.

D. Operations of Naval Facilities Engineering Divisions and ROICC Offices.

The Western Division of Naval Facilities Engineering Command is, as was true of the Southwest Division before the consolidation, an engineering field division. It represents the construction capability for the Navy in eight western states and Alaska, employs about 900, and is primarily responsible for design and construction of federal facilities assigned to it. ROICC is an arm or extension of the field division. It is a field office at the site of the work or close to it, reporting to the engineering field division for military control, civilian personnel and budgetary logistics. Prior to the consolidation there were ten ROICC field offices which reported to the Southwest Division. One of these, located at San Diego, continued at this location but reported to the Western Division after the consolidation. Working thereat were civil engineers, an electrical engineer, and inspectors. In 1970 at this ROICC office there were four supervisory and no non-supervisory engineers; at present there are four supervisory and one non-supervisory engineers. The number of personnel in any given discipline at an ROICC office is determined from its workload. There are engineering personnel in 50 percent, or 15 of the offices. Of these, all are civil engineers, except for an electrical engineer in San Diego ROICC office and a mechanical engineer in the Bremerton, Washington ROICC office.

E. Hiring Role of CCPO and The Thurston Appraisal of Gorgone.

1. CCPO at San Diego does all the personnel service work for about 29 Naval commands in that area. Respondent, which has its own personnel staff at San Bruno, is not serviced by CCPO. When a command desires to fill a vacancy, it will contact CCPO and request it to recruit for the position. CCPO, in turn, sends a copy of the job announcement to all activities for posting thereat. Use is made of the Department of Defense Stopper List (DOD Stopper), also called DOD priority or Central Referral System, which applies to all career conditional employees, and is a list of employees separated by reduction in force. The command separating the individual is responsible for registering the employee in this system. If an employee is on this priority or DOD stopper list, he would be automatically referred to the commands serviced by CCPO for available positions. When an employee is on the list but is being terminated, CCPO would check with the activity separating him to ascertain whether the individual is available for a position. However, before any job is filled, CCPO must check the DOD stopper list for availability.

As part and parcel of the hiring procedure, CCPO sends out appraisal or voucher forms when job announcements are made or an individual applies for a position. One appraisal form is sent to the individual's present supervisor, and another to his former supervisor. The forms are returned to Ruth Bielke, personnel staffing specialist, who attaches them to the job application. Whereupon both documents are forwarded to the command which had a vacancy for the particular position. A copy of the appraisal form may remain on file with CCPO.

2. Bielke testified, and I find, that she issued an announcement of a vacancy for Mechanical Engineer, <sup>5/</sup> Naval Ship Engineering Center, San Diego, while Gorgone was still employed by the Southwest Division. The announcement itself is dated December 24, 1969. Further, Gorgone applied directly for this position, and Bielke, on behalf of CCPO, sent appraisal forms to Gorgone's last two supervisors in late December, 1969 or January, 1970. One of these who received an appraisal form to be filled out was Joel Thurston who had supervised Gorgone previously.

Gorgone testified, and I find, that on or about January 14, 1970 Thurston told Gorgone that he had received an appraisal form for Gorgone and invited the latter to fill it out. However, Gorgone refused. A day or two later Thurston called him into the office, and proceeded to fill out the form in Gorgone's presence. The supervisor filled out the blanks and assigned a high rating to the performance of the employee. In the space provided for "remarks," Thurston wrote "active in the union." When questioned by Gorgone as to why he wrote that statement, Thurston replied he felt obliged to do so. Despite the urging of the employee, the supervisor refused to delete the remark and the appraisal was sent to CCPO. The personnel specialist testified, and I find, that she had seen the appraisal when it came into the office, that it was a very good appraisal in terms of work performance, and the words "active in the union" were written at the bottom of the form. Bielke further testified she did not recall the name of the supervisor who signed the appraisal.

A few days after the voucher was received by CCPO, Gorgone, accompanied by Rhodes, went to said personnel office in order to obtain a copy as well as have the remark deleted. However, he was unsuccessful as Mr. Hammond, Director of CCPO, refused both requests. Sometime later Gorgone contacted Bielke and asked her to save the appraisal as a lawsuit might be in the offing. Accordingly, she placed it in a manila or large brown envelope, wrote Gorgone's name thereon with the notation "do not destroy - lawsuit to be pending per Mr. Gorgone's request." She then placed it in a file of vouchers. Gorgone testified, and I find, that he visited the CCPO office several times thereafter in an effort to seek employment. On each such occasion - and specifically at the time the complaint was filed herein on January 26, 1971, as well as in May or June, 1972, Gorgone saw the appraisal form which was filled out by Thurston. However, the appraisal subsequently disappeared, although

<sup>5/</sup> Complainant's Exhibit No. 4.

Bielke could not fix the date of disappearance. She did testify, and I find, that Bud Wilkins, team leader at CCPO, told her the summer help went through the vouchers, which might account for the loss or misplacement. Complainant was unable to produce the form at the hearing, and the record reveals the document is still missing from CCPO's files. 6/

F. Union Activities of Gorgone, Rhodes and Other Employees.

In 1966 Gorgone and Rhodes organized the employees at the Southwest Division, and solicited the workers to join Complainant union. The latter then became the exclusive bargaining representative of all professional and non-professional employees, including those in the ROICC office, of said division. After the consolidation, management discontinued recognition of the union as to the original unit. However, an election was held and the union became the representative of the supervisory engineers at ROICC. Gorgone served initially as chief steward for one year, and in that capacity he represented employees at various grievance sessions with management as well as at labor hearings. He then became vice-president and so served until the termination of the base. Rhodes became president of the union at the outset and continued the presidency until 1970. Henry Wheeler, who was very active in the union at both grievance sessions and negotiation meetings with management, also occupied the position of vice-president. Wheeler is presently in the ROICC office of Respondent, and is now the new president of the Union. Fred Burnett, who is employed at the ROICC office at San Diego, is vice-president. He also was actively engaged in representing employees at grievance meetings with management. Ed Wiscowski served as chief steward of the Union, and he relayed problems of the employees to the offices of the Union. Wiscowski dealt with management in an effort to resolve grievances, and he is still employed by Respondent.

Between 1966-1970 several supervisory personnel of Respondent discussed the Union with Gorgone. 7/ Walter Hoss commented on Gorgone's union activity although he never expressed annoyance or dislike of his actions. Seymour Berkely, Budget officer, remarked that he had an idea the reason Respondent was moving was because of union trouble. In certain instances when an employment problem arose, Berkely uttered a comment such as "your union did it again." Gorgone and Rhodes testified, and I find, that during 1966 and 1967 there were at least 10-12 such conversations with the supervisor. On several occasions Berkely asked Gorgone why he "rocked the boat" - or the management official would query, "Why do you want a union, you never had it so good?" In these instances both employees attempted to explain the need for having a union represent the engineers.

6/ Counsel for Respondent objected to oral testimony as to the content of the appraisal form on the ground that it is heresy and violates the best evidence rule. The undersigned overruled the objection and permitted the testimony based on the showing that the document was lost or destroyed. Ruch v. Rock Island, 97 U.S. 693; Cyclopedia of Trial Practice, Section 215, P. 506.

7/ Complainant's counsel stated at the hearing he did not claim that any remarks made during this period constituted a violation of the Order.

Record testimony shows further intercessions on the part of the union leaders in behalf of their fellow employees. In 1968 and 1969 union officials Gorgone, Rhodes, Burnett and Emerson claimed that Ed Carr, secretary-treasurer of the Union, had been harassed in his job and passed over for a promotion. Meetings were held with Carr's supervisors as well as the Admiral. Further, in 1969, Rhodes, on behalf of the Complainant, wrote Melvin Laird a letter accusing personnel officer Bernice Santo and comptroller E. G. Riley of corruption and lying. Correspondence between the Union and Admiral Wooding followed, but nothing resulted from the specific charges leveled against Respondent's agents. During his tenure as president Rhodes also presented to management, on behalf of his fellow workers, problems of employees regarding health, compensation claims, shortage on travel allowance money for moving, and working conditions.

G. Failure or Refusal By Respondent to Rehire Gorgone After the Consolidation and His Termination.

In 1959 Gorgone was hired by Respondent's Southwest Division as a GS-9 Mechanical Engineer. Classified as a general engineer, Gorgone was registered in the priority list as both a mechanical and industrial engineer. His skill as an engineer is unquestioned. Gorgone prepared designs, final drawings and specifications for mechanical projects, systems and equipment for the Naval Facilities of the 11th Naval District. He worked on projects involving heating, ventilating and air conditioning for buildings and he participated in the design of ventilation systems for atomic, biological and chemical bomb shelters. As a specialist on boilers Gorgone assisted ROICC on mechanical engineering problems. When Respondent created a utilities management group, Gorgone and a few other engineers went with Thurston as a management level crew. At the time of the base termination Gorgone was employed as a GS-12 Mechanical Engineer in the maintenance division of Southwest.

Prior to the consolidation, all personnel at the Southwest Division were notified of the impending move from San Diego to San Bruno and the closing of the base on June 30, 1970. Each individual so notified was given an opportunity to transfer to the new location. Gorgone, although offered a transfer to San Bruno, refused since he did not wish to leave the San Diego area. A letter 8/ dated May 1, 1970, from the Commander of the Southwest Division to Gorgone, notified him that the facility proposed to separate him from his position in view of his refusal to accept a transfer to the consolidated Western Division in San Bruno. Based upon his request in order to complete certain work upon which he was engaged, Gorgone was permitted to remain at the Southwest Division until October, 1970 at which time he was terminated from his employment. Prior to his severance Gorgone indicated he would only accept a position in the San Diego area. Although he applied for various positions with naval commands in the area, which will be hereinafter discussed, Gorgone remained unemployed until the latter part of December, 1971. Since that date he has been engaged as a GS-9 Draftsman with the Naval Amphibious Base at Coronado, California.

8/ Complainant's Exhibit 1.



Under the Referral System for displaced employees, a displaced employee must designate an area - other than the one from which he is displaced - for which he wants consideration in order to perfect his priority. Gorgone designated his displaced area, San Diego, on all applications. Upon ceasing to be a career conditional employee in October, 1970, Gorgone was placed in priority 2, and on January 25, 1971 a memo 9/ from the staffing specialist of Respondent notified Gorgone he had been placed in priority 1 under the DOD Referral System. Under the DOD Instruction 10/ pertaining to this system, an activity must employ a qualified applicant in priority 1, or leave the position vacant. This is the highest priority and does not permit reassignment or transfer within the facility without going first to this list. Priority 2 allows for transfer or reassignment of employees already on the Navy roll, hires and transfers from outside DOD being prohibited. Gorgone maintains that Respondent should have hired him, as a qualified and rated employee, for either of two positions after the consolidation.

1. An announcement 11/ dated October 23, 1970 listed a vacancy with Respondent for a position as Mechanical Engineer, GS-12, in ROICC, at San Diego. Sometime between that date and October 29, 1970 - the closing date in applications - Gorgone applied personally for this job. Prior to July 1, 1970, ROICC personnel obtained much staff assistance from the design division of the command by crossing a compound and talking to design engineers. With the anticipated move of the engineering quarters, ROICC officers were concerned about having staff expertise for their operation, and therefore an announcement was issued for both a Mechanical and an Electrical Engineer. Later, during October-November, 1970, Edward L. Hughes, director of the construction division of Respondent, determined that the workload did not justify a Mechanical Engineer position at ROICC. Hughes concluded a civil engineer was needed to make the San Diego branch more compatible with the other ROICC offices in the Western Division. A Mechanical Engineer had never been utilized in the San Diego ROICC office, and all ROICC offices in this division utilized only civil engineers, except for an electrical engineer in San Diego and a mechanical engineer in ROICC-Bremerton, Washington.

Record testimony reflects that in most construction projects civil engineering would constitute 50-60 percent of the disciplines; that while there were still major electrical contracts at San Diego requiring unusual expertise, the successful performance of no project listed 12/ between October, 1970 and June, 1971 was impaired by the lack of having a mechanical engineer discipline available. Respondent's official testified further, and I find, that some of these projects did require mechanical engineering work, and that most of it was done via commercial contract with an architect or engineer firm on a retainer basis. Accordingly,

9/ Complainant's Exhibit 9.

10/ Complainant's Exhibit 10.

11/ Complainant's Exhibit 14(a).

12/ Respondent's Exhibit 3.

Hughes testified he cancelled the mechanical engineer position announcement, and it is not expected the mechanical engineer discipline will be utilized at ROICC, San Diego. Upon the cancellation of the mechanical engineer's position, a civil engineer GS-12 position was substituted therefor. No contention is made by Complainant that Gorgone was entitled to the substituted position. Under date of November 7, 1970 Gorgone was notified by Respondent that the position of mechanical engineer GS-12, ROICC, San Diego would "not be filled at this time." 13/

2. Prior to July 1, 1970 the civil defense work portion was in the planning section of the Southwest Division. Thereafter, civil defense became part of the San Diego branch of the Western Division. This section does fallout shelter survey work for the Department of Civil Defense, determining the usefulness of buildings as fallout shelters. A job announcement 14/ dated January 27, 1971, with a closing date of February 28, 1971, was issued by Respondent for the position of General Engineer, GS-11 or 12, in the Civil Defense Support Section at San Diego. Originally the job was intended as a permanent one; but it became known that the Civil Defense Support work would be transferred to the State of California in 1972, and the position was therefore changed to temporary. Gorgone had applied for the job as announced, and staffing specialist Phyllis Metzcar forwarded his employment form to Robert Manuel, head of the Civil Defense Support Branch, on February 8, 1971 with a memo 15/ regarding consideration of Gorgone for the vacancy. On March 15, 1971 Gorgone filled out a form 16/ indicating he was "still interested in the job, even though only temporary."

Respondent's personnel office submitted a list 17/ of six men who filed applications and were both interested in, and qualified for, the general engineer's position with the Civil Defense Support Branch. Each individual was rated as to "(a) knowledge of building design and construction, (b) knowledge of contract administration procedures for construction and A/E contractors, (c) experienced in fallout shelter analysis, (d) efficiency and effectiveness as employee/supervisor, (e) ability to meet and deal effectively." Joseph F. Dupont, rated at 18.5 and Thomas B. Stone, with a rating of 16, received the two highest scores and were selected for the positions by a panel consisting of Manuel and two other employer representatives. Of the remaining applicants, their scores were as follows:

13/ Complainant's Exhibit 14(b).

14/ Complainant's Exhibit 15(a).

15/ Complainant's Exhibit 15(b).

16/ Complainant's Exhibit 15(c).

17/ Respondent's Exhibit 6.

William D. Reichert	13	
Thieleu	13	
William Marteus	12	
<u>Joseph Gorgone</u>	<u>11</u>	(Underscoring supplied)

Manuel's testimony reveals that primary consideration was given to an individual with an architectural degree. In view of the fact that survey work is concerned in the fallout shelters, one who has designed buildings is in a better position to determine how they are built. Dupont was an architect, and was either taking, or had completed, fallout shelter analysis courses. Stone was a civil engineer who had been the officer in charge of construction at the Great Lakes air base. Both Dupont and Stone were working at the Western Division in jobs about to be abolished.

With respect to Gorgone's capabilities and qualification for this position, the record reveals that while he had familiarity with building design, the Defense Section was not doing any design work. Moreover, Gorgone had never worked on ROICC jobs, or in any field construction. Gorgone had completed a course in atomic engineering, but this study did not relate to fallout shelter survey. Radiological surveys were not used, and while Gorgone's radiological defense training would be helpful, it was not directly related to the work at hand. Record testimony also reflects that the DOD priority assigned to Gorgone did not apply in the case of a temporary position.

Although Dupont is still employed in the same position, Stone left within one week after being hired as he was unable to pass the fallout shelter analysis course. Manuel testified, and I find, that the Navy was notified by the Office of Civil Defense not to replace Stone as it was anticipated the State would handle the Civil Defense support activities. The one position of general engineer remaining after Stone's departure continued to be vacant from February, 1971 to June, 1972. Manuel further testified that in June they were advised to fill the position. Accordingly, the position was advertised. A new list was compiled since the lists once used are considered no longer of any value. Gorgone's name was not on the new roster, and no explanation was given as to the reason for its absence. Although the job was filled, the replacement left on August 15, 1972. The Navy has received specific instructions not to hire anyone else and the job has not been filled since its vacancy last August. Manuel's testimony indicates he knew Gorgone was a union member, but it did not affect his selection of candidates for this position of general engineer; and, further, Gorgone's unionism was not discussed in any way among the various men on the selection panel.

H. Refusal or Failure of Other Naval Facilities to Employ Gorgone

Shortly after learning of the proposed consolidation, Gorgone sought employment in the San Diego area with other naval commands. In January, 1970, he applied for the job of mechanical engineer with the Naval Ship

Engineering Command.<sup>18/</sup> CCPO, which issued the announcement, checked with Respondent to ascertain if Gorgone was available for the position. Respondent's personnel representative replied in the affirmative, and stated he was qualified for the vacancy. Whereupon CCPO sent Gorgone's application to the Naval Ship Engineering Command, and in late January, 1970 he was notified to appear for an interview. Gorgone was interviewed by Mr. Hand, and another representative of the Naval Ship Engineering Command. He testified, and I find, that Hand mentioned Gorgone had been rated highly by Thurston and others. Hand then asked the meaning of the statement "active in the union" on the appraisal, and Gorgone replied he had been active. The interviewer inquired why this remark would have been put on the form, and Gorgone said he couldn't explain it. When Gorgone asked Hand if the latter was "adverse" to his being in the union, the employer's representative did not answer. The interview concluded by Hand stating they would let Gorgone know about the position, and subsequently he was notified that he was not selected.

Of the approximate 30 naval commands in the area, Gorgone applied for an engineering job with about 20, each of which had a union representing the command's unit employees. The record reflects that, in addition to the one heretofore mentioned, Gorgone applied for four other engineering positions with the Naval Ship Engineering Command which were under Hand's supervision. Only one of these - #B226-71, Mechanical Engineer, Machinery Dept., GS-830-11 or 12 - had a closing date (July 11, 1971) within the nine month limitation of the filing of the complaint herein. The record does not indicate why Gorgone was not chosen for this position or the one for which he was interviewed in 1970. Record facts show Gorgone also applied for the following engineering positions:

- (a) mechanical engineer - Naval Air Station, North Island, S.D., #114-71, GS830-11
- (b) mechanical engineer - Naval Air Rework Facility, Naval Air Station, North Island, S.D. #108-71, GS830-11
- (c) mechanical engineer - Shipbuilding, Conversion, and Repair, 11th Naval District, S.D. #B44-71, GS830-11
- (d) general engineer - Naval Air Rework Facility, Naval Air Station North Island, S.D., #176-71, GS801-12 and #232-71, GS801-11. (2 positions)

Although it appears that Gorgone was priority 1 during the period he applied for the jobs listed above, he was not hired for any of them.

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<sup>18/</sup> Complainant does not contend that the failure to hire Gorgone for this job was discriminatory since it occurred more than nine months before the complaint was filed. It requests the incident be considered as background to support later refusals by this command to hire Gorgone as being discriminatory.

The only other personnel interview Gorgone had was with the Naval Training Center. He was interviewed for a general engineer position GS-11 by the Public Works Officer but no reference was made to the Thurston appraisal. Another applicant, who was the only other contender for the job, received the appointment. No testimony was presented at the hearing herein by any official or representative of any command or facility, other than Respondent; and no direct evidence appears on the record that Gorgone was not hired by these activities because of his union activities with Respondent.

I. Failure or Refusal by Respondent to Rehire Rhodes.

Rhodes had been employed at the Southwest Division, Naval Facilities Engineering Command, as an electrical engineer, GS-12, from January, 1964 through June 27, 1970. He was a registered civil engineer, and at the time of his termination he was working in the Utilities Division, Engineering Branch. His record as an able engineer is clearly demonstrated, having received an award in 1967 for outstanding as to all factors of adaptability, quality and quantity, and generally receiving a rating of outstanding as to two of such factors. There were three other electrical engineers in the Utilities Division: Fred Burnett, Tom Lieb and Nova Dennis. About one month before the consolidation, there was a reduction in force of one electrical engineer. Rhodes bumped Lieb who was eliminated from the job.

Prior to the consolidation, and in anticipation thereof, Rhodes was offered a transfer as an electrical engineer under Harold Bishop in San Bruno. Since Rhodes had accused Bishop of harrassment of an employee at one time, he refused to accept the proffered position. Rhodes attempted to attain a different job with Respondent in San Bruno but was unsuccessful. Between the time of his separation on June 27, 1970 and November, 1970, Rhodes did not seek employment in the San Diego area. He sought non-DOD employment originally, and then on November 13, 1970 he wrote a letter 19/ to Respondent's Director of Personnel, H. Cullen, requesting he be enrolled in the DOD referral system for Oregon, Northern California and Nevada. Attached to this letter was Form S7 filled out by Rhodes - an application for Federal Employment as a GS-11, 12 or 13 engineer (general, civil, supv. civil, electrical, and mechanical) with designated locations of San Diego or San Bruno.20/ This was acknowledged by Cullen by a letter 21/ dated December 15, 1970. Rhodes contends he thus sought employment with Respondent in the San Diego area where he was discriminatorily denied two jobs.

19/ Complainant's Exhibit 18(a).

20/ Complainant's Exhibit 18B.

21/ Complainant's Exhibit 19.

1. Respondent issued a job announcement 22/ dated November 18, 1970 for the position of GS-12, Supervisory Engineer at ROICC, San Diego. Rhodes did not get the position, and he therefore wrote a letter 23/ dated December 22, 1970 to M. J. Baker, comptroller, inquiring whether his name was among those considered and requesting the names of the selection panel members. Rhodes testified he received a reply from Baker, the gist of same being that he did not get the job but it was filled by someone "on board." Edward Hughes, director of construction, testified he was a member of the selection panel which chose the person for this supervisory civil engineer's job; that Rhodes was not on the list of names referred to the panel which was confined to selecting someone from the list given to it. The job was filled by laterally transferring Bob Lieberman who had been working as a GS-12 civil engineer in Respondent's construction division. The record does not reveal the basis for the selection of Lieberman, or the reason why a lateral transfer was made. Neither does it disclose the extent of consideration, if any, which may have been given to Rhodes as a candidate for this position. There is, moreover, no record testimony or direct evidence that Rhodes' union activities were a factor in his failure to obtain this position.

2. On December 24, 1970 Respondent announced 24/ an opening for civil engineer, GS-12 with its ROICC office in San Diego, which vacancy arose as a result of the death of civil engineer Larry Rice. After issuance of this announcement, Hughes noticed that the qualifications recited therein were directed to an electrical engineer. Therefore the job announcement was readvertised 25/ on December 30, 1970 with civil engineer requirements. Rhodes testified he had a thorough knowledge of engineering principles related to electrical equipment - as required of applicants - but did not obtain the position although he applied for it.

Hughes testified that within a week or two after the announcement the workload at 29 Palms location was reviewed. It was decided that the declining workload thereat could not support a civil engineer. Accordingly, management transferred Frances Rigney, a civil engineer at 29 Palms who had applied for the advertised position, to the ROICC office as a GS-12 civil engineer. There has been no civil engineer at 29 Palms since Rigney left. There was a selection panel appointed to select a candidate for this job, and Hughes - although not on the panel - testified he reviewed the panel's recommendations and Rhodes' name was not on the list of applicants referred to the selection board. The record does not indicate why Rhodes was not on the list given to the panel, nor is there

22/ Respondent's Exhibit 4.

23/ Complainant's Exhibit 20.

24/ Complainant's Exhibit 21(a).

25/ Complainant's Exhibit 21(b).

any direct evidence reflecting that he was not considered for the position because of his past union activities.

Concluding Findings

A. Respondent's Appraisal of Gorgone As "Active in the Union" As Violative of Section 19(a)(1) of the Order.

It is provided under Section 19(a)(1) of the Order herein that an agency shall not "interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order." As a predicate for this adjuration Section 1 of the Order states that each employee has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization, and that each employee is to be protected in the exercise of this right.

In determining whether the "Thurston appraisal" of Gorgone violated the Order, it is necessary to ascertain if the remark "active in the union," which was written on the form, infringed upon the exercise of the rights accorded employees in the foregoing Section. It is noted that the appraisal form sent to Respondent's former supervisor of Gorgone by CCPO was not in response to any communication with the naval command. Nor did CCPO make a specific inquiry as to any union activities of this employee. Thus, the remark inserted by Respondent's agent was voluntary in nature and gratuitously offered. It formed no part of Gorgone's qualification as an engineer, and could serve no purpose save to inform a prospective employer that this employee was an activist in the union albeit a competent worker. Thurston's appraisal of Gorgone extended to an area not germane to a consideration of his capabilities.

Within that frame of reference I am not convinced that this comment preserves the freedom to engage in union activities which the Order seeks to assure each employee. It operates as a watchdog over his union activities and holds them up for inspection. It advances an added factor for a prospective employer to consider in determining whether to hire the employee. If the right to engage freely in union activities has any significant meaning, an employee should have the right to expect that such a factor forms no part of his appraisal. Notification to other employers that Gorgone is active in the union, as an unsolicited comment which is unrelated to his work, is an infringement upon that freedom. The "Thurston appraisal," insofar as it included the remark "active in the union" constituted an interference with rights assured employees. Accordingly, I conclude that Respondent violated Section 19(a)(1) of the Order when its supervisor, Joel Thurston, included the remark "active in the union" in his appraisal of employee Joseph Gorgone. <sup>26/</sup>

<sup>26/</sup> Although Section 203.2(b)(3) of the Regulations requires a complaint to be filed within nine months of the unfair labor practice, I do not believe this forecloses a finding that the "Thurston appraisal" was violative of 19(a)(1). Despite the fact that the appraisal was made (Con't.)

B. Respondent's Alleged Discrimination of Gorgone After the Consolidation In Violation of Section 19(a)(2).

Complainant contends that Respondent discriminated against Gorgone in violation of Section 19(a)(2) of the Order by (1) refusing and failing to rehire him after the consolidation for two positions, (2) blacklisting him with other naval commands via the Thurston appraisal so that Gorgone failed to receive positions with these other commands - all as a result of his union activities while employed with Respondent. It was conceded by Complainant's counsel that there is no direct evidence in support of this contention, and counsel stated at the hearing that the supporting evidence is circumstantial in nature.

The record herein scarcely supports discriminatory conduct toward Gorgone on the part of Respondent. In truth, the circumstances belie discrimination by reason of union activities. Thus, despite the fact that Gorgone was an organizer of the union, and its vice president for several years, he was promoted during his tenure of employment from GS-9 to GS-12. Notwithstanding his continuous prosecution of grievances on behalf of employees, as well as his representation of the workers at meetings with management, Gorgone was selected as part of a management level crew in the utilities section. There was no attempt on the part of Respondent to treat Gorgone any differently from others upon the termination of the base at San Diego. He was offered a transfer, as were all others at the base, to San Bruno, but Gorgone refused to accept it since he did not choose to leave the San Diego area. At his own request, Gorgone was permitted to remain for several months beyond the termination date in order to complete some tasks upon which he was working. All of these considerations demonstrate to me that Gorgone was in fact accorded consideration during his employment, and I find no disparate treatment in years past which might serve to evince an anti-union animus toward him.

Nor do I conclude that the "Thurston appraisal" reveals a discriminatory motive in not rehiring Gorgone. While the appraisal interfered with rights assured by the Order, it was made long before the filling of vacancies at ROICC. Further, the recitation by Thurston regarding Gorgone's being active in the union was solely a supervisor's appraisal, and the record does not reflect it was linked in any manner with the failure by Respondent to rehire Gorgone. It may well be that the employer would have preferred a union representative less vocal or persistent in handling grievances. Respondent may have even welcomed Gorgone's spurning the transfer to San Bruno. But neither preference is equatable to a discriminatory refusal to rehire him after the consolidation.

<sup>26/</sup> (Continued) one year before the complaint was filed, it remained on file with CCPO and was accessible until May or June, 1972. The unfair labor practice continued and was therefore in effect within the limitation period of Section 203.2(b)(3). See, in the private sector, Houston Maritime Assn. Inc. 168 NLRB 615; Melville Confections, Inc. 142 NLRB 1334.

It is also noted that both Henry Wheeler and Fred Burnett have been vice presidents of the union, were active in the union representing employees at grievance sessions with management, and yet these individuals are still employed at the San Diego ROICC office of Respondent. Moreover, Ed Wiscowski, former chief steward of the union who dealt with management in attempting to resolve grievances, is still employed. The continued employment of formerly active union officials goes far in dispelling any inference of discrimination toward Gorgone by reason of his being active in the union.

1. Job Announcement on October 23, 1970 For Mechanical Engineer GS-12.

At its ROICC office in San Diego Respondent had never employed mechanical engineers. Most mechanical engineering work was performed by outside contractors. However, in order to maintain staff expertise after the consolidation, it was decided to utilize a mechanical engineer. A job vacancy was announced on October 23, 1970 and Gorgone applied for the position. Later that month, or during November, the director of construction, Hughes, decided the workload did not justify a mechanical engineer at this office and the job announcement was cancelled.

In order to establish discrimination directed toward Gorgone with respect to this job, Complainant would be required to prove the cancellation was based on Gorgone's having applied for the job. One must infer that rather than hire Gorgone, the employer decided not to employ a mechanical engineer - and all because of Gorgone's union activities. The record is devoid of any facts warranting such an inference. No evidence controverts the reasons advanced by Respondent for cancelling the vacancy. While Complainant attempted to show that if a mechanical engineer was required at Bremerton, Washington, one should be needed at San Diego by reason of the work performed there, it is not for others to make a decision in this regard. I conclude, on the basis of the record testimony, that Respondent withdrew the job vacancy for mechanical engineer, GS-12, in October or November, 1970 for business reasons; that such withdrawal was unrelated to any former union activity on Gorgone's part; and that no discriminatory motive existed as to this action under the Order.

2. Respondent's Failure to Rehire Gorgone As General Engineer, GS-11 or 12, Civil Defense Support Branch.

The record does not support a conclusion that Respondent refused to hire Gorgone for the position of General Engineer, GS-11 or 12, Civil Defense Support Section, which was announced in January 21, 1971, for discriminatory reasons. He was considered for the job, along with five others, and all were rated based on factors of skill, experience and personality. This position involved fallout shelter work, and a panel of three employee representatives selected two men to be hired: Joseph F. Dupont and Thomas B. Stone. The former had been an architect and the latter, as a civil engineer, was the officer in charge of construction at the Great Lakes Air Base. Both men scored highest of

all applicants. The record reflects that Gorgone received the lowest score, and this resulted, in part, from his not having worked in ROICC jobs or field construction, and also because his experience was primarily in design work. Again, I do not find it proper to substitute outside judgment for Respondent's in respect to rating applicants for jobs. Moreover, the priority assigned to Gorgone did not entitle him to first consideration, since the position was designated temporary soon after the original announcement, and priority 1 did not apply to temporary positions. While Complainant might urge a conclusion that it was made temporary to escape selecting Gorgone, the evidence does not uphold this view. Contrariwise, the record reveals that it was expected Civil Defense functions would be transferred to the State of California. Thus, a rational basis existed for changing the tenure of the job from permanent to temporary.

Although Stone left shortly after being hired, since he did not pass the shelter course he was taking, Respondent did not fill the job until August, 1972. This was in accord with the instructions not to replace him in view of the expectancy that the state would handle this work. Finally, the employer was advised to fill the job, and a new list was used which did not contain Gorgone's name. The record shows Respondent utilizes new lists when a vacancy is filled each time, and although one might wonder if it were not more efficient to maintain names from former lists, this method adopted by the employer does not per se constitute discrimination. In any event, there were three other individuals, Reichert, Thieleu and Martens who received higher scores than Gorgone, and each would have been entitled to the position before him. The chief of the Civil Defense Section, Manuel, testified that he was aware of Gorgone's unionism, but it played no part in the selection of the two general engineers. There are no factors in the procedure adopted by the employer, or its explanations thereof, in respect to hiring for this position which justifies a contrary inference. The record reflects no discriminatory motive in failing to rehire Gorgone for this position, and I conclude Respondent did not violate Section 19(a)(2) of the Order in this regard.

3. Alleged "Blacklisting" of Gorgone by Respondent With Other Naval Commands.

Complainant insists that the appraisal form, which remarked that Gorgone was active in the union, was tantamount to a blacklisting of Gorgone with other employers. This is an equation which I do not feel is justified herein. The comment regarding Gorgone's union activities, while an infringement as heretofore concluded, does not reach the extent of an admonition or suggestion not to employ him by reason thereof. In the face of the fact that two-thirds of the commands in the area were unionized, the recital could scarcely carry with it the implication that a union adherent should be avoided at all costs. Moreover, when the CCPO called Respondent regarding Gorgone's employability, the personnel office was told he was available and qualified. There was no reference to his union activities, nor any attempt made by Respondent to interfere with his being employed elsewhere.

We are concerned with the intendment of the appraisal, and its reasonable effect upon a prospective employer. Not only is it on its face far from a clear and unmistakable warning not to employ Gorgone, but the appraisal scarcely carries with it this implication. That the latter is a true and valid conclusion is buttressed by the only evidence pertaining to another employer's evaluation of the remark. Thus, the representative of the Naval Ship Engineering Command, Hand, sought to learn from Gorgone the significance of the comment that he was active in the union. To him it was apparently anything but a clear suggestion not to hire Gorgone because of these activities. Moreover, we are not apprised as to the reason why Gorgone did not receive that or any other positions with this command. No representative of any other command testified at the hearing, and there exists no evidence to establish that the appraisal was responsible for the failure by them to hire Gorgone. Accordingly, I conclude the "Thurston appraisal" did not constitute a blacklisting of Gorgone by Respondent with other naval commands.

C. Respondent's Alleged Discrimination of Rhodes After the Consolidation In Violation of Section 19(a)(2).

It is Complainant's position that Rhodes was likewise discriminatorily denied two positions by Respondent after the transfer of operations to San Bruno. Record facts do not support a finding that the employer herein, in failing to rehire Rhodes, was motivated by his past union activities.

This employee acted as president of the union for approximately four years. During this time he received excellent ratings, including an outstanding award. Despite comments to Rhodes by supervisors regarding the union and his activities on behalf of other fellow workers, no adverse action was ever taken against Rhodes, nor did management preclude him from presenting grievances or acting as a union representative. Notwithstanding the fact that Rhodes wrote Secretary Laird a letter in 1969 accusing the personnel officer and the comptroller of corruption, there is no evidence of any retaliatory action by Respondent. Thus, just prior to the consolidation, Rhodes exercised his seniority rights and bumped a junior employee during a reduction in force. He was also offered a transfer to San Bruno, and though he preferred not to accept because of his former difficulties with Harold Bishop - under whom he believed he would work - the fact remains that the employer treated him similarly to others. No facts warrant a conclusion that a transfer to work under Bishop's supervision was to harass Rhodes or to induce him to reject the move. While Rhodes contends there were other spots which he could have filled at San Bruno, and which he sought, management's decision in this regard cannot by itself connote discrimination. The underlying reasons for the selection of the particular section to which Rhodes was assigned in the proposed transfer do not appear, and I cannot draw an unfavorable inference from the fact that Rhodes was offered a transfer which might result in his being supervised by Bishop.

As heretofore noted, other workers at the base who are still employed, or who also refused a transfer, occupied positions as officers and officials

of the union since 1966, and the record is barren of any discrimination practiced toward them. This is true albeit these employees were actively engaged in union affairs, presenting grievances on behalf of other workers and negotiating with management on their behalf. While Respondent may not have welcomed Rhodes' zeal as union president, the circumstances herein do not support a conclusion that he was denied employment because of his part in union activities.

1. Job Announcements of Supervisory Engineer, ROICC, San Diego, GS-12, and Civil Engineer, ROICC, San Diego, GS-12.

These jobs were announced in November and December, 1970 respectively, and it is contended that Respondent discriminatorily refused to hire Rhodes for both positions. In the case of the supervisory engineer position, the employer laterally transferred Bob Lieberman to the job. The Civil Engineer's position was filled by transferring Frances Rigney from the 29 Palms location after it was decided a Civil Engineer was not required thereat. Record facts show that in both instances Rhodes' name did not appear on the list of candidates submitted to the panel.

One might well express surprise at Respondent not utilizing Rhodes for either of these two vacancies at ROICC in San Diego, particularly since this individual was very competent. Wonderment could even grow into suspicion of management's reasons for failing to rehire Rhodes. But suspicions cannot serve in lieu of facts, and it will not suffice to speculate on the motivating factors behind the decisions to employ Lieberman and Rigney for these positions. In respect to the Civil Engineer's position, the record supports an inference that the employer concluded a civil engineer was no longer needed at 29 Palms, and thus transferred Rigney from that location to ROICC, San Diego. In either situation, one is compelled, in the absence of factors evincing a discriminatory motive, to accept management's judgment in filling these jobs. Moreover, the record does not disclose that the unionism of Rhodes was responsible for his not being on the list submitted to the panel. Neither does it reflect whether consideration was given to Rhodes and the action taken in regard thereto.

Accordingly, I conclude that no evidence supports a finding that Respondent refused and failed to rehire Rhodes for the positions at ROICC, San Diego, of Supervisory Engineer, GS-12 and Civil Engineer, GS-12 because of his past union activities, and I find no discrimination exists under Section 19(a)(2) by reason thereof.

Recommendations

In view of my findings and conclusions heretofore stated, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

1. That those portions in the complaint alleging violations by Respondent of Sections 19(a)(2) and (4) of Executive Order 11491 be dismissed.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees by inserting any remarks or comments in any appraisal form or reference letter regarding the union activities of any of our employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured by Section 19(a) of Executive Order 11491, as amended.

2. That Respondent be found to have engaged in conduct proscribed by Section 19(a)(1) of Executive Order 11491 by virtue of its supervisor having inserting the remark "active in the union" in an appraisal form of one of its employees, and that, accordingly, the following Order, which is designed to effectuate the policies of Executive Order 11491, be adopted.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Western Division of Naval Facilities Engineering Command, San Bruno, California shall:

1. Cease and desist from:

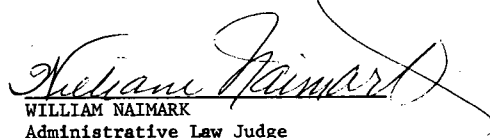
(a) Interfering with, restraining or coercing employees by inserting any remarks or comments in any appraisal form or reference letter regarding the union activities of any of its employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of said Order.

(a) Post at its facility at the Naval Engineering Command, San Bruno, California, and at its ROICC headquarters in San Diego, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated at Washington, D. C.  
February 26, 1973

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(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature and 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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is 9061 Federal Office Building, 450 Golden Gate Ave., San Francisco, California 94102.

May 31, 1973

A/SLMR No. 265

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION  
REGION 5, CHICAGO, ILLINOIS  
A/SLMR No. 265

This case involved a representation petition filed by Local 234, American Federation of Government Employees, AFL-CIO, (AFGE) seeking an election in a unit of all employees of the Public Buildings Service (PBS), General Services Administration (GSA), located in the State of Minnesota. The PBS is one of the five program services of the GSA. Region 5 of the GSA is headquartered in Chicago, Illinois and encompasses six states. The Activity takes the position that the petitioned for unit is inappropriate because, among other things, it will induce fragmentation, and will not promote effective dealings and efficiency of agency operations.

The Assistant Secretary concluded that, under all circumstances, the employees in the petitioned for unit possess a clear and identifiable community of interest. In reaching this determination, the Assistant Secretary noted that the claimed unit includes all employees under the Minnesota Area Office of PBS in Region 5; that they perform the same job functions; that they are subject to the same personnel practices and procedures; and that they are subject to the direction and guidance of the PBS Area Manager in Minnesota. The Assistant Secretary noted also that the claimed unit would be consistent with the established bargaining history of Region 5 of the GSA and that there was no evidence that such a unit would not promote effective dealings and efficiency of agency operations. Accordingly, and as no labor organization was seeking to represent the claimed employees in a more comprehensive unit, the Assistant Secretary found the petitioned for unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended, and he ordered an election in the appropriate unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION  
REGION 5, CHICAGO, ILLINOIS

Activity

and

Case No. 51-2245(RO)

LOCAL 234, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer June Cedarleaf. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the parties' briefs, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Local 234, American Federation of Government Employees, AFL-CIO, herein called the AFGE, seeks an election in a unit of all Wage Grade and General Schedule employees employed by the Public Buildings Service, General Services Administration, in the State of Minnesota, excluding supervisors, professionals, guards, management officials and employees engaged in Federal personnel work except in a purely clerical capacity. <sup>1/</sup>

The Activity takes the position that the proposed unit is inappropriate because (1) it will not promote effective dealings and efficiency of agency operations; (2) establishing such a unit will induce fragmentation and would be inconsistent with prudent management

<sup>1/</sup> The unit description appears essentially as amended at the hearing. The AFGE indicated at the hearing that its petition herein was intended to include the employees of a Public Buildings Service operation located in Superior, Wisconsin, because these employees work under the supervision of the Duluth, Minnesota field office of the Public Buildings Service.



policies; and (3) the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees of Region 5 of the General Services Administration.

The mission of General Services Administration, hereinafter called GSA, is to provide the various services required by agencies of the Federal government. To accomplish this mission, GSA, which is headquartered in Washington, D.C., has ten regional offices, each headed by a Regional Administrator. Under each Regional Administrator are five Regional Commissioners who head the various program services for their region. One of these program services is the Public Buildings Service, herein called PBS, which is concerned primarily with providing care and maintenance for Federal buildings and with providing non-government office space where government space is unavailable.<sup>2/</sup>

Region 5 of the GSA is headquartered in Chicago, Illinois, and encompasses the states of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin and employs overall some 2800 to 3000 employees.<sup>3/</sup> Organizationally, the PBS in Region 5 is composed of 6 area offices and 27 field offices reporting to the PBS Regional Commissioner. The claimed unit of some 112 employees, includes all the PBS employees in the Minneapolis area office and its subordinate field offices in Minneapolis, St. Paul and Duluth.

The Minneapolis area office of the PBS is headed by an Area Manager who is responsible for administering and coordinating the PBS program in the Minnesota geographic area. The record reveals that the Area Manager makes biannual inspections of the PBS field offices in his area to assure that they are conforming to the guidelines set by the National and Regional Offices of GSA, and that, in turn, his office is inspected annually by the PBS Regional Commissioner. The Area Manager serves as the supervisor of his immediate office staff and for the Building Managers who are in charge of the three PBS field offices in Minnesota. Further, he is responsible for coordinating, compiling, reviewing and approving reports of the subordinate offices.<sup>4/</sup>

All requests for personnel actions affecting the petitioned for employees must go through the Area Manager, although the final authority

<sup>2/</sup> The other four program services of GSA are the Automated Data and Communication Service, the Federal Supply Service, the Property Management and Disposal Service, and the National Archives and Records Service.

<sup>3/</sup> Of the 2800 to 3000 employees of GSA in Region 5, some 2000 presently are included in approximately 30 existing exclusively recognized units.

<sup>4/</sup> The Building Managers also receive certain technical supervision from the chiefs of the various divisions under the PBS Regional Commissioner located at Region 5 headquarters.

in personnel matters for these employees, as well as for the other PBS and GSA employees in Region 5, is the Regional Administrator. The record reflects that with respect to performance appraisals other than satisfactory, promotion evaluations, and incentive awards, GSA regulations require two levels of concurrence, including the initiating level, before an ultimate decision is made by the Regional Commissioner of the particular program service. Thus, as to the PBS employees in the petitioned for unit, the Area Manager or the Building Managers would be one level of concurrence. Similarly, with respect to disciplinary matters such as formal reprimands and letters of warning, the record reveals that while the Regional Commissioner renders the final decision, the Area Manager or the Building Manager's concurrence would be necessary.

Under all of the circumstances, I find that the employees in the petitioned for unit possess a clear and identifiable community of interest. Thus, the evidence establishes that the claimed unit includes all the employees under the Minnesota Area Office of PBS in Region 5; that the employees perform the same job functions; that all the employees in the claimed unit are subject to the same personnel practices and procedures; and that all the employees in the claimed unit are subject to the direction and guidance of the PBS Area Manager in Minnesota. Moreover, such a unit would be consistent with the established bargaining history of Region 5. Thus, as noted above, the record reflects that there are currently a number of exclusively recognized units in Region 5. Moreover, there are negotiated agreements covering most of these units.<sup>5/</sup> In these circumstances, and noting the absence of any specific countervailing evidence that the proposed unit would not promote effective dealings and efficiency of agency operations, I reject the Activity's contention that establishing such a unit will induce fragmentation and be inconsistent with prudent management policies.<sup>6/</sup> Accordingly, and as no other labor organization is seeking to represent the claimed employees in a more comprehensive unit, I find that the petitioned for unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. I, therefore, shall direct an election in the following unit:

All Wage Board and General Schedule employees of the Public Buildings Service, General Services Administration, employed in the State of Minnesota,

<sup>5/</sup> The U.S. Civil Service Commission's Publication, Union Recognition in the Federal Service, 1971, reflects that the great majority of the some 30 recognized units in GSA Region 5, are covered by negotiated agreements.

<sup>6/</sup> The Federal Labor Relations Council has ruled that evidence on whether a requested unit will promote effective dealings and efficiency of agency operations is within the special knowledge of and must be submitted by the agency involved. See Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC 71A-9.

including employees of the Superior, Wisconsin office of the Public Buildings Service, General Services Administration; excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

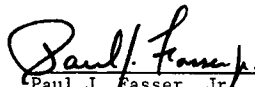
May 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY PURSUANT TO  
SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 234, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.  
May 31, 1973

  
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Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF HEALTH,  
EDUCATION AND WELFARE, REGIONAL  
OFFICE VI  
A/SLMR No.266

The Petitioner, National Federation of Federal Employees, Independent, Local 266 (NFFE), sought an election in a unit of the professional and nonprofessional General Schedule employees in the Activity's headquarters located in Dallas, Texas. The parties were in agreement on the appropriateness of the claimed unit and the eligibility of employees. They also would exclude from the unit certain job classifications on the basis that the incumbent employees were either management officials, confidential employees, or supervisors. The Regional Administrator issued a Notice of Hearing because, in his view, certain of the excluded classifications raised policy questions under the Order.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In reaching this determination, he noted that the employees in the claimed headquarters unit shared a common mission and facilities and were covered by the same personnel and labor-relations policies. Moreover, the record revealed that there were similar job classifications in each of the agencies within the headquarters and that there had been transfers of employees among the various components of the headquarters facility.

In these circumstances, the Assistant Secretary concluded that the employees sought by the NFFE possessed a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, he directed an election in the unit found appropriate.

The Assistant Secretary also made eligibility determinations with regard to the job classifications which were considered to have raised policy questions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF HEALTH,  
EDUCATION AND WELFARE, REGIONAL  
OFFICE VI 1/

Activity

and

Case No. 63-3933(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, INDEPENDENT, LOCAL 266

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer William J. Autry. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Federation of Federal Employees, Independent, Local 266, herein called NFFE, seeks an election in a unit of all professional 2/ and nonprofessional General Schedule employees of

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1/ The name of the Activity appears as corrected at the hearing.

2/ While the petitioned for unit includes professional employees, the record does not set forth sufficient facts with respect to their duties, training, educational background, etc., so as to provide a basis for a finding of fact that employees in particular classifications are professionals. Accordingly, I shall make no findings as to which employee classifications herein constitute professional employees within the meaning of the Order.

Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, members of the Commissioned Officer Corps of Region VI, Health Services and Mental Health Administration (Public Health Services), temporary employees whose appointments do not exceed 90 days, all employees of Region VI Social Security Administration District and Branch Offices, and supervisors and guards as defined by Executive Order 11491, as amended. 3/

The record indicates that the Activity and the NFFE are in agreement as to the appropriateness of the claimed unit. The Activity contends, and the NFFE agrees, that 14 classifications, discussed below, are ineligible for inclusion in the unit sought because the employees in such classifications are either management officials, confidential employees, or supervisors. 4/

The Unit

The primary mission of the Department of Health, Education and Welfare (HEW) is to provide service to the public in the fields of health, education and social security. To carry out this mission, the HEW is organized into the following six operating components: the Office of Education; the Social Rehabilitation Service; the Social Security Administration; the Food and Drug Administration; the National Institutes of Health; and the Health Services and Mental Health Administration. Much of the day-to-day operations of the HEW are carried out in its ten regions throughout the country. The Activity in the instant case is the headquarters of Region VI, located in Dallas, Texas. 5/ The record establishes that a Regional Director represents the Secretary of HEW in the Region. In this capacity, he provides leadership and coordination in the various Department programs, exercising general supervision over Regional activities. In addition, the Regional Director through liaison, monthly conferences, and other means, coordinates and integrates the activities

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3/ The unit appears as amended at the hearing.

4/ Although there was no disagreement between the parties in this regard, the Regional Administrator issued a Notice of Hearing because in his view certain of the excluded classifications raised policy questions under the Order.

5/ Region VI encompasses the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

of the five operating components within the Regional Office which receive technical direction from their separate headquarters' offices. 6/

According to the record, the Region's central personnel office has the responsibility for servicing all HEW components within the Region. Further, the Regional Director's office has the responsibility for handling all mail, procurement, duplicating activities, safety programs, negotiation of contracts for various services, and all accounting functions. The record discloses also that there have been transfers by employees between components within the headquarters; that similar job classifications are found in each of the agencies within the headquarters; that common facilities (such as parking and eating) and the same social organizations and credit unions are shared by all of the headquarters' employees; and that recruitment, promotions, and reductions-in-force occur on a Region-wide basis.

Based on the foregoing, and noting particularly the agreement of the parties with respect to the appropriateness of the claimed unit, I find that there is a clear and identifiable community of interest among the headquarters' employees in Regional Office VI, and that such a unit will promote effective dealings and efficiency of agency operations. Thus, the record reveals that the employees in the claimed unit share a common mission and facilities and are covered by the same personnel and labor-relations policies. Moreover, there are similar job classifications in each of the agencies within the headquarters and there have been transfers of employees among the various components of the Regional headquarters. Under all of these circumstances, I find that the claimed employees constitute a unit appropriate for the purpose of exclusive recognition under the Order. 7/

#### Eligibility Issues

As stated above, the Activity contends, and the NFFE agrees, that 14 employee classifications should be excluded from the unit sought by the latter for the reasons that they are management officials and/or supervisors, confidential employees and/or employees engaged in Federal personnel work in other than a purely clerical capacity. The em-

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6/ These components include all of the 6 operating components mentioned above except the National Institutes of Health.

7/ In the unit proposed, the NFFE sought to exclude specifically "Social Security Administration District and Branch Offices." Inasmuch as the unit found appropriate, in effect, excludes all district and branch offices of all the operating agencies of Region VI, I shall not exclude specifically any branch or district office of a particular agency within Region VI.

employees in the disputed classifications are employed in the Social Security Administration (SSA) for Region VI headquarters. The record reveals that the following four bureaus are within the SSA: District Office Operations; Disability Insurance; Health Insurance; and Hearings and Appeals. Each bureau in the Region is headed by a Regional Representative.

#### Jose J. Trevino, Richard B. Corley, and Floyd H. Jamison

The Activity contends that the following employees should be excluded from any unit found appropriate on the basis that they are management officials and/or supervisors: Jose J. Trevino and Richard B. Corley, Administrative Officers (GS-341-12), Management Section, Bureau of District Office Operations; and Floyd H. Jamison, Social Insurance Administrator (GS-105-12), Operations Section, Bureau of District Office Operations. The evidence establishes that these employees have authority to hire, discharge, reward or discipline their respective secretaries. Further, they have authority to grant them leave or evaluate their performance. There is no evidence that the exercise of the foregoing authority is of a merely routine or clerical nature or does not require the use of independent judgment.

Under these circumstances, and noting the agreement of the parties in this regard, I find that Trevino, Corley and Jamison are supervisors within the meaning of Order and should be excluded from the unit found appropriate. 8/

#### Ruth Kronke

Ruth Kronke is classified as Senior Staff Assistant (GS-341-12), employed in the Management Section, Bureau of District Operations. The Activity contends that she should be excluded from any unit found appropriate on the basis that she is a management official and/or a supervisor. The record reveals that her duties are involved solely with the training needs of employees within Region VI. In this connection, she has a responsibility to identify training needs through the Regional Training Development Committee and to administer the career development program as established for employees under the Government Employees Training Act. The practices and procedures regarding the administration of the training program within the SSA have been established by its central office in Baltimore, Maryland, as well as by the Civil Service Commission and the SSA Regional Representative. Kronke makes recommendations to the

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8/ In view of the foregoing, it was considered unnecessary to decide whether Trevino, Corley and Jamison should be excluded from the unit on the basis that they are management officials.

Regional Representative with regard to priorities in the use of training funds, and suggests to district managers employees who are eligible for, and would benefit from, participation in the SSA training program. The record reveals that her recommendations in this regard usually are followed.

Based on the foregoing evidence, I find that Kronke's involvement in the administration of the Activity's employee training and career development program warrants the conclusion that she is engaged in non-clerical Federal personnel work for the Activity. <sup>9/</sup> Inasmuch as Section 10(b)(2) of the Order specifically excludes from bargaining units employees engaged in Federal personnel work in other than a purely clerical capacity, I find that Kronke should be excluded from the unit found appropriate. <sup>10/</sup>

Rudolph Wilkinson

Rudolph Wilkinson has been detailed temporarily to the Operations Section of the Bureau of District Office Operations to undergo training before assuming his position of Administrative Officer (GS-341-12) in the Bureau of District Operations, Management Section. The Activity contends that he should be excluded from any unit found appropriate on the basis that he is a management official and/or a supervisor. As of the date of hearing in the instant case, Wilkinson had been employed in the Operations Section for approximately 3 months and had spent approximately half of his time as Regional Suggestion Coordinator. In this connection, he evaluates employee suggestions and submits them to higher management for final judgment. He acts also as Health Insurance Coordinator in the Regional Office, receiving and answering requests for advice or clarification from the district offices of SSA regarding problems concerning Medicare. Wilkinson testified that in his capacity as Health Insurance Coordinator he is a resource employee and also is training to become the resource employee with regard to the Evaluation Measurement System.

Based on the foregoing, I find that the evidence does not support the Activity's contention that Wilkinson is acting as a management official. Rather, the record indicates that he is merely in a training

<sup>9/</sup> Cf. Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230.

<sup>10/</sup> Under these circumstances, it was considered unnecessary to decide whether Kronke should be excluded from the unit on the basis that she is a management official and/or a supervisor.

capacity for a future job and the evidence does not establish that he is performing or will be performing functions which would be viewed as those of a management official within the meaning of the Order. <sup>11/</sup> However, inasmuch as evidence was insufficient to establish whether Wilkinson exercises authority which would render him a supervisor within the meaning of Section 2(c) of the Order, I shall make no finding as to his supervisory status.

Mary L. Stewart

Mary L. Stewart is classified as a Social Insurance Specialist (GS-105-13) and acts as electronic data processing and procedures coordinator in the Operations Section of the Bureau of District Office Operations. The Activity contends that she should be excluded from any unit found appropriate on the basis that she is a management official and/or a supervisor. The record reveals that in performing her functions, Stewart is involved in implementing established procedures, recommending new procedures, and coordinating and appraising district office operations as they relate to the electronic data processing of social insurance claims. Generally, she accompanies the Assistant Regional Representative on regular field visits for the purpose of reviewing field office operations. The record reveals that, on occasion, she visits the field independently and, upon her return, makes recommendations to the Assistant Regional Representative who has the final authority in this regard. Further, she communicates frequently with SSA central office concerning methods for the improvement of field procedures, and recommends methods for bringing about such improvement. She serves also as the Regional Office resource person on both the Electronic Data Processing and Equal Employment Opportunity Regional Committees.

Based on the foregoing, I find that the evidence demonstrates that Stewart's job functions reflect that she is essentially an expert render-

<sup>11/</sup> See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135 in which a management official was defined as an employee "...having authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or programs. In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be."

ing resource information or recommendations with respect to established policy as distinguished from an employee who participates in the ultimate determination as to what a policy will be. Accordingly, I find that Stewart is not a management official within the meaning of the Order. Moreover, as the record reveals that Stewart has no subordinate employees, I find that she is not a supervisor within the meaning of the Order. In these circumstances, I find that Stewart should be included in the unit found appropriate.

Donna W. Sanders

Donna W. Sanders is classified as a Health Insurance Program Specialist (GS-105-9), employed in the Regional Representative's Office. The Activity contends that she should be excluded from any unit found appropriate because she is a confidential employee and/or an employee engaged in Federal personnel work in other than a purely clerical capacity. The record reveals that essentially she is an administrative assistant to both the Administrative Officer and the Regional Representative. <sup>12/</sup> In this connection, she has access to the majority of personnel matters which are handled by the Administrative Officer and the Regional Representative. The evidence establishes that Sanders has been delegated authority to interview and hire summer aides. Also, she interviews other job applicants and, occasionally, does the initial screening for the Administrative Officer who is the selecting officer. After selection for employment, Sanders processes all personnel matters for successful applicants.

Based on the foregoing job functions, I find that Sanders is engaged in non-clerical Federal personnel work for the Activity. Inasmuch as Section 10 (b)(2) of the Order specifically excludes such employees from bargaining units, I find that she should be excluded from the unit found appropriate on the basis that she is engaged in Federal personnel work in other than a purely clerical capacity. <sup>13/</sup>

Ola H. Grafton

Ola H. Grafton is classified as an Administrative Aide (GS-301-5) in the Administrative Branch of the Bureau of Health Insurance. The Activity contends that she is a confidential employee and, as such, should be excluded from any unit found appropriate. The record estab-

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<sup>12/</sup> The Administrative Officer is her immediate supervisor.

<sup>13/</sup> Under these circumstances, it was considered unnecessary to decide whether Sanders should be excluded from the unit on the basis that she is a confidential employee.

lishes that Grafton is responsible for administrative and clerical duties in the office of the Administrative Officer who is her immediate supervisor. She receives visitors, handles telephone calls, and has access to the incoming mail of the Administrative Officer who handles most of the personnel matters within the Bureau of Health Insurance. Grafton testified that while no labor relations matters have arisen in her office, if her immediate supervisor were to be engaged in labor relations matters, she believes that she would be aware of the extent of his involvement in such matters.

Under the circumstances, I find that Grafton is not a confidential employee within the meaning of the Order and should be included in the unit found appropriate. In Virginia National Guard, Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69, confidential employees were determined to be those who act in a confidential capacity with respect to persons who formulate and effectuate management policies in the field of labor relations. In this connection, it was noted that employees who merely have access to personnel or statistical information would not be deemed to be confidential employees. The record testimony herein reveals that Grafton merely has access to certain personnel information. In these circumstances and noting the highly speculative nature of her possible future involvement in labor relations matters, I find that Grafton does not meet the test of a confidential employee set forth above.

Beverly A. Bedwell and Edward Lessard

Beverly A. Bedwell and Edward Lessard are employed as specialists in the District Offices and Professional Groups Branch, Bureau of Health Insurance. Bedwell is classified as Staff Officer (GS-105-13) and Lessard is classified as Staff Assistant (GS-105-12). The Activity contends that these employees are management officials and/or supervisors and, as such, should be excluded from any unit found appropriate. The record indicates that their work involves the administration of health insurance programs in the district offices in Region VI, which include, (1) the administration of the "buy-in" program, which involves the negotiation of contracts between the Bureau of Health Insurance and four of the five states covered by the Region VI, under which the states pay part of the premiums on behalf of Medicare; (2) the determination of health insurance training needs in the district offices; (3) assuring that the private insurance companies (carriers) involved in processing Medicare claims carry out the established national and regional policies; (4) the coordination of the procedures the carriers and the district offices must adhere to; and (5) responsibility for liaison functions with the professional health organizations in the Region, such as medical and hospital associations.

The record reveals that the duties of these two employees are similar. In carrying out their above functions they coordinate the administration

of various bureau programs and provide technical guidance to field offices. Further, they are engaged in making comprehensive reviews of the field offices and in preparing evaluation reports of the offices' operations. The record indicates that these employees' functions are performed in conformity with Departmental policies as well as with instructions of the SSA central office and regional guidelines.

Under these circumstances, I find that the responsibilities of Beverly A. Bedwell and Edward Lessard do not extend beyond the role of resource persons to the point of active participation in deciding policy. Accordingly, in my view, these employees are not management officials within the meaning of the Order. With regard to the Activity's claim that Bedwell and Lessard are supervisors, the record establishes that currently these individuals do not have any subordinate employees. Accordingly, I find that Bedwell and Lessard are neither supervisors nor management officials and, therefore, they should be included in the unit found appropriate.

Theodore F. Moellering

Theodore F. Moellering is classified as a Program Evaluation Analyst (GS-105-13) employed in the Regional Commissioner's office. The Activity asserts that this employee is a management official and/or a supervisor and should be excluded from any unit found appropriate.

The record reveals that Moellering conducts special studies designed to evaluate the effectiveness within the Region of the entire SSA program, including the effectiveness of and compliance with established SSA policies and procedures. In this connection, he analyzes operational data and evaluates the effectiveness of the particular process or function involved, including the adequacy of procedures and work methods for meeting operational needs, quality objectives and administrative goals. The results of such studies are incorporated into formal reports and include recommendations which are submitted to the Regional Commissioner and, subsequently, to the central office in Baltimore, Maryland. The evidence establishes that certain of these recommendations ultimately have been adopted as a national SSA policy. Also, Moellering visits field offices and sits in on comprehensive reviews in order to evaluate the review program itself. Additionally, he visits field offices monthly to keep field personnel informed of the role of the Regional Commissioner and to elicit their suggestions as to the operations of their offices. The record reveals in this regard that his recommendations to the Regional Commissioner, on occasion, have become Regional operating policy. Moellering acts as liaison between the Regional Commissioner and the various state Health Insurance Administrators with regard to the social security coverage of state and local government employees. In addition, he acts in a liaison capacity with private insurance carriers.

Based on the foregoing, I find that Moellering is a management official within the meaning of the Order, and should be excluded from the

unit found appropriate. 14/ Thus, in my view, the foregoing evidence establishes that he has the authority to influence, and has in fact influenced, the making of policy necessary to the agency or activity with respect to personnel, procedures, or programs.

Norman E. Hall

Norman E. Hall is employed in the Regional Commissioner's office and is classified as Training Officer (GS-105-13). The Activity contends that Hall is a management official and/or a supervisor and, as such, should be excluded from the unit found appropriate. The record establishes that he coordinates training and career development programs in the Region between the SSA's central office and the Regional Director's office, making certain that the SSA training program is implemented effectively according to central office guidelines. He has the authority to contract for training services on behalf of the Regional Commissioner, and also to sign Government Employee Training Act requests. The evidence establishes that his recommendations to the bureaus on training and staff development matters usually are followed. Further, he identifies deficiencies in the implementation of training programs. The record reveals also that his recommendations concerning the Region's Upward Mobility Program have been approved by the Regional Commissioner.

Based on the foregoing, and noting Hall's participation in the planning, coordinating, and implementing of the SSA's Region-wide training and career development programs, I find that he is engaged in non-clerical Federal personnel work for the Activity. Inasmuch as Section 10(b)(2) of the Order specifically excludes employees engaged in Federal personnel work in other than a purely clerical capacity from bargaining units, I find that Hall should be excluded from the unit found appropriate. 15/

Bart J. Henseler

Bart J. Henseler is employed as Public Affairs Officer (GS-301-13) in the office of the Regional Commissioner. The Activity contends that he is a management official and/or a supervisor and should be excluded from any unit found appropriate. The record establishes that he oversees all public affairs activities in the Region and evaluates their effectiveness. In this connection, he makes recommendations to the

14/ Under these circumstances, it was considered unnecessary to decide whether Moellering should be excluded from the unit on the basis that he is a supervisor.

15/ Under these circumstances, it was considered unnecessary to decide whether Hall should be excluded from the unit on the basis that he is a management official and/or a supervisor.

Regional Commissioner to assure public understanding of SSA programs and policies. Further, he acts as chairman of the Regional Public Affairs Council which is composed of the Regional Representatives of the SSA bureaus. 16/ Henseler issues press releases on behalf of the Regional Commissioner and has the responsibility for informing the news media of inaccuracies in news stories concerning SSA. He visits the field offices to evaluate the effectiveness of their respective public affairs programs, and the evidence establishes that his recommendations for improvement usually are followed. In this connection, he has frequent daily contact with the Regional Commissioner.

Based on the foregoing, I find that Henseler is a management official within the meaning of the Order, and should be excluded from the unit found appropriate. 17/ Thus, in my view, the foregoing evidence establishes that he participates actively in the ultimate determination of public affairs policy and, in essence, determines such policy as it applies within the Region, with some assistance from higher level directives. In this connection, he works closely with the Regional Commissioner who usually approves his policy recommendations. 18/

William E. Williams

William E. Williams is classified as an Administrative Assistant (GS-314-12), and is employed in the Regional Commissioner's Office. The Activity contends that he is a management official and/or a supervisor and, as such, should be excluded from any unit found appropriate. The evidence establishes that he participates in reviews of program administration by the bureaus, particularly with regard to the Equal Employment Opportunity program. In this regard, his responsibility includes the assignment of an Equal Employment Opportunity counselor upon the request of an employee who has filed an informal complaint. If the complaint is not settled informally at this level, the employee may file a formal complaint which is forwarded to Williams who, on behalf of the Deputy Equal Employment Opportunity Officer, assigns an investigator who subsequently makes a report and recommendations to the

16/ The Council's function is to deal with public relations and communication problems that may arise with the public or the news media, or with the various components of the organization.

17/ Under these circumstances, it was considered unnecessary to decide whether Henseler should be excluded from the unit on the basis that he is a supervisor.

18/ Cf. 926th Tactical Airlift Group, U.S. Air Force Reserve, Naval Air Station, Belle Chasse, Louisiana, A/SLMR No. 221.

central office of SSA where a decision is made concerning the complaint. If the employee is dissatisfied with the decision, a hearing may be requested and it is Williams' responsibility to arrange for a hearing examiner, a court reporter, and for securing suitable space. In addition, he reports monthly to SSA central office on all Equal Employment Opportunity complaints. Also, if he decides that additional counselors or investigators are needed, after consultation with the Regional Commissioner, he advises the bureaus to make such additions to the staff. Williams' other responsibilities include acting as newsletter editor, membership in the Regional Commissioner's awards committee, and the preparation of the annual organizational chart.

From the foregoing evidence, it is clear that in performing his functions, including those involving the Equal Employment Opportunity program, Williams does not participate in the formulation or determination of what policy shall be. Rather, the record reveals that his various functions are those of an employee rendering resource information or recommendations with respect to existing policy. 19/ Under these circumstances, I find that Williams is not a management official within the meaning of the Order. Further, as the record reveals that Williams has no subordinate employees, I find that he is not a supervisor within the meaning of the Order. Accordingly, Williams should be included in the unit found appropriate.

Based on all of foregoing circumstances, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional General Schedule employees of Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity,

19/ Cf. Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111.



management officials, and supervisors and guards as defined in the Order. 20/

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professional, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting Group (a): All professional employees of Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding, nonprofessional employees, members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

20/ As noted above, the petition herein excludes members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services). As the Assistant Secretary stated in Department of Health, Education and Welfare (HEW), Health Services and Mental Health Administration (HSMHA), Maternal and Child Health Services, A/SLMR No. 192, these individuals do not constitute civilian employees within the meaning of Title 5 of the United States Code. Accordingly, I find that members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services) should be excluded from the unit found appropriate.

Also as noted above, the petition herein excludes "temporary employees whose appointments do not exceed 90 days." The record does not establish whether any such employees presently are employed by the Activity. Moreover, there is insufficient evidence to determine whether such employees, while hired only for a specific period, have a reasonable expectation of future employment beyond that period. In these circumstances, no finding is made as to the eligibility of this category of employees. Further, no finding is made with respect to the attempted exclusion of "confidential employees" as there is no evidence that any such employees presently are employed by the Activity.

-13-

Voting Group (b): All General Schedule employees of Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding professional employees, members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Federation of Federal Employees, Independent, Local 266.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Independent, Local 266. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the National Federation of Federal Employees, Independent, Local 266, was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional General Schedule employees of Regional Office VI, Department of Health, Education and Welfare employed in Dallas, Texas, excluding members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

-14-

May 31, 1973

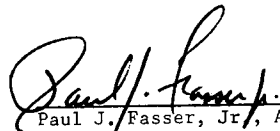
2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

- (a) All General Schedule employees of Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding professional employees, members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.
- (b) All professional employees of Regional Office VI, Department of Health, Education and Welfare, employed in Dallas, Texas, excluding nonprofessional employees, members of the Commissioned Officers Corps of Regional Office VI, Health Services and Mental Health Administration (Public Health Services), employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Independent, Local 266.

Dated, Washington, D.C.  
May 31, 1973

  
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Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
U. S. PUBLIC HEALTH SERVICE HOSPITAL,  
BOSTON-BRIGHTON, MASSACHUSETTS  
A/SLMR No. 267

The Petitioner, National Association of Government Employees (NAGE), sought an election in a unit of all nonsupervisory professional registered nurses employed by the Public Health Service Hospital, Boston-Brighton, Massachusetts. The Activity contended that the proposed unit was inappropriate because all employees of the Activity, including those in the claimed unit, share a clear and identifiable community of interest and that recognition of an additional unit at the Activity would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the unit sought by the NAGE was appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that the registered nurses meet specific educational, training and licensing requirements, share the same working conditions, have the same personnel policies, do not interchange with other categories of employees, and perform duties distinguishable from those of other employees of the Activity. Also, he rejected the Activity's contention that the unit petitioned for would not promote effective dealings and efficiency of agency operations. Under these circumstances, and noting that Section 10(b) permits the establishment of a unit on a functional basis, the Assistant Secretary directed an election in the claimed unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
U. S. PUBLIC HEALTH SERVICE HOSPITAL,  
BOSTON-BRIGHTON, MASSACHUSETTS 1/

Activity

and

Case No. 31-6107(RO)

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer James E. Cannon. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, National Association of Government Employees, hereinafter called NAGE, seeks an election in a unit composed of all part-time and full-time professional registered nurses employed by the Department of Health, Education and Welfare, U. S. Public Health Service Hospital, Boston-Brighton, Massachusetts, excluding management officials, supervisors, other professionals, Wage Board employees, General Schedule employees, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and all employees of the U. S. Public Health Service outpatient clinic at Portland, Maine. 3/

- 1/ The name of the Activity appears as amended at the hearing.
- 2/ The name of the Petitioner appears as amended at the hearing.
- 3/ The proposed unit appears as amended at the hearing. The Activity and the NAGE agree that the employees in the claimed unit are professional employees within the meaning of the Order.

The Activity takes the position that the proposed unit is inappropriate because all employees of the Activity, including those in the claimed unit, share a clear and identifiable community of interest and that the small size of the Activity suggests that a single unit, installation-wide, would result in effective dealings. In its brief, the Activity argues that the existence of three separate units at the Activity 4/ would result in three separate negotiations and would require dealings within three contractual areas with representatives of three different units--all within a small activity not structured for such a complex situation. 5/

The Activity is one of nine U. S. Public Health Service Hospitals which are part of the Health Services and Mental Health Administration of the Department of Health, Education and Welfare. The mission of the Activity is to provide medical treatment for merchant seamen, active duty and retired members of the Coast Guard and their dependents, members of the uniformed services and their dependents, foreign seamen, and Federal employees who become ill at work or who are injured in the line of duty. Also, it conducts research and training programs. The Activity is headed by a Director and is subdivided into two branches: the Clinical Branch and the Administrative Branch. It also maintains an outpatient clinic in Portland, Maine, which provides medical and dental services to ambulatory patients. The outpatient clinic is supervised by a clinic director, who reports directly to the Director of the Activity.

The evidence establishes that the 24 registered nurses eligible for inclusion in the claimed unit are employed in three classifications: clinical nurse, operating room nurse and nurse anesthetist. With the exception of the two nurse anesthetists, who are part of the Surgery Department, all registered nurses are under the Nursing Department, a subdivision of the Clinical Branch. The operating room nurses report to the Operating Room Supervisor. Supervision and direction of the clinical nurses flow from the supervisory clinical nurses, who report to the Director of Nursing. Each nursing unit consists of a supervisory clinical nurse and a number of clinical nurses, licensed practical nurses and nursing assistants. The units operate on a three shift basis so that nursing care is provided continuously on a 24-hour day basis.

The record indicates that all registered nurses of the Activity meet specific educational, training and licensing requirements, share the same working conditions and are governed by the same personnel policies. There is no interchange between registered nurses and other

- 4/ The record reveals that NAGE currently holds exclusive recognition in two units at the Activity. NAGE Local R1-108 represents all Wage Board employees, while NAGE Local R1-190 is the exclusive representative for a unit of all General Schedule employees, excluding professional employees. There is no negotiated agreement currently in effect in either unit.
- 5/ No petition has been filed for an Activity-wide unit.

employee classifications at the Activity, although the nature of the operation of a hospital requires that nurses have contact with other employees involved in patient care. The evidence establishes further that the duties of registered nurses are distinguishable from those of licensed practical nurses in that licensed practical nurses are assigned to less complex medical situations and are not permitted to administer certain types of medications.

Under all the circumstances, I find that the unit sought by the NAGE is appropriate for the purpose of exclusive recognition. Thus, as noted above, the record establishes that the Activity's registered nurses have specific educational, training and licensing requirements, share the same working conditions and personnel policies, do not interchange with other categories of employees, and perform duties distinguishable from those performed by other employees of the Activity. Under these circumstances, and noting that Section 10(b) of the Order permits the establishment of a unit on a functional basis, I find that the employees in the claimed unit share a clear and identifiable community of interest.<sup>6/</sup> Further, I reject the Activity's contention that the proposed unit would not promote effective dealings and efficiency of agency operations. In this regard, the record reveals that the Activity's Personnel Officer testified that the most recent negotiations with respect to the two existing units at the Activity consumed a combined total of only 6-7 hours. In addition, he testified that the existence of two separate units had not created inefficiency or problems with respect to the mission of the Activity. Under these circumstances, I find that the Activity has not demonstrated that the claimed unit would not promote effective dealings and efficiency of agency operations.<sup>7/</sup>

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional registered nurses employed by the  
Department of Health, Education and Welfare, U. S.  
Public Health Service Hospital, Boston-Brighton,

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<sup>6/</sup> Cf. Veterans Administration Hospital, Lexington, Kentucky,  
A/SLMR No. 22.

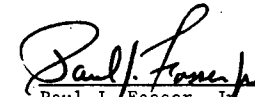
<sup>7/</sup> In this regard, Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9, where the Federal Labor Relations Council stated that "evidence as to whether a requested unit will promote effective dealings and efficiency of agency operations is within the special knowledge of, and must be submitted by, the agency involved."

Massachusetts,<sup>8/</sup> excluding other professional employees, Wage Board employees, other General Schedule employees, employees engaged in Federal personnel work in other than a purely clerical capacity, all employees of the U. S. Public Health Service outpatient clinic at Portland, Maine,<sup>9/</sup> management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees.

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

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<sup>8/</sup> As noted above, the NAGE sought to include "part-time" registered nurses in the proposed unit. Inasmuch as the record contains no evidence concerning their duties, hours of work or regularity of employment, I shall make no finding with respect to their inclusion in the unit.

<sup>9/</sup> The parties were in agreement that employees of the clinic should be excluded from any unit found appropriate.

May 31, 1973

A/SLMR No. 268

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION  
ON CHALLENGED BALLOTS OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,  
NORTHERN MARKETING AND NUTRITION RESEARCH  
DIVISION, PEORIA, ILLINOIS  
A/SLMR No. 268

UNITED STATES DEPARTMENT OF AGRICULTURE,  
NORTHERN MARKETING AND NUTRITION RESEARCH  
DIVISION, PEORIA, ILLINOIS

Activity

and

Case No. 50-5165,  
A/SLMR No. 120,  
FLRC No. 72A-4

LOCAL 3247, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL 1696, NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES

Intervenor

SUPPLEMENTAL DECISION ON CHALLENGED BALLOTS

On December 23, 1971, the Assistant Secretary issued a Decision on Challenged Ballots in A/SLMR No. 120 in which he found, among other things, that for the purpose of unit placement and voting eligibility an individual was not a supervisor within the meaning of the Order if the authority exercised was limited to one employee. Under these circumstances, the Assistant Secretary concluded that Curtis A. Glass, a professional employee of the Activity, was not a supervisor within the meaning of the Order. Accordingly, he ordered that his challenged ballot be opened and counted, only if it affected the ultimate results of the election conducted on May 11, 1971.

The Activity subsequently filed a petition for review of the Assistant Secretary's decision which was accepted by the Federal Labor Relations Council. On April 17, 1973, the Council issued its Decision and Appeal setting aside the Assistant Secretary's decision with respect to the challenged ballot of Glass on the grounds that supervisory status under the Order was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. Accordingly, the Council remanded the instant case to the Assistant Secretary for appropriate action consistent with its decision.

Pursuant to the Council's Decision on Appeal, the Assistant Secretary issued a Supplemental Decision on Challenged Ballots in which he adopted the Hearing Examiner's conclusion that Glass effectively evaluated the performance of another employee and was, therefore, a supervisor within the meaning of the Order. Accordingly, the Assistant Secretary adopted the Hearing Examiner's recommendation that the challenge to the ballot of Glass be sustained and that his ballot not be opened and counted.

On December 23, 1971, the Assistant Secretary issued a Decision on Challenged Ballots in A/SLMR No. 120, in which he found, among other things, that for the purpose of unit placement and voting eligibility, an individual was not a supervisor within the meaning of the Order if the authority exercised was limited to one employee. Under these circumstances, the Assistant Secretary concluded that Curtis A. Glass was not a supervisor within the meaning of the Order.<sup>1/</sup> In this connection, he ordered that Glass' ballot be opened and counted, only if it affected the ultimate results of the election conducted on May 11, 1971. Thereafter, the Activity requested the Federal Labor Relations Council, hereinafter called the Council, to review the Assistant Secretary's decision in A/SLMR No. 120. Subsequently, the Council advised the parties that it had accepted the Activity's petition for review.

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<sup>1/</sup> Because Glass exercised authority as to one employee, it was found unnecessary to determine whether Glass' duties met any of the criteria for a supervisor as defined in Section 2(c) of the Order.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL  
WASHINGTON, D. C. 20415

On April 17, 1973, the Council issued its Decision on Appeal in the subject case, setting aside the Assistant Secretary's decision with respect to the challenged ballot of employee Curtis Glass. In this regard, the Council concluded that supervisory status under the Order was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. Accordingly, the Council remanded the instant case to the Assistant Secretary for appropriate action consistent with its decision.

The Hearing Examiner in the instant case concluded that Glass (a GS-12 research chemist) effectively evaluated the performance of employee Tjarks (a GS-7 chemist) and, therefore, was a supervisor within the meaning of the Order. Under the circumstances set forth in his Report and Recommendations, I hereby adopt the Hearing Examiner's finding in this regard and his recommendation that the challenge to the ballot of Glass be sustained and that his ballot not be opened and counted.<sup>2/</sup>

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

United States Department of  
Agriculture, Northern Marketing  
and Nutrition Research Division,  
Peoria, Illinois

and

Local 3247, American Federation  
of Government Employees, AFL-CIO

A/SLMR No. 120  
FLRC No. 72A-4

and

Local 1696, National Federation  
of Federal Employees

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision on Challenged Ballots in which the Assistant Secretary held, among other things, that, for the purpose of unit placement and voting eligibility, an individual was not a supervisor within the meaning of the Order if the authority he exercised was limited to one employee. The propriety of that holding is the major policy issue which the Council determined warranted review. A brief statement of the pertinent facts is set forth below.

An election was conducted involving Local 3247, American Federation of Government Employees, AFL-CIO (AFGE), and Local 1696, National Federation of Federal Employees (NFFE), among all general schedule employees at the activity, including professionals, but excluding supervisors and other usually excluded categories.

The results of the election disclosed that the challenged ballots cast were sufficient in number to affect the results of the election. One of those challenged ballots, which is alone involved in the instant appeal, was cast by Curtis Glass, a GS-12 research chemist. Glass' ballot was challenged by the activity on the ground that he was a supervisor, as defined by the Order.

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<sup>2/</sup> I am advised administratively that pursuant to the Decision on Challenged Ballots in A/SLMR No. 120, the challenged ballot of Curtis A. Glass was not opened and counted inasmuch as it would not have affected the ultimate results of the election.

Following a formal hearing before a hearing examiner the Assistant Secretary issued his decision on those challenged ballots, sustaining certain challenges, but overruling the challenge to the ballot of Curtis Glass. With respect to Glass' status, the Assistant Secretary concluded:

In my view, the language of the Order is clear and free from ambiguity in stating that " 'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment" (Emphasis added). In these circumstances, for the purpose of unit placement and voting eligibility, I find that Glass is not a supervisor within the meaning of the Order inasmuch as the authority he exercises is limited to one employee. Accordingly, I hereby overrule the challenge to his ballot, and direct that, in the event Glass' ballot affects the results of the overall election, his ballot be opened and counted.<sup>[1/]</sup>

The agency appealed the Assistant Secretary's "one-subordinate" rule, contending that it was inconsistent with the purposes and policies of the Order. The AFGE, which alone filed an opposition to the agency's appeal, argues that the Assistant Secretary's decision is mandated by the use of the plural reference to subordinate employees in the section 2(c) definition of "supervisor."

Opinion

As indicated above, the Assistant Secretary's decision is based on his view as to proper construction of the Order, i.e., "Supervisor" as defined in the Order. Section 2(c) of the Order provides,

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,

<sup>1/</sup> The Assistant Secretary made no express determination as to whether Glass' authority, if exercised over more than one subordinate, would have met the criteria for a supervisor as defined in section 2(c) of the Order.

or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is true that the section 2(c) definition of "supervisor" uses the plural forms, so there is literal support for the Assistant Secretary's finding. However, the customary rule of statutory construction is that the singular may include the plural, and the plural, the singular, except where a contrary intent plainly appears.<sup>2/</sup> In this connection, 1 U.S.C. § 1 (1970) expressly provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise - ... words importing the plural include the singular."

Here the context of section 2(c) of the Order plainly does not indicate any intent that the plural is to exclude the singular. Moreover, it is inconsistent with the purposes of the Order to interpret section 2(c) as requiring the possession of authority over more than one subordinate in order to find that an individual is a supervisor.

In regard to the purposes of the Order, Executive Order 10988, which preceded the present Executive Order 11491, contained no definition of the term "supervisor." Further, it permitted supervisors to hold union office provided no conflict of interest or incompatibility with law or official duties arose; and permitted exclusive representation of supervisors and nonsupervisors in units which did not include subordinates whose performance the supervisors officially evaluated; and provided no separate program for associations of supervisors.

The President's Study Committee, after reviewing experience under Executive Order 10988, stated its view of the labor-management relations role of supervisors to be as follows:<sup>3/</sup>

. . . We view supervisors as a part of management, responsible for participating in and contributing to the formulation of agency policies and procedures and contributing to the negotiation of agreements with employees. Supervisors should be responsible for representing management in the administration of agency policy and labor-management agreements, including negotiated grievance systems, and for

<sup>2/</sup> See e.g., Wiggins Builders Supplies v. Smith, 149 A.2d 360, 362 (1959); 50 Am. Jur., Statutes, § 256 (1964).

<sup>3/</sup> Labor-Management Relations in the Federal Service, 1971, p. 40.

expression of management viewpoints in daily communication with employees. In short, they should be and are part of agency management and should be integrated fully into that management. We are also concerned that recognition granted for units of supervisors not compromise in any way the free choice by subordinate employees of their own representatives.

Consistent with this view the Study Committee recommended that the present definition of supervisor be adopted. Moreover, in order to integrate effectively supervisors into agency management Executive Order 11491 provided that supervisors may not be included in bargaining units and may not be covered by a negotiated agreement; supervisors were included within the Order's definition of "agency management," and supervisors' acts toward employees may constitute unfair labor practices imputable to an agency. Also, the Order prohibits supervisors from holding union office, or representing a union, and requires agencies to establish separate systems for communicating and consulting with its supervisors or associations of supervisors.

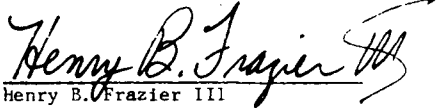
Quite clearly, the Order thus intends that a clear delineation be drawn between supervisory and nonsupervisory employees. A person with such authority stands as a representative of agency management - responsible for participating in and contributing to the formulation of agency policies and procedures, for the negotiation of agreements with employee representatives and for expressing management's viewpoints in daily communication with employees. Additionally, such persons are responsible for administering agency policy and labor-management agreements.

Based on the foregoing purposes of the Order, we find that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. In other words, the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status, notwithstanding the number of persons supervised, and we so find.

There will certainly be factual situations where it is appropriate to determine that an individual who allegedly supervises one subordinate, in fact, exercises authority of a merely routine or clerical nature, and does not exercise independent judgment with respect to that employee. We hold that the Assistant Secretary may not resolve questions of supervisory status solely upon the basis that an alleged supervisor has only one subordinate.

For the foregoing reasons, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision with respect to the challenged ballot of employee Curtis Glass to be inconsistent with the purposes of the Order, and, therefore, it is set aside. The case accordingly is remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: April 17, 1973



May 31, 1973

A/SLMR No. 269

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NEW JERSEY DEPARTMENT OF DEFENSE

Activity

NEW JERSEY DEPARTMENT OF DEFENSE  
A/SLMR No. 269

and

Case No. 32-1984,  
A/SLMR No. 121,  
FLRC No. 72A-2

On December 27, 1971, the Assistant Secretary issued a Decision and Order Clarifying Units in A/SLMR No. 121, in which, among other things, he found that employees in the classification of Personnel Equipment and Survival Technician, WG-12, and Personnel Technician, GS-6, were not supervisors within the meaning of the Order in that the authority they exercised was limited, at most, to one employee.

LOCAL 371, NAATA, INTERNATIONAL  
UNION OF ELECTRICAL, RADIO AND  
MACHINE WORKERS, AFL-CIO

Petitioner

On April 17, 1973, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the matter of United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4, in which it found, in pertinent part, that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. For the reasons stated in the latter decision, the Council remanded the decision in A/SLMR No. 121 to the Assistant Secretary for appropriate action.

SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT

On December 27, 1971, the Assistant Secretary issued a Decision and Order Clarifying Units in A/SLMR No. 121, in which he ordered, among other things, that the exclusively recognized unit involved in Case No. 32-1984 be clarified by including certain classifications on the basis that the employees in such classifications were not supervisors within the meaning of the Order. In this connection, he found that employees in the classification of Personnel Equipment and Survival Technician, WG-12, and the classification of Personnel Technician, GS-6, were not supervisors because the authority exercised by the incumbents in these positions was limited to one employee. In reaching his decision on this issue, the Assistant Secretary relied exclusively on his decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120. Thereafter, the Activity requested the Federal Labor Relations Council, hereinafter called the Council, to review the Assistant Secretary's decision in A/SLMR No. 121. Subsequently, the Council advised the parties that it had accepted the Activity's petition for review.

Pursuant to the Council's Decision on Appeal, the Assistant Secretary reviewed the record in the case and concluded that the Personnel Equipment and Survival Technician, WG-12, was not a supervisor within the meaning of the Order, but that the Personnel Technician was a supervisor. Accordingly, he issued a Supplemental Decision and Order Clarifying Unit to reflect these findings.

On April 17, 1973, the Council issued its Decision on Appeal from the Assistant Secretary's decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4, finding, in pertinent part, that supervisory status was intended to be determined on the basis of the authority of the individual, not on the precise number of subordinates. Also, on April 17, 1973, the Council issued its Decision on Appeal in the subject case, setting aside, for the reasons stated in its

Decision on Appeal in A/SLMR No. 120, FLRC No. 72A-4, the Assistant Secretary's findings that the employees in the above-named classifications were not supervisors within the meaning of the Order because the authority they exercised was limited, at most, to one employee. Accordingly, the Council remanded the subject case to the Assistant Secretary for appropriate action consistent with its decision.

Pursuant to the remand of the Council, and upon the entire record in this case, including the briefs of the parties, the Assistant Secretary finds:

Personnel Equipment and Survival Technician, WG-12

The Personnel Equipment and Survival Technician is responsible directly to the Flying Training Instructor. The incumbent has one Personnel Equipment and Survival Technician, WG-11, in his section reporting to him. The position is located in the Mission Equipment Maintenance Functional Area of an Air Technician detachment and supports flying activities at McGuire Air Force Base, New Jersey. The incumbent is responsible for instructing aircrews in the use and care of personal and survival equipment. In this connection, he issues, fits, adjusts and maintains all personal and survival equipment. His responsibilities encompass the use, care, and issuance, as well as training with respect to the life support equipment used by air crews.

While the Activity alleges that the incumbent exercises certain supervisory functions, the record indicates that such functions either are not engaged in or are of a routine nature. Thus, the evidence establishes that the incumbent works alongside the other employee in the section on practically a full time basis. Further, he has never recommended anyone for promotion, has not adjusted any grievances, and has no authority to hire, fire, or sign time and attendance forms. Moreover, the record reveals that the incumbent does not direct the work of the other employee in the section because, in view of the nature of the work, the other employee in the section knows what is expected of him and performs his job in accordance with established work directives and specific requests. Further, any independence of judgment utilized by the incumbent usually is confined to whether or not specific equipment is available for a particular mission, and based on that availability, whether such mission should be flown. The record indicates that the incumbent has attended staff meetings, but not supervisory meetings, and that any work priorities or hours established by the incumbent are governed by the type of mission to be flown and prepared for, and not by the independent judgment of the incumbent.

Under the foregoing circumstances, I find that the authority exercised by an employee in this classification is routine in nature and does not require the exercise of independent judgment. Accordingly, I find that an employee in this classification is not a supervisor within the meaning of the Order and, therefore, should be included in the unit.

-2-

Personnel Technician, GS-6

The Personnel Technician, GS-6, is responsible directly to the Personnel Superintendent, and has one Personnel Specialist, GS-5 in his section reporting to him. The position is located in the Personnel Functional Area of an Air Technician detachment at McGuire Air Force Base, New Jersey. The incumbent is responsible for the preparation and maintenance of personnel records and reports and personal affairs records.

Although the evidence indicates that the incumbent works alongside the other employee in the section for a small portion of the day, it also indicates that he makes daily work assignments, in certain instances explains how such assignments should be performed, sets work priorities, checks the employee's work for completeness and accuracy, and runs the section on a daily basis without supervision from higher management levels. The Personnel Technician also has the authority to settle grievances and make recommendations and evaluations of the employee in his section for in-step increases, which the record reveals usually are followed. Further, he initials leave slips, and recommends the scheduling of annual leave, with the majority of these recommendations being followed. The record indicates that the incumbent also has effectively recommended the granting of compensatory time and has attended supervisory meetings. Moreover, the record discloses that because his immediate supervisor is located a long distance from the incumbent's work location, the latter frequently is called upon to use independent judgment with respect to reports that are not standardized and has directed and monitored the employee specialist in his section in on-the-job training and job related courses.

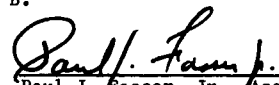
Under the foregoing circumstances, and noting that the incumbent possesses independent and responsible authority to direct the employee in his section, to schedule and assign work and leave, to attend supervisory staff meetings, and to adjust or recommend effectively the adjustment of grievances, I find that the Personnel Technician is a supervisor within the meaning of the Order and, therefore, should be excluded from the unit.

ORDER

Pursuant to the Council's Decision and Appeal in FLRC No. 72A-2, the Order of the Assistant Secretary of Labor for Labor-Management Relations set forth in A/SLMR No. 121, is hereby modified as set forth below:

The employee classification "Personnel Technician, GS-6" is moved from "Group A" to "Group B."

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-3-

May 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

New Jersey Department of Defense

and

A/SLMR No. 121  
FLRC No. 72A-2

Local 371, NAATA, International  
Union of Electrical, Radio &  
Machine Workers, AFL-CIO, et al.

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

This appeal, which was accepted for review by the Council, arose from a Decision and Order Clarifying Units in which the Assistant Secretary held, among other things, that certain employees<sup>1/</sup> were not supervisors within the meaning of the Order in that the authority they exercised was limited, at most, to one employee. In reaching his decision on this issue in the instant case, the Assistant Secretary relied exclusively on his decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120.

On this date the Council has issued its Decision On Appeal From Assistant Secretary Decision in the matter of United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4, in which it found, in pertinent part, that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. For the reasons fully set forth in that Decision, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision with respect to the employees herein involved to be inconsistent with the purposes of the Order, and, therefore, it is set aside. This case accordingly is remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.

  
Henry B. Frazier  
Executive Director

Issued: April 17, 1973

1/ The classifications at issue are Personnel Equipment and Survival Technician, WG-12; and the Personnel Technician, GS-6. Since the parties have not contested the Assistant Secretary's finding that the Procurement Technician, GS-8, had no subordinate employees, further consideration of that employee's status was deemed unwarranted.

DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT, REGION II  
A/SLMR No. 270

The subject case involves a representation petition filed by the American Federation of Government Employees, H.U.D. District II Council of Locals, AFL-CIO (AFGE). The AFGE sought a unit which encompassed all employees employed by Region II of the Department of Housing and Urban Development which is composed of a Regional Office and seven field offices. The National Federation of Federal Employees, Local 1616, (NFFE), intervened in the proceedings.

The Activity and the NFFE contended that the instant petition was barred by their current negotiated agreement which covered the employees at the Activity's Newark, New Jersey Area Office. The AFGE contended that the agreement did not constitute a bar because it was negotiated pursuant to exclusive recognition granted the NFFE without the benefit of a secret ballot election subsequent to the effective date of Executive Order 11491. The AFGE also contended that even if the agreement were held to constitute a bar to an election, such bar would apply only to the employees at the Newark Area Office and it expressed a willingness to represent the employees in any unit deemed appropriate by the Assistant Secretary. In addition, the NFFE contended, contrary to the Activity and the AFGE, that a current negotiated agreement between the Activity and an AFGE local, which was a member of the petitioning AFGE H.U.D. District II Council, constituted a bar to the subject petition.

Regarding the alleged bar involving the Newark Area Office agreement, the Assistant Secretary noted that the alleged improper granting of exclusive recognition to the NFFE, which constituted the basis for the AFGE's contention that the negotiated agreement did not constitute a bar, occurred more than two years prior to raising of the issue by the AFGE. He concluded that to allow such an alleged impropriety to affect the existing bargaining relationship between the Activity and the NFFE would be inconsistent with the established policies of the Assistant Secretary as set forth in his Regulations which require that charges involving unfair labor practices be filed within six months of their occurrence. In these circumstances, the Assistant Secretary concluded that the NFFE's status as exclusive bargaining representative was not subject to attack in this proceeding and as the AFGE's petition was not timely filed with respect to the parties' negotiated agreement, such agreement constituted a bar to an election among the employees at the Newark Area Office.

Regarding the negotiated agreement between the Activity and the AFGE, the Assistant Secretary found that because neither the AFGE nor the Activity asserted the agreement as a bar and in view of the fact that the scope of the agreement was unclear and that it was an agreement of indefinite duration, no agreement bar existed.

The Activity and the NFFE contended that the Activity-wide unit sought by the AFGE was inappropriate and that each field office within the Region and the Regional Office constituted separate appropriate units. Noting that overall authority for conducting the Activity's operations lies in the Regional Office, and that the claimed employees were engaged in the same basic mission, had similar skills and working conditions, were subject to the same basic personnel policies and regulations, and no labor organization was seeking to represent the employees on any other basis, the Assistant Secretary concluded that the Region-wide unit sought by the AFGE, as modified by the procedural bar at the Newark Area Office, was appropriate for the purpose of exclusive recognition and he directed an election in such unit.

With regard to Audit Division employees, the Assistant Secretary found that the evidence revealed their community of interest differed from that of the other employees in the appropriate unit. In this regard, he noted that while the Audit Division employees were housed in the Activity's Regional Office they were not under the direction or control of the Regional Office in that their supervision emanated directly from HUD's Central Office in Washington, D.C. He noted also that the Audit Division employees had historically been represented on a separate basis.

A/SLMR No. 270

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT, REGION II

Activity

and

Case No. 30-4700(RO)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, H.U.D.  
DISTRICT II COUNCIL OF LOCALS,  
AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, LOCAL 1616

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Louis A. Schneider. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, including the briefs filed by the AFGE and the NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

1/ As it is incumbent upon a hearing officer in a unit determination proceeding to develop a complete record to enable the Assistant Secretary to resolve all issues raised in such proceeding, I find no merit in the contention of the National Federation of Federal Employees, Local 1616, herein called NFFE, that the Hearing Officer erred in exploring alternative positions with the American Federation of Government Employees, H.U.D. District II Council of Locals, AFL-CIO, herein called AFGE, with respect to the appropriate unit in this matter.

2. The AFGE seeks an election in a unit of all professional and nonprofessional employees of the Department of Housing and Urban Development (HUD), Region II, which includes employees in the Regional Office, Area Offices, and Insuring Offices in New York, New Jersey and Puerto Rico, excluding confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.<sup>2/</sup>

The NFFE and the Activity contend that the petition herein is barred, insofar as it covers the HUD's Newark Area Office, by a current negotiated agreement between the NFFE and the Activity which covers the employees in such office.<sup>3/</sup> The AFGE asserts that the negotiated agreement in this regard does not constitute a bar because the initial grant of exclusive recognition, which resulted in the agreement, was defective in that it occurred subsequent to the effective date of Executive Order 11491 without an election as required by the Order. The AFGE further contends that, assuming the negotiated agreement constitutes a bar to an election, such bar would apply only to the Newark Area Office and not to the remainder of the unit sought in this matter. The NFFE, contrary to the Activity and the AFGE, contends also that an existing negotiated agreement between AFGE Local 913 and the Activity covering certain Regional employees constitutes a bar to further proceedings in the subject case.

#### Background

The record discloses that the Activity is one of ten regions of HUD. As presently constituted, it employs approximately 900 rank-and-file employees and encompasses a geographical area including New York, New Jersey, Puerto Rico and the Virgin Islands. It is divided into a Regional Office, located at New York, New York; 5 Area Offices located

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<sup>2/</sup> The unit appears as amended at the hearing. I reject the NFFE's contention raised at the hearing and again in its brief that the AFGE's petition should be dismissed because no evidence was presented to establish that the AFGE had a sufficient showing of interest in support of its petition in the claimed unit. In this regard, Section 202.2(f)(1) of the Assistant Secretary's Regulations provides, in part, that, "The Area Administrator shall determine the adequacy of the showing of interest administratively, and such determination shall not be subject to collateral attack at a unit or representation hearing." (emphasis added)

<sup>3/</sup> The NFFE, which intervened in the subject petition filed by the AFGE, initially petitioned for an election among the Newark Area Office employees in Case No. 32-2392, which petition was consolidated for hearing with the instant petition. However, the NFFE withdrew its petition at the hearing after the Activity raised its current negotiated agreement with NFFE as a bar to further proceedings.

at New York, New York; Buffalo, New York; Newark, New Jersey; Camden, New Jersey; and Puerto Rico; and 2 Insuring Offices located at Albany, New York, and Hempstead, Long Island, New York. Prior to September 30, 1970, the Activity had been designated as Region I and was comprised of New York and the New England States area. As of September 30, 1970, the Activity was redesignated as Region II and given jurisdiction over the above-mentioned Area Offices and Insuring Offices in New York, New Jersey, Puerto Rico and the Virgin Islands. In this connection, the former region encompassing Puerto Rico and the Virgin Islands was incorporated into the newly-formed Region II as an Area Office.

#### Alleged Agreement Bars

The record establishes that on December 5, 1969, the NFFE requested recognition as the exclusive bargaining representative of a unit of employees in the Newark, New Jersey Insuring Office consisting of all nonsupervisory, nonprofessional General Schedule employees of the then existing Insuring Office. After an investigation of the matter, the Activity, by letter dated January 18, 1970, accorded the NFFE exclusive recognition in the claimed unit retroactive to December 31, 1969. Thereafter, the Activity and the NFFE negotiated an agreement which had an effective date of November 3, 1970, and a termination date of November 2, 1972. As noted above, the Activity reorganized its operations effective September 30, 1970. The reorganization resulted in an increase in the number of employees at the Newark facility <sup>4/</sup> from approximately 100 to some 187, including 73 employees who were transferred to Newark from the New York Regional Office.<sup>5/</sup>

The AFGE contends that because the Activity accorded the NFFE exclusive recognition as the representative of the Newark employees subsequent to the effective date of Executive Order 11491, and without conducting a secret ballot election as required by the Order, such recognition was invalid. Under these circumstances, the AFGE argues that because the recognition was invalid, the negotiated agreement between the Activity and the NFFE, which resulted from such recognition, may not serve as a bar to the instant petition.

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<sup>4/</sup> The reorganization upgraded the Newark Insuring Office to an Area Office.

<sup>5/</sup> The reorganization resulted in a decrease in the number of rank-and-file employees in the New York Regional Office from approximately 700 to 100 and an increase in the employee complement of each of the Area Offices within the newly constituted Region II.

While the recognition in question may have been accorded subsequent to the effective date of Executive Order 11491 without the benefit of a secret ballot election, in my view, in the circumstances of this case, it would not effectuate the policies of the Order to permit the alleged defects in such recognition to affect the existing contractual relationship between the Activity and the NFFE at the Newark facility. Thus, to permit an attack on the existing contractual relationship based on an alleged impropriety in the initial grant of exclusive recognition which occurred more than two years prior to the raising of such issue would not be consistent with the established policies as set forth in the Assistant Secretary's Regulations which limits the processing of alleged violations of Section 19 of the Order to those that are raised within six months of their occurrence.<sup>6/</sup> In my view, to apply a contrary policy in the circumstances of this case would subject otherwise stable bargaining relationships to the possibility of challenges at any time and would not serve to promote effective and meaningful labor-management relations. Accordingly, and noting that the negotiated agreement between the Activity and the NFFE is otherwise valid on its face, I find that the AFGE's petition herein was not timely filed insofar as it covered employees of the Newark Area Office as such petition was barred by a negotiated agreement at that location.<sup>7/</sup>

As indicated above, the NFFE contends that the current negotiated agreement between the Activity and the AFGE Local 913 constitutes a bar

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<sup>6/</sup> Section 203.2(a)(2) of the Regulations of the Assistant Secretary provides in connection with the filing of an unfair labor practice charge that, "The charge must be filed within six (6) months of the occurrence of the alleged unfair labor practice."

<sup>7/</sup> In view of the AFGE's position that it is willing to represent employees in any unit found appropriate by the Assistant Secretary, I find no merit in the contention by the NFFE and the Activity that because the AFGE's petition was untimely filed insofar as it covered employees of the Newark Area Office the petition should be dismissed. I find further that as the record establishes that the employees who were transferred to the Newark Area Office as a result of the Activity's reorganization are performing essentially the same duties as other employees in the Newark Area Office and share the same basic supervision, skills, and working conditions as such other employees, the transferred nonprofessional employees constitute an accretion or addition to the existing bargaining unit represented by the NFFE and, consequently, may not be included in the unit sought herein by the AFGE.

to the instant petition.<sup>8/</sup> The agreement contended to be a bar was executed on June 30, 1969, to be effective for a period of two years. It also provided that if no new agreement was executed prior to the termination date, it would remain in effect until a new agreement was signed by the parties. The agreement covered a unit consisting of all nonsupervisory professional and nonprofessional employees of Region I, but did not include employees of any Insuring Offices because, at that time, such offices were not under the administrative jurisdiction of the HUD Regional Office. The parties did not negotiate a new agreement, but on June 30, 1972, subsequent to the reorganization of the Activity's operations discussed above, the parties executed a memorandum of understanding which extended the terms and conditions of the agreement for a period not to exceed 90 days after the decision of the Department of Labor on a petition for clarification of unit (CU) filed by the AFGE in Case No. 30-3754. The CU petition was dismissed by the Department of Labor, LMSA Regional Administrator on June 26, 1972. It is the NFFE's position that the negotiated agreement, as extended by the parties' memorandum of understanding, constitutes a bar to the instant petition inasmuch as the petition filed on June 30, 1972, was not filed during the sixty to ninety day open period prior to the expiration of the agreement.

Under all of the circumstances, I find that the negotiated agreement between the Activity and AFGE Local 913, as extended by the June 30, 1972, memorandum of understanding, did not constitute a bar to an election. In this regard, it was noted that the evidence establishes that neither the Activity, AFGE Local 913, nor any of the other AFGE locals which are members of the AFGE, H.U.D. District II Council, contend that the negotiated agreement constitutes a bar to the instant petition.<sup>9/</sup> Moreover, in view of the Activity's reorganization, the scope of the agreement was unclear, and its expiration provision did not contain a clearly enunciated fixed term.<sup>10/</sup>

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<sup>8/</sup> The record reveals that the petitioning AFGE H.U.D. District II Council of Locals, AFL-CIO, is comprised as follows: (a) Local 913 (New York Regional Office) which had been recognized as the exclusive representative under Executive Order 10988 for certain Region I employees; (b) Local 2837 which was certified as the exclusive representative of employees of the Puerto Rico Area Office on June 1, 1971; (c) Local 2512 which was certified as exclusive representative of the Hempstead Insuring Office employees on June 22, 1970; (d) Local 3264 at Camden, New Jersey; and (e) Local 3367 at Buffalo, New York.

<sup>9/</sup> Compare U. S. Department of Defense, DOD. Overseas Dependent Schools, A/SLMR No. 110.

<sup>10/</sup> Cf. Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45.

In all of these circumstances, I find that the agreement did not constitute a bar to an election in the subject case.

#### Appropriate Unit

With respect to the appropriateness of the unit sought, the Activity and the NFFE contend that the Region-wide unit sought by the AFGE is inappropriate. Rather, in their view, each Insuring Office and Area Office in the Region and the Regional Office constitutes a separate appropriate unit.<sup>11/</sup> In this connection, the Activity maintains that each of the Insuring and Area Offices operates as a separate autonomous unit from the Regional Office and that to include all offices in the Region in a single unit would defeat the Activity's decentralization program and, consequently, would not promote effective dealings and efficiency of agency operations. In addition, the Activity and the NFFE contend that the employees in the Activity's Audit Division, who currently are represented by AFGE Local 913 in a separate unit, constitute a separate appropriate unit and should not be included in the unit sought herein by the AFGE.

The Activity is responsible for carrying out all of the HUD programs within the area of its jurisdiction. The Central Office of HUD, located in Washington, D.C., initiates the various programs and allocates to each Region a specific amount of money to fill the needs of such programs in that Region. The individual Regional Office then divides the money among its component Area and Insuring Offices. The Regional Office is concerned primarily with staff functions whereas the Area Offices and Insuring Offices are concerned with the actual operational implementation of the HUD programs. In this regard, Area Offices have the sole responsibility for the administration of such programs as model cities, urban renewal, public housing, public facility loans, and rehabilitation loans. On the other hand, Insuring Offices administer housing insurance programs. It is the function of the Regional Office to monitor the operation of the various HUD programs to insure that they are administered according to HUD regulations.

<sup>11/</sup> The parties agreed that the requested unit includes professional and nonprofessional employees and they stipulated that employees in the classifications of civil engineer, architect, economist, and attorney are professional employees within the meaning of the Executive Order. As there is no evidence in the record which indicates that the parties' stipulation was improper, I find that employees in these classifications are professional employees within the meaning of the Order. The parties stipulated also to the exclusion of temporary employees and confidential employees. Inasmuch as there is no evidence in the record which indicates that the parties' stipulations were improper, I find that these employees should be excluded from the unit found appropriate.

The record reveals that the directors of the various field offices have the day-to-day responsibility for the operation of their offices, including the authority to authorize grants, loans and advances, and to approve third party contracts. The actions of the field offices in administering the HUD programs are not subject to review by the Regional Office. However, as indicated above, the Regional Office monitors the administration of such programs to insure that they are administered in conformity with HUD policies and procedures. The record reveals also that while the directors of the various field offices can hire and promote up to GS-11 and their determinations in this respect are not subject to review by the Regional Office, the Regional Office monitors all hirings and promotions and it may cancel such actions where it is found that such actions do not comply with existing personnel regulations and policies. Also, the record establishes that the Regional Office is responsible for all promotions above the level of GS-11, and that its approval is required for changes in job classifications which may deviate from the established organizational structure. In addition, the Regional Office controls the average grade levels and the budgets for all field offices and all of the Activity's official personnel records are maintained at the Regional Office.

The evidence establishes that while the directors of the various field offices have responsibility in connection with the discharge of employees, disposition of employee grievances, discipline, and labor relations in their respective offices, all policies on these matters emanate from either the Regional Office or the Activity's Central Office in Washington, D.C., and such policies are the same for all of the Activity's employees. In addition, the record reveals that while the directors of the field offices are authorized to negotiate and execute collective-bargaining agreements, such agreements are subject to Regional Office review for technical and legal sufficiency prior to their execution. Also, the Regional Office provides the field offices with technical advice in areas having to do with personnel relations and provides training for field personnel.

All of the Activity's employees are subject to the same basic policies regarding wages, hours and working conditions and there are only minimal differences in the application of such policies between the various offices. Also, the record reveals that all of the Activity's employees have similar skills, and, through merit staffing, employees have the opportunity to transfer between offices. Additionally, the record discloses that the Regional Office periodically details employees from one office to another. In this regard, there were approximately 25 such details of nonsupervisory employees during the past year in Region II for periods ranging between 30 to 90 days. Furthermore, during the same one-year period, there were a number of additional details between offices for lesser periods of time.

Under all of the circumstances, and noting particularly that the overall authority for conducting the Activity's operations lies with the Regional Office, and that all of the employees involved are engaged in the same basic mission and have similar skills and working conditions, I find that the unit petitioned for, as modified above, is appropriate for the purpose of exclusive recognition. In reaching the foregoing decision note also was taken of the fact that all labor relations and personnel policies emanate from either the Regional Office or the Central Office of HUD and that while the field offices have the primary responsibility for carrying out the operational aspect of the Activity's mission, the Regional Office is responsible for insuring that such offices perform their tasks in accordance with HUD regulations and policies. Moreover, in view of the overall authority exercised by the Regional Office, as discussed above, I find that the evidence is insufficient to establish that the claimed unit will not promote effective dealings and efficiency of agency operations.<sup>12/</sup> Accordingly, and as no labor organization is seeking to represent the claimed employees on any other basis, I find that the employees in the requested unit, as modified herein by the existence of an agreement bar at the Newark, New Jersey Area Office, have a clear and identifiable community of interest and constitute a unit appropriate for the purpose of exclusive recognition under the Order.<sup>13/</sup>

With respect to the employees in the Activity's Audit Division, who currently are represented by AFGE Local 913, the evidence establishes that while they are housed in the Activity's Regional Office, they are not considered to be a part of the Activity and their supervision emanates directly from the Central Office of HUD in Washington, D.C. Further, there is no interchange between employees of the Audit Division and other employees of Region II. The bargaining history involving the Audit Division employees reveals that they have been represented on an exclusive basis by AFGE Local 913 since 1965, and that while Local 913 also represents employees in the Activity's Regional Office, Audit Division employees always have been represented in a separate unit. In view of the foregoing collective-bargaining history, and noting particularly that the Audit Division employees have different supervision from other Activity employees and that overall direction and control of Audit Division employees does not emanate from Region II, I find that their community of interest is separate and distinct from that of the employees in the unit found appropriate herein. Thus, they will not be included in such unit.

<sup>12/</sup> Cf. Department of the Navy, Military Sea Lift Command, A/SLMR No. 245.

<sup>13/</sup> The decision in Portland Area Office, Department of Housing and Urban Development (HUD), A/SLMR No. 153, in which an HUD Area Office was found to constitute an appropriate unit was not considered to require a contrary result. Thus, there was no finding in that case that a Region-wide unit was inappropriate.

Accordingly, I find that the following employees may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees of the Department of Housing and Urban Development, Region II, excluding all nonprofessional employees in the Newark, New Jersey Area Office and all employees of the Audit Division, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professional unless the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desire of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All professional employees of the Department of Housing and Urban Development, Region II, excluding all employees of the Audit Division, nonprofessional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All nonprofessional employees of the Department of Housing and Urban Development, Region II, excluding all employees in the Newark, New Jersey Area Office and all employees of the Audit Division, professional employees, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the AFGE, or by the NFFE,<sup>14/</sup> or by neither.

<sup>14/</sup> The record in the subject case is unclear as to the adequacy of the NFFE's showing of interest in the unit found appropriate. Accordingly, before proceeding to an election in this case, the appropriate Area Administrator is directed to evaluate the NFFE's showing of interest. If he determines that the NFFE's showing of interest is inadequate the NFFE's name should not be placed on the ballot.



The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the AFGE, or by the NFFE, or by neither. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether the AFGE, or the NFFE, or neither was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Department of Housing and Urban Development, Region II, excluding all nonprofessional employees in the Newark, New Jersey Area Office and all employees of the Audit Division, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Department of Housing and Urban Development, Region II, excluding nonprofessional employees, all employees of the Audit Division, confidential

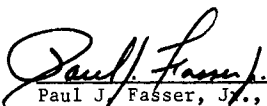
employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional employees of the Department of Housing and Urban Development, Region II, excluding professional employees, all employees in the Newark, New Jersey Area Office and all employees of the Audit Division, confidential employees, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, H.U.D. District II Council of Locals, AFL-CIO; or by National Federation of Federal Employees, Local 1616; or by neither.

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

May 31, 1973

A/SLMR No. 271

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION (DCASR),  
BOSTON, MASSACHUSETTS  
A/SLMR No. 271

This case arose as a result of a petition filed by the American Federation of Government Employees, AFL-CIO, Local 1906, (AFGE) seeking an election in a unit of all eligible nonprofessional employees of DCASR, Boston, with duty station at headquarters, 666 Summer Street, Boston, Massachusetts. The National Association of Government Employees, Local R1-210 (NAGE), which is currently the exclusively recognized representative of the employees in the petitioned for unit, intervened contending that a unit consisting of all eligible nonprofessional employees at DCASR, Boston headquarters and at the Defense Contract Administration Services District (DCASD) Rochester, New York, for which it is also the exclusive representative under a separate recognition, was the appropriate unit. The Activity contends that the appropriate unit is a Regionwide unit of all eligible employees of the entire Region, including all employees in existing exclusively recognized units.

Under all of the circumstances, the Assistant Secretary concluded that the petitioned for unit was appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations. In this connection, he found the petitioned for unit had not merged with any other unit and remained a separate and distinct bargaining unit, and he rejected the contention that the negotiated agreement covering the claimed employees automatically was extended to the DCASD employees at Rochester. In finding the petitioned for unit appropriate, the Assistant Secretary noted that the claimed unit was identical to the currently recognized unit; that it was a separate and distinct bargaining unit with a long, established bargaining history; and that no petition for a more comprehensive unit had been filed by any labor organization. The Assistant Secretary also rejected the Activity's contention that only a Regionwide unit was appropriate and that the existing exclusively recognized units in the Region should be eliminated. He noted that such a policy would not be consistent with the purposes of the Order as it would impair the stability of labor-management relations.

Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION (DCASR),  
BOSTON, MASSACHUSETTS

Activity

and

Case No. 31-6092

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1906

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R1-210

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer James Cannon. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the Activity and the Petitioner, American Federation of Government Employees, AFL-CIO, Local 1906, herein called AFGE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The AFGE seeks an election in a unit of all General Schedule and Wage Board employees of the Defense Contract Administration Services Region (DCASR) of the Defense Supply Agency, located at headquarters, 666 Summer Street, Boston, Massachusetts, excluding management officials, professionals, employees engaged in Federal personnel work other than those in a purely clerical capacity, and supervisors and guards as defined in Executive Order 11491.

The Intervenor, the National Association of Government Employees, Local R1-210, herein called NAGE, which is currently the exclusively recognized representative of the employees in the petitioned for unit, contends that a combined unit consisting of all eligible nonprofessional employees located at DCASR headquarters, 666 Summer Street, Boston, Massachusetts and at the Defense Contract Administration Services District Office in Rochester, New York, is the appropriate unit.

The Activity contends that the only appropriate unit is a Region-wide unit made up of all eligible employees of the entire Region. In the Activity's view, such a Regionwide unit would include all of the employees in the some 15 exclusively recognized units in the Region, plus eligible employees who are not currently included in any exclusively recognized unit. Further, in the event that the Assistant Secretary finds the existing unit, for which the AFGE is seeking an election, to be appropriate, the Activity takes the position that the unit description should be modified to include those employees of the Activity who presently are unrepresented.

DCASR, Boston, is one of a number of such Regions of the Defense Supply Agency. It provides contract administration services in support of the Department of Defense and other Federal agencies, and encompasses a geographic area which includes the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York (except New York City and adjoining counties). There are two Defense Contract Administration Services Districts (DCASD's) within DCASR, Boston. DCASD, Hartford, encompasses a geographic area which includes the States of Connecticut and Vermont, western Massachusetts and a small portion of New York along the New York-Vermont line. Within this DCASD are four Defense Contract Administration Services Offices (DCASO's). 1/ DCASD, Rochester, encompasses most of upstate New York except the bordering towns in the Schenectady area. 2/ DCASR, Boston, also exercises line responsibility over a geographic area which includes Maine, New Hampshire, Rhode Island and eastern Massachusetts, and which includes four DCASO's at plant sites in Massachusetts, Vermont, and New Hampshire, which report directly to headquarters.

DCASR, Boston, is under the command of a Regional Commander, a military officer, whose office is located in Boston at the Activity's headquarters. Directly under the Commander and located at headquarters are a number of offices and directorates which are responsible for planning and monitoring all facets of the Activity's operations. In this regard, the offices are concerned primarily with matters regarding

1/ The DCASO's include one area office at Bridgeport, Connecticut, and three offices located at plant sites in Connecticut. The plant site offices are concerned with administering contracts with particular contractors.

2/ DCASD, Rochester, includes three area DCASO's at Buffalo, Syracuse and Binghamton and a plant DCASO in Utica, New York.

planning, administration, contract compliance problems and security problems at defense plants; and the directorates are concerned with matters of contract administration, production and quality assurance. Personnel management is centralized at DCASR, Boston headquarters, but there are two personnel management specialists located at each of the DCASD's in Hartford and Rochester, who advise on personnel matters, perform some recruitment, and are responsible for promotion and evaluation for clerical positions in these districts.

There are approximately 705 employees in the petitioned for unit which encompasses DCASR, Boston headquarters. The record indicates that the NAGE was granted exclusive recognition for this unit on September 1, 1967, and that it has negotiated several agreements with the Activity covering the unit employees. The record shows also that the current negotiated agreement between the parties has been in effect since December 3, 1970, and that the instant petition covering employees in the exclusively recognized unit was filed timely on September 21, 1972. There is no evidence that the NAGE has failed to represent the unit employees, is defunct, or has otherwise disclaimed an interest in representing the unit employees.

The evidence establishes that on May 27, 1971, NAGE Local R1-210, which, as noted above, is the exclusive representative of the petitioned for employees, was certified as the exclusive representative of all professional and nonprofessional employees of the Activity's Rochester DCASD. The record reveals that no negotiated agreement has been entered into covering the Rochester DCASD unit. As noted above, in the instant proceeding, the NAGE asserts that the appropriate unit should contain all of the nonprofessional employees of the Rochester DCASD, together with all of the nonprofessional employees in the petitioned for unit. 3/ In this regard, the NAGE contends essentially that the two separate units in Boston, Massachusetts, and Rochester, New York, for which it is the exclusive representative, through recognitions acquired in 1967 and 1971, have merged and that the negotiated agreement covering the DCASR, Boston headquarters employees has been extended by the parties to cover the employees in Rochester. In this connection, the NAGE contends that dues are withheld from employees in both units and it indicates that this arrangement is pursuant to its negotiated agreement covering the employees at DCASR, Boston headquarters. On the other hand, the Activity maintains that it withholds dues from the employees at the Rochester DCASD pursuant to an "extension" of a "prior" agreement that covered the Rochester employees under Executive Order 10988, and not pursuant to the negotiated agreement covering the DCASR, Boston headquarters employees. Other than the NAGE's contention, noted above, there is no evidence that the agreement covering the DCASR, Boston

3/ It should be noted that the unit the NAGE claims is appropriate in this matter would not include the professional employees in the currently recognized Rochester DCASD unit. There is no evidence that the NAGE has not represented these professional employees after it was granted recognition as the exclusive representative of the DCASD employees at Rochester. Nor is there any evidence that the Rochester DCASD unit is inappropriate.

headquarters employees has been applied specifically to the employees in the Rochester unit, or that the Activity considers such negotiated agreement to be applicable to employees in the exclusively recognized unit at Rochester.

Based on the foregoing, I find that the petitioned for unit, currently represented by the NAGE, is appropriate for the purpose of exclusive recognition. In this connection, the record reflects that such unit has not merged with any other exclusively recognized unit and, therefore, remains a separate and distinct bargaining unit. 4/ Thus, the record does not reflect that the negotiated agreement covering employees in the claimed unit has, in fact, been extended to the employees in the exclusively recognized unit at the DCASD, Rochester. I reject also the NAGE's contention that the negotiated agreement covering the Boston unit automatically was extended to the employees in the DCASD, Rochester unit, on the basis that the same NAGE local was chosen by employees in the two respective units. Further, I find that the record shows that the claimed unit is identical to the currently recognized DCASR, Boston headquarters unit; that such unit has a long established and continuing bargaining history; and that no other labor organization has petitioned for a more comprehensive unit. 5/ Under these circumstances, I find that employees in the claimed unit share a clear and identifiable community of interest and that the petitioned for unit, which has a long and established bargaining history, will promote effective dealings and efficiency of agency operations.

In reaching the decision herein, I reject the Activity's contention that the only appropriate unit is a single Regionwide unit and that, in the circumstances of this case, the existing exclusively recognized units located in the Region should be eliminated. Under the Activity's contention, current exclusive representatives in the recognized units within the Region could be challenged not only by timely filed petitions for their respective units, but also by a petition for a Regionwide unit, whenever and at whatever time such a petition would be filed. Should a Regionwide petitioner fail to be selected by the employees, under the Activity's rationale, employees who had been included previously in less comprehensive units would continue to be represented in such units by their bargaining representative. In my view, such a policy would not be consistent with the purposes and policies of the Order. Thus, it would impair the stability of labor-management relations

4/ As the Boston and Rochester units are still separate and distinct units, the petition in the instant case is not, in effect, seeking to "carve out" certain employees from a more comprehensive existing unit. Accordingly, the principles set forth in United States Naval Construction Battalion Center, A/SLMR No. 8, were not considered to be applicable to the instant case.

5/ Cf. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 181; National Center for Mental Health Services, Training and Research, A/SLMR No. 55.

because there would be no certainty as to the duration of any existing bargaining relationship as such relationship would be subject to termination at any time a more comprehensive unit was sought. When a labor organization has acquired recognition as the exclusive representative in an appropriate unit, I find that such unit should not be subject to constant potential challenge. Rather, a challenge should be permitted only at a well-defined time consistent with the Assistant Secretary's Regulations and established policies.

Under all of the circumstances, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Board employees of the Defense Contract Administration Services Region, Boston, with duty station at headquarters, DCASR, 666 Summer Street, Boston, Massachusetts, excluding professionals, employees engaged in Federal personnel work other than those in a purely clerical capacity, management officials, and supervisors and guards as defined in Executive Order 11491. 6/

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work that period because they were out ill, or on vacation or on furlough including those in the military services who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

6/ The parties stipulated that certain employees should be excluded from the unit because they exercised supervisory functions. Other employees were stipulated to be confidential employees and therefore excludable from the unit, and intermittent student trainees and cooperative (SIS) employees were stipulated to be excludable from the unit on the basis that they have no reasonable expectation of future employment. Further, the parties stipulated that part-time employees should be included in the unit because of their reasonable expectation of future employment. There is no evidence that the foregoing stipulations were improper.

Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, AFL-CIO, Local 1906; or by National Association of Government Employees, Local R1-210; or by neither.

May 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Dated, Washington, D.C.  
May 31, 1973



Paul J. Fasser, Jr. Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES POSTAL SERVICE,  
BERWYN POST OFFICE, ILLINOIS  
A/SLMR No. 272

This case involves an unfair labor practice complaint filed by an individual, Dennis L. Brodie (Complainant), against the Respondent Activity, alleging, among other things, that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491 by threatening to terminate the employment of the Complainant because of his activities as President of the local union that represented employees of the Respondent; and by discharging the Complainant on December 26, 1970 for such reason, although the discharge was purportedly for excessive tardiness in reporting for work.

The Administrative Law Judge concluded, contrary to the contentions of the Respondent, that the issue in the complaint was not subject to an established appeals procedure and that, therefore, Section 19(d) of Executive Order 11491, prior to its amendment, did not deprive the Assistant Secretary of jurisdiction to entertain the complaint. In this connection, he found that the subject matter of the complaint was not covered by the appeals procedure under the parties' collective-bargaining agreement, and furthermore, even if Respondent's regulations contemplated an appeals procedure which provided a remedy for the alleged discrimination, the Complainant was prevented from introducing evidence of alleged discrimination during the course of the hearing under the appeals procedure. Consequently, a remedy for the alleged violative conduct was not available under the established appeals procedure.

With respect to the merits, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (2) of the Order by discharging Complainant for discriminatory reasons, as the discharge was motivated, at least in part, by the Complainant's union activities. He recommended that the Respondent be required to offer the Complainant reinstatement to his former position together with appropriate backpay from the time of the discharge.

Contrary to the holding of the Administrative Law Judge, the Assistant Secretary concluded that under Section 19(d) of the Order, prior to its amendment, he did not have jurisdiction to decide the merits of the complaint. In this connection, the Assistant Secretary found that the issue in the complaint was, in fact, subject to the established appeals procedure under the parties' collective-bargaining agreement. He found further that under Section 19(d), prior to its amendment, when a complaint of an alleged violation of Section 19(a)(1), (2), or (4) was subject to an established appeals procedure that procedure was

prescribed as the "exclusive procedure for resolving the complaint." The Assistant Secretary noted in this regard that the Study Committee's Report and Recommendations (1969) and the Report and Recommendations of the Federal Labor Relations Council (1971) indicated that if there was an established appeals procedure available to the parties it was the "exclusive procedure" and was not under the control of the Assistant Secretary. Accordingly, the Assistant Secretary concluded he had no jurisdiction in this matter to examine whether the appeals system was applied properly to the Complainant.

Having found that the agency appeals procedure was available to the Complainant, and that under Section 19(d) he was without authority to review the application of such procedure as to the Complainant, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 272

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES POSTAL SERVICE,  
BERWYN POST OFFICE, ILLINOIS

Respondent

and

Case No. 50-5531(26)

Dennis J. Brodie

Complainant

DECISION AND ORDER

On January 3, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled proceeding finding that the United States Postal Service, Berwyn Post Office, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the Respondent's exceptions and brief, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations to the extent consistent herewith.

The complaint in the subject case alleged that the Respondent violated Sections 19(a)(1), (2) and (6) of Executive Order 11491 by threatening to terminate the employment of Dennis J. Brodie, herein called Complainant, because of his activities as President of the local union that represented the employees of the Respondent; by discharging

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1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings.

the Complainant on December 26, 1970, for discriminatory reasons, although such discharge was purported to be for excessive tardiness in reporting for work; and by refusing to confer with members of the local union concerning a charge of unfair labor practices allegedly committed by the Respondent. 2/

At the hearing and in its exceptions, the Respondent asserted the complaint herein should be dismissed in its entirety because the matter raised was subject to an established grievance or appeals procedure within the meaning of Section 19(d) of Executive Order 11491 and, thus, the Assistant Secretary was without jurisdiction to consider the complaint. 3/ Although the Administrative Law Judge agreed with the Respondent that the provisions of Section 19(d) of Executive Order 11491, prior to its amendment by Executive Order 11616, were in effect for the purposes of the instant case, he concluded "that the issue in the complaint in this case...was not subject to an established appeals procedure and that therefore Section 19(d) does not deprive the Assistant Secretary of jurisdiction to entertain the complaint." In this connection, the Administrative Law Judge found that the grievance and appeals procedure provided under the parties' collective-bargaining agreement, which had been utilized by the Complainant, did not cover the subject matter of the complaint, i.e., the allegation that the Complainant was discriminated against because of his union activities. Moreover, the Administrative Law Judge determined that even if the Respondent's regulations contemplated an appeals procedure which provided for a remedy for discrimination based on union activity, the Complainant was prevented from introducing evidence during the course of his hearing under the appeals procedure in support of such an allegation. Therefore, he concluded that a remedy for the alleged violative conduct herein was not available to the Complainant under the established appeals procedure.

Having found that the Assistant Secretary was not precluded by Section 19(d) of the Order from entertaining the complaint, the

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2/ As no evidence was introduced to support Complainant's allegation that the Respondent violated Section 19(a)(6) of the Order, the Administrative Law Judge's recommendation that this aspect of the complaint be dismissed for failure of proof, is hereby adopted.

3/ Section 19(d) of Executive Order 11491, prior to its amendment by Executive Order 11616, effective November 24, 1971, provided that: "When the issue in a complaint of an alleged violation of paragraph (a)(1),(2) or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary." All of the relevant events herein occurred, and the instant complaint was filed, prior to the effectuation of the amendments of Executive Order 11491.

Administrative Law Judge found further that the evidence established that the Respondent violated Sections 19(a)(1) and (2) of the Order by discharging the Complainant for discriminatory reasons. In concluding that the Respondent's discharge of the Complainant was, in part, motivated by the latter's union activities, the Administrative Law Judge noted that Complainant was the President of the local union, was vocal in its support, and had an acrimonious relationship with management because of his militant union stance. Further, he noted that the record reflected certain instances of union animus toward the Complainant on the part of management, and disparate treatment of the Complainant for his tardiness in reporting to work when compared to the discipline meted out to other employees. In this latter regard, the Administrative Law Judge found, based on a comparison of the Complainant's and other employees' tardiness records, that not only was the Complainant not the worst offender, but he was the only permanent employee who had been discharged for excessive tardiness, and that many of the employees used for comparison purposes received little or no discipline despite their excessive tardiness. The Administrative Law Judge concluded that such disparity of treatment was inexplicable other than on the grounds that management seized upon the admitted tardiness record of the Complainant, not only to set an example for other tardy employees, but also to rid itself of a staunch and troublesome union adherent. Under these circumstances, he recommended, in part, that the Respondent be ordered to offer reinstatement to the Complainant to his former position with backpay from the time of his discharge until reinstatement, minus any outside earnings during that period.

The Respondent contends that in reaching his decision the Administrative Law Judge used an unfair yardstick for comparison of tardiness records by comparing the record of the Complainant for only an eight month period in 1970 with the full twelve month record of other employees. It asserts that a comparison based only on an eight month period would show the Complainant to have the worst tardiness record among all of its employees, amply justifying his discharge.

As noted above, the Administrative Law Judge found that the Assistant Secretary had jurisdiction to decide the merits of the subject case and that Section 19(d) was not controlling. Under the particular circumstances of this case, I conclude that I must reject this finding. In my view, the record establishes that the issue in the instant complaint was, in fact, subject to an established appeals procedure under the parties' negotiated agreement and, accordingly, Section 19(d) controls the disposition of this case. 4/

In finding that the subject matter of the unfair labor practice complaint herein was not covered by the appeals procedure under the

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4/ My decision herein should not be construed to mean that I necessarily disagree with the findings and recommendations of the Administrative Law Judge with respect to the merits of the case as well as his proposed remedy.

parties' negotiated agreement; the Administrative Law Judge concluded that the applicable provision in such agreement, Section K of Article X 5/, reflected that only alleged discrimination "because of race, creed, color, national origin or sex" was subject to the appeals procedure and that, under all the circumstances, he had no basis for determining that an established appeals procedure covered the complaint. I find that the Administrative Law Judge's conclusion in this regard is based on too narrow an examination of the negotiated agreement and appropriate Civil Service Commission Regulations. Thus, Article X of the agreement does not clearly limit the matters subject to the appeals procedure to those set forth in Section K, but defines an adverse decision as, among other things, "---an action which results in a discharge from employment." Section K of Article X reflects merely that under appropriate Civil Service Regulations, the Postal Service was permitted to use its adverse action appeals procedure to process allegations of certain enumerated types of discrimination over which the Civil Service Commission has statutory jurisdiction. However, in my view, Section K does not clearly preclude the consideration, under the adverse action appeals procedure of Article X of the agreement, of other types of discrimination, such as that alleged in the complaint in this case. In other words, Section K does not necessarily limit the application of Article X, but merely clarifies how certain appeals shall be handled. Under these circumstances, I find the evidence to be insufficient to establish that the complaint in the subject case was not subject to an established grievance or appeals procedure.

It is clear that under Section 19(d), prior to its amendment, when a complaint of an alleged violation of Section 19(a)(1), (2), or (4) was subject to an established appeals procedure, that procedure was prescribed as the "exclusive procedure for resolving the complaint." In this connection, it should be noted that in the Report and Recommendations of the Federal Labor Relations Council (1971), the inadequacies of Section 19(d), as initially formulated, were recognized. Thus, the Council stated that Section 19(d) "inhibit[ed] the development of a single body of unfair labor practice precedents and a single, uniform procedure for processing and resolving unfair labor practice complaints under the Order..." The Council stated further that "[t]he decision as to whether an unfair labor practice has been committed should not be made under grievance and appeals systems which are not under the control of the Assistant Secretary...." and that to provide an opportunity to seek third-party adjudication the requirement should be eliminated which provides "that when the issue in certain unfair labor practice complaints is subject to a grievance procedure, that

5/ Section K reads: "When an employee alleges in his appeal that the proposed adverse action is based in whole or in part on discrimination because of race, creed, color, national origin or sex the claim of discrimination shall be adjudicated under the regulations of the Civil Service Commission and Departmental regulations. The claim of discrimination shall be investigated and an initial local level decision rendered prior to or concurrently with the processing of the other matters in the appeal."

-4-

procedure is the exclusive procedure for resolving the complaint." It was for the foregoing reasons, among others, that the Council recommended changes in Section 19(d) which were adopted by the President and which provided that "Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures." (emphasis added)

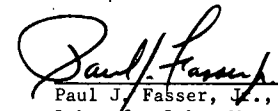
Nor do I find, in this regard, any basis in the Order or in the Study Committee's Report and Recommendations (1969) to conclude that the Assistant Secretary was intended under original Section 19(d) to review established grievance and appeals procedures to determine whether such procedures have been applied in a fair and regular manner or whether they have provided an adequate remedy. Indeed, the Report and Recommendations of the Federal Labor Relations Council in 1971, as set forth above, indicates that prior to the amendment of the Order, if there was an established procedure, it was the "exclusive procedure" available to the Complainant and was outside the control of the Assistant Secretary. Under these circumstances, I find, contrary to the Administrative Law Judge, that the Assistant Secretary has no jurisdiction in this matter to review the question whether the Respondent's appeals system was applied properly to the Complainant.

In summary, it is my view that, having found that the agency appeals procedure herein was available to the Complainant and that under Section 19(d) I am without authority to review the application of such procedure as to the Complainant, further proceedings on the instant complaint are unwarranted. Accordingly, I shall order that the complaint herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-5531(26) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, J., Assistant Secretary of  
Labor for Labor-Management Relations

-5-



UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-5531(26)

United States Postal Service,  
Berwyn Post Office, Illinois  
Respondent

and

Dennis J. Brodie  
Complainant

REPORT AND RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGE

Thomas A. Hett, Esq.  
Serpico, Stamos, Dvorak, Navigats & Hett  
Chicago, Illinois,  
For the Complainant

D. Richard Froelke, Esq.  
Richard M. Stanton, Esq.  
Assistant Regional Labor Counsel  
United States Postal Service  
For the Respondent

Before: Milton Kramer, Administrative Law Judge

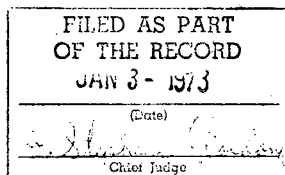


Table of Contents

	<u>Page</u>
I. Statement of the Case	1
II. The Contentions of the Parties	1
III. Pre-Hearing Proceedings Within the Department of Labor	2
A. The Prehearing Pleadings and Rulings	2
B. Discussion of Pre-Hearing Proceedings and Conclusions Concerning the Issues Raised Therein	6
1. General Observations	6
2. The Employer's Special Petition for Relief	6
3. Respondent's Motion to Dismiss; Jurisdiction to Entertain the Complaint	7
4. Respondent's Motion to Transfer Proceedings and Motion for Summary Judgment	10
IV. Facts	10
V. Discussion and Conclusions	15
A. Evidence on Which Findings Are Not Made	15
B. Discriminatory Treatment of Union Officials Compared with Others	15
C. Discharge for Mixed Motives, One of Which Is for Militant but Legitimate Union Activities, is Unlawful	17
VI. Recommendations	18
Appendix	
Attachment to Appendix	

Case No. 50-5531(26)

United States Postal Service,  
Berwyn Post Office, Illinois,  
Respondent

and

Dennis J. Brodie,  
Complainant

REPORT AND RECOMMENDATIONS

I. Statement of the Case

This case was initiated by a complaint filed June 25, 1971 by the Complainant under Executive Order 11491. It alleges that the Respondent violated Sections 19(a)(1), (2), and (6) of the Executive Order by (1) threatening to terminate the employment of Complainant because of his activities as President of the local of a union that represented employees of Respondent, by (2) discharging him December 26, 1972 for such reason although such discharge was purportedly for excessive tardiness in reporting for work, and by (3) refusing to confer with members of the local of the union concerning a charge of unfair labor practices by the Respondent.

The Area Administrator and the Regional Administrator made investigations of the complaint accompanied and followed by extensive prehearing proceedings detailed below. On May 4, 1972 the Regional Administrator issued a Notice of Hearing to be held June 20, 1972 in Chicago, Illinois. This Notice was followed by additional prehearing proceedings detailed below. Hearings were held on June 20 and 21, 1972 at which the parties were represented by counsel. Pursuant to extensions of time, briefs were filed in August, 1972. Pursuant to stipulation of the parties, substantial documentary evidence was received in evidence. Both parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs.

On the basis of the record, the demeanor of the witnesses and my determinations of their credibility, and the briefs, I make the Findings and Conclusions set forth below.

II. The Contentions of the Parties

The Complainant contends that his discharge purportedly for excessive tardiness was only a pretext and that his discharge was actually because of his activities as President of his local union. The Respondent

contends (1) that Complainant's discharge was actually because of his excessive tardiness and not because of his union activities, and (2) there was an internal appeal procedure that covered Complainant's discharge and his contention of the reason therefore, that such procedure was availed of by Complainant with decisions adverse to his contention, and that in such circumstances the provisions of Section 19(d) of the Executive Order deprive the Assistant Secretary of jurisdiction to entertain the complaint.

III. Pre-Hearing Proceedings Within the Department of Labor

A. The Prehearing Pleadings and Rulings

After the Regional Administrator announced his intention to issue a Notice of Hearing, a number of motions and related documents were filed and acted on as stated below.

1. A Motion to Stay Issuance of Notice of Hearing, dated and served October 12, 1971, addressed to the Regional Administrator by Respondent, moved that the issuance of the Notice of Hearing be stayed until the Assistant Secretary ruled on a Special Petition for Relief.

2. An Employer's Special Petition for Relief, dated and served October 12, 1971, was filed with the Assistant Secretary. It contended that the Regional and Area offices had deprived the Respondent of procedural due process in that (a) they had not required the Complainant to submit any evidence in support of the complaint; (b) during the investigation they repeatedly suggested compromise and suggested hearing dates while the Respondent was still attempting to submit evidence in support of its defenses; (c) they refused adequately to analyze the evidence submitted by the Respondent; (d) they prejudged the case by proposing to order a hearing although Complainant had had two hearings under the provisions of the collective bargaining agreement; (e) they refused to express any basis or theory of a violation of Section 19(a)(1) of the Executive Order; and (f) they refused, in violation of §203.8 of the Regulations, to disclose the "reasonable basis" for the complaint as required by §203.8.

It urged that the Respondent had already been seriously prejudiced by such lack of fundamental fairness, and requested the Assistant Secretary to order the Regional Office to transmit the file to him for him to determine whether there was a "reasonable basis" for the complaint and to act in accordance with §203.6 of the Regulations, or that the Assistant Secretary order the Regional Office to reconsider the matter and undertake a true investigation in accordance with §203.5 of the Regulations.

3. On January 13, 1972 the Assistant Secretary wrote to the Respondent's attorney pointing out that although the Regulations provided for review of a dismissal of a complaint by the Regional Administrator they did not provide for review of his determination that a Notice of Hearing should issue because a respondent would have

full opportunity to be heard on the issues involved after the Notice of Hearing. For that reason, and because there was no basis in the Regulations to grant the relief requested, both motions were denied.

4. A Motion to Dismiss, dated and served January 17, 1972, was filed by the Respondent with the Regional Administrator. It recited that the letter of proposed adverse action from Respondent to Complainant was dated September 3, 1970; that pursuant to the collective bargaining agreement the Complainant had requested a hearing under the agreement's appeals procedure; that the hearing was held November 6, 1970 before a Hearing Officer-Investigator; that on December 16, 1970, the Regional Director of the Post Office, on review of the report of the Hearing Officer, sustained the charge of excessive tardiness and ordered Complainant's removal from the service; that on December 26, 1970 Complainant was removed from the service; that on January 9, 1971 Complainant, pursuant to the collective bargaining agreement, appealed to the Board of Appeals and Review of the Post Office Department; that the Board on May 19, 1971 sustained the charge of repeated tardiness and sustained Complainant's removal; and that this exhausted the contractual appeals procedures.

The Respondent argued that the amendment by Executive Order 11616 to Section 19(d) of Executive Order 11491 limited Complainant to following the contractual grievance procedure or the complaint procedure, but did not permit both. It argued further that Complainant had exhausted his remedies under the contractual procedure, that he was therefore barred from thereafter pursuing the procedure under the Executive Order, and that the complaint should be dismissed.

5. On January 25, 1972, Complainant filed an Answer to Motion to Dismiss. It argued that the Motion to Dismiss did not meet Complainant's contention that his removal for excessive tardiness was a pretext and that he in fact was removed for union activities; that the Motion failed to meet Complainant's contention that the punishment for the pretextuous offense was excessive; that the Complainant was not seeking a multiplicity of forums because the adverse action hearing and appeals procedure were discriminatory and unfair because of bias; and that the complaint sets forth a distinct violation of Section 19(a)(1) of Executive Order 11491.

6. On January 24, 1972, before the Answer to Motion to Dismiss, the Regional Director wrote to Respondent's attorney. He pointed out that since the complaint antedated Executive Order 11616, the provisions of Executive Order 11491 before those amendments were applicable. He inquired whether the Regulations governing the appeal within the Post Office permitted litigation of the issue of whether the punishment was imposed for union activities and whether such contention was in fact considered.

7. On March 3, 1972 Respondent filed a Supplemental Memorandum in Support of Motion to Dismiss. It described some of the procedures pertaining to the hearing under the agreement. It argued that the hearing

had been admittedly fair procedurally, and that although there was an allegation of discrimination for union activity no such evidence was introduced. It argued that Complainant had filed an unfair labor practice complaint on January 25, 1971 but had withdrawn it February 19, 1971 because Section 19(d) precluded it. It argued that Complainant raised the issue of violation of the Executive Order before the Board of Appeals and Review and that the Board had found without merit the assertion that the rules were not impartially enforced. It argued also that the alleged violation was stated at the Post Office hearing, argued orally before the Board of Appeals and Review, and found to be without merit, and that Section 19(d) excludes further litigation. Alternatively, it argued that Complainant had not made a prima facie case providing a reasonable basis for the complaint.

8. On March 27, 1972 Complainant replied to Respondent's Supplemental Memorandum. It argued that the Supplemental Memorandum did not answer either of the questions posed by the Regional Director in his letter of January 24, 1972. It suggested that the absence of regulations permitting litigation in the internal appeal of the issue of whether the discharge was for union activities should be considered an admission that the regulations did not permit litigating such issue. It argued that the procedure on the appeal, if followed, might permit litigating such issue, but the Complainant was not permitted to examine the records of other employees to show discriminatory treatment on the ground it was not relevant. It said there was no indication the issue of discrimination for union activities could be or was litigated. It urged that the charge of discrimination for union activities alleged in the complaint was clear and specific and warranted a hearing.

9. On March 29, 1972 the Regional Administrator wrote to Respondent's attorney that after full consideration of the arguments presented he was of the opinion that there was a reasonable basis for the complaint and that a hearing was necessary and that he would issue the Notice of Hearing when satisfactory dates were determined.

10. On May 4, 1972 the Regional Administrator issued a Notice of Hearing to be held June 20, 1972.

11. The Respondent then filed with the Assistant Secretary a Motion to Transfer Proceedings to the Assistant Secretary and Motion for Summary Judgment. It and its accompanying Memorandum in Support were dated and served May 16, 1972.

The Motion stated that it was filed pursuant to §203.18 of the Regulations. It was based on the proposition that there was no dispute as to "these" jurisdictional facts and that Section 19(d) of the Executive Order barred further processing of the claim of violation of Sections 19(a)(1) and (2) of the Order because those claims were "subject to an established grievance or appeals" procedure and were in

fact argued at all stages of the grievance and appeal procedure. <sup>1/</sup> It asked also that the hearing scheduled for June 20, 1972 be postponed, and that oral argument be granted on the Motion to transfer and for summary judgment.

The Memorandum in Support discussed the agreements establishing the Board of Appeals and Review, the composition of the Board, and the method of selecting its members. It discussed also the procedures for adverse actions and appeals therefrom, including the Initial Procedure, the First Appellate Level, and the Second Appellate Level. It discussed also the facts theretofore developed in this case and their processing through those procedures. It then discussed the provisions of the Postal Manual and the collective bargaining agreement concerning procedures and the proscription of following more than one of alternative procedures. It argued that Complainant urged his unfair labor practice charge at every stage, and that Section 19(d) of the Order bars relitigating that issue in this proceeding. It argued also the refusal-to-bargain point mentioned above, and urges that its consideration here would be disruptive of proceedings pending before the National Labor Relations Board and might embarrass the Respondent.

12. On May 25, 1972 the Acting Regional Administrator denied the Motion. He said that while Respondent's arguments might be proven to have merit, the case had been noticed for hearing, the allegations of the complaint would best be decided after hearing, and as the Assistant Secretary had pointed out in his letter of January 13, 1972, there was no provision for review of a Regional Administrator's decision that a hearing is warranted. He denied also the request that the hearing be postponed. A copy of this decision was sent to the Assistant Secretary.

13. The Respondent, on May 26, 1972, asked for reconsideration of the Acting Regional Administrator's decision of May 25, 1972. It argued that its Motion had been filed with the Assistant Secretary and was pending before him and that there was nothing for the Regional Office to rule on at the time.

14. On June 6, 1972 the Regional Administrator sustained the decision of the Acting Regional Administrator. He said that the Regulations do not provide for pre-hearing motions to be made directly to the Assistant Secretary, and that the Assistant Secretary would not consider

<sup>1/</sup> It argued also that the allegation of a violation of Section 19 (a)(6), a refusal to negotiate, was moot because of the Postal Reorganization Act, a subsequent nationwide collective bargaining agreement, and the current jurisdiction of the National Labor Relations Board. This contention of mootness need not be decided because the contention is now moot; although a violation of Section 19(a)(6) was alleged in detail in the complaint, supporting evidence was not introduced. I will recommend that this part of the complaint be dismissed for failure of proof.

the subject motion. He said that the hearing would afford Respondent his day in court on the issues involved in the proceeding.

The foregoing contentions of Respondent were renewed at the hearing.

B. Discussion of Pre-Hearing Proceedings and Conclusions Concerning The Issues Raised Therein

1. General Observations

Only a small part of the issues raised in the foregoing pre-hearing proceedings are issues within my jurisdiction to make a determinative recommendation in this case. If an unfair labor practice complaint is filed and objection is made to the case being noticed for hearing, and the record before me sustains the complaint, my function is to recommend that the complaint be sustained regardless of whether the Regional Administrator was correct in all respects in noticing the case for hearing.

This is so because it is not my function to sit as a board of review of the actions of the Regional Administrator but to act on the basis of the record made before me. At times, of course, the record before me may present the same issues that were presented to the Regional Administrator. In such cases I conceive my function to be to recommend a proper resolution of the issues and not to recommend that the Regional Administrator acted correctly or incorrectly. It will sometimes happen, perhaps frequently, that my recommendation will call for the same disposition of a case that the Regional Administrator was asked and refused to make. This would not necessarily or even probably mean that there was error in noticing the case for hearing. It may well be that a case which might have been disposed of by the Regional Administrator is more properly disposed of after hearing.

With these views in mind, let us look again at the issues raised in the pre-hearing proceedings.

2. The Employer's Special Petition for Relief

The "Employer's Special Petition for Relief" was made to the Assistant Secretary (see paragraph III, 2, supra.) It made six contentions, none of which are before me for decision.

The first of those contentions was that the Area and Regional offices had not required the Complainant to submit evidence in support of the complaint. The extent of the duty, if any, of those offices to require such evidence is not a question for me to decide. I cannot properly look behind the Notice of Hearing for such purpose. The question before me is whether the evidence before me sustains the complaint. The second contention was that during the investigation they suggested compromise and hearing dates while the Respondent was attempting to submit evidence in support of its defenses. Here again, the extent of

the duty, if any, of the Area and Regional offices to give the Respondent adequate opportunity to submit to them evidence in support of its defenses is not a question for me. The question before me is weighing the evidence before me. And it certainly is not within my function, but is a matter of administrative discretion, to determine when is the appropriate time to start suggesting compromise or hearing dates. The third contention was that they refused adequately to analyze the Respondent's evidence. My function is to analyze the evidence before me, not to appraise others' analyses of the evidence before them (assuming they had a duty to make such analyses). The fourth contention was that they prejudged the case by proposing a hearing. Proposing a hearing is not a judgment determining the merits but only a judgment that a hearing might be justified, a judgment beyond my jurisdiction to review. The fifth contention was that they refused to express any theory of a violation of Section 19(a)(1) of the Executive Order. It is not within my jurisdiction to determine the extent of their duty, if any, to express to a respondent their theory of a violation, assuming they believed there was a violation. The sixth contention was that they refused, in violation of Section 203.8 of the Regulations, to disclose what they thought was the "reasonable basis" for the complaint. The extent of the duty, if any, to make such disclosure to Respondent is not a question before me.

3. Respondent's Motion to Dismiss; Jurisdiction to Entertain the Complaint

After the Assistant Secretary's denial of the Special Petition, the Respondent filed a Motion to Dismiss with the Regional Administrator (see paragraph III, 4, supra.) It recited facts allegedly constituting an exhaustion of the contractual appeals procedure and argued that Complainant was therefore barred by Section 19(d) of the Executive Order, as amended by E.O. 11616, from seeking relief under the complaint procedure under the Executive Order. This raises an issue of the jurisdiction of the Assistant Secretary to entertain the complaint, and therefore is an issue within my jurisdiction to make a recommendation to the Assistant Secretary. No action of the Regional Administrator can confer on the Assistant Secretary jurisdiction the Assistant Secretary does not otherwise have, except jurisdiction to consider his own jurisdiction.

The complaint was filed June 25, 1971. Executive Order 11616 is dated August 26, 1971 and became effective ninety days thereafter. Since the complaint antedated the effective date of the amendatory Order, the governing provisions of Section 19(d) are those in effect before that amendment.

The original provisions of Section 19(d) provided that when the issue in a complaint is an alleged violation of Section 19(a)(1), (2), or (4), and that issue is subject to an established grievance or appeal procedure, such procedure is the exclusive procedure for resolving the complaint; all other complaints of violations of Section 19 may be filed with the Assistant Secretary. It thus becomes necessary to determine whether the issue herein was subject to an established grievance or appeal procedure.

Upon receiving the Motion to Dismiss, the Regional Administrator wrote to Respondent's attorney on January 24, 1972 inquiring whether the regulations governing the appeal procedure within the Post Office permitted litigation of the issue whether the punishment of Brodie was imposed because of union activities and whether such issue was in fact considered.

On March 3, 1972 Respondent filed a Supplemental Memorandum in Support of Motion to Dismiss. It stated that the authority for the appeal within the Post Office was Article X of the collective bargaining agreement a copy of which was attached to the Supplemental Memorandum. It asserted that in Complainant's appeal he alleged discrimination because of his union activity but failed to introduce evidence at the hearing before the hearing officer to support such allegation; and that before the Board of Appeals and Review Complainant made the same allegation but that that Board "considered and found without merit Complainant's assertion that management had failed to enforce the rules fairly and impartially." This was not directly responsive to the Regional Administrator's inquiry.

The collective bargaining agreement referred to provides in Article X,K that if an appeal on a proposed adverse action alleges discrimination "because of race, creed, color, national origin or sex" such claim shall be investigated and adjudicated. 2/ No mention is made of a claim of discrimination because of union activities, nor is there anything else in the record to show that such issue was covered by the established appeal procedure. Thus I have no basis in the record for determining that an established appeals procedure covers the complaint. 3/

With respect to Respondent's assertion that although the appeal alleged discrimination because of union activity but that no evidence to support the claim was introduced, it was management that prevented Complainant from introducing before the hearing officer what would have been the best evidence to show or disprove discrimination. Complainant asked for an opportunity to examine the time cards of the other employees but was refused such opportunity on the ground that it was his tardiness, not the tardiness of other employees, that was the issue. At the appeal hearing Complainant asked the hearing officer for such opportunity, but he also denied the request on the ground that only Complainant's record would be considered, and not the record of others. 4/ (This ruling is corroborative of the conclusion that the appeal procedure did not cover an issue of discrimination because of union activity.) The hearing officer, of course, made no finding on this point of alleged discrimination for union activities.

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2/ Exh. S7, exh. A, p. 53.

3/ Cf. A/SLMR Rpt. No. 25.

4/ Tr. 40-41,103,317-18.

Respondent's assertion that the Board of Appeals and Review "considered and found without merit" Complainant's contentions of discrimination is simply an assertion of Respondent's counsel. The record shows that that Board sustained the decision below. Whatever findings that may have implicitly affirmed, it did not constitute a determination that there was no discrimination because of union activity, since there were no such findings below, and there was no record of discrimination or non-discrimination on that basis because both management and the hearing officer denied Complainant the opportunity to present such evidence because they considered it irrelevant to the appeal. The record shows affirmatively that the Board of Appeals and Review, in agreement with the decisions below, regarded the attempted evidence of the tardiness of others to show discrimination as irrelevant. 5/ This is hardly consonant with Respondent's assertion that the Board "considered and found without merit" Complainant's contention of discrimination, and I find that the Board did not make such finding; it found in that regard only that the contention of prejudice to Complainant because of denial of access to those time cards was without merit because those time cards were irrelevant.

Even if the Regulations of the Post Office did contemplate the appeals procedure providing a remedy for discrimination because of union activity, it cannot be controverted on the basis of the record that such remedy was denied to Complainant. Words on a piece of paper are not a remedy. The actual procedure on the appeal denied to Complainant the opportunity to substantiate his contention by the holding that the evidence would be irrelevant. When Section 19(d) provided that the appeals procedure should be exclusive of a remedy before the Assistant Secretary for a claimed unfair labor practice if such a remedy was available, it must have meant that it should be exclusive if it was actually available. If, as such regulations were applied to Complainant's case, such a remedy was not available, the issue was not subject to the appeals procedure in this case.

I conclude that the issue in the complaint in this case of a violation of Sections 19(a)(1) and (2) was not subject to an established appeals procedure and that therefore Section 19(d) does not deprive the Assistant Secretary of jurisdiction to entertain the complaint. This is not a finding that the appeals procedure was properly or improperly applied. It is simply a recognition that as applied, whether correctly or incorrectly, it did not make a remedy available to Complainant for his claimed violation of Sections 19(a)(1) and (2). 6/

5/ Exh. 51H, p.3.

6/ It is observed that in reaching this conclusion I have relied to some extent on material in the record that was not introduced into the record until the hearing before me. It may be observed that the Regional Administrator may have been well advised not to make a definitive jurisdictional ruling on the incomplete record before him.

4. Respondent's Motion to Transfer Proceedings and Motion for Summary Judgment

After the Regional Administrator issued the Notice of Hearing, the Respondent filed with the Assistant Secretary a Motion to Transfer Proceedings to the Assistant Secretary and Motion for Summary Judgment. (See paragraph III, 11, supra.)

Although ostensibly motions filed pursuant to Section 203.18 of the Regulations, they were not in fact such motions. That Section provides for motions before hearing to be made to the Regional Administrator, and this motion was made to the Assistant Secretary. The denial of the motions by the Regional Office (with a copy of the denial sent to the Assistant Secretary) was apparently in accord with the usual procedure.

These motions were for the most part a repetition of the jurisdictional arguments made earlier. They argued that the Complainant had argued his unfair labor practice charge at every stage of the proceedings within the Post Office and should not be permitted to argue it again before the Assistant Secretary. 7/ This has been discussed in full above. The charge may have been argued at every stage of the internal Post Office proceedings, but it was not considered or decided.

IV. Facts

Dennis J. Brodie, the Complainant in this case, was thirty years old at the time of the hearing. He began working in the Berwyn, Illinois Post Office as a temporary letter carrier on June 2, 1962 and became a permanent letter carrier on September 15, 1962. Berwyn has its own local Postmaster except that sometimes, during a vacancy in that office, the chief officer is an Officer-in-Charge. Brodie became a member of the National Association of Letter Carriers, Branch 1545, in October 1963. He became Treasurer of the Branch in January, 1964, Secretary in 1965, and President in 1968. As a member of the union's negotiating team while an officer, and especially while President, he was quite militant in his labor negotiations. After his discharge from the Post Office on December 24, 1970, he was employed by Branch 1545 as Advisor to the President of the Branch on May 26, 1971. On March 1, 1972 that Branch merged with four other locals to become Branch 825, with headquarters in LaGrange, Illinois. Since that date Complainant has been employed as business agent of Branch 825.

Allen Schwartz was employed by the Post Office as a management intern. He was employed in various capacities in various Post Office facilities around the country to learn the various aspects of the operation of the Post Office. After about a year and a half of such

7/ Apparently the Respondent was still reading Section 19(d) as it provided after its amendment by Executive Order 11616 instead of the provisions that governed before that amendment.

work, in January, 1970, while working as a clerk in Evanston, Illinois, Postmaster Beranek of the Berwyn Post Office died and Schwartz was appointed Officer-in-Charge of the Berwyn Post Office. As such, he was in charge of all aspects of the operation of that Post Office, including its labor relations. He had under him about 125 employees of whom almost two-thirds (seventy-nine) were letter carriers. He remained in that position about fourteen months, from January 1970 to March 1971.

Wayne J. Gardner, at the time of the hearing, had been Assistant Postmaster for one year. Prior thereto he had been Superintendent of Mails for over a year and before that had been Assistant Superintendent and foreman of mails. He was the representative of the Berwyn Post Office with whom the union conducted about ninety percent of its labor relations during the period here relevant. The conduct of labor relations between him and Brodie was such that it frequently ended, as several witnesses testified, in Gardner and Brodie "yelling" at each other. On a number of occasions he commented that his job would be easier but for Brodie and Schumacher.

James Toman was the employee or official of the Berwyn Post Office who, among other duties, kept the time records of the employees. Form 3971 was a tardiness card. Toman made such a card only if an employee reported seven or more minutes late. Specifically, such a card was not made at Berwyn if an employee was six minutes late although the Postal Manual called for such a card to be made if the employee was more than five minutes late. If an employee called in sick more than six minutes after his starting time, it was counted as a tardiness. In such instances the employee was charged both with sick leave and with being late.

Exhibits R2 through R12, and Exhibit C5, are compilations of the records of tardiness of Brodie and other employees during various periods. Toman participated in the preparation of these exhibits. In compiling those tabulations with respect to Brodie, he sometimes resorted to the original time cards for Brodie where he thought the tardiness cards for Brodie were incomplete; he used only the tardiness cards for the other employees, and did not resort to the time cards for the other employees. Thus, to the unknown extent to which tardiness cards were inadvertently not made, the record exaggerates Brodie's tardiness relative to the other employees. Specifically with respect to Exhibit C6 for identification, which was not received in evidence but concerning which there was testimony, this resort to the time cards as well as the tardiness cards for Brodie was done at the request of Counsel. Toman did not work on preparing the information for Brodie's notice of proposed adverse action, described below, but only on the exhibits for the hearing in this proceeding.

Carl A. Schumacher was employed at the Berwyn Post Office between May 1965 and November 1970. He became Vice-President of the local union in 1967 or 1968. He participated in the negotiation of labor relations in that capacity. He received several warnings concerning his tardiness,

one letter of reprimand, and one suspension of one week. His letter of reprimand and his suspension were while he was Vice-President of the Union local. He received a notice of proposed separation from the service for excessive tardiness at the same time as Brodie. After hearing he did not wait for action to be taken on his appeal but found other suitable employment and resigned.

Jack P. Halligan at the time of the hearing was the shop steward of Branch 825. Before the merger of the locals he had held several offices in Branch 1545. He became Vice-President when Schumacher resigned that office, and became President when Brodie was discharged. He testified, and I credit this testimony, that at a Christmas party in 1969 Gardner told him that it was only a matter of time before they would get Brodie and Halligan would move up in the union.

At the Berwyn Post Office there was no regularly established progression of degrees of discipline or reprimand for misconduct, consisting of tardiness or otherwise. It was contemplated or understood that in general there would first be counseling with the delinquent employee, followed by a warning, perhaps an additional letter of warning, then an official reprimand, then a suspension without pay, then perhaps a bigger suspension, and finally removal. No employee other than Brodie had actually been dismissed for excessive tardiness, but Schumacher (the Vice-President of the local) resigned when he found another suitable job and thought his dismissal was likely, and several probationary employees had been removed for that reason although the actual dismissal generally was ostensibly for more general reasons of unsuitability.

When Schwartz arrived on the job at Berwyn in January 1970 he found that tardiness in reporting for work was a problem, and he testified that the problem with respect to Brodie was "very serious". He also participated in labor negotiations. After he observed the operation of that facility for some time, he personally prepared letters of proposed adverse action against Brodie and Schumacher, the President and Vice-President of the union local, for excessive tardiness. These were prepared personally by Schwartz, without consultation with Toman, the timekeeper. Also, these were the only letters of proposed adverse action initiated by Schwartz during his tenure. Brodie's letter was dated September 3, 1970. The record does not show the date of Schumacher's letter but it was at about the same time. In preparing Brodie's letter Schwartz used both the tardiness cards and the time cards, although the tardiness cards showed tardiness only of seven minutes or more; thus the charge against Brodie included days on which he was six minutes late. (It will be remembered that the Postal Manual excused tardiness of five minutes or less.)

The letter to Brodie proposing adverse action (removal from the service) listed thirty-four days of tardiness during the first eight months of 1970, and recited that in the year before he had been suspended for five days for tardiness. Of the thirty-four instances, four were later determined not to be substantiated, twenty-one were for

thirteen minutes or less, and of those thirteen Brodie was late by six minutes on nine occasions. Omitting those that were not substantiated (four) and those of six minutes (nine) because comparisons with others would not show tardiness of six minutes, Brodie was late twenty-one times in eight months of which twelve were thirteen minutes or less. Counting the six-minute tardinesses, Brodie was late thirty-times in eight months of which twenty-one, or more than two-thirds, were thirteen minutes or less.

In considering degree of tardiness, Schwartz testified that he considered primarily the frequency of tardiness and only to a minor extent the amount of time by which an employee was tardy. I do not credit this testimony. Schwartz testified that although men who were tardy nevertheless worked eight hours and got their work done, they got it done late and the mail was delivered late and that was why tardiness was bad. I do not credit the testimony that it made little difference to the chief official of the Berwyn Post Office whether the mail was delivered ten minutes late or two hours late.

Schwartz and Gardner gave evidence of the tardiness of other employees with bad records, and explained the differences of treatment of them and Brodie. Chvatal, for example, was a long-time employee. But they did not make comparisons with certain others who also, so far as the record shows, were not the subjects of adverse action, certainly not dismissal from the service. In comparing Brodie's tardiness in 1970, the subject of the proposed adverse action letter of September 3, 1970, with the tardiness of others, it is noted that of the thirty times Brodie was late four instances of lateness were by more than fifty minutes, one by an hour and fifty-three minutes, one by an hour and thirty-five minutes, one by an hour and eighteen minutes, and one by an hour and six minutes. In all cases, both Brodie and the others, the letter carriers worked the full eight hours regardless of the time they reported; reporting late meant only that the mail would probably be delivered late.

M. J. Lugowski had been late eighteen times in 1969, fourteen of them in December. Of the eighteen, six were by more than fifty minutes; one was by three hours and two minutes, one by one hour and thirty-five minutes, one by one hour and eleven minutes, one by one hour and seven minutes, one by one hour and four minutes, and one by fifty-seven minutes. In the same year Thomas Martirano was late thirty-two times, once by four hours and thirty-seven minutes, once by two hours and fifteen minutes, twice by one hour and fifty-three minutes, once by one hour and thirty-eight minutes, once by one hour and nineteen minutes, once by one hour and sixteen minutes, once by one hour and three minutes, once by fifty-eight minutes, twice by fifty-seven minutes, and once by fifty-five minutes.

The same Lugowski in 1970 was late eighteen times, although there was a period of more than six months when he was not late at all (except perhaps for the tolerance of six minutes). But of the eighteen, twelve were for more than fifty minutes. One was for two hours and eight minutes, one for an hour and fifty-nine minutes, and ten were

between fifty-two minutes and an hour and nineteen minutes. No disciplinary action was taken against Lugowski in either of those years, not even a letter of warning.

J. Alsbury was late fourteen times in 1970, seven times by an hour or more. No discipline was imposed. Jack Halligan, a union officer, was delinquent six times, once when he did not show up at all. He received a letter of warning for the time he did not show up, and another warning for tardiness. But D. M. Halligan, who was delinquent thirteen times, including five days when he failed to report at all, received no discipline at all. W. H. Morris was late twelve times in the first four months of 1970, eight of them by more than fifty minutes (up to an hour and thirty-five minutes); no discipline was imposed.

R. J. Randazzo was tardy twenty-one times in the last four months of 1970, ten of them by more than fifty minutes. One was by an hour and fifty-one minutes, two by an hour and forty-four minutes, one by an hour and thirty-one minutes, one by an hour and twenty-one minutes, one by an hour and nineteen minutes, one by an hour and three minutes, and three by between fifty-nine minutes and fifty-four minutes. He was counseled near the beginning of that four month period and at the end of the period received a letter of warning for his last twelve tardinesses within a six-week period.

J. Ranisavljevic was delinquent twenty-four times in the last five months of 1970. On three days he did not report at all. On one day he was late three and a half hours and on another an hour and a half. On four other days he was late more than fifty minutes. He received a letter of warning for one of the days he did not report and another for some of his tardinesses. Nothing was done about the other two days he did not show up.

Schumacher, who was given a notice of proposed separation from the service along with Brodie, was late twenty-seven times in the first eight months of 1970. Only eight of them were by more than fifteen minutes, and of those eight only four were by more than twenty minutes.

Apart from Brodie and Schumacher, the President and Vice-President of the Union, one of whom received a suspension and was fired, and the other of whom was suspended and resigned while his appeal was pending, the most severe discipline imposed by the Berwyn Post Office for tardiness in the years 1969-71 was a letter of warning. 8/

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8/ Exh. R10; the record shows also that Mary Ann Sladek received three letters of warning in 1970-71 and an additional later letter which reprimanded her for tardiness.



V. Discussion and Conclusions

A. Evidence on Which Findings Are Not Made

There was evidence, consisting largely of the testimony of Halligan but also other evidence, concerning the intimidating effect resulting from Brodie's firing, and concerning the unfairness, for reasons unrelated to union animus, of the appellate proceedings within the Post Office concerning the notice which resulted in Brodie's firing. Some of the testimony was contradicted or explained, and some was not. I need make no findings concerning these lines of testimony because I (1) have no jurisdiction to review the appellate proceedings on discipline except insofar as it relates to union animus, and (2) it is the tendency of the Agency's discriminatory conduct to discourage membership in a union or to interfere with, restrain, or coerce an employee in the exercise of his rights under the Order, regardless of proof that the conduct had such effect, that would be violative of Sections 19(a)(1) and (2) and the policy of Section 1 of the Order. Environmental Protection Agency and AFGE, A/SLMR No. 136, (1972). "The gravamen of Section 19(a)(2) is that the discrimination would tend to discourage membership in a labor organization." See also Veterans Administration Hospital, Charleston, South Carolina and Service Employees International Union, A/SLMR No. 87, (1971). It is thus unnecessary to make findings concerning this contradictory and dubious evidence.

B. Discriminatory Treatment of Union Officials Compared with Others

Brodie's record of tardiness was such that, considered in isolation, it may well have afforded a basis for involuntary separation from the service. But it is not the function of this proceeding to determine whether there existed just cause for firing Brodie. It is our function to determine whether in fact he was discharged for union activities.

Determining whether an employee was fired for union activities, when ostensibly he was fired for other legitimate reasons, is inherently a difficult determination except in the most glaring cases. It requires ascertaining what is in another's mind. One cannot read another's mind (or perhaps one's own) as one may read the block letters of a nursery rhyme. Nor may a conclusion be reached by omphaloskepsis. It is by inference from an observation of other objective facts that one must determine the purpose of Brodie's discharge. Such an observation leads to the conclusion that Brodie's discharge was motivated at least in major part by his vigorous activities as a union official.

We start with the observation that Complainant, as President of the local union and even before that as an officer and member of the negotiating team, was an extremely militant and persistent labor negotiator. Next, he is the only permanent employee of the facility who has ever been discharged for excessive tardiness, although Schumacher, the Vice-President of the local, came close, resigning just before the decision on appeal came down. But most persuasively, a comparison of

his tardiness record and the discipline imposed on him for tardiness with the records and discipline of others who were not union officials makes his discharge for tardiness virtually inexplicable except on the basis of his objectionable vigor as a union official. In making this comparison, it must be borne in mind that six minutes tardiness is included in the figures for Brodie but not for the others, and that inadvertent errors in neglecting to make tardiness cards were corrected in respect to Brodie by resorting to the time cards in preparing the relevant exhibits, and that this resort to time cards in preparing the tabulations was not done with respect to other employees.

Brodie's record of tardiness in 1970, for which he was fired after earlier discipline, was thirty times in eight months, of which twenty-one, or more than two-thirds, were for thirteen minutes or less of which nine (30%) were by exactly six minutes, a degree of tardiness not counted as tardiness for the others. Only four were by more than fifty minutes, ranging from an hour and four minutes to an hour and fifty-three minutes.

Although Brodie's record for punctuality was bad, it was not worse than and even not as bad as some other employees who were not fired and against some of whom no discipline at all was imposed. M. J. Lugowski, for example, was late fourteen times in December 1969, six times by more than fifty minutes ranging from fifty-seven minutes to three hours and two minutes. In 1970 there was a stretch of more than six months when he was not tardy at all by more than six minutes, but still was late eighteen times, twelve of which were by more than fifty minutes ranging from fifty-two minutes to an hour and nineteen minutes. Yet no disciplinary action at all was taken against him. During the hearing I commented on this seeming disparate treatment of Brodie and Lugowski and suggested Respondent explain it in its brief. No attempt to do so was made.

Other disparities are described above under Facts. Thomas Martirano was late thirty-two times in 1969, twelve of them by more than fifty minutes ranging from fifty-five minutes to four hours and thirty-seven minutes. He received only a letter of warning for eleven of the tardinesses within a seven-week period. The disparate treatment in 1970 of two persons named Halligan strongly suggests union animus in imposing discipline during that year. Jack Halligan, a union officer, was delinquent six times during the year on one of which he was a "no show." He received a letter of warning for his "no show" and another for tardiness. But D. M. Halligan in the same period was delinquent thirteen times including five "no shows;" he received no discipline at all.

Brodie was late thirty times in the first eight months of 1970 four of which were by more than fifty minutes. R. J. Randazzo was late twenty-one times the last four months of that year, ten of them by more than fifty minutes. He was counseled and received a letter of warning. J. Ranisavljevic was delinquent twenty-four times in the last five months of that year three of which were "no shows" and six were tardinesses of from fifty-one minutes to three hours and thirty-one minutes. He received two letters of warning, one of them for one of the "no shows" and another

for some of the tardinesses, with no discipline at all for the other two "no shows."

The record does not show that any permanent employee other than Brodie and Schumacher had ever been fired by the Berwyn Post Office for tardiness, and Brodie testified that none had during his eight and a half years as an employee of that facility. This testimony was not controverted, and for that reason I find it accurate.

The adversely discriminatory treatment of union officials for tardiness appears to have taken place almost entirely while the chief executive officer at Berwyn was a management intern who is no longer there. He was disturbed because of the militant attitude in labor relations of Brodie and Schumacher. He was disturbed also by what appeared to be rampant tardiness at the facility. I conclude that he saw an opportunity to alleviate both problems with a single action. Brodie was among the worst of the tardy employees, and was the principal union negotiator. By firing him he would be rid of the most obstreperous union negotiator and would be notifying the other delinquent employees that repeated tardiness would not indefinitely result only in warnings or reprimands. But Brodie's record was not the worst. Thus I conclude that but for his union activities Brodie would not have been selected as an example to the others, although his record, considered in isolation, may have merited discharge. We cannot properly consider his record in isolation.

C. Discharge for Mixed Motives, One of Which is for Militant but Legitimate Union Activities, Is Unlawful

In the private sector it is thoroughly established, both by administrative decision and judicial opinion, that where a discharge or other discipline is ostensibly imposed for an untainted reason but in fact had a dual purpose, one legitimate and the other unlawful, the discipline cannot be sustained. 9/ N.L.R.B. v. West Side Carpet Cleaning Co., 329 F. 2d 758, 55 LRRM 2809, 2811 (6th Cir. 1964); N.L.R.B. v. Hotel Conquistador, 398 F. 2d 430, 68 LRRM 2726 (9th Cir. 1968); Wood Bros. v. N.L.R.B., \_\_\_\_\_ F. 2d \_\_\_\_\_, 80 LRRM 2646 (9th Cir. 1972). As the Sixth Circuit has said, to find discriminatory action unlawful:

"It is not necessary that anti-union motivation be the only reason for the discriminatory action complained of. It is sufficient if it is a substantial reason..." N.L.R.B. v. Electric Steam Radiator Corp., 321 F. 2d 733, 54 LRRM 2092, 2096 (6th Cir. 1963).

The Second Circuit has held:

"And even though the discharge may have been based on other reasons as well, if the employer was partly motivated by union activity, the discharges were violative of the Act."

9/ Of course, if an employee has a record justifying discipline and that record is used as a pretext for imposing discipline, the discipline will be set aside and rectified. N.L.R.B. v. Bean and Son, Inc., 450 F. 2d 93, 78 LRRM 2625 (5th Cir. 1971), cert. den. October 10, 1972

N.L.R.B. v. Great Eastern Corp., 309 F. 2d 352, 51 LRRM 2410, 2412 (2d Cir. 1962). The Tenth Circuit has used substantially the same language. Betts Baking Co. v. N.L.R.B., 380 F. 2d 199, 65 LRRM 2568, 2571, 2573 (10th Cir. 1967). The Fifth Circuit, by way of dictum, goes even farther:

"...an Employer may discharge for no cause, or an unfounded cause so long as it was not in the least part precipitated by anti-union discrimination." (Emphasis added)

General Tire v. N.L.R.B., 332 F. 2d 58, 56 LRRM 2183, 2184 (5th Cir. 1964).

This is a sound principal and should be applied in the Federal sector except perhaps for "the least part" language. At the least, it should be applied in this case. I have concluded above that while Brodie's discharge was motivated in part by his record of tardiness and a desire to remedy the general problem of tardiness in Berwyn, it would not have taken place "but for" his militant attitude on behalf of the union. One may disapprove or commend such an attitude, but such attitude is legitimate and imposing discipline for it is an infringement of the policy of the second sentence of Section 1 of the Executive Order and violative of Section 19(a)(1). Since it also has a tendency to discourage union membership, it is violative of Section 19(a)(2). 10/ I conclude that by discharging Complainant in the circumstances of this case, Respondent violated Sections 19(a)(1) and (2) of Executive Order 11491.

This does not mean that a union official is insulated from discipline for misconduct. It does mean that he may not be singled out, because of his union activities, as an example to others substantially equally delinquent or worse as an example of discipline that may be imposed for misconduct. It is to be hoped that upon his reinstatement Brodie will pay closer regard to punctuality. He should know that persistence in his habits of tardiness is not insulated from discipline by his union activities.

VI. Recommendations

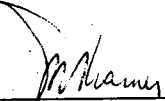
I recommend that the Respondent be held to have violated Sections 19(a)(1) and (2) of Executive Order 11491 in discharging Complainant. Insofar as the complaint alleges a violation of Section 19(a)(6), I recommend that it be dismissed for failure of proof. No evidence at all was introduced to support that allegation. I recommend that Respondent be ordered to reinstate Complainant to his former position

10/ Environmental Protection Agency and A.F.G.E., A/SLMR No. 136, (1972).

with back pay from the time of his discharge until reinstatement, minus his outside earnings during that period. A recommended Order is attached hereto.

I recommend that Respondent be ordered to post a notice of the rectification of its improper action and its intention to act properly in the future. Although it is virtually certain that word of Complainant's reinstatement and the reasons therefore will promptly be thoroughly disseminated, official notice of the remedial action as to Brodie should be given by the Respondent and an announcement made that union activity will not in the future be a basis for discipline. 11/

A form of Order is appended hereto as Appendix A and a form of Notice is attached thereto as Attachment A.

  
MILTON KRAMER  
Administrative Law Judge

January 3, 1973

Appendix A

ORDER

Pursuant to Section 6(b) of Executive Order 11491 and 29 C.F.R. §203.25(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Postal Service, Berwyn Post Office, Illinois, shall:

1. Offer to Dennis J. Brodie full and immediate restitution to the position from which it discharged him in December 1970, without prejudice to the seniority and other rights appertaining to such position.
2. Make Dennis J. Brodie whole for any loss of earnings he may have suffered as a result of said discharge from the time of said discharge to the date of his reinstatement or to the effective date of the offer of reinstatement, whichever is earlier.
3. Post for thirty days on its bulletin boards on which notices to employees are customarily posted a copy of the Notice attached hereto as Attachment A.
4. In accordance with 29 C. F. R. §203.26, report to the Assistant Secretary in writing within forty days from the date of receipt of this Order what steps have been taken to comply with this Order.

\_\_\_\_\_  
W. J. USERY  
Assistant Secretary for  
Labor-Management Relations

January , 1973

Attachment A

Notice to Employees of the Berwyn Post Office  
Posted by Order of  
Assistant Secretary for Labor-Management Relations  
Department of Labor

We will not discharge any employee solely or in part because of his activities as a representative of a labor organization or on behalf of a labor organization or its members or employees it represents.

We will offer to Dennis J. Brodie full and immediate reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights appertaining to his former position and will make him whole for any loss of earnings he may have suffered as a result of his discharge that was effective December 26, 1970.

\_\_\_\_\_  
Berwyn Post Office

by

\_\_\_\_\_  
Postmaster

11/ See Headquarters, U. S. Army Aviation Systems Command and A.F.G.E., A/SLMR No. 168, requiring, without discussion, the posting of a notice concerning a violation of Section 19(a)(6); petition for review of requirement of posting notice granted by F.L.R.C., Oct. 27, 1972.

May 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,  
EASTERN REGION,  
BOSTON ARTCC,  
NASHUA, NEW HAMPSHIRE  
A/SLMR No. 273

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This case involves an unfair labor practice complaint filed by Local R1-71, National Association of Government Employees, Ind. (Complainant) against the Federal Aviation Administration, Eastern Region, Boston ARTCC, Nashua, New Hampshire (Respondent), alleging that the Respondent violated Section 19(a)(1), (3), (5) and (6) of Executive Order 11491 by granting the use of its facilities for the purpose of an organizational campaign to the Professional Air Traffic Controllers Organization, Inc. (PATCO) when Complainant was, at all times, the exclusively recognized representative, and while a negotiated agreement between the parties was in effect.

The Complainant was granted exclusive recognition in 1965 and, thereafter, the parties executed a negotiated agreement on January 18, 1967. This agreement remained in effect unchanged until October 5, 1970, when the Complainant requested renegotiations with respect to certain items in the agreement. Thereafter, on October 8, 1970, a decertification petition was filed by a unit employee which later was withdrawn on March 30, 1971. After the withdrawal of the DR petition, the Respondent contacted the Complainant and made arrangements for negotiations to commence on May 13, 1971. However, the Complainant requested postponement of the negotiation "until a later date." On June 7, 1971, PATCO filed a petition for a nationwide unit of air traffic controllers which included certain employees of the unit represented by the Complainant. On January 12, 1972, the Respondent called a meeting of representatives of the Complainant and PATCO advising them that the Complainant's status as exclusive representative had been challenged, that the negotiated agreement between the Respondent and the Complainant was no longer in effect, and that it intended to grant PATCO the right to post campaign material on the Respondent's bulletin boards.

The Administrative Law Judge recommended dismissal of the complaint in its entirety. In reaching his conclusion that the alleged violations of Section 19(a)(1) and (3) were without foundation, the Administrative Law Judge found, among other things,

that a question of representation, raised by PATCO's petition, was pending when the Respondent granted PATCO access to its bulletin boards. Thus, he noted that PATCO was in "equivalent status" with the Complainant as a participant in the representation proceeding and that the grant of access by the Respondent was consistent with the Assistant Secretary's decisions in U. S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143, and Defense Supply Agency, Defense Contract Administration Services Region, SF, Burlingame, California, A/SLMR No. 247. With respect to the 19(a)(5) and (6) allegations, the Administrative Law Judge found that no persuasive evidence was established in their support.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
EASTERN REGION,  
BOSTON ARTCC,  
NASHUA, NEW HAMPSHIRE

Respondent

and

Case No. 31-5570 CA

LOCAL R1-71,  
NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, IND.

Complainant

DECISION AND ORDER

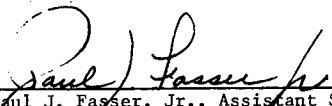
On April 13, 1973, Administrative Law Judge John H. Fenton issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge. <sup>1/</sup>

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-5570 CA be, and it hereby is, dismissed.

Dated, Washington, D.C.  
May 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

<sup>1/</sup> Cf. Department of the Army, U. S. Army Natick Laboratories, Natick, Massachusetts, A/SLMR No. 263.

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION  
EASTERN REGION  
BOSTON ARTCC  
NASHUA, NEW HAMPSHIRE

Respondent

and

CASE NO. 31-5570 CA

LOCAL R1-71  
NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, IND.

Complainant

and

PROFESSIONAL AIR TRAFFIC CONTROLLORS  
ORGANIZATION INC.  
NATIONAL MARINE ENGINEERS  
BENEFICIAL ASSOCIATION, AFL-CIO  
Party

Joseph W. Noonan, Esq.

Federal Aviation Administration  
800 Independence Avenue  
Washington, D. C., for the Respondent

Roger P. Kaplan, Esq.

National Association of Government  
Employees, Suite 512  
1341 G Street N. W.  
Washington, D. C. 20005, for the Complainant

A. Ernest Van Tassell, Jr.

Professional Air Traffic Controllers  
Organization Inc., P. O. Box 321  
Merrimack, New Hampshire 03054, for the Party

Before: JOHN H. FENTON, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arose under Executive Order 11491 pursuant to a Notice of Hearing issued by the Regional Administrator of the U. S. Department of Labor, Labor-Management Services Administration, New York Region.

Local R1-71, National Association of Government Employees filed a complaint on February 16, 1972, against the Boston Air Route Control Center, FAA. In essence, NAGE charged the Center with violating Section 19(a)(1), (3), (5) and (6), commencing on January 12, 1972, 1/ by granting the use of Agency facilities for purposes of an organizational campaign to Professional Air Traffic Controllers Organization, Inc. The nub of this complaint is that NAGE was at all times the exclusively recognized representative and hence PATCO did not enjoy the "equivalent status" which would entitle the Center to make its facilities available on an equal basis. It was also alleged that the accord of such access to PATCO constituted a refusal to recognize NAGE in violation of 19(a)(5), a refusal to consult in violation of 19(a)(6), and interference with the rights of employees in violation of 19(a)(1).

A hearing was held in Nashua, New Hampshire, on November 9, 1972. Respondent and Complainant were represented by counsel, and PATCO was represented by an officer of that union. All parties had an opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Both Complainant and Respondent filed briefs which I have considered.

Upon the entire record in this case, including my observation of the witnesses, I make the following findings, conclusions and recommendations.

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1/ Date recited in charge corrected by stipulation at hearing.

FINDINGS OF FACT

On January 3, 1967, a contract between NAGE and the Center was approved by FAA. By the terms of Article XVIII, Section a, the agreement became effective on January 4, although the actual date of execution by local officials of the parties postdated approval by the Agency head, taking place on January 18.

On October 5, 1970, NAGE Local R1-71 President, Mr. Alfred G. DePaolo, filed timely notice of desire to renegotiate (FAA Ex. #1). On October 22, 1970, the Boston Area Administrator of LMSA informed the Center that a DR petition had been filed on behalf of certain employees 2/ seeking an election to determine whether NAGE represented a majority of the unit employees (FAA Ex. #6). NAGE intervened on October 26, 1970. Negotiations were then postponed pending resolution of the question of representation presented by the petition. The Boston Area Administrator's office allegedly advised the Chief of the Center not to negotiate until that question was resolved.

On February 4, 1971, the NAGE and the Center signed a Memorandum of Understanding, (FAA Ex. #3), which addressed itself to one of the three matters with respect to which NAGE had requested renegotiation of the contract - the summer leave program, jury duty, and grievance procedures. (FAA Ex. #1) That Memorandum revised the summer leave program, particularly to provide where operationally feasible for two weeks of leave rather than one during the summer months. Under Article 8, Section g. of the contract (Complainant's Ex. #1), requests for leave had to be submitted by January 1, and the vacation schedule posted by February 1, because of the operational necessity of 7 days per week, 24 hours per day monitoring of air traffic in and out of Boston. The Memorandum of Understanding specifically recited that "insofar as renegotiation of the referenced Agreement has been deferred and due to the request of the majority members of Local R1-71, we agree that until such time as the following can be incorporated into referenced Agreement, summer annual leave policy for

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2/ Case No. 31-3389 E.O., filed by one Frances Perrotta.

calendar 1971 shall be approved on this revised basis." Mr. Clarence Kynock, Chief of the Center, signed for FAA. There exists on the document no provision for approval by higher FAA authority, as was the case with the contract.

On March 30, 1971, the New York LMSA Regional Administrator informed the parties that permission had been granted petitioner to withdraw the petition in Case No. 31-3389 E.O. Acting upon the provisions of Section 202.3(d) of the Rules and Regulations, which afford an incumbent union ninety days from the date of LMSA approval of such a withdrawal request in which to renegotiate an agreement free from rival claim, FAA contacted NAGE on April 15, 1971, and made arrangements to commence negotiations. Confirmation of these arrangements to begin negotiations on May 13 is contained in a letter from FAA's Carl Amelio to NAGE President Alfred DePaolo (FAA Ex. #8)

On May 12 by memo from Mr. DePaolo to Mr. Kynock, Boston Center Chief, FAA was informed that the NAGE Boston office had informed Mr. DePaolo that "negotiations that were to be held on May 13 and 14, have been temporarily postponed until a later date." (FAA Ex. #2) No further arrangements for negotiations were made prior to the expiration of the ninety-day period, on or about June 28, 1971. Meanwhile, on June 7 PATCO filed a petition (Case No. 22-2603), seeking to represent air traffic controllers in a nationwide unit encompassing the Boston Center. NAGE and other organizations intervened and the case went to hearing. On July 20, 1972, the Assistant Secretary issued his decision, finding a nationwide unit of controllers appropriate and directing an election. (Federal Aviation Administration, Department of Transportation, A/SLMR No. 173) However, for reasons not relevant here he excluded the Boston Center controllers from that unit finding. In doing so he first concluded that the collective bargaining agreement was no bar because NAGE had requested renegotiation on October 5, 1970, and the Center had responded by agreeing to negotiate and scheduling a meeting for May 13, 1971. Notwithstanding that no negotiations in fact took place, he reasoned that the parties agreement to renegotiate operated to terminate the

- 4 -

the contract and thus to remove it as a bar prior to the filing of PATCO's petition.

Meanwhile, back at the Center, PATCO had requested and was granted a measure of access for organizing purposes. While there is a great deal of confusion and disagreement regarding the facts as recalled by the participants, I think the following is clear. On or about January 12, 1972, in response to a request from PATCO, Center Chief Donald L. Turner called a meeting of NAGE and PATCO representatives. He stated that NAGE's status as exclusive representative had been challenged by PATCO's petition, that the contract with NAGE was no longer in effect, and that he intended to grant PATCO's request for the right to post campaign materials on the bulletin boards. PATCO was thereupon given the right, already enjoyed by NAGE, to submit materials for posting on the bulletin boards. Thus, the two unions shared such space. Union witnesses testified with some uncertainty that this privilege was extended to PATCO for a number of weeks before Center officials acknowledged their error and withdrew permission. FAA officials, on the other hand, testified that such permission was withdrawn upon issuance of A/SLMR No. 173, in which the Boston Center was excluded from the nationwide unit and hence the election. Without respect to consideration of demeanor, I credit the Center's explanation because it is consonant with the sequence of events. <sup>3/</sup> In any event, it was this grant of access for organizational purposes which precipitated filing of the complaint approximately one month later

#### Issue

Whether the Center violated Section 19 of the Order by allowing PATCO, a rival union, to post organizing literature on agency bulletin boards at a time when NAGE was entitled to exclusive recognition, and/or was party to a valid and subsisting contract with the Center.

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<sup>3/</sup> Union witnesses also asserted that Center officials during discussions about the grant of access to PATCO, had withdrawn recognition. I think it clear that the Center only stated that the contract was no longer in effect and that it neither stated, nor conducted itself in a manner suggesting, that it did not recognize NAGE as the exclusive representative.

- 5 -

### Contentions

NAGE asserts first that it is still party to a valid contract. Thus, it argues that the Memorandum of Understanding signed on February 4, 1971, fulfilled its desire to renegotiate the contract, and that it never thereafter requested renegotiation. As a second ground for asserting a subsisting agreement, it contends that its October 5, 1970 request to renegotiate was untimely because made more than 90 days before January 18, the date the contract was signed (as opposed to January 4, the date recited as its effective date). As a third ground, it contends that even if a timely request occurred, thus forestalling automatic renewal of the contract, withdrawal of the decertification petition on March 30, 1971, operated under Section 202.3(d) of the Assistant Secretary's Rules and Regulations to extend the contract until June 30, thus erecting a contract bar to the PATCO petition filed on June 7.

Apart from these considerations of contract bar, NAGE argues more fundamentally that its status as exclusive bargaining representative precluded the Center from granting organizing rights on the premises to PATCO, because the two unions did not enjoy the equivalent status which is under Section 19(a) (3) of the Order, a prerequisite to the furnishing of services and facilities on an impartial basis. It asserts that it was premature for the Center to grant such privileges before the Assistant Secretary issued A/SLMR No. 173, since the two unions could enjoy equivalent status only if both were placed on the ballot (U. S. Department of Interior, Geological Survey Center, Menlo Park, California, A/SLMR No. 143).

The Center asserts that the various arguments bottomed on contract which NAGE advances have been foreclosed by the Assistant Secretary's decision in the related representation case that no contract existed to bar the PATCO petition. It contends that all the evidence bearing on contract bar in the instant proceeding was either presented or could have been presented to the Assistant Secretary in the representation case, and that A/SLMR No. 173 is therefore res judicata. With respect to the question whether NAGE's status as exclusive representative rendered the competing unions

nonequivalents so as to preclude the furnishing of services to PATCO, the Center argues that equivalent status becomes operative once a petition is filed which raises a valid question concerning representation. Thus, it asserts that once the petition was filed, and NAGE intervened, the Center was "obligated to observe a general policy of equal treatment of the organizations that now had equivalent status before the Assistant Secretary in the matter of the representation petition."

### Decision

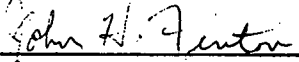
No case was cited to me, nor do I know of one, in which the Assistant Secretary has spoken to the issue whether he will apply the doctrine of res judicata to foreclose relitigation in an unfair labor practice case of issues he has already decided in a representation case. For purposes of this decision I think it suffices to say that he addressed himself, in A/SLMR No. 173, to the question whether the collective bargaining agreement was in effect on June 7, 1971, so as to bar the PATCO petition filed on that date, and he found it was not. There has been no showing that any evidence in this record was unavailable while the representation proceeding was pending before the Assistant Secretary. In such circumstances I regard his holding as binding on me.

On the issue of "equivalent status," I am again unaware of any precedent squarely in point. In Menlo Park, supra, the Assistant Secretary set aside an election because the Agency permitted a labor organization to conduct a "vote no" campaign on the premises where that organization had not intervened in the representation proceeding and therefore was not on the ballot. In doing so he held that where the non-intervening union "although notified of such petition, chose not to intervene in the proceedings, these two organizations could not be considered to have equivalent status." In DSA Defense Contract Administration Services, Administrative Region S. F., Burlingame, California, A/SLMR No. 247, the Assistant Secretary held that the Menlo Park principle applied with equal force in unfair labor practice proceedings, and that it applies even in a case which has



Recommendation

In view of the findings and recommendations made above, I recommend that the Assistant Secretary dismiss the complaint.

  
\_\_\_\_\_  
John H. Fenton  
Administrative Law Judge

DATED: April 13, 1973

not reached the "election phase." Thus, it is clear that an Agency violates Section 19(a)(1) and (3) of the Order if, at a time when a question of representation is pending, it grants a non-intervening union permission to use its facilities for campaign purposes, and it does not matter whether electioneering is permitted after the election is directed, or membership solicitation is permitted before direction of the election, or dismissal of the petition. Here PATCO was the petitioner, and the question of representation raised by its petition was pending when it was granted access to the bulletin board. It thus enjoyed equivalent status, as a participant in the representation proceeding, with NAGE; and the Center's grant of equal access was entirely consonant with my reading of Menlo Park, and Burlingame. The only distinguishing feature in the instant case is that NAGE at all times enjoyed status as the recognized exclusive bargaining representative. While it might be argued that in such circumstances it is unlawful to extend campaign privileges to the outside union unless and until an election is directed, i.e., that the exclusive representative should be protected from premature and perhaps pointless harassment, I find in the Order and in the Assistant Secretary's decisions no indication that such is the case. The only restraint I perceive is that where several unions are on equal footing as participants in a representation proceeding, any services or facilities furnished them in connection with that proceeding must be made available on an impartial basis. Thus, I do not view the timing of the access granted here to be significant. I conclude that the complaint allegations of Section 19(a)(1) and (3) violations are without foundation and I recommend that they be dismissed. With respect to the Section 19(a)(5) and (6) allegations, I find no persuasive evidence that the Center ever withdrew recognition from NAGE or ever refused to consult, confer or negotiate with that labor organization, and I recommend that those allegations be dismissed.

June 1, 1973

A/SLMR No. 274

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE INTERIOR  
U.S. GEOLOGICAL SURVEY, CENTRAL REGION,  
PUBLICATIONS DIVISION

DEPARTMENT OF THE INTERIOR  
U.S. GEOLOGICAL SURVEY, CENTRAL REGION,  
PUBLICATIONS DIVISION  
A/SLMR No. 274

Activity

and

Case No. 61-1968(RO)

This case involves a representation petition filed by the National Federation of Federal Employees, Local 322 (NFFE), for a unit of all employees of the Publications Division of the U.S. Geological Survey (Survey), headquartered in Denver, Colorado. The Activity contended that the only appropriate unit would include all employees of the Central Region serviced by the Regional Personnel Office.

NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, LOCAL 322

Petitioner

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 3375, AFL-CIO

Intervenor

Each of the seven divisions of the Survey maintains operations in the Central Region. There is no director with overall line authority over the employees of the Region, and the four field offices of the Publications Division located in the Central Region report separately to four branches located at the Bureau level. On the other hand, the other divisions in the Central Region have a single chief at the regional level. Responsibility for most personnel matters in eleven states of the Region has been delegated to the Regional Personnel Officer in Denver.

DECISION AND ORDER

In all the circumstances, the Assistant Secretary concluded that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In reaching this determination, the Assistant Secretary noted that the employees of the Publications Division in the Central Region are in four separate field offices reporting independently to the branches of the Publications Division at the National Office; that the employees of the Publications Division in the Central Region work closely with other employees of the Survey, many of whom work at the same location; that the mission of the employees of the Publications Division is one of service to the other divisions in the Central Region which requires a close relationship with other divisions; that similar job classifications exist throughout the Central Region among Survey employees, including those of the four branches of the Publications Division; that there have been employee transfers between the Publications Division and the other divisions of the Survey in the Central Region; and that responsibility for personnel matters has been centralized in the Regional Personnel Officer for the Central Region. Under these circumstances, the Assistant Secretary concluded that the employees in the Publications Division did not share a clear and identifiable community of interest separate and distinct from certain other Survey employees, and that the establishment of the petitioned for unit would not promote effective dealings and efficiency of agency operations.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Lyle F. Meyer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, 1/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The NFFE seeks an election in a unit of all nonsupervisory employees of the Publications Division of the Central Region, U.S. Geological Survey, with headquarters at Denver, Colorado, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary employees with an expectation of employment for a period of 90 days or less, guards and supervisors as defined in Executive Order 11491, as amended. The

1/ The Petitioner, National Federation of Federal Employees, Local 322, herein called NFFE, filed an untimely brief which has not been considered.

Accordingly, he ordered that the petition be dismissed.

Activity contends that the claimed unit is inappropriate and asserts that the only appropriate unit would include all the U.S. Geological Survey employees of the Central Region serviced by the Regional Personnel Office. The Intervenor, American Federation of Government Employees, Local 3375, AFL-CIO, herein called AFGE, is in essential agreement with the NFFE's position.

The U.S. Geological Survey, herein called the Survey, is one of seven major bureaus of the Department of the Interior. It was established to classify public lands and to examine the geological structure, mineral resources, and products of the lands in the national domain. The Publications Division is one of seven divisions of the Survey, 2/ and its general functions include editing scientific and technical manuscripts; preparing technical illustrations and maps; reproducing topographic, geologic, and other maps; preparing visual aids; storing and distributing maps for the public and Government agencies; and furnishing advice and planning assistance to the Director and the operating divisions of the Survey with respect to publications matters. In the Publications Division, at the Bureau level, are the following four functional branches: the Branch of Texts, the Branch of Technical Illustrations, the Branch of Map Reproductions, and the Branch of Distribution. Each of the four functional branches of the Publications Division is represented by a field office located at the Denver headquarters of the Central Region of the Survey. 3/ Each field office of the Publications Division is headed by a section chief who is responsible directly to his respective branch chief in Washington, D.C. 4/ The work of the Publications Division at the Regional level is coordinated through one of the section chiefs of the Publications Division who serves, on a rotating basis, on the Central Region Survey Committee. The Committee is composed of a representative of each divisional operation in the Central Region and is chaired by the Assistant Director of the Survey for the Central Region. 5/

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2/ The record reveals that the other six divisions of the Survey are: the Geologic Division, the Conservation Division, the Water Resources Division, the Topographic Division, the Computer Center Division, and the Administrative Division.

3/ The record reflects that in addition to the Central Region of the Survey, which is headquartered in Denver, Colorado, there are two other geographic regions of the Survey; the Western Region and the Eastern Region, headquartered in Menlo Park, California, and Reston, Virginia, respectively.

4/ All of the other Divisions of the Survey have operations in the Central Region and are headed by a single chief, except the Topographic Division which has a Regional Coordinator.

5/ The record reveals that the Assistant Director of the Central Region does not have line authority over the four branches of the Publications Division or over employees in other divisions located in the Central Region and serves only in a staff capacity for the Director of the Survey. It was noted that there is no director with overall line authority over the Region.

The record reveals that over 1300 of the 3400 Survey employees in the fifteen states comprising the Central Region are located in Denver and that many of these 1300 employees work in the same building. In this regard, all of the 107 employees of the Publications Division in the Central Region are located in the Denver Federal Center, except for eleven employees who work out of three Public Information Offices, one of which is located elsewhere in Denver. The other two Public Information Offices are located in Salt Lake City, Utah and Dallas, Texas. 6/

The evidence establishes that the mission of the branches of the Publications Division in the Central Region is to provide certain services for other divisions in the Region. In connection with the performance of their job functions, Publications Division employees work closely with employees of the other six divisions in the Region. Thus, the record shows that the technical editors of the other divisions and Publications Division technical editors of the Branch of Technical Illustrations and the Branch of Texts work together in putting various manuscripts and illustrations into final form for publication. Further, the record reveals that Publications Division cartographers, who prepare maps for publication, often communicate with employees of other divisions which may have prepared the original rough version of the map, and together they attempt to resolve any problems that may have arisen.

The majority of job classifications of the employees in the petitioned for unit also are found in the other six divisions of the Central Region. Thus, cartographers (or map makers) and cartographic technicians are found in all but two of the divisions of the Region and they represent a large proportion of the work force of both the Topographical Division and the petitioned for employees of the Publications Division. Moreover, the record reveals that cartographers in the Topographical Division do much the same work as those in the Publications Division. 7/ The record reflects also that in addition to cartographers, photographers and illustrators are found in several divisions in the Central Region including the Publications Division, and that employees with backgrounds in geology and physical science, including the technical editors in the Publications Division, are found throughout the Central Region. In this regard, during the past two years at least seven transfers, involving employees in similar job functions, have occurred between the Publications Division and the other divisions in the Central Region.

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6/ The record reveals that these eleven employees receive their supervision from the Chief of the Branch of Distribution of the Publications Division, in Washington, D.C., and not from any regional section chief.

7/ The record reveals that on occasion the Topographical Division performs cartographic work, on a consignment basis, for the Publications Division.

June 15, 1973

The record reflects that the basic responsibility for most personnel matters, involving employees in eleven states of the Central Region, has been delegated from the National Office of the Survey to the Regional Personnel Officer in Denver. Thus, the Regional Personnel Officer has final responsibility for matters such as appointments to all positions in GS-12 or below and for adverse actions, disciplinary actions and promotions. 8/ Moreover, the Regional Personnel Officer has been delegated authority to act as the chief negotiator in the negotiation of any collective-bargaining agreements covering employees within his jurisdiction, and to administer any such agreements.


Based on the foregoing, I find that the unit sought by the NFFE is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. In this regard, it was noted particularly that the employees of the Publications Division in the Central Region are in four separate field offices reporting independently to the branches of the Publications Division at the National Office; that the employees of the Publications Division in the Central Region work closely with other employees of the Survey, many of whom work at the same location; that the mission of employees of the Publications Division is one of service to the other divisions in the Central Region which requires a close working relationship with other divisions of the Central Region; that similar job classifications exist throughout the Central Region among Survey employees, including those in the four branches of the Publications Division; that there have been employee transfers between the Publications Division and the other divisions of the Survey; and that responsibility for personnel policies and procedures for most Central Region employees has been centralized in the Regional Personnel Officer.

Under all of these circumstances, I find that the employees of the Publications Division do not share a clear and identifiable community of interest separate and distinct from certain other Survey employees, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NFFE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 61-1968(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 1, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

8/ Formal grievances are handled at the Bureau level of the Survey.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

LOCAL 1858, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES,  
(REDSTONE ARSENAL, ALABAMA)  
A/SLMR No. 275

This case involved an unfair labor practice complaint filed against Local 1858, American Federation of Government Employees (Respondent), alleging, in essence, that the latter violated Section 19(b)(1) of the Order by interfering with and restraining the Complainant (an individual) in the exercise of his rights under Section 1(a) of the Order; specifically his right to refrain from joining or assisting the Respondent.

Prior to March 17, 1972, the Complainant had been a member of the Respondent. Upon being advised of his removal as special assistant to the Respondent's President and his appointment as shop steward, the Complainant wrote the Activity (the Redstone Arsenal located in Alabama), with a copy to Respondent's President, advising the Activity that lacking any faith or confidence in the leadership of the Respondent and its National Office, he was declining the appointment as shop steward. Subsequent to this, on March 17, 1972, the Complainant submitted his written resignation from membership in the Respondent. (Respondent's constitution and by-laws neither defined nor limited the circumstances under which a member can resign.) Thereafter, the Respondent refused to accept the resignation and filed charges against the Complainant alleging that his letter to the Activity attacked the integrity and ability of Respondent's leadership and violated its constitution. The Complainant eventually was tried in absentia and expelled.

In agreement with the Administrative Law Judge, the Assistant Secretary found that in the circumstances of this case the Complainant had a right under the Respondent's constitution and by-laws to resign from membership at any time, and that the Respondent's refusal to accept the Complainant's resignation from membership on March 17, 1972, interfered with Complainant's rights under Section 1(a) of the Order to join and assist a labor organization or to refrain from any such activity in violation of Section 19(b)(1) of the Order.

Under the circumstances of the case, the Administrative Law Judge ordered the Respondent to rescind its expulsion action. The Assistant Secretary disagreed with the Administrative Law Judge in this regard.

He noted that the termination of membership in a labor organization does not extinguish the labor organization's right to enforce discipline against a former member based on conduct occurring prior to the termination of membership. However, under the circumstances of this case, because the propriety of the discipline was not raised in the complaint, the Assistant Secretary did not deem it appropriate to consider whether the Respondent's expulsion of the Complainant was permissible under the Order and, if so, whether such discipline was reasonable.

A/SLMR No. 275

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LOCAL 1858, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES,  
(REDSTONE ARSENAL, ALABAMA)

Respondent

and

Case No. 40-4250(CO)

ROBERT L. MURPHY,

Complainant

DECISION AND ORDER

On January 8, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled proceeding, finding that Local 1858, American Federation of Government Employees (AFGE), herein called Respondent, had committed an unfair labor practice and recommending that it cease and desist from such conduct and take certain affirmative actions. Thereafter, the Respondent filed timely exceptions with respect to the Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Report and Recommendations and the entire record, including the Respondent's exceptions, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge to the extent consistent herewith.

In essence, the complaint in the subject case alleges that the Respondent violated Section 19(b)(1) of the Order by interfering with and restraining the Complainant in the exercise of his rights provided for under Section 1(a) of the Order; specifically, his right to refrain from joining or assisting the Respondent. The Administrative Law Judge concluded that in refusing to accept the Complainant's resignation

from membership on March 17, 1972, 1/ the Respondent violated Section 19(b)(1) of the Order. 2/

The essential facts of the case, which are not in dispute, are set forth in detail in the Report and Recommendations, and I shall repeat them only to the extent necessary.

The Respondent is the exclusive representative of certain employees, including the Complainant, at the Redstone Arsenal, herein called the Activity, which is located in Alabama. Prior to March 17, the Complainant had been a member of the Respondent. After receiving a letter from the President of the Respondent removing him as a special assistant to the President and appointing him as a shop steward, on February 14, the Complainant sent a letter to the chief of the Activity's personnel office, with copies to two other management representatives and to the Respondent's President, advising the chief that "lacking any faith or confidence as demonstrated by the leadership of Local 1858 and the National Office of the American Federation of Government Employees represented by the Fifth District leadership," he was declining the appointment as shop steward.

On March 17, the Complainant sent a letter to the Respondent's President resigning his membership and returning his membership card. On April 12, the Respondent preferred charges against the Complainant based on the latter's letter of February 14, charging him with a violation of the AFGE's constitution as a result of his attack on the integrity and ability of the Respondent's leadership. With respect to the Complainant's contention that he was no longer a member and, therefore, was not subject to discipline, the Respondent advised the Complainant on April 20 that he was still considered to be a member and would be considered a member until September 1, 3/ "unless the President [of the Local] or the general membership decree otherwise." The Complainant was tried in absentia by the Respondent's Executive Committee on May 2 and was expelled from the Local, a decision which was confirmed by the membership on June 12.

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1/ Unless otherwise indicated, all of the events in the subject case occurred in 1972.

2/ The Administrative Law Judge found further that the questions as to whether the Complainant's conduct prior to tendering his resignation was violative of the Respondent's constitution, and as to whether the discipline imposed on him was reasonable or proper, were not before him and need not be decided.

3/ September 1 would have been the earliest date that a revocation of authorization for dues deductions could become effective.

In agreement with the Administrative Law Judge, I find that in the circumstances of this case the Complainant had a right under the Respondent's constitution and by-laws to resign from membership at any time. 4/ Thus, and noting the absence of any restriction by the Respondent on such right, 5/ I find that the latter's statement to the Complainant on April 20, that despite his resignation he still was considered to be a member and would be considered a member until September 1, "unless the President [of the Local] or the general membership decree otherwise," interfered with, restrained, or coerced him in the exercise of his rights assured by the Order. In this connection, I agree with the Administrative Law Judge that the rights assured by the Order which have been interfered with by the Respondent's conduct are the rights set forth in Section 1(a) to join and assist a labor organization or to refrain from any such activity. Accordingly, under all of the circumstances, I find that the Respondent's above-noted conduct violated Section 19(b)(1) of the Order.

In his remedy, the Administrative Law Judge concluded that the Complainant's expulsion was the proximate result of the violation of the Order; i.e., the Respondent's refusal to recognize and honor the Complainant's resignation. Accordingly, he ordered, among other things, that the Respondent rescind its action of expelling the Complainant from membership and advise the Complainant it had done so. Under the circumstances of this case, I do not agree in this regard with the reasoning or the conclusions of the Administrative Law Judge. Under Section 19(c) of the Order, 6/ a labor organization has the right to enforce discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of the Order. Where an

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4/ As noted by the Administrative Law Judge, there is no indication, nor has it been urged by the Respondent, that its constitution, by-laws, or any other document defines or limits the circumstances under which a member can resign.

5/ Under the circumstances of this case, it was considered unnecessary to decide whether and to what extent a labor organization may restrict the right of its members to resign in its constitution or by-laws.

6/ Section 19(c) provides, "A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order."

individual is a member of the labor organization at the time of the improper conduct, the labor organization may enforce discipline against the individual member irrespective of whether he subsequently has terminated his membership. Thus, in my view, the termination of membership in a labor organization does not extinguish a labor organization's right to enforce discipline against a former member for improper conduct prior to the termination of membership. However, under the circumstances of this case, because the question of the propriety of the discipline was not raised in the complaint, I deem it inappropriate to consider whether the Respondent's expulsion of the Complainant was permissible under the Order and, if so, whether such discipline was reasonable.

#### CONCLUSION

Based on the foregoing, I find that by refusing to accept and not honoring the Complainant's resignation from membership in the Respondent labor organization submitted in accordance with the latter's constitution or by-laws, the Respondent violated Section 19(b)(1) of Executive Order 11491, as amended.

#### THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(b)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that Local 1858, American Federation of Government Employees shall:

1. Cease and desist from:

Refusing to accept or honor the resignation from membership of Robert L. Murphy submitted on March 17, 1972.

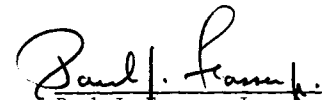
2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

- (a) Accept and honor the resignation from membership of Robert L. Murphy effective as of March 17, 1972.

-4-

- (b) Post at its Local business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations which shall be signed by the President of Local 1858, American Federation of Government Employees. The notices shall remain posted for a period of 60 days, and Local 1858 shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.
- (c) Submit signed copies of said notice to the Redstone Arsenal for posting in conspicuous places where the unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.
- (d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
June 15, 1973

  
Paul J. Kasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-5-

APPENDIX  
NOTICE TO ALL MEMBERS

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED,  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We will not refuse to accept or honor the  
resignation from membership in Local 1858  
of Robert L. Murphy or any other member,  
submitted in accordance with our constitution  
or by-laws.

Local 1858  
American Federation of  
Government Employees

Dated \_\_\_\_\_ By \_\_\_\_\_  
President

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 question concerning this notice or  
compliance with any of its provisions, they may communicate  
directly with the Regional Administrator of the Labor-  
Management Services Administration, U. S. Department of  
Labor whose address is: Room 300, 1371 Peachtree St., N.E.,  
Atlanta, Georgia 30309.

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 40-4250(CO)

Robert L. Murphy,  
Complainant

and

Local 1858, American Federation of  
Government Employees,  
Respondent

REPORT AND RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Robert L. Murphy,  
Pro Se

Dolph David Sand,  
For the Respondent



UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

- 2 -

Case No. 40-4250(CO)

Robert L. Murphy,  
Complainant

and

Local 1858, American Federation of  
Government Employees,  
Respondent

REPORT AND RECOMMENDATIONS

I. Preliminary Statement

This case arises under Executive Order 11491. The complaint was dated June 16, 1972 and filed June 19, 1972 under Section 19(b)(1) of the Executive Order. It alleges a violation of that subsection by Respondent by its interfering with and restraining Complainant's exercise of his rights under Section 1(a) of the Order, specifically his right to refrain from joining or assisting a labor organization.

The Area Administrator made an investigation of the complaint and reported to the Regional Administrator. The Regional Administrator issued a Notice of Hearing to be held September 6, 1972 in Huntsville, Alabama. The hearing was held on that date and at that place. The parties were given full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. The Respondent filed and served a brief on October 2, 1972. The Complainant did not file a brief.

II. The Issue

The issue is clear-cut: Does the assurance in Section 1(a) of the Executive Order of the right of an employee, "freely and without fear of penalty or reprisal, to form, join, or assist a labor organization or to refrain from any such activity," assure the right to remain or not to remain a member of a labor organization.

Other issues raised at the hearing and in the brief are irrelevant.

III. Findings of Facts

The facts are not controverted and no credibility issues are involved.

The Respondent, Local 1858, American Federation of Government Employees (the Union), is the duly authorized and recognized representative of

certain employees of Redstone Arsenal, Alabama, the Activity. The Complainant at all relevant times was an employee of the Activity and was one of the employees represented by the Union for the purposes of Executive Order 11491.

Prior to March 17, 1972, Complainant had been a member of the Union for an unspecified time. He had executed an authorization of dues check-off which, under Government regulations, could be revoked by the employee effective only on March 1 or September 1 of any year.

In February 1972 Complainant and the Union had some disagreements. Briefly, on February 7 the President of the local Union wrote to Complainant advising him that there were too many special assistants to the President and that Complainant was being removed from the list. Complainant was appointed a shop steward. By letter of February 14 to the chief of the personnel office, with copies to two other management people and to the Union's President, Murphy advised him that "lacking any faith or confidence as demonstrated by the leadership of Local 1858 and the National Office of the American Federation of Government Employees represented by the Fifth District leadership," he declined the appointment as shop steward.

On March 17, 1972, Complainant sent a letter to the President of the Union resigning his membership and returning his membership card. On March 15, 1972, he had advised the Activity that he revoked his dues deduction authorization. The Activity advised him on March 17 that in accordance with regulations the revocation could not be effective except on a March 1 or a September 1. On April 12, 1972 the Union preferred charges against the Complainant because of his letter of February 14, 1972, charging violation of the AFGE constitution in attacking the integrity and ability of the Union leadership, and advising him that the charges had been investigated by a committee of Local 1858, which committee had found probable cause. Complainant was advised of a trial on May 2, 1972 before a committee of the Union consisting of the Local's Executive Committee at which trial Complainant would be entitled to representation.

On April 18, 1972 Complainant replied to the letter of April 12, 1972 preferring charges. He stated that he was not a member of the Union and had not been since March 17, and urged the Union to cease its harassment. On April 20 the Union replied that Complainant was considered still to be a member and would be considered a member until September 1 "unless the President [of the Local] or the general membership decree otherwise." On May 2, 1972 Murphy's trial before the Executive Committee was held in absentia and it was decided that he be expelled from the Local. He was so advised on May 5 and was advised further that the decision would be placed before the membership meeting on June 12 at which meeting Murphy would have the right to be present and make a statement on his behalf.

Murphy did not appear at the June meeting and his expulsion was confirmed.<sup>1/</sup> On June 16 the Activity ceased Complainant's dues deduction upon being informed by the Union that Complainant was no longer a member.

On June 19, 1972 Complainant filed his complaint, dated June 16, against the Local alleging a violation of Section 19(b)(1).

At the hearing Complainant testified, and I find, that he had no objection to the amount of the dues being withheld until September 1 as provided in the regulations but did not want to be a member of the Union after his resignation. The Union took the position at the hearing before me that it did not equate payment of dues with membership and conceded that membership could be terminated although dues continued to be withheld. <sup>2/</sup>

The Local has about 4,000 members. Applications for membership generally are acted on in groups of 50 or more and not individually. Thus one who has been expelled might be readmitted upon a new application without the Local realizing it was admitting a member who had been expelled.

#### IV. Discussion and Conclusions

There is no indication, nor is it urged, that there is anything in the Union's constitution or bylaws or any other union document "defining or limiting the circumstances under which a member could resign." <sup>3/</sup> The Executive Order provides in Section 1(a) that an employee in the Executive Branch of the Government "has the right...to form, join, and assist a labor organization or to refrain from any such activity..." Section 7 of the National Labor Relations Act <sup>4/</sup> provides that "employees shall have the right...to form, join, or assist labor organizations... and shall also have the right to refrain from any or all of such activities" except as such right to refrain may be restricted by a valid union-security agreement. (Since no such union-security agreement is here involved, that exception may be ignored in this discussion.) The language declaring the right to join or assist or not to join or assist is thus,

<sup>1/</sup> Although the record shows that the AFGE constitution permits a further appeal to its National Executive Council and does not show that Complainant took such an appeal, Respondent does not contend, and I do not find, that taking such an appeal is a condition precedent to commencing this proceeding. Cf. 29 C.F.R. §204.2(a)(4).

<sup>2/</sup> Tr. 20.

<sup>3/</sup> N.L.R.B. v. Granite State Joint Board, Textile Workers Union, \_\_\_ U.S. \_\_\_, decided December 7, 1972, 41 Law Week 4074.

<sup>4/</sup> 29 USCA §157.

for the purposes of discussing this case, the same in substance under Section 1(a) of Executive Order 11491 and Section 7 of the National Labor Relations Act. Court decisions under N.L.R.A. are therefore persuasive.

In the Granite State case <sup>5/</sup> the Supreme Court held that the right to refrain, absent provisions to the contrary in the union constitution or like governing provisions, includes the right to resign "subject of course to any financial obligations." <sup>6/</sup> In this case there is no problem of financial obligations; the Complainant recognized that he could not terminate his dues deductions until September 1, and had no objection to that but did not want to be a member between the date of his resignation, March 17, and September 1. And the Union expressly does not equate dues deduction with membership; it recognizes that one may no longer be a member although the amount of his dues continues to be withheld until the following March 1 or September 1 due to federal regulations restricting to these dates the right of an employee to terminate his authorization of dues deduction.

When Complainant resigned and revoked his dues deduction authorization, it was recommended to the Executive Committee that they accept the withdrawal and revocation, but the Executive Committee voted not to accept. Insofar as the withdrawal is concerned, their refusal to accept it was a nullity under the Granite State case, and Murphy ceased to be a member pursuant to his resignation. Under that case, and even apart from that case, a member of a union has the right, in the factual situation present in this case, to withdraw from the union at any time.

The Union makes three arguments against the foregoing conclusion, none of them persuasive.

First, it argues that the Executive Order was drawn with care and precision, and that the express language assuring the right to join or assist and to refrain from doing so without mentioning the right to resign or not to resign was intended to exclude assurance of a right to resign, an inclusio unius est exclusio alterius argument.

This is unpersuasive for a variety of reasons. The Granite State case indicates the contrary. Secondly, an organic enactment, such as Executive Order 11491, should be construed to make a rational whole. No reason is perceived why the Order should guarantee the right not to become a member but afford no assurance of the right to cease to be a member. The Respondent would have us hold that by joining, an employee waives (for life?) the right not to be a member. It must be remembered that there is nothing in this case that can be construed as an agreement limiting the right to cease being a member. Looked at as a whole, Section 1(a) guarantees the right to be or not to be a member. Finally, the right

<sup>5/</sup> Supra, fn. 2.

<sup>6/</sup> Quoting from Communications Workers v. Labor Board, 215 F. 2d 835, 838.

to refrain from assisting a union includes the right not to be a member. Being a member is a form of assistance to a union. Mere numbers in the membership often are, or may be, persuasive of the wisdom of acceding to a union's position or may be significant in the union's stature. Absent restrictions not present in this case, no federal employee is required unwillingly to assist a union representative, and the Executive Order guarantees employees the right not to do so.

Second, the Union argues that Section 19(c) of the Order recognizes the right of a union to impose reasonable discipline and that Murphy's letter of February 14 to Management expressing a lack of confidence in the leadership violated the Union's constitution and justified the discipline of expulsion. It argues further that if a member could affectively resign each time charges were preferred against him and thus prevent the imposition of discipline, the right to discipline would be frustrated and meaningless.

The questions of whether Complainant's conduct in February was violative of the Union's constitution and whether the discipline imposed was reasonable or proper are not before me, or at least are questions I need not decide. This is not a case of a member resigning from a union, after charges are made against him, to avoid discipline. The resignation was on March 17 and the charges were made on April 12 on the basis that the Union considered him still a member despite his resignation and therefore subject to union discipline. The question is whether the Union had a right to reject Murphy's resignation. I have concluded above that under the facts then existing, Murphy had an untrammelled right to resign. There is no indication that Murphy resigned to escape discipline and every indication that he resigned because of disaffection with the Union's leadership, nor is it at all clear that even if he had resigned for the purpose of escaping expulsion there was any impediment to his doing so.

Third, the Union appears to argue that its action was justified by a problem of administrative feasibility. It argues that it had a large membership, that it sometimes accepted to membership fifty or more members at a monthly meeting, and that if it could not have expelled Complainant he might have reapplied for membership and been accepted if he had been a member in good standing when his last membership terminated, since it was administratively not feasible to consider each applicant individually. This has no proper bearing on Complainant's right to resign. The Union's administrative problem in passing on individual applications for membership cannot appropriately determine a member's right to resign. Nor is it perceived how expelling Murphy instead of recognizing and honoring his resignation would have solved such a problem if it exists.

I conclude that the Respondent violated Section 19(b)(1) by interfering with and restraining Murphy's exercise of his right under Section 1(a) not to remain a member.

V. The Remedy

There remains the question of what can feasibly or effectively be done to remedy the violation. Murphy stands today as a person who was expelled from the Union. His expulsion was not the direct violation of the Executive Order. But his expulsion was the proximate result of the violation of the Order, the Union's refusal to recognize and honor his resignation. Had he not wrongly been considered to remain a member, he could not have been expelled, whatever other forms of obloquy might have been cast at him. The most practicable way to remedy the wrong resulting to Murphy from Respondent's improper action would be for it to rescind its action of expulsion; and to remedy its wrong of violating the Executive Order it should be required to post a notice that it recognizes the right of members to resign, --this would of course be subject to whatever financial obligations exist at the time of resignation.

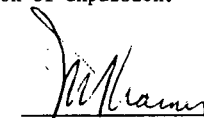
VI. Recommendations

I recommend that the Assistant Secretary:

1. Find that Local 1858, American Federation of Government Employees, violated Section 19(b)(1) by refusing to accept and not honoring Complainant's resignation dated March 17, 1972.
2. Order the Respondent to cease and desist from refusing to accept resignations of Government employees.
3. Order the Respondent to rescind its action of expelling Complainant from membership and advise Complainant it has done so.
4. Post on each of the bulletin boards available to it in each of the buildings of Redstone Arsenal, Huntsville, Alabama, a copy of the Notice attached to the Assistant Secretary's order, stating it recognizes the right of its members to cease being members at any time. Such notice should be signed by Respondent's President and remain posted for thirty days.

A suggested form of Order and of the Notice to be attached to the Order are appended hereto as Appendix A and Attachment A, respectively.

I do not recommend that the Notice state that the expulsion of Murphy has been rescinded. This would unnecessarily, and perhaps to Murphy's detriment, publicize the action of expulsion.



MILTON KRAMER  
Administrative Law Judge

January 8, 1973

Pursuant to Section 6(b) of Executive Order 11491 and 29 C.F.R. §204.91(a), the Assistant Secretary of Labor for Labor-Management Relations finds that Local 1858, American Federation of Government Employees, violated Section 19(b)(1) of Executive Order 11491 by refusing to accept and refusing to honor the resignation from membership of Robert Leonard Murphy, and orders that it shall:

1. Cease and desist from refusing to accept or honor resignations of employees of Redstone Arsenal, Huntsville, Alabama.
2. Rescind its action expelling Robert Leonard Murphy from membership and notify Mr. Murphy that it has done so.
3. Post for thirty days on each of the bulletin boards available to it in Redstone Arsenal, Huntsville, Alabama a copy of the Notice attached hereto, signed by the President of Local 1858.
4. In accordance with 29 C.F.R. §204.92, report to the Assistant Secretary in writing within forty-five days from the date of receipt of this Order what steps have been taken to comply with the foregoing.

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W. J. USERY  
Assistant Secretary for Labor-  
Management Relations

January , 1973

Notice to Members of Local 1858, American Federation  
of Government Employees  
Pursuant to A Decision and Order of the  
Assistant Secretary of Labor for Labor-Management Relations  
United States Department of Labor

We recognize the right of our members to cease being members of Local 1858 at any time and will honor resignations of members.

We will not interfere with, restrain, or coerce anyone in the exercise of his or her rights assured by Executive Order 11491.

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President, Local 1858,  
American Federation of Government Employees

June 22, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
DISTRICT OFFICE,  
LAKEVIEW, OREGON  
A/SLMR No. 276

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 212, a hearing was held in this case for the purpose of adducing additional evidence upon which a determination could be made with regard to the professional status of certain employee classifications.

The Assistant Secretary found that employees in the job classifications Range Conservationist, Wildlife Biologist, Forester, and Civil Engineer were professional employees within the meaning of the Order. In this regard, he noted that these employees occupy positions which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning; their work is predominately intellectual in character, requiring the consistent exercise of discretion and judgment; and the results of their work cannot be standardized in relation to a given period of time.

Accordingly, and noting the conclusion in Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, cited above, that the unit sought by the National Federation of Federal Employees, Local 692, in the subject case is appropriate, the Assistant Secretary directed an election in a unit of the Activity's professional and nonprofessional employees.

A/SLMR No. 276

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
DISTRICT OFFICE,  
LAKEVIEW, OREGON

Activity

and

Case No. 71-2120(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 642

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held in the subject case. Thereafter, on October 30, 1972, a Decision and Remand was issued by the Assistant Secretary 1/ in which it was found, among other things, that the unit sought by the National Federation of Federal Employees, Local 642, herein called NFFE, was appropriate for the purpose of exclusive recognition. As the record did not provide an adequate basis upon which to make a determination regarding the professional status of certain employee classifications, the Assistant Secretary remanded the subject case to the appropriate Regional Administrator for the purpose of receiving additional evidence in this regard. On January 30 and March 13 and 14, 1973, a further hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record, including the facts developed both prior and subsequent to the remand, as well as the brief filed by the Activity, I make the following eligibility determinations:

1/ Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212.

### Range Conservationist

The Activity employs several employees in the job classification Range Conservationist. 2/ The major job function of this position is the protection and proper utilization of the range and grazing lands. 3/ This object is accomplished primarily through the formulation of management allotment plans. In preparing a management allotment plan, the Range Conservationist determines the optimal usage for a parcel of land and then devises the necessary method to attain this usage, taking into account such factors as watershed stabilization, wildlife habitat and forage requirements, as well as various other factors which might affect the environmental equilibrium of the specific parcel of land involved. A Range Conservationist is required to have a bachelor's degree from an accredited college or university with a major study in range management or a related field. Included in this educational requirement is a minimum of 30 semester hours in any combination of plant, animal, and soil sciences and natural resources management. 4/ The record reveals that a Range Conservationist's specialized education is necessary, and is utilized on a continuous basis, in the performance of his duties.

### Wildlife Biologist

A Wildlife Biologist is responsible for protecting and providing suitable habitats for the wildlife located within the Activity's jurisdiction. The incumbent's duties include performing wildlife inventories, analyzing this information, and making specific recommendations as to what is needed on a particular area of land to provide better wildlife conditions. Further, the incumbent is responsible for the technical guidance and review of all wildlife aspects of the overall district plan, including the impact of other district programs on wildlife. In accomplishing these duties, the incumbent is subject to minimal day-to-day supervision and utilizes independent judgment and discretion in discharging his responsibilities.

2/ One of the Activity's employees has the job title of Range and Watershed Specialist. The record shows that this individual reviews district plans and provides technical guidance to other Range Conservationists in the district. In other respects, however, he performs duties similar to those of the Range Conservationists.

3/ Other job functions of a Range Conservationist include renewing and granting leases for grazing privileges.

4/ Typical of some of the courses taken to meet this requirement are: agrostology, plant ecology, plant physiology, plant taxonomy, animal ecology, zoology, range production, range survey, range management planning, and range policies and administration.

-2-

The minimum educational requirements for this position include a bachelor's degree with at least 30 semester hours in biological science. 5/ The record shows that this specialized education is essential in carrying out the duties of the incumbent and is utilized on a continuous basis.

### Forester

The Forester employed by the Activity primarily is responsible for protecting timber resources from fire, insects, disease and other environmental factors and ensuring its proper utilization to meet present and future needs. In this regard, the incumbent is charged with developing timber sale plans, which involve deciding what trees will be cut, and taking into account such other factors as possible road construction to the timber site and the impact of such action on the environment and wildlife. In performing these duties, the incumbent receives no daily supervision and utilizes a significant amount of independent judgment. The record reveals that upon receiving an assignment, the Forester determines the best method to accomplish such assignment, subject only to a flexible set of Activity guidelines.

The minimum educational requirements for this position include a four-year bachelor's degree with at least 24 semester hours of course work in forestry. 6/ The record reveals that a Forester's specialized education is necessary, and is utilized on a continuous basis, in the performance of his duties.

### Civil Engineer

The Civil Engineer employed by the Activity is responsible for the construction and maintenance of district roads, water developments, bridges, and recreational facilities and buildings. In this regard, the incumbent checks the feasibility of and makes initial measurements for cost estimates of various projects. Further, he drafts contract specifications and performs the layout, survey and design for various engineering projects at the Activity.

5/ The 30 semester hours' requirement must be broken down as follows: 9 semester hours in such wildlife subjects as mammalogy, ornithology, animal ecology, wildlife management, or research courses in the field of wildlife biology; 12 semester hours in various specialized zoology courses; and 9 semester hours in botany or related plant sciences.

6/ The 24 semester hours' requirement must be diversified sufficiently to fall in at least four of the following areas: (1) silviculture, (2) forest management, (3) forest protection, (4) forest economics, (5) forest utilization, and (6) such subjects as forest engineering, forest recreation, range management, watershed management, and wildlife management.

-3-

To qualify for the position of Civil Engineer, the candidate must have completed successfully a full four-year professional engineering curriculum leading to a bachelor's or higher degree in engineering in an accredited college or university or its equivalent. 7/ In connection with the performance of his job functions, the incumbent is required to use his specialized knowledge and learning on a continuous basis.

Based on the foregoing circumstances, I find that the employees of the Activity in the job classifications of Range Conservationist, Wildlife Biologist, Forester and Civil Engineer meet the criteria for professional employees as set forth in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. Thus, the evidence establishes that these employees occupy positions which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning; their work is predominately intellectual in character, requiring the consistent exercise of discretion and judgment; and the results of their work cannot be standardized in relation to a given period of time. Under these circumstances, I find that Activity's employees herein designated as Range Conservationist, Wildlife Biologist, 8/ Forester, 9/ and Civil Engineer are professional employees within the meaning of the Order.

7/ As an alternative, candidates may substitute training and/or technical experience that provide (1) a thorough knowledge of the physical and mathematical sciences underlying professional engineering; and (2) a good understanding, both theoretical and practical, of the engineering sciences and techniques and their application to one of the branches of engineering. This knowledge and understanding must be equivalent to that provided by a full four-year professional engineering curriculum and must be demonstrated by having passed successfully the Engineer-in-Training Examination or an equivalent examination. The incumbent, in the instant case, although lacking a college degree, fulfilled the prescribed requirements by passing the U.S. Civil Service Commission's equivalency examination.

8/ Compare, in this regard, Department of Interior, Bureau of Land Management, Riverside District and Land Office, cited above, in which, among other things, it was found that Range Conservationists and Wildlife Management Specialists were not professional employees within the meaning of the Order. The record in that case did not reveal that the incumbents in these job classifications were required to have knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or study in an institution of higher learning.

9/ Cf. United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, A/SLMR No. 227, where employees designated as Foresters with similar job qualifications were found to be professional employees within the meaning of the Order.

Accordingly, and noting the conclusion in Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, cited above, that the unit sought in the subject case is appropriate, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional employees of the Bureau of Land Management District Office, Lakeview, Oregon, including temporary or seasonal employees, excluding the Secretary to the District Manager, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 10/

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals unless the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All professional employees of the Bureau of Land Management District Office, Lakeview, Oregon, excluding nonprofessional employees, the Secretary to the District Manager, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All nonprofessional employees of the Bureau of Land Management District Office, Lakeview, Oregon, including temporary or seasonal employees, excluding professional employees, the Secretary to the District Manager, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented for the purpose of exclusive recognition by the NFFE.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive

10/ As to the inclusion in the unit of the Activity's Fire Control Technician, see the discussion in this regard in Department of Interior, Bureau of Land Management District Office, Lakeview, Oregon, cited above.

recognition, and (2) whether or not they wish to be represented for the purpose of recognition by the NFFE. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether or not the NFFE was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

All professional and nonprofessional employees of the Bureau of Land Management District Office, Lakeview, Oregon, including temporary or seasonal employees, excluding the Secretary to the District Manager, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

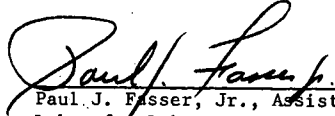
(a) All professional employees of the Bureau of Land Management District Office, Lakeview, Oregon, excluding nonprofessional employees, the Secretary to the District Manager, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional employees of the Bureau of Land Management District Office, Lakeview, Oregon, including temporary or seasonal employees, excluding professional employees, the Secretary to the District Manager, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 642.

Dated, Washington, D.C.  
June 22, 1973

  
Paul J. Esser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations



June 22, 1973

A/SLMR No. 277

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
AIRWAY FACILITIES SECTOR (ARTCC),  
ALBUQUERQUE, NEW MEXICO  
A/SLMR No. 277

The Petitioner, Andrew Deshotel, an employee of the Activity, sought the decertification of the Intervenor, American Federation of Government Employees, Lodge 2760 as the exclusive representative of a unit of nonsupervisory Class Act and nonsupervisory Wage Grade employees at the Airway Facilities Sector, Albuquerque, New Mexico.

The Intervenor contended that those employees classified as technicians-in-depth at the Activity were management officials and should be excluded from the unit. Further, the Intervenor asserted that as the Petitioner in the instant case is a technician-in-depth, and, thereby, is a management official, the petition herein is defective and should be dismissed.

In determining whether the technicians-in-depth are management officials the Assistant Secretary applied the criteria established in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. He concluded that the evidence did not establish that such employees were management officials. In this regard, the Assistant Secretary noted that the technicians-in-depth's function had not been shown to extend beyond the role of a resource person to the point of active participation in deciding policy. Nor was it shown that their interests were more closely aligned with management than with other unit employees. Under these circumstances, the Assistant Secretary found that the technicians-in-depth should be included in the unit found appropriate and that the petition herein was not rendered defective by virtue of the fact that it was filed by a technician-in-depth.

Noting the prior certification of the petitioned for unit and the lack of any disagreement between the parties as to the scope of the unit described, the Assistant Secretary directed that an election be conducted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
AIRWAY FACILITIES SECTOR (ARTCC),  
ALBUQUERQUE, NEW MEXICO

Activity

and

Case No. 63-4058(DR)

ANDREW DESHOTEL

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LODGE 2760

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Arthur Jack Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity's brief, 1/ the Assistant Secretary finds:

1. The Petitioner, Andrew Deshotel, an employee of the Activity, seeks the decertification of the Intervenor as the exclusive representative of employees in the following unit:

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1/ The Intervenor filed an untimely brief which has not been considered.

All nonsupervisory Class Act and nonsupervisory Wage Grade employees assigned to the Airway Facilities Sector (Air Route Traffic Control Center), located at 6900 Los Angeles Drive, Albuquerque, New Mexico, excluding all management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, secretary, administrative officer, clerk-stenos, and supply specialists and supervisors as defined in Executive Order 11491.

2. On October 18, 1971, the Intervenor was certified as the exclusive representative of the employees in the above unit. 2/
3. The parties herein are not in disagreement as to the scope of the petitioned for unit, which is identical to the unit certified on October 18, 1971. The Intervenor, however, asserts that certain employees of the Activity classified as technicians-in-depth are management officials and should be excluded from the unit. Further, the Intervenor asserts that as the Petitioner in the instant case is classified as a technician-in-depth and, thereby, is a management official, the petition herein is defective and should be dismissed. In this regard, the Activity and the Petitioner contend that the two technicians-in-depth employed by the Activity are not management officials and/or supervisors within the meaning of Executive Order 11491.

The Activity is a component of the Department of Transportation, Federal Aviation Administration and is headed by a Sector manager. The record reveals that the Activity's technicians-in-depth act as technical experts, in a staff capacity, with respect to the evaluation of the Activity's operations and the installation of equipment. 3/ As part of their functions, they evaluate specific equipment operations by tracing the cause of any substandard performance through personal inspection, or by working with journeymen technicians who may be in charge of the particular equipment involved. The record reveals that their evaluations of operations are performed within established guidelines, and that they are guided in making such evaluations by national tolerances and standards of operations, rather than by independent judgment. With respect to the installation of equipment, 4/ the technicians-in-depth act as representatives of the Activity in ascertaining the technical integrity of such equipment once it is installed and readied for

- 2/ The record reveals that there have been no negotiated agreements covering the employees in the unit.
- 3/ The record reveals that the technicians-in-depth have no subordinates directly assigned to them.
- 4/ The record reveals that new equipment is installed by facilities and equipment technicians who are not attached to the Activity.

operation. The evidence establishes that the technicians-in-depth confer daily with the Sector manager on operational matters, but do not determine or effectively influence the making of policy with respect to personnel, procedures, or programs.

The record reveals also that the technicians-in-depth administer certification examinations to other technicians, 5/ to determine whether they are capable of working on and maintaining a particular piece of equipment. The examination involved is a standard "doing type" examination issued by the Federal Aviation Academy. Although, in evaluating the results of the certification examinations, the technicians-in-depth exercise some discretion and independent judgment with regard to determining whether a technician has utilized the correct process in achieving the desired result, normally the correct process has been pre-determined through a policy letter or directive. Further, although the technicians-in-depth grade these examinations, the actual certification is granted or denied by the Sector manager. The record reveals also that the Activity's technicians-in-depth attend weekly staff meetings which are attended by staff personnel and line supervisors, and which are open to journeymen technicians. The evidence shows that matters discussed at these meetings are concerned essentially with operational matters, rather than with employee grievances or personnel problems.

Based on the foregoing circumstances, I find that the Activity's technicians-in-depth do not meet the criteria for a management official set forth in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. In that case it was found that a "management official" is an employee having authority to make, or effectively influence the making of, policy with respect to personnel, procedures, or programs. It was noted further that in determining whether an employee was a management official it should be ascertained whether the employee involved was an expert or professional rendering resource information or recommendations, or whether his role extended to the point of active participation in the ultimate determination as to what a particular policy in fact will be. In the instant case, I find that the role of the technicians-in-depth does not extend beyond that of a resource person to the point of active participation in deciding policy. Nor has it been shown that their interests are more closely aligned with management than with other unit employees. 6/ Accordingly, I find that the

- 5/ First line supervisors also may administer examinations provided they do not actively supervise the particular technician taking the examination.
- 6/ See Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230, involving employees in the same job classification. In that decision, the Assistant Secretary found that technicians-in-depth were not management officials within the meaning of the Order.

technicians-in-depth should be included in the unit found appropriate. 7/  
In these circumstances, I find also that the petition herein was not rendered defective by virtue of the fact that it was filed by a technician-in-depth. 8/

As noted above, the unit involved herein previously was certified under Executive Order 11491. Accordingly, and noting the lack of any disagreement between the parties as to the scope of the unit, I shall direct that an election be conducted in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All nonsupervisory Class Act and nonsupervisory Wage Grade employees assigned to the Airway Facilities Sector (Air Route Traffic Control Center) located at 6900 Los Angeles Drive, Albuquerque, New Mexico, excluding all management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, secretary, administrative officer, clerk-stenos, and supply specialists and supervisors as defined in Executive Order 11491.

#### DIRECTION OF ELECTION

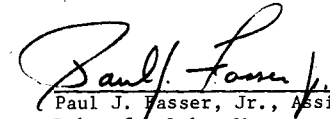
An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations.

7/ Although not specifically contended by the Intervenor at the hearing, it was implied by the latter that the technicians-in-depth were supervisory employees. As noted above, the evidence reveals that the technicians-in-depth have no subordinates directly assigned to them. Under these circumstances, I find that they are not supervisors within the meaning of the Order.

8/ Compare, in this regard, Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, FLRC No. 72A-19, in which the Federal Labor Relations Council found, in agreement with the Assistant Secretary, that "a petition is defective and should be dismissed if it was filed by a person determined to be a member of agency management, or an employee whose participation in the management of a labor organization or acting as its representative would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee."

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Lodge 2760.

Dated, Washington, D.C.  
June 22, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

June 25, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE ARMY,  
TRANSPORTATION MOTOR POOL,  
FORT WAINWRIGHT, ALASKA  
A/SLMR No. 278

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, Local 1834, AFL-CIO (Complainant). The Complainant alleged that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by refusing to permit an employee in an Equal Opportunity discrimination proceeding to be accompanied by his designated union representative at a meeting held by management for the purpose of discussing the implementation of a Civil Service Commission Hearing Examiner's recommendation in the case.

In agreement with the Chief Administrative Law Judge, and under all the circumstances of the case, the Assistant Secretary found the February 18, 1972, meeting constituted a "formal" discussion within the meaning of Section 10(e) of the Order and that the Respondent's refusal to afford the Union the opportunity to be represented at such formal discussion was violative of Section 19(a)(6) of the Order. Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.

The Chief Administrative Law Judge found that the Respondent violated Section 19(a)(1) of the Order by virtue of its denial of an employee's request to be represented at the February 18, 1972, formal discussion relating to matters affecting general working conditions by his chosen representative. The Assistant Secretary agreed with the Chief Administrative Law Judge's conclusion, but did not adopt his rationale that Section 7(d)(1) provided a basis for such a finding. In this connection, the Assistant Secretary found that, read in its entirety, Section 7(d)(1) does not establish any rights for employees, organizations or associations enforceable under Section 19 of the Order, but rather delineates those instances in which employees may choose a representative other than exclusive representative in certain grievance and appellate actions, and those instances in which agencies may consult and/or deal with certain organizations or associations not qualified as labor organizations without violating Section 19 of the Order.

On the other hand, the Assistant Secretary found that in addition to the right conferred on an exclusive representative to be represented at "formal" discussions, Section 10(e) establishes a concomitant right

running to all employees in a unit. This obligation under 10(e) is to be "responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership." In the Assistant Secretary's view, this obligation could not be met if agencies were permitted to thwart the exclusive representative's obligation to represent the interests of all employees in the unit by refusing to permit the employees to choose the exclusive representative as their representative. Thus, the Assistant Secretary concluded that agency conduct denying the right of unit employees to be represented by their exclusive representative violated Section 19(a)(1) of the Order. Accordingly, he found that Respondent's denial of the employees' request for Union representation made during the formal discussion on February 18, 1972, was violative of Section 19(a)(1).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE ARMY,  
TRANSPORTATION MOTOR POOL,  
FORT WAINWRIGHT, ALASKA

Respondent

and

Case No. 71-2290(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1834, AFL-CIO

Complainant

DECISION AND ORDER

On March 20, 1973, Chief Administrative Law Judge H. Stephan Gordon issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Chief Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Chief Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Chief Administrative Law Judge, as modified below.

In agreement with the Chief Administrative Law Judge, I find that, under all the circumstances, the February 18, 1972, meeting held by the Respondent with employee Willie W. Martin concerning the implementation of a decision by a U.S. Civil Service Commission Hearing Examiner constituted a formal discussion within the meaning of Section 10(e) of

the Order, and that the Respondent's refusal to afford the Complainant the opportunity to be represented at such formal discussion was violative of Section 19(a)(6) of the Order. 1/

The Chief Administrative Law Judge further found that the Respondent violated Section 19(a)(1) of the Order by virtue of its denial of Mr. Martin's request to be represented at the February 18, 1972, formal discussion by his chosen representative. In finding a 19(a)(1) violation the Chief Administrative Law Judge noted, among other things, that Section 7(d)(1) of the Order confers a specific right on employees, regardless of whether they are represented in a unit of exclusive recognition, to choose their own representative in a grievance or appellate action. 2/ While, in the circumstances of this case, I agree with the Chief Administrative Law Judge's conclusion that the Respondent's conduct herein violated Section 19(a)(1) of the Order, I do not adopt the Chief Administrative Law Judge's rationale that Section 7(d)(1) provides a basis for such finding. Thus, in my view, read in its entirety, Section 7(d) does not establish any rights for employees, organizations or associations enforceable under Section 19 of Executive Order 11491, as amended. Rather, I view Section 7(d) as delineating those instances in which employees may choose a representative other than their exclusive representative in certain grievance or appellate actions, and those instances in which an agency may consult and/or deal with certain organizations or associations not qualified as labor organizations without violating Section 19 of the Order. Under these circumstances, and in the absence of evidence of any contrary intent, I find, contrary to the Chief Administrative Law Judge, that Section 7(d)(1) cannot provide a basis for a finding of violation of Section 19 of the Order.

On the other hand, I find that, in addition to conferring a right on an exclusive representative to be given the opportunity to be represented at "formal" discussions, 3/ Section 10(e) establishes a concomitant right running to all employees in a unit. Thus under Section 10(e), an obligation is placed upon an exclusive representative

- 1/ Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.
- 2/ Section 7(d)(1) of the Order provides, "Recognition of a labor organization does not - (1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in section 13;"
- 3/ See U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, cited above.

to be "responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership." In my view, this requirement could not be met if agencies were permitted to thwart the exclusive representative's obligation to represent the interests of all employees in the unit by refusing to permit the employees to choose the exclusive representative as their representative. In my opinion, agency conduct denying the right of unit employees to be represented by their exclusive representative, violates Section 19(a)(1) of the Order. Accordingly, I conclude that the Respondent's denial of Mr. Martin's request for union representation made during the formal discussion of February 18, 1972, 4/ was inconsistent with the rights assured to unit employees under the Order, and thereby violated Section 19(a)(1).

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving American Federation of Government Employees, Local 1834, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Refusing the request made by Mr. Willie W. Martin to be represented by the president of American Federation of Government Employees, Local 1834, AFL-CIO, or any other representative designated by said labor organization, at any formal discussion between management and Mr. Willie W. Martin, convened for the purpose of discussing the implementation of a decision by a U. S. Civil Service Commission Hearing Examiner involving a charge of discrimination.

(c) Interfering with, restraining, or coercing Mr. Willie W. Martin or any other employee in the bargaining unit by denying them the right to be represented by the president of American Federation of

4/ At page 15 of his Report and Recommendations, the Chief Administrative Law Judge inadvertently found that the meeting involved herein, which he found to constitute a "formal" discussion, occurred on September 18, 1972. This inadvertency is hereby corrected.

Government Employees, Local 1834, AFL-CIO, or any other individual designated to act as a representative of said labor organization, at any meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

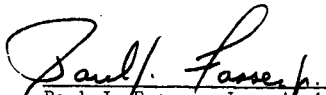
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Notify American Federation of Government Employees, Local 1834, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit by its own chosen representative.

(b) Post at its facility at U. S. Department of the Army, Fort Wainwright, Alaska, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, United States Department of the Army, Fort Wainwright, Alaska, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
June 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving American Federation of Government Employees, Local 1834, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT refuse the request made by Mr. Willie W. Martin to be represented by the president of American Federation of Government Employees, Local 1834, AFL-CIO, or any other representative designated by said labor organization, at a formal discussion between management and Mr. Willie W. Martin convened for the purpose of discussing the implementation of a decision by a U. S. Civil Service Commission Hearing Examiner involving a charge of discrimination.

WE WILL NOT interfere with, restrain, or coerce, Mr. Willie W. Martin or any other employee in the bargaining unit by denying them the right to be represented by the president of American Federation of Government Employees, Local 1834, AFL-CIO, or any other individual designated to act as a representative of said labor organization at any meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

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

Dated \_\_\_\_\_ By \_\_\_\_\_

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 Administrator of the Labor-Management Services Administration, U. S. Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

U. S. DEPARTMENT OF THE ARMY :  
TRANSPORTATION MOTOR POOL :  
FORT WAINWRIGHT, ALASKA :  
Respondent :  
and :  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL 1834 (AFL-CIO) :  
Complainant :

CASE NO. 71-2290 (CA)

Captain Ronald A. Salvatore, Post Advocate,  
Fort Wainwright, Alaska, for Respondent.  
Gary B. Landsman, American Federation of  
Government Employees, AFL-CIO, for  
Complainant.

Before: H. Stephan Gordon  
Chief Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed under Executive  
Order 11491 (herein called the Order) by American Federation  
of Government Employees, Local 1834, AFL-CIO (herein called  
the Complainant) against United States Department of the

Army, Transportation Motor Pool, Fort Wainwright, Alaska  
(herein called Respondent), a hearing was held in the above-  
captioned matter before the undersigned on September 22,  
1972, at Fairbanks, Alaska.

At the hearing all parties were represented by  
counsel who were afforded full opportunity to be heard,  
to examine and cross-examine witnesses, and to introduce  
evidence bearing on the issues involved herein.

Subsequently both parties filed briefs which have  
been duly considered by the undersigned. 1/

On the basis of the entire record, the observation  
of the witnesses and their demeanor, and the testimony  
adduced at the hearing, I make the following findings, con-  
clusions, and recommendations:

Findings of Fact

This case comes before the Assistant Secretary of  
Labor through an unfair labor practice charge premised on  
the allegation that Respondent illegally refused to permit  
the Complainant in an Equal Employment Opportunity dis-  
crimination proceeding to be accompanied by his designated  
representative at a meeting held by management for the  
purpose of discussing the implementation of the Civil  
Service Commission Hearing Examiner's recommendation in  
that case.

This case initially arose when Mr. Willie Martin,  
an automotive mechanic in the Transportation Motor Pool at  
Fort Wainwright, Alaska, was transferred from the engine  
rebuild shop to the "floor" of the motor pool. The  
engine rebuild shop differed from the normal shop work on  
the "floor" in that it required increased skills and  
afforded the men the opportunity to perform a greater  
amount of precision work. The increase in workload on the

1/ Complainant filed a motion to correct the transcript  
with respect to certain specifics. This motion is  
herewith granted.



"floor" in early 1971 necessitated the temporary closing of the engine rebuild section and the transfer to the "floor" of the three individuals then working in that section. Approximately two months later, two of these individuals were returned to the engine rebuild section, but Mr. Martin was not. Mr. Martin thereupon contacted Mr. Frank Shelton, the president of Local 1834, American Federation of Government Employees, the exclusive bargaining representative, and complained that the failure to transfer him back to the engine rebuild section was based on racial discrimination on management's part. Thereafter on April 20, 1971, Mr. Martin designated Mr. Shelton as his representative in the racial discrimination charge and on April 21 he designated Mr. Ulysses Brown as his Equal Opportunity Counselor.

There followed a series of meetings with management personnel throughout which Mr. Martin was represented by Messrs. Brown and Shelton, and on April 27, 1971, these meetings culminated in Mr. Martin's filing a formal complaint of racial discrimination against management at Fort Wainwright.

During the subsequent investigations by the Inspector General of the Army and the U. S. Civil Service Commission, as well as in the hearing before the Civil Service Commission Hearing Examiner, Mr. Martin was always represented by Mr. Shelton.

Subsequently, the Civil Service Commission Hearing Examiner rendered a decision wherein he recommended that although the racial discrimination charge was not supported by the evidence, assignments to the engine rebuild section should be made on a rotating basis between Mr. Martin and the other civilian employee then working in that section.

On January 27, 1972, Mr. Albert Kransdorf, Director of the Employment Policy and Grievance Review Staff, U. S. Department of the Army, issued a final decision wherein it

formally approved the Hearing Examiner's recommendation, and by letter advised Mr. Martin of such approval. The letter also informed Mr. Martin that "necessary implementing action" would be effected. Concurrently, Major Robert Urbano, the Officer in Charge of the Motor Pool, was instructed by his superiors to implement the Hearing Examiner's recommendations.

On February 14, 1972, Mr. Martin, through his representative Mr. Shelton, appealed the Army's decision in the discrimination case to the Board of Appeals and Review.

On February 18, 1972, Major Urbano decided to call a meeting for the purpose of discussing with Mr. Martin the implementation of the Hearing Examiner's decision. Present at this meeting, which lasted approximately ten to fifteen minutes, were Major Urbano, Chief Warrant Officer Foster, Chief of the Maintenance Branch, Mr. Martin, and Mr. Martin's immediate supervisor, Mr. John Smith. Mr. Martin had not been previously informed about the nature of the meeting. On the contrary, he was, in fact, led to believe by Mr. Smith that he was being called to the meeting in his capacity of job steward of the Union. After he informed Mr. Smith that he had alerted the shop employees, Mr. Smith explained to Mr. Martin that he was to come to the meeting alone. However, even at this point in time, the nature or purpose of the meeting was not explained to Mr. Martin. It was not until he reported to Major Urbano's office that Mr. Martin was told that the purpose of the meeting was to discuss the implementation of the Hearing Examiner's recommendation with regard to the then still pending discrimination complaint. When Mr. Martin was advised as to the nature of the meeting, he immediately requested the presence of Mr. Shelton, his Union representative. Major Urbano rejected this request on the ground that he felt the presence of Mr. Martin's Union representative was not "necessary" since he merely

wanted to inform him that the Hearing Examiner's decision would be implemented. Major Urbano then proceeded with the meeting, discussed the Hearing Examiner's recommendations, and instructed Chief Warrant Officer Foster and Mr. Smith to implement the decision. Mr. Martin remained silent throughout the meeting and, except for being present, did not participate in any way. At the conclusion of the meeting, Major Urbano asked Mr. Martin whether he had any questions regarding the implementation of the decision. In response, Mr. Martin again requested the presence of his union representative, but the meeting was terminated without acceding to this request.

The record reflects some conflict in testimony regarding the exact conversation which took place during the meeting of February 18, 1972. The evidence is consistent on the point that Mr. Martin, after having been denied the presence of his representative, remained silent and did not participate in the conversation. However, regarding Major Urbano's statements, some essential conflict exists. Thus, Major Urbano testified that in the course of the meeting, he only informed Mr. Martin of the fact that he, Major Urbano, had received instructions to implement the Hearing Examiner's decision, but that no details regarding this implementation were discussed. In fact he assumed that the presence of Mr. Martin's representative was unnecessary because he did not discuss any details, but merely desired Mr. Martin's presence because he (1) wanted him to witness his instructions to Mr. Martin's supervisors; and (2) was merely conveying some good news which he assumed Mr. Martin would welcome. Major Urbano's testimony is partly corroborated by the testimony of Mr. Smith and Chief Warrant Officer Foster, although there do appear various discrepancies in the three versions.

- 5 -

In contrast to the above-described version of the discussion taking place on February 18, Mr. Martin testified that the meeting consisted of more than a mere announcement of the impending implementation of the Hearing Examiner's decision and that, in fact, certain aspects and details regarding this implementation were touched upon by Major Urbano. Thus, Mr. Martin testified that Major Urbano did refer to a specific date regarding the implementation of the decision, that Major Urbano referred to a sixty-day rotation period, and that reference was made to "how I was going back and so forth."

Despite the fact that the testimony of Respondent's witnesses is to a degree mutually corroborated and Mr. Martin's testimony, by necessity, must stand alone, I credit Mr. Martin's version of the conversation during the February 18 meeting.

Aside from the demeanor of the witnesses, I also base my finding on the following facts. Major Urbano's version that he merely called the meeting to inform Mr. Martin of Respondent's decision to implement the Hearing Examiner's recommendation is inconsistent with the fact - a fact of which Major Urbano should have been aware - that Mr. Martin had been apprised of that decision in the above referred to letter of January 27, 1972. Thus, there was no reason to call a meeting for the purpose of imparting news to Mr. Martin which was no news at all. In the same vein, Mr. Urbano testified that he merely wanted to convey the glad tidings to Mr. Martin. Yet Major Urbano should have known that the decision of the Army was really not such good news as far as Mr. Martin was concerned, for on February 14, 1972 - four days prior to the meeting - Mr. Martin had appealed the decision to the Board of Appeals and Review. Moreover, the situs of the meeting, as well as the presence of Mr. Smith and Chief Warrant Officer Foster, lends an air of formality to this meeting which warrants the inference that it concerned itself with more than a mere announcement. A further inconsistency in Major

- 6 -

Urbano's testimony is the fact that at one point during the meeting he did ask Mr. Martin whether he had any questions. Surely, such question anticipated a response which inevitably would have to lead to some discussion of details. The only reason it did not do so was because Mr. Martin refused to enter into the discussion without the presence of his representative. There are also some discrepancies in Respondent's testimony. Thus, Major Urbano testified, and such testimony was corroborated, that he denied Mr. Martin's request to have his representative present because he merely wanted him to witness the Major's instructions to Mr. Martin's supervisors and did not expect Mr. Martin to participate in the meeting. Yet, at another point, he testified that he did not permit Mr. Martin's representative to be present because he wasn't even aware that "we were talking about the racial discrimination complaint--I was only announcing his new job assignment." This inconsistency is further emphasized by the corroborated testimony of Respondent's witnesses to the effect that in the course of the meeting Major Urbano was half-reading and half-explaining the decision of the Hearing Examiner in that very discrimination case. Moreover, it stretches credulity too far, especially in the light of his professed unawareness of essential events, to assume that Major Urbano would have called a rather high-level and formal meeting merely to announce a new job assignment to an employee.

It is true that the meeting was of such short duration that no prolonged discussion could have taken place. However, the short duration was due mainly to Mr. Martin's refusal to be drawn into the conversation without the presence of his representative, thus foreclosing any lengthy or detailed discussion. It does not detract from a finding that the meeting was called for the express purpose to discuss the implementation of the Hearing Examiner's decision and that at least some details and aspects of such implementation were in fact discussed.

- 7 -

There is also considerable testimony that no duress was used on Mr. Martin and that he voluntarily remained in the room throughout the meeting - the inference being that he thereby consented to Major Urbano's statement that the presence of his representative was unnecessary. I reject such an inference. From the very outset Mr. Martin made it eminently clear that he did not wish to participate in the meeting without his representative; throughout the meeting he remained silent and refused to be drawn into the discussion; and at the conclusion of the meeting, he again responded to Major Urbano's question with a request to have his representative present. Indeed, his very presence at the meeting was due only to the fact that he had not previously been informed of the meeting's purpose. Under these circumstances, Mr. Martin did everything he could civilly do and still protect his rights. To expect an employee to walk out of a meeting in the presence of three superiors is not only totally unrealistic but would attribute to him a rudeness which the demeanor of this particular witness hardly warranted. An assumption that by his silent presence he acquiesced in the meeting is unwarranted.

#### Issue

The issue presented herein is whether Respondent's refusal to permit the presence of a duly designated Union representative during the meeting of February 18, 1972, constituted a violation of the Executive Order.

- 8 -

Conclusions of Law

Section 19(a)(1) of the Order specifically provides that management shall not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order." These rights, insofar as applicable herein, are more fully set forth in Section 1(a) and 7(d) of the Order. Thus, Section 1(a) of the Order provides that each employee "...has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain. . ." from doing so.

Section 7(d)(1) of the Order confers a specific right on employees, regardless of whether they are represented in a unit of exclusive recognition, to choose their own representative in a grievance or appellate action. However, even if an employee chooses to present his grievance through someone other than his exclusive bargaining representative, the Order bestows certain rights on the exclusive bargaining representative. Thus, Section 10(e) provides that an exclusive bargaining representative must be afforded the opportunity to be represented at formal discussions between management and employees when such formal discussions concern themselves with grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. Section 13 of the Order also emphasizes this point. Thus, pursuant to that Section, if an employee, or a group of employees, choose to present or adjust a grievance without the intervention of the exclusive representative, such adjustment must not be inconsistent with the terms of any existing collective bargaining agreement and the exclusive representative must have "been given opportunity to be present at the adjustment."

- 9 -

2/

In a recent case, whose factual situation is strikingly similar to the instant case, the Assistant Secretary, relying on the language of Section 10(e) of the Order, held that management's refusal to permit the presence of the exclusive representative during discussions concerning an employee's working conditions was violative of Section 19(a)(6) of the Order. I find the rationale as well as the conclusions of the Assistant Secretary, as more fully explicated in the above-cited decision, to be entirely applicable, and therefore controlling, to the instant case.

While the referred to Assistant Secretary's decision also deals with certain 19(a)(1) conduct not applicable herein, that case did not address itself to the question whether the refusal of an employee's request to be represented by his union representative violates Section 19(a)(1) of the Order. In reliance on Section 1, Section 7(d) and Section 10(e), I find that such refusal is, indeed, violative of Section 19(a)(1) of the Order. While Section 7(d)(1) is couched in negative terms, i.e.,

"Recognition of a labor organization does not --  
(1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in Section 13." [Emphasis supplied]

the provisions of this Section clearly bestow on employees the right to be represented in "grievances or appellate

2/ Local 1909, AFGE, AFL-CIO v. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, S. C., Case No. 40-3520(CA), A/SLMR No. 242, January 17, 1973.

- 10 -

actions. While it is true that this specific section is also designed to assure a certain freedom of choice to the employee in the selection of his representative, and while he may indeed choose not to be represented by his union, the terms of the Section do not preclude him from selecting the exclusive bargaining representative as his spokesman in a grievance discussion. Indeed, if the employee is free to choose any representative for that purpose, it follows, a fortiori, that he is free to choose to be represented by his exclusive bargaining agent during a grievance discussion and that the denial of such a request, when read in the context of Section 1 as well as the extremely broad and encompassing language of Section 10(e) of the Order, violates Section 19(a)(1).

In reaching this conclusion, I find it unnecessary to rely, pass on, or distinguish the private sector cases cited by the parties in their briefs. Since these cases decided by the National Labor Relations Board deal with situations involving the investigation of possible employee misconduct and potential disciplinary action, I find both their factual and legal applicability to the instant case too remote for a meaningful analysis in either the 19(a)(1) or 19(a)(6) context.

Respondent's brief sets forth certain additional arguments which warrant further discussion. Thus, Respondent contends that finding a violation under the Executive Order would conflict with Section 713.214 of the Civilian Personnel Circular 7. This section sets forth the representation requirements in reference to complaints of discrimination such as Mr. Martin's and provides in pertinent part:

"(b) Presentation of complaint: At any stage in the presentation of a complaint, . . . the complainant shall be free from

restraint, interference, coercion, discrimination, or reprisal and shall have the right to be accompanied, represented, and advised by a representative of his own choosing. . . ."  
[Emphasis supplied.]

Respondent, placing the emphasis on the word "presentation" argues that Mr. Martin's "presentation" of his case had ended and therefore he was no longer entitled to be "accompanied, represented, and advised by a representative of his own choosing," either by virtue of the above-cited Section or Section 7(d) of the Order. I find such a construction too narrow. As noted above, I have placed the emphasis on the words "at any stage. . ." Respondent argues that "once the Hearing Examiner concluded the hearing Mr. Martin's right to representation ended. . ." This ignores the fact that the conclusion of the hearing did not lay the matter to rest. At the time of the February 18th meeting, Mr. Martin had already filed a timely appeal, thus keeping his discrimination charge very much alive. Surely, it could not be argued logically that subsequent to the hearing, Mr. Martin was deprived of representation in the further processing of his case. Moreover, the most crucial, and possibly the most controversial part of the decision was its implementation. It would be illogical and too tortured a reading of Section 713.214 or Section 7(d) of the Order to assume that an employee is entitled to representation during the processing and litigation of his grievance, but loses such right at the most critical time, i.e., the implementation of the award. I therefore find no inconsistency between the provisions of the Executive Order and the cited Civilian Personnel Circular. On the contrary, and without having to decide the nonexistent issue of a possible conflict between two inconsistent governmental regulations, I find a startling

similarity and consistency between Sections 1 and 7 of the Executive Order and Section 713.214 of the Civilian Personnel Circular. Clearly, under both, Mr. Martin was entitled to be represented during the February 18 meeting by a representative of his own choosing.

Respondent further argues that its conduct cannot be found violative of the Order because the record is devoid of any evidence that it was motivated by anti-union considerations. While the record is devoid of any evidence showing union-animus on Respondent's part, neither such evidence nor such a conclusion is necessarily a prerequisite to a finding that violations of Sections 19(a)(1) and (6) occurred. It is a fact of life that even in the context of the most harmonious and admirable labor-management relations, as indeed in all legal relationships between contending parties, differences regarding their respective legal rights and duties will arise - differences which necessarily must be resolved by appropriate legal forums. Animosity is not a prerequisite to litigation - to the contrary, its presence is to be deplored and its absence is to be lauded. However, the absence of animus cannot be the determining factor in the resolution of complex and technical legal determinations.

Respondent also relies on Section 12 of the Order and the corresponding Article VIII of its collective bargaining agreement, the so-called management rights sections, in arguing that work assignments as such are not subject to negotiation with the exclusive bargaining representative. Respondent's reliance on that Section of the Order and its almost verbatim counterpart in the agreement is misplaced. Mr. Martin's assignment to the Engine Rebuild Section was not a routine work assignment. It had its origin in a grievance brought by Mr. Martin. It was the result of prolonged grievance procedures which culminated in a formal hearing. In all prior stages of

this proceeding, Respondent recognized and met its obligation to deal with Mr. Martin through his chosen union representative. It would be rather unrealistic to argue that at a certain stage of these proceedings, Mr. Martin's transfer to the Engine Rebuild Section on a unique rotation basis lost its characteristic of a grievance and assumed the nature of a routine work assignment. I therefore find the provisions of Section 12 of the Order and Article VIII of the agreement not applicable to the instant case.

Finally, Respondent argues that the language of Section 10(e) of the Order which requires that the exclusive representative be afforded the opportunity to be represented at "formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit" (emphasis added), is not applicable to the instant case, because the subject matter of the February 18 meeting was a mere change in work assignment of a single individual as contemplated by the management rights clause of the contract, and had no impact on the general working conditions of the employees in the unit. I have already rejected the contention of the applicability of either Section 12 of the Order or Article VIII of the agreement. Similarly, I reject the contention that the adjustment of Mr. Martin's grievance did not have an impact on the general working conditions of the employees in the unit. Without deciding the issue whether Section 10(e) applies to any and all grievance discussions between management and employees, it cannot be gainsaid that the resolution of this particular grievance would have a general impact on all the employees in the unit. While the immediate resolution of the grievance may well have affected only two employees, its long-range ramification, its precedential value for all employees, and its ultimate and cumulative effect did indeed affect the

general working conditions of the employees in the unit. In this respect it is also noteworthy that the Hearing Examiner's resolution of this issue was not based on the racial discrimination charge. In fact, he dismissed this charge as not being supported by the evidence. Thus, the implementation of the Hearing Examiner's recommendation went beyond the possible rectification of a single employee's complaint of racial discrimination. In the absence of such a finding by the Examiner, Complainant's actions with respect to the work assignment of Mr. Martin assumed the color of a general grievance, the resolution of which would indeed affect the general working conditions of the employees in the unit. I therefore find, under the circumstances of this case, that the September 18 meeting constituted a "formal" discussion within the meaning of Section 10(e) of the Order and that such discussion did involve matters relating to "personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

#### CONCLUSION

In conclusion I find that, by conducting a formal discussion on February 18, 1972, concerning a grievance and other matters affecting general working conditions of employees in the bargaining unit, without affording the Complainant or his chosen representative the opportunity to attend such discussion, the Respondent improperly refused to consult, confer, or negotiate with its employees' exclusive bargaining representative in violation of Section 19(a)(6) of the Executive Order.

I further find that by refusing Mr. Martin's request to be represented in the discussion of February 18, 1972, by his chosen Union representative, Respondent interfered with, restrained, or coerced employee in violation of Section 19(a)(1) of the Executive Order.

#### RECOMMENDATIONS

Having found that Respondent has engaged in conduct which is violative of Sections 19(a)(1) and (6) of the Executive Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that U. S. Department of the Army Transportation Motor Pool, Fort Wainwright, Alaska, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local 1834, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Interfering with, restraining, or coercing its employees by preventing the president of Local 1834, American Federation of Government Employees, AFL-CIO, or any other individual acting as a representative of said labor organization, from representing or speaking on behalf of any employee in the bargaining unit at formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

(c) Refusing the request made by Mr. Willie W. Martin to be represented by the president of Local 1834, American Federation of

Government Employees, AFL-CIO, or any other representative of said labor organization, at any meeting or formal discussion between management and Mr. Willie W. Martin, convened for the purpose to discuss his discrimination charge.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, to consult, confer, or negotiate in good faith with the president of Local 1834, American Federation of Government Employees, AFL-CIO, or any other representative of such labor organization duly designated by Mr. Willie W. Martin or any other employee who is a member of the unit of which the said labor organization is the exclusive bargaining representative, at any meeting or formal discussion between management and Mr. Willie W. Martin, or any other employee in the aforementioned unit, concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Notify Local 1834, American Federation of Government Employees, AFL-CIO, of and give it the opportunity to be represented



at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(c) Post at its facility at U.S. Department of the Army, Fort Wainwright, Alaska, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, United States Department of the Army, Fort Wainwright, Alaska, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local 1834, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT interfere with, restrain, or coerce our employees by preventing the president of Local 1834, American Federation of Government Employees, AFL-CIO, or any other individual acting as a representative of said labor organization, from representing or speaking on behalf of any employee in the bargaining unit at formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

WE WILL NOT refuse the request made by Mr. Willie W. Martin to be represented by the president of Local 1834, American Federation of Government Employees, AFL-CIO, or any other representative of said labor organization, at any meeting or formal discussion between management and Mr. Willie W. Martin convened for the purpose to discuss his discrimination charge.

1

Dated, Washington, D. C.

MARCH 20, 1973

H. Stephan Gordon  
Chief Administrative Law Judge

June 25, 1973

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND ORDER  
 OF THE ASSISTANT SECRETARY  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL upon request, consult, confer, or negotiate in good faith with the president of Local 1834, American Federation of Government Employees, AFL-CIO, or any other representative of such labor organization duly designated by Mr. Willie W. Martin, or any other employee, who is a member of the unit of which the said labor organization is the exclusive bargaining representative, at any meeting or formal discussion between management and Mr. Willie W. Martin, or any other employee in the aforementioned unit, concerning a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL notify Local 1834, American Federation of Government Employees, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

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

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
 (Signature)

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

INTERNAL REVENUE SERVICE,  
 CHICAGO DISTRICT  
 A/SLMR No.279

This case involves an unfair labor practice complaint filed by National Association of Internal Revenue Employees and Chapter 10, National Association of Internal Revenue Employees (Complainants) against the Internal Revenue Service, Chicago District (Respondent) alleging that the Respondent had violated Section 19(a)(1) of Executive Order 11491, as amended, by not permitting Hymen Burstein, a supervisor of the Respondent, to have the representative of his choice represent him in a grievance proceeding, allegedly in contravention of rights assured him under Section 7(d)(1) of the Order.

The Complainants contend that Burstein is an employee within the meaning of Section 2(b) of the Order; that the Complainants have the right to bring this proceeding before the Assistant Secretary under Section 203.1 of the Assistant Secretary's Regulations; and that Section 7(d)(1) of the Order grants an employee the right to choose his representative in a grievance proceeding.

The Administrative Law Judge recommended dismissal of the complaint in its entirety. In this regard, he found that supervisors are employees within the meaning of Section 2(b) of the Order and that the Complainants had standing to file the instant complaint. He found also that Section 7(d)(1) of the Order does not confer rights on employees but simply disavows taking away certain rights that may be conferred elsewhere by law or regulation. He noted in this regard that other provisions of the Order provide for representation rights of nonsupervisors or of labor organizations and that because Section 10(e) specifically grants to a labor organization which has been accorded exclusive recognition the right to be present at formal discussions of grievances of "employees in the unit", it thereby excludes supervisors from the provision.

Upon consideration of the entire record including the exceptions and supporting brief, the Complainants' supplemental supporting brief and the Respondent's reply thereto, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation. Accordingly, he ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,  
CHICAGO DISTRICT

Respondent

and

Case No. 50-8941(26)

NATIONAL ASSOCIATION OF INTERNAL  
REVENUE EMPLOYEES AND CHAPTER 10,  
NATIONAL ASSOCIATION OF INTERNAL  
REVENUE EMPLOYEES

Complainants

DECISION AND ORDER

On February 15, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged, and recommending that the complaint be dismissed. Thereafter, the National Association of Internal Revenue Employees and Chapter 10, National Association of Internal Revenue Employees, hereinafter called Complainants, filed exceptions to the Administrative Law Judge's Report and Recommendation.<sup>1/</sup>

The Assistant Secretary has reviewed the rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the Complainants' exceptions, supporting brief and supplemental brief, and the Respondent's reply, I hereby adopt the findings,<sup>2/</sup> conclusions and recommendation of the Administrative Law Judge.

<sup>1/</sup> The Complainants also filed a Motion requesting that an attached supplemental brief, in support of the exceptions to the Administrative Law Judge's Report and Recommendation, be made a part of the record and be considered by the Assistant Secretary. Thereafter, the Respondent filed a reply brief. Both the Complainants' supplemental brief and the Respondent's reply brief have been considered in reaching the decision in the subject case.

<sup>2/</sup> In footnote 7 of his Report and Recommendation, the Administrative Law Judge inadvertently referred to Section 7(e) rather than 10(e) in connection with a labor organization's right to be represented at formal discussions. This inadvertent error is hereby corrected.

I agree with the Administrative Law Judge's finding that, with certain exceptions, the definition of "employee" contained in Section 2(b) of the Order does not exclude supervisors. Thus, while the Study Committee's Report and Recommendations (1969) made it clear that recognition should not be granted for any unit which includes supervisors and that supervisors should not participate in the management or representation of a labor organization, it did not recommend that supervisors be precluded from membership in a labor organization. Further, while the Study Committee recommended the adoption of a definition of "supervisor" similar to that found in the private sector, it did not recommend the adoption of the private sector definition of "employee."<sup>3/</sup> In this latter regard, Section 2(b) of the Executive Order provides, in part, that "'Employee'....does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order" (emphasis added). Under these circumstances, I agree with the Administrative Law Judge's conclusion that, except for the limitations specified in Section 2(b), supervisors are not generally excluded from the coverage of the Order on the basis of their supervisory status.

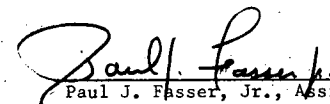
I also agree with the Administrative Law Judge's finding that further proceedings on the instant Section 19(a)(1) complaint are unwarranted based on the view that Section 7(d)(1) of the Order does not confer any rights enforceable under Section 19 and that any rights flowing from Section 10(e) of the Order do not flow to supervisors.<sup>4/</sup>

Accordingly, in agreement with the recommendation of the Administrative Law Judge, I shall order that the complaint herein be dismissed.<sup>5/</sup>

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-8941(26) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

<sup>3/</sup> Section 2(3) of the National Labor Relations Act provides, in part, that "The term 'employee' shall....not include...any individual employed as a supervisor..."

<sup>4/</sup> Cf. United States Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278

<sup>5/</sup> In view of the disposition herein, I find it unnecessary to reach the question raised by the Respondent that a conflict of interest would result if, under the circumstances of this case, the Complainants were permitted to represent a supervisor of the Respondent.

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8941(26)

National Association of Internal Revenue Employees  
and Chapter 10, National Association of Internal  
Revenue Employees,

Complainants

and

Internal Revenue Service, Chicago District,  
Respondent

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Michael E. Goldman, Assistant Counsel  
Robert M. Tobias, Counsel  
Washington, D. C.  
For the Complainants

G. Jerry Shaw  
Office of Chief Counsel  
Internal Revenue Service  
Washington, D. C.  
For the Respondent

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8941(26)

National Association of Internal Revenue Employees  
and Chapter 10, National Association of Internal  
Revenue Employees,

Complainants

and

Internal Revenue Service, Chicago District,  
Respondent

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491. It was initiated by a complaint dated May 19, 1972 and filed May 22, 1972. The complaint alleges a violation of Section 19(a)(1) of the Executive Order by the Respondent in not permitting Hymen Burstein to have the representative of his choice in a grievance proceeding, allegedly in contravention of rights assured by Section 7(d)(1) of the Order.

The Area Administrator investigated the Complaint and reported to the Regional Administrator on July 6, 1972. On July 22, 1972 Respondent filed with the Regional Administrator a Motion to Dismiss on the grounds that Burstein was a supervisor, that supervisors are not "employees" within the meaning of Section 19(a)(1) proscribing unfair labor practices against employees, that supervisors may not be represented before the Respondent or the Assistant Secretary by a labor organization that represents non-supervisory employees, and that Complainants lacked standing to bring this proceeding. Complainants replied to the Motion to Dismiss on July 31, 1972. On August 29, 1972 the Regional Administrator denied the Motion to Dismiss without ruling on the merits of Respondent's arguments but finding that Section 7(d)(1) could arguably be found to establish the right alleged to be infringed. The same day he issued a Notice of Hearing to be held October 25, 1972 in Chicago, Illinois.

Hearings were held in Chicago, Illinois on October 25 and 26, 1972 at which the parties were represented by counsel. The parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by both sides.

Hymen Burstein has been an employee of the Respondent for thirty-one years and is a member of National Association of Internal Revenue Employees (hereinafter sometimes referred to as "NAIRE"). At the time of the hearing he was employed in a supervisory capacity as Chief of Review Staff, Chicago District, Internal Revenue Service, and had been so employed since February 19, 1971. Immediately prior thereto he was employed in a supervisory capacity as Chief, Large Case Branch No. 1, Audit Division. He was a second tier supervisor with ten groups, each with its own supervisor, below him.

Upon his reassignment to his present position he complained to the District Director and then, on March 25, 1971, filed a formal grievance with the District Director of Respondent seeking reinstatement to his former position on the grounds that it afforded better opportunity for further promotion and that he had been performing its functions satisfactorily. In his formal grievance he designated "Mr. Ed McCarthy" as his representative. He testified, and I find, that he selected Mr. McCarthy because of McCarthy's extensive experience in presenting grievances. On April 20, 1971, the District Director replied that since Mr. McCarthy was an official of NAIRE (he was local President) and since NAIRE represented non-supervisory employees in the District, <sup>1/</sup> Respondent could not accept him as Burstein's representative, because the intent of E. O. 11491 was that supervisors should not have as a representative a union that represents non-supervisory employees, and that such limitation was necessary to prevent a conflict of interest between the personal interests of a supervisor and his official duties in labor relations.

On October 8, 1971, Burstein wrote to the District Director designating "Edward E. McCarthy, as an employee of the Internal Revenue Service," to represent him in his grievance. On November 8, 1971, the Acting District Director replied that it was impossible to disregard the fact that Mr. McCarthy was the President of the local chapter of NAIRE and that it was inappropriate for McCarthy to represent Burstein because employees under Burstein's supervision were represented by NAIRE on an exclusive basis thus giving rise to a problem of conflict of interest.

On February 4, 1972, Burstein designated the law firm of Harris, Burman and Silets, of Chicago, as his representative. Respondent knew that that firm was on a retainer with NAIRE. Burstein told the District Director that he was paying the law firm's fee to represent him, and that firm was permitted to represent him.

The procedural steps antecedent to filing the complaint were taken, and the complaint was filed.

#### Discussion and Conclusions

##### I. Standing to Sue

The Respondent filed with the Regional Administrator a Motion to Dismiss the complaint on the ground, inter alia, that the Complainants lack standing to bring this proceeding because, even if Burstein had a

<sup>1/</sup> It has been the exclusive representative since 1965.

right under Section 7(d)(1) of the Order that was infringed by Respondent, it was Burstein's right and not Complainant's right that was infringed, and since Burstein is a supervisor and therefore cannot be represented in collective bargaining by Complainants, they have no "standing to sue" either on behalf of itself or on behalf of Burstein. The same contention was made at the hearing before me and in the brief.

The Complainants argue that they have standing because of the literal meaning of the Regulations on standing and by analogy to decisions under the National Labor Relations Act. I find that Complainants have standing although I find both these arguments unpersuasive.

Section 203.1 of the Assistant Secretary's regulations provides:<sup>2/</sup>

"A complaint that an agency, activity, or labor organization has engaged in any act prohibited under Section 19 of the Order...may be filed by an employee, an agency, activity, or labor organization."

Complainants argue that that regulation literally provides that a labor organization may file a complaint, they are concededly a labor organization, ergo, they may be Complainants in this case.

That is too simplistic an approach. Following that reasoning further, any labor organization at all, even one without the remotest nexus with the case, or indeed even any other agency in the Executive Branch <sup>3/</sup> could have been the Complainant in this case. I believe the regulations did not contemplate proceedings such as this being instituted by someone with at most an academic interest, or perhaps even a mischievous interest, in the proceeding. I believe it was contemplated that there would be some nexus <sup>4/</sup> between the alleged wrong and the Complainant.

Complainants analogize decisions under the National Labor Relations Act. The analogy is inapposite. Under that Act the General Counsel of the Board has express, probably exclusive, statutory authority to file complaints of unfair labor practices. <sup>5/</sup> Analogizing the situation with the filing of charges (as distinguished from a complaint) with the Board's General Counsel, as Complainants do, is too remote a situation to be useful.

I believe therefore that it is not any entity that falls within the literal words of Section 203.1 that may file any complaint. But it does

<sup>2/</sup> 29 C.F.R. §203.1

<sup>3/</sup> With the exception of those specified in Section 3(b) of the Executive Order.

<sup>4/</sup> Complainants in their brief argue there need be none at all.

<sup>5/</sup> 20 U.S.C.A. §153(d), 160(b).

not follow that only those who have "standing to sue" in the judicial common law sense have standing to file a complaint under Section 203.1. Even that concept of "standing to sue" has been substantially broadened by the Supreme Court in the last few years. "Standing to sue" has a relationship to "case or controversy" under Article III of the Constitution, but we are not Article III courts, and so our recognition of standing to commence proceedings may properly, if it is otherwise sound, be even broader than the recently expanded judicial concept of standing.

There is no need in this case to attempt to delineate the precise boundaries of the interest we should recognize as giving standing to file a complaint under Section 19(a) of the Executive Order. It is enough to find some minimum boundary within which Complainants fall to sustain their standing to file this complaint.

Burstein named McCarthy to represent him in presenting his grievance. McCarthy was an official of Complainants. Respondent refused to recognize McCarthy as Burstein's representative solely on the ground that he was an official of Complainants. (The reason for its refusal, concern over a potential conflict of interest, is irrelevant to this immediate question, whatever relevance it may have to the proper interpretation of Section 7(d)(1) of the Order.) With Complainants as the parties adverse to Respondent, we are assured that "the dispute sought to be adjudicated will be presented in an adversary context...." <sup>6/</sup> The combination of these four circumstances, I conclude, is enough for us to recognize Complainants as permissible complainants. This is not a conclusion that less would not be enough.

II. The Applicability of Section 7(d)(1) of the Executive Order to Supervisors.

The parties are in sharp disagreement over the scope and meaning of Section 7(d)(1). The Respondent argues that it does not apply to supervisors at all and that even if it did apply it does not confer any rights not otherwise existing. The Complainants argue that it does apply to supervisors and that it codifies and protects the right of an employee to be represented by anyone of his choice in a grievance action.

Section 2(b) of the Executive Order defines an "employee" to exclude a supervisor (with an irrelevant exception) "for the purpose of exclusive recognition...." I conclude that for purposes other than exclusive recognition and activities pertaining thereto (such as the negotiation of collective bargaining agreements), it does not exclude supervisors.

6/ Flast v. Cohen, 392 U.S. 83, 101, 20 L. Ed. 2d 947, 962, 88 S. Ct. 1942, 1953 (1968), quoted in Sierra Club v. Morton, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361, 1364 (1972).

Section 7(d) of the Order provides:

"(d) Recognition of a labor organization does not --

- (1) Preclude an employee...from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in section 13;"

Although there was a negotiated grievance procedure, it of course did not apply to Burstein, a supervisor. Since exercising grievance rights not under a negotiated procedure does not involve exclusive recognition, I conclude that Section 7(d)(1) applies to Burstein although he is a supervisor.

III. The Nature of Section 7(d)(1); a Disclaimer or Source of a Right.

There is presented the question of whether Section 7(d)(1) affirmatively confers on an employee, including a supervisor, a right to select his representative in a grievance proceeding, or whether it is merely a disclaimer of taking away such a right that may be created elsewhere and does not affirmatively create such a right or reenact such a right created elsewhere.

The latter is its literal language. Section 7(d)(1) does not purport to create or reenact or codify anything. It is simply a statement that exclusive recognition does not preclude something else. The something else, the right to select one's representative in a grievance action, is not found anywhere else in the Order with respect to supervisors. Other provisions of the Order do provide for representation rights of non-supervisors or of the union, <sup>7/</sup> but this case does not involve that issue. This decision considers the question of the right of a supervisor, not an employee in the bargaining unit, to representation at a grievance hearing.

This conclusion that the pertinent part of Section 7(d)(1) is only a disclaimer of taking away rights is confirmed by looking at other parts of Section 7(d).

The exception in Section 7(d)(1), "except when presenting a grievance under a negotiated grievance procedure," is not a disclaimer. It provides for taking away a right that otherwise may exist. Because of the exception, an employee is, or may be, precluded from selecting his own representative in a grievance action under a negotiated procedure. But nothing

7/ E.g., Section 7(e) gives the union the right to be present at formal discussions of grievances of "employees in the unit," thereby excluding supervisors from the provision.

indicates that any other right otherwise existing is taken away, or that any right not otherwise existing is established.

Section 7(d)(2) provides that exclusive recognition does not preclude an agency dealing with a veterans organization concerning matters of interest to employees with veterans preference. Surely it would not be argued that 7(d)(2) confers on veterans organizations the right to be dealt with on such matters; dealing with them simply is not precluded by exclusive recognition. If veterans organizations have such a right, it is granted elsewhere than in the Order. Section 7(d)(3) provides that exclusive recognition does not preclude dealing with religious, professional, or other lawful associations concerning matters of particular applicability to members of such associations. Surely it would not be argued that Section 7(d)(3) confers on such associations the right to be dealt with concerning such matters; it is simply not precluded. The provisions of Section 7(d)(1), concerning the selection of a representative in a grievance proceeding, are the same, *mutatis mutandis*, as the provisions of Sections 7(d)(2) and (3). These provisions speak to what they do not do. They do not preclude certain conduct by executive agencies. They do not thereby create any rights in the organizations or the employees to engage in that conduct. I conclude that Section 7(d)(1) does not establish a right of an employee in a grievance matter to have a representative of his choice; it only does not take away such right he might otherwise have.

Although Section 7(d)(1) does not establish such a right, it may be that other provisions of the Order establish such a right for an employee in the bargaining unit.<sup>8/</sup> This decision is limited to the case of a supervisor.

IV. The Governing Provision Putatively Violated and the Remedy.

Complainants argue that Section 7(d)(1) incorporates the protections of law and regulations afforded employees in presenting grievances, and show provisions of the Federal Personnel Manual, the Treasury Personnel Manual, and especially the Internal Revenue Manual that at least superficially give a grievant the right to choose a representative in presenting a grievance. I need not determine what rights of that nature are conferred by those regulations nor the limitations on the exercise of those rights.

I have concluded above that Section 7(d)(1) does not confer or incorporate any rights; it simply disavows taking away certain rights that may be conferred elsewhere by law or regulation. If Burstein had no such rights conferred elsewhere, then no law or regulation was violated. If some other law or regulation gave him a right to a representative of his own choosing in presenting a grievance, and that right was denied him by Respondent, then Respondent violated that other law or regulation, not the Executive Order. Thus Burstein, and the Complainants, are in the wrong forum. For an alleged violation of the alleged right under the various regulations referred to by Complainants, the remedy is in whatever

<sup>8/</sup> See footnote 7.

body or bodies have jurisdiction to grant such remedy for such violation. It has not been shown, and I do not find, that the Assistant Secretary is such a tribunal. The Executive Order was not intended to be a panacea for the employee relations of Executive Branch employees. It does not assure the right that supervisors shall have to select representatives in presenting grievances.

It thus is unnecessary to discuss or decide the matter to which the parties devoted considerable attention--viz, whether, if the Executive Order confers a right on a supervisor to select a representative of his choice in presenting a grievance, there would be a potential conflict of interest in Burstein being represented in his grievance by a person who is an official of a union which presented grievances and other matters of employees of whom Burstein was a second tier supervisor to whom such grievances could go and, if there was such potential conflict of interest, its impact on his right, if any, to select a representative of his choice. Since the right of Burstein, if any, to select a representative of his choice in his grievance matter is not a right assured by the Executive Order, the conduct of the Respondent in denying him that right was not a violation of Section 19(a)(1) of the Order.

Recommendation

I recommend that the complaint be dismissed on the ground that the allegedly unlawful conduct was not in violation of Executive Order 11491.



MILTON KRAMER  
Administrative Law Judge

February 15, 1973

June 25, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, WESTERN  
SERVICE CENTER, OGDEN, UTAH  
A/SLMR No. 280

This case involves an unfair labor practice complaint filed by National Association of Internal Revenue Employees and Chapter 67, National Association of Internal Revenue Employees (Complainants) against the U.S. Department of Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah (Respondent), alleging that the Respondent had violated Section 19(a)(1) of Executive Order 11491, as amended, by announcing a policy whereby a supervisor would not be permitted to be represented in a grievance or appellate action by a representative of the labor organization that represents employees supervised by the aggrieved supervisor.

The Administrative Law Judge, relying on the rationale contained in his Report and Recommendation in a related case, Internal Revenue Service, Chicago District, A/SLMR No. 279, involving the same agency, the same national Complainant, and similar issues, recommended dismissal of the complaint in its entirety. In his decision in the related case, which was adopted by the Assistant Secretary, the Administrative Law Judge found that while supervisors are not generally excluded from the coverage of the Order on the basis of their supervisory status, Section 7(d)(1) of the Order does not confer upon supervisors any rights enforceable under Section 19 of the Order. Moreover, the Administrative Law Judge held in that case that any rights flowing from Section 10(e) of the Order did not flow to supervisors.

The Assistant Secretary concluded that the principles expressed in Internal Revenue Service, Chicago District, A/SLMR No. 279, were equally applicable to the instant case and that, therefore, the Respondent's stated policy of refusing to permit supervisors to be represented in grievance proceedings by a representative of the labor organization that represented employees supervised by the grievant-supervisor, was not violative of Section 19(a)(1) of the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 280

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, WESTERN  
SERVICE CENTER, OGDEN, UTAH

Respondent

and

Case No. 61-1790(CA)

NATIONAL ASSOCIATION OF INTERNAL  
REVENUE EMPLOYEES AND CHAPTER 67,  
NATIONAL ASSOCIATION OF  
INTERNAL REVENUE EMPLOYEES

Complainants

DECISION AND ORDER

On February 28, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged and recommending that the complaint be dismissed. Thereafter, National Association of Internal Revenue Employees and Chapter 67, National Association of Internal Revenue Employees, hereinafter called Complainants, filed exceptions to the Administrative Law Judge's Report and Recommendation. <sup>1/</sup>

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the Complainants' exceptions, supporting brief and supplemental brief, and the Respondent's reply, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

The complaint in the instant case alleged, in effect, that the Respondent violated Section 19(a)(1) of Executive Order 11491, as amended, by announcing a policy whereby a supervisor would not be

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<sup>1/</sup> The Complainants also filed a supplemental brief in support of the exceptions and Respondent filed a reply brief, both of which have been considered.



permitted to be represented in a grievance or appellate action by a representative of the labor organization that represents employees supervised by the aggrieved supervisor. It is asserted that such a policy is violative of rights assured under Section 7(d)(1) of the Order. 2/

The essential facts of the case are set forth in detail in the Administrative Law Judge's Report and Recommendation, and I shall repeat them only to the extent necessary.

The Complainants had represented exclusively certain employees of the Respondent for several years, 3/ and the evidence establishes that a number of supervisors, originally included in the unit, retained their union membership after the inception of Executive Order 11491. At a supervisory training program conducted by the Respondent in March 1972, confusion was created by virtue of certain statements that were alleged to have been made by one or more instructors to the effect that supervisors could not be represented in a grievance action by an official of the labor organization which represented rank-and-file employees. 4/ To eliminate this confusion, the Respondent's Director issued a memorandum to its supervisors, advising them that they could be represented in a grievance procedure by anyone of their choosing, including a representative of the labor organization. Thereafter, the Director of the Personnel Division of the Internal Revenue Service (IRS) contacted the Complainants' National Vice President and advised him that it was IRS policy that supervisors could not be represented in grievance proceedings by a representative of the labor organization that represented employees supervised by the grievant-supervisor and that the official of the Respondent, who had issued the above-mentioned memorandum, agreed with this policy. Thereafter, the complaint in the instant case was filed.

The Administrative Law Judge, relying on the rationale contained in his Report and Recommendation in a case involving the same agency,

2/ Section 7(d)(1) reads, "Recognition of a labor organization does not—(1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in section 13;"

3/ Recognition was granted under Executive Order 10988.

4/ In view of my findings herein, I find it unnecessary to determine whether or not such statements were, in fact, made during the training program.

-2-

the same national Complainant, and similar issues, 5/ concluded that the Respondent's conduct in the instant case did not constitute a violation of Section 19(a)(1) of the Order. In his decision in the related case, which on this date I have adopted, the Administrative Law Judge found that while supervisors are not generally excluded from the coverage of the Order on the basis of their supervisory status, Section 7(d)(1) did not confer upon supervisors any rights enforceable under Section 19 of the Order. Moreover, he found that any rights flowing from Section 10(e) of the Order did not flow to supervisors. 6/ Accordingly, he recommended that the complaint in that case be dismissed.

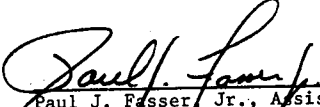
In my view, the principles expressed in Internal Revenue Service, Chicago District, A/SLMR No. 279, are equally applicable to the facts of the instant case. 7/ I find, therefore, in agreement with the Administrative Law Judge, that the Respondent's stated policy, of refusing to permit supervisors to be represented in grievance proceedings by a representative of the labor organization that represented employees supervised by the grievant-supervisor, was not violative of Section 19(a)(1) of the Order.

Accordingly, I find that further proceedings on the instant complaint are unwarranted, and I shall order that the complaint be dismissed. 8/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-1790(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 25, 1973

  
Paul J. Fisser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

5/ Internal Revenue Service, Chicago District, A/SLMR No. 279. In that case the Respondent Activity denied a supervisor the right to be represented in a grievance proceeding by an official of the labor organization involved.

6/ See also, in this regard, United States Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278.

7/ As I find that the Respondent's policy did not violate the Order, it was not considered necessary to determine whether a published policy, which contravened the provisions of the Order, would be violative of the Order if such policy had not been implemented.

8/ In view of the disposition herein, I find it unnecessary to reach the question raised by the Respondent that a conflict of interest would result if, under the circumstances of this case, the Complainants were permitted to represent a supervisor of the Respondent.

-3-

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 61-1790(CA)

National Association of Internal Revenue Employees  
and Chapter 67, National Association of Internal  
Revenue Employees

Complainants

and

U. S. Department of the Treasury  
Internal Revenue Service  
Western Service Center  
Ogden, Utah

Respondent

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Michael E. Goldman, Assistant Counsel  
Robert M. Tobias, Counsel  
Washington, D. C.

For the Complainants

G. Jerry Shaw  
Office of Chief Counsel  
Internal Revenue Service  
Washington, D. C.

For the Respondent

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 61-1790(CA)

National Association of Internal Revenue Employees  
and Chapter 67, National Association of Internal  
Revenue Employees

Complainants

and

U. S. Department of the Treasury  
Internal Revenue Service  
Western Service Center  
Ogden, Utah

Respondent

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491. It was initiated by a complaint dated May 19, 1972 and filed May 23, 1972. The complaint alleges a violation of Section 19(a)(1) of the Executive Order by the Respondent in announcing a policy that a supervisor would not be permitted in a grievance or appellate action to have as his representative an official of the union that represents the employees supervised. This was alleged to be in contravention of Section 19(a)(1) because violative of a right assured by Section 7(d)(1) of the Order.

The Respondent filed a Motion to Dismiss the complaint with the Regional Administrator on the grounds that supervisors are not covered by the provisions of the Executive Order concerning unfair labor practices, that even if they were covered they may not be represented before the Internal Revenue Service by a labor organization that represents non-supervisory employees, that they may not be represented in this proceeding by such a labor organization, and that the expression of a policy without implementation of the policy cannot be an unfair labor practice. On July 31, 1972 the Complainants filed a Reply to Respondent's Motion to Dismiss. On August 29, 1972 the Acting Regional Administrator denied the Motion to Dismiss on the grounds that the Assistant Secretary had not decided whether a supervisor is an employee under Section 19 of the Order nor whether action of an agency or activity which results in contemplative injury rather than actual injury to a specific person may constitute a violation of Section 19(a), and that such issues, which undoubtedly would arise elsewhere, should be decided by the Assistant Secretary on the basis of a record. On August 30, 1972 the Regional Administrator issued a Notice of Hearing to be held in Ogden, Utah on October 31, 1972.

Hearings were held in Ogden, Utah on October 31 and November 1, 1972. The parties were represented by counsel and afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. For good cause the time to file briefs was extended and both sides filed timely briefs on January 9, 1973.

Facts

On March 21, 22, and 23, 1972 the Respondent held a series of training sessions for its supervisors. These were conducted by officials of the Civil Service Commission, the Western Region of the Internal Revenue Service, and the Western Service Center (the Respondent) of the Internal Revenue Service. Among the subjects discussed was labor-management relations. The evidence is in sharp conflict on whether the supervisors were told they could not be represented in a grievance action by an official of the union that represented non-supervisory employees, but it appears, and I find, that some supervisors became uncertain on whether they had such right. Some of the supervisors were members of the union (Chapter 67) that represented non-supervisory employees but of course they were not included in the collective bargaining unit.<sup>1/</sup> The Director of the Respondent was notified that Complainants intended to file a complaint that Respondent violated the Order by stating at the training session that supervisors could not be represented by a union official in a grievance of a supervisor.<sup>2/</sup>

To eliminate the confusion, Robert H. Terry, the Director of the Respondent, on April 13, 1972 issued a memorandum to "All Supervisors" stating that supervisors could be represented in a grievance by any person of their choice including a representative of the union. This satisfied Complainants at that time.

The issue of whether officials of Complainants could represent supervisors in grievance matters existed also in other regions and activities of IRS.<sup>3/</sup> The national President of the Complainants, Vincent L. Connery,

<sup>1/</sup> Chapter 67, NAIRE, one of the Complainants, received recognition as the representative of non-supervisory employees under Executive Order 10988 and has continued to be accorded exclusive recognition.

<sup>2/</sup> The charge involved also another matter not now in issue: whether supervisors could vote in elections of union officials.

<sup>3/</sup> This does not appear in the record in this case but it does appear in the record in the related case of the Chicago District of Internal Revenue Service, No. 50-8941(26). Counsel were the same in that case and in this one. It was stipulated on the record in this proceeding that the record made in the Chicago case, in which the hearing was held one week earlier, could be referred to in this case as though it were part of the record in this case. Tr. 86-87.

wrote to A. J. Schaffer, Director, Personnel Division of the Internal Revenue Service in Washington, D. C., concerning union officials acting as representatives of supervisors in grievances. Mr. Schaffer wrote to Mr. Connery on May 12, 1972 stating that the position of Mr. Terry, Director of the Respondent, was contrary to the established policy of IRS, that Mr. Terry had been so advised, and that Mr. Terry now agreed with the IRS position. Mr. Schaffer stated that it was IRS policy that supervisors could not be represented in grievances by a representative of the union that represented employees supervised by the grievant-supervisor.

Mr. Terry had in fact been so advised by Mr. Schaffer and adopted the policy of the national headquarters. But he never formally revoked or corrected his memorandum of April 13 to "All Supervisors." Nor did he advise representatives of Local 67 that Schaffer had overruled Terry's memorandum until a meeting on May 23, 1972, the day the complaint in this proceeding was filed and four days after it was signed.

Discussion and Conclusions

This case presents the identical underlying substantive issues as Case No. 50-8941(26).<sup>4/</sup> I am the Administrative Law Judge in both cases, counsel for the Complainants are the same, the national Complainant is the same (the local Complainants, local units of the national Complainant, are different), and the Respondents are different activities of the same agency. The facts and factual issues are somewhat different, and the adjective legal issues or the setting in which they are presented are different. But the underlying substantive issues are the same in both cases. These are whether Section 7(d)(1) of the Executive Order applies to supervisors, whether it confers any rights on supervisors or merely disclaims the Order's taking away rights conferred elsewhere, and whether the denial to a supervisor of the right to be represented by an official of the union that is the collective bargaining representative of employees he supervises violates the Order. I made my Report and Recommendation in the Chicago case on February 15, 1973.

This case presents certain factual issues. It presents also the issue of Complainants' standing to bring this proceeding. The Chicago case, in which I found the Complainants had standing, presented that issue in a different context. This case presents also the issue of "case or controversy," whether an announcement of a policy, without its implementation or application in a concrete case to a particular individual, should be entertained and decided by the Assistant Secretary (the announcement

<sup>4/</sup> National Association of Internal Revenue Employees and Chapter 10, National Association of Internal Revenue Employees, Complainants and Internal Revenue Service, Chicago District, Respondent.

of the policy is denied) as a live controversy over whether the policy violates Section 19(a)(1) of the Executive Order.<sup>5/</sup>

Normally I would not decide the merits of a case without first deciding whether the Complainant has standing to present it, whether the case presents a "case or controversy", and without deciding all the material factual issues. But where, as here, the underlying issues on the merits are identical with such issues in another case in which I recently made a Report and Recommendation and in which I concluded those issues in a way that would dispose of this case regardless of how the other issues are decided, I believe it appropriate to treat Respondent's brief as a demurrer to Complainant's presentation of the evidence and argument. Or it may be analogized to a motion under Rule 12(b)(6), F.R.C.P., a motion to dismiss for failure to state a claim upon which relief may be granted. That is, accepting Complainants' version of the facts, and assuming they have standing to bring this proceeding, and assuming it presents a live issue that the Assistant Secretary should entertain and decide, do Complainants have a cause of action?

I found in the Chicago case that denying to a supervisor the right to have as his representative in a grievance an official of the union that is the exclusive representative of employees he supervises does not violate Executive Order 11491. Hence I conclude Complainants have not shown a cause of action. I adopt Points II, III, and IV of the Discussion and Conclusions of my Report in the Chicago case.

Further support for the ultimate conclusion I reached in Case No. 50-8941, that denying to a supervisor the right to be represented in a grievance by an official of the union that represents rank and file employees may violate other regulations but does not violate E.O. 11491, may be found in Bucholtz and Crouch v. Walters, D. Ct. D.C. No. 1968-72, decided February 8, 1973.

In that case Crouch was an IRS supervisor, Bucholtz was a lawyer employed by NAIRE on a salary, and Walters was the Commissioner of Internal Revenue. Crouch had a grievance and designated an official of NAIRE as her representative in presenting it. IRS denied her the right to be so represented on the same ground it denied Burstein such right in

<sup>5/</sup> See Environmental Protection Agency and AFGE, A/SIMR No. 136 (1972). Section 19(a)(2) proscribes encouraging or discouraging union membership by discrimination in conditions of employment. In that case it was held that conduct which had a tendency to discourage membership in a union violated Section 19(a)(2) without showing actual discouragement. In this case Respondent argues that announcement of a policy, without applying it to anyone, does not violate Section 19(a)(1) which proscribes interfering with or restraining an employee in the exercise of rights assured by the Order. Announcing a policy that a union official could not represent a supervisor in a grievance has the tendency to discourage a supervisor from selecting a union official, and so if necessary to decide whether this case presents a case or controversy, I would hold that it does.

Case No. 50-8941 and it would deny such right in this case. Crouch then designated Bucholtz. IRS denied her the right to be represented by Bucholtz because of his "connection" with NAIRE. It was shown by deposition that Bucholtz, as a salaried employee of NAIRE, represented non-supervisors in grievances before IRS supervisors like Crouch. Crouch and Bucholtz commenced the action for a declaratory judgment and injunction against IRS denying Crouch the right to be represented by Bucholtz and interfering with the right of Bucholtz to practice law. Crouch had made no fee arrangement with Bucholtz and it appeared she would pay none.

The plaintiffs filed a Motion for Summary Judgment. They relied on the Internal Revenue Manual, the Treasury Personnel Manual, and the Federal Personnel Manual, as in this case. The defendant filed a Motion to Dismiss for lack of jurisdiction of the subject matter or in the alternative for Summary Judgment. In support of its position that the Court lacked jurisdiction of the subject matter, it argued that although the plaintiffs' brief had not mentioned E.O. 11491 a decision on the merits involved an interpretation of that Order, that two cases (this case and No. 50-8941) were then pending before the Assistant Secretary involving that same interpretation, and it cited several cases to the effect that the Court did not have jurisdiction to make that interpretation.<sup>6/</sup>

The District Court (Judge Pratt), without setting forth reasons, denied the defendant's Motion to Dismiss or in the alternative for Summary Judgment, granted plaintiff's Motion for Summary Judgment, and permanently enjoined IRS from denying to Crouch the right to be represented by Bucholtz and from denying to Bucholtz the right to represent Crouch. I believe it quite unlikely that had Judge Pratt thought that Crouch's right to be represented by Bucholtz stemmed from the Executive Order or that the denial of such right was a violation of the Order, he would have ruled as he did without mentioning the Executive Order.


Furthermore, if the Executive Order assures a supervisor the right to be represented at a grievance by anyone of his choice, and if the Bucholtz case was correctly decided, then a supervisor would have a choice of forums for the denial of that right. He could bring a proceeding before the Assistant Secretary under Section 19(a) of the Executive Order for denying him a right assured by the Order, or he could commence an action in accordance with the Bucholtz decision in a District Court for the agency violating its own regulations and perhaps the Federal Personnel Manual, or perhaps he could bring both proceedings, *seriatim* or concurrently. It should not lightly be concluded that the Executive Order was intended to produce such a confused result and such result should be avoided if rationally possible. It is not only rationally possible to avoid it but it is avoided by what I believe to be the required conclusion under the Executive Order without regard to such considerations.

<sup>6/</sup> A substantial portion of the transcript of hearing in this case was made an exhibit.

June 27, 1973

Recommendation

I recommend that the complaint be dismissed on the ground that the allegedly unlawful conduct was not in violation of Executive Order 11491.

  
MILTON KRAMER  
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. ARMY ELECTRONICS COMMAND,  
FORT MONMOUTH, NEW JERSEY  
A/SLMR No. 281

This case arose as a result of an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 476 (Complainant) alleging that the U. S. Army Electronics Command, Fort Monmouth, New Jersey (Respondent) violated Section 19(a)(1) of Executive Order 11491, as amended, by refusing to maintain on official time an employee of the Respondent who appeared on behalf of the Complainant at a unit determination hearing being held pursuant to the Regulations of the Assistant Secretary. The Respondent contends that Section 19(a)(1) does not require that union witnesses be maintained on official time.

In agreement with the Administrative Law Judge and based on the decisions in Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139 and Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256, the Assistant Secretary found that the Respondent violated Section 19(a)(1) by refusing to maintain on official time an employee who testified on behalf of the Complainant at a unit determination hearing. The Assistant Secretary also found the Respondent's existing policy of refusing to maintain on official time necessary witnesses testifying on behalf of a labor organization at formal unit determination hearings conducted pursuant to the Assistant Secretary's Regulations to be violative of Section 19(a)(1). However, in agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent was not obligated to make available on official time any employees who appeared solely as union representatives and found no violation in this respect. Accordingly, the Assistant Secretary ordered that the Respondent restore to the individual employee involved eight hours of annual leave covering the period in which he testified at a formal unit determination hearing, and that the Respondent take such action as was necessary to bring its Regulations into compliance with the above-stated policy of the Assistant Secretary.

Noting that the Federal Labor Relations Council has accepted for review Department of the Navy and the U. S. Naval Weapons Station, cited above, and Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, cited above; and further directed that the Assistant Secretary's Decision and Order in both matters be stayed pending final disposition of the appeals, the Assistant Secretary deferred the implementation of the remedial order in the subject case until such time as the Council ruled on the above appeals.

February 28, 1973

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY ELECTRONICS COMMAND,  
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-2851(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 476

Complainant

DECISION AND ORDER

On May 8, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions, statements of positions and briefs, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U. S. Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

Interfering with, restraining, or coercing employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Assistant Secretary's Regulations.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

a. Restore to Mr. Herbert Cahn eight of the hours of annual leave with which he was charged for December 7 and 9, 1971, based on his testifying at the formal unit determination hearing in Cases Nos. 32-2003, 2235, etc.

b. Take such action as is necessary in order to bring its regulations into compliance with the requirement that necessary union witnesses be made available on official time to participate in formal unit determination hearings held pursuant to the Assistant Secretary's Regulations.

1/ The Federal Labor Relations Council (Council) has accepted for review the Assistant Secretary's Decision and Order in Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139, FLRC No. 72A-20, and in Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256, FLRC No. 73A-18, which cases involve issues similar to those involved in the subject case. The Council also directed that the Assistant Secretary's Decision and Order in both cases be stayed pending final disposition of the appeals. Under these circumstances, it was concluded that the implementation of the remedial order in the subject case should be deferred pending the Council's resolution of the appeals in the above-noted cases. It should be noted, however, that this deferral action would not relieve either party herein from having to comply with the Council's rules concerning the filing of a petition for review of the Decision and Order in this matter.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

WE WILL restore to Mr. Herbert Cahn eight of the hours of annual leave with which he was charged because he testified on December 7 and 9, 1971, at the formal unit determination hearing in Cases Nos. 32-2003, 32-2235, etc.

WE WILL take such action as is necessary in order to bring our Regulations into compliance with the requirement that necessary union witnesses be made available on official time for participation in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

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

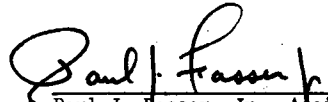
Dated: \_\_\_\_\_ By: \_\_\_\_\_

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 Administrator of the Labor-Management Services Administration, U. S. Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, N. Y. 10036.

c. Post at the United States Army Electronics Command, Fort Monmouth, New Jersey, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

IT IS HEREBY ORDERED that in all other respects the complaint in Case No. 32-2851(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 27, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

U. S. ARMY ELECTRONICS COMMAND  
FORT MONMOUTH, NEW JERSEY

Respondent

and

CASE NO. 32-2851 (CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
LOCAL 476

Complainant

Capt. Dennis E. Cole, Office of Staff Judge  
Advocate, Fort Monmouth, New Jersey 07703  
for the Respondent

Irving Geller, Esq., 1737-H Street, N.W.,  
Washington, D. C. 20006, for the Complainant

Before: Samuel A. Chaitovitz  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on December 6, 1972 by the Regional Administrator of Labor-Management Services Administration, New York Region, based on a complaint filed by National Federation of Federal Employees Local 476 (hereinafter called the Union or NFFE) against the United States Army Electronics Command, Fort Monmouth, New Jersey (herein called the Activity or the Respondent). The complaint alleged, in substance, that the Activity violated Section 19(a)(1) of the

Order by placing individuals 1/ on annual leave rather than duty status 2/ for days during which they attended and testified at a representation hearing conducted pursuant to the Order.

A hearing was held before the undersigned on December 18, 1972 at Fort Monmouth, New Jersey. Both parties were represented at the hearing, and their representatives were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Both parties were given an opportunity to file briefs with the undersigned.3/

From the entire record in this case,4/ from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

Statement of Facts

A formal representation hearing was held in a series of consolidated representation cases 5/ on December 6, 7, 8, 9, 16 and 17, 1971 6/ on the grounds of the Army installation at Fort Monmouth, New Jersey. The purpose of the hearing was to

1/ Mr. Herbert Cahn was the only such individual concerning which evidence was introduced at the hearing.

2/ "Duty status" herein means being paid for the time in question and not being required to take annual leave or leave without pay. It may hereinafter also be referred to as "pay status" and "official time."

3/ Only the complainant chose to file such a brief.

4/ The following corrections are hereby made in the transcript of the subject hearing: Page 13, line 13, "have" is changed to "why"; Page 19, line 18, "question" is changed to "objection"; and Page 82, line 22, "1984" is changed to "19(a)(4)."

5/ Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, Case Nos. 32-2003, 32-2235, 32-2240, 32-2392, 32-2405 and 32-2432.

6/ The hearing in Case No. 32-2003, prior to the consolidation was commenced on August 31, 1971. No allegation of any unfair labor practice has been made with respect to the August 31 hearing.



enable the Assistant Secretary for Labor-Management Relations to make a determination concerning the appropriateness of a collective bargaining unit.

Mr. Herbert Cahn, an employee of the Respondent Activity, attended the entire hearing and testified on December 7 and 9. <sup>7/</sup> The parties stipulated that Mr. Cahn was a necessary witness in the representation hearing. Mr. Cahn's place of work was about one-quarter of a mile from the place of hearing. When not actually testifying Mr. Cahn, who was at that time president of the Union, sat at the counsel table and assisted and advised the NFFE Counsel.

Mr. Cahn testified that prior to the representation hearing of December 6, he requested of his supervisor that he be granted official time in order to be present at the representation hearing. <sup>8/</sup> Mr. Cahn did not recall advising his supervisor that he would be called as a witness in the representation hearing. Mr. Cahn discovered during that pay period that his request was denied and that he would be charged with annual leave.

There was no evidence introduced that any request for Mr. Cahn's attendance as a witness was made to the Hearing Officer or any other representative of the Department of Labor. Mr. Cahn testified that he was not instructed by the Hearing Officer to attend the hearing.

<sup>7/</sup> Judicial notice is taken of the official transcript of the representation hearing. In this regard the transcript indicates that:

Date of hearing	Pages of transcript	Page Mr. Cahn called to stand	Page Mr. Cahn excused
December 6	100 to 188	not called	
December 7	189 to 327	275	327
December 8	328 to 492	not called	
December 9	493 to 637	630	637
December 16	638 to 764	not called	
December 17	765 to 835	not called	

The hearing resumed on December 7 after the luncheon break at 1:15 p.m. on page 247 and on December 9 at 1:15 p.m. at page 574.

<sup>8/</sup> Mr. Cahn was not sure whether this request was made a few hours or days before the hearing opened.

On December 6, two witnesses testified, both called by the Activity. This order of presenting evidence was determined by the Hearing Officer. There was no evidence submitted that at any time the Hearing Officer was advised or knew that Mr. Cahn was waiting to testify or wanted to testify and then return to work. <sup>9/</sup> Similarly no evidence was introduced that either Mr. Cahn or the Union made any attempt to ascertain when the Activity's witnesses would be finished and when the Union would be allowed to call its witnesses. In this regard it should be noted that on December 7, two witnesses were called to testify by the NFFE before Mr. Cahn was called.

The Activity charged Mr. Cahn with annual leave for all the time he was in attendance at the hearing, including the two occasions he testified. <sup>10/</sup> The Activity did not charge witnesses and representatives who appeared on behalf of the Activity with annual leave for their times of attendance.

The decision to charge Mr. Cahn with annual leave for the period he attended and testified in a representation hearing was pursuant to Army policy and regulations.

#### Contentions of the Parties

The Union contends that the Activity violated Section 19(a)(1) of the Order by refusing to maintain Mr. Cahn on duty status for the entire period of time he attended the representation hearing.

<sup>9/</sup> There is some evidence that NFFE counsel and Mr. Cahn might have complained to the Hearing Officer concerning the length of the hearing.

<sup>10/</sup> Mr. Cahn was charged with the following annual leave for the hearing dates in question:

December 6, 1971	8 hours
December 7, 1971	6 hours
December 8, 1971	8 hours
December 9, 1971	8 hours
December 16, 1971	6 hours
December 17, 1971	7 hours

The Activity contends that Section 19(a)(1) order does not require that it retain on pay status witnesses in representation hearings who testify on behalf of the Union and further, that to so hold in the instant case would be an unlawful retroactive application of Department of the Navy and U. S. Naval Weapons Station, A/SLMR No. 139.

#### CONCLUSIONS

The subject case is controlled by Department of the Navy and U. S. Naval Weapons Station, supra, 11/ and Department of the Army, Reserve Command Headquarters, Camp McCoy, A/SLMR No. 256, in which the Assistant Secretary interpreted the Order in relation to the obligation of an activity to keep on pay status necessary witnesses in unit determination hearings.

The U. S. Naval Weapons Station Case, supra, and the Camp McCoy Case, supra, clearly established that it is a violation of the Order, as interpreted by the Assistant Secretary, for an activity to refuse to retain on pay status necessary witnesses in unit determination hearings, who appear on behalf of the Union. The contention of the Activity that an application of this interpretation of the order to conduct that that predated the decision in the U. S. Naval Weapons Station Case, supra, was rejected in the Camp McCoy Case, supra, and is therefore rejected in this instant case.

It is clear, based on the foregoing authority, that Mr. Cahn should at least have been maintained on duty status for the periods of time during which he testified. In both instances his testimony commenced after the luncheon recess and concluded on the same day. Because there is some difficulty in precisely scheduling witnesses' appearances, it is concluded that Section 19(a)(1) of the Order, as interpreted by the Assistant Secretary, requires that Mr. Cahn should have been on duty status, and not required to take annual leave, for the entire afternoon session of the hearing on both days. Therefore, he should not have been charged for eight of the hours of annual leave (four hours for each day) and to do so was a violation of Section 19(a)(1) of the Order. Similarly, any Army policies or regulations that require such treatment would also violate Section 19(a)(1) of the Order.

11/ The Federal Labor Relations Council has granted review of this decision. In the absence of a decision of the Federal Labor Relations Council to the contrary, the decision of the Assistant Secretary is still controlling.

With respect to remainder of the annual leave Mr. Cahn was charged with for attending the representation hearing, it is concluded that, in all the circumstances here present, there was no violation of Section 19(a)(1) of the Order. In this regard, the subject case is factually distinguishable from the Camp McCoy Case, supra. In that case the witness testified on both days for which he was denied official time, the Department of Labor representatives were notified that he was to be called as a witness and he was ordered by the Department of Labor to attend the hearing in order to testify. In the subject case Mr. Cahn did not testify at all on four of the six days for which he was charged annual leave. The evidence did not establish that any representative of the Department of Labor was advised that Mr. Cahn would be called as a witness and Mr. Cahn was not instructed or requested by the Department of Labor to attend the hearing. Neither at the outset of the hearing when the Activity's witnesses were called first, nor at any other time did either Mr. Cahn or the NFFE Counsel advise the Hearing Officer or the Activity that Mr. Cahn was waiting to testify. There was no attempt to work out any procedure whereby Mr. Cahn, who worked only one-quarter mile away could return to his work and be called on the post telephone when and if he was to be called as a witness.

The record establishes further that when not actually testifying Mr. Cahn sat at counsel table and aided and assisted NFFE counsel in the presentation of his case and waited to testify further, if needed. As it turned out after testifying on December 9, he attended the last two days of the hearing, December 16 and 17 and never did testify again. In the Naval Weapons Station Case, supra, and the Camp McCoy, supra, the Assistant Secretary made it abundantly clear that although witnesses should not be placed on annual leave and to do so violated Section 19(a)(1) of the Order, agencies are not obligated to make available on official time employees who appear solely as Union representatives.

It is concluded therefore, that Mr. Cahn appeared at the hearing as a union representative at all times, except the eight hours described above during which he testified, and that it would not effectuate the policies of the Order, as interpreted by the Assistant Secretary in the Naval Weapons Station Case, supra, and the Camp McCoy Case, supra, to require the Activity to maintain him on pay status while he so acted on behalf of the Union. It follows then that the Activity did not violate Section 19(a)(1) of the Order in refusing to grant

Mr. Cahn official time to attend the representation hearing during the entire days of December 6, 8, 16 and 17 and during the mornings of December 7 and 9.

#### REMEDY

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary for Labor-Management Relations:

1. That in light of the conclusions that Respondent engaged in certain conduct proscribed by Section 19(a)(1) of Executive Order 11491, and that certain of Respondent's other conduct did not violate Section 19(a)(1) of Executive Order 11491, he adopt the following Order which is designed to effectuate the policies of Executive Order 11491.

#### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

Interfering with, restraining, or coercing employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

a. Restore to Mr. Herbert Cahn 8 of the hours of annual leave with which he was charged for December 7 and 9, 1971, because of his testifying at the formal unit determination hearing in Case No. 32-2003, 32-2235, etc.

b. Take such action as is necessary in order to bring its regulations into compliance with the requirement that necessary union witnesses be made available on official time to participate in formal unit determination hearings held pursuant

- 7 -

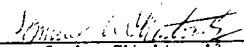
to the Regulations of the Assistant Secretary for Labor-Management Relations.

c. Post at the United States Army Electronics Command, Fort Monmouth, New Jersey, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

It is hereby Ordered that in all other respects the complaint in Case No. 32-2851 (CA) be, and thereby is, dismissed.

Dated May 8, 1973  
Washington, D.C.

  
\_\_\_\_\_  
Samuel A. Chaitovitz  
Administrative Law Judge

- 8 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

WE WILL restore to Mr. Herbert Cahn eight of the hours of annual leave with which he was charged because he testified on December 7 and 9, 1971 at the formal unit determination hearing in Cases No. 32-2003, 32-2235, etc.

WE WILL take such action as is necessary in order to bring our Regulations into compliance with the requirement that necessary union witnesses be made available on official time for participation in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

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

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

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.

APPENDIX, cont'd

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: 233 West 49th Street, New York, New York 10019.

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ABERDEEN PROVING GROUND COMMAND,  
 DEPARTMENT OF THE ARMY  
 A/SLMR No. 282

The Activity-Petitioner filed an RA petition seeking an election in a unit of guards of the Aberdeen Proving Ground, Maryland. The Activity contended that as a result of a consolidation of the Edgewood Arsenal into the Aberdeen Proving Ground, it had a good faith doubt that the American Federation of Government Employees, AFL-CIO, Local 1799 (AFGE) represented a majority of guards in the consolidated unit. At the time of the consolidation, the AFGE represented the some 10 guards in the Aberdeen guard unit, while the approximately 67 guards at the Edgewood Arsenal, which the Activity asserts are now accreted to the Aberdeen guard unit, were represented on an exclusive basis by National Federation of Federal Employees, Local 178 (NFFE). Thus, the issue raised by the RA petition was whether the Edgewood guard unit had been accreted or added to the Aberdeen guard unit, thereby causing the majority status of the AFGE to be placed in doubt.

The Assistant Secretary noted that in determining whether a reorganization has resulted in an accretion or an addition of one unit to another, the primary consideration is whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. Under the circumstances of this case, the Assistant Secretary found that the reorganization which occurred was primarily administrative and did not so thoroughly combine and integrate the guard unit at the Edgewood Arsenal with the guard unit at the Aberdeen Proving Ground so as to require a conclusion that the guard unit at Edgewood had lost its independent identity. Thus, the Assistant Secretary noted that the employees of the two installations performed the same jobs they performed prior to the reorganization; the guard functions at the two facilities continued to have certain different requirements; notwithstanding a familiarization course for Aberdeen employees at Edgewood, substantial interchange for purposes other than training had not occurred and was not contemplated by the Activity; and the units were located some 15 miles apart, and the Activity intended to allow the employees to remain at their present locations. Moreover, the Assistant Secretary noted that although there is currently common overall supervision, the Activity expressed an intent to hire new supervisors who would be stationed permanently at Aberdeen.

Based on the foregoing, the Assistant Secretary found that there had been no addition or accretion of employees of the guard unit of the Edgewood Arsenal to the guard unit at the Aberdeen Proving Ground represented by the AFGE and that, therefore, the Activity had failed to support its alleged good faith doubt as to the majority status of the AFGE in the Aberdeen Proving Ground unit. Accordingly, the RA petition was dismissed.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ABERDEEN PROVING GROUND COMMAND,  
 DEPARTMENT OF THE ARMY

Activity-Petitioner

and

Case No. 22-3519(RA)

AMERICAN FEDERATION OF  
 GOVERNMENT EMPLOYEES,  
 AFL-CIO, LOCAL 1799

Labor Organization

and

NATIONAL FEDERATION OF  
 FEDERAL EMPLOYEES, LOCAL 178

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Howard S. Naiman. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including such briefs as were filed by the parties, the Assistant Secretary finds:

The Activity-Petitioner filed an RA petition in this matter seeking an election in a unit consisting of all nonsupervisory personnel classified as guard, GS-085, employed in the Civilian Security Police Section, Security Administration Branch, Provost Marshal Division, Security Office, Aberdeen Proving Ground, Maryland, excluding supervisors, managerial officials, WG-WL employees and other GS employees.

The evidence establishes that a reorganization involving the Aberdeen Proving Ground and the Edgewood Arsenal occurred in June 1971. Prior to that time, the Aberdeen Proving Ground and the Edgewood Arsenal

were separate Army installations, some 15 miles apart. The reorganization resulted in Edgewood Arsenal becoming a tenant organization and a part of the Aberdeen Proving Ground. At the time of consolidation, the American Federation of Government Employees, AFL-CIO, Local 1799, herein called AFGE, represented on an exclusive basis the approximately ten guards at the Aberdeen facility. The approximately 67 guards located at the Edgewood Arsenal were represented on an exclusive basis by the National Federation of Federal Employees, Local 178, herein called NFFE. Each unit was covered by a negotiated agreement, with each negotiated agreement containing an automatic renewal clause. In this connection, the AFGE and the NFFE assert that an agreement bar exists as to the instant petition. 1/

The Activity contends that as a result of the reorganization, it has a good faith doubt that the AFGE represents a majority of the guards in the newly consolidated unit. In support of its contention, the Activity states that the reorganization of the facility resulted in (1) the elimination of the Edgewood guard unit as a separate entity, and (2) the inclusion of the some 67 guards, formerly in the Edgewood unit and represented by the NFFE, into the Aberdeen unit of some 10 guards represented by the AFGE. On the other hand, the AFGE and the NFFE assert that the reorganization as to the guards was purely administrative in nature and resulted in no loss of identity of either unit of guards. 2/

Prior to the reorganization, the primary mission of the Aberdeen Proving Ground was basically to act as a materiel testing facility, with a secondary mission of providing logistical and service support to its tenants. The mission of the former Edgewood Arsenal Command was manufacture, experimentation and evaluation of products, including chemicals. The evidence reveals also that prior to the reorganization, the mission of the guards at the two installations differed slightly. Thus, the guards located at Edgewood were responsible for protection of Government property, motorized patrol, controlling ingress and egress through restricted areas, and protection of storage and restricted areas. Their duties included control of chemical and biological testing areas. On the other hand, the guards at Aberdeen performed "straight physical security." The evidence discloses that a guard trained to work at Aberdeen would not be qualified to work at Edgewood without some additional training to deal with hazards which might arise from the chemical operations at Edgewood. However, a guard trained to work at Edgewood would be qualified to perform normal guard duties at Aberdeen after an orientation as to the physical layout of that facility. The evidence establishes that the distinction in the missions of the two installations, including the guard function, was unchanged as a result of the reorganization.

1/ In view of the disposition herein, it was considered unnecessary to pass upon the agreement bar issue.

2/ The record reflects that the Activity has continued dues withholding for both labor organizations.

The record reveals that several administrative changes affecting the guard employees at Edgewood and Aberdeen occurred as a result of the reorganization. Thus, prior to June 1971, Edgewood and Aberdeen each had its own personnel office. Currently, guards at both locations are serviced by a single personnel office which is located at Aberdeen. Further, since the reorganization, there is one area of consideration for merit promotion covering the entire Aberdeen complex, whereas, prior to the reorganization, the two installations had separate areas of consideration. The record shows also that the supervisory staffs of the two formerly separate guard operations have been combined. Thus, before the consolidation, there was a chief supervisor and one first-line supervisor located at the Aberdeen Proving Ground, 3/ while at the Edgewood Arsenal there was a chief supervisor and five first-line supervisors under him. 4/ The former chief supervisor of the Edgewood Arsenal guard unit retains his office at Edgewood and he now is the chief of the security guard section of the Aberdeen Proving Ground. 5/ The four remaining first-line supervisors, who held that position at Edgewood, remain as supervisors of the guards at Edgewood and continue to be stationed permanently at Edgewood, although they now also have supervisory responsibility with respect to the guards at Aberdeen. In performing this latter duty, they occasionally drive the approximately 15 miles to Aberdeen. 6/

The record reflects that it is the policy of the Activity to assign guards permanently to one location or the other. It also has been its policy since the reorganization to allow guards employed prior to the reorganization to remain at their original locations. Prior to the reorganization, there were a few isolated instances of transfer between the two separate installations brought about by reductions-in-force. As noted above, since the reorganization, it has been the policy of the Activity not to transfer the guards, although many of the guards have been rotated temporarily for periods of one to four or more months for training purposes. However, the record is clear that training was the sole purpose for this temporary rotation.

In attempting to determine whether a reorganization has resulted in an accretion or an addition of one unit to another, the primary consideration

3/ From the record, it appears that the first-line supervisor is no longer with the Activity.

4/ One of the five has retired.

5/ While it appears that the Aberdeen Chief of Security and Administration is the superior of the Edgewood Chief of the security guard section, the latter gives guidance to the former on chemical security.

6/ While it does not appear that any first-line supervisors are, at present, permanently stationed at Aberdeen, the record discloses that the Activity plans to hire additional supervisory personnel to be stationed at Aberdeen in the future.

June 30, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

LOS ANGELES AIR ROUTE TRAFFIC CONTROL CENTER,  
FEDERAL AVIATION ADMINISTRATION  
A/SLMR No. 283

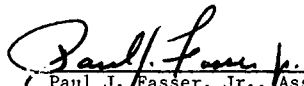
is whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. In my view, the evidence reflects that the reorganization which occurred in the instant case was primarily administrative and did not so thoroughly combine and integrate the guard unit at the Edgewood Arsenal with the guard unit at the Aberdeen Proving Ground so as to require the conclusion that the guard unit at Edgewood Arsenal has lost its independent identity. Thus, although there is common supervision at the top level, some cross-training, and other indicia of organizational integration, such as a common personnel office and a combined area of consideration for merit promotion, there has not been a blending of employees to the extent that the guard units located at Aberdeen and at the former Edgewood Arsenal have lost their separate identities. In this connection, the record shows that the employees of the two installations perform the same jobs as they performed prior to the reorganization; that, in fact, the guard functions at Edgewood continue to have certain different requirements, which require additional training from those at Aberdeen; that, notwithstanding the familiarization course for Aberdeen employees, substantial interchange has not occurred and is not contemplated by the Activity; that the units are located some 15 miles apart; and that the record shows that the Activity intends to allow the employees to remain at their present locations. Moreover, although there is currently common overall supervision, the Activity has expressed an intent to hire new supervisors who would be stationed permanently at Aberdeen.

Based on the foregoing, I find that in the circumstances of this case there is insufficient basis to support the Activity's contention that the employees at the Edgewood Arsenal guard unit represented by the NFFE have accreted or been added to the Aberdeen Proving Ground guard unit represented by the AFGE. Accordingly, as there has been no addition or accretion of employees to the guard unit represented by the AFGE, I find that the Activity has failed to support its alleged good faith doubt as to the majority status of the AFGE in the Aberdeen Proving Ground guard unit. In these circumstances, I shall dismiss the RA petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-3519(RA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 29, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-4-

The complaint in this unfair labor practice case alleged that the Respondent violated Section 19(a)(1) and (2) of the Order by censoring and requiring censorship of material produced by the Complainant, Professional Air Traffic Controllers Organization, Los Angeles Center Chapter, herein called PATCO, before permitting it to be "distributed" and by subjecting an employee to disciplinary action if he exercised rights guaranteed by the Order. The dispute arose over use of the Respondent's bulletin boards, the use of reading binders, and the use of a table in the employees' locker room for the dissemination of information.

The dispute over the use of an Activity bulletin board arose after PATCO requested and was granted, along with two other organizations, the use of a facility bulletin board which was located in a hallway. Deletions of material were made by the Activity before it permitted posting on the bulletin board of some of the items submitted by PATCO.

Reading binders, or loose-leaf notebooks were another medium of communication by organizations to interested employees and, prior to the spring of 1971, these had been maintained in work areas. In March 1971 an officer of PATCO was given permission to install a table in a nonwork area to contain reading binders belonging to PATCO and other alleged labor organizations. At that time it was agreed that any document which PATCO placed on the bulletin board, which had been previously censored at the request of the Activity, would be conformed before being placed in the reading binder. After this agreement, it appears that Agency policy was changed so that material which had been censored for posting on the bulletin board no longer had to be similarly altered before placement in the reading binder. Subsequently, an unedited copy of one of the previously censored bulletin board postings which had been placed in the PATCO reading binder was removed by an official of the Respondent and the responsible PATCO official was reminded of the prior agreement and told that if the conditions of that agreement were not met, "it may be necessary to remove the distribution table and read [sic] binder in the locker room."

When PATCO was granted permission to use the table in the nonwork area to contain the reading binders, permission also was granted to use the table for the placement of items that employees could pick up, provided any such documents which had been censored prior to posting on the bulletin board would also be conformed before being placed on the table.

The Administrative Law Judge concluded that although the use of a bulletin board is a privilege, as distinguished from a right, and that limitations placed on its use are not contrary to the purposes of the Order, the Respondent, nevertheless, violated Section 19(a)(1) by its application and interpretation of its own rules in relation to bulletin board postings. He found also that Section 19(a)(1) had been violated by censoring the reading binders, because their use was a method of employee communication traditionally permitted in nonwork areas by the Respondent and therefore was not a privilege which the latter could limit or deny. For the same reasons set forth concerning the reading binders he found that the restrictions on material placed on the table for distribution violated Section 19(a)(1).

The Assistant Secretary agreed with the Administrative Law Judge that the use of facility bulletin boards is not a right of individual employees or organizations which represent employees but rather is a privilege which ordinarily may be granted or withheld by an agency or activity. As the use of bulletin boards is a privilege, that privilege may reasonably be conditioned, to among other things, prevent violations of law, and the privilege can be withdrawn if it is demonstrated that the reasonable conditions have been violated. The Assistant Secretary found that the particular conditions imposed by the Respondent in this case were, on their face, reasonable. However, he found that the Respondent's application of its conditions to the use of its bulletin boards went beyond the standards which the Respondent had established, and that the evidence reflected that, in certain instances, the Respondent ignored its own conditions and ordered material deleted because the material was allegedly inconsistent with standards which had not previously been announced. Accordingly, the Assistant Secretary found the Respondent violated Section 19(a)(1) by the manner in which it applied and interpreted its own rules concerning the use of bulletin boards.

The Assistant Secretary found, contrary to the conclusion of the Administrative Law Judge, that the use of reading binders, like the use of bulletin boards, is not a protected form of distribution for communication in the traditional sense and is not therefore protected as a right. He found that the use of the reading binders is a privilege subject to qualifications similar to those which may be placed upon the use of bulletin boards. He did, however, agree with the ultimate conclusion of the Administrative Law Judge that the Respondent violated Section 19(a)(1) by its conduct in connection with the binders. Thus, as with the bulletin boards, the Agency promulgated what appeared to be reasonable rules and then proceeded to use standards different from those it had published in determining whether certain items might be placed in the binders. In addition, the Assistant Secretary noted that the Respondent's rules could reasonably be read, and were in fact read, to indicate that materials censored for posting on the bulletin board would not also have to be censored before being placed in the binders.

The Assistant Secretary found, with respect to the materials placed on the reading table for dissemination, that, while neither employees

or organizations representing employees would be entitled to the use of the table as a matter of right for the dissemination of material, these handouts were akin to traditional protected distribution material, and were entitled to protection similar to that afforded materials distributed by employees in nonwork time in nonwork areas. Under these circumstances, he found that the requirement that these materials be censored to conform with bulletin board postings also violated Section 19(a)(1).

The Assistant Secretary also adopted the Administrative Law Judge's findings that the Respondent violated Section 19(a)(1) in other respects and he ordered that the Respondent cease and desist from the actions found to have violated the Order and directed the Respondent to take certain affirmative action as outlined in his decision.



## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LOS ANGELES AIR ROUTE  
TRAFFIC CONTROL CENTER,  
FEDERAL AVIATION ADMINISTRATION

Respondent

and

Case No. 72-CA-3014(26)

PROFESSIONAL AIR TRAFFIC  
CONTROLLERS ORGANIZATION,  
LOS ANGELES CENTER CHAPTER

Complainant

## DECISION AND ORDER

On February 1, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above entitled proceeding finding that the Respondent, Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondent's exceptions and brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The record reflects that in addition to the Complainant, the Professional Air Traffic Controllers Organization, Los Angeles Center Chapter, (PATCO), at least two other organizations [the National Association of Government Employees (NAGE) and the Air Traffic Controllers Association (ATCA)] were active at the Respondent's facility. 1/ Employees of the

1/ Although referred to as labor organizations by the Administrative Law Judge, it is unnecessary for the purpose of this decision to determine whether both organizations are, in fact, labor organizations within the meaning of the Order.

Respondent number approximately 470, including some 356 air traffic controllers. Also employed at the same location are employees of private corporations, as well as employees of outside contractors providing janitorial and cafeteria services. The evidence establishes that, at all times material, there was no exclusively recognized collective bargaining representative for the air traffic control personnel at the facility involved herein.

The instant complaint alleged that the Respondent violated Section 19(a)(1) and (2) of the Order by censoring and requiring censorship of PATCO material before permitting it to be "distributed" and by subjecting an employee to disciplinary action if he expressed rights guaranteed by the Order. The events which gave rise to the complaint concern a dispute over the use of the Respondent's bulletin boards, the use of reading binders, and the use of a table in the employees' locker room for the dissemination of information.

Early in 1969, PATCO requested and was granted permission, along with NAGE and ATCA, to use a facility bulletin board. The bulletin board was located in a hallway which, although not generally open to the public, on rare occasions might be used by people touring the facility. 2/

During 1971, of approximately 36 items submitted by PATCO for approval before posting on the bulletin board, four or five were found by the facility chief or his deputy to contain objectionable material. In this connection, in late September or early October 1971, a newsletter was submitted by PATCO and returned by the Respondent with considerable editing. Thereafter, and up to April 1972, several other items, the

2/ Two rules of the Federal Aviation Administration (FAA), are pertinent to the use of bulletin boards in this matter. A rule in existence, at all times material herein, granted labor organizations the use of bulletin board space "provided they submit material to be posted to management for prior approval." In addition, a regulation of the FAA relating to Labor-Management Relations, which was published August 7, 1971, stated that "[Local] Management officials may establish standards for the literature to be posted on bulletin boards and conditions under which the privilege of posting will continue." The regulation went on to suggest four criteria which the unit head "should keep in mind..."

- a. The material to be posted contains the names of the issuing or sponsoring labor organizations;
- b. The material contains nothing such as the FAA name or seal that would imply official endorsement;
- c. The material shall not be of such a nature that it is slanderous to an individual or organization;
- d. The material shall not be so inflammatory that it would be disruptive of the work situation."

contents of which are described in the Administrative Law Judge's Report and Recommendations, were submitted to the Respondent and returned for posting only after certain deletions were made. In testifying as to the reasons why portions were deleted from the various items, the Respondent's officials offered several different criteria, some of which, while not necessarily inconsistent with the prescribed standards set forth at footnote 2 above, were not clearly based upon those standards. 3/

A second medium of communication for the organizations involved herein consisted of reading binders, or loose-leaf notebooks, labeled with the name of each organization. Prior to the spring of 1971, these had been maintained by the organizations in work areas. In March 1971, Floyd Wines, president of the Complainant, was given permission to install a table in a nonwork area which would contain PATCO, NAGE and ATCA reading binders. At that time, PATCO agreed that any document it placed on the bulletin board, which had been previously censored at the request of the Activity, would be conformed before being placed in PATCO's reading binder. The table was installed in spring or early summer of 1971. Subsequently, several memoranda of agency policy were transmitted to Wines based on which he surmised that material which had been censored for posting on the bulletin board no longer had to be similarly altered before placement in the reading binder. 4/ Thereafter, an unedited copy

3/ Thus, it was asserted that the deletions of portions of a submission in late September or early October 1971, were because, among other reasons, "We don't believe it was true" and because posting certain information on the bulletin board would be equivalent to an FAA endorsement. Portions of a second censored document were deleted because an Activity official thought the portions would be "an insult to every person in the FAA" and that such portions were defamatory. Portions of a third document were deleted with an explanation that "in our opinion, this is not true and the agency's actions [since the event] bear this out..." In this latter regard, the explanation also stated, "This does not, however, preclude you from placing this newsletter in the PATCO reading binder in the locker room." At the hearing in this matter, an official of the Respondent testified that placing the material in question on FAA property "would indicate that the Agency concurs in this...attack...and I don't feel that the Agency property is the place for it...." A fourth submission was returned by the Respondent with language crossed out and an explanation that the language was "contrary to Agency policy for posting on the bulletin board."

4/ A memorandum dated July 13, 1971, set forth the following FAA policy:

"...they [labor organizations] may be allowed space on bulletin boards provided they submit material to be posted to management for prior approval. Competing labor organizations will receive equal treatment. Labor organizations may be allowed to distribute literature in non-work areas. Such material does not have to be approved by management, but it should be made clear to the organization that it is liable for the content of the material..."

(continued)

-3-

of one of the previously censored bulletin board postings was placed in the PATCO reading binder. The document subsequently was removed from the binder by the Deputy Facility Chief and returned to Wines with a memorandum which asserted that portions of the document violated FAA Handbook requirements. The memorandum reminded Wines of the agreement that material censored for posting on bulletin boards would be censored also before inclusion in the reading binders, and noted that if the conditions agreed upon were not met, "it may be necessary to remove the distribution table and read [sic] binder in the locker room." At the hearing, a witness for the Respondent testified that the document was removed from the binder because it violated the facility's agreement with the Complainant, and that it was "scurrilous and defamatory."

A third issue involved herein concerned the use of the reading binder table for dissemination of other written material. Thus, at the time when permission was granted PATCO to use a table in a nonwork area for the reading binders, use of the table as a place to leave copies of documents for distribution to interested employees also was discussed.

4/ A second document dated July 22, 1971, sent to Wines by the Respondent's Facility Chief, stated in part:

"2. Labor Organization's Rights.

(a) No recognition.

\* \* \* \* \*

- (2) May be allowed to distribute literature in non-work areas, (such material does not have to be approved by management, but the organization is liable for its contents).

In addition to the above, the following policy is established:

Literature placed in reading binders or notebooks should be treated in the same manner as material distributed by unions. Such material does not have to be reviewed by management, but the unions must assume responsibility for content of the material."

A section of the FAA Handbook dated August 9, 1971, further outlined certain policy on reading binders. It provided that where there is no recognized labor organization, reading binder privileges may be extended to any lawful labor organization. Such binder "should clearly identify the labor organization and contain a statement that the contents of the binder have not been reviewed in advance nor approved by FAA management. Management officials may periodically check the contents of the binder to assure that it contains nothing of a scurrilous or defamatory nature...."

-4-

The evidence establishes that the Respondent applied the same limitations to documents left on the table as was applied to the reading binder and, as a result, no literature placed on the bulletin board could be placed on the table unless it was edited to conform to the bulletin board version. On the other hand, items not placed on the bulletin board could be placed in unedited form on the table.

The record reflects also that prior to August 1971, all distribution of literature at the facility, including literature distributed by employees of the Respondent, was subject to management approval. Subsequent to August 1971, however, notices and policy statements by the Respondent made clear that this restriction was removed from the FAA handbook and that literature could be distributed by employees in nonwork areas during nonwork times without prior approval by the Respondent. However, despite the notices and policy statements, the evidence reveals that on February 28, 1972, the Complainant's vice-president was told by the Respondent's Deputy Facility Chief that one of the Complainant's publications could not be distributed by the Respondents' employees in nonwork areas on nonduty time unless it was first edited.

The Administrative Law Judge concluded that although the use of a bulletin board is a privilege, as distinguished from a right, and that limitations placed on its use are not contrary to the purposes of the Order, the Respondent, nevertheless, violated Section 19(a)(1) of the Order in the subject case by its application and interpretation of its own rules in relation to the bulletin board postings. He concluded also that the Respondent violated Section 19(a)(1) by censoring the reading binders based on the view that the use of reading binders was a method of employee communication traditionally permitted in nonwork areas by the Respondent and, therefore, not a privilege which, except for valid and compelling reasons not present in the subject case, the Activity could limit or deny. Finally, for the same reasons set forth concerning the reading binders, the Administrative Law Judge found that the restrictions on material placed on the table for distribution violated Section 19(a)(1).<sup>5/</sup>

I agree with the Administrative Law Judge and the Respondent that the use of facility bulletin boards is not a right of individual employees or organizations which represent employees. Rather, in my view, the use of

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<sup>5/</sup> Noting the absence of exceptions in this regard, I hereby adopt the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) of the Order by threatening to discipline an employee for failing to comply with improper limitations upon communication. Also, in agreement with the Administrative Law Judge, I find that further proceedings are unwarranted as to that portion of the complaint alleging a violation of Section 19(a)(2) as a result of the same incident. I also adopt the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) by virtue of the February 28, 1972, statement by the Respondent's Deputy Facility Chief that employee distributions in nonwork areas on nonwork time would require prior approval. Cf. Charleston Naval Shipyard, A/SLMR No. 1.

bulletin boards is a privilege which ordinarily may be granted or withheld by an agency or activity. Further, because the use of bulletin boards is a privilege, it follows that such privilege may be reasonably conditioned to, among other things, prevent violations of law and that the privilege can be withdrawn if it is demonstrated clearly that the reasonable conditions set for bulletin board use have been violated. Under the circumstances of the subject case, I find that the conditions imposed by the Respondent on bulletin board use, including bulletin boards located in public areas, were, on their face, reasonable. <sup>6/</sup> However, I agree with the Administrative Law Judge that in the instant case the Respondent's application of its conditions on the use of its bulletin boards went beyond the standards which the Respondent had established. Thus, the evidence reflects that, in certain instances, the Respondent ignored existing standards and ordered material deleted because the material was allegedly inconsistent with standards which had not previously been announced. Under all of the circumstances and in agreement with the Administrative Law Judge, I find that the Respondent violated Section 19(a)(1) of the Order by the manner in which it applied and interpreted its own rules concerning the use of its bulletin boards.

However, contrary to the conclusion of the Administrative Law Judge, I find that the use of reading binders, like the use of bulletin boards, is not a protected form of employee distribution or communication in the traditional sense and that, therefore, the use of binders is not protected as a right. Rather, I find that their use is a privilege subject to qualifications similar to those which may be imposed upon the use of bulletin boards. While I thus cannot adopt the Administrative Law Judge's rationale for finding that the Respondent violated Section 19(a)(1) by the restrictions it imposed on the use of reading binders, I agree with his ultimate conclusion that the Respondent violated Section 19(a)(1) by virtue of its conduct in connection with the binders. As the record reflects, the Activity's policy regarding the reading binders was, at best, ambiguous and that, as in the case of the bulletin boards, it promulgated what appeared to be reasonable rules, and then proceeded to use standards different from those it had published in determining whether certain items might be included in the binders. Thus, while an FAA handbook rule stated, in part, that binders "should clearly identify the labor organization and contain a statement that the contents of the binder have not been reviewed in advance nor approved by FAA management," a witness for the Respondent stated that the binder "is an extension" of the bulletin board, and that "they are essentially the same, that there is no distinction between the two, and that they both need prior review." <sup>7/</sup> Emphasis added. In addition, the Respondent's rules as to reading binders set forth at footnote 4 above, could reasonably be, and were read to indicate that

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<sup>6/</sup> Cf. Federal Aviation Administration, New York Air Route Traffic Control Center, A/SLMR No. 184, where the Assistant Secretary noted that while an agency should not police or censor campaign propaganda, it does have the right to ensure that literature which is posted on its property is not violative of any law.

materials censored for posting on the bulletin board would not also have to be censored before being placed into the reading binders. 7/

With respect to the Respondent's limitations as to materials placed on the table in the employee locker room, I find that while neither employees nor organizations representing employees would be entitled to the use of the table as a matter of right for the dissemination of material, the handouts placed on the table in the instant case were akin to traditional protected distribution materials. Thus, in agreement with the Administrative Law Judge, I find that the material left on the reading table for dissemination is entitled to protection similar to that afforded materials distributed by employees on their nonwork time in nonwork areas. 8/ I conclude, therefore, in agreement with the Administrative Law Judge, that the requirements herein that items left on the table in the nonwork area conform to the censorship required for bulletin board postings interfered with employee rights assured by the Order and thereby violated Section 19(a)(1).

#### THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order. Having found further that the Respondent did not engage in certain other conduct prohibited by Section 19(a)(2) of the Executive Order, as amended, I shall order that portion of the complaint to be dismissed.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, shall:

1. Cease and desist from:

7/ That the Complainant interpreted the rule this way is clear in view of the manner in which the Respondent learned that an uncensored document was included in the reading binder. A PATCO telephone message advised callers that if they wished to know what material had been omitted from the bulletin board posting, they might look in the reading binder for the complete document. The record reveals that both parties understood that management personnel often would dial the information number to hear the recorded messages.

8/ Cf. Charleston Naval Shipyard, cited above.

-7-

(a) Interfering with, restraining, or coercing employees by censoring or otherwise limiting those items which employees and labor organizations wish to place on bulletin boards and in reading binders properly assigned for their use for reasons different from or inconsistent with standards published by the Federal Aviation Administration to regulate such use.

(b) Interfering with, restraining, or coercing employees by censoring or otherwise limiting those items which they wish to distribute on behalf of the Complainant or any other labor organization during their nonwork time in nonwork areas of the Activity.

(c) Interfering with, restraining, or coercing employees by threatening them with discipline or loss of privileges if they fail to comply with improper limitations placed upon communications.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights protected by Executive Order 11491, as amended;

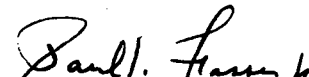
2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at the Los Angeles Air Traffic Control Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the facility chief and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The facility chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges a violation of Section 19(a)(2) of Executive Order 11491, as amended.

Dated, Washington, D.C.  
June 30, 1973

  
Paul J. Rasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-8-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees by censoring or otherwise limiting those items which employees and labor organizations wish to place on bulletin boards and in reading binders properly assigned for their use for reasons different from or inconsistent with standards published by the Federal Aviation Administration to regulate such use.

WE WILL NOT interfere with, restrain, or coerce employees by censoring or otherwise limiting those items which they wish to distribute on behalf of the Professional Air Traffic Controllers Organization (PATCO) or any other labor organization during their nonwork time in nonwork areas of the Activity.

WE WILL NOT interfere with, restrain, or coerce employees by threatening them with discipline or loss of privileges if they fail to comply with improper limitations placed upon communications.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Executive Order 11491, as amended.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

LOS ANGELES AIR ROUTE TRAFFIC  
CONTROL CENTER,  
FEDERAL AVIATION ADMINISTRATION

Respondent

CASE NO. 72-CA-3014 (26)

and

PROFESSIONAL AIR TRAFFIC  
CONTROLLERS ORGANIZATION,  
LOS ANGELES CENTER CHAPTER

Complainant

Thomas R. Smarz, Esq.,  
Office of the General Counsel,  
Federal Aviation Administration,  
800 Independence Avenue, S. W.  
Washington, D. C., for the Respondent.  
Russell J. Sommer, Representative  
Professional Air Traffic Controller  
Organization, Los Angeles Center  
Chapter, P.O. Box 1251, Palmdale,  
California, for the Complainant.

Before: Samuel A. Chaitovitz, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on

May 22, 1972 by the Regional Administrator of Labor-Management Services Administration, San Francisco Region, based on a complaint filed by Professional Air Traffic Controllers Organization, Los Angeles Center Chapter (herein called the Complainant, PATCO, or the Union), against Los Angeles Air Route Traffic Control Center, Federal Aviation Administration (herein called the Respondent, FAA, or the Activity). The Complaint alleged that Respondent violated Section 19(a)(1) and (2) of the Order by censoring and requiring censorship of Union material before permitting it to be distributed 1/ and subjecting employee Floyd Wines to disciplinary action in the event he exercised his rights guaranteed by the Order.

A hearing was held before the undersigned on July 13 and 14, 1972 at Los Angeles, California. Both parties were represented at the hearing, and their representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Both parties were granted an opportunity to file briefs. 2/

From the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations.

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1/ All the parties understood this to refer to the use of bulletin boards, reading binders, as well as other forms of distribution.

2/ Only Respondent filed a brief.

The Los Angeles Air Traffic Control Center of the Federal Aviation Administration is composed of approximately 470 Air Traffic Personnel including some 356 Air Traffic Controllers. Employees of IBM and Mider Corporation also work at the center building 3/ itself, together with employees of outside contractors providing janitorial and cafeteria services. At all times material herein there was no recognized collective bargaining agent for the control personnel at the Los Angeles Air Route Traffic Control Center.

#### A. Use of Bulletin Boards

During early 1969 PATCO requested and received permission to utilize a bulletin board in order to post notices for employees of the Los Angeles Air Traffic Control Center. This privilege was also extended to two other organizations, National Association of Government Employees (hereinafter referred to as NAGE) and Air Traffic Controllers Association (hereinafter referred to as ATCA). The bulletin board in question is one cork bulletin board approximately 20 feet long divided by metal strips into sections. The sections of the bulletin board 5/ are respectively devoted to Compliance and Security notices, Civil Service notices, private notices, 6/ employee practices, General and Regional notices, job bids, and, toward the left-hand side, there are three identical sections, one labeled "ATCA," one "NAGE" and one "PATCO." This bulletin board is located in the hallway of the center building about 25 feet from the control room door.

3/ The center building is "H" shaped and is composed of three wings, an administrative wing, an operational wing and an automation wing.

4/ I take judicial notice that an election has been ordered and held in a nationwide unit of Air Traffic Controllers, including the Los Angeles Control Center. Federal Aviation Administration, A/SLMR 173. PATCO won the election and has been certified.

5/ Each section is labeled by plastic engraved labels about 1 1/2 inches high.

6/ These are personal notices of controllers, e.g., advertising items for sale, etc.

At all times material herein the FAA maintained a rule that labor organizations may be allowed use of bulletin board space "provided they submit material to be posted to management for prior approval." Chapter 7 of the FAA's Order Relating to Labor Management Relations, also called Agency Order or Handbook 3710.7B, as signed on August 7, 1971, in paragraph 706 states in part that "[Local] Management officials may establish standards for the literature to be posted on bulletin boards and conditions under which the privilege of posting will continue." It went on to state:

"The unit head should keep in mind the following criteria:

- a. The material to be posted contains the names of the issuing or sponsoring labor organization;
- b. The material contains nothing such as the FAA name or seal that would imply official endorsement;
- c. The material shall not be of such a nature that it is slanderous to an individual or organization;
- d. The material shall not be so inflammatory that it would be disruptive of the work situation." <sup>7/</sup>

PATCO primarily placed newsletters and other similar Union publications on the bulletin board. When it desired to place a document on the bulletin board the practice was for an officer or official of the Union to submit the document to a

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<sup>7/</sup> There is no indication that the rules and regulations pertaining to the use of bulletin boards were any different prior to August 1, 1971.

secretary in the office of the Facility Chief who would, in turn, submit it to the Facility Chief Freiman or the Deputy Facility Chief Donald C. Detmers. If the Facility Chief or his Deputy found anything objectionable the document would normally be returned with a note stating that a certain portion of the document was objectionable; this would be further indicated by parenthesis around the objectionable portion on the document itself. If PATCO still wished to post the document, it would excise the objectionable portion by crossing it out and resubmit the document. If it was then approved, as changed, the Facility Chief or his Deputy would initial it and return the document to the Union, which would then post it on the bulletin board. During 1971 PATCO submitted approximately 36 items for posting on the bulletin board and approximately four or five were found by the Facility Chief or his Deputy to contain objectionable material. Almost all the decisions were communicated to the Union by Deputy Facility Chief Detmers. During the latter part of September or first week in October, 1971, PATCO submitted its newsletter, dated September 24, 1971, to Deputy Facility Chief Detmers for approval. It was returned to PATCO with indications that the following portions, as indicated by parentheses, had to be deleted before the document could be approved for posting:

"...The controllers in Chicago feel that the dismissals of Carl DeBroux and John Strausser are (hard, tough, vindictive action on the part of the FAA)....

"We have been informed that the cost to the agency in the firing of Mr. Richard Holzhauser, Oakland Center, is estimated at \$10,000. The expense to the American taxpayer in the dismissal of 68 controllers and the subsequent reinstatement of 34 to date adds up to a tremendous amount of money. (The FAA has clearly indicated by their actions that expense is of no concern and they will continue to spend your tax dollar against your fellow controllers.)"

PATCO deleted those portions indicated by parenthesis and the news memorandum was then posted on the bulletin board. Deputy Facility Chief Detmers testified that these portions were required to be deleted because a year and a half before there had been a so-called "strike" and that it had been "highly emotional" for all concerned. The FAA had been trying "to play what happened in the past down." He stated that he had felt that these portions would "play up the fact that ... there still are problems with the FAA at this point." In stating why these portions were objectionable he also testified, "in the first place, we don't believe it was true." He stated that allowing this to be posted on the bulletin board would be equivalent to an FAA endorsement and further that it would not foster good labor management relations.

PATCO National News Memorandum 40-71, dated November 5, 1971, was submitted by PATCO to Deputy Facility Chief Detmers for permission to post it on the bulletin board. This news memorandum was returned to PATCO with a note saying that the particular portion in brackets was objectionable and did not comply with the agency regulations. The portions found objectionable were, as indicated by parenthesis:

"...Senator Hartke said the (FAA has a 'pitiful lack of concern for aviation safety.') and that there is a need for complete review and reorganization of the agency. Tombstones of 31 persons killed in the crash of a plane chartered by Wichita State University are (mute testimony to government irresponsibility,) Hartke said."

The Union deleted the bracketed portions and resubmitted the News Memorandum to Deputy Facility Chief Detmers who initialed it. The Union then placed the News Memorandum on the bulletin board. Deputy Facility Chief Detmers testified that he required these portions to be deleted because he "never met a single FAA employee ... who does not consider that his

primary concern, his primary reason for being there is the concern for aviation safety..." and he thought that the objectionable portions would be an insult to every person in the FAA. He went on to state that he considered such portions defamatory.

During the latter part of April, 1972, PATCO submitted a copy of its April 19, 1972 Newsletter to the Facility Chief's office for review before posting on the bulletin board. This Newsletter was returned with a memorandum from then Acting Facility Chief Donald Detmers stating that the Newsletter had not been initialed for "posting on the bulletin board since it states on page 1 that there was going to be a blood bath in the Department of Transportation after the sick-out. In our opinion, this is not true and the agency actions since the sick-out certainly bear this out. This statement is contrary to Handbook 3710.7B, paragraph 706. This does not, however, preclude you from placing this Newsletter in the PATCO reading binder in the locker room." Mr. Detmers testified that although he had no objection to employees communicating on a personal basis and expressing such an opinion, placing it on an Agency property "would indicate that the Agency concurs in this...attack...and I don't feel that the Agency property is the place for it...."

PATCO submitted a copy of a publication called "From the President's Desk," dated January 27, 1972, to the Facility Chief's office for approval for posting on the bulletin board. This document was returned to PATCO by Mr. Detmers together with a memorandum dated February 25, 1972, which stated that on page 2 of the publication there appeared language, which was indicated by parenthesis, which is "contrary to Agency policy for posting on the bulletin board. After this part of the sentence has been removed, this letter may be returned for initialling..." The portion found objectionable is indicated by parenthesis as follows:

"...The almost (total lack of understanding by FAA of the enormous responsibility shouldered by our radar instructors and controllers in administering live training to tomorrow's controllers) gives me cause for grave concern..."



In examining which statements could be posted on the bulletin board and which had to be excised before posting would be permitted within the limitations of Handbook 3710.7B, Mr. Detmers testified that he would try to determine whether "those opinions were clearly defamatory, or derogatory against another agency, against another individual or against another organization. So, we don't feel it is proper and in line with Handbook 3710.7B for the Agency's mission to be upset or destroyed or hindered by somebody attacking somebody else on FAA premises." He testified further that anything posted on the bulletin board would be equivalent to an FAA endorsement.

B. Use of Reading Binders 8/ ,

There had apparently been reading binders maintained by PATCO, NAGE and ATCA in the control room, admittedly a work area, prior to the Spring of 1971. During the first two weeks of March, 1971, Mr. Floyd Wines, then president of the Complainant, approached Deputy Facility Chief Detmers with a drawing for a table-like structure which he requested permission to place in the locker room. 9/ The table was to be shared by the three organizations, PATCO, NAGE and ATCA so they could place reading binders and documents for distribution on it. It was agreed further that any document that PATCO put on the bulletin board, which had been changed at the request of the Facility, would also be changed

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8/ Also called "read binders." These are three-ring binders made of black paste board with metal backing. They are approximately 3 inches thick and 12 x 13 inches in length and width. Each is labeled with the name of the organization that maintained the documents in that particular binder. The FAA's name appears nowhere on the binders.

9/ Admittedly a non-work area.

before being placed in the PATCO Reading Binder. 10/ Mr. Detmers, then Acting Facility Chief, after checking with his Regional Office, approved the project and soon thereafter, in the Spring or very early Summer, 1971, the table was built by Mr. Wines and installed in the locker room with the PATCO, NAGE and ATCA reading binders on it. This table was suggested so that everyone interested could read the binders, and "compare notes" and because it would cause less clutter around the Facility than if things were widely distributed.

Union President Wines received at his request from the Facility Management Personnel a copy of a memorandum dated July 13, 1971, from Brick E. Erickson, Chief, Manpower Division of the Rocky Mountain Region of the FAA to "all Supervisory Personnel, all field facilities." The memorandum transmitted an agency notice which stated, in part:

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10/ It is alleged that this condition was volunteered by PATCO and not demanded by the Facility. There is no evidence that any other organization either voluntarily or otherwise agreed to such a limitation in the locker room. Mr. Detmers testified that this PATCO limitation also applied to documents placed on the table for distribution. Mr. Detmers testified further that the reading binder was subject to post publishing review and that PATCO's agreement with respect to the reading binder and the distribution table only covered items that were also posted on the bulletin board but did not apply to anything not posted on the bulletin board. However, he went on to state that if something were placed only in the reading binder it would still be subject to agency limitations. violations of which could result in loss of the privilege of maintaining a reading binder. He indicated, however, that he would be somewhat stricter in judging what went on the bulletin board than what went only into the reading binder.

"... They [labor organizations] may be allowed space on bulletin boards provided they submit material to be posted to management for prior approval. Competing labor organizations will receive equal treatment. Labor organizations may be allowed to distribute literature in non-work areas. Such material does not have to be approved by management, but it should be made clear to the organization that it is liable for the content of the material...."

Mr. Wines then received a document dated July 22, 1971, addressed to him from Mr. Ben L. Freiman, Facility Chief, Los Angeles Air Route Traffic Control Center, that stated, in part:

"\* \* \* \* \*

2. Labor Organization's Rights.

(a) No recognition.

\* \* \* \* \*

- (2) May be allowed to distribute literature in non-work areas, (such material does not have to be approved by management, but the organization is liable for its contents).

\* \* \* \* \*

In addition to the above, the following policy is established:

Literature placed in reading binders or notebooks should be treated in the same manner as material distributed by unions. Such material does not have to be reviewed by management, but the unions must assume responsibility for content of the material."

- 10 -

Union President Wines concluded that this meant that material to be placed in the PATCO reading binder no longer had to be "censored" and that material that was "censored" and placed on the bulletin board could be placed "uncensored" in the PATCO reading binder.

FAA Handbook 3710.7B, paragraph 707, entitled "Labor Organization Reading Binders," dated August 9, 1971, provides that, where there is no recognized labor organization, reading binder privileges may be extended to any lawful labor organization. This paragraph provides that such binder "should clearly identify the labor organization and contain a statement that the contents of the binder have not been reviewed in advance nor approved by FAA management. Management officials may periodically check the contents of the binder to assure that it contains nothing of a scurrilous or defamatory nature...." 11/

As described hereinbefore a copy of PATCO National News Memorandum dated September 28, 1971, was posted on the bulletin board with the requested deletions made. An unedited copy of this News Memorandum was placed in the PATCO reading binder. Deputy Facility Chief Detmers testified that he telephoned PATCO "Dial For News" and the recorded message advised that if any one desired to find out what was struck out of the News Memorandum that was posted on the bulletin board, it could be found in the reading binder. Mr. Detmers did so and found in the

11/ At this point it should be noted that Mr. E.L. Embrey, Chief of Union Management Relations Division of the Office of Labor Relations, FAA, testified that he was responsible for the formulating and drafting of Handbook 3710.7B and that the reading binder "is an extension" of the bulletin board. He stated "they are essentially the same, that there is no distinction between the two, and that they both need prior review."

- 11 -

reading binder a copy of the News Memorandum containing, completely in tact, those portions found to be objectionable by the Facility. He removed the document from the binder and returned it to Mr. Wines together with a memorandum he dictated over Facility Chief Freiman's signature dated October 14, 1971. This memorandum pointed out that certain portions of the PATCO News Memorandum had been found to be in violation of the FAA Handbook requirements and that while these had been deleted from the copy placed on the bulletin board, they were not eliminated from the copy in the reading binder. Mr. Detmer's memorandum stated that when the placement of the distribution table and read binder was first discussed, the Union advised that "anything eliminated from the bulletin board notices would, in turn, be eliminated from copies placed in the read binder or distributed on Government facilities." The memorandum went on to "advise that the read binder copy must be edited the same as the bulletin board copy." The memorandum then stated that the Facility hoped that the Union would live up to the conditions agreed upon when the use of the distribution table was agreed upon because, it continued, "that in the event this does not happen it may be necessary to remove the distribution table and read binder in the locker room." This last was stated to be "in accordance with paragraph 707 of FAA Handbook 3710.7B."

Mr. Detmers testified that when he removed the PATCO memorandum down October 14, 1971, he did so because it violated the Facilities agreement with the Union. He stated further that he also concluded that, within the Activity's Rules and Regulations, it was scurrilous and defamatory. He stated however that perhaps he would be more "thick skinned" when examining binder material than when examining bulletin board material.

#### C. Other Distribution

The FAA's Notice N3710.2, dated July 13, 1971, stated that labor organizations may be allowed to distribute literature in non-work areas. This notice further states "Such material

does not have to be approved by management, but it should be made clear to the organization that it is liable for the content of the material." Facility Chief Freiman's memorandum of July 22, 1971 to Union President Wines restated this policy. Paragraph 703(b) of FAA Handbook 3710.7B effective August 9, 1971 states:

"b. Solicitation for members by individual employees. Individual employees may engage in solicitation of labor organization memberships during the non-work time of all employees involved providing there is no interference with normal operations. Individual employees may distribute literature on behalf of a labor organization on FAA premises provided it is done in non-work areas during non-work time of all employees involved. There shall be no restriction at any time on the right of employees to freedom of normal person-to-person communication at the work place, provided there is no interference with the work of the FAA."

The use of the distribution table in the locker room as a place to leave copies of documents for distribution was part of the March 1971 discussion concerning the installation of reading binders in the locker room. With respect to material placed on the distribution table, Mr. Detmers stated that it was subject to the same agreement and therefore the same limitations as the reading binder and that nothing placed on the bulletin board could be placed on the distribution table unless edited to conform to the version on the bulletin board. He stated, however, that if the item were not placed on the bulletin board, it could be placed unedited on the distribution table.

Mr. Wines states that he was advised by Mr. Detmers that anything that had been edited and placed on the bulletin board could not be placed on a table in the cafeteria 12/ in an unedited version.

Mr. Detmers testified that prior to August, 1971, anytime a labor organization wished to distribute literature on Activity property, even if in non-work areas, during non-work time, and by employees of the Activity, management approval was required. He testified further, however, after August, 1971, FAA Handbook 3710.7B removed this restriction.

Mr. Drewlo 13/ testified that on February 28, 1972, during a conversation between Mr. Drewlo and Mr. Detmers, that he was told by Mr. Detmers that a publication, "From the President's Desk," could not be distributed by Activity employees, in non-work areas on non-duty time, unless it was first edited. 14/

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12/ The Union had apparently twice been given permission to maintain a table for distribution of printed material in the cafeteria, for limited periods of time. At least one such occasion was subsequent to the Spring of 1971.

13/ Mr. Robert Drewlo, an employee of the Facility, is currently president of the Union, and was vice president of the Union between July 1, 1971 and July 1, 1972.

14/ I credit Mr. Drewlo's version of the conversation because his memory, with respect to the conversation, was more complete and precise than Mr. Detmer's who could only vaguely recall some conversations.

- 14 -

#### D. Alleged Threat to Union President Wines

In reply to some questions posed by PATCO, Mr. Freiman advised Russel Sommer, PATCO Representative, by letter dated December 13, 1971:

"\* \* \* \* \*

The answer to the second part of your question concerning what action, disciplinary or otherwise, can be contemplated or taken against an employee who is distributing material found objectionable and not in conformance with agency regulations is very similar to the first part. That is, whenever an employee violates agency regulations, he is subject to disciplinary action. Should the distribution of union material be conducted in such a manner as to violate said regulations, I would review the facts and make a decision accordingly. I cannot at this time give you a stated action since I would be prejudging the violator. My decision should and would be based on all the pertinent facts involved."

In memoranda, dated October 14 and December 13, 1971, Mr. Freiman advised Mr. Wines that if PATCO continued to abuse the privilege of maintaining the reading binder and distribution table, the privilege would be revoked.

#### CONCLUSIONS

In the private sector the law involving union distribution has historically involved a balancing and accommodating of interests; on the one hand, the rights of the employees to organize and on the other, the employer's right to control his own property. It is well settled in the private sector, in striking this balance, that employees, absent unusual

- 15 -

circumstances, are privileged to solicit and distribute Union literature on company premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) and Stoddard-Quick Manufacturing Co., 138 NLRB 615. This approach has been applied and accepted in the interpretation of the Executive Order. Charleston Naval Shipyards, A/SLMR No. 1.

#### A. Use of Bulletin Boards

The first major question presented is whether the Activity's limitations on the use of the bulletin boards by PATCO violate Section 19(a)(1) of the Executive Order.

The FAA takes the position that use of an agency service or facility, in this instance the bulletin board, is a privilege and that a request to use any such service or facility may be granted entirely, granted conditionally or partially, or denied. 15/

Therefore Respondent contends the use of its facilities, including bulletin boards, is a privilege which was conditionally granted to PATCO. FAA points to FPM letter No. 711-30 which states that management has substantial discretion in deciding what facilities and services will be made available and that before use of facilities or services are granted, reasonable conditions for their use should be established. The FPM letter states that benefits will thus be derived by virtue of improved labor-management relationships.

15/ The FAA notes that Section 19(a)(3) states that an agency may furnish facilities when "consistent with the best interests of the agency, its employees and the organization" and when furnished, "if requested, on an impartial basis to organizations having equivalent status."

The Charleston Naval Shipyards case has established that the use of non-working areas and non-work time to distribute Union literature, absent special circumstances, is a right that cannot be denied or infringed upon. Therefore, the broad statement that use of FAA facilities is a privilege which can be denied or conditionally granted by the FAA is too broad. It is true, however, that use of facility bulletin boards is not a right and absent special circumstances could be denied. 16/ Universal Life Insurance Co., 169 NLRB 1118, although not controlling precedent is a case whose reasoning seems quite persuasive.

It does not follow, and I reject the contention, that because a privilege, in this case, the use of bulletin boards, may be granted or denied that that privilege may be conditionally granted regardless of the conditions. It is apparent that in the event a privilege is conditionally granted, the conditions must be lawful and not in conflict with the purposes and objectives of the Order. 17/

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16/ PATCO has not contended, nor have they introduced any evidence to establish that there were any unusual circumstances present and that the use of facility bulletin boards was necessary in order for PATCO to adequately communicate with employees.

17/ In the private sector it is well established that even when distribution of literature is a matter of right, certain reasonable and minimal limitations can be placed upon it. cf. Texaco, Inc., 189 NLRB No. 51; Jefferson Standard Broadcasting Company, 94 NLRB 1507 enf'd sub nom NLRB v. Local Union 1229 IBEW, 346 U.S. 464; Owens-Corning Fiberglas Corp., 172 NLRB No. 20.

The limitations and restrictions placed on the use of bulletin boards by the FAA were that nothing "slandorous" or "inflammatory" may be placed on them. These limitations, although somewhat vague and broad, can hardly be said to be contrary to the purposes of the Order. In FAA, New York Air Route Traffic Control Center, A/SLMR No. 184, the Assistant Secretary stated on page 3 "an agency does have the right to ensure that literature which is posted on its property is not violative of any law."

The actual application of these standards by the Activity in the subject case indicate how broadly the language of the rules was interpreted. <sup>18/</sup> The Activity refused to allow PATCO to post notices that were critical of the FAA or which contained quotations that were uncomplimentary or critical of the FAA. Such an approach, which amounted to censorship of propaganda and required PATCO to delete statements which the Activity disapproved of merely because they criticized the FAA, would seem clearly to be contrary to the basic objectives of the Order as interpreted in the Charleston Naval Shipyards case; supra, and in Bureau of Customs, A/SLMR No. 169, where the Assistant Secretary held, in circumstances there present, that the Activity had an "affirmative obligation to provide a means" so that the electorate could receive the information necessary to make "an intelligent, informed choice." In fact, in circumstances where the FAA allowed a labor organization to use a bulletin board the Assistant Secretary stated "In my view, an agency should not police or censor campaign propaganda by a labor organization." FAA, New York Air Traffic Control Center, supra, at page 3.

<sup>18/</sup> Mr. E.L. Embrey, FAA's Chief of Union Management-Relations Division of the Office of Labor Relations, who was responsible for drafting the FAA's rules testified that these rules forbade posting anything on the bulletin boards that was critical of the FAA.

This limitation therefore appears to be contrary to the Order's policy of encouraging the free flow of communications so that employees can themselves make informed judgments. Moreover, it is quite obvious that this practice which allows the Activity to censor and expunge any statement that is critical of it, would give an undue advantage to a labor organization which chose to flatter and write only favorable things about the Activity.

The FAA argues further that the use of bulletin boards is a working condition and therefore is a subject for collective bargaining. It is further submitted that a labor organization becomes entitled to use bulletin boards only by virtue of a valid collective bargaining agreement. See, NLRB v. Proof Co., 242 F2d 560 (CA 7). The FAA contends further that since PATCO was not the exclusive representative of its employees the FAA could not have recognized, bargained with, and entered into a collective bargaining agreement with PATCO. This contention is rejected because it does not follow that because the use of bulletin boards is a working condition and a subject for bargaining with an exclusive collective bargaining representative, that if bulletin board use is granted to a labor organization, when there is no exclusive bargaining representative, that any limitation or condition may be placed upon it. Again, any such limitations must be in harmony with the purposes of the Order.

The Activity submits that the bulletin board in question is in a hallway frequented by the public and therefore any notice appearing on it would appear to the public to be a statement of, or adopted by, the FAA. This is a matter that should have been considered when deciding initially whether to grant access to the bulletin board. In the instant case, it is not too persuasive a consideration since the evidence indicates the public, as such, is not often in the hallway where the bulletin board is located, and then usually either under escort or while on business. The Activity could easily have avoided such a problem by posting a disclaimer on the bulletin board stating that the statements thereon were attributable to the party who posted them, and do not reflect

the position of the FAA. 19/ Such a disclaimer notice is required by the FAA's own rules with respect to reading binders.

Two other possible justifications for the censorship here involved are that the statements were untrue and/or were inflammatory and would involve disruption of the work being performed. With respect to the first item, untruthfulness, the statements involved, including Senator Hartke's, were basically in the nature of opinions and not simple issues of right or wrong. They were the types of statements that could be answered and the "record set straight," if the Activity so desired. Censoring the statements is contrary to the spirit of the Order and seems the least effective way of providing the employees with the information necessary to make informed judgments. 20/ See, Texaco, Inc., supra. In light of the foregoing discussion, although the Activity's rules and regulations, with respect to the use of bulletin boards, on their face, do not violate the Order, their application and interpretation in the circumstances here present do violate Section 19(a) (1) of the Order.

19/ In this regard, it noted that individual employees can post personal notices. Presumably the Activity does not feel that it is adopting or responsible for every representation made by employees who post notices to sell or rent personal items.

20/ A possible justification, not raised by the FAA, that the censorship here involved was privileged under a policy present in the private sector and set forth in Jefferson Standard Broadcasting Co., 94 NLRB 1507, enf'd sub nom NLRB v. Local Union 1229 IBEW, supra. In that case, the Union criticized the broadcasting content of the radio station and distributed these criticisms to the general public. The NLRB found this conduct to be unprotected. In that case, the distribution to the public had nothing to do with the labor dispute. The Jefferson Standard case, even if its reasoning was accepted into the public sector, is clearly distinguishable. In the subject case, the posting was aimed at employees, not the general public, and PATCO's criticisms, although some involved the effectiveness, or lack thereof, of the FAA in performing its functions, all involved items that had an impact on the working conditions of employees PATCO was seeking to communicate with.

- 20 -

## B. Reading Binder

The use of reading binders by PATCO and other employee organizations was apparently a customary practice as distinguished from the use of bulletin boards. Prior to the Spring of 1971, a number of the organizations, including PATCO, maintained reading binders as a method of communicating with employees in the five main work areas at the Los Angeles Control Center. There was no evidence submitted that there was any limitation on the use of such reading binders, or on what items could be placed in them.

Pursuant to an agreement between PATCO and the Activity, an official of PATCO constructed a table that could hold the reading binders of the three organizations 21/ as well as have shelf space available so that leaflets and other printed material could be placed on it for employees to take with them. Pursuant to the agreement, this table was placed in the employee locker room, admittedly a non-work area. The record established that when PATCO was granted permission to install the read binder table in the locker room and to move the reading binders from the work areas into the locker room, a non-work area, PATCO agreed that it would not place any item in the reading binder, if that item was also placed on the bulletin board, unless the item placed in the reading binder was edited to first conform with the copy that was on the bulletin board. 22/ The Activity states that this limitation only applies to items placed both in the reading binder and on the bulletin board. PATCO complied with this

21/ PATCO, ATCA, and NAGE.

22/ It is undisputed that this requirement also applied to items placed on the reading binder table for actual distribution.

- 21 -

agreement until July 22, 1971, when a memorandum was received from Facility Chief Freiman specifically stating that items placed in the reading binder would be treated the same as items distributed in non-work areas and did not have to be reviewed by management. It is noted further that the Activity's own regulations, dated 9 August 1971 (Handbook 3710.7B, Chapter 7, paragraph 707) states that management officials may periodically check the contents of the reading binders "to assure that it contains nothing of a scurrilous or defamatory 23/ nature. Management should advise the labor organization that abuse of this privilege may result in its loss." [Footnotes added.]

First, at least at the facility in question, reading binders, unlike bulletin boards, are a traditionally and recognized method for employee organizations to communicate with the employees. Whereas the use of bulletin boards may be in the nature of a privilege, the use of reading binders should be treated in the same manner as any other protected form of employee distribution or communication and therefore can be limited or denied only for valid and compelling reasons. 24/

The Activity's regulations (FAA Handbook 3710.7B, Chapter 7, ¶ 707), which provides for review of contents of reading binders after material is placed in the binder and prohibits only "scurrilous or defamatory" items, although somewhat vague 25/ are not unlawful on their face.

23/ Mr. E.L. Embrey testified that he was responsible for drafting of this order and that although words "slanderous" and "inflammatory" used in connection with bulletin boards differ from "scurrilous" and "defamatory" no distinction was intended and the difference was inadvertent.

24/ The fact that the reading binders were moved from work areas to non-work areas did not convert this method of communication into a privilege.

25/ These regulations also provide for a clear disclaimer to be placed in the reading binder so that any contention that statements contained in the binders could be attributed to the Activity is clearly without merit.

The incidents of actual removal of items from the binder and the refusal to allow items to be placed in the binder, however, clearly violated the Order because they involved items which, although critical of the FAA, did not warrant their removal because of any contention or showing that they were unlawful or that they would, or did, lead to any disruption of work or discipline problems.

The Activity contends further that it was privileged to limit the use of the reading binder because of PATCO's voluntary undertaking not to place anything in the reading binder that was also on the bulletin board unless edited to conform with the copy appearing on the bulletin board. As discussed heretofore, however, the editing that was actually required before certain items were allowed to be placed on the bulletin board, violated Section 19(a)(1) of the Order and therefore the requirement that items placed in the reading binders to be similarly edited also violates Section 19(a)(1) of the Order.

However, even if the Activity were privileged to censor bulletin board items, applying the same limitations to the reading binders would be clearly inappropriate and unprivileged. As discussed above, reading binders were a traditional method of communication and were located in non-work areas. Therefore censorship of reading binders would unduly interfere with employees rights to communicate with each other.

Further, since the Activity could not have required this censorship of materials to be placed in reading binders, it could not have conditioned permission to place reading binders in the locker room upon PATCO's agreeing to such censorship. In these circumstances any such voluntary undertaking by PATCO 26/ would be just that, purely voluntary and the continuation of such undertaking could not therefore be required. In the circumstances here present,

26/ There was no indication that either of the other two organizations, NAGE or ATCA, assumed the same limitations.



therefore, it is concluded that the censorship of the material PATCO desired to place in its reading binder frustrated the purposes and policies of the Order as discussed in the Charleston Naval Shipyards case, supra, and the Bureau of Customs case, supra. The policy of the Activity interfered with the employees' rights to become informed of various Unions' positions and their rights to communicate with each other concerning working conditions and matters of mutual concern. Such a policy violates Section 19(a)(1) of the Order.

#### C. Other Distribution

Prior to August, 1971, employees of the Activity would have had to seek permission of management to distribute Union literature during non-work time anywhere within the FAA facility, including the locker room and other non-work areas. This limitation was allegedly lifted by the Activity subsequent to August, 1971, and employees were not required to seek Activity approval to distribute Union literature. However, the weight of the evidence indicates that in February, 1972, the Activity advised PATCO that Union items to be distributed by employees still had to be approved by the Activity. This requirement is in violation of the Order. See, Charleston Naval Shipyards, supra.

The Activity's requirement that anything PATCO places on the distribution table in the locker room, that is also placed on the bulletin board, shall be edited so that it is identical to the copy placed on the bulletin board is also contrary to the policy of the Order. This is the same limitation discussed above concerning items to be placed in the reading binders and it was part of the same agreement of Spring 1971 that provided for the setting up of the distribution shelf and reading binders in the locker room. For the same reasons set forth above in the discussion concerning reading binders it is concluded that the limitations placed by the Activity upon items to be placed by employees on the distribution shelf violate the Order.

- 24 -

#### D. Threat to Discipline Floyd Wines

PATCO contends finally that a threat to discipline Mr. Wines, the Union president, unless he complied with the Activity's limitations concerning the distribution of material and on the use of bulletin boards and reading binders violated Section 19(a)(1) and (2) of the Order. This alleged threat of disciplinary action was set forth in a letter to Mr. Wines from Facility Chief Freiman dated December 13, 1971. Because there was no evidence of any actual discrimination against Mr. Wines, it is concluded that there is no merit to the allegation that Section 19(a)(2) of the Order was violated.

As discussed above, however, it has been concluded that the Activity's limitations with respect to use of bulletin boards and reading binders violate the Order. Therefore, threatening someone with revocation of the privileges of maintaining or using the reading binder or distribution table for failing to comply with these improper limitations, would itself constitute an interference with that employee's protected rights and violate Section 19(a)(1) of the Order. The December 13 letter to Mr. Wines did not contain any clear threat of disciplinary action but it did contain a threat of loss of the privileges in question if the limitations discussed above were not followed. There was a general threat in the December 13 letter to the PATCO Representative to discipline any employee who violates these improper limitations. It is concluded that these threats violated Section 19(a)(1) of the Act.

- 25 -

## RECOMMENDATIONS

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

1. That in light of the conclusion that Respondent did not engage in conduct proscribed by Section 19(a)(2) of Executive Order 11491, that portion of the complaint alleging violation of Section 19(a)(2) of Executive Order 11491 be dismissed.

2. That in light of the conclusion that Respondent by virtue of its limitations on the distribution of Union literature and the use of bulletin boards and reading binders and by virtue of its threats to employees to discipline them or to deprive them of the use of bulletin boards and reading binders for refusing to abide by the aforementioned limitations engaged in conduct proscribed by Section 19(a)(1) of Executive Order 11491, that the following Order, which is designed to effectuate the policies of Executive Order 11491, be adopted.

### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, shall:

1. Cease and desist from:

a) Interfering with, restraining or coercing employees by censoring or otherwise

limiting those items which employees and labor organizations wish to place on bulletin boards and in reading binders assigned for their use because such items are critical of the Federal Aviation Administration.

b) Interfering with, restraining or coercing employees by censoring or otherwise limiting those items which employees wish to distribute to one another during non-working time and in non-work areas or wish to place on a distribution table in a non-work area because such items are critical of the Federal Aviation Administration.

c) Interfering with, restraining or coercing employees by threatening them with discipline or loss of privileges if they post items on assigned bulletin boards or place items in assigned reading binders or otherwise lawfully distribute items which are critical of the Federal Aviation Administration.

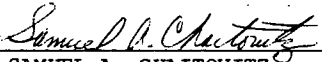
d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights protected by Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491:

a) Post at its facility at the Los Angeles Air Route Traffic Control Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the

Facility Chief and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Facility Chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated at Washington, D.C.  
FEBRUARY 1, 1973

- 28 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees by censoring or otherwise limiting those items which employees and labor organizations wish to place on bulletin boards and in reading binders assigned for their use because such items are critical of the Federal Aviation Administration.

WE WILL NOT interfere with, restrain or coerce employees by censoring or otherwise limiting those items which employees wish to distribute to one another during non-working time and in non-work areas or wish to place on a distribution table in a non-work area because such items are critical of the Federal Aviation Administration.

WE WILL NOT interfere with, restrain or coerce employees by threatening them with discipline or loss of privileges if they post items on assigned bulletin boards or place items in assigned reading binders or otherwise lawfully distribute items which are critical of the Federal Aviation Administration.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights protected by Executive Order 11491.

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

Dated: \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

Appendix cont'd

July 18, 1973

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION ON OBJECTION OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NON-APPROPRIATED FUND ACTIVITIES,  
XVIII AIRBORNE CORPS AND FT. BRAGG,  
FT. BRAGG, NORTH CAROLINA  
A/SLMR No. 284

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The subject case involved an objection to an election held on November 1, 1972, filed by the Petitioner, Local 3397, American Federation of Government Employees, AFL-CIO, between it and Local R5-160, National Association of Government Employees, the Intervenor.

The objection alleged that the Intervenor had engaged in conduct which improperly affected the results of the election by its National Vice-President Harry Breen having displayed a piece of paper, supposedly a check in the amount of \$5000 by the Petitioner, made payable to Robert T. Busby, former National Vice-President of the Intervenor, and who, at the time of the election, was working as a temporary representative for the Petitioner.

The Administrative Law Judge concluded that if any objectionable conduct occurred, the Petitioner had ample opportunity to respond effectively prior to the election. Not having done so, the Administrative Law Judge found that the Petitioner should not be permitted subsequently to raise such matters to attack the validity of the election. Accordingly, he recommended that the objection be overruled.

Upon review of the Administrative Law Judge's Report and Recommendation and the entire record in the case, including the exceptions filed by the Intervenor, and noting particularly the absence of exceptions by the Petitioner, whose objection had been overruled by the Administrative Law Judge, the Assistant Secretary adopted the Administrative Law Judge's recommendation that the objection be overruled. Accordingly, he returned the case to the appropriate Regional Administrator for final action.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NON-APPROPRIATED FUND ACTIVITIES,  
XVIII AIRBORNE CORPS AND FT. BRAGG,  
FT. BRAGG, NORTH CAROLINA

Activity

and

Case No. 40-4368(RO)

LOCAL 3397, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL R5-160, NATIONAL ASSOCIATION  
OF GOVERNMENT EMPLOYEES

Intervenor

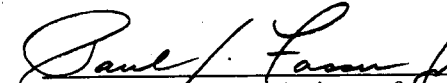
DECISION ON OBJECTION

On June 1, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation on Objection to Election in the above-entitled proceeding, recommending that the Petitioner's objection to the election be overruled. Thereafter, exceptions to the Administrative Law Judge's Report and Recommendation were filed by the Intervenor.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the exceptions filed by the Intervenor, and noting particularly that no exceptions were filed by the Petitioner, whose objection had been overruled by the Administrative Law Judge, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

IT IS HEREBY ORDERED that the objection to the election in the above-entitled proceeding be, and it hereby is, overruled and that the case be returned to the appropriate Regional Administrator for final action.

Dated, Washington, D.C.  
July 18, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

Preliminary Statement

-----  
 NON-APPROPRIATED FUND ACTIVITIES :  
 XVIII AIRBORNE CORPS AND FT. BRAGG :  
 FT. BRAGG, NORTH CAROLINA, :  
                                   Activity :  
                                   : :  
 and : :  
 LOCAL 3397, AMERICAN FEDERATION OF : :  
 GOVERNMENT EMPLOYEES, AFL-CIO, : :  
                                   Petitioner : :  
                                   : :  
 and : :  
 LOCAL R5-160, NATIONAL ASSOCIATION : :  
 OF GOVERNMENT EMPLOYEES, : :  
                                   Intervenor : :  
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CASE NO. 40-4368(RO)

KENNETH E. MARTIN, Captain, Office of the  
 Staff Judge Advocate, Ft. Bragg, North Carolina  
 and  
RONALD E. WOODARD, Civilian Personnel Division,  
 Ft. Bragg, North Carolina, for the Activity  
GERALD SOMMER, Esquire, Staff Counsel, American  
 Federation of Government Employees, AFL-CIO  
 1325 Massachusetts Avenue, N.W.  
 Washington, D.C., for Petitioner  
ROGER P. KAPLAN, Esquire, General Counsel  
 National Association of Government Employees  
 Suite 512, 1341 G Street, N.W.  
 Washington, D. C., for Intervenor

Before: SALVATORE J. ARRIGO  
 Administrative Law Judge

This proceeding, heard in Fort Bragg, North Carolina on March 27, 1973 arises under Executive Order 11491 (herein called the Order), pursuant to a Notice of Hearing on Objection issued on February 8, 1973, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Atlanta Region. At the hearing all parties were represented by counsel and/or representative, and were afforded full opportunity to adduce evidence, call, examine, and cross examine witnesses and argue orally. Counsel for Petitioner made oral argument on the record and counsel for Intervenor filed a brief, both of which I have duly considered.

Upon the entire record in this matter and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

A. Background

Pursuant to an Agreement for Consent or Directed Election approved on October 10, 1972, a secret ballot election was conducted on November 1, 1972, in accordance with the provisions of the Order among certain employees of Non-Appropriated Fund Activities, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina (herein called the Activity). The results of the election were as follows:

Approximate number of eligible voters.....	1075
Void ballots.....	6
Votes cast for Local R5-160, NAGE.....	222
Votes cast for Local 3397, AFGE, AFL-CIO.....	109
Votes cast against exclusive recognition.....	28
Valid votes counted.....	359
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	359

Challenged ballots were not sufficient in number to affect the results of the election and a majority of the valid votes counted plus challenged ballots were cast for Local R5-160, National Association of Government Employees.

Thereafter on November 7, 1972, Local 3397, American Federation of Government Employees, AFL-CIO (herein called AFGE or Petitioner) filed timely objections to the election alleging that Local R5-160, National Association of Government Employees (herein called NAGE or Intervenor) engaged in conduct which improperly affected the results of the election. The objections were investigated and subsequently the Regional Administrator issued the instant Notice of Hearing having found that one of the

objections raised a "relevant issue of fact which may have affected the results of the election . . ." 1/

Petitioner's objection which is the subject matter of this proceeding is as follows:

"Mr. Harry Breen, National Vice President of National Association of Government Employees, displaying a piece of paper supposedly being an AFGE check made payable to Mr. Busby in the amount of \$5,000.00. Mr. Busby was a former National Vice President with NAGE and who at the time of the election was working as a temporary representative for AFGE. The purpose of this is to discredit not only Mr. Busby but to discredit AFGE."

During the hearing Petitioner introduced testimony regarding the possible use of leaflets which purported to refer to the alleged check to Mr. Busby. Intervenor moved to strike such testimony contending that since the matter of leaflets was not specifically raised in Petitioner's objections, it could not be raised at the hearing. 2/ I denied Intervenor's motion and in its brief Intervenor requests that I reverse my ruling.

While Petitioner's objection does not specifically mention "leaflets", I find that the objection is couched in sufficiently broad language to encompass the use of a leaflet in "displaying a piece of paper supposedly being an AFGE check." Further, the possible use of leaflets is quite relevant in assessing the extent to which the alleged

1/ The Regional Administrator dismissed a second objection filed by Petitioner.

2/ Intervenor relies on Section 202.20(b) of the Regulations of the Assistant Secretary which provides, in relevant part: "Within 5 (five) days after the tally of ballots has been furnished, a party may file objections to the procedural conduct of the election, or to conduct which may have improperly affected the results of the election, setting forth a clear and precise statement of the reasons therefore. \* \* \* Within 10 (ten) days of the filing of the objections, unless an extension of time has been granted by the Area Administrator, the objecting party shall file with the Area Administrator evidence, including signed statements, documents and other material supporting the objections."

misrepresentation may have been promulgated which, in turn, bears on whether the alleged conduct, if objectionable, could have affected the results of the election. Therefore, I find that the proffered testimony concerning the possible use of leaflets is reasonably related to the basic objection under consideration and accordingly I reaffirm my ruling made at the hearing that such testimony may be received.

#### B. Testimony on the Alleged Objectionable Conduct

Clarence Montgomery, a porter at the facility's main Noncommissioned Officer's (NCO) Club and a member of the voting unit herein, testified that sometime during the week prior to the week of the election he and approximately eight other unit employees met with Harry Breen, NAGE National Vice President and Mrs. Rose Phillips who was temporary President of NAGE Local R5-160 at that time. 3/ According to Montgomery's testimony the meeting occurred in the NCO Club main ballroom at approximately 1 p.m., which was the end of the work day for those employees in attendance. During the meeting Breen and Phillips presented the NAGE "viewpoint on the election" at which time Phillips stated that AFGE representative Robert Busby was paid \$5,000 to solicit votes for AFGE. 4/ Phillips referred to Busby as a "turncoat". Phillips, in the presence of Breen, then produced what was apparently a photostatic copy of a check for \$5,000 made out to Robert Busby and signed by an unidentified person. Phillips also had a piece of literature which contained a reproduction of the check imposed thereon, the letters "NAGE" and two "blocks" with writing which indicated that the reader was to vote for NAGE.

Montgomery testified that a day or two later he questioned Busby about the check and Busby denied any such payments. Montgomery stated that he discussed the check with about 15 or 20 unit employees.

3/ Montgomery was uncertain as to the specific date of the meeting. Originally he testified that the meeting occurred sometime during the last week before the election, perhaps a Monday or Tuesday. Later he testified that the meeting took place 3 to 4 days prior to the election. November 1, 1972, the date of the election was a Wednesday.

4/ Robert T. Busby was hired by Petitioner in late September 1972 to assist in organization and election campaign work at the Fort Bragg facility. Busby had previously been a National Vice President for NAGE during the period 1967 to 1970. The evidence reveals that Busby was employed by AFGE during the period of September 28, 1972 to December 15, 1972, for which he was paid \$1,401 as wages and \$1,180.70 for expenses. The evidence further reveals that Busby was never paid \$5,000 by AFGE for any reason.

Montgomery further testified that subsequently, on the Friday night during the week prior to the election, he noticed a piece of literature on the bulletin board in the main NCO Club which contained a picture of a \$5,000 check made out to Robert Busby and text which indicated that the check was paid to Busby to solicit votes for AFGE. Montgomery also recalled that somewhere on the document appeared the letters "NAGE" and the legend "Vote for NAGE" or words to that effect. The bulletin board is located near the NCO Club employees time card rack. Approximately 375 unit employees work in the main NCO Club.

Montgomery also testified that on the following Saturday he saw the same piece of literature at the service bar in the main NCO Club. According to Montgomery 3 other unit employees observed the leaflet at that time.

Robert T. Busby testified that some time before the election it came to his attention that Breen had displayed what purported to be a copy of a \$5,000 check payable to Busby from AFGE. Busby initially testified that he first heard of the check matter 8 days prior to the election. <sup>5/</sup> The day after first hearing of the existence of the check, Busby related this information to his superior, AFGE National Representative Carlisle Fields. Busby testified that at least 25 employees had questioned him about the check during which occasions Busby denied that there was any truth to the matter.

Busby also testified that the only time prior to the election that he heard of the existence of a leaflet involving the check occurred approximately 3 days before the election when an employee who was questioning him about the \$5,000 check mentioned that he received the information through a leaflet. However prior to giving this testimony, Busby denied on no less than 5 separate occasions in his testimony that any employee had mentioned to him that there was literature in existence relative to the \$5,000 check.

Other than Busby's denials of the purported \$5,000 payment to those employees who discussed the matter with him, AFGE took no further responsive action.

Whitney McPherson, a member of AFGE and a warehouse employee at Fort Bragg, at the time of the election testified that on October 31, 1972, Breen produced a photostatic copy of a check payable to Busby in the amount of \$5,000. <sup>6/</sup> Warehouse employees were not included in the

<sup>5/</sup> Thereafter Busby's testimony changed to reflect that he had first heard of the matter 6 days before the election. He also testified that he first heard of the check 5 days before the election.

<sup>6/</sup> At the time of the hearing, McPherson was no longer employed in the Federal service nor was he a member of AFGE.

unit herein and participated in a run-off election in a separate unit on November 1, 1972. McPherson testified that he was in a small office with two other employees having his lunch when Breen walked into the room. Breen was conversing with another employee when he produced a photostatic copy of the check and said "this is what they're paying Mr. Busby to come down here to work." The reproduction was then passed around to the three employees.

Breen and Phillips both deny meeting with employees at the NCO Club at any time during the election campaign period. Breen, as National Vice President was in charge of conducting the NAGE election campaign at Fort Bragg. Breen denied having ever met Montgomery; ever exhibiting a check or what purported to be a copy of a check payable to Busby in the amount of \$5,000 to any employee at the installation; or ever seeing or authorizing a leaflet containing a copy of a \$5,000 check payable to Busby. He acknowledged however that he showed McPherson a check for \$36.96 which he received from Phillips (to be discussed infra).

Mrs. Phillips had been an officer in AFGE Local 3397 until her resignation on July 20, 1972. She became temporary President of NAGE Local R5-160 on July 13, 1972 after which she engaged in organizational and election campaign activities for NAGE at Fort Bragg. Phillips had no recollection of having ever met Montgomery; denied making the statements Montgomery attributed to her; and denied having ever seen any NAGE campaign document containing a copy of a \$5,000 check to Busby. Phillips testified that two or three days before the election (probably on the preceding Saturday) she received in the mail from AFGE headquarters, Washington, D.C. a check in the amount of \$36.96 payable to AFGE Local 1770. <sup>7/</sup> The envelope was postmarked October 11, 1972, Washington, D.C. <sup>8/</sup> An attachment to the check indicated that the money was in reference to a "Bill for meeting hall and refreshments dated 10/2/72 (Meeting held on September 25, 1972)". According to Phillips, two or three days thereafter she turned the check over to Breen.

Breen testified that during the morning of October 31, 1972, Phillips gave him the \$36.96 check and informed him that she had "just gotten it". At lunchtime, according to Breen, he happened to meet McPherson near a vending machine in the warehouse where McPherson worked. Breen stated that on the way "back to the room where . . . (McPherson) normally sat eating his lunch" he presented NAGE views on the election to McPherson, encouraged him to vote for NAGE and showed him the \$36.96 check and the envelope addressed to Phillips. Breen testified:

"I said I wanted to show him how disorganized the AFGE really is. There's an awful lot of literature being put out about AFGE concerning Rose Phillips, that she was no longer an officer of AFGE and

<sup>7/</sup> Intervenor Exhibit No. 1.

<sup>8/</sup> Intervenor Exhibit No. 6(b).



here they send her a check in the mail to her house well after she resigned. I just wanted to show it to the employees, how their literature is not in conformance with what information they have back at their National Office." According to Breen, McPherson mentioned that Busby, a former NAGE Vice President was now campaigning for AFGE to which Breen made a "sarcastic" reply to the effect that he wouldn't be surprised if Busby was being paid as much as \$5,000 to campaign on behalf of AFGE.

Breen also testified that shortly thereafter on the same day he showed the \$36.96 check to one other person -- Margaret Milburn, a non-employee representative of AFGE. Breen stated that his conversation with Milburn was similar to the one he had with McPherson. 9/

#### Discussion and Conclusions

A relevant consideration in determining whether a misstatement warrants setting aside an election is whether the party against whom the misstatement was made had an adequate opportunity to reply. 10/ Of course, an underlying presumption is that the party who would be called upon to respond had sufficient information within its knowledge to make an effective reply. In the case herein, assuming arguendo that the testimony of Petitioner's witnesses is generally credited, a composite of the testimony of Montgomery and Busby indicates that AFGE had knowledge of the alleged misrepresentation at least 5 to 6 days before the date of the election. Thus, Montgomery testified that he was aware of the matter prior to the Friday before the election and had promptly passed this information on to Busby. Further Busby's own testimony reveals that he knew of the matter of the check at least 5 to 6 days before the election. It is also beyond denial that AFGE had in its possession complete knowledge relative to the amount of money it had paid Busby.


9/ Margaret Milburn was not called as a witness. Counsel for Petitioner represented at the hearing that Milburn was in ill health and was hospitalized while the hearing was in progress.

10/ Department of the Army Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 177; Army Material Command, Army Tank Automotive Command, Warren Michigan, A/SLMR No. 56. Similarly, in the private sector, the National Labor Relations Board has considered a party's opportunity to reply to be highly significant in considering pre-election conduct alleged to be objectionable. See Hollywood Ceramics Company Inc., 140 NLRB 221; and Hardy-Herppolsheimer Division of Allied Stones of Michigan, Inc., et. al. 173 NLRB 1109.

Therefore, I find that if any objectionable conduct occurred, AFGE, by the testimony of its own witnesses, had ample opportunity to promulgate an effective response prior to the election, if it so desired. Having not done so, it should not be allowed to subsequently raise such matters to attack the validity of the election. 11/

#### Recommendation

I recommend that Petitioner's objection to the election be overruled and the case be returned to the Regional Administrator for the Atlanta Region for final action consistent herewith.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated at Washington, D.C.  
June 1, 1973

11/ In view of this conclusion, further specific findings and credibility resolutions are unnecessary.

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL OCEANIC AND ATMOSPHERIC  
 ADMINISTRATION, NATIONAL OCEAN SURVEY  
 A/SLMR No. 285

This case involves a complaint filed by the National Maritime Union (NMU) against National Oceanic and Atmospheric Administration, National Ocean Survey (NOS), alleging violations of Section 19(a)(1), (5) and (6). The Alaska Fishermen's Union (AFU) intervened in the proceeding. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Regional Administrator. The complaint alleged that employees on vessels transferred pursuant to a reorganization constituted an accretion or addition to the NMU bargaining unit covering nonsupervisory personnel and steward's department officers employed by NOS at its Pacific Marine Center.

The AFU, as exclusive representative of employees on the transferred vessels, took the position that the transfer of vessels and their crews did not result in an accretion or addition to the NMU unit and that the AFU units involved remained unchanged. The Activity contended that there was no authority under which it could make a determination to support the position of either Union, and remained "neutral to the positions of both parties."

In all the circumstances, the Assistant Secretary concluded that because no accretion or addition resulted from the reorganization, the Respondent NOS was not obligated to consult, confer or negotiate with NMU with regard to the transferred employees. In reaching this determination, the Assistant Secretary noted that in considering whether a reorganization has resulted in an accretion or addition of one unit to another, the primary consideration is whether the employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282. The Assistant Secretary found that the facts subsequent to the reorganization herein established that the employees represented by AFU and NMU continued to perform their original missions; remained on the same vessels in the same locations and have not interchanged with other employees; and have remained under the same immediate supervision.

Accordingly, the Assistant Secretary dismissed the complaint in its entirety.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL OCEANIC AND ATMOSPHERIC  
 ADMINISTRATION, NATIONAL OCEAN  
 SURVEY

Respondent

and

Case No. 22-3709(CA)

NATIONAL MARITIME UNION

Complainant

and

ALASKA FISHERMEN'S UNION

Intervenor

## DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Regional Administrator Eugene M. Levine's April 27, 1973, Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts 1/ and accompanying exhibits, 2/ the Assistant Secretary finds:

1/ The Alaska Fishermen's Union, herein called AFU, did not sign the Addendum to the Stipulation submitted on April 2, 1973, but rather set forth its position regarding the Addendum in a letter to the Respondent dated March 26, 1973. In reaching a decision in the instant case I have considered the entire record, including the Addendum to the Stipulation and the above-mentioned letter of the AFU.

2/ The parties did not file briefs.

The complaint herein alleges that the Respondent violated Section 19(a)(1), (5) and (6) of the Executive Order by refusing to recognize and negotiate or confer with the Complainant, the National Maritime Union, hereinafter called NMU, as the exclusive representative for nonsupervisory personnel employed on four vessels which had been transferred from the National Marine Fisheries Service (NMFS) into a unit currently represented by the NMU. 3/ The complaint alleges that the employees on these vessels constitute an accretion or addition to the NMU bargaining unit covering nonsupervisory personnel and steward's department officers employed by the Respondent at its Pacific Marine Center facility located in Seattle, Washington. The AFU contends that it is the exclusive representative of the employees on the transferred vessels. It takes the position that the transfer of the vessels and their crews did not result in an accretion or addition to the NMU unit and that the two AFU units involved herein remain unchanged. 4/ The Activity, contending that there is no authority under which it could make a determination to support the position of either Union, states that it is "neutral to the positions of both parties."

In the stipulation herein, the parties requested a determination by the Assistant Secretary as to whether the nonsupervisory employees on the former NMFS vessels JOHN N. COBB and OREGON, through accretion, are now a part of the NMU unit at the Respondent's Pacific Marine Center; whether a new appropriate unit has been created; or whether the previously existing units remain appropriate.

#### Background

The National Ocean Survey (NOS) was created in 1970 pursuant to Reorganization Plan No. 4 which reorganized many of the existing Federal environmental agencies under the newly created National Oceanic and Atmospheric Administration (NOAA), a component of the Department of Commerce. The predecessor to NOS was the Coast and Geodetic Survey, a branch of the Environmental Science Services Administration of the Department of Commerce. The mission of the Coast and Geodetic Survey was to operate a fleet of vessels for the purpose of charting, investigation and research in the oceans as an aid to navigation, and to improve marine technology. The Coast and Geodetic Survey deep-sea vessels operated out of the Atlantic Marine Center in Norfolk, Virginia and the Pacific Marine Center in Seattle, Washington.

3/ The parties stipulated that of the four vessels involved the MILLER FREEMAN and GEORGE KELEZ have been deactivated. Accordingly, only the status of the employees on the vessels JOHN N. COBB and OREGON remains for consideration herein.

4/ The AFU represented the disputed employees in two units: (1) employees on the KELEZ and COBB, and (2) employees on the OREGON.

Another component of NOAA created in 1970 pursuant to the Reorganization Plan was the NMFS, which formerly had been the Bureau of Commercial Fisheries (BCF) under the Department of the Interior. NMFS' mission was to operate a fleet of vessels to carry out biological marine research.

In July 1971, by administrative reorganization, the Office of Fleet Operations was established as a separate entity within NOS to assume responsibility for the centralized management of the entire NOAA fleet. Major responsibilities of the consolidated NOAA fleet are nautical charting surveys; scientific research; physical, geophysical and biological oceanography; fisheries resource surveys; exploratory fishing; fishery engineering; and meteorological observations of the upper air and sea/air interaction boundaries.

#### Bargaining History

##### National Ocean Survey

Since October 21, 1963, the NMU has been the exclusive representative for units of all unlicensed nonsupervisory personnel employed on vessels under the jurisdiction of the NOS Atlantic and Pacific Marine Centers. In this regard, while separate units were established at the Atlantic and Pacific Marine Centers, the record reveals that the parties have negotiated one agreement for both Centers and, for all practical purposes, have treated eligible employees in both Centers as one bargaining unit. Additionally, the NMU obtained exclusive recognition in July 1970 for a unit of all Chief Stewards employed aboard Atlantic and Pacific Marine Center vessels. The most recent negotiated agreement between the parties covering unlicensed nonsupervisory personnel expired June 15, 1972, and has been extended by mutual consent. 5/

##### National Marine Fisheries Service

Since October 1963, the AFU has been the exclusive representative for several units of employees aboard NMFS vessels. 6/ Initial recognition was granted under Executive Order 10988 by the BCF Director of the Northwest Region at Seattle, Washington, covering a unit of all employees,

5/ As of January 1, 1973, it appears that the NMU represented approximately 206 employees in the Atlantic Marine Center and 262 employees in the Pacific Marine Center.

6/ Although the stipulation of the parties included the description of a number of vessels in which AFU had gained exclusive recognition, initially only four such vessels were the subject of the instant complaint.

except Masters, employed on the vessels GEORGE KELEZ and JOHN N. COBB. In March 1968, exclusive recognition was granted the AFU for a unit of all employees, except Masters, employed on the vessel JOHN R. MANNING. The MANNING was subsequently deactivated and replaced by the OREGON which was thereafter transferred to the Northwest Fisheries Research Center with the vessels KELEZ and COBB. A negotiated agreement between the AFU and the NMFS covering all of the above-noted vessels expired on June 14, 1972, and has been extended for one year or until a new agreement is reached, whichever is sooner. 7/

Transfer of National Marine Fisheries Service  
Vessels to National Ocean Survey

After NOAA was created, its Administrator directed that NMFS and NOS vessels be combined in a single fleet under the authority of the Director of NOS. The first step of the consolidation of the NOAA fleet took place on July 1, 1972, and involved the addition of the NMFS vessels MILLER FREEMAN, GEORGE KELEZ, OREGON and JOHN N. COBB to the existing fleet of NOS vessels under the authority of the NOS Pacific Marine Center. As noted above, only two of these vessels, the JOHN N. COBB and the OREGON, currently remain on active duty status. The evidence established that these vessels, with the same Masters and crews, presently are under the authority and jurisdiction of the Director of the NOS Pacific Marine Center.

The Director of NOS announced that, where positions and capabilities are identical, in the future there will be a policy of interchange of crew members between all NOS vessels, including former NMFS ships. To date, however, former NMFS vessels continue to be exclusively employed in their original missions of biological marine research and NOS vessels continue to be employed in their original mission of physical research. The record indicates also that despite the above-noted announcement by the Director of NOS with respect to interchange of personnel, no employee interchange, in fact, has occurred. 8/ In addition, the NOAA established a single marine wage policy regarding all its vessels, including former NMFS ships. Previously, West Coast based vessels of NMFS were covered by wage policies based on the Military Sealift Command Pacific Schedule of Wages derived from West Coast private industry rates. The record

7/ As of January 1, 1973, it appears that the AFU represented approximately 48 employees in the above-noted units.

8/ Moreover, it appears from the record that the positions aboard former NMFS vessels differed from those aboard the NOS vessels so that interchange under the conditions presented by the Administrator might not be possible.

reveals that this has been discontinued by NOAA in favor of one overall Atlantic Schedule of Wages which derives its rates and policies for unlicensed personnel from the NMU Atlantic Coast private industry contracts.

All of the facts and positions set forth above are derived from the parties' stipulation and accompanying exhibits.

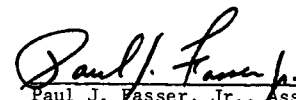
The basic issue presented herein is whether, as a result of the above-noted reorganization, the former NMFS units have been accreted to or added to the NOS unit exclusively represented by the NMU. As I noted in Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282, in determining whether a reorganization has resulted in an accretion or an addition of one unit to another, the primary consideration is whether the employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. Based on the facts presented in the parties' stipulation, I find insufficient basis to support the NMU's contention that the non-supervisory employees of the vessels COBB and OREGON have, in fact, lost their separate and distinct community of interest. Thus, the evidence establishes that subsequent to the reorganization, employees in the units represented by the AFU and the NMU continued to perform their original missions of biological research for former NMFS ships and physical research by NOS vessels; they have remained on the same vessels in the same locations and have not interchanged with other employees; and they have remained under the same immediate supervision. 9/

In these circumstances, I find that because there was no accretion or addition herein, the Respondent was not obligated to consult, confer, or negotiate with the NMU with regard to the non-supervisory employees aboard the vessels COBB and OREGON. Accordingly, I shall dismiss the instant complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-3709(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Vasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

9/ Cf. Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

July 25, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE ARMY,  
EDGEWOOD ARSENAL, ABERDEEN  
PROVING GROUND COMMAND  
A/SLMR No. 286

This case involves an unfair labor practice complaint, filed by National Federation of Federal Employees (Complainant), against the U.S. Department of the Army, Edgewood Arsenal, Aberdeen Proving Ground Command (Respondent), alleging that the Respondent violated Section 19(a)(1), (2), and (5) of the Executive Order by unilaterally terminating dues withholding for employees who had been members of a unit represented by the Complainant at the Edgewood Arsenal. The Respondent acknowledged that it had terminated dues withholding for certain of its employees, and asserted in defense of such action that as a result of a reorganization these employees were no longer members of the unit exclusively represented by the Complainant.

The Complainant, through its Local 178, was the exclusive representative in a command-wide unit of General Schedule and Wage Grade employees at the Edgewood Arsenal. Prior to a reorganization of June 28, 1971, the Aberdeen Proving Ground was a separate, but physically adjacent installation, at which there were a number of exclusively recognized units of employees. After the reorganization, the Edgewood Arsenal became a tenant of Aberdeen and, while it continued its prior mission of supplying chemical, biological, and radiological expertise to the Army, the support function it had performed for its own tenants was transferred to Aberdeen.

Subsequent to the reorganization, the Activity filed three RA petitions with respect to certain of the exclusively recognized units at Aberdeen. The Regional Administrator concluded, among other things, that the units had, in fact, accreted into the Aberdeen units. None of the parties appealed this decision of the Regional Administrator. Thereafter, in May 1972, the Respondent notified the Complainant that it was required to terminate dues withholding for the employees administratively transferred to Aberdeen, and that this action would become effective June 26, 1972.

At the hearing, the Respondent and the Intervenors moved to dismiss the complaint based on the contention that the decision of the Regional Administrator in dismissing the RA petitions was dispositive in the instant case. The Administrative Law Judge recommended, among other things, that the motions to dismiss be granted with respect to the employees who were found by the Regional Administrator in the RA proceedings to have accreted to units at Aberdeen.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety. The Assistant Secretary noted that he agreed with the Administrative Law Judge's recommendation to grant the motions to dismiss with respect to the employees who were found in the RA proceedings to have accreted to units at Aberdeen. In his view, when the parties in the prior representation cases accepted the finding of the Regional Administrator on the accretion issue, such finding was binding on the parties and was not subject to relitigation by them in any subsequent proceeding under the Order, absent newly discovered and previously unavailable evidence, or changed circumstances, none of which were contended to exist in the subject case.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE ARMY.  
EDGEWOOD ARSENAL, ABERDEEN  
PROVING GROUND COMMAND

Respondent

and

Case No. 22-3568(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES

Complainant

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO

Intervenor

and

INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS

Intervenor

DECISION AND ORDER

On April 18, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations 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. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

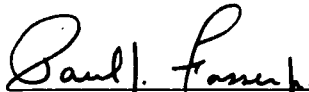
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed to the Report and Recommendations, I hereby adopt

the findings, conclusions, and recommendations 1/ of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-3568(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

1/ The Administrative Law Judge recommended, among other things, that the motions to dismiss made by the Respondent and both Intervenor be granted with respect to the allegations that the Respondent improperly refused to continue dues withholding on behalf of the Complainant for the employees who accreted to the fire fighter, boiler plant branch and overall Wage Grade units at the Aberdeen Proving Ground Command. In arriving at his recommendations, the Administrative Law Judge noted that the Regional Administrator, in determining the appropriateness of three RA petitions, had previously found that accretions had occurred in the above-noted units. He noted also that the Complainant was a party to those proceedings and had not requested review by the Assistant Secretary of the Regional Administrator's actions. I agree with the Administrative Law Judge's recommendation to grant the motions to dismiss. In my view, when the parties in the prior representation cases accepted the finding of the Regional Administrator on the accretion issue, such finding was binding on the parties and was not subject to relitigation by them in any subsequent proceeding under the Order, absent newly discovered and previously unavailable evidence, or changed circumstances, none of which were contended to exist in the subject case.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

U. S. DEPARTMENT OF THE ARMY  
EDGEWOOD ARSENAL, ABERDEEN  
PROVING GROUND COMMAND,

Respondent

and

CASE NO. 22-3568 (CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES

Complainant

and

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, AFL-CIO,

Intervenor

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

Intervenor

Timothy Kristl, Esq., and  
Harry Bender, Esq., Staff Judge Advocates Office,  
Aberdeen Proving Ground, Maryland 21005, for  
Respondent.

George Tilton, Esq. and Michael Forscey, Esq.,  
1737 H Street, N. W., Washington, D. C. 20006,  
for the Complainant.

Louis C. Poulton, Esq., International Association  
of Machinists and Aerospace Workers, AFL-CIO,  
1300 Connecticut Avenue, N. W., Washington, D.C.  
20036, on behalf of Intervenor International  
Association of Machinists and Aerospace Workers,  
AFL-CIO.

Fred Schillreff, Esq., International Association of  
Fire Fighters, 1759 New York Avenue, N. W.,  
Washington, D. C. 20006, on behalf of Intervenor  
International Association of Fire Fighters.

Before: Samuel A. Chaitovitz, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on October 12, 1972, by the Acting Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Philadelphia Region.

National Federation of Federal Employees on behalf of Local 178 (herein called Complainant or NFFE) initiated the matter by filing a complaint on June 13, 1972, against United States Department of the Army, Edgewood Arsenal, Aberdeen Proving Ground Command (herein called the Respondent or Edgewood Arsenal, when referring to that entity, and Aberdeen Proving Ground Command, when referring to that entity). The complaint alleges that Respondent violated Sections 19(a)(1), (2) and (5) of the Order by unilaterally determining and announcing that as of June 12, 1972, dues withholding on behalf of NFFE was to be terminated for certain employees who had been in a unit represented by NFFE Local 178, and had been administratively reassigned to the Aberdeen Proving Ground Command.

The International Association of Machinists and Aerospace Workers, AFL-CIO (herein called IAM) moved before the Regional Administrator to intervene in the subject case and the Regional Administrator, on October 25, 1972, granted IAM's motion. At the hearing in the subject case, the International Association of Fire Fighters (herein called IAFF), moved to intervene and the undersigned Administrative Law Judge granted its motion.

A hearing was held before the undersigned on November 14, 15, and 17 at Aberdeen, Maryland. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter all parties filed briefs 1/ which have been duly considered by the undersigned.

Upon the entire record in this case, from his observation of the witnesses and their demeanor, and from all the evidence adduced at the hearing, 2/ the undersigned makes the following findings, conclusions and recommendations.

1/ The IAFF filed a statement that it joined in the positions taken in the briefs filed by the Respondent and the IAM.

2/The following corrections are hereby made in the transcript of the subject hearing:

Pg.15 line 21 At the end of the line a period (.) is substituted for the comma (,).

Pg.17 line 4 "procurement" is substituted for "produrement."

Pg.66 line 5 "Mr. Tilton" is substituted for "Mr. Poulton."  
line 6 "count" is substituted for "account."

Pg.71 line 12 "matters" is substituted for "merits."

Pg.74 line 3 "command over the" is substituted for "gone over to."

Pg.79 line 8 "state" is substituted for "have"; "fact" is substituted for "facto."

Pg.85 line 1 "Grade" is substituted for "Trade."

Pg.86 line 15 "less" is deleted.

Pg.96 line 17 "makeup" is substituted for "backup."

Pg.100 line 17  
+ line 19 "Grade" is substituted for "Trade."

Pg.101 line 10 "Grade" is substituted for "Trade."

Pg.110 line 13 "43B" is substituted for "3B."

Pg.113 line 11 "standing" is substituted for "understanding."

Pg.234 line 21 "AFGE" is substituted for "ACKE."  
line 24 "IAFF" is substituted for "IAM."

- 3 -

### Background Prior to June, 1971

Prior to June, 1971, the Aberdeen Proving Ground and the Edgewood Arsenal comprised two separate but physically adjacent army installations separated only by the Bush River. Because of the nature of the terrain and the separation by the river, the two installations were connected by public roads and were approximately 15 miles apart.

The Aberdeen Proving Ground Command was under the immediate command of the United States Army Test and Evaluations Command, which in turn was under the command of the United States Army Material Command. Aberdeen Proving Ground performed two basic missions - to conduct certain weapons testing operations and to support the tenants located on the land area of the Aberdeen Proving Ground. Aberdeen Proving Ground had about 30 tenants 3/ to whom it provided an entire series of support services. This support consisted of providing many services and functions, including among others, in the area of civilian personnel, post exchange, security, safety, fire fighting, maintenance and repair of vehicles and equipment, supply, and procurement. The Aberdeen Proving Ground therefore employed a large number of civilian employees, both Class Act and Wage Grade employees (hereinafter referred to respectively as GS and WG), who provided these support services, as well as others who worked in the performance of its other mission, weapons testing. At the Aberdeen Proving Ground there were several collective bargaining units with several different labor organizations holding exclusive recognition. The IAM was the certified representative of a unit of WG employees who were employees in the boiler plant operations; the American Federation of Government Employees (AFGE) was certified for a unit of Experimental Mobile Equipment Testers;

3/ Each tenant was an organization that had its own mission.

- 4 -



the IAFF was certified for a unit of fire fighters; the AFGE represented the guards; and the IAM was certified as the representative for a unit of all other non-supervisory Wage Grade employees employed by the Aberdeen Proving Ground Command. <sup>4/</sup>

The Edgewood Arsenal was under the immediate command of the United States Army Munitions Command, which in turn was under the command of the United States Army Material Command. Edgewood Arsenal also had a twofold mission -- to provide all of the chemical, biological, and radiological services and expertise for the United States Army, and to support the tenants located on the land area of the Edgewood Arsenal. These support services were similar to those described above which were performed by the Aberdeen Proving Ground Command. Edgewood Arsenal had a command-wide unit composed of approximately 2047 WG and GS employees which was represented by NFFE.

#### The Reorganization

In late 1970 and early 1971, the United States Army Material Command, which had the overall command over both the Aberdeen Proving Ground Command and the Edgewood Arsenal, decided to reorganize these two installations and to combine the land areas concerned into one installation, the Aberdeen Proving Ground Command, and to assign all the support functions which the Edgewood Arsenal performed for its tenants, to the Aberdeen Proving Ground Command. The Edgewood Arsenal was to become one of the Aberdeen Proving Ground Command's tenants, located on the newly acquired land, and the Edgewood Arsenal would then be responsible for performing only one of its two prior missions, that of supplying chemical, biological, and radiological expertise to the Army. The purpose of the reorganization was to cut costs and eliminate the duplication of support services which existed because the two installations were located side by side.

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<sup>4/</sup> There was no overall unit for GS employees of the Aberdeen Proving Ground Command.

On June 28, 1971, this reorganization was effected and the land areas, which were formerly part of the Edgewood Arsenal, and the support functions, which were formerly performed by the Edgewood Arsenal, were taken over and assumed by the Aberdeen Proving Ground Command.

Those employees and other personnel of the Edgewood Arsenal who had been assigned to provide the support services were administratively transferred to the Aberdeen Proving Ground Command. Approximately 906 individuals, including some supervisory and professional employees, were so transferred from the Edgewood Arsenal to the Aberdeen Proving Ground Command. <sup>5/</sup> This included about 419 GS and 487 WG employees. With respect to these 906 employees, the branches of the Edgewood Arsenal for which they worked were abolished and their employees, responsibility and authority were transferred to the corresponding or similar branches or directorates of the Aberdeen Proving Ground Command.

The individuals transferred from the Edgewood Arsenal to the Aberdeen Proving Ground Command were completely integrated into the organizational structure of the Aberdeen Proving Ground Command. There was an overall reduction-in-force because of this attempt to do away with duplication of functions and supervisory positions. In determining which employees would hold supervisory positions, these individuals coming from the Edgewood Arsenal who had held supervisory positions were compared against individuals holding supervisory positions at the Aberdeen Proving Ground, in terms of reduction-in-force and retention rights, and that individual with the most retention rights and the most seniority was the individual who ended up with the supervisory position. Therefore some of the resulting supervisors were former supervisors for the Aberdeen Proving Ground Command and others were supervisors who were transferred in from the Edgewood Arsenal. All of the employees who were transferred administratively from the Edgewood Arsenal to Aberdeen

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<sup>5/</sup> There is no allegation that the decision to reorganize or the actual reorganization constituted a violation of the Executive Order.

Proving Ground, and those employees who were originally at Aberdeen Proving Ground, are under the same overall supervisor - the installation commander, Colonel Harris. Those employees that were transferred to the Aberdeen Proving Ground Command were integrated into the branch or directorate responsible for performing the specific support services which were most closely related to the duties they had performed at the Edgewood Arsenal before the transfer. The transferred employees and those that were originally Aberdeen Proving Ground employees are under common first or second line supervision. 6/ The employees, regardless of where they originated, are indistinguishable.

6/ e.g., The carpenters who were located at Aberdeen Proving Ground prior to the merger and the carpenters who were administratively transferred to Aberdeen Proving Ground in the merger, are under the Chief of the Carpenter's Branch of the Buildings and Grounds Division of the Facilities Engineering Directorate, so that the Director of the Facilities Engineering Directorate would be the same for both sets of individuals as would the division chief of the Buildings and Grounds Division. As a further example, individuals who were reassigned from Edgewood Arsenal to the Equipment Maintenance Branch, Logistics Directorate at Aberdeen Proving Ground have a new branch chief or second-line supervisor and in most instances a new and different first-line supervisor. These individuals are not only under a new supervisor, but the preponderance of the reassigned individuals have actually physically relocated from the Edgewood area of Aberdeen Proving Ground to the Aberdeen area of Aberdeen Proving Ground.

- 7 -

The vast majority of the employees transferred from the Edgewood Arsenal to the Aberdeen Proving Ground Command continue to perform essentially the same type of work regardless of the transfer or any other organizational changes. 7/

With respect to the employees' physical locations, most were physically transferred to the Aberdeen Proving Ground although this varied greatly. Some entire operations, including the employees, were physically transferred from the Edgewood Arsenal over to what had formerly been the physical location of the Aberdeen area of the Aberdeen Proving (e.g., warehousemen). Other operations maintained employees in both locations, the Edgewood area and the Aberdeen area. For example, fire fighters were maintained in bases at both locations after the merger, but there is transfer and interchange between locations -- fire fighters are rotated between locations, and are cross-trained. Similarly the post exchanges were maintained at both locations, but the one in the old Edgewood Arsenal area is now operated as a part of the Aberdeen Proving Ground Command and is integrated into its operations. Still other operations or duties (e.g., custodial and janitorial) remain solely at the Edgewood Arsenal area although made part of the appropriate branch and directorate of the Aberdeen Proving Ground Command 8/ and except for the physical location are treated like any other part of the Aberdeen Proving Ground Command. Generally the employees of the Aberdeen Proving Ground Command were used, assigned, and interchanged between the locations as needed. Prior to the merger, and currently, there is no transfer and interchange between employees of the Edgewood Arsenal Command and the Aberdeen Proving Ground Command.

7/ e.g., Carpenters continue to perform carpentry, fire fighters continue to perform the work of firemen, automobile mechanics continue to work on automobiles, etc.

8/ The Aberdeen Proving Ground had contracted out its custodial and janitorial functions and therefore, although it had some one responsible for seeing that services were performed, it employed no janitorial or custodial employees prior to merger.

- 8 -

Prior to the merger, all employees at Edgewood Arsenal were serviced by the Edgewood Arsenal Civilian Personnel Office for personnel policies, including promotion and reduction in force. They were not able to compete in a merit promotion situation for job openings at Aberdeen Proving Ground. The employees at Aberdeen Proving Ground prior to the merger were serviced by a Civilian Personnel Office located at Aberdeen Proving Ground. They were not able to compete in a merit promotion situation or reduction-in-force situation for job openings at Edgewood Arsenal. Subsequent to the merger, all of the employees located on what is now Aberdeen Proving Ground (including what used to be the former Edgewood Arsenal) are serviced by one Civilian Personnel Office. All these employees may now compete for merit promotion purposes for an opening anywhere on the installation, including any tenant operations. There are, however, still many competitive areas for reduction-in-force purposes. Those employees who were administratively transferred and came under the control of the Aberdeen Proving Ground in the merger are now within the Aberdeen Proving Ground Command competitive area for reduction-in-force purposes and may therefore "bump" anywhere within the Aberdeen Proving Ground Command. Those employees who are employed by the Edgewood Arsenal and therefore whose functions pertain to the mission which is still performed by the Edgewood Arsenal tenant or activity, have a separate competitive area, that of Edgewood Arsenal activity, for reduction-in-force purposes.

On the 29th of September, 1971, Aberdeen Proving Ground Command filed three representation petitions 9/ requesting that the Department of Labor determine who had exclusive recognition at the Aberdeen Proving Ground Command for the overall unit of Wage Grade employees, for the unit of fire fighters and for the unit of boiler plant employees. At the same time, the Aberdeen Proving Ground Command also filed an amendment of certification petition to amend the name of Edgewood Arsenal so that the designation would not indicate that it was an installation. On the 20th of January, 1972, the Department of Labor dismissed the three representation petitions for the overall Aberdeen Proving Ground Command-wide unit of Wage Grade employees, the unit of boiler plant

9/ Case Nos. 22-2873(RA); 22-2901(RA); and 22-2874(RA).

employees and the unit of fire fighters. The dismissal stated that there was an accretion to the respective units of the employees transferred from Edgewood Arsenal to Aberdeen Proving Ground. 10/

In May, 1972, Aberdeen Proving Ground Command held a meeting of all the unions concerned stating that it would be required to terminate the NFFE dues withholding for those employees who were administratively transferred to Aberdeen Proving Ground Command. Shortly thereafter, the installation published a notice to all employees that for those employees transferred to Aberdeen Proving Ground Command from the former Edgewood Arsenal, the dues withholding for NFFE would be terminated on the 12th of June, 1972. At the request of NFFE this time was extended to the 26th of June, 1972, at which time the termination became effective. It is this termination that is the subject of the instant unfair labor practice case.

The overall collective bargaining unit of the Edgewood Arsenal is still an active and viable unit of approximately 1100 employees and is represented by NFFE. NFFE entered into a collective bargaining agreement at the Edgewood Arsenal on June 9, 1972, which set forth the unit in Article 3, Section 1 as "the unit covered by this agreement includes all full-time, non-supervisory GS, WG, and WL employees assigned to the Edgewood Arsenal, exceptions are professionals, guards, and employees engaged in personnel work in other than a purely clerical capacity." Prior to the signing of the aforementioned collective bargaining agreement, the Edgewood Arsenal Command and the NFFE entered into a Memorandum dated June 9, 1972, and signed by Col. John K. Stoner, Jr., Commanding Officer of Edgewood, and Leo A. Laferriere, President of Lodge 178, NFFE, which stated "The negotiating session opened with the understanding between Management and NFFE-178 negotiating teams

10/ On October 24, 1972, the Department of Labor issued a decision in the amendment of certification petition filed the previous year amending the certification to read "Edgewood Arsenal, United States Army Munitions Command, Aberdeen Proving Ground, Maryland."

that the Management team was negotiating a contract for a unit of non-supervisory GS, WG, and WL employees that were assigned to Edgewood Arsenal, a U.S. Army Munitions Command activity located as a tenant at APG, EA, Md, and excluded those employees from the unit who were officially assigned to the APG Command, by an SF 50, Notification of Personnel Action, effective 28 June 1971."

The third paragraph of that memorandum provides "This contract is being signed by the CO, EA, with the understanding that the provisions of the contract apply only to the non-supervisory GS, WG and WL employees assigned to Edgewood Arsenal directorates and offices, and does not include those employees indicated in para 2 above, assigned officially by SF 50 to the APG Command."

#### Conclusions of Law

##### Motions to Dismiss

At the hearing, Respondent and both Intervenor moved that the instant complaint be dismissed based on the contention that the decision of Regional Administrator Overath in Case Nos. 22-2873(RA), 22-2901(RA), and 22-2874(RA) disposed of the instant case. The Complainant opposed the motion and the undersigned reserved ruling.

The Regional Administrator dismissed the three petitions concluding that no question concerning representation existed in any of them holding, in effect, that the transferred employees from the Edgewood Arsenal had accreted to the three units at Aberdeen. NFFE was a party to these proceedings, was served with all the papers, including the Regional Administrator's dismissing the problems and did not appeal the Regional Administrator's determination.

In the administration of the National Labor Relations Act, as amended, it is quite clear that basic matters which were raised, or could have been raised, in a representation case, cannot be relitigated before an Administrative Law Judge

in an unfair labor practice case. The National Labor Relations Board has held that matters once decided in the representation case, whether or not appealed, cannot be relitigated before the Administrative Law Judge in a refusal to bargain case. 11/ This is an attempt to avoid litigation and relitigation of matters raised in representation cases in subsequent unfair labor practice cases. The Administrative Law Judge in Safeway Stores, Inc., supra, stated at page 878, "It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representative proceeding." [Emphasis added.]

Although not binding precedent in cases arising under the Order, this reasoning seems persuasive. Section 6(a) of the Order provides that the Assistant Secretary shall decide, in representation cases, questions as to the appropriate unit and other related issues. It was pursuant to § 202.6 of the Rules and Regulations promulgated under this portion of the Order that the Regional Administrator dismissed the three representation petitions. Since no review of these decisions was sought, they are in effect decisions of the Assistant Secretary. Therefore for the same reasons pertaining to cases arising under the National Labor Relations Act, as amended, I conclude that these findings are binding upon me. Therefore those employees who transferred from the Edgewood Arsenal who were found by the Regional Administrator to have accreted to the collective bargaining units at the Aberdeen Proving Ground Command will be deemed to have so accreted for the purposes of this case.

Section 21 of the Executive Order provides that no checkoff is permitted unless the labor organization holds exclusive recognition. Because the three representation cases discussed above hold that certain of the employees in question accreted to collective bargaining units not represented by NFFE, it is therefore recommended that the motion be granted, and that the complaint be dismissed insofar as it deals with

11/ cf., Safeway Stores, Inc., 175 NLRB 875 and Crimptex, Inc., 157 NLRB 263.

the Respondent's refusal to continue to withhold NFFE dues for the employees who accreted to the fire fighter, boiler plant branch and "overall Wage Grade" units at the Aberdeen Proving Ground Command.

#### The Reorganization

The unfair labor practice alleged by NFFE is that the Aberdeen Proving Ground Command violated Sections 19(a) (1), (2), and (5) of the Order by canceling the checkoff arrangement with respect to certain employees who were transferred from the Edgewood Arsenal to the Aberdeen Proving Ground Command. Section 21 of the Order provides that in order for there to be a valid checkoff arrangement for any employee, the labor organization must hold exclusive recognition and there must be a written agreement between the Activity and the labor organization which provides such a checkoff. Therefore in the instant case, it must first be determined whether NFFE continued to hold exclusive recognition for the former employees of Edgewood Arsenal who were transferred on June 28, 1971, to the Aberdeen Proving Ground Command.

The basic question presented is whether the reorganization was such that the transfer of employees from the Edgewood Arsenal to the Aberdeen Proving Ground Command resulted in these transferred employees losing "community of interest" with the employees in Edgewood Arsenal's collective bargaining unit or whether the reorganization was basically a "paper" one which left the "transferred" employees with the same basic community of interests as the other employees in the Edgewood Arsenal unit.

With respect to those employees who accreted to existing units at the Aberdeen Proving Ground Command, it was recommended above that the complaint be dismissed. However, since the factual situation with respect to those employees is substantially identical to that of the other transferred employees, and in the event the foregoing recommendation is not adopted, the following discussion and conclusions shall deal with and apply to all the transferred employees.

- 13 -

The instant situation is controlled by Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, A/SLMR No. 195. <sup>12/</sup> In that case, the Assistant Secretary found that employees at the McGuire Air Force Base Exchange, after it merged with the Fort Dix Post Exchange, constituted an addition or accretion to the unit of employees at the Fort Dix Post Exchange that was represented by AFGE. In the Fort Dix case, supra, the Assistant Secretary was dealing with a situation in which unrepresented employees accreted to a unit of represented employees. The subject case, however, deals with whether certain represented employees at Edgewood Arsenal accreted to existing units at Aberdeen Proving Ground that have representation and others joined employees at Aberdeen Proving Ground that are unrepresented. Nevertheless, despite this factual distinction, the reasoning and considerations set forth in Fort Dix are applicable to the subject case.

The particular facts of the subject case compel the conclusion that the employees of the Edgewood Arsenal when transferred to the Aberdeen Proving Ground Command lost their community of interest with the employees that remained in the Edgewood Arsenal command and in the unit represented by NFFE. The transferred employees became indistinguishable from the other employees of the Aberdeen Proving Ground Command. In this regard it must be noted that they were under the same commander and supervision as the other employees at the Aberdeen Proving Ground Command. <sup>13/</sup> With

<sup>12/</sup> See also Army and Air Force Exchange Service, Fort Bliss Post Exchange, El Paso, Texas, A/SLMR No. 236; U. S. Department of Housing and Urban Development, A/SLMR No. 202; and U. S. Department of the Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 203.

<sup>13/</sup> Those employees that remained employees of the Edgewood Arsenal were under separate command and supervision.

- 14 -

respect to all the Aberdeen Proving Ground Command employees there was, within the various branches and directorates, interchange and transferring of the employees; they were subject to the same Aberdeen Proving Ground Command-wide personnel policies, including reduction in force procedure administered through the personnel office of the Aberdeen Proving Ground Command; they all provided services for the Aberdeen Proving Ground Command and its tenant activities; they have, within the same branch or directorate, similar skills and job classifications and perform the same type of work; all the employees of the Aberdeen Proving Ground Command have the same fringe benefit programs; and are all located on the contiguous land area now under the command of the Aberdeen Proving Ground Command.

In these circumstances it must be concluded that the transferred employees are now a functional part of the Aberdeen Proving Ground Command, have the same community of interest as the other employees of the Aberdeen Proving Ground Command, and have lost their community of interest with those who remained in the Edgewood Arsenal unit represented by NFFE. To hold otherwise would result, with respect to the employees who accreted to units at the Aberdeen Proving Ground Command represented by AFGE, IAM, or IAFF, in a situation where employees in the circumstances described above, would be represented by different unions, even though they are in the same branch or directorate of the Aberdeen Proving Ground Command, under the same supervision, working under the same working conditions, performing similar work, in most instances working side by side and are indistinguishable. 14/ Such a result is totally unacceptable in light of the criteria and considerations set forth by the Assistant Secretary in the Fort Dix case. Similarly, those GS employees who were transferred to Aberdeen Proving Ground Command and did not become part of an existing unit cannot be held to have remained part of the Edgewood Arsenal unit. To reach such a conclusion would result in a situation where some employees would be represented by NFFE and others would be unrepresented even though they work in the same branch or

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14/ Except that some had been transferred from the Edgewood Arsenal.

directorate of the Aberdeen Proving Ground Command, under common supervision, working under the same working conditions, performing similar work, in many instances working side by side and are indistinguishable. 15/

NFFE is urging that employees' placement in a unit is determined not by the job they perform or by their community of interests, but rather by where the employees originated and who had represented them before their transfer. Such a suggestion is inconsistent with the unit and representation policies of the Order as interpreted by the Assistant Secretary in the Fort Dix case. 16/ In these circumstances it must be concluded NFFE no longer represented the Edgewood Arsenal employees that were transferred to the Aberdeen Proving Ground Command.

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15/ Except that some had been transferred from the Edgewood Arsenal.

16/ Naval Air Reserve Training Unit, A/SLMR No. 106, which is relied upon by the Complainant is factually distinguishable. In the subject case, the amount of integration and interchange of the transferred employees with respect to the Aberdeen Proving Ground Command is much greater than was present in the Naval Air Reserve Training Unit case. Also, it should be noted that in the instant case, the Edgewood Arsenal unit continued in existence, and the transferred employees were much more closely integrated into the Aberdeen Proving Ground Command operation than into the Edgewood Arsenal operation. In the Naval Air Reserve Treasure Unit case, the employees in question remained at the training cite, physically separated and identifiable with no real change in their situation, unlike the situation in the instant case.

In so concluding, I reject Complainant's further contention that even if the transferred employees were no longer represented by NFFE within the meaning of Section 21 of the Order, that neither the Activity nor the Regional Administrator can make that determination and that only the Assistant Secretary is competent to make it. The Activity's decision is, of course, reviewable under the provision of the Order and, of course, it acts at its peril should it be wrong. On the other hand, if in fact it correctly determines that within the meaning of the Order NFFE is no longer eligible to have checkoff withheld for certain employees, its refusal to continue the checkoff can hardly be said to be a violation of the Order. 17/

I conclude that because NFFE no longer represented the Edgewood Arsenal employees that were transferred to the Aberdeen Proving Ground Command, it was no longer entitled under Section 21 of the Order to have dues checked off for these employees. 18/

17/ In this regard, it should be noted that the Activity did notify NFFE in advance of the decision to cancel the checkoff, and there is no evidence that it refused to discuss the matter with NFFE. In fact, the effective date of that transaction was extended at NFFE's request.

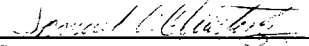
18/ The contention that in any event NFFE did not have a contract covering those employees is not relied upon. If in fact NFFE did represent these employees, the Edgewood Arsenal's position that it would not bargain concerning these employees with NFFE might have constituted an unfair labor practice in itself. The effect of any such unfair labor practice upon NFFE's right to checkoff need not be reached.

- 17 -

In the circumstances here present therefore I conclude that the Respondent Activity's termination of the dues checkoff did not constitute a violation of Section 19(a)(1), (2), and (6) of the Order.

#### RECOMMENDATION

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary of Labor for Labor-Management Relations dismiss the complaint.

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated Washington, D. C.  
APRIL 18, 1973

- 18 -

July 25, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION  
ATLANTA AIRWAY FACILITY, SECTOR 12  
ATLANTA, GEORGIA  
A/SLMR No. 287

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This unfair labor practice proceeding involves a complaint filed by American Federation of Government Employees, Local 3322, AFL-CIO, (Complainant), alleging that the Respondent Activity violated Section 19(a)(1) and (6) of the Executive Order, as amended, by refusing to negotiate. The Respondent contended that it could not negotiate an agreement at the time the Complainant sought negotiations because the Respondent had a good faith doubt that the unit was appropriate, as reflected by an RA petition it had filed, and because there was a conflicting representation claim by a rival labor organization.

The Administrative Law Judge found that the Respondent, by refusing to negotiate with the Complainant regarding the ground rules for negotiation of a collective bargaining agreement on September 22, and October 6, 1972, refused to consult, confer or negotiate with the exclusive representative of the employees in the certified unit in violation of Section 19(a)(6) of the Order, and, in so doing, interfered with and restrained employees in the exercise of rights in violation of Section 19(a)(1) of the Order. In arriving at his decision, the Administrative Law Judge found that, while an RA petition was the proper vehicle to question the appropriateness of a certified unit, certain conditions must be present in order for an agency or activity to use this procedure properly without risk of committing an unfair labor practice. In this connection, he concluded that an agency must have a good faith doubt that the recognized or certified union represents a majority of the employees, or that the scope or character of the unit has changed so substantially or materially that it is no longer appropriate. The Administrative Law Judge concluded these factors were not present in the instant case as the Respondent conceded that the Complainant represented a majority of the employees in the unit and as it was aware that there had been no change in the character or scope of the unit subsequent to the certification and at the time it questioned the appropriateness of the unit. Accordingly, the Administrative Law Judge found that the Respondent was not entitled to raise the appropriateness of the unit as a defense for its refusal to consult, confer, or negotiate with the Complainant.

The Administrative Law Judge concluded also that there was no merit in the Respondent's contention that the RO petition filed by another labor organization raised a question concerning representation which precluded the negotiation of any agreement with the Complainant. In this connection,

he found that the petition by the other labor organization was filed after Respondent's refusal to negotiate on September 22, 1972; that Respondent was unaware of the petition at the time it again refused to negotiate on October 6, 1972; and that the petition was subsequently withdrawn.

Upon review of the entire record in the proceeding, including the Report and Recommendations of the Administrative Law Judge, and noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION  
ATLANTA AIRWAY FACILITY, SECTOR 12  
ATLANTA, GEORGIA

Respondent

and

Case No. 40-4593(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3322, AFL-CIO

Complainant

DECISION AND ORDER

On May 30, 1973, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and entire record in the subject case, and noting particularly that no exceptions were filed to the Report and Recommendations, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, Atlanta Airway Facility, Sector 12, Atlanta, Georgia, shall:

- 1. Cease and desist from:

(a) Refusing to consult, confer, or negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, the exclusive representative of the employees of the Respondent.

(b) Interfering with, restraining, or coercing its employees in the exercise of the rights assured by Executive Order 11491, as amended, by refusing to consult, confer, or negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, the exclusive representative of the employees of the Respondent.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

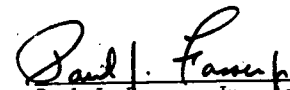
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, consult, confer, or negotiate in good faith with the representatives of American Federation of Government Employees, Local 3322, AFL-CIO, the exclusive representative of the employees of the Respondent.

(b) Post at its facility at the Atlanta International Airport Terminal Building, Atlanta, Georgia, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Atlanta Airway Facility's Manager and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Airway Facility's Manager shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX  
NOTICE TO ALL EMPLOYEES

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to consult, confer, or negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, the exclusive representative of the employees in Sector 12A.

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 Executive Order.

WE WILL, upon request, consult, confer, or negotiate in good faith with American Federation of Government Employees, Local 3322, AFL-CIO, the exclusive representative of the employees in Sector 12A.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

This Notice must remain posted for sixty (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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

FEDERAL AVIATION ADMINISTRATION  
ATLANTA AIRWAY FACILITY, SECTOR 12  
ATLANTA, GEORGIA,

Respondent

and

CASE NO. 40-4593(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
LOCAL 3322, AFL-CIO 1/  
Complainant

Appearances:

William W. Heimbach  
Deputy Director of Labor Relations  
Washington, D. C., for the Respondent

Dolph David Sand, Esq.  
Washington, D. C., for the Complainant

REPORT AND RECOMMENDATIONS

Statement of the Case

GORDON J. MYATT, Administrative Law Judge: Pursuant to a complaint filed on November 29, 1972, 2/ under Executive Order 11491, as amended, by American Federation of Government Employees, 5th District, AFL-CIO (hereinafter called the Union), against Federal Aviation Administration, Atlanta Airway Facility, Sector 12 (hereinafter called the Respondent Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Atlanta Region on February 5, 1973.

A hearing was held in this matter on April 4, 1973, in Atlanta, Georgia. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. 3/ Upon conclusion of the taking of testimony, Counsel for the Complainant

1/ The name of the Complainant appears as amended at the hearing.

2/ Unless otherwise indicated, all dates herein refer to the year 1972.

3/ At the hearing the Union requested and was granted leave to strike the allegation charging a violation of Section 19(a)(5) from the Complaint and to proceed solely on alleged violations of Sections 19(a)(1) and 19(a)(6) of the Executive Order. The Respondent offered no objections to the amendment and these were the only issues tried at this hearing.

made an oral argument on the record and the Respondent submitted a brief in support of its position. Both the oral argument and the brief have been duly considered by me in arriving at my determination in this matter.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

A. Background Facts

Atlanta Airway Facility, Sector 12 consists of four operational units which are geographically separated, although in commuting distance, and are under the common management and control of the Sector Manager. Sector 12A embraces the Sector headquarters and is located in and around the Atlanta International Airport terminal building. Sector 12B is a Sector Field Office which is physically located at the Fulton County Airport, Atlanta, Georgia. Sector 12C is another Sector Field Office located in Smyrna, Georgia. Sector 12D is the final Sector Field Office component and is located at the Dekalb-Peachtree Airport in Chamblee, Georgia. <sup>4/</sup>

The original Certification of Representative in this case was issued by the Area Administrator on July 9, 1971, in the name of American Federation of Government Employees, AFL-CIO, Local 2123. This certification was issued pursuant to an election conducted as a result of a consent agreement between the parties. The unit for which the bargaining representative was certified was described as follows:

All non-supervisory general schedule and wage grade employees assigned to Airway Facilities Sector 18200 [Currently designated Sector 12A], Atlanta Municipal Airport.

Excluded: Management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, and guards and supervisors as defined in Executive Order 11491, personnel assigned to receive training.

<sup>4/</sup> The current designation of the various components of Sector 12 became effective July 1, 1971. Prior thereto each component had a different numerical designation. The change was purely for administrative purposes and in no way affected the organizational structure or the duties of the employees in each of the component operations. (Joint Exhibit 1, attachments 5A and 21).

On September 14, 1971, a petition was filed by the Union to amend the certification by substituting the name of Local 3322, AFGE for that of Local 2123, AFGE as the exclusive representative. <sup>5/</sup> After due notification by the Area Administrator, the Respondent Activity indicated that it had no objection to the proposed amendment to the certification. At the same time it informed the Area Administrator of the new numerical designation of the sector involved. Subsequently, the Regional Administrator issued his Report and Findings on the petition in which he found that the proposed amendment should be granted, absent the timely filing of a request for review. On November 23, 1971, the Area Administrator, pursuant to the Regional Administrator's report ordered the certification amended to reflect the substitution of the name of Local 3322 as the exclusive representative.

B. The Alleged Unlawful Conduct

Sometime during the first part of September, 1971, the president of the Union met with the manager and the labor relations official of the Respondent Activity and requested recognition and negotiation of a dues deduction agreement. The request was denied at that time because the certification was in the name of Local 2123. As noted above, the Union filed a petition to amend the certification shortly thereafter. On October 10, 1971, the Union submitted a written proposal to the Respondent Activity for a dues deduction agreement. A meeting between the parties was scheduled for November 23, 1971. <sup>6/</sup> The Respondent Activity intended to seek the Union's agreement to a dues deduction agreement which it drafted rather than the proposal submitted by the Union. The Union president did not attend the meeting however, and he informed the Respondent's officials prior thereto that the Union would not sign the agreement as proposed by the Activity. The Union objected to the proposal submitted by the Respondent Activity because it could be terminated, with proper notice, by either party. The Union sought an agreement which would be in effect for a specified period of time. <sup>7/</sup>

<sup>5/</sup> The Union determined that it was necessary to establish a local to represent only those employees at the Atlanta Airport and consequently requested a charter from the parent organization to establish Local 3322.

<sup>6/</sup> This was the date that the Area Administrator issued his amended certification.

<sup>7/</sup> The Respondent's officials took the position that since the amendments to Executive Order 11491 would become effective November 24, 1971, November 23 was the last date on which a separate dues deduction agreement could be executed. Hereafter, according to the interpretation of the Respondent's officials, any provision relating to deduction of dues would have to be incorporated in the collective bargaining agreement.

On December 3, 1971, the Respondent Activity sought advice from the Area Administrator regarding the length of the certification year, inasmuch as the original certification had been amended. The Area Administrator responded on December 6, 1971, to the effect that the certification year commenced at the time of the original certification-- July 9, 1971. As a result of this inquiry, the Respondent Activity recognized the Union as the exclusive representative of the employees in the unit by means of a letter dated December 10, 1971.

On September 8, 1972, the Union submitted proposals to the Respondent Activity for establishing ground rules for the negotiation of a collective bargaining agreement. The representatives of the parties met on September 22, and the Respondent took the position (for the first time) that the unit for which the Union was certified was not appropriate. This position was based on the fact that the amended Executive Order (E. O. 11616) required a grievance procedure to be incorporated in the collective bargaining agreement. <sup>8/</sup> The Respondent Activity concluded that if an agreement were negotiated for the employees in Sector 12A, it would be compelled to administer a dual system for dealing with employees of that sector and the employees of the other component facilities. It was the view of the Respondent Activity that such a requirement would result in a "dual, cumbersome, and inefficient management system," because the employees in all of the component facilities were under common management and control and performed similar functions and duties.

The parties agreed to meet subsequently and did so on October 6, 1972. The Respondent Activity informed the Union representatives that it was filing a RA petition with the Area Administrator to question the appropriateness of the unit. The Activity's officials also gave the Union a copy of the petition and a detailed statement of the reasons for questioning the appropriateness of the unit and the status of the Union in the overall unit. <sup>9/</sup>

<sup>8/</sup> Section 13a of Executive Order 11616 provides, in pertinent part, as follows:

- (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure may not cover any other matters, including matters for which statutory appeals procedures exist, and shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances....

<sup>9/</sup> There is no doubt, and indeed it is conceded by the Respondent Activity, that the Union represented at all times a majority of the employees in the unit for which it was certified.

On that same day, but subsequent to its meeting with the Union officials, the Respondent Activity was notified that the National Association of Government Employees (NAGE) had filed a RO petition for a region-wide unit which included the employees in Sector 12A. It is evident in the record that the Respondent Activity had no knowledge of this petition at the time it met with the Union representatives on September 22, and on October 6. The NAGE petition was subsequently withdrawn on December 12.

Concluding Findings

The facts of this case are not in material dispute. The central issue is whether the Respondent Activity could refuse to negotiate with the Union, when requested to do so, for the reasons advanced by it. The Respondent Activity contended on September 22, that the unit for which the Union was certified was no longer appropriate and that it would not negotiate until a determination had been made in this regard. To compel such a determination, the Respondent Activity filed the RA petition on October 6.

While it is clear that an RA petition is the proper vehicle to question the appropriateness of a certified unit, certain conditions must be present to enable an agency or activity to utilize this procedure without being guilty of committing an unfair labor practice. In dealing with the efficacy of an RA petition under these circumstances, the Assistant Secretary has stated: <sup>10/</sup>

...where an agency or activity has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in the unit or because of a substantial change, subsequent to recognition or certification, in the character or scope of the unit it contends that the recognized or certified unit now an inappropriate unit within the meaning of the Order, it may file an RA petition. (Emphasis supplied)

I interpret this to mean that an agency or activity must have a good faith doubt that the recognized or certified union represents a majority of the employees in the existing unit or that the scope or character of the certified unit has changed so substantially or materially that it is no longer appropriate. None of these factors are present in the instant case.

It is conceded by all parties that the Union represented a majority of the employees at all times in the unit for which it was certified. It is also quite evident that there has been no change whatsoever in the scope or character of the certified unit, or indeed, the entire organizational

<sup>10/</sup> Headquarters, U. S. Army Aviation Systems Command, St. Louis, Mo., A/SLMR No. 160.

structure of Sector 12. All of the component facilities which constituted the overall sector at the time of the original consent agreement and election remained the same in scope and character at the time the Respondent questioned the appropriateness of the unit. The only change--which is of no consequence here--was the numerical designation of individual components. The employees continued to perform the same work in the same locations, the supervision and control remained the same, there was no interchange of employees between the various facilities, and the structural organization of the overall sector was identical to that which existed at the time of the original certification. Moreover, there is no indication that the Union had abandoned its representative capacity for the employees in the unit for which it was certified. <sup>11/</sup>

In these circumstances, the Respondent Activity can not now raise the appropriateness of the unit as a defense to the refusal to consult, confer, or negotiate as required by the Executive Order. This is especially true since the Respondent Activity expressly agreed to the scope of the certified unit when it executed the consent agreement, and impliedly agreed to the appropriateness of the unit during the investigation of the petition to amend the certification. Cf. Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144. Furthermore, at the time of the refusal to negotiate there was no other labor organization seeking to represent the employees in the certified unit. In sum, the unit was identical in every respect to that initially certified, and the Respondent Activity was under a duty to negotiate with the Union, upon request, as the exclusive representative. Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168.

Accordingly, I find that the Respondent Activity, by refusing to negotiate with the Union regarding the ground rules for negotiation of a collective bargaining agreement on September 22 and October 6, refused to consult, confer or negotiate with the exclusive representative of the employees in the certified unit as required by Section 19(a)(6) of the Executive Order. I further find that in so doing the Respondent Activity interfered with, and restrained employees in the exercise of rights assured by the Executive Order and violated Section 19(a)(1) of the Order.

<sup>11/</sup> The Respondent Activity seeks to cast some doubt upon the Union's willingness to actively represent the employees in the certified unit by suggesting that the refusal to execute the dues deduction agreement on November 23, 1971, was evidence of unwillingness to act as the bargaining representative. I do not, however, draw such an inference. Indeed, the Union refused to sign the agreement because it deemed the terms to be unsatisfactory. The mere fact that the Union did not agree or acquiesce to the Respondent's terms regarding this ancillary agreement does not indicate an unwillingness to represent the employees. Rather, it shows that the Union was seeking to negotiate terms as favorable as it could for its members.

There remains for consideration here one further contention advanced by the Respondent Activity. It is asserted strongly in Respondent's brief that it could not negotiate with the Union in the face of a representation petition filed by the National Association of Government Employees for a region-wide unit. This argument would be persuasive if the facts indicated that knowledge of such a petition was present at the time of the refusal to negotiate with the incumbent Union, but the facts belie this claim. It is evident that on September 22 no such petition had been filed by NAGE and that the Respondent's refusal was motivated solely by its desire to have the overall unit declared the appropriate unit. Furthermore, on October 6 when the Respondent again repeated its contention that the unit was inappropriate, it did not have knowledge of the RO petition filed by NAGE. Therefore, the Respondent cannot be heard to assert that such a petition raised a question of representation concerning the exclusive representative of the employees in the certified unit. The NAGE petition was an event which occurred after the fact and was subsequent to Respondent's refusal to negotiate with the Union. Moreover, the NAGE petition was withdrawn on December 12, and there was no other labor organization claiming the unit for which the incumbent unit was certified. In these circumstances, I find no merit to the Respondent Activity's claim that a question concerning representation of the employees in the certified unit was raised prior to Respondent's refusal to negotiate with the Union.

RECOMMENDATIONS

Upon the foregoing findings of fact and conclusions, and upon the entire record in this case, pursuant to Section 203.22(a) of the Regulations, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Federal Aviation Administration, Atlanta Airway Facility, Sector 12, Atlanta, Georgia, shall:

1. Cease and desist from:
  - (a) refusing to consult, confer, or negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, as the exclusive representative of the employees of Sector 12A, in accordance with the requirements of Section 19(a)(6) of Executive Order 11491, as amended.
  - (b) Interfering with, restraining or coercing its employees in the exercise of the rights assured by Executive Order 11491, as amended, by refusing to negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, as the exclusive representative of the employees of Sector 12A.

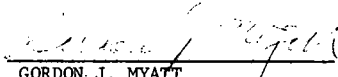
(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, consult, confer, or negotiate in good faith with the representatives of American Federation of Government Employees, Local 3322, AFL-CIO, as the exclusive representative of the employees in the certified unit for Sector 12A.

(b) Post at its facility at the Atlanta International Airport Terminal Building, Atlanta, Georgia, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Atlanta Airway Facility's Manager and shall be posted and maintained by him for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Airway Facility's Manager shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing within twenty days of the date of this Order as to what steps have been taken to comply herewith.

  
GORDON J. MYATT  
Administrative Law Judge

Dated: May 30, 1973

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to negotiate with American Federation of Government Employees, Local 3322, AFL-CIO, as the exclusive representative of the employees in Sector 12A, in accordance with requirements of Section 19(a)(6) of the Executive Order.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Executive Order.

WE WILL, upon request, consult, confer, or negotiate in good faith with American Federation of Government Employees, Local 3322, AFL-CIO as the exclusive representative of our employees in Sector 12A.

Federal Aviation Administration,  
Atlanta Airway Facility, Sector 12,

By \_\_\_\_\_

Dated \_\_\_\_\_

This Notice must remain posted for sixty (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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N. E., Atlanta, Georgia 30309.

July 25, 1973

A/SLMR No. 288

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNITS  
OF THE ASSISTANT SECRETARY

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY SAFEGUARD SYSTEMS COMMAND,  
P.O. BOX 1500, HUNTSVILLE, ALABAMA

Activity-Petitioner

and

Cases Nos. 40-4660(CU)  
40-4661(CU)  
40-4662(CU)  
40-4663(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1858, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNITS

This matter is before the Assistant Secretary pursuant to Regional Administrator J. Y. Chennault's April 19, 1973, Order Consolidating Cases and Order Transferring Cases to the Assistant Secretary under Section 206.5(a) and (b) of the Assistant Secretary's Regulations.

Upon the entire record in the subject cases, including the parties' stipulation of facts, issues, and accompanying exhibits, the Assistant Secretary finds:

In Case No. 40-4660(CU), the United States Safeguard Systems Command (SAFSCOM) proposes a clarification of the existing SAFSCOM nonprofessional employee unit to include those eligible nonprofessional employees previously represented in a mixed professional and non-professional employee unit at the United States Army Safeguard Logistics Command (SAFLOG). SAFSCOM further proposes in Case No. 40-4663(CU) to clarify the existing SAFSCOM professional employee unit to include those professional employees previously represented in the mixed professional and nonprofessional employee SAFLOG unit. 1/

1/ In view of the discontinuance of the SAFLOG operations, effective January 15, 1973, SAFSCOM, in Cases Nos. 40-4661(CU) and 40-4662(CU), seeks the "decertification" of the previously certified units at SAFLOG.

U. S. ARMY SAFEGUARD SYSTEMS COMMAND,  
P. O. BOX 1500, HUNTSVILLE, ALABAMA  
A/SLMR No. 288

This case involves petitions for clarification of unit (CU) filed by the U. S. Army Safeguard Systems Command (SAFSCOM), Huntsville, Alabama, which seek to include in an existing unit of SAFSCOM professional employees, and an existing unit of SAFSCOM nonprofessional employees, those employees formerly employed by U. S. Army Safeguard Logistics Command (SAFLOG).

Because of a reorganization SAFLOG was discontinued and merged into SAFSCOM. SAFLOG's logistics support functions for the Safeguard Ballistic Missile Defense System, together with its employees, were transferred into SAFSCOM as its Logistics Management Directorate. At the time of the merger, SAFLOG and SAFSCOM employees were physically located in contiguous office spaces in the same building. A group of SAFLOG employees were directly assigned and integrated within SAFSCOM and the others were to remain in the Directorate pending further reorganization and reduction-in-force actions to be completed by June 29, 1973. The centralized civilian personnel administration of SAFSCOM is responsible for administering the reduction-in-force procedures which encompass all SAFSCOM employees, including those from SAFLOG. Position classification series, grade ranges, the type of work performed, and personnel of both activities are essentially indistinguishable.

The Assistant Secretary, in ordering the proposed clarifications, found that the former SAFLOG nonprofessionals constitute an addition or accretion to the existing unit of SAFSCOM nonprofessionals, and that the former SAFLOG professionals constitute an addition or accretion to the existing unit of SAFSCOM professionals. In this respect, he noted the common locations and position classifications of the employees involved and the fact that within a brief period after the merger of the Commands, SAFLOG employees were directly assigned and integrated within SAFSCOM and the remaining SAFLOG employees either are directly assigned and integrated into SAFSCOM or will be pursuant to an established timetable. Further, he noted that the American Federation of Government Employees, Local 1858, AFL-CIO, the exclusively recognized representative of the employees concerned, and the only labor organization involved, was in agreement with the proposed clarification.

By order of the Secretary of the Army dated January 4, 1973, and effective January 15, 1973, SAFLOG, which was headquartered at Huntsville, Alabama, was discontinued and its personnel and equipment were transferred to SAFSCOM, which also is headquartered at Huntsville. In essence, the four petitions herein filed by the Activity seek to clarify the existing exclusively recognized bargaining units as they currently exist pursuant to the new organizational structure brought about by the merger of SAFLOG into SAFSCOM. Three bargaining units are involved: a unit of nonprofessional employees of SAFSCOM, a unit of professional employees of SAFSCOM, and a mixed unit of SAFLOG professional and nonprofessional employees. The American Federation of Government Employees, Local 1858, AFL-CIO, herein called AFGE, is the certified exclusive representative of the employees in each of the three units.

On November 4, 1970, the AFGE was certified as the exclusive representative of a unit of SAFLOG nonprofessional employees and of a unit of SAFSCOM nonprofessionals. Subsequently, the AFGE filed a petition for exclusive recognition for a unit of professional employees of SAFLOG and a petition for exclusive recognition for a unit of professional employees of SAFSCOM. Following a hearing concerning these petitions, the Assistant Secretary found the petitioned for units appropriate and directed elections to determine whether or not the professional employees in SAFLOG and SAFSCOM desired to be included within the represented nonprofessional units at their respective Commands and, if not, whether or not they desired to be represented by the AFGE in separate units. 2/ The professional employees of SAFLOG chose to be added to the represented nonprofessional unit in that Command. On the other hand, the professional employees of SAFSCOM voted to be represented by the AFGE in a separate unit. The certifications of representative were issued by the Area Administrator on January 26, 1973.

SAFSCOM's mission is to accomplish the assigned development, acquisition, and installation functions for the Safeguard Ballistic Missile Defense (BMD) System and the Site Defense Prototype Demonstration Program. SAFLOG had been responsible for logistic support of the Safeguard BMD System. With the merger of the two Commands, SAFLOG's support functions and its employees were transferred into SAFSCOM as the Logistics Management Directorate, which is scheduled to become reoriented to the Logistics Management Division of SAFSCOM's Safeguard Project Office. 3/

2/ United States Army Safeguard Logistics Command, and United States Army Safeguard Systems Command, Huntsville, Alabama, A/SLMR No. 224.

3/ For the most part, logistic support functions are now intended to be performed by a private contractor rather than by Government personnel, and it is indicated that all such functions of the Logistics Management Directorate not directly associated with the management of a contractor logistic support effort have been or will be eliminated shortly.

At the time of the merger of SAFLOG into SAFSCOM there were 1,015 civilian employees assigned to SAFSCOM and 423 assigned to SAFLOG, all of whom were physically located in contiguous office spaces in the same building. As of January 15, 1973, the 423 employees of SAFLOG were transferred to SAFSCOM as the Logistics Management Directorate. Since that date, 64 of these employees have been directly assigned and integrated within SAFSCOM. The remaining employees continue to be employed in the Logistics Management Directorate pending further reorganization and reduction-in-force actions which were to be completed by June 29, 1973.

The Civilian Personnel Officer, U. S. Army Missile Command, Huntsville, Alabama, has authority for centralized civilian personnel administration of SAFSCOM and is responsible for administering the reduction-in-force procedures which encompass all SAFSCOM employees, including those transferred from SAFLOG. As stipulated to by the parties, as of June 30, 1973, former SAFLOG employees will be fully integrated into SAFSCOM.

The facts set forth above are as presented in the parties' stipulation of facts and accompanying exhibits. They contend that a finding of accretion herein of eligible personnel of the former SAFLOG employees into the respective SAFSCOM units will continue to assure a clear and identifiable community of interest among the employees concerned, and will promote effective dealings and efficiency of agency operations. Moreover, they assert that all factors upon which existing SAFSCOM units were determined to be appropriate have continued in effect without exception after the reorganization. In this respect, the parties agree that "[t]he position classification series, grade ranges, the type of work performed, and personnel of both the losing and gaining activities are essentially indistinguishable."

Under the circumstances of this case, I find that the nonprofessional employees previously employed by SAFLOG constitute an addition or accretion to the exclusively recognized unit of nonprofessional employees of SAFSCOM represented by the AFGE, and that the professional employees previously employed by SAFLOG constitute an addition or accretion to the exclusively recognized unit of professional employees of SAFSCOM also represented by the AFGE. Thus, as noted above, SAFSCOM employees and former SAFLOG employees are located in contiguous office spaces in the same building and are subject to the same personnel policies, including reduction-in-force procedures. Further, the position classification series, grade ranges, and the type of work performed by former SAFLOG personnel are essentially indistinguishable from those of the SAFSCOM employees with whom they have been merged. In this respect, the evidence establishes that within a brief period after the merger of the two Commands, 64 SAFLOG employees were directly assigned and integrated within SAFSCOM and that the remaining SAFLOG employees either are directly



July 25, 1973

assigned and integrated into SAFSCOM or will be pursuant to an established timetable. Moreover, it is clear that the AFGE, the exclusively recognized representative of the employees concerned, and the only labor organization involved in this proceeding, is in agreement with the proposed clarification actions in this matter.

Accordingly, I find that the existing unit of SAFSCOM nonprofessional employees should be clarified to include all eligible nonprofessional employees previously employed by SAFLOG, and that the existing unit of SAFSCOM professionals should be clarified to include all eligible professional employees previously employed by SAFLOG.

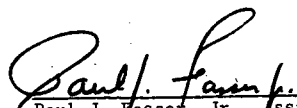
ORDER

IT IS HEREBY ORDERED that the unit of all nonprofessional employees of U. S. Army Safeguard Systems Command, located at Huntsville, Alabama, for which the American Federation of Government Employees, Local 1858, AFL-CIO, was certified as the exclusive bargaining representative on November 4, 1970, be, and it hereby is, clarified to include in said unit all eligible nonprofessional employees previously employed by the U. S. Army Safeguard Logistics Command.

IT IS FURTHER ORDERED that the unit of all professional employees of U. S. Army Safeguard Systems Command, located at Huntsville, Alabama, for which the American Federation of Government Employees, Local 1858, AFL-CIO, was certified as the exclusive bargaining representative on January 26, 1973, be, and it hereby is, clarified to include in said unit all professional employees previously employed by the U. S. Army Safeguard Logistics Command.

IT IS FURTHER ORDERED that the petitions in Cases Nos. 40-4661(CU) and 40-4662(CU) be, and they hereby are, dismissed. 4/

Dated, Washington, D. C.  
July 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF NAVY,  
BUREAU OF MEDICINE AND SURGERY,  
GREAT LAKES NAVAL HOSPITAL, ILLINOIS  
A/SLMR No. 289

This case involved an unfair labor practice complaint filed by National Federation of Federal Employees, Local 167 (Complainant), against the United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois (Respondent). The complaint alleged that the Respondent violated Section 19(a)(6) of the Executive Order by denying to the Complainant information it requested concerning a reduction-in-force (RIF) and in not consulting with the Complainant concerning the RIF.

The Respondent sought dismissal of the complaint on the basis that the complaint was procedurally defective in several respects. In agreement with the Administrative Law Judge, the Assistant Secretary found that the complaint was substantially in compliance with the Assistant Secretary's Regulations and should not be dismissed for procedural reasons.

On January 20, 1972, the Respondent issued notices of the RIF, effective March 19, 1972, to 33 employees, including the President of the Complainant local. No formal notice was given to the local as such. About ten days before the reduction-in-force was to become effective two representatives of the Complainant contacted the Respondent, demanding that they be given copies of documents relating to the RIF by the next morning. The Respondent countered that this was not administratively possible but offered to allow the representatives to examine the documents and then to try to provide copies of certain relevant documents. The Complainant's representatives declined this offer and made no further attempts to secure information concerning the RIF.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent did not improperly deny information concerning the RIF to the Complainant. Relying on Section 11(a) of the Executive Order, the Administrative Law Judge further concluded that the Respondent was in violation of Section 19(a)(6) of the Order by failing to give advance notice of the impending RIF to the Complainant. The Assistant Secretary agreed that the Respondent violated Section 19(a)(6)

4/ The disposition herein was considered to render moot the petitions in Cases Nos. 40-4661(CU) and 40-4662(CU).

in this regard. While noting that the decision to effectuate a RIF action was a matter upon which there was no obligation to meet and confer, the Assistant Secretary concluded that the issuance of RIF notices without affording an exclusive representative notice and an opportunity to meet and confer, to the extent consonant with law and regulations, as to the procedures management intended to observe in choosing which employees were to be subject to the RIF, violated Section 19(a)(6) of the Order. In this regard, the Assistant Secretary ordered that the Respondent cease and desist from such violative conduct and be directed that the Respondent take certain affirmative action as outlined in his decision.

In the circumstances, the Assistant Secretary also found that the Respondent had not failed to meet and confer in good faith concerning the impact of its RIF decision on the employees adversely affected by such decision. The Assistant Secretary noted, in this regard, that, after receiving notice of the RIF decision, the Complainant made no timely request to meet and confer on the impact of the RIF action.

A/SLMR No. 289

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF NAVY,  
BUREAU OF MEDICINE AND SURGERY,  
GREAT LAKES NAVAL HOSPITAL, ILLINOIS

Respondent

and

Case No. 50-8247

LOCAL 167, NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On March 22, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, herein called the Respondent, had engaged in certain unfair labor practices and recommending that it cease and desist from such conduct and take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The complaint in the instant case alleged that the Respondent violated Section 19(a)(6) of the Order by denying the Complainant information it requested concerning a reduction-in-force (RIF) and not consulting with the Complainant concerning the RIF. 1/

1/ The complaint originally alleged violations of Sections 19(a)(3), (5) and (6). The portion of the complaint alleging violation of Section 19(a)(3) and (5) was subsequently withdrawn.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendation and I shall repeat them only to the extent necessary.

Local 167, National Federation of Federal Employees, hereinafter called the Complainant, has represented exclusively the employees of the Respondent since 1970. The parties have never entered into a negotiated agreement.

On January 20, 1972, the Respondent issued notices of a RIF to become effective on March 19, 1972. The 33 employees affected, including the President of the Complainant local, were sent a RIF notice. No formal notice was given to the Complainant. The record reveals that in early March 1972, shortly before the RIF was to take effect, two representatives of the Complainant visited the office of the Respondent's civilian personnel representative seeking copies of various documents relating to the RIF, including job descriptions for the 23 positions involved, retention registers and copies of work sheets. The Complainant's representatives indicated their desire to obtain such documents by the next morning. The civilian personnel representative stated that it was not administratively possible to provide the requested material by the next morning but offered to allow the Complainant's representatives to examine the documents and to attempt to have copies made of the specific documents they felt they needed. The Complainant's representatives declined this offer and made no further attempts to contact the Respondent concerning the RIF. The Complainant then filed a charge and subsequent complaint alleging, in pertinent part, that the denial of information concerning the RIF and the failure to consult with the Complainant concerning the RIF constituted an unfair labor practice. Thereafter, the Respondent filed a Motion to Dismiss the complaint with the Regional Administrator on the grounds that the complaint was procedurally defective in several respects. The Regional Administrator denied the Motion on the grounds that the issues presented could best be decided after the taking of record testimony and referred the Motion to the Administrative Law Judge. The Motion was renewed by the Respondent at the hearing.

The Respondent contended in its Motion to Dismiss that the Complainant failed to file a charge with it prior to the filing of the complaint as required by the Assistant Secretary's Regulations. <sup>2/</sup> However, in this regard, the record reveals that on March 14, 1972, the Complainant sent a telegram to the Commanding Officer of the Respondent stating that "Failure to consult on present and tending (sic) reduction-in-force and refusal to make retention lists available constitute unfair labor practices under Section 19 (5) and (6) of the Executive Order 11491."

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<sup>2/</sup> The applicable Regulations were those in effect prior to the amendments of the Regulations dated September 15, 1972.

In agreement with the Administrative Law Judge, I find that the Complainant's telegram of March 14 constituted a charge within the meaning of Section 203.2 of the Regulations in that it clearly put the Respondent on notice of the violations of the Order it was alleged to have committed.

The Respondent further contended in its Motion that the complaint should be dismissed because the entire report of investigation was not filed with the complaint as required by Section 203.3(e) of the Assistant Secretary's Regulations. In this connection, the record shows that the Complainant's telegram of March 14, 1972, which constituted the pre-complaint charge, was not attached to the complaint. Nevertheless, I concur with the Administrative Law Judge's conclusion that under the circumstances of this case such omission should not be the basis for dismissal of the complaint. Report on a Decision of the Assistant Secretary, No. 16 indicates clearly that, pursuant to Section 203.2 of the Assistant Secretary's Regulations, a charge must be filed directly with the party against whom the charge is directed prior to filing a complaint with the Assistant Secretary. It is clear that the overall intent of Report No. 16 was to assure that a charged party is put on notice of the charge so that an investigation and informal attempts to resolve the matter can be made by the parties. As discussed above, the Respondent in the subject case was properly charged prior to the filing of the complaint. The purpose of the report of investigation is to provide information which will serve as a basis for the Regional Administrator to make a determination concerning whether there is a reasonable basis for the complaint which would warrant the issuance of a notice of hearing. Evidence in the record indicates that the Regional Administrator was aware of the content of the charge during the investigation of the case. In this regard, it was noted particularly that the report of investigation submitted to the Regional Administrator contained a letter from the Respondent to the Complainant replying to the allegations contained in the charge. Under these circumstances, I find that the failure to include the charge telegram in the report of investigation attached to the complaint did not warrant dismissal of the complaint in this matter.

The Respondent's Motion to Dismiss also asserted that the complaint herein was defective because, in the space provided on the complaint form for describing the attempts by the parties to resolve the alleged violations and the results, the Complainant wrote "see attachments" rather than furnishing a narrative description of the attempts. In this regard, the Respondent relied on the Report on a Ruling of the Assistant Secretary, Report No. 48, as support for its contention that the complaint should be dismissed. However, I find that Report No. 48 is inapplicable to the situation herein in that it deals with omissions as to the basis of the complaint section of the complaint form, <sup>3/</sup>

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<sup>3/</sup> Cf. Defense Supply Agency, Defense Contract Administration Services Region, SF, Burlingame, California, A/SLMR No. 247, at footnote 1.

rather than with the section which describes attempts to resolve the alleged violations. Moreover, the correspondence attached to the complaint, in fact, described attempts by the parties to resolve the alleged violations and the results thereof. Accordingly, I adopt the Administrative Law Judge's conclusion that dismissal of the complaint based on the above noted alleged defect was not warranted.

Additionally, the Respondent's Motion sought dismissal of the complaint on the basis that it was filed less than thirty days after the telegram constituting the charge was filed, thereby depriving the parties of a full opportunity to try to resolve the matter informally. The Complainant, on the other hand, contended that it considered the Respondent's letter of March 21, 1972, to be a final answer to its charge and that no purpose would have been served by waiting an additional three days to file its complaint. In agreement with the Administrative Law Judge, I find that the Complainant was justified in taking the position that the Respondent's March 21, 1972 letter constituted a final decision on its charge. Thus, the letter stated, in part, that, "It is true that NFFE was not consulted as to the reduction-in-force, but this is a management action excluded from the consultation requirements by Section 11 of Executive Order 11491." Accordingly, dismissal of the complaint based on untimeliness was not considered warranted.

Based on all of the foregoing, and in agreement with the Administrative Law Judge, the Motion to Dismiss is hereby denied on all counts.

With respect to the merits, it was alleged that the Respondent improperly denied the Complainant information it had requested concerning the RIF. In this connection, I agree with the finding of the Administrative Law Judge that the Complainant offered no evidence to refute the Respondent's position that it was impossible to comply with the request for documents within the time specified. Further, as noted by the Administrative Law Judge, the Complainant did not contend that the Respondent's offer to examine the materials without receiving copies would have been inadequate. Accordingly, I adopt the Administrative Law Judge's recommendation that further proceedings based on the alleged refusal to furnish information were unwarranted.

With respect to the Respondent's alleged improper refusal to consult, the Administrative Law Judge found that the Respondent violated Section 19(a)(6) of the Order by not giving the Complainant advance notice of the intended RIF and an opportunity to confer thereon in advance of giving individual notices to the affected employees. In this connection, he relied on Section 11(a) of the Order which states, in part, that an agency and an exclusive representative shall meet at reasonable times and confer in good faith on matters affecting working conditions. He reasoned that because a RIF is a "matter affecting working conditions," an exclusive representative should be

consulted about the method and impact of carrying out the RIF before final action is taken. He further noted that because Section 11(a) requires conferring with the employees' representative on matters affecting working conditions "at reasonable times," the Respondent herein was obligated to confer as soon as its RIF decision was reached and "perhaps sooner." In the Administrative Law Judge's view, the formulation of the final plan of carrying out the RIF should be done with the benefit of consultation, assuming there is time to consult as there was in the instant case.

I agree with the finding of the Administrative Law Judge in this regard. Thus, while the decision to effectuate a RIF action is, in my view, a matter upon which there is no obligation under the Executive Order to meet and confer, <sup>4/</sup> there is no basis in the Order to conclude "that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved." <sup>5/</sup>

In the instant case, the Respondent issued RIF notices to 33 employees without notifying the Complainant and providing it with an opportunity to meet and confer, to the extent consonant with law and regulations, as to the procedures management intended to observe in choosing which employees were to be subject to the RIF action. <sup>6/</sup> Under these circumstances, I find, in agreement with the Administrative Law Judge, that the Respondent's unilateral conduct in this

<sup>4/</sup> Section 11(b) of the Order provides, in part, that "the obligation to meet and confer does not include matters with respect to the mission of an agency; ...the number of employees; and the numbers, types and grades of positions or employees assigned to an organizational unit, work project or tour of duty... (emphasis added). Further, Section 12(b) of the Order provides, in part, that management officials of an agency retain the right "to relieve employees from duties because of lack of work or for other legitimate reasons."

<sup>5/</sup> Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, see also Naval Public Works Center, Norfolk, Virginia, 71A-56. While these Federal Labor Relations Council (Council) Decisions on Negotiability Issues did not involve questions related to RIF actions, I find the above rationale of the Council to be applicable in such situations.

<sup>6/</sup> Cf. Naval Public Works Center, Norfolk, Virginia, cited above.

regard was in derogation of its obligation to meet and confer in good faith and that such conduct thereby violated Section 19(a)(6) of the Order. 7/

Moreover, under the circumstances of this case, I find that the Respondent did not violate Section 19(a)(6) of the Order by failing to meet and confer in good faith concerning the impact of its RIF decision on the employees adversely affected by such decision. Thus, the evidence establishes that RIF notices were issued to, among others, the President of the Complainant local on January 20, 1972, to be effective March 19, 1972, and that at no time in this period did the Complainant seek to confer with the Respondent concerning the impact of the RIF on the employees adversely affected. In consequence, I find that further proceedings are unwarranted in this regard based on the view that the Complainant made no timely request to meet and confer on the impact of the RIF action. 8/

#### THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(6) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order. 9/

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois shall:

7/ Compare U. S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261, which was viewed as factually distinguishable from the instant case. Thus, in Norton, the evidence established that prior to the elimination of the "graveyard" shift the Complainant had been notified by the Respondent of the latter's intended action but did not make a request to meet and confer in this regard.

8/ Cf. U. S. Department of Air Force, Norton Air Force Base, cited above.

9/ Under the particular circumstances of this case, I concur in the Administrative Law Judge's conclusion that a remedial order requiring a return to the status quo is unwarranted.

#### 1. Cease and desist from:

Instituting a reduction-in-force action involving employees exclusively represented by Local 167, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 167, National Federation of Federal Employees or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reduction-in-force action.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

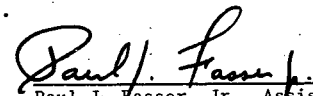
(a) Notify Local 167, National Federation of Federal Employees, or any other exclusive representative, of any intended reduction-in-force action, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reduction-in-force action.

(b) Post at its facility at the Great Lakes Naval Hospital, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges other violations of Section 19(a)(6) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Yasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a reduction-in-force action involving employees exclusively represented by Local 167, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 167, National Federation of Federal Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reduction-in-force action.

WE WILL notify Local 167, National Federation of Federal Employees, or any other exclusive representative, of any intended reduction-in-force action and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reduction-in-force action.

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

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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 directly with the Regional Administrator of the Labor-Management Services Administration, U. S. Department of Labor whose address is: Room 848-Everett M. Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604.

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

\_\_\_\_\_  
Case No. 50-8247  
\_\_\_\_\_

United States Department of Navy,  
Bureau of Medicine and Surgery,  
Great Lakes Naval Hospital, Illinois  
Respondent

and

Local 167, National Federation of  
Federal Employees  
Complainant

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Stuart M. Foss, Esq.  
Labor Relations Advisor  
Office of Civilian Manpower Management  
Department of the Navy  
Washington, D. C. 20390  
For the Respondent

Irving I. Geller, General Counsel  
National Federation of Federal Employees  
Washington, D. C. 20006  
For the Complainant

Table of Contents

	<u>Page</u>
Statement of the case	1
Facts	2
Discussion and conclusions	4
I. Issues raised by the Motion to Dismiss	4
A. The alleged absence of a charge preceding the complaint	4
B. Complainant's incomplete report of investigation and "See Attachments"	5
II. The denial of information	7
III. The alleged refusal to consult	8
IV. The appropriate remedy	11
Recommendations	12
Order	13
Attachment	14

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8247

United States Department of Navy,  
Bureau of Medicine and Surgery,  
Great Lakes Naval Hospital, Illinois  
Respondent

and

Local 167, National Federation of  
Federal Employees  
Complainant

Report and Recommendation

Statement of the Case

This case arises under Executive Order 11491. It was initiated by a complaint dated April 7, 1972, signed by the Trustee of the Complainant, and filed April 10, 1972. The Respondent contends that the complaint was invalid because it did not comply with Sections 203.2 and 203.3(e) of the Regulations.<sup>1/</sup>

The complaint alleges violations of Section 19(a)(6)<sup>2/</sup> of the Executive Order by the Respondent Activity in denying to the Complainant information it requested concerning a reduction in force and in not consulting with Complainant concerning the reduction in force. The Respondent challenges Complainant's position that the complaint alleges these two violations of Section 19(a)(6), and contends it alleges only that Respondent denied to Complainant information it requested concerning the reduction in force which denial of information was a failure to consult. The complaint is slightly ambiguous in that respect. But earlier communications between the parties, especially Exhibit C-1, make it clear that Complainant was claiming these two distinct violations of Section 19(a)(6), and I therefore interpret the slightly ambiguous complaint as so alleging. I so indicated at the hearing and permitted

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<sup>1/</sup> Prior to their amendment of September 15, 1972. This contention is discussed further below.

<sup>2/</sup> The complaint originally alleged violations of Sections 19(a)(3), (5), and (6). The Complainant, first informally and then formally, requested withdrawal of that portion of its complaint alleging violations of Section 19(a)(3) and (5) because a representation election was pending. On November 24, 1972, the Regional Administrator granted such withdrawal.

evidence on both violations although Respondent consistently contended that only the first alleged violation, the alleged denial of information, was before me.<sup>3/</sup>

The Area Administrator investigated the complaint and reported to the Regional Administrator. On May 3, 1972 the Respondent filed with the Regional Administrator a Motion to Dismiss, and Memorandum in Support, on various procedural grounds including grounds (1) that the complaint did not comply with Section 203.2(a)(1) of the Regulations in that Complainant did not file a charge with the Respondent, (2) that the complaint did not comply with Section 203.3(b) of the Regulations in that there was not filed the "entire report of investigation by the parties" required by Section 203.2(a)(4), and (3) that the complaint was defective in filling in box 3(a) simply with "See Attachments", contrary to A/SLMR Rpt. No. 48.

On November 24, 1972, the Regional Administrator granted a "Request for Limited Withdrawal" of the complaint and denied, without ruling on its merits, the Motion to Dismiss on the ground "that the issues raised by those allegations can best be decided only after the taking of record testimony."

On November 1, 1972, the Regional Administrator issued a Notice of Hearing to be held November 28, 1972 in Chicago, Illinois. Hearings were held that day in Chicago at which the parties were represented by counsel. The parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. For good cause shown, extensions of time to January 19, 1973 were granted to file briefs. The parties filed timely briefs.

Facts

Complainant has been the exclusive representative of approximately 340 non-supervisory employees (including professional) of the Activity since June 15, 1970, and was recognized as representative for three or four years before that. It does not have and has never asked for a collective bargaining agreement. It has been in trusteeship because of financial matters since January 27, 1972. Abraham Orlofsky, a national vice-president, is the trustee.

On January 20, 1972, the Respondent issued notices of reduction in force, effective March 19, 1972. Under the RIF, twenty-three positions were to be abolished affecting thirty-three employees each of whom was given a Notice. Vernon Estes, President of the Complainant local, was one of the employees affected and given a Notice. No notice was given to the local as such; Respondent takes the position that the personal notice to Estes constituted also notice to the local.

<sup>3/</sup> Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

At about that time Complainant's status as exclusive representative was challenged by the American Federation of Government Employees.<sup>4/</sup> Estes was one of the prospective officers of the challenging AFGE local. On January 25, 1972 Estes came to the office of Respondent's civilian personnel representative, Jack M. Powell, accompanied by two AFGE representatives. They discussed Estes' RIF and the RIF in general, and Powell gave them some information they requested.

Shortly after Orlofsky became trustee, some members in the unit complained to him about the RIF notices. This began early in February. During the first week in March, Sam Rivers, a national representative of NFFE and his assistant, Leroy Williams, came to see Powell to obtain information about Estes' RIF. Powell told them he had already discussed it with Estes and the two AFGE representatives accompanying him, and wanted some assurance from Estes on who was representing him.

A few days later Rivers and Williams returned to Powell's office. They did not have any authorization from Estes to represent him. They asked Powell for copies of the job descriptions of the positions involved in the RIF, copies of the retention registers involved, copies of the work sheets, and copies of any related documents. They advised him that they wanted to have the copies of those papers the next morning. Powell protested that he could not have that many copies that soon. He offered to make the papers available for their inspection at an extra desk in his office, to go over the papers with them, to discuss them, and to try to have copies made of specific documents they then felt they needed. They stated they wanted copies of all the papers by the following morning to take with them for study. This was about ten days before the RIF was to become effective and about fifty days after the RIF notices were given.

The facts recited in the immediately preceding paragraph are based on uncontradicted evidence. What happened thereafter is contradicted.

Powell testified that Rivers and Williams did not return, the next morning or thereafter. Neither Rivers nor Williams testified. At the time of the hearing Rivers was no longer employed by NFFE. No reason was given for Williams not being called as a witness. Orlofsky testified that Rivers and Williams told him they made further efforts to obtain the information. This, of course, was hearsay. Hearsay is innately less reliable than direct testimony. In addition, Powell's testimony rang clear, forthright, and with candor. Orlofsky, too, testified candidly and with sincerity, but he was testifying not about what he personally knew but about what others had told him had happened to those others. What those others told Orlofsky was of course not subject to cross-examination. I accept Powell's version of what happened.

On March 14, 1972, Orlofsky sent a telegram to the Commanding Officer of Respondent Activity as follows:

<sup>4/</sup> A representation petition was filed February 10, an election was held on June 8, and Complainant was recertified on June 15, 1972.



"Failure to consult on present and tending [sic] reduction in force and refusal to make retention lists available constitute unfair labor practices under Section 19(5) and (6) of the Executive Order 11491."

The word "tending" in that telegram was a typographical error and was intended to be and was understood as "pending".

On March 21, 1972, the Respondent wrote to the national President of NFFE acknowledging that NFFE had not been consulted about making the RIF and taking the position that a RIF was not a mandatory consultation subject under E.O. 11491. It stated also that since there was no collective bargaining agreement there was no local consulting or conferring requirement.

Discussion and Conclusions

I. Issues Raised by the Motion to Dismiss

The Respondent filed with the Regional Administrator a Motion to Dismiss the complaint because the Complainant had not fully complied in several respects with certain of the procedural Regulations prescribing what should be done before and at the time of filing a complaint with the Area Administrator.

Most questions of whether there has been compliance with the Regulations governing proceedings prior to the Notice of Hearing are questions normally to be decided finally by the Regional Administrator. To be sure, some procedural steps may be jurisdictional to further proceedings, and jurisdictional defects may be raised at any time except perhaps insofar as raising the defect may be precluded by Section 203.19 of the Regulations.

But in this case Respondent moved the Regional Administrator to dismiss the complaint for procedural reasons and the Regional Administrator denied the motion not on the merits of the motion but on the ground "that the issues raised by those allegations can best be decided only after the taking of record testimony." Although denominated an "Order Denying Motion to Dismiss", it was in substance an Order under Section 203.18(b), a referral of the motion to the Administrative Law Judge. The Motion to Dismiss was renewed by the Respondent at the hearing.<sup>5/</sup>

A. The Alleged Absence of a Charge Preceding the Complaint

The Respondent says there was no charge made by Complainant to it, before the filing of the complaint, that it had violated the Executive Order, as required by Section 203.2(a)(1) of the Regulations. The Complainant argues that it considered its telegram of March 14, 1972 to

the Respondent as the required charge. That telegram<sup>6/</sup> unequivocally charges Respondent with violating Sections 19(a)(5) and (6) of the Order by failing to consult on the RIF and by refusing to make the retention lists available. I conclude that this constituted a charge within the meaning of Section 203.2(a)(1). Perhaps the Regional Administrator did not overrule this contention because that telegram was not among the documents before him; it did not become part of the record in this case until introduced by Complainant at the hearing as Exhibit C-1.<sup>7/</sup>

B. Complainant's Incomplete Report of Investigation and "See Attachments"

Respondent contends that the complaint should be dismissed because it was not accompanied by the entire report of investigation by the parties as required by Section 203.3(b) of the Regulations (formerly, and at the time the complaint was filed, Section 203.3(e)). It contends also that the complaint should be dismissed because in describing the attempts to resolve the dispute and the results of the attempts it stated "See attachments",<sup>8/</sup> and because the complaint was filed less than thirty days after what might be considered the charge, allegedly depriving it of "the full 30 days grace period" to try to resolve the matter informally.

The complaint had three attachments, two of which pertained to the portion of the complaint withdrawn. The other was a letter of March 21 from Respondent to the national President of NFFE, Nathan Wolkimer, replying to Complainant's telegram of March 14 and to another message from Wolkimer received by Respondent a day earlier. Complainant's telegram, which I have found constituted the charge, was not attached.

The failure to include the charge in the report of investigation was a failure fully to comply with the requirements of the Regulations. But the complaint should not be dismissed, at this stage, for that reason. The failure to include the charge might have been sufficient reason for dismissal of the complaint earlier.<sup>9/</sup> But no one was harmed by that omission. Certainly Respondent was familiar with it; its letter of March 21 was addressed to it. It appears that the Area Administrator became aware of it at least in the course of his investigation; a copy of Respondent's reply to the charge was sent to the Area Administrator during the investigation.<sup>10/</sup> I do not suggest that such omission should

<sup>6/</sup> Exhibit C-1.

<sup>7/</sup> To the effect that the absence of a charge is not a jurisdictional defect to further proceedings, see Veterans Administration Hospital, Charleston, S. Carolina, A/SLMR No. 87.

<sup>8/</sup> Allegedly in non-compliance with the Regulations as interpreted by A/SLMR Rpt. No. 48.

<sup>9/</sup> See A/SLMR Rpt. No. 16.

<sup>10/</sup> Exhibit AS-1, p. 3.

<sup>5/</sup> Exhibit R-1; Tr. 27.

always be condoned. I do conclude that after the hearing has been held, and it appears no one has been harmed or prejudiced by the omission, it should not be the basis for dismissal of the complaint.

The complaint left the space on the complaint form, for a description of the attempts by the parties to resolve the alleged violation and the result of the attempts, blank except for the statement "See attachments". The form asks that the particulars be attached, and that was done (except for the omission of the charge). But the form asks also for a description, and that was not done.

Respondent relies on A/SIMR Report No. 48 for its contention that the complaint should be dismissed for that reason. In that case it was the space for a statement of the basis of the complaint that was left blank except for a reference to "attached documents." And that Report says that Area Offices should not accept complaints with such deficiencies, not that a complaint should be dismissed for that reason after the hearing has been held. In this case the attachment (again except for the omission of the charge, which I have found harmless), does show the efforts made. The omission of the narrative in these circumstances should not be treated as rendering the complaint jurisdictionally defective.<sup>11/</sup> This is not a conclusion that the Area Administrator would have been unwarranted had he refused to accept the complaint or insisted on an amendment.

The Respondent argues that the complaint should be dismissed because it was filed less than thirty days after the charge and the Regulations<sup>12/</sup> contemplate that the Respondent would have thirty days after the charge to try to resolve the matter informally.<sup>13/</sup> The telegram constituting the charge was sent to Respondent on March 14, 1972 and the complaint was filed April 10, 1972, twenty-seven days later.

The Complainant takes the position that it considered Respondent's letter of March 21 (Exhibit AS-1, p. 5) a final answer to its charge, and that no useful purpose would have been served by waiting the three additional days. The Respondent takes the position that it expected a reply to its letter of March 21.

<sup>11/</sup> Defense Supply Agency, Burlingame, California, A/SIMR No. 247, in which it was held that "see attached letter" in the space for "Basis of the Complaint" was not fatally defective where the attached letter contained a clear statement of the basis of the complaint.

<sup>12/</sup> Section 203.2 of the Regulations that were in effect at the time the complaint was filed.

<sup>13/</sup> The present Regulations are more specific. In addition to the substance of the original provision it adds in Section 203.2(b)(2), that in response to the charge the Respondent makes "a written decision expressly designated as a final decision", the charging party may immediately file a complaint.

Respondent's letter of March 21, while susceptible to refutation by one not agreeing with it, did not appear to require an answer. With respect to the charge of the denial of the retention lists, it stated that if an affected employee designated a representative he and the representative "will be given access" to information affecting him "to which he has a right". Respondent already knew that Complainant wanted more than access; it had already offered "access" but Complainant wanted copies. The letter acknowledged that Complainant had not been consulted concerning the RIF, but took the position that such subject was excluded from the consultation requirements by Section 11 of the Executive Order; in addition, it took the position that the absence of a collective bargaining agreement excluded any local requirement of consultation. It concluded with the expression of a hope that Complainant would view Respondent's position as recognizing all Complainant's rights arising from E. O. 11491.

This did not leave matters in midair. Respondent's statements were categorical, except for the information it would make available, and the parties already knew each other's position on that subject. The filing of the complaint was not precipitate action before the expiration of the thirty days. Complainant was not unjustified in believing that three more days of correspondence would be futile, and if it had waited three more days before filing the complaint this issue could not have arisen. At this late date, after a hearing has been held, it would not promote the procedures of administering the Executive Order to dismiss the complaint for having been filed three days too early. The Regulations provide that the rules should be construed liberally to effectuate the purposes of the Order. Section 206.8(a), formerly Section 205.7(a).

The Motion to Dismiss should be denied.

The Complainant characterizes the Motion to Dismiss as a "hyper-technical effort to thwart purposes of Executive Order 11491".<sup>14/</sup> Respondent's reliance on the procedural regulations is not properly so characterized. Those procedural regulations are calculated to promote informal settlements of disputes and the efficiency of administering the Executive Order. The fact that I have found that in the particular circumstances and at the stage of the proceeding in which those issues are presented to me those purposes would not be fulfilled and might be impeded by dismissal of the complaint does not mean that complainants may play fast and loose with the procedural rules. It means only that in the particular circumstances presented to me, at this stage, I do not consider literal and rigid compliance with some of these rules to be jurisdictionally prerequisite to further proceedings.

II. The Denial of Information

On or about March 10, 1972, about ten days before the RIF notices were to become effective and fifty days after they were issued, representatives of Complainant, Rivers and Williams, called on Powell. I have

<sup>14/</sup> Complainant's brief, p. 6.

found above that they asked Powell for copies of the job descriptions of the positions involved in the RIF, copies of the retention registers, copies of the work sheets, and copies of any related documents, and they stated they wanted them the next morning. Powell stated that it was administratively impossible to have that much copy work done that soon. He offered to make the material available to Rivers and Williams for their examination at a spare desk in his office, to go over the papers with them and discuss them, and to try to get copies of individual documents that might be needed. But Complainant's representatives insisted on copies of all the documents to take with them for study, and they wanted them the next morning. I emphasize that this was about fifty days after the notices had been issued, and about ten days before they were to become effective. Complainant's representatives then left, and did not return. The next communication from Complainant concerning the documents was the charge of March 14, 1972.

To be sure, a collective representative will often need information from the Agency or Activity in order to be able to discuss matters intelligently on an informed basis. And in such situations the employing agency may have a duty to furnish the information and a refusal to do so may constitute a refusal to bargain or a refusal to consult.

But we need not decide in this case the extent of that duty, nor who should bear the cost of making copies of documents. Here the only request was for copies of voluminous documents to be made available the next morning. The Activity said it was impossible to comply and offered to make the documents immediately available for examination and discussion. The Complainant offered no evidence to refute the Respondent's position that it was impossible to comply with the request for copies of the documents that soon nor does it urge that examining the material without receiving copies would have been inadequate. Whatever may have been the Respondent's duty to furnish Complainant with information, it did not include doing the impossible.

### III. The Alleged Refusal to Consult

For budgetary reasons the Respondent decided to eliminate twenty-three positions. The abolition of these positions and the resulting transfer of some personnel affected thirty-three employees. For some undisclosed period before January 20, 1972, Respondent prepared lists of positions to be abolished, persons affected, and the like, and made revisions in its plans. On January 20 it sent notices of the reduction in force to the thirty-three employees affected by its decision theretofore reached. Estes, the President of Complainant, was one of the twenty-three employees whose position was to be abolished and he received a RIF notice. The Respondent continued to revise its RIF plan, and ultimately Estes' position was not abolished.

The Respondent concedes that it did not give Complainant notice of the RIF other than by the fact that Estes, President of the Complainant, was one of those to be affected and so was given personal notice. It takes the position that no notice to the representative is required in

advance of the RIF notice. It concedes there is an obligation to bargain with the representative concerning the impact of a RIF <sup>15/</sup> after the notice is given but takes the position that there is no obligation to bargain or consult about whether there shall be a RIF and no obligation to initiate consultation before the RIF notices are issued.

Section 11(b) of the Executive Order, in its second sentence, although it does not use the term "reduction in force", rather clearly provides that an agency need not confer with the representative on whether there shall be a RIF. <sup>16/</sup> Complainant does not contend to the contrary.

The Respondent did not refuse to consult about the impact of the RIF at any time it was requested to do so, and Complainant did not ask for consultation before the notices were issued. The Complainant argues it did not know about the RIF plan in advance and so could not have asked for advance consultation. There is no evidence to the contrary. This issue thus presents the question whether, when it is feasible to do so, an agency has the obligation to notify the collective representative when it intends to institute a RIF.

Section 11(a) of the Executive Order provides that "An Agency and a labor organization that has been accorded exclusive recognition...shall... confer...with respect to...matters affecting working conditions..." (Emphasis added)

A most fundamental "matter affecting working conditions" is the matter of who shall continue to work when the force is being reduced, the manner in which the reduction shall be carried out, and the consequences of being separated from the working force or being otherwise adversely affected. The parties, then, both of them, have the duty to confer on it.

The Respondent argues that not only is advance consultation not required but that it was impracticable to give advance notice. They base this argument on the propositions that (1) such notice to the union would give rise to demoralizing rumors, (2) protracted discussions could unreasonably delay necessary action, and (3) many proposed reductions in force are altered or cancelled before the notices are issued to the affected employees.

Such arguments are unpersuasive. The absence of notice to the union is no guarantee that rumors will not circulate. With notice and advance consultation, rumors are less likely to be distorted and demoralizing when the employees know their representative is being consulted and in a position to keep the employees informed.<sup>17/</sup> The discussions need not be

<sup>15/</sup> See Naval Air Training Unit, Memphis, Tenn., A/SLMR No. 106, p. 6.

<sup>16/</sup> This is probably strengthened by Section 12(b)(3), (4) and (5). See Island Animal Disease Laboratory, FLRC No. 71A-11(1971).

<sup>17/</sup> Cf. Federal Employees Metal Trades Council and U.S. Naval Supply Center, Charleston, S. Carolina, FLRC No. 71A-52.

protracted and can (and should) be kept within the time limits of necessity. And the alterations or cancellations that may occur are more considerably performed if the representatives of the employees are consulted in the process. Respondent's testimony showed that alterations in the overall RIF commonly take place, and indeed occurred in this case, after the RIF notices are issued as well as before. Carrying Respondent's argument further would lead to the clearly unsound conclusion that notice to and consultation with the union is not required until after the Activity has reached a final and immutable plan for the RIF.

Section 11(a) requires conferring with the employees' representative on matters affecting working conditions "at reasonable times". I conclude that a reasonable time includes some time in advance of the time the affected employees are notified, as much in advance as is administratively feasible. The union should be consulted about the method and impact of carrying out the RIF before final action is taken. It may happen in some situations that the necessity of reducing forces occurs abruptly and there is no time for advance consultation. But that is not this case. Here there was advance preparation and work sheets prepared, but the preparation was without the benefit of union consultation.

In the private sector the National Labor Relations Board has held that laying off employees without advance notice to and consultation with the collective bargaining representative is violative of the duty to bargain concerning conditions of employment. Exchange Parts Company, 139 N.L.R.B. 710 (1962), enfcd. 339 F. 2d 829 (5th Cir. 1965); Dixie Ohio Express Company, 167 N.L.R.B. 573 (1967). In the later case of Burns Ford, 182 N.L.R.B. 753 (1970), the employer on April 10 decided to lay off eight salesmen. On April 16 it notified the union and the eight employees that their employment would be terminated effective April 22. The Board held that the week between the notices and the effective date of the terminations satisfied the requirement of affording an opportunity to bargain. In the instant case there was a sixty day period between the individual notices and the effective date of the RIF, in accordance with the Federal Personnel Manual and internal Department of Navy regulations.

I conclude that the principle of the earlier Board decisions is in accord with a sound view of the obligation to consult and that we should follow a like principle, but that the later decision of the Board is not in accord with the obligation to confer under the Executive Order.

The obligation under the Executive Order to confer on matters affecting working conditions is to confer at reasonable times. In my opinion it is reasonable to confer as soon as the decision to reduce forces is reached, perhaps sooner, and it is unreasonable to wait longer before giving notice. The formulation of the final plan of carrying out the reduction in force should be done with the benefit of consultation (assuming there was time to consult as there was here). It should not be finally formulated prior to consultation, with the result that all the representative can do is to try to persuade the Activity that its final formulation, announced to the employees, was unsound and should be changed.

The Activity requests that in the event that I find that the complaint raises and there is pending before me the issue over the Activity's admitted failure to confer with the union prior to the notices being issued to the employees, I reopen the record "in order to fully litigate that question, including the presentation of evidence that Respondent Activity has no obligation in that regard."<sup>18/</sup>

During the hearing I made it plain that I viewed the complaint as raising that issue. There was no request for a continuance predicated on surprise. The issue of the obligation to give the union advance notice of a RIF is a legal question. The fact that there was no advance notice to the union is admitted. Respondent's request does not indicate the nature of the evidence it would offer at a reopened hearing bearing on the nature of the obligation. In such circumstances, I deny the request.

#### IV. The Appropriate Remedy

The reduction in force has been put in effect. It would be highly speculative and probably impossible to determine what differences, if any, there would have been in the changes put in effect if Complainant had been given advance notice, and thus to determine which employees have suffered injury as a result of the violation of the Executive Order. To order the RIF to be undone and all employees made whole for any injury they suffered from the RIF would be far too severe in the circumstances of this case.

Whether or not formal notice to the Complainant was consummated by the individual notice to its President, one of the employees affected, is unimportant. Obviously, formal notice accompanied by a suggestion of conferring would have been better. But the President of the Complainant in fact knew about it, and came around to talk about it. When Orlofsky, the trustee, took over a week after the individual notices, the members complained to him about the RIF. But Complainant did nothing about the general RIF until about ten days before the expiration of the 60-day notice. That much or most of the delay may have been due to the upsetting circumstances of trusteeship being imposed and a representation election being in the offing <sup>19/</sup> cannot be attributed to Respondent. And when representatives of Complainant came to talk about the overall RIF they made only what I have found to have been an unreasonable request for information. There is no evidence that Complainant raised or discussed with Respondent any substantive matters.

In these circumstances I will recommend that the only remedial action be a posting by Respondent that it will thereafter give advance notice to Complainant of an intended reduction in force. Although the notice I recommend be posted is unqualified, it should be understood that where circumstances require a rather prompt reduction in force the amount of advance notice to the union need be only what is reasonable in the circumstances and not what would be reasonable under better circumstances.

<sup>18/</sup> Respondent's brief, p. 9.

<sup>19/</sup> The representation petition was filed February 10, the election was held June 8, and Complainant was recertified June 15.

Recommendations

I recommend that:

1. The Motion to Dismiss be denied.
2. Insofar as the complaint alleges a violation of Section 19(a)(6) because of Respondent's denial of a request for information, it be dismissed.
3. Respondent be held to have violated Section 19(a)(6) in not giving Complainant advance notice of the intended reduction in force and an opportunity to confer thereon in advance of giving individual notices to the affected employees.
4. Respondent be ordered to post a notice that before issuing notices of a reduction in force it will give Complainant advance notice thereof and an opportunity to confer thereon concerning its impact.

A form of Order is attached hereto as Appendix A and a form of Notice is attached thereto as Attachment A.



MILTON KRAMER  
Administrative Law Judge

March 22, 1973

Appendix A

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and 29 C.F.R. §203.25(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that United States Naval Hospital, United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, shall:

1. Cease and desist from instituting reductions in force in units represented by an exclusive bargaining representative without giving the exclusive representative reasonable advance notice of the intended reduction in force and of the individual notices it intends to issue to affected employees in the unit.
2. Give to the exclusive representative of a unit in which it intends to institute a reduction in force notice of such intention reasonably in advance of issuing the individual notices to the employees to be affected.
3. Post on bulletin boards on which notices to employees are customarily posted copies of the Notice attached hereto marked "Attachment A". Copies of the Notice will be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such copies, they shall be signed by the Commanding Officer and posted and maintained by him. The Commanding Officer shall take reasonable steps to assure that such Notices are not altered, defaced, or covered by other material.
4. In accordance with 29 C.F.R. §203.26, report to the Assistant Secretary in writing within ten days from the date of receipt of this Order what steps have been taken to comply with this Order.

W. J. USERY, JR.  
Assistant Secretary of Labor  
for Labor-Management Relations

March , 1973



## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NORFOLK NAVAL SHIPYARD

Respondent

and

Case No. 22-3025(CA)

TIDEWATER VIRGINIA FEDERAL  
EMPLOYEES METAL TRADES  
COUNCIL, AFL-CIO

Complainant

## DECISION AND ORDER

On May 16, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, Norfolk Naval Shipyard, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, <sup>1/</sup> conclusions and recommendations of the Administrative Law Judge. <sup>2/</sup>

<sup>1/</sup> On page 15 of his Report and Recommendations, the Administrative Law Judge inadvertently noted that the Respondent's letter purporting to be its "final decision" was dated November 11, 1972, instead of November 11, 1971. This inadvertence is hereby corrected.

<sup>2/</sup> Inasmuch as the negotiated agreement involved herein was entered into prior to November 24, 1971, the otherwise applicable provisions of the Order contained in Section 13(d), as implemented by Part 205 of the Assistant Secretary's Regulations, were inoperative.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Norfolk Naval Shipyard shall:

## 1. Cease and desist from:

a. Unilaterally determining the arbitrability of the Council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics) pursuant to its negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

b. Interfering with, restraining, or coercing its employees by unilaterally determining the arbitrability of the Council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics) pursuant to its negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

c. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

a. Upon request, proceed to advisory arbitration on the Council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics).

b. Post at its Norfolk, Virginia Facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

c. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX  
NOTICE TO ALL EMPLOYEES

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally determine the arbitrability of the Council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics) pursuant to the negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

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 Executive Order.

WE WILL, upon request, proceed to advisory arbitration on the Council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics).

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

Dated \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U. S. Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

.....  
: NORFOLK NAVAL SHIPYARD :  
: Respondent :  
: :  
: TIDEWATER VIRGINIA FEDERAL : Case No. 22-3025 (CA)  
: EMPLOYEES METAL TRADES :  
: COUNCIL, AFL-CIO :  
: :  
: Complainant :  
: :  
.....

JOHN J. CONNERTON, Esquire  
Labor Relations Advisor  
Office of Civilian Manpower Management  
Department of the Navy  
Washington, D.C., for Respondent

GILBERT BATEMAN and H. M. BUNCH, JR.  
Tidewater Virginia Metal Trades  
Council, AFL-CIO  
Norfolk Naval Shipyard  
Portsmouth, Virginia 23709, for Complainant

Before: Salvatore J. Arrigo  
Administrative Law Judge



REPORT AND RECOMMENDATIONS

Preliminary Statement

This proceeding, heard in Norfolk, Virginia on August 29-30 and October 26, 1972 arises under Executive Order 11491 (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor-Management Relations (hereafter called the Assistant Secretary) a Notice of Hearing on Complaint issued on July 3, 1972 with reference to alleged violations of Section 19(a)(1) and (6) of the Order. The Complaint, filed on February 15, 1972, by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (hereafter called Complainant or the Council) alleged that Norfolk Naval Shipyard (hereafter called Respondent or the Facility) violated Section 19(a)(1), (2) and (6) of the Order by its refusal to refer a council dispute to arbitration in accordance with the provisions of the negotiated agreement. However, by letter dated June 15, 1972, Complainant was advised by the Acting Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor, Philadelphia Region that the 19(a)(2) allegation was being dismissed.

During the hearing Respondent filed two written motions with me, both entitled Motion to Dismiss (Respondent Exhibit Nos. 9 and 11). 1/ When the motions were filed I reserved ruling on them and informed the parties that I would treat the motions in my decision. In view of my disposition of this case, as explained hereafter, the motions are denied.

At the hearing all parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Briefs were filed by both parties.

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1/ Respondent's motions recite that on March 30, 1972, it filed a Motion to Dismiss with the Regional Administrator for the Philadelphia Region of the Labor-Management Services Administration. At the time of the instant hearing, no response to that motion had been received by Respondent.

- 2 -

Upon the entire record in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Introduction

At all times material hereto, the Council 2/ has been the bargaining representative of various of the Facility's employees. The collective bargaining unit is comprised of approximately 6400 employees and includes employees classified as Electronics Mechanics and Instrument Mechanics (Electronics). The Council was first recognized as the exclusive representative of the Facility's employees in 1963. The parties negotiated the initial contract in 1964 and the agreement negotiated in 1967 was still in effect at the time of these procedures. 3/ As described more fully below the negotiated agreement provides for a grievance procedure which culminates in advisory arbitration.

II. The Alleged Unfair Labor Practices

On June 18, 1971, Complainant filed two council disputes 4/ with the Facility both of which concerned Electronics Mechanics performing the duties of Instrument Mechanics. An Electronics Mechanic (Wage Grade-11) tests, overhauls, repairs, modifies, calibrates and installs various electronic equipment for the

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2/ In 1970 the Fifth Naval District Metal Trades Council, AFL-CIO changed its name to Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

3/ Complainant Exhibit No. 1.

4/ A council dispute is a form of grievance which the Council, as opposed to an individual employee, has a contractual right to pursue in certain situations. A council dispute may also culminate in advisory arbitration.

- 3 -

Facility. An Instrument Mechanic (Wage Grade 12) repairs, overhauls, modifies, adjusts, tests and calibrates various types of electronic instruments which are used by Electronics Mechanics.

One dispute alleged "Management in Shop 67 is in violation of the Negotiated Agreement, and existing regulations. Over a period of time, Electronics Mechanics assigned to the Instrument Room, Electronics Shop, have been misassigned to the duties of Instrument Mechanics (Electronics)." 5/ The other dispute alleged "Management in Shop 67 is in violation of the Negotiated Agreement, and existing regulations. In the Instrument Room, Electronics Shop, Apprentice Electronics Mechanics have been continuously misassigned to the duties of Apprentice Instrument Mechanic (electronic). To this date, Council does not know of any Apprentice Instrument Mechanics ever assigned to the Instrument Room." 6/ Both disputes were filed under Article III of the negotiated agreement and sought the following corrective action: "That the employees of the Shop 67 Instrument Room be assigned in accordance with the Negotiated Agreement and existing regulations."

By memoranda dated June 24, 1971 7/ the Facility notified Complainant that it was refusing to process the disputes contending that the matter was not appropriate for processing under Article III of the agreement. With regard to the first mentioned dispute, Respondent suggested "that should any employee consider the duty he is assigned to perform to be improperly rated, an appeal could be initiated under the provision of . . . (NAVSHIPYDNORINST 12531.6 of 5 February 1969)." The Facility's response to the second mentioned dispute went on to state that "The matter of work experience planned to enable the apprentice to become competent in the skills required by this trade is a matter to be determined by the employer. In accordance with the provisions of the Negotiated Agreement with the MTC the employer will discuss with the Council appropriate suggestions and recommendations presented by the Council relative to the apprentice program." 8/

5/ Complainant Exhibit No. 3(b).

6/ Respondent Exhibit No. 18.

7/ Complainant Exhibit No. 10 and Respondent Exhibit No. 19.

8/ Complainant does not appear to have further pursued this dispute.

By letter dated June 30, 1971, the Council informed the Facility that it was not satisfied with the Step 2 decision on the dispute and requested that the dispute be submitted to Step 3 "in accordance with the Negotiated Agreement, Article III, Section 4." 9/ Subsequently, on July 27, 1971, the Council requested "that the Council Dispute submitted on 6-18-71 be submitted to advisory arbitration in accordance with the arbitration procedure outlined in Article XXIII of the Negotiated Agreement." 10/

The Facility's response to the Council's request for arbitration is contained in a letter dated 16 September 1971. That letter states as follows:

This is in response to your letter of 27 July 1971, requesting arbitration in the matter submitted as a council dispute dated 18 June 1971. The subject of the dispute is an alleged misassignment of Electronic Mechanics (WG-11) to perform the duties of Instrument Mechanics (WG-12).

This matter arose as a personal grievance of Messrs. W. V. Piland, J. D. Hilliard and J. D. Duncan which was submitted for consideration pursuant to the negotiated procedure, on 5 May 1971. Several meetings and discussions have occurred between the grievants, the Council and various levels of management including the department head, in an attempt to resolve the matter. Each time the grievance was returned as it has always concerned the allegation by the three men that they are performing duties outside of their rating. The parties were advised to resubmit the complaint as a classification appeal of job title and/or pay. I point out again that the basic issue, as noted in the corrective action desired in the original grievance, is that the grievants feel their job classification is in error. Therefore, this matter cannot be resolved until it is processed as an appeal pursuant to the appropriate procedure, a decision on which will be made by OCMM and/or the Civil Service Commission.

9/ Complainant Exhibit No. 11.

10/ Complainant Exhibit No. 3(a).

- 5 -

The record shows that Messrs. Piland and Hilliard have been promoted to Instrument Mechanic (Electronic), WG-12 for 120 days and Mr. Duncan has been reassigned because of his special nuclear qualifications. These promotions and the reassignment, would appear to possibly satisfy their complaint.

In light of the above, there is not only no showing of a violation of the negotiated agreement or existing regulations as alleged in your Council dispute, but your complaint was returned to you on 24 June 1972, with an appropriate reason. However, it is apparent that a misunderstanding exists in the Council concerning the clarification of procedures to follow which were discussed in Mr. Twomey's meeting with Captain Page on 25 June 1971. As you will recall, Captain Page, by his letter of 29 June, invited additional discussion with the grievants in his continuing effort to resolve the matter. Therefore, if the employees desire to pursue the matter as an appeal, it is suggested that they appeal pursuant to NAVSHIPYDNORINST 12531.6. On the other hand, should the Council desire and request it, Captain Page and Mr. Wilkinson will again meet with you to discuss and obtain an understanding or clarification of procedures.

I share with you your concern that employees be assigned work pursuant to the negotiated agreement and existing regulations.

Sincerely yours,

/s/ Jamie Adair  
JAMIE ADAIR  
Rear Admiral, USN  
Commander

On September 16, 1971, Complainant filed an unfair labor practice charge against the Facility alleging that the Facility violated Section 1, 2 and 6 of the Order when it

- 6 -

"refused to refer the Council Dispute' ... to arbitration in accordance with the provisions of Articles III and XXIII of the Negotiated Agreement...."

On November 2, 1971, the parties met to discuss the unfair labor practice charge. In a letter to Complainant dated November 11, 1971, the Facility inter alia summarized the meeting of November 2 as follows: 11/

Subsequent to all of the above events, a meeting between the Metal Trades Council, the Director of Industrial Relations and the Head of Employee Relations was held on 2 November 1971. At this meeting the Director of Industrial Relations informed you of the shipyard's inability to meet with your request to submit either the assignment of personnel or a position classification determination to arbitration. This position is, of course, substantiated by our agreement, specifically Article XXIII, which excludes position classification from the grievance and arbitration procedure and Article IV which specifically sets forth that management officials retain, among other things, the right to assign employees. In light of this, the Director of Industrial Relations again suggested that the employees in question had every right and indeed should be advised, were they still dissatisfied, to submit a classification appeal, which could and would be reviewed as requested, by either the shipyard, the Office of Civilian Manpower Management, or the Civil Service Commission. Further, in an attempt to resolve the real issue, which I am informed is the alleged failure to classify and pay these employees properly for the duties they allegedly performed, the Director of Industrial Relations has volunteered to have conducted immediately a work audit of the duties and responsibilities assigned the remaining two individuals, Messrs. Piland and Hilliard, including a review of their work records over the past several weeks, in an attempt to determine whether or not these

11/ Complainant Exhibit No. 6.

- 7 -

men have been assigned work appropriate to the instrument mechanic rating. Additionally, Mr. Wilkinson advised that, if you could provide him with the names of other electronic Mechanics whom you feel were likewise continuously assigned higher level duties, he could cause a work audit to be conducted of their assignments.

Upon careful review of the foregoing, it appears to me that the proposal on the part of the shipyard to conduct work audits to determine, in fact, whether these men have been assigned work at a higher level and our commitment that, should this be found to be so, additional Instrument Mechanic positions would be created for which all qualified Electronic Mechanics could compete for permanent promotion, appears to be a most appropriate method of resolving the basic dispute. Therefore, I am requesting Mr. Wilkinson to proceed immediately with the work audits of the two men and further I am requesting that, upon your provision of additional names, he conduct work audits of their duties.

With this action, I would expect to have within the next few weeks a determination as to whether, in the finding of shipyard classification officials, these men are, in fact, performing Instrument Mechanic duties or are performing duties appropriately within the Electronic Mechanics rating. Subsequent to that determination, you will be advised that either the shipyard will create additional Instrument Mechanic billets as warranted, or that no additional billets are warranted. The individual employees may exercise their right to appeal either of the above classification decisions. This appears to me to be more fruitful than your pursuit of the alleged unfair labor practice charge, and I urge that you accept this as the appropriate method of proceeding.

Sometime thereafter, Complainant supplied the Facility with "a list of names."

There was no further communication between the parties relative to this matter until January 26, 1972 at which time the Council, by letter, again requested that the Facility refer

the council dispute to arbitration. 12/ The letter of January 26 stated in relevant part:

"On November 11, 1971 we received a letter from you concerning the aforementioned unfair labor practice charge. You again refused to refer the Council dispute to arbitration.

"Most of the content of your letter was devoted to the issues of the misassignment dispute, and not to the issue at hand, which is your refusal to arbitrate.

"The express desire of the Council is to settle this matter here at the Norfolk Naval Shipyard. Because of this desire, we have been very patient and have allowed the Shipyard more than adequate time to consider a remedy. We are again requesting that you refer the subject, council dispute, to arbitration. If the Council has not received satisfaction in this matter by 4:45 p.m. on February 4, 1972, then we will submit a complaint to the U.S. Department of Labor in accordance with E. O. 11491."

Respondent made no reply to the Council and accordingly on February 15, 1972, the instant Complaint was filed.

### III. Issues and Contentions of the Parties

The basic issue herein is whether Respondent's refusal to arbitrate the council dispute concerning the work performed by Electronics Mechanics and Instrument Mechanics constitutes an unfair labor practice under the Order. 13/

12/ Complainant Exhibit No. 7.

13/ I find that whether or not the council dispute was a continuation or outgrowth of the individual grievances filed with regard to this work is immaterial to the Council's right to pursue the matter qua Council.

Complainant contends that the underlying issue involves "a misassignment" which can properly be processed as a council dispute under Article III of the agreement or as a trade jurisdiction dispute (Article XXVII), neither of which it contends are precluded from arbitration either under the contract or by law or regulation. The Council argues that Respondent's refusal to arbitrate was a unilateral determination and accordingly violated Section 19(a)(1) and (6) of the Order.

Respondent contends that no violation of the Order has been established in that:

(1) the Complaint was untimely filed;

(2) the matter involves a classification dispute which is precluded from arbitration by terms of the agreement and by application of Section 19(d) of the Order in that the matter could have been resolved by an administrative appeals procedure;

(3) Complainant has made no showing of bad faith in Respondent's refusal to arbitrate the matter;

(4) no independent violation of Section 19(a)(1) of the Order can be established under the circumstances of this case; and

(5) in any event a satisfactory offer of settlement under the Order was made which bars any finding of unfair labor practice.

#### IV. Applicable Contract Provisions

##### ARTICLE II

##### Provisions of Law and Regulations

Section 1. It is agreed and understood by the Employer and the Council that in the administration of all matters covered by this agreement, the parties hereto are governed by the provisions of any applicable existing or future laws or regulations of the Federal Government, including but not restricted to those rules and regulations

issued by the Civil Service Commission, the Department of Defense, and the Department of the Navy, including the Naval Ship Systems Command.

\* \* \* \* \*

##### ARTICLE III

##### Rights of Council

\* \* \* \* \*

Section 4. The Council shall have the right and will discuss with the Employer any dispute or issue concerning the interpretation or application of this agreement or any policy, regulation or practice now or hereafter enforced wherein the Employer has discretion. However, any dispute or issue not taken up with the Employer within thirty (30) calendar days subsequent to the circumstances giving rise to the issue shall not be presented or considered. These disputes or issues will be processed in the following manner:

\* \* \* \* \*

Step 3. If a satisfactory settlement has not been reached in Step 2, the Council may present the dispute to the Department Head in writing within ten (10) work days of receipt of the Step 2 decision. Within ten (10) work days after receipt of a request to meet, the Department Head shall arrange to meet with the Council Conference Committee and the Steward in an effort to resolve the matter. The Department Head shall render a written decision within ten (10) work days after the meeting with the Council and such decision if not satisfactory to the Council may be submitted to advisory arbitration in accordance with the arbitration procedures outlined in Article XXIII.

In keeping with the personal nature of matters covered by grievance procedure, grievances (as defined by NCPI 770), can be initiated only by employees as provided for

in Article XXIII. However, the Council has the right to pursue matters of this nature under this section as alleged violations of the agreement which may affect other employees in the Unit.

All time limits herein may be extended by mutual agreement of the Council and the Employer.

\* \* \* \* \*

#### ARTICLE XII

##### Changes in Job and Position Descriptions

\* \* \* \* \*

Section 2. An employee in the Unit, who feels his job is improperly rated or position is improperly classified, shall have the right to appeal in accordance with existing appeal procedures.

\* \* \* \* \*

#### ARTICLE XXIII

##### Grievance and Arbitration Procedures

Section 1. The purpose of this Article is to provide procedures for discussing, considering, deciding and processing grievances, complaints or any alleged violations involving the interpretation or application of this agreement from an employee or employees and to provide for advisory arbitration should it be desired in order to assist in reaching a satisfactory settlement of the grievance of an employee or employees within the Unit.

Section 2. For application in this Article a grievance or complaint is defined as any alleged violation or difference of opinion as to the interpretation or application of personnel policies and practices or the application of the negotiated agreement, or any law, rule or regulation governing civilian personnel matters which

adversely affect the employee personally. Also, any employee's feeling of dissatisfaction of his working conditions and relationships which are outside his control. Identical grievances from more than one employee are included in this definition.

Section 3. Grievances, complaints and appeals resulting from the following types of action are excluded from the provisions of this Article.

\* \* \* \* \*

2. Position classification.

\* \* \* \* \*

7. Ungraded rating determination, wage and pay level determinations and pay alignments.

\* \* \* \* \*

Section 4.

\* \* \* \* \*

Step 3: Within ten (10) work days after receiving the written appeal, the department head will meet with the aggrieved employee and his representative for further discussion and consideration of the grievance or complaint. Within ten (10) work days after the discussion, the employee and his representative will be notified in writing of the department head's decision. If the employee is not satisfied with the decision, he may within ten (10) work days after its receipt, submit to the Commanding Officer an appeal along with the case record and any additional pertinent information for further review and consideration or for submission to arbitration for an advisory recommendation to the Shipyard Commander. The written decision of the Shipyard Commander is not appealable.

Step 4. If the employee desires to submit his grievance through arbitration he must in addition to his written appeal, present a written concurrence

by the Council, together with a written commitment on the part of the Council that the Council will comply with all other terms and conditions, and applicable regulations of higher authority concerning arbitration, including the equal sharing with the Employer in the payment of all costs, fees and disbursements in accordance with applicable regulations; provided that the per diem cost in the Navy Department shall not exceed that authorized in appropriate regulations. The arbitrator shall have no authority to add to, subtract from, or in any way modify the provisions of this agreement.

Section 5. The Employer, or his representative within ten (10) work days after receiving the request for arbitration, will meet with the Council representative to select an arbitrator. If the selection of an arbitrator cannot be agreed upon, then either party may request the Federal Mediation and Conciliation Service to submit the names of five (5) persons qualified to serve as arbitrators. Within ten (10) work days after receiving the names both parties shall meet again to consider them. If no agreement can be reached on the selection of one of the named arbitrators, then each party will strike one name from the list, and then repeat. The remaining name shall be the authorized arbitrator.

\* \* \* \* \*

#### ARTICLE XXVII

##### Trade Jurisdiction

Section 1. The Employer agrees to make work assignments with due consideration among others of past practices in trade jurisdiction.

Section 2. The Employer retains the basic right to assign work in the manner considered best to maintain the efficiency of Shipyard operation. However, in the event a problem arises with respect to trades or craft jurisdiction affecting employees in the unit, the Council may bring such matters to the attention

of appropriate officials of the Employer. The Employer agrees to consider the views and recommendations of the Council in regard to policies and practices relating to assignment of work to the various trades.

\* \* \* \* \*

#### V. Discussion and Conclusions

##### 1. Timeliness of the Complaint

Section 203.2 of the Regulations of the Assistant Secretary in effect at the time the Complaint herein was filed provides "that a complaint to the Assistant Secretary shall not be considered timely unless filed within nine (9) months of the occurrence of the unfair labor practice or within thirty (30) days of the receipt by the charging party of the final decision, whichever is the shorter period of time." It is Respondent's position that its letter to the Council dated November 11, 1972 14/ was a final decision and since the Complaint was not filed until February 15, 1972, the Complaint was untimely. Complainant denies that the letter of November 11 constitutes a final decision under the Order.

The evidence reveals that during the meeting of November 2, 1971, the parties reviewed the background of the dispute and Complainant renewed its request that the dispute go to arbitration and suggested that the parties select an arbitrator. Respondent reiterated its position that it considered the dispute to be one involving position classification which was not a proper subject of a grievance under the terms of the agreement. Respondent suggested that the Complainant advise employees to file a classification appeal in the matter and further advised that in order to resolve the unfair labor practice charge it would undertake to make work audits of the jobs and if warranted take such action as necessary. Joseph Wilkinson, the Facility's Director of Industrial Relations, testified that at the November 2 meeting, Council representatives were told that this offer represented management's "final resolution"

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14/ Complainant Exhibit No. 6.

of the matter 15/ and he presumed that the Council was in agreement with this procedure since the Council subsequently submitted "a list of names" to the Facility. However, Wilkinson further testified that the letter of November 11, 1971 represented management's final decision on the matter.

The letter of November 11, 1971, as reproduced on page 7-8 herein, reflects what transpired during the November 2 meeting and sets forth management's proposal to resolve the matter. However, the letter does not mention the question of the Council's right to proceed to arbitration on the dispute. Nor does the letter indicate that Respondent's position is clearly final. Rather, the Facility merely suggests a course of action (individual job audits) which, inferentially, might preclude a final decision on the arbitrability question. Indeed, the letter is susceptible to the interpretation that after the audits were completed, the Council might again raise the question of its right to have the dispute arbitrated if it was not satisfied with the results of the job audits.

In the procedural scheme of the Regulations of the Assistant Secretary a "final decision" is vitally significant with regard to a party's right to bring an unfair labor practice case before the Assistant Secretary and avail itself to the processes of the Order. Since a final decision may have such far reaching effects a respondent's reply should, at the very least, be clear and unambiguous. 16/ The Facility's reply herein, rather than being clear and unambiguous, is susceptible to various interpretations both as to the finality of its position and whether the reply was, by inference, a rejection of the Council's contention that the matter was arbitrable as a council dispute. In these circumstances 17/ I find that no

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15/ Council President Hugh Bunch testified "I think he did give a final okay decision on the matter. He indicated I would have to get a letter." Bunch also testified that it was at this meeting that the Council "agreed to allow them more time."

16/ Section 203.2(b)(2) of the revised Regulations of the Assistant Secretary requires "a written decision expressly designated as a final decision."

17/ I also note that after Respondent received Complainant's letter of January 26, 1972 (Complainant Exhibit No. 7) it failed to reply and indicate at that time that it had already supplied its "final decision."

- 16 -

"final decision" within the meaning of the Regulations of the Assistant Secretary was ever received by Complainant with regard to its unfair labor practice charge and, accordingly, find that the Complaint herein was timely filed.

## 2. The Dispute under the Contract and Governing Regulations

It is Complainant's position that the dispute in question involves a "misassignment" or "trade jurisdiction" dispute under the contract and neither the contract, regulations nor law precludes the matter from being presented to an arbitrator. Respondent sees the dispute as a "position classification" matter which, it argues, is excluded from consideration as a grievance by Article XXIII of the contract and is also excluded from consideration as a council dispute by Article III of the agreement. Neither "misassignment" nor "position classification" is expressly defined in the contract.

Various witnesses testified as to the meaning "misassignment" and "position classification." Council President Bunch testified that a job misassignment would occur when an employee is assigned duties outside of the scope of the job description for which he was hired. According to Bunch a clear illustration of a misassignment is if a sweeper was assigned the duties of an electrician which situation would also give rise to a trade jurisdiction violation under the contract. Carlton Jernigan, Personnel Management Specialist, Industrial Relations Office, Norfolk Naval Shipyard, testified that disputes involving position classification are rating determinations and would begin when an employee feels either his rating, his title series or pay level is contrary to the duties assigned to him. William Bunting, Group Superintendent, Electrical and Electronic Shop testified that a misassignment and a misclassification matter were "somewhat the same." Respondent contends that if there were elements of position classification and misassignment involved in the situation, the matter would not be grievable because a statutory appeals procedure was available to resolve the controversy. However, Respondent acknowledged that if the issue was purely a misassignment situation it would be possible for the Council to file a grievance on that matter.

Respondent, after concluding that this situation presents a question of position classification, argues that Article III

- 17 -



of the negotiated agreement when read together with Article XXIII and Navy Civilian Personnel Instruction (NCPI) 770 18/ and its successor precludes the Council from filing a dispute on this matter. The provisions of Article XXIII closely tract NCPI 770 relative to the types of matters that will not be considered grievances such as position classification questions, ungraded rating determinations, wage determinations and pay adjustments. Respondent contends that its policy in this regard is consistent with and flowed from the authority of Chapter 771 of the Federal Personnel Manual which was in effect at the time the contract was negotiated. 19/ Respondent further argues that Article III, Section 4, Step 3 of the contract by its express references to Article XXIII and NCPI 770 places the same limitations on the Council that are imposed on individual employees with regard to filing grievances. To support this conclusion Allen Meyers, Labor Advisor, Department of the Navy testified that during the negotiations which gave rise to the contract there were protracted discussions with regard to Articles III and XXIII and there was no intent to extend a greater right to the Council than those rights possessed by the employees it represented. Meyers stated it was clearly understood during negotiations that council disputes would only pertain to those matters which involved the Union as an entity separate and apart from the employees. Some examples of matters the Council could pursue under Article III, according to Meyer, are questions involving the Council's right to have stewards; disputes relating to apprentice programs, training, or wage surveys; and union representation on safety, incentive award or United Fund Campaign committees. However, in

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18/ NCPI 770 (Respondent Exhibit No. 3) sets forth the regulations and procedures for processing appeals, grievances and complaints of civilian employees of the Department of the Navy. Position classification appeals are specifically excluded from consideration as a grievance under this regulation.

19/ Respondent Exhibit No. 2.

- 18 -

response to a question concerning the second sentence in Article III, Section 4, Step 3, second paragraph 20/ Meyers responded that there was a great deal of discussion with regard to Article III in general and "the two parties recognized that there were individual interests in actions taken by the employer that the Union as the other party had a right to enforce by its own right against the employer even though they as a matter of fact had a personal impact on individuals." Meyers also testified that he had no recollection as to whether "mis-assignment" was ever discussed in connection with the Council's rights under this Article or at any other time during negotiations.

In sum, Respondent concludes that since an individual could not file a grievance on a position classification matter neither could the Council. Respondent contends that employee position classification and pay category appeals may only be processed under NAVSHIPYDNOR Instruction 12531.6 21/ which provides procedures for the resolution of such matters by the Navy's Office of Civilian Manpower Management or the Civil Service Commission.

Complainant, in sum, argues that by the terms of the agreement an individual is not precluded from filing a grievance on misassignment and if an individual may file such a grievance so may the Council under its interpretation of Article III of the agreement where, as here, the matter affects other employees. Complainant also contends that NAVSHIPYDNOR Instruction 12531.6 supports its position that the dispute in question could not be resolved through a position classification appeal by its analysis and interpretation of the procedures and examples set forth in that regulation. 22/ Complainant concludes that an appellant in a position classification appeal desires to have a position established or changed while Council herein requests that employees be assigned only to duties within their trade. Therefore, according to Complainant a position classification appeal would not be the proper vehicle to resolve a misclassification dispute.

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20/ "However, the Council has the right to pursue matters of this nature under this section as alleged violations of the agreement which may affect other employees in the Unit."

21/ Respondent Exhibit No. 12.

22/ Ibid.

- 19 -

Complainant further argues that the instant matter can be considered a trade jurisdiction dispute under Article XXVII of the agreement and such a dispute is appropriate for proceeding to arbitration under Article III. Complainant contends that Electronics Mechanics and Instrument Mechanics are two different trades and to support this argument Complainant points to the existence of two separate job definitions 23/ and the Navy's own regulations which list Electronics Mechanic and Instrument Mechanic as two separate trades authorized for apprenticeship in the Department of the Navy. 24/ Further, William Bunting, Group Superintendent of the Electrical and Electronics Shop testified that Electronics Mechanics and Instrument Mechanics are two separate trades noting, however, that the work may be similar and that the jobs are closely related.

Respondent counters that this case does not present a trade jurisdiction dispute within the meaning of Article XXVII of the agreement. Labor Advisor Meyers testified that during the 1967 negotiations with regard to Article XXVII "it was the intention here to address ourselves to the rivalry between unions and trades; for example, the installation of stud welding by shipwrights aboard ship by shipboard personnel as opposed to welders. This is the kind of a situation this was addressing itself to." 25/ However, Meyers also testified that during the negotiations no discussions occurred regarding the positions encompassed by the term craft or trade or a definition thereof.

Respondent argues that even if Complainant presented a trade jurisdiction dispute under Article XXVII, by its own interpretation of the language of Section 2 of that Article, the matter would be neither grievable nor arbitrable. It would

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23/ Complainant Exhibit Nos. 8 and 9.

24/ Complainant Exhibit No. 14.

25/ The Council is an amalgam of some twenty different labor organizations including locals of the International Brotherhood of Electrical Workers, Pipefitters, Operating Engineers, Machinists, Boilermakers, Patternmakers, Planners and Estimators, and Pipe Coverers.

conclude that the responsibility of management extends only to consultation with the Council if such a dispute arose. Respondent adverts to the testimony of Council President Bunch wherein in response to a question as to what obligation he felt the employer was under in Section 2, Bunch replied "I feel the employer should meet to consult with us." However, Bunch also testified that there is nothing in Article XXVII, which precludes taking this type of dispute to arbitration.

From a review of the terms of the Order it is readily apparent that arbitration as a dispute settling mechanism is considered rather important in the scheme of collective bargaining relations in the Federal sector. Indeed, the Assistant Secretary expressed this conviction in Long Beach Naval Shipyard A/SILMR No. 154, when he stated "In my view, such an advisory arbitration provision constitutes an invaluable tool for promoting labor relations harmony in the Federal Service." When the contract herein was negotiated the parties subscribed to this concept when they agreed, at least in principle, that the machinery of advisory arbitration would be available to assist them in the satisfactory settlement of their controversies. Article III, Section 4 of the agreement broadly sets forth the right of the Council to discuss and ultimately take to advisory arbitration disputes or issues "concerning the interpretation or application of this agreement or any policy, regulation or practice now or hereafter enforced wherein the employer has discretion." Nowhere in the contract is Respondent given the right to unilaterally determine what is arbitrable.

A resolution of this matter requires an assessment of the nature of the dispute (misassignment or position classification) and the Council's rights under the agreement. Accordingly, the meaning and application of the agreement lies at the heart of the controversy. It appears that this is the very type of matter in which the assistance of an arbitrator would be not only highly desirable but is envisioned in the grievance-arbitration provisions of the contract. However, notwithstanding its contractual agreement to seek the advice of an arbitrator when such controversies arise, Respondent now seeks to circumvent the terms of the agreement by unilaterally determining what is arbitrable based upon its independent assessment of the situation and its own interpretation of the agreement. Such conduct

is tantamount to unilaterally modifying substantial terms of the contract, which terms are basic to the Council's representational rights, responsibilities and effectiveness.

In Long Beach Naval Shipyard (supra) the Assistant Secretary stated "If such arrangements (provisions for advisory arbitration) are to be effective, . . . they must be honored by the parties to the fullest extent possible. Thus, where an arbitration clause in the negotiated agreement permits either party to seek arbitration, to permit either party to the agreement to determine the question of arbitrability unilaterally would, in effect, 'render useless the establishment of bilateral grievance and arbitration machinery'." (Citing Veterans Administration Hospital, Charleston, South Carolina, A/SLMR NO. 87.) Respondent's conduct in unilaterally determining the arbitrability of the council dispute herein certainly does not demonstrate that it has "honored . . . to the fullest extent possible" the terms of its agreement with Complainant.

I do not conclude that all refusals to arbitrate in any situation would constitute a violation of the Order. However, in the instant case it has not been shown that the Council under the contract or relevant regulations is clearly precluded from proceeding to arbitration in this matter. Nor has it been shown that the Council's request for arbitration is grounded on frivolous or specious reasons. Rather, the Council's position is based on a reasonable and arguable interpretation of the contract. Accordingly, in all the circumstances I find Respondent's conduct to be in derogation of its obligation to consult, confer, or negotiate and therefore violative of Section 19(a)(6) of the Order. 26/

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26/ Due to the substantial differences between collective bargaining in the Federal service and the private sector under the Labor-Management Relations Act, as amended (LMRA), I do not find persuasive LMRA case law relative to refusals to arbitrate. Thus, in the Federal service rights and obligations are regulated by executive order as opposed to statute and unlike the private sector, Federal employees may not engage in self-help through strikes. Moreover, Section 301 of the LMRA provides that suits may be brought in Federal district courts for violations of contract. No similar specific authorization is provided in the Federal sector.

I further find that Respondent's action with regard hereto demeans the Council in the eyes of the unit employees and conveys to the employees the impression that union representation is futile thereby discouraging membership in the Council. Accordingly, I find that Respondent has, under all the circumstances, violated Section 19(a)(1) of the Order by interfering with, restricting and coercing its employees in the exercise of rights assured by the Order.

Respondent asserts that a refusal to arbitrate is not violative of the Order in the absence of "bad faith" and that "the crucial determination here is whether or not the Respondent acted in good faith . . ." However, the Assistant Secretary stated in U.S. Army School/Training Center, Fort McClellan, Alabama, A/SLMR NO. 42, p. 7 ". . . in the processing of grievances pursuant to a negotiated grievance procedure, good faith is not demonstrated where . . . an activity informs the exclusive representative that a grievance has been decided not on the basis of the undertakings of the grievance procedure, but on the activity's own personal judgment." Accordingly, in the circumstances of this case I find that Respondent's conduct in unilaterally determining the arbitrability of the council dispute does not support its claim that it acted in good faith in this matter. 27/

### 3. Other Matters

According to Respondent, no independent violation of Section 19(a)(1) of the Order can be found herein since the Facility's refusal to arbitrate occurred prior to November 24, 1971, the effective date of E. O. 11616, which amended E. O. 11491. Respondent argues that when the refusal to arbitrate occurred, the unamended Order was in effect and Section 19(d) of that Order barred any Section 19(a)(1) action which could be resolved by "an established grievance or appeals procedure." 28/

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27/ See Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, p. 7.

28/ Section 19(d) of the unamended Order provides in relevant part: "When the issue in a complaint of an alleged violation of paragraph (a)(1) . . . of this section is subject to an established grievance or appeals procedure that procedure is the exclusive procedure for resolving the complaint."

Respondent contends that the position classification appeals procedure referred to above satisfies the mandate of Section 19(d) of the unamended Order.

Respondent's position is based on the unwarranted assumption that the underlying dispute clearly and unquestionably presents a position classification issue. Indeed, the Council vigorously contests this conclusion. Further, position classification appeals procedures cannot resolve the question of the Council's right to request arbitration under the contract. Moreover, I find that Respondent's unilateral determination of the arbitrability of the dispute (and resulting refusal to arbitrate) is a continuing violation of the Order which persisted after the effective date of the amended Order and, indeed, continues until remedied. Accordingly, I find that Section 19(d) of the unamended Order is no bar to the action herein.

Respondent also urges that this Complaint should be dismissed in that Respondent submitted a satisfactory offer of settlement within the meaning of Section 203.7(a) of the Regulations of the Assistant Secretary. <sup>29/</sup> In a meeting between the parties conducted on July 10, 1972, Respondent made an offer to settle the unfair labor practice case, which offer Complainant rejected. By letter to Complainant dated 13 July 1972 the Facility restated its offer of settlement.<sup>30/</sup> That letter states as follows:

On 10 July 1972 the Metal Trades Council Committee met with the representatives of the shipyard on the matter of your unfair labor practice charge pending before the U.S. Department of Labor. This case (No. 22-3025(CA)) claims that the shipyard refused to arbitrate on a matter which concerned the classification of duties performed by Messrs. W. V. Piland, J. D. Hilliard and J. D. Duncan.

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<sup>29/</sup> Section 203.7(a) of the Regulations in effect in July 1972 provides in relevant part: "If the Regional Administrator determines . . . that a satisfactory offer of settlement has been made, he may request the complainant to withdraw the complaint or in the absence of such withdrawal within a reasonable time, he may dismiss the complaint."

<sup>30/</sup> Respondent Exhibit No. 7.

Because this has obviously become a matter of a real difference of opinion, my representatives offered on 10 July to go to arbitration on the threshold question. That is, they offered to present to arbitration the question as to whether the matter regarding Messrs. Piland, Hilliard and Duncan is grievable and thus arbitrable under the terms of our agreement and existing regulations. The shipyard's offer therefore is for the Metal Trades Council and shipyard to seek an arbitrator's opinion as to whether or not the matter is arbitrable.

As this question has been pending for some time I urge you to accept the remedy we have offered. I would appreciate your written response at your earliest convenience.

By letter dated July 24, 1972, Complainant rejected the Facility's offer. <sup>31/</sup>

The clear implication of Section 203.7(a) of the Regulations is that any offer of settlement must be made to the Regional Administrator for his approval and he is authorized to act accordingly. There is no evidence of submission to or action by the Regional Administrator on any offer of settlement in this case. Further, the evidence reveals that Respondent's offer went only to the question of whether the grievance of Messrs. Piland, Hilliard, and Duncan was grievable and thus arbitrable. It is apparent therefore that the Facility was willing to have only the question of the grievability and arbitrability of the individual employees' grievance decided by an arbitrator and not the matter which gave rise to the Complaint--the arbitrability of the council dispute. Accordingly, for the foregoing reasons, I find no merit to Respondent's contention relative to having submitted a "satisfactory offer of settlement."

#### Remedy

In sum, I have found that Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral determination

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<sup>31/</sup> Respondent Exhibit No. 8.

with regard to the arbitrability of the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics. To order Respondent to merely arbitrate the question of the arbitrability of the dispute would not afford a complete remedy in this matter since, if the matter was found to be arbitrable and nothing more, the underlying dispute would still be unresolved. If the arbitrator found the dispute was arbitrable Complainant would then be forced to file another dispute in order to obtain a final resolution of the matter. Such a needless procedure with the attendant time and expenses involved would not be in furtherance of the policies of the Order. Accordingly, I am recommending that, upon request, the entire matter be submitted for advisory arbitration at which time Respondent can put forth its defense with regard to the arbitrability of the dispute, if it so desires.

#### Recommendations

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

#### Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Norfolk Naval Shipyard shall:

1. Cease and desist from:

a. Unilaterally determining the arbitrability of the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics) pursuant to its negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

b. Interfering with, restraining or coercing its employees by unilaterally determining the arbitrability of the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics) pursuant to its negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

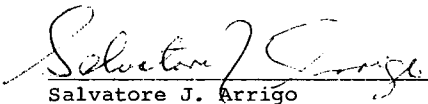
c. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

a. Upon request proceed to advisory arbitration on the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronics).

b. Post at its Norfolk Virginia Facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

c. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.

  
Salvatore J. Arrigo  
Administrative Law Judge

DATED: May 16, 1973

## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally determine the arbitrability of the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronic) pursuant to the negotiated agreement with the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO.

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 Executive Order.

WE WILL, upon request, proceed to advisory arbitration on the council dispute concerning the work assignments of Electronics Mechanics and Instrument Mechanics (Electronic).

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor, whose address is Room 1012 Penn Square Building, 1317 Filbert St., Philadelphia, Pennsylvania 19107.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMC AMMUNITION CENTER,  
SAVANNA, ILLINOIS  
A/SLMR No. 291

This case, involving a representation petition by the Government Employees Assistance Council, Incorporated, also known as Government Employees Assistance Council (GEAC), presented the question whether employees of the Army Materiel Command (AMC) Ammunition Center (Center) constituted a separate unit, or whether they shared a community of interest with employees of the Savanna Army Depot (Depot), currently represented by Local R7-36, National Association of Government Employees (NAGE), the exclusive representative.

Prior to July 1971, employees of the Center were employed by the Depot in what was then the Special Missions Directorate and they were included in the existing exclusively recognized unit. Pursuant to a reorganization, the Center was established as a separate command entity and became a tenant of the Depot. Thereafter, GEAC filed two petitions; one for a unit of employees of the Depot and one for employees of the Center. In Savanna Army Depot, Savanna, Illinois, A/SLMR No. 228, the Assistant Secretary dismissed the petition relating to the Depot based on the existence of an agreement bar. Also, he remanded the instant petition to the appropriate Regional Administrator for further hearing.

The Assistant Secretary found, in all of the circumstances, that employees of the Center did not have a community of interest separate and distinct from employees of the Depot. In this regard, the following factors and circumstances were noted: a majority of the employees transferred to the Center previously were assigned to the Special Missions Directorate of the Depot and, currently, perform job functions similar to those previously performed; the Civilian Personnel Officer of the Depot is responsible for personnel matters involving both the Center's and Depot's employees, including labor relations and grievance matters; certain vacancies are posted locally on bulletin boards in both the Center and Depot and applicants are ranked without regard as to where they are employed; employees of both the Center and Depot use the same eating facilities, are served by the same credit union and receive treatment from the same health clinic; and certain Depot and Center employees work in the same buildings at the Depot.

Based on these factors, the Assistant Secretary found that employees of the Center shared a community of interest with employees of the Depot and have remained in the exclusively recognized unit

subsequent to the reorganization. In this regard, and because the current negotiated agreement was found to constitute a bar with regard to the Depot employees in A/SLMR No. 228, the Assistant Secretary found that this agreement also constituted a bar to the petition in the subject case. Accordingly, he ordered that the instant petition be dismissed.

A/SLMR No. 291

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMC AMMUNITION CENTER,  
SAVANNA, ILLINOIS

Activity

and

Case No. 50-8197

GOVERNMENT EMPLOYEES ASSISTANCE  
COUNCIL, INCORPORATED, ALSO KNOWN  
AS GOVERNMENT EMPLOYEES ASSISTANCE  
COUNCIL

Petitioner

and

LOCAL R7-36, NATIONAL ASSOCIATION  
OF GOVERNMENT EMPLOYEES

Intervenor

SUPPLEMENTAL DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Elmer R. Sims. Thereafter, on December 18, 1972, the Assistant Secretary issued a Decision, Order, and Remand 1/ in which he dismissed the petition in Case No. 50-8195 covering employees of the Savanna Army Depot and remanded the subject case to the appropriate Regional Administrator to reopen the record for the purpose of securing additional evidence concerning the appropriateness of the unit sought. On April 3, 1973, a further hearing was held before Hearing Officer John R. Lund. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed. 2/

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1/ A/SLMR No. 228.

2/ In the absence of objections, the Petitioner's post hearing motion that its Exhibit #1, initially rejected by the Hearing Officer, be admitted into evidence is granted, and, accordingly, it has been considered in reaching the decision herein.

Upon the entire record in this matter, including the facts developed at the hearings held both prior and subsequent to the remand, and the brief submitted by the Petitioner, Government Employees Assistance Council, Incorporated, also known as Government Employees Assistance Council, hereinafter called GEAC, I find:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The GEAC seeks an election in the following unit: All non-supervisory and nonprofessional Class Act (GS) and Wage Grade (WG) employees of the U.S. Army Materiel Command (AMC) Center, Savanna, Illinois, excluding all ammunition inspector surveillance personnel and trainees, and all management officials, supervisors, guards, and those personnel excluded by Section 10(b)(1)(2)(3) and (4) of Executive Order 11491, as amended.

The Activity agrees with the GEAC that the claimed unit is appropriate. On the other hand, the Intervenor, Local R7-36, National Association of Government Employees, herein called NAGE, takes the position that the employees in the petitioned for unit do not share a community of interest separate and apart from the employees of the Savanna Army Depot, hereinafter called the Depot. In this regard, it contends that the creation of the AMC Center, hereinafter called the Center, in Savanna, Illinois, involved merely a paper reorganization and that the employees of the Center remain in an existing exclusively recognized unit with the Depot employees and are covered by a negotiated agreement which bars the petition in the subject case.

Prior to July 1, 1971, the employees of the Center were part of what was then known as the Special Missions Directorate of the Savanna Army Depot. 3/ On that date, pursuant to a reorganization, the Center was established as a separate command entity and became a tenant of the Depot located on the Depot's property. The former director of the Special Missions Directorate at the Depot was named Director of the Center. The record reveals that some 100 of the approximately 140 employees now employed at the Center were employed by the Depot before the reorganization occurred. Further, while several new functions were assigned to the Center in addition to the Special Missions functions subsequent to the reorganization, previous functions performed prior to the reorganization were retained by the Center.

The Center is one of a number of centers within the U.S. Army providing various services to U.S. Army Depots, including the Savanna Army Depot. Since the reorganization, the Director of the Center and the Commanding Officer of the Depot report independently to the Deputy Commanding General for Logistics Support (DCGLS), while prior to the reorganization, the

3/ Prior to July 1, 1971, employees of the Special Missions Directorate were represented exclusively by the NAGE in the same unit with other Depot employees.

then director of the Special Missions Directorate was under the administrative control of the Commanding Officer of the Depot. The record reveals that the Center employees are located in 6 buildings 4/ at the Savanna Army Depot base, 2 of which also house Depot employees. While employees of the Depot do not work alongside employees of the Center, the record reveals that 4 Depot WG employees are assigned to work directly for the Center, 1 Depot janitor cleans the Center's nuclear weapons area during the daytime, and Depot electricians, carpenters, and plumbers are available to perform services for the Center as provided for in the Interservice Support Agreement between the Depot and the Center.

The record reveals also that the Civilian Personnel Officer (CPO) of the Depot is responsible for personnel matters involving both the Center's and the Depot's employees. In this regard, the CPO handles labor relations matters for the Depot and its tenants, including the Center, and acts as a consultant to the Center in instances where grievances have been filed by Center employees. The evidence establishes that since the reorganization, clerical employees have transferred from the Depot to the Center. Additionally, while certain vacancies at the Center must be referred for review to Headquarters, AMC, before they are filled, certain other vacancies are posted locally on bulletin boards in both the Center and the Depot, and applicants are ranked without regard as to whether they are employed at either the Center or the Depot. Moreover, employees of both the Center and the Depot use the same eating facilities, are served by the same credit union, and receive treatment from the same health clinic, which is another tenant of the Depot.

Under all of the circumstances, I find that the Center employees do not have a community of interest that is separate and distinct from the Depot employees. Thus, the record reflects that although the Center was made a separate entity on July 1, 1971, a majority of the employees transferred to the Center previously were assigned to the Special Missions Directorate of the Depot and, as such, were within the established bargaining unit at that facility. The record reflects also that these employees currently are performing job functions similar to those previously performed by the Special Missions Directorate of the Depot. Additionally, the Depot CPO performs services for the Center in connection with its personnel policies, including labor relations and grievance matters. Moreover, certain vacancies for promotions are posted in both the Depot and the Center and candidates are ranked without regard to where they are employed; Depot and Center employees are served by the same health clinic and credit union, and use the same eating facilities; and certain Center and Depot employees work in the same buildings at the Depot.

4/ The Interservice Support Agreement between the Depot and the Center, executed July 23, 1971, lists 15 buildings assigned to the Center, as well as warehouse space. It appears that several of the buildings are not now in use but will be available if they are needed at some future date.



July 25, 1973

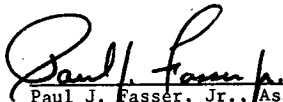
UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Based on the foregoing factors, I find that the Center employees share a community of interest with the Depot employees and have, in effect, remained in the exclusively recognized unit subsequent to the reorganization of July 1971. In this connection, it should be noted that in the Savanna Army Depot, Savanna, Illinois, A/SLMR No. 228, the Assistant Secretary found that the negotiated agreement between the NAGE and the Depot constituted a bar to the petition in Case No. 50-8195 relating to the Depot employees. In view of the above determination that the Center employees have remained in the exclusively recognized unit and that they, together with the Depot employees, constitute an appropriate unit, I find that the current negotiated agreement, which was found to constitute a bar to the petition in Case No. 50-8195, also constitutes a bar to the petition in the subject case. Accordingly, I shall order that the subject petition be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-8197 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 25, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

5/ In view of the disposition herein, I find it unnecessary to make any finding as to the status of employees of the other tenants of the Depot.

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO  
CLYDE WEBBER, NATIONAL PRESIDENT

NINTH DISTRICT, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
KERMIT I. TULL, NATIONAL VICE-PRESIDENT

LOCAL 916, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
LOWELL MALLOY, PRESIDENT  
A/SLMR No. 292

This case resulted from a complaint filed by Claud Nance alleging that the American Federation of Government Employees (AFGE) had violated Section 204.2(a)(5) of the Standards of Conduct Regulations implementing Section 18 of Executive Order 11491, as amended, by removing him from membership in Local 916 without a hearing.

The Complainant, upon his retirement from the United States Post Office, was employed by the AFGE as a National Representative. He was assigned to organize employees at Tinker Air Force Base in Oklahoma City, Oklahoma, where he was elected to honorary membership in Local 916. Subsequently, he applied for retired membership in Local 916 and was accepted in an en masse admission of new members. When the district and national AFGE leadership learned of his admission into membership in Local 916, the Local was ordered to drop his name from the membership rolls. The reason stated was that he did not meet the qualifications for membership in the national or the local constitution since he had never worked under the jurisdiction of the AFGE. The Complainant's name was eventually removed from the local's membership rolls.

The Administrative Law Judge concluded that Section 204.2(a)(5) of the Regulations which prohibits the expulsion or other discipline of a union member, except for nonpayment of dues, without following prescribed procedures, applies only to union members who are Federal employees. He therefore recommended that the complaint be dismissed since the Complainant was not at any relevant time an employee of the Federal Government. The Assistant Secretary agreed with the recommendation to dismiss, but found that while other sections of the Executive Order cover only Federal employees, Section 18 is not so limited because it deals with the conduct of labor organizations subject to the Order and the rights of members of such organizations.

The issue in this case, the Assistant Secretary concluded, was whether the Complainant was a bona fide member of AFGE Local 916 and therefore entitled to a hearing to determine whether his name should be removed from the membership rolls. The evidence indicated that the Complainant was erroneously accepted as a dues paying member in violation of the membership requirements in the local and national constitutions. There was no convincing evidence that the membership requirements were not uniformly applied. The Complainant's honorary membership in Local 916 carried with it none of the rights or responsibilities of a member and did not entitle him to the protection in Section 204.2(a)(5) of the Regulations.

Since the Complainant was not a bona fide member of Local 916, he was not entitled to bring an action under Section 204.2(a)(5), and the Assistant Secretary, therefore, dismissed the complaint.

A/SLMR No. 292

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO  
CLYDE WEBBER, NATIONAL PRESIDENT

NINTH DISTRICT, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
KERMIT I. TULL, NATIONAL VICE-PRESIDENT

LOCAL 916, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
LOWELL MALLOY, PRESIDENT

Respondents

and

Case No. 63-3250

CLAUD NANCE

Complainant

DECISION AND ORDER

This proceeding, under Section 18 of Executive Order 11491, as amended, and Part 204, Chapter II, Code of Federal Regulations, Standards of Conduct for Labor Organizations, arose as a result of a complaint filed with the Dallas Area Administrator of the Labor-Management Services Administration by Claud Nance against the American Federation of Government Employees (AFGE) on December 28, 1971, alleging a violation of Section 204.2(a)(5) of the Regulations. <sup>1/</sup>

On March 9, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendations. He recommended that the complaint be dismissed on the ground that the Standards of Conduct Regulations protect only the rights of union members who are Federal Government employees and since the Complainant was not a Federal employee at any relevant time he had no rights under Section 204.2(a)(5).

<sup>1/</sup> Section 204.2(a)(5) provides as follows: "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues by such organization or by any officer thereof unless such member has been (i) served with written specific charges; (ii) given a reasonable time to prepare his defense; (iii) afforded a full and fair hearing."

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I adopt the recommendation of the Administrative Law Judge that the case be dismissed but on different grounds as indicated below.

#### FACTS

The Complainant was employed by the United States Post Office for thirty-eight years as a letter carrier. He was an active member of the National Association of Letter Carriers (NALC) and when he retired from the Post Office he retained his membership in the NALC as a retired employee. He was never employed in a bargaining unit represented by the AFGE.

After his retirement from the Post Office, the Complainant was employed by the AFGE as a National Representative and was assigned to organize employees at Tinker Air Force Base in Oklahoma City, Oklahoma. He was highly successful and Local 916 elected him to honorary membership in May 1966 in appreciation for his organizing efforts.

On April 1, 1970, the Complainant submitted an application for retired membership in Local 916. He described himself on the application as a "Retired Federal Worker" and was accepted in an en masse admission of new members at the next membership meeting of the Local where the names of the applicants were not read to the membership. He paid the annual dues of three dollars as a retired member for that year and again the following year.

The Complainant, in his position as a National Representative, had a number of disagreements with then AFGE President Griner, and on June 1, 1971, President Griner wrote him terminating his employment with AFGE effective June 7, 1971. On June 8, 1971, Kermit I. Tull, AFGE Ninth District Vice-President, wrote to Mr. N. J. Nance, President of Local 916 informing him that he had just learned that the Complainant was paying dues as a retired member of the Local, and that Complainant was ineligible for membership in the AFGE under the provisions of the National Constitution. On June 30, 1971, Mr. N. J. Nance wrote the Complainant informing him that he was ineligible for membership and that his name had been removed from the membership rolls. At the July 6, 1971, membership meeting the Parliamentarian for the Local stated that in his opinion the Complainant was eligible for membership and a motion was passed to sustain the membership of the Complainant as long as he paid his dues and remained a member in good standing. Immediately afterwards, Mr. N. J. Nance requested an interpretation from the AFGE national office of the National Constitution provisions concerning eligibility for membership. National President Griner informed him in a letter of July 13, 1971, that the Complainant was not eligible for membership and ordered him to drop the Complainant's name from the local's membership rolls and to refrain from any similar error in the future in accepting applicants for membership. At the

-2-

August 3 membership meeting of Local 916 a motion to declare President Griner's letter null and void carried. In an August 7, 1971, letter to Mr. N. J. Nance, National President Griner stated that the AFGE National Executive Council had voted to support him in his interpretation of the National Constitution that the Complainant was not eligible for membership and that the Local would be placed under trusteeship if it did not immediately take positive action to comply with the Constitution. The Local Executive Council then voted to drop the Complainant from the membership rolls.

On September 3, 1971, the Complainant filed a complaint in United States District Court and was granted a preliminary injunction prohibiting the Union and its officers from depriving him of any of the rights of membership. This injunction was dissolved on November 24, 1971, and the complaint dismissed for lack of jurisdiction of the subject matter. On December 28, 1971, the Complainant filed his complaint in this matter with the Dallas Area Administrator of the Labor-Management Services Administration. He alleged that he had legal membership in Local 916 and that the action of the Local 916 Executive Board in removing his name from membership rolls violated Section 204.2(a)(5) of the Standards of Conduct Regulations.

#### ISSUES

In the Administrative Law Judge's view the issue was whether Section 204.2(a)(5) of the Regulations, prohibiting the expulsion or other discipline of a union member except for nonpayment of dues, without following prescribed procedures applies to a union member who was not at any relevant time an employee of the Federal Government. He concluded that it did not, finding that Section 204.2(a)(5) was intended as a protection of Government employees rather than as a more general regulation of unions that represent Government employees regardless of whether the particular conduct involves a Government employee.

I do not agree with the Administrative Law Judge's broad conclusion that members who are not Federal employees are not entitled to the protection of Section 204.2(a)(5). Section 204.2 "The Bill of Rights of members of labor organizations" is part of the Standards of Conduct Regulations which were adopted pursuant to Section 18 of the Executive Order. While other sections of the Executive Order cover only Federal employees, Section 18 is not so limited because it deals with the conduct of labor organizations subject to the Order and the rights of members of such organizations.

It is my conclusion that the issue in this case is whether the Complainant was a member of AFGE Local 916 and therefore entitled to a hearing to determine whether his name should be removed from the membership rolls. The Union contended that he was never a bona fide member of the Union because he had never met the qualifications for membership in either the AFGE National Constitution or the constitution of Local 916

-3-

and that the action of the Local in admitting him as a retired member and accepting his dues for two years was an error. The Complainant contended that any question about his eligibility should have been raised at the time he was accepted as a retired member by the Local and that after having paid his dues for two years he was a member with all the rights of a member under the Bill of Rights.

In a hearing alleging a violation of the Bill of Rights the burden of proof is on the Complainant (Sections 204.62 and 203.14 of the Regulations) and I find that the Complainant has failed to meet that burden. The record, taken as a whole, indicated that it was because of the laxity of admission procedures in Local 916, that the Complainant was erroneously accepted as a dues paying retired member. He was not eligible for membership in Local 916 because he had never been an employee of Tinker Air Force Base. 2/ Furthermore, he did not meet the requirements for membership contained in Article III, Section 1 of the AFGE National Constitution since all his Federal employment had been under the jurisdiction of the National Association of Letter Carriers, AFL-CIO. 3/ The Complainant contended that he did meet these qualifications because the Parliamentarian of Local 916 ruled that he was eligible for membership in the AFGE at the moment of his retirement because he was then no longer in a bargaining unit under the jurisdiction of the NALC. However, unless clearly arbitrary or unreasonable, the interpretation of the membership provisions in the National Constitution by the National President and National Executive Council, who found that Complainant was not eligible for membership, must take precedence over any decision by the Local

2/ Article III, Sections 1 and 2 of the Constitution of Local 916 state: "All Civilian employees, including those paid from both appropriated and nonappropriated funds, of Tinker AFB, Oklahoma are eligible for membership. Any person who at the time of being separated without prejudice from employment at Tinker AFB was a member in good standing of Local 916 is eligible for membership."

"Retired persons who have not had a lapse for more than any consecutive six month period are eligible for membership. Dues for such persons will be equal to the per capita tax for such persons."

3/ "All persons of the following classes, without regard to race, creed, color, national origin, or sex excepting those over whom jurisdiction has been granted to other national or international unions by the American Federation of Labor and Congress of Industrial Organizations, shall be eligible to the full rights and privileges of membership of this Federation.

"(a) All Civil employees of the United States Government and the District of Columbia are eligible for membership in this Federation.

"(b) Any person who at the time of being separated without prejudice from employment covered by Subsection (a), was a member in good standing of any local in this Federation; or any person who was eligible for membership in this Federation at the time of retirement."

-4-

Parliamentarian. 4/ Article III, Section 3 of the AFGE National Constitution states, in part, that "Locals shall have full power to elect or reject applicants for membership." However, Article III, Section 1 of the National Constitution establishes qualifications for membership in the AFGE and the acceptance of applicants for membership by locals may properly be conditioned on the applicants meeting those eligibility requirements.

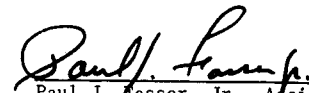
These membership requirements must, of course, be uniformly applied nationally throughout the organization. The Complainant alleged at the hearing that the membership requirements were loosely and unevenly applied and he named one individual who, he alleged, had never been a Federal employee when he was first elected to national union office. However, other testimony indicated that an AFGE convention found this individual ineligible to be a member or an officer, and that he subsequently did obtain Federal employment before he was again elected to office. Therefore, I must conclude that the record does not support the allegation that the Complainant was being discriminated against when national officers required that Local 916 drop his name from the membership rolls.

The Complainant's honorary membership in Local 916 does not entitle him to the protection of Section 204.2(a)(5). In my view, a person who has an honorary membership in a labor organization which carries with it none of the rights and responsibilities of a member is not a member within the meaning of that term as used in the Standards of Conduct. Since the Complainant had never fulfilled the requirements for membership in the AFGE, I find that he does not meet the definition of a "member" as used in the Standards of Conduct, and thus has no rights under Section 204.2(a)(5).

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-3250 be, and it hereby is dismissed.

Dated, Washington, D.C.  
July 25, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

4/ Article III, Section 6 of the Constitution of Local 916 states: "The Constitution and bylaws of AFGE Local 916 shall not be inconsistent with the National Constitution of the American Federation of Government Employees. In the event of a dispute, the question at issue will be submitted to the National Executive Council whose decision shall be final and binding on the officers and members of the Local."

-5-

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 63-3250

American Federation of Government  
Employees, AFL-CIO  
John F. Griner, National President

Ninth District, American Federation of  
Government Employees, AFL-CIO  
Kermit I. Tull, National Vice-President

Local 916, American Federation of  
Government Employees, AFL-CIO  
Lowell Malloy, President  
Labor Organizations

and

Claud Nance  
Complainant

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Claud Nance  
1228 N. W. 36th Street  
Oklahoma City, Oklahoma 73118  
Pro Se

Raymond J. Malloy, Esquire  
American Federation of Government Employees, AFL-CIO  
1325 Massachusetts Avenue, N. W.  
Washington, D. C. 20005  
For the Respondents

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 63-3250

American Federation of Government  
Employees, AFL-CIO  
John F. Griner, National President

Et al., Respondents

and

Claud Nance  
Complainant

Report and Recommendation

Statement of the Case

This case arises under Section 18 of Executive Order 11491 and Part 204 of the Assistant Secretary's Regulations, "Standards of Conduct," (29 CFR Ch. II, Part 204) adopted pursuant thereto. The Area Administrator treated two documents written by Complainant as the complaint in this case. One was an undated letter from the Complainant to the Area Administrator, captioned "A Complaint and a Request," which was filed December 28, 1971. The other was a memorandum dated December 28, 1971 from the Complainant Claud Nance to N. J. Nance, former President of Respondent Local 916, a copy of which was sent to the Area Administrator. These allege that Complainant was improperly dropped from membership in Local 916. On January 20, 1972 Complainant wrote another letter to the Area Administrator alleging that Local 916 was continuing to deny him his rights of membership.

The Area Administrator investigated the alleged violation of Part 204 and reported to the Regional Administrator on February 16, 1972 with a recommendation that the matter be scheduled for hearing. On March 29, 1972 the Regional Administrator designated the case for hearing to begin May 10, 1972 in Oklahoma City, Oklahoma. On May 4, 1972 the Respondent American Federation of Government Employees filed with the Regional Administrator a Motion to Dismiss the Complaint. Pursuant to Section 203.18(b) of the Regulations, the Regional Administrator referred the Motion to the (then) Hearing Examiner. Pursuant to motion and for good cause, the hearing was postponed to June 6, 1972.

Hearings were held in Oklahoma City on June 6 and 7, August 1 and 2, and November 14, 15, and 16, 1972. Complainant appeared pro se and Respondents were represented by counsel. All parties were afforded full opportunity to examine and cross-examine witnesses, adduce other evidence, argue orally, and file briefs. For good cause the time for filing briefs was extended and briefs were timely filed on January 22, 1973.

Facts

Complainant was employed by the United States Post Office for 38 years as a letter carrier. He was a member of and active in the National Association of Letter Carriers, a labor organization. He retired from that employment on February 11, 1965, but retained his membership in N.A.L.C. as a retired employee. He was never employed in a bargaining unit represented by the American Federation of Government Employees.

Local 916, A.F.G.E., is the exclusive representative of a number of bargaining units at Tinker Air Force Base in Oklahoma. It has been recognized as exclusive representative since 1969. In recent years its membership has fluctuated around 7,000. At its monthly meetings it admits to membership between 40 and 150 applicants en masse. It is the only collective bargaining representative at the base except that the International Association of Machinists represents a small bargaining unit. Its constitution limits its membership to civilian employees at Tinker and retired persons who have not had a lapse in dues for more than six months. It provides also for honorary membership without voting rights or eligibility to hold office. The national constitution of A.F.G.E. limits membership to civilian employees of the United States or the District of Columbia, to separated employees who when separated were members in good standing, and to retired persons who at retirement were eligible for membership. It excludes from eligibility for membership employees over whom jurisdiction was assigned by AFL-CIO to another union. At all relevant times the National Association of Letter Carriers was assigned jurisdiction of letter carriers, Complainant's only government employment, by AFL-CIO.

Late in 1965, after his retirement from the Post Office, Complainant was employed by A.F.G.E. as an organizer (National Representative) to build up the membership of Local 916 and, later, other locals. He was highly successful and was elected to honorary membership in Local 916 in May 1966. On April 1, 1970 Complainant submitted an application for membership describing himself as a "Retired Federal Worker" and submitted the dues of \$3.00 per year for a retired member. (The regular dues are more than ten times that amount.) The same day he was accepted to membership as a retired employee. A year later he paid another \$3.00 as yearly dues of a retired member. He was the only member of Local 916 who was not and had not been an employee at Tinker.

On June 1, 1971 the President of A.F.G.E. wrote a letter to Complainant terminating his employment effective June 7, 1971. The validity of that termination is still pending in arbitration. On June 30, 1971 the President of Local 916 wrote a letter to Complainant which he received July 1, 1971 advising him that he was ineligible for membership and that his name had been removed from the membership rolls. Thereafter the Local two or three times sent Complainant a check for \$6.00 in refund of the two years' dues he had paid as a retired member and each time Complainant returned the check. In February, 1972, Complainant sent a check for \$3.00 to Local 916 for his third year's dues as a retired member, and it was returned to him. He challenges the legality of the determination that he is not a member of Local 916.

On September 3, 1971 Complainant filed a complaint in the United States District Court for the Western District of Oklahoma seeking an injunction against A.F.G.E., Local 916, and all officers of those organizations, depriving him of rights of membership. The next day he was granted a preliminary injunction. On November 24, 1971 the District Court dissolved the preliminary injunction and dismissed the complaint for lack of jurisdiction of the subject matter.

On January 3, 1972, the national president of A.F.G.E. wrote to Complainant advising him that he could have a hearing on a mutually agreeable date to present his position on why the "initial determination" of his ineligibility to be a member was wrong. Complainant did not reply to that letter. At the hearing he stated that he did not reply because he could not get a fair hearing within A.F.G.E. but was willing to submit the matter to a neutral body for determination.

The record contains an abundance of additional material irrelevant to the basis of my recommendation in this case.

The Issue

Whether Section 204.2(a)(5) of the Regulations, prohibiting the expulsion or other disciplining of a union member, except for non-payment of dues, without following prescribed procedures, applies to a union member who was not at any relevant time an employee of the Federal Government.

Numerous other issues are raised which are unnecessary to decide.

Discussion and Conclusion

At the commencement of the hearing and during the hearing I repeatedly but unsuccessfully urged the parties to address themselves to several questions that I thought fundamental in this case. One of those questions was whether the Standards of Conduct Regulations, and particularly Section 204.2(a)(5), apply to union members who are not employees of the Federal Government. I conclude that Section 204.2(a)(5), prohibiting the expulsion or other disciplining of a member of a union (except for non-payment of dues) without following prescribed procedures, does not apply to a member who was in the position of Complainant.

Initially, the question is whether Section 204.2(a)(5) was intended as a protection of government employees or was intended as a more general regulation of unions that represent government employees regardless of whether the particular conduct involves a government employee. For the reasons set forth below, I conclude it was the former at least for the purposes of this case.

Part 204 of the Regulations are issued under the authority conferred on the Assistant Secretary by the first sentence of Section 18(d) of the Executive Order. Section 204.2(a)(5) is copied verbatim from Section 101

of the Landrum-Griffin Act, <sup>1/</sup> 29 USCA §411(a)(5). Presumably the two Sections (Section 204.2(a)(5) of the Order and 29 USCA §411(a)(5)) mean the same thing in their respective spheres.<sup>2/</sup>

The spheres of operation of the two sections are different. Section 411 applies to the private sector. 29 USCA §402(i). The Executive Order is directed to the rights of federal employees.<sup>3/</sup> To hold that either of those sections applies to every member of the union, regardless of where he is employed, would create an undesirable situation approaching the intolerable.


Some of the unions in this country, including some of the largest, represent some federal employees and have some federal members but overwhelmingly operate in the private sector. The record in this case shows, for example, that a small number of civilian employees at Tinker Air Force Base are represented by the International Association of Machinists, a union that operates overwhelmingly in the private sector. Absent the strongest indication to the contrary, and I find none, it is not to be supposed that it was intended that an IAM member whose sole employment has been with, say, the Southern Railway or General Electric or Annheuser-Busch, could have his allegedly improper expulsion adjudicated under 29 CFR Part 204 by the Assistant Secretary.<sup>4/</sup> Nor is it to be supposed he would have a choice of forums, depending on a "race to the courthouse," or have it adjudicated in both forums seriatim or concurrently.

I conclude that Section 204.2(a)(5) was intended to apply only in the case of federal employees.<sup>5/</sup> To hold otherwise would serve no purpose announced in the preamble to the Executive Order and would not further the policy of the Order declared in Section 1. Those purposes and that policy are concerned with the performance, well-being, morale, and rights of federal employees, not employees in the private sector.

At no relevant time was Complainant a federal employee. His federal employment ceased on February 11, 1965, long before the actions complained of in this case and long before he became a member, correctly or incorrectly, validly or invalidly, of A.F.G.E. He has never been a federal employee in a unit represented by A.F.G.E.<sup>6/</sup> He therefore had no rights under Section 204.2(a)(5), and no such rights of his were infringed. His complaint therefore was not a complaint falling within Section 204.54. It should be dismissed for that reason.

Recommendation

I recommend that the complaint be dismissed.

  
MILTON KRAMER  
Administrative Law Judge

March 9, 1973

<sup>1/</sup> The Labor-Management Reporting and Disclosure Act of 1959.  
<sup>2/</sup> I have found no cases under Landrum-Griffin presenting a factual situation comparable to that presented here.  
<sup>3/</sup> Section 1; with respect to rights to membership, see Section 19(c).  
<sup>4/</sup> Query: Could a member of that union whose sole employment is as a civilian employee at Tinker Air Force Base have his allegedly improper expulsion from IAM adjudicated under the Landrum-Griffin Act, because that union is "engaged in an industry affecting commerce?" 29 USCA §402(i). But that question is not before us.  
<sup>5/</sup> See A/SLMR Rpt. No. 36, holding that the rights of a member of a union subject to the Order are protected by Part 204 of the Regulations although the member is not employed by an Executive agency where the member was an employee in the Legislative Branch and the union had members in both the Executive and Legislative Branches.

<sup>6/</sup> It is noted that in the private sector the National Labor Relations Board sometimes declines to exercise jurisdiction it has under the legislation applicable to it on the ground that the potential impact of the case on interstate commerce is too trivial to warrant the exercise of its jurisdiction. E.g., Denver Building and Construction Council, 90 N.L.R.B. 378 (1950); Reiley's Stores, 96 N.L.R.B. 516 (1951); Federal Dairy Co., 91 N.L.R.B. 638 (1950); Local 905 of Retail Clerks, 83 N.L.R.B. 564 (1949). In a case such as this one, where the Complainant at no relevant time was a federal employee and the alleged mistreatment of him would have no impact on the purpose or policy of the Executive Order, or in which the federal interest, if any, is minimal, I would not extend A/SLMR Rpt. No. 36 to exercise jurisdiction. Even if Section 18(d) authorizes regulations to cover a situation such as this one, I would not interpret the Regulations to cover it.

July 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,  
PBS, FSS, ADTS, FRESNO, CALIFORNIA  
A/SLMR No. 293

This case involved a representation petition filed by American Federation of Government Employees, Local 3378, AFL-CIO (AFGE), seeking an election in a unit of all nonsupervisory General Services Administration (GSA) employees working in the Public Buildings Service (PBS), the Automated Data and Communications Service (ADTS) and the Federal Supply Service (FSS), located at Fresno, Yosemite, Sequoia-Kings Canyon, and Bakersfield, California. The PBS, ADTS and FSS are three of the five program services of the GSA in Region 9, which is headquartered in San Francisco, California and encompasses four states. The Activity took the position that the petitioned for unit is inappropriate because, among other things, the employees in the claimed unit do not possess a clear and identifiable community of interest separate and distinct from other employees of Region 9, and that it will not promote effective dealings and efficiency of operations. The Intervenor, National Federation of Federal Employees, Local 1378 (NFFE), took no position with respect to the appropriateness of the unit.

The Assistant Secretary found that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In this regard, he noted that the claimed employees do not share a clear and identifiable community of interest in that the unit sought includes GSA employees of three program services in a geographic area within Region 9 who have little or no commonality other than the fact that they work in the same geographic area. Under these circumstances, and noting also that such a unit would not promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered that the AFGE's petition be dismissed.

A/SLMR No. 293

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
PBS, FSS, ADTS, FRESNO, CALIFORNIA 1/

Activity

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3378, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1378

Intervenor

Case No. 70-2452

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert M. Sichon. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 3378, AFL-CIO, herein called AFGE, seeks an election in a unit of all General Services Administration (GSA) employees working in the Public Buildings Service (PBS), the Automated Data and Communications Service (ADTS) and the Federal Supply Service (FSS), located at Fresno, Yosemite, Sequoia-Kings Canyon, and Bakersfield, California, excluding professional employees, employees engaged in Federal personnel work in

1/ The name of the Activity appears as corrected at the hearing.



other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 2/

The Activity takes the position that the proposed unit is inappropriate because establishing such a unit will not promote effective dealings and efficiency of agency operations; the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees of Region 9 of GSA; and the petitioned for unit is based solely on the extent to which the employees have been organized. It asserts that the only appropriate unit would consist of a region-wide residual unit of GSA employees not covered by current negotiated agreements. The Intervenor, National Federation of Federal Employees, Local 1378, herein called NFFE, takes no position with respect to the appropriateness of the petitioned for unit.

The mission of GSA is to provide the various services required by agencies of the Federal Government. To accomplish this mission, GSA, which is headquartered in Washington, D.C., has ten regional offices, each headed by a Regional Administrator. Under each Regional Administrator are five Regional Commissioners who head the various program services for their respective regions. The program services involve generally the procurement and supply of personal property and nonpersonal services, the acquisition of real property and management of Federally owned and leased space and property, the utilization of available real and personal property, the disposal of surplus real and personal property, and records management.

The program services involved in the petitioned for unit are PBS, which is concerned primarily with providing care and maintenance for Federal buildings and with providing nongovernment office space where government space is unavailable; ADTS, which provides telecommunications service to all Federal agencies within the geographical boundaries of Region 9; and FSS, whose main function is to operate all the interagency motor pools in Region 9. 3/

Region 9 of GSA is headquartered in San Francisco, California, and encompasses the states of California, Nevada, Arizona and Hawaii. Located in the Regional headquarters in San Francisco, are, among others, the Regional Administrator for Region 9, the Regional Commissioners for the various program services, and, under the latter, directors for such services.

2/ The unit description appears essentially as amended at the hearing.

3/ Other GSA program services in Region 9 include the National Archives and Records Service (NARS), which maintains the records of Region 9, and which has three record centers and a records management division within the Region; and the Property Management and Disposal Service (PMDS), which deals with the management and disposal of Federally owned property.

The employees in the claimed unit comprise all of the GSA employees employed in the Fresno-Bakersfield area. The record reveals, however, that there are 18 PBS field offices, 16 FSS motor pools, and 35 ADTS facilities dispersed throughout Region 9, all of which are subject to standardized programs and procedures which have been established by GSA headquarters in Washington, D.C. The personnel office for the Region, which is located in Regional headquarters in San Francisco, must review and approve all personnel actions, and, in this regard, all Region 9 employees are subject to the same personnel policies and regulations, and enjoy the same fringe benefits.

The employees in the three program services involved in the subject case are under the jurisdiction of a PBS manager, a motor pool manager, and two chief operators, all of whom are engaged in the day-to-day activities of their respective services. These individuals report directly to their respective directors who, as noted above, are located in the San Francisco Regional headquarters, and they are subject to the authority of such directors for any non-emergency action which is required in the field. Although the managers in the field may initiate personnel actions with regard to hiring or firing of employees, the record reveals that only the personnel office at Regional headquarters has the final authority to hire or fire. Further, while the managers in the field may issue satisfactory performance ratings to employees without approval from the Regional headquarters, any outstanding or unsatisfactory performance ratings must be approved at the Regional level. The record reveals also that there is no common supervision of the employees employed in the three program services involved herein, nor do the employees covered by the petition in the different program areas work in close contact with one another. Moreover, there is no evidence of any transfers or interchange among the employees of the three services. 4/ Also, there have been Regionwide postings of jobs, although the record establishes that, generally, areas of consideration are limited geographically by approximately 25 to 30 mile distances.

Based on the foregoing circumstances, I find that the petitioned for unit is inappropriate for the purpose of exclusive recognition. Thus, in my view, the evidence establishes that the claimed employees do not share a clear and identifiable community of interest. In this regard, it was noted particularly that the unit sought includes GSA employees of three program services in a geographic area within GSA, Region 9 who have little or no commonality other than the fact that they work in the same geographic area. The three program services involved are separate divisions in the field reporting independently to the directors of each service who are located in the Regional headquarters. The record reveals also that there is no common supervision

4/ Transfers which have occurred throughout the Region have involved primarily transfers of duty stations.

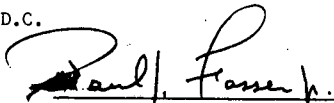
of the employees in the three program services; that the employees in the three program services are not engaged in similar duties; that they do not work in the same specific areas; and that they do not transfer or interchange from one service to another.

Under these circumstances, I find that the employees in the claimed unit do not share a clear and identifiable community of interest and that such a unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-2452 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 31, 1973

  
\_\_\_\_\_  
Paul J. Passer, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

July 31, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
LOCAL 1650, BEEVILLE, TEXAS (NAVAL AIR STATION,  
CHASE FIELD, BEEVILLE, TEXAS) and AMERICAN FED-  
ERATION OF GOVERNMENT EMPLOYEES, WASHINGTON, D.C.  
(NAVAL AIR STATION, CHASE FIELD, BEEVILLE, TEXAS)  
A/SLMR No. 294

This proceeding involved unfair labor practice complaints filed by Charles R. Bridges and Arnold Medina (Complainants) alleging violation of Section 19(c) of the Executive Order; as amended. Specifically, the complaints alleged that American Federation of Government Employees, Local 1650, and American Federation of Government Employees, Washington, D.C. (Respondents) violated Section 19(c) of the Order by refusing them reinstatement to membership. The Respondents maintained that this action was taken in accordance with the constitution of the Respondent Local which required a two-thirds majority of the members voting to accept an individual for reinstatement to membership. They argued that Bridges has not been denied membership but only had been refused reinstatement and that Section 19(c) of the Order does not deal with reinstatement rights; that a labor organization is entitled to regulate its internal affairs, which embraces the right to enforce eligibility requirements; and that the Respondent Local was enforcing discipline under Section 19(c) of the Order when it refused for good cause, i.e., the commission of acts inimical to the Respondents' best interests, to readmit Bridges to membership. As to Complainant Medina, the Respondents contended that he is not an employee in the unit and is, in fact, retired on disability. Therefore, they contended that no relief should be granted him under Section 19(c).

The Administrative Law Judge found that the requirement in Respondent Local's constitution is at variance with the language of Section 19(c) of the Order which, in his opinion, grants an absolute right to a unit employee to become a member in a labor organization of his own choosing, except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. He concluded that in the particular circumstances of this case the Respondents may refuse membership to Bridges if "it accords him certain rights before a vote is taken regarding his application." This would include charges being filed against Bridges and a hearing being held for any disciplinary action that the Respondents might wish to institute against him. With respect to Medina, the Administrative Law Judge recommended that the complaint be dismissed on the basis that Medina is not now employed at the Naval Air Station, Chase Field, having retired. As to the additional allegation that the National, American

Federation of Government Employees violated Section 19(c) with respect to the denial of reinstatement to Bridges, the Administrative Law Judge concluded that under the circumstances the National organization should be charged with responsibility for the violative conduct as to Bridges.

Upon review of the entire record in this proceeding, including the Report and Recommendations of the Administrative Law Judge and the exceptions filed by the Respondents, the Assistant Secretary adopted the Administrative Law Judge's finding that the Respondents' refusal to reinstate Bridges, based on his failure to obtain a two-thirds majority of voting members, violated Section 19(c) of the Order. In this regard, however, contrary to the Administrative Law Judge, the Assistant Secretary concluded that the appropriate remedy should provide that Bridges be unconditionally reinstated to membership upon application and tender of initiation fees and dues uniformly required. It was noted that, thereafter, as a member, he would be subject to any discipline, enforced in accordance with the procedures under the constitution and by-laws of either of the Respondents which conform to the requirements of the Order, with respect to any improper conduct engaged in during the period of his prior membership.

With respect to Medina, the Assistant Secretary concluded that the Respondents' refusal to reinstate him violated Section 19(c) of the Order. However, because the evidence established that Medina had retired and, therefore, is no longer a unit employee, the Assistant Secretary found it inappropriate to issue a remedial order in such a situation.

Based on his findings of violation of Section 19(c), the Assistant Secretary ordered that the Respondents cease and desist from such conduct and take certain specific affirmative actions, including reinstating Bridges to membership in the Respondent Local.

A/SLMR No. 294

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1650,  
BEEVILLE, TEXAS  
(NAVAL AIR STATION, CHASE  
FIELD, BEEVILLE, TEXAS)  
and  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, WASHINGTON, D.C.  
(NAVAL AIR STATION, CHASE FIELD,  
BEEVILLE, TEXAS)

Respondents

and

Case No. 63-4010(CO)

CHARLES R. BRIDGES

Complainant

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1650,  
BEEVILLE, TEXAS  
(NAVAL AIR STATION, CHASE FIELD,  
BEEVILLE, TEXAS)

Respondent

and

Case No. 63-4006(CO)

ARNOLD MEDINA

Complainant

DECISION AND ORDER

On May 10, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices and recommending that they cease and desist from such conduct and take certain affirmative action as set forth in the attached Administrative Law

Judge's Report and Recommendations. The Administrative Law Judge found other alleged conduct of Respondent Local 1650 not to be violative of the Order. Thereafter, the Respondents filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondents' exceptions, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, except as modified below.

In agreement with the Administrative Law Judge, I find that by refusing to reinstate Complainant Charles R. Bridges to membership based upon his failure, pursuant to Article III, Section 6 of Respondent Local 1650's amended constitution, to obtain a two-thirds majority of voting members, Respondent Local 1650 violated Section 19(c) of the Order. Thus, Section 19(c) of the Order provides, in effect, that an employee in an appropriate unit shall not be denied membership in a labor organization which is accorded exclusive recognition except for the failure to meet reasonable occupational standards uniformly required for admission or for the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. It is clear that the denial of reinstatement of Bridges was not based on either of the foregoing exceptions. 1/ Further, it is clear that during his membership in Respondent Local 1650 and, subsequent to his resignation, Bridges was never charged by the Local with respect to any alleged misconduct he engaged in during the period in which he was a member of such Local. 2/

With respect to Complainant Arnold Medina, the Administrative Law Judge concluded that since he is not now employed at the Naval Air

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1/ I agree with the Administrative Law Judge's finding that a denial of reinstatement is tantamount to a denial of membership.

2/ Compare, in this regard, Local 1858, American Federation of Government Employees, (Redstone Arsenal, Alabama) A/SLMR No. 275. Among other things, it was found in that case that the termination of membership in a labor organization does not extinguish a labor organization's right to enforce discipline against a former member for improper conduct prior to the termination of membership. As noted above, in the instant case, the Respondent Local 1650 did not, at any time material herein, charge Bridges with acts of misconduct. To the extent, however, that the Administrative Law Judge found that a former member may not be disciplined after his resignation for acts engaged in while he was a member, I do not adopt such finding in view of the above-noted rationale in Local 1858, American Federation of Government Employees, (Redstone Arsenal, Alabama), cited above.

Station, Chase Field, the Employer herein, no relief should be granted under Section 19(c) of the Order. I find, for the reasons stated above in connection with the refusal to reinstate Complainant Bridges, that Respondent Local 1650's refusal on June 13, 1972, to reinstate Medina to membership, for reasons other than his failure to meet reasonable occupational standards uniformly required for admission or his failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership, violated Section 19(c) of the Order. 3/ However, because the evidence establishes that Medina retired on November 14, 1972, and, therefore, is no longer a unit employee, I find it inappropriate to issue a remedial order in such a situation.

In his proposed remedy with respect to Complainant Bridges, the Administrative Law Judge concluded that in view of Bridges' previous conduct while a member, Respondent Local 1650 could treat Bridges in the same manner as though it were considering his expulsion from the union. In the Administrative Law Judge's view, if the Respondents desired to deny membership to Bridges, the latter should have the benefit of a hearing and all of the safeguards applicable to all members. Accordingly, he ordered, among other things, that the Respondents cease and desist from denying membership to Bridges for any reason other than this failure to tender initiation fees and dues uniformly required as a condition of acquiring membership unless a hearing is afforded him after charges have been preferred, and the members of Respondent Local 1650 have thereafter voted to reject Bridges as a member of Respondent Local 1650.

I do not agree with the Administrative Law Judge's proposed remedy in this regard. Thus, in view of the Respondents' 4/ improper refusal to reinstate Bridges to membership in violation of Section 19(c) of the Order, I find that an appropriate remedial order should provide for Bridges' unconditional reinstatement to membership. Thereafter, of course, as a member he would be subject to any discipline, enforced in accordance with the procedures under the constitution and by-laws of either of the Respondents which conform to the requirements of the Order, with respect to any improper conduct engaged in during the period of his prior membership.

#### THE REMEDY

Having found that the Respondents have engaged in certain conduct prohibited by Section 19(c) of Executive Order 11491, as amended, I

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3/ On June 13, 1972, Medina was a unit employee.

4/ In agreement with the Administrative Law Judge, I find that, in the circumstances of this case, the Respondent National also violated Section 19(c) of the Order.

shall order the Respondents to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that American Federation of Government Employees, Local 1650, Beeville, Texas, and American Federation of Government Employees, AFL-CIO, Washington, D.C. shall:

1. Cease and desist from:

- (a) Giving effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, Local 1650, to the extent that it requires or calls for a two-thirds vote by the members of said labor organization for admission or readmission to membership in American Federation of Government Employees, Local 1650, by any new applicant, or any former member of said Local who has resigned, or removed himself, from membership in said Local.
- (b) Denying membership to Charles R. Bridges in American Federation of Government Employees, Local 1650, for any reason other than his failure to meet reasonable occupational standards uniformly required for admission, or his failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

- (a) Take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, Local 1650, into compliance with the requirement that membership in said Local shall not be denied to any applicant for admission or applicant for readmission, who previously resigned, or removed himself, from membership in said Local for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

-4-

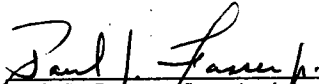
(b) Upon application and tender of initiation fees and dues uniformly required, reinstate Charles R. Bridges to membership in American Federation of Government Employees, Local 1650.

(c) Post at their respective business offices and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by a representative of American Federation of Government Employees, Local 1650, and by a representative of American Federation of Government Employees, AFL-CIO, and shall be posted by each Respondent for a period of 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Submit signed copies of said notice to the Naval Air Station, Chase Field, Beeville, Texas, for posting in conspicuous places where unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.

(e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of the Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
July 31, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-5-

APPENDIX

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT give effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, Local 1650 to the extent that it requires or calls for a two-thirds vote by the members of said labor organization for admission or readmission to membership in the American Federation of Government Employees, Local 1650 by any new applicant or any former member of said Local who has resigned, or removed himself, from membership in said Local.

WE WILL take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, Local 1650, into compliance with the requirement that membership in said Local shall not be denied to any applicant for admission or applicant for readmission, who previously resigned or removed himself, for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

WE WILL, upon application and tender of initiation fees and dues uniformly required, reinstate Charles R. Bridges to membership in the American Federation of Government Employees, Local 1650.

American Federation of Government Employees,  
Local 1650.

By \_\_\_\_\_  
(Signature and Title)

American Federation of Government Employees,  
AFL-CIO.

By \_\_\_\_\_  
(Signature and 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 members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

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

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

- 2 -

The proceedings herein are based on a second amended complaint filed under Executive Order 11491 (herein called the Order) by Charles R. Bridges in Case No. 63-4010(CO) on December 4, 1972 against both American Federation of Government Employees, AFL-CIO, Local 1650, Beeville, Texas, and American Federation of Government Employees, AFL-CIO, Washington, D. C. (herein called Respondent National) and upon a second amended complaint filed under the Order by Arnold Medina in Case No. 63-4006(CO) on September 5, 1972 against American Federation of Government Employees, AFL-CIO, Local 1650, Beeville, Texas (herein called Respondent Local or Local 1650).

Each Complainant alleged in his respective complaint that he applied for membership in Local 1650 on June 13, 1972 and was denied the right to become a member. Such denial is alleged to be violative of Section 19(c) of the Order. Respondents deny a violation of the Order, and assert it had a right, under Section 19(c) thereof, to enforce discipline under its constitution and by-laws, and thus refuse to readmit Bridges and Medina to membership in Local 1650.

At the hearing Respondents were represented by counsel, and each Complainant appeared on his own behalf. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. All parties filed briefs which have been duly considered by the undersigned.

Upon the entire record in this case, from my observations of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

1. At all times material herein Charles R. Bridges (herein called Bridges) was and still is employed at the Naval Air Station, Chase Field, Beeville, Texas.
2. At all times material herein, and until November 14, 1972, Arnold Medina (herein called Medina) was employed at the Naval Air Station, Chase Field, Beeville, Texas.
3. On November 14, 1972 Medina retired from employment with the Federal Government, terminating his position with the Naval Air Station, Chase Field, Beeville, Texas. At all times since November 14, 1972 Medina has remained on disability retirement.
4. Bridges became a member of Local 1650 in 1966, and he served as President of said Local 1650 from May, 1968 until May, 1970.
5. At all times material herein, Local 1650 has been, and is now, the exclusive bargaining representative of all civilian employees in the service of the Naval Air Station at Chase Field, Beeville, Texas.

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1650 :  
BEEVILLE, TEXAS :  
and :  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES :  
WASHINGTON, D. C. :  
Respondents :  
and :  
CHARLES R. BRIDGES :  
Complainant : Case Nos. 63-4010(CO)  
and :  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1650 : 63-4006(CO)  
BEEVILLE, TEXAS :  
Respondent :  
and :  
ARNOLD MEDINA :  
Complainant :  
-----

Raymond J. Malloy, Esq.  
American Federation of Government  
Employees, AFL-CIO  
400 1st Street, N. W.  
Washington, D. C. 20001  
On behalf of the Respondents

Charles R. Bridges, Complainant  
Appearing pro se

Arnold Medina, Complainant  
Appearing pro se

Before: William Naimark, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a Notice of Hearing issued on December 7, 1972, by the Regional Administrator of the Labor-Management Services Administration, Kansas City Region, a hearing was held in the above-entitled matter before the undersigned on February 13 and 14, 1973 at Beeville, Texas. The cases herein were consolidated for hearing by virtue of an Order issued by the said Regional Administrator on December 5, 1972.

6. Bridges was expelled from membership in Local 1650 on May 5, 1970 because he instituted a lawsuit against American Federation of Government Employees, AFL-CIO. On August 15, 1970, after having withdrawn said lawsuit, Bridges was reinstated to membership in Local 1650.

7. Medina became a member of Local 1650 in February, 1968. He resigned from membership on September 1, 1970, and was readmitted to membership in January, 1971.

8. Bridges and Medina both resigned from Local 1650, effective as of March 7, 1971 and neither one to date has been readmitted to membership therein.

9. Various witnesses presented by Respondent testified, without contradiction, as to certain conduct engaged in by Bridges while acting as president of Local 1650. The acts by Bridges, some or all of which were the subject of charges filed against him with the Respondent National and the Department of Labor, were as follows:

(a) A series of checks were made out to Bridges, or to cash, and the proceeds obtained by Bridges - but the minutes of the membership meetings disclosed no authorization was given for the issuance of such checks.

(b) A check was signed by Bridges and made payable to Paul Green, Jr., an employee and union member, for \$29 to cover expenses for attendance at a business meeting in San Antonio. Green never endorsed the check or received the proceeds, but the check had been cashed and Green's name appeared as an endorsement.

(c) Bridges asked for, and received, several hundred dollars to cover the Ira Rech case 1/ which had been closed several months earlier.

(d) Bridges, while "running" for the office of 10th District National Vice-President, used the equipment and material of Local 1650 to print letters and other data in furtherance of his campaign - all without authorization by, or approval from, Local 1650.

(e) During 1971 Bridges told several employees there were plans to decrease the membership in Local 1650. Further, he stated that if there were enough dropouts, it would be impossible to maintain the Respondent Local at the Naval Air Station.

(f) Bridges stated to employee Trier on September 1, 1970, in the presence of Kenneth Burris, treasurer of Local 1650 since January, 1971, that he (Bridges) would cause a lot of members to drop out if he did not get what he wanted from the union.

1/ No evidence was adduced at the hearing as to what this case involved.

(g) Bridges caused Barbara Bruckner, secretary of Local 1650, to spend about 90 percent of her time working on matters relating to his campaign for obtaining the position of 10th District National Vice-President.

(h) Local 1650 requested Bridges to reimburse it in the amount of \$495 as and for the value of services rendered by Barbara Bruckner, secretary, to Bridges during his campaign to become 10th District National Vice-President. Bridges agreed to reimburse the local union accordingly, but has failed to do so.

(i) Bridges told Evelyn L. Massengole, an employee, and others, that "he was going to tear the union up."

(j) Bridges stated, during his campaign for the 10th District National Vice-Presidency, that he would use any means to defeat Jordan - who was also a candidate for the position - and that he would lie, cheat, or use any means necessary to reach his goal.

(k) At a time when Bridges was still a member of Local 1650 he applied for membership in, and was accepted by, Local 3138, Oklahoma City, Oklahoma and Local 2488, Fort Worth, Texas, and Respondent National determined that such action by Bridges violated AFGE national policy - all of which was made known to the membership of Local 1650.

10. At all times material herein Local 1650 adhered to the practice and policy of paying \$5.00 to any member who brought in either a new or readmitted member to the union. In view of the fact that several members, including Medina, had dropped out of the union, and then were readmitted to membership, it was necessary for Local 1650 to pay \$5.00 each time said members were readmitted to the union.

11. On April 13, 1971 Local 1650 membership voted to adopt certain amendments to its constitution and by-laws which were approved by Respondent National on May 11, 1971. These amendments, which were in effect on June 13, 1972, were as follows:

ARTICLE III

Membership, Dues and Expenses

Section 5. Any person or persons who have been expelled from the American Federation of Government Employees by action of the National President, the Executive Council or by the Local for conduct unbecoming to a member and/or not in the best interest of the AFGE, shall not be considered for reinstatement in AFGE Local 1650 membership until such time as the member is cleared and 2/3 majority of AFGE Local 1650 members voting.

Section 6. A member who removes himself from AFGE Local 1650 membership, will require 2/3 majority of the voting members present, to be reinstated.



Section 7. All employees desiring membership in AFGE Local 1650 will be voted on for acceptance at the regular monthly meetings. Member accepted will require 2/3 majority of votes of members voting.

12. On June 13, 1972 both Bridges and Medina submitted to Local 1650 applications for readmission to said union.

13. A regularly scheduled membership meeting of Local 1650 was held on the night of June 13, 1972. At that meeting the applications of Bridges and Medina were considered by the members present thereat. <sup>2/</sup>

Considerable discussion took place at the aforesaid meeting on June 13, 1972 among the members regarding Bridges' past activities, including the matters set forth in paragraph 9(a) thru 9(k) above. Several members of Local 1650, including Bruggess H. Hickman, currently president of the union, spoke against readmitting Bridges to membership because of his past activities.

14. D. J. Hooks, who presided over the meeting on June 13, 1972, called upon the membership to vote upon Bridges' application for readmission. A vote was taken by show of hands, and the result was 24 to 2 against readmitting Bridges to membership in Local 1650. <sup>3/</sup>

15. At the meeting on June 13, 1972 the members, in considering Medina's application for readmission, discussed (a) the fact that Medina's record of dropping out of the union and then returning as a member was mostly to Local 1650, and as a result of his record Medina was a bad risk, and (b) the close association between Bridges and Medina during their tenure as members of Local 1650, and the fact that both resigned from the union at the same time.

16. At the said meeting on June 13, 1972 the members of Local 1650 voted on whether to accept Medina's application for readmission to

The applications were considered despite Section 9 of the Local's constitution which provides that if charges are pending against a member, he shall not be "reconsidered" for membership or reinstatement. This provision was, in effect, waived by the members voting on the application. Thus, re Bridges, against whom charges were pending with the Labor Department, I do not consider this a defense or justification for rejecting his application despite the union's citing Section 9 as a basis for its rejection.

Edgar L. Love, a witness called by Bridges, testified the members did not vote on accepting or rejecting Bridges but voted as to whether the application should be tabled. In view of the stipulation entered into by Bridges as to this matter, and the clear testimony of the other witnesses on this regard, I find the vote was taken as to whether or not to readmit Bridges into membership in Local 1650.

membership. A vote was taken by show of hands and the result was 16 to 8 against readmitting Medina to membership in Local 1650.

17. By letter dated June 14, 1972 President Burgess Hickman of Local 1650 wrote Bridges informing him that the membership had voted on June 13, 1972 to reject his application for readmission to Local 1650 by a vote of 24 to 2, and stating that the denial of membership was pursuant to Article III, Section 6 of the constitution and by-laws of Local 1650.

18. By letter dated June 15, 1972 President Burgess Hickman of Local 1650 wrote Medina informing him that the membership had voted on June 13, 1972 to reject his application for readmission to Local 1650 by a vote of 16 to 8, and stating that the denial of membership was pursuant to Article III, Section 6 of the constitution and by-laws of Local 1650.

19. Neither Bridges nor Medina was refused membership in Local 1650 on June 13, 1972 for failure to tender initiation fees and dues uniformly required for admission to membership in Local 1650.

20. Article XII of the Constitution of American Federation of Government Employees sets forth the procedures whereby each local union shall conduct trials of charges against individual members, including the preferring of charges, the holding of a hearing therein, the recommendation of the local's executive board or trial committee, and the voting by the local members on the recommendations of such executive board or trial committee.

#### Concluding Findings

#### Refusal to Admit Charles R. Bridges To Membership As Alleged Violation of Section 19(c) of the Order

In respect to Bridges, the issue, albeit difficult of resolution, is easily stated: May a union, under the guise of enforcing discipline, refuse membership to an applicant who was formerly a member and resigned after engaging in conduct that might otherwise have subjected him to discipline during his membership.

Respondents urge that, under 19(c) of the Order, Local 1650 has the right to refuse to readmit a former member who has committed acts inimical to the union's best interests. It insists that (a) Bridges has not been denied membership in Local 1650, having been a member for many years, but has only been refused reinstatement - and Section 19(c) of the Order does not deal with reinstatement rights; (b) a union is entitled to regulate its internal affairs, which embraces the right to enforce eligibility requirements - and Sections 6 and 9 of Article III of the local's constitution and by-laws is a reasonable exercise of this right; (c) Local 1650 was enforcing discipline under 19(c) of the Order when it refused, for good cause, to readmit Bridges to membership.

The applicable section of Executive Order 11491 which is involved herein is 19(c), and it reads as follows:

Sec. 19(c) "A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order."

The contention that 19(c) has no applicability here because Bridges has been denied reinstatement, as contrasted with membership, is a distinction without a difference insofar as the effect upon the Complainant is concerned. The union may speak of the contemplated act as a reinstatement, but a denial thereof is tantamount to a denial of membership. To argue, as does Local 1650, that Bridges has not been refused membership because he was a member previously is specious reasoning. He has been denied reinstatement to membership in the union. Apart from the question as to whether this was justifiable under the Order, the fact remains that characterizing his application as one for reinstatement does not alter this denial. Accordingly, Respondent's argument that the complaints herein are not subject to 19(c) since the employees are seeking "reinstatement" to Local 1650 is rejected.

That the unions may well enact rules governing their internal affairs, and bearing upon the members, is unquestioned. However, in some instances these rules are subject to limitations imposed by statute or, as in the case at bar, by the Executive Order. Thus, it remains to be determined whether Section 6, Article III of the local's constitution and by-laws conflict with 19(c) so as to constitute no defense to its action herein.

It seems clear that, based on the testimony at the hearing, Bridges engaged in conduct which was deserving of reprimand or discipline. Further, I have no difficulty with concluding that the past actions of Bridges, while President of Local 1650, were factors which influenced the members to vote against accepting him back into the union. But I have considerable difficulty in reaching the conclusion that Local 1650 is entitled to discipline Bridges once his resignation becomes effective. As the Court of Appeals stated in Lodge 405, Machinists v. NLRB (Boeing Co.) 79 LRRM 2443:

"It is, therefore, obvious that membership in the labor organization is the sine que non to the authority of a union to impose disciplinary burdens upon the employees it represents."

While counsel for Respondents cites Scotfield v. NLRB (Wisconsin Motor Corp.) (U. S. Sup. Ct. 1969) 70 LRRM 3105 for the proposition that rejection of reinstatement is discipline, the court just upheld the imposition by a union of fines to secure conformance to a union rule setting ceilings on production. But the court reaffirmed the principle that membership in the union was a requirement for disciplinary authority. As the court commented in the Boeing case, supra, "after resignation both the member's duty of fidelity and the union's corresponding right to discipline him for breach of that duty are extinguished."

There is no gainsaying the conclusion that Local 1650 could have taken disciplinary action against Bridges before March 7, 1971. Article XII of the Respondent National's constitution, entitled "Offenses; Trials, Penalties, Appeals" sets forth 14 different acts any of which, if engaged in by a member of a Local union, is a basis for discipline. These specific acts would have covered the conduct of Bridges as heretofore outlined. It is also noted, moreover, that the said Article XII provides for charges to be preferred against an accused member and a trial to be conducted by the local executive board or trial committee. Under this procedure a member of the local union may be fined, suspended, or expelled by a majority vote of the members. The constitution of Local 1650, under Article VIII, states that offenses shall be handled in accordance with the provisions set forth in Article XII of the national constitution.

Note is taken of the Rules and Regulations implementing the Order, particularly in respect to standards of conduct governing labor organizations. Section 204.2(5) provides as follows:

"(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues by such organization or by any officer thereof unless such member has been (i) served with written specific charges; (ii) given a reasonable time to prepare his defense; (iii) afforded a full fair hearing.  
(underscoring supplied)

While it is understandable that Local 1650 does not welcome Bridges as a member of its union, my interpretation of 19(c) of the Order militates against the right of a union to refuse admitting or readmitting him back as a member without providing safeguards similar to those required in enforcing disciplinary action. The language of 19(c) seemingly implies, if it does not express, an intention to permit any and all employees in the unit to become union members so long as they tender dues and initiation fees. The clause preserving to the unions the right to enforce discipline must, I conclude, be referable to action taken by the union against a member during his membership and not after his resignation. Once an individual is no longer a member, as Bridges, the disciplinary action envisaged under the Order and Section 204.2(5) of the Rules and Regulations can no longer be exercised. If Local 1650 deemed Bridges' past conduct reprehensible, it could have followed its own procedures, as

hat proposed as to Bridges. Furthermore, I conclude Medina is not entitled to relief under Section 19(c) by reason of his not being an employee in the unit.

Responsibility of Respondent  
National for Acts of Local 1650

The second amended complaint filed by Bridges alleges unfair labor practices by both the Respondent Local 1650 and the Respondent National. While the actual vote to refuse membership to Bridges was conducted among the members of the local, I am constrained to conclude the national organization should be charged with responsibility therefor.

The amendments to the local's constitution, which are in conflict with the Order, were put into effect only after approval was granted by the Respondent National. Further, the latter was aware of, and had scrutinized the conduct of Bridges, and had conducted an audit into the books of his administration. It had censored Bridges and approved the action taken by the local in respect to him. Moreover, the national's constitution sets the standards, and procedures, under which locals operate with regard to disciplining its members, and Local 1650 must pursue these procedures. Accordingly, the Respondent National has sanctioned the actions of the Local 1650 herein, and particularly in respect to the rejection of Bridges' application. See Rubber Workers, Local 796 (Tennessee Wheel & Rubber Co.) 166 NLRB 165.

Recommendations

Having found that Respondents have engaged in conduct which is violative of Section 19(c) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that American Federation of Government Employees, Local 1650, Beeville, Texas, and American Federation of Government Employees, AFL-CIO, Washington, D. C. shall:

1. Cease and desist from:

(a) Giving effect to any provision or section of Article III of the Constitution of American Federation of Government Employees, Local 1650 to the extent that it requires or calls for a 2/3 vote by the members of said union for admission or readmission to membership in American Federation of Government Employees, Local 1650 by any new applicant, or any former member of said local who has resigned, or removed himself, from membership in said local union.

well as those set forth in the Rules and Regulations, and possibly expelled him. Had it done so, I would not conclude that Bridges could have then reapplied for membership and be entitled to be restored thereto. But the Respondent Local chose not to enforce discipline in this manner. It sat on its rights - and I do not believe it is entitled to refuse Bridges membership as a result of the vote taken on June 13, 1972. To the extent that Article III, Section 6 requires a 2/3 vote to accept an individual into membership, it is at variance with the language in 19(c) of the Order. Accordingly, I conclude Local 1650 was not entitled to invoke that provision of its constitution so as to deny membership to Bridges.

Despite this conclusion, I am persuaded that Bridges is not in the exact posture as a new applicant who has never been a member of Local 1650. His previous conduct, while a union member, gives rise to reasons for the union's taking some action in evaluating this conduct in view of Bridges' application to return as a member. In this respect, I would conclude Local 1650 should at least treat Bridges in the same manner as though it were considering his expulsion from the union. Thus, if the union desires to deny membership to Bridges, the latter should have the benefit of a hearing in regard to the actions of which he is accused. Charges should be preferred accordingly, and the same safeguards applicable to disciplinary action against members be guaranteed him. Such a course is consistent with 19(c) of the Order, and preserves to the union its rights to regulate internal affairs and establish eligibility requirements. At the same time, it affords Bridges a full hearing before the union and an opportunity to explain or rebut the accusatory charges levelled against him. Accordingly, I am of the opinion that the union may refuse membership to Bridges if it accords him certain rights before a vote is taken regarding his application; but the denial of membership to Bridges, without these safeguards, - as prevailed on June 13, 1972 - constitutes a violation of Section 19(c) of the Order.

Refusal to Admit Arnold Medina  
To Membership As Alleged Violation  
of Section 19(c) of the Order

Respondents contend that since Medina is not now employed at the Naval Air Station, Chase Field, the employer herein, no relief should be granted under Section 19(c) of the Order. I find this argument sound. Section 19(c) of the Order prohibits the denial of membership to an employee in the appropriate unit. Medina had retired on disability on November 14, 1972 and at the present time is no longer employed at the Air Station. While there may have been a violation as of June 13, 1972 - by reason of their rejecting Medina's application for reasons other than failure to tender dues and initiation fees - Medina's subsequent retirement renders it unwise and unfair to order Respondents to admit him to membership at this time. Medina seeks readmission as an active member of Local 1650, and I conclude he would not be eligible for admission either under the Order or the local constitution. Accordingly, I will not recommend that Respondent Local be ordered to take action similar to

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT give effect to any provision or section of Article III of the Constitution of American Federation of Government Employees, Local 1650 to the extent that it requires or calls for a 2/3 vote by the members of said union for admission or readmission to membership in American Federation of Government Employees, Local 1650 by any new applicant, or any former member of said local who has resigned, or removed himself, from membership in said local union.

WE WILL NOT deny membership to Charles R. Bridges in American Federation of Government Employees, Local 1650, for any reason other than his failure to tender initiation fees and dues uniformly required as a condition of acquiring membership therein unless a hearing is accorded Charles R. Bridges by American Federation of Government Employees, Local 1650 pursuant to Article XII of the Constitution of American Federation of Government Employees, AFL-CIO, after charges have been preferred, and the members of said local union have thereafter voted to reject the said Charles R. Bridges as a member of American Federation of Government Employees, Local 1650.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our members in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

American Federation of Government Employees,  
Local 1650.

By \_\_\_\_\_  
(Signature and Title)

American Federation of Government Employees,  
AFL-CIO.

By \_\_\_\_\_  
(Signature and Title)

(b) Denying membership to Charles R. Bridges in American Federation of Government Employees, Local 1650, for any reason other than his failure to tender initiation fees and dues uniformly required as a condition of acquiring membership therein unless a hearing is accorded Charles R. Bridges by American Federation of Government Employees, Local 1650 pursuant to Article XII of the Constitution of American Federation of Government Employees, AFL-CIO, after charges have been preferred, and the members of said local union have thereafter voted to reject the said Charles R. Bridges as a member of American Federation of Government Employees, Local 1650.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Take such action as is necessary in order to bring Article III of the constitution of American Federation of Government Employees, Local 1650, into compliance with the requirement that membership in said local union not be denied any applicant for admission or readmission therein, pursuant to Section 19(c) of Executive Order 11491, as amended.

(b) Post at their respective business offices and meeting halls or places copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Assistant Secretary of Labor for Labor-Management Relations, shall, after being duly signed by a representative of Local 1650, and by a representative of American Federation of Government Employees, AFL-CIO, be posted by each respondent immediately upon the receipt thereof. Said notices shall be posted for a period of 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Furnish signed copies of said notice to Naval Air Station, Chase Field, Beeville, Texas, for posting at places where it customarily posts information to its employees. Notices shall be furnished to Naval Air Station, Chase Field, within 14 days of the date of this order.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply therewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated, Washington, D. C.  
May 10, 1973

Dated \_\_\_\_\_

August 6, 1973

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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND REMAND OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL LABOR RELATIONS BOARD,  
REGION 17, AND NATIONAL LABOR  
RELATIONS BOARD  
A/SLMR No. 295

This proceeding arose upon the filing of an unfair labor practice complaint by David A. Nixon (Complainant) against the National Labor Relations Board, Region 17, and the National Labor Relations Board (Respondents). The complaint alleged that the Respondents violated Sections 19(a)(1) and (4) of the Order in connection with the Complainant's exercise of his protected, "concerted" right to file exceptions and grievances under the negotiated agreement between the General Counsel of the National Labor Relations Board and the National Labor Relations Board Union, and to file charges under the Executive Order. Following the hearing, the Administrative Law Judge issued a Report and Recommendations dismissing the complaint in its entirety.

With respect to certain allegations set forth in the complaint, the Assistant Secretary agreed with the Administrative Law Judge's findings that under all the circumstances the Respondents did not violate the Order. Thus, he found, (1) that on June 14, 1972, the Complainant was accorded a timely appraisal and review of his work performance and rating with respect to the Respondent Agency's Supervisory Register; (2) that the Complainant failed to meet his burden of proof in showing that he was denied a fair and regular oral developmental interview on June 8, 1972, by reason of his filing of exceptions and grievances under the parties' negotiated agreement and charges under the Order; and (3) that the Respondents' rule of August 21, 1972, prohibiting staff personnel from discussing their testimony with the Complainant during office hours, was not inappropriate under the circumstances of this case and was not applied in a disparate or discriminatory manner.

In connection with the Administrative Law Judge's further finding that the Complainant had not met his burden of proof in support of other allegations in the complaint, the record reflects that at the hearing the Administrative Law Judge sustained the Respondents' objections to the production, as an exhibit, of the annual appraisal of another employee similarly situated with the Complainant, and to the admission of any testimony as to the contents of the appraisal, because of the document's "confidential" nature. However, in his decision, the Assistant Secretary noted that an appropriate means by which aggrieved parties may attempt to establish discriminatory motivation is to show, through the introduction of comparative evidence, that other similarly situated employees have

been treated in a different manner. Thus, under the circumstances of this case, the Assistant Secretary found that by denying the Complainant in the subject case the opportunity to introduce evidence which might have shown, alone or in conjunction with other evidence, that the Complainant was treated in a disparate and discriminatory manner, the Administrative Law Judge committed prejudicial error.

At the hearing, certain other exhibits were rejected by the Administrative Law Judge, apparently because he concluded they were offered to establish violations of the Order and, as such, were untimely in relation to the complaint. The Assistant Secretary noted, however, that while a complaint alleging unfair labor practices must be filed within a certain specified time period of the alleged violations, events occurring outside such periods may properly be introduced into evidence to provide background information and to shed light on events occurring within the time period covered in the complaint. Thus, the Assistant Secretary found that, if otherwise deemed relevant, the material rejected by the Administrative Law Judge should have been admitted into evidence for the noted purpose.

Accordingly, as the Complainant was improperly precluded from presenting evidence in support of certain of his allegations, the Assistant Secretary remanded the subject case to the Administrative Law Judge for further hearing.

A/SLMR No. 295

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD,  
REGION 17, AND NATIONAL LABOR  
RELATIONS BOARD

Respondents

and

Case No. 60-3035(CA)

DAVID A. NIXON

Complainant

DECISION AND REMAND

On January 23, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the National Labor Relations Board, Region 17, and the National Labor Relations Board, herein called Respondents, had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, David A. Nixon, herein called Complainant, filed exceptions to the Administrative Law Judge's Report and Recommendations and a supporting brief, and the Respondents were granted permission to, and filed, a reply brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing. Except as provided below, the rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions and briefs of the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations only to the extent consistent herein.

The complaint in the instant case alleges that the Respondents violated Sections 19(a)(1) and (4) of the Order in connection with the Complainant's exercise of his protected, "concerted" right to file exceptions and grievances under the negotiated agreement between the General Counsel of the National Labor Relations Board and the National Labor Relations Board Union, and to file charges under the Executive Order. Specifically, it was alleged that the Respondents: (1) failed and refused to accord Complainant a timely appraisal and review regarding his work performance and rating with respect to the Respondent Agency's Supervisory Register; (2) engaged, through their officers and/or agents,

n reprisal activities against the Complainant, which included falsely attributing mishandling to various aspects of the Complainant's case work; (3) denied a fair and regular developmental interview to the complainant; and (4) subjected the Complainant to a written professional appraisal, dated June 14, 1972, which was disparate and discriminatory as to the manner in which it was prepared and as to its contents. At the hearing, the Complainant was permitted, without objection, to amend the complaint to include the allegation that the Respondents violated sections 19(a)(1) and (4) of the Order by promulgating a disparate and discriminatory rule prohibiting staff personnel from discussing the subject matter of their testimony with the Complainant during office hours, such rule having the purpose and/or effect of frustrating the complainant's means of preparing and presenting his case in this matter. In addition, at the hearing, the Administrative Law Judge denied several other motions to amend the complaint. I hereby affirm these latter rulings. 1/

I agree with the Administrative Law Judge's findings that under all the circumstances the Respondents did not violate the Order with respect to certain of the allegations set forth in the complaint. Thus, I find, 1) that on June 14, 1972, the Complainant was accorded a timely appraisal and review of his work performance and rating with respect to the Respondent Agency's Supervisory Register; (2) that the Complainant failed to meet his burden of proof in showing that he was denied a fair and regular oral developmental interview on June 8, 1972, by reason of his filing of exceptions and grievances under the parties' negotiated agreement and charges under the Order; and (3) that the Respondent's rule of August 21, 1972, prohibiting staff personnel from discussing their testimony with the Complainant during office hours, was not inappropriate under the circumstances of this case and was not applied in a disparate or discriminatory manner. 2/

In his Report and Recommendations, the Administrative Law Judge found also that the Complainant had not met his burden of proof in support of his allegations that the Respondents had engaged in reprisal activities against him and had written the allegedly disparate and discriminatory June 14, 1972, appraisal of his work performance by reason of his protected, "concerted" activity of filing exceptions and grievances under the parties'

1/ In affirming these rulings, I note particularly the Administrative Law Judge's finding that the Complainant had been advised prior to the hearing that no further amendments to the complaint would be accepted because of a lack of time to investigate. In these circumstances, I find it unnecessary to pass upon the Administrative Law Judge's conclusions, as stated in footnote 2 of his Report and Recommendations, concerning whether certain "benefits" sought by the Complainant may not be obtained under the Order.

2/ In reaching this conclusion, I find it unnecessary to consider the appropriateness of the Administrative Law Judge's conclusions with respect to Section 12(b) of the Order and the rights of employees or labor organizations in adversary proceedings.

negotiated agreement, and his filing of charges under the Order. In attempting to show that he received disparate treatment from the Respondent because he engaged in "concerted" activity, 3/ the Complainant, during the course of the hearing, sought the production of the annual appraisal of another employee in the same grade and classification, who, the evidence established, was the only other employee supervised by the Complainant's immediate supervisor. The Administrative Law Judge sustained the Respondents' objections to the production of the other employee's appraisal as an exhibit and to the admission of any testimony as to its contents by reason of the document's "confidential" nature. 4/

In my view, an appropriate means by which aggrieved parties may attempt to establish discriminatory motivation is to show, through the introduction of comparative evidence, that other similarly situated employees have been treated in a different manner. 5/ I find that by denying the Complainant in the subject case the opportunity to introduce evidence which might have shown, alone or in conjunction with other evidence, that the Complainant was treated in a disparate and discriminatory manner, the Administrative Law Judge committed prejudicial error.

In addition, during the hearing, the Administrative Law Judge placed in the rejected exhibit file certain other exhibits offered by the Complainant pertaining to the latter's work product and to grievances he had filed previously against the Respondent. The proffered exhibits were rejected, in some instances, because they involved matters that had been or were subject to the grievance procedure, and in other instances because they were related to events occurring outside the time period covered by the charge and complaint. In this connection, the Administrative Law Judge apparently concluded that certain of the exhibits were offered to establish violations of the Order and, as such, were untimely in relation to the complaint. While a complaint alleging unfair labor

3/ While Section 1(a) of Executive Order 11491 does not specifically include "concerted" activity as a protected right, (compare Section 7 of the National Labor Relations Act), in my view, an action by an agency or activity to discourage or interfere with an employee's filing of grievances pursuant to a negotiated agreement would be inherently destructive of the rights assured employees in Section 1(a) of the Executive Order "----freely and without fear of penalty or reprisal, to form, join, and assist a labor organization----." See, in this regard, Department of Defense, Arkansas National Guard, A/SLMR No. 53.

4/ The Respondents did not contend that production of the appraisal or admission of testimony on the appraisal was conditioned or precluded by an existing Civil Service Commission or Agency directive, ruling or regulation.

5/ This is not to say that such evidence, standing alone, automatically would result in a finding of a violation of the Order. Thus, in order to find a violation, the evidence overall must reflect that under all of the circumstances the disparate or discriminatory treatment was meted out because the aggrieved party had engaged in conduct protected by the Order.

practices must be filed within a certain specified time period of the alleged violations [see Section 203.2(b) of the Assistant Secretary's Regulations], events occurring outside such periods may properly be introduced into evidence to provide background information and to shed light on events occurring within the time period covered by the complaint. I find, therefore, that, if otherwise deemed relevant, the material rejected by the Administrative Law Judge should have been admitted into evidence for the above noted purpose.

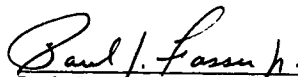
As the Complainant herein was improperly precluded from presenting evidence in support of his allegations that the method of preparation and the content of his June 14, 1972, appraisal was disparate and discriminatory and was part of the Respondent's reprisal activities against the Complainant because he exercised his protected right to file exceptions and grievances under the parties' negotiated agreement and charges under the Order, I shall remand the subject case for further hearing to adduce the proffered evidence. In this regard, both parties shall be afforded an opportunity to introduce additional relevant evidence on these specific issues if they so desire.

ORDER

IT IS HEREBY ORDERED that this proceeding be, and it hereby is, remanded to the Administrative Law Judge for the purpose of reopening the record to adduce additional evidence consistent with the above decision.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the Administrative Law Judge shall prepare and submit to the Assistant Secretary a Supplemental Report and Recommendations in accordance with Section 203.22 of the Assistant Secretary's Regulations.

Dated, Washington, D.C.  
August 6, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



January 30, 1973

To: W. J. Usery, Jr.  
Assistant Secretary of Labor

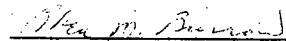
Subject: NATIONAL LABOR RELATIONS BOARD,  
REGION 17  
and  
NATIONAL LABOR RELATIONS BOARD  
Respondents

and

DAVID A. NIXON  
Complainant

CASE NO. 60-3035 (CA)

I am hereby forwarding to you an amended cover sheet to substitute for your copy of my "Report and Recommendations" in the above case. Also, I am enclosing an Errata sheet indicating changes to be made in the body of the Report. I am transmitting directly to the Office of Federal Labor-Management Relations the original and additional copies of the Errata sheet and amended cover sheet.

  
Rhea M. Burrow  
Administrative Law Judge

Enclosures



UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

NATIONAL LABOR RELATIONS BOARD, )  
REGION 17 )  
and )  
NATIONAL LABOR RELATIONS BOARD )  
Respondents ) CASE NO. 60-3035 (CA)  
and )  
DAVID A. NIXON )  
Complainant )

David A. Nixon, Esquire  
National Labor Relations Board,  
Region 17  
601 East 12th Street  
Kansas City, Missouri 64117

For the Complainant

George Norman, Counsel  
National Labor Relations Board  
Room 1057  
1717 Pennsylvania Avenue, N.W.  
Washington, D.C. 20570

For the Respondents

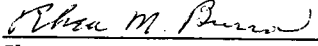
Before: Rhea M. Burrow  
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR -MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

NATIONAL LABOR RELATIONS BOARD, )  
REGION 17 )  
and )  
NATIONAL LABOR RELATIONS BOARD )  
Respondents ) CASE NO. 60-3035 (CA)  
and )  
DAVID A. NIXON )  
Complainant )

ERRATA

The Administrative Law Judge's Decision in the above-entitled case is hereby amended as follows: (1) The attached cover sheet will replace the original title sheet and will reflect two separate respondents to conform to the allegations in the complaint; (2) the word "Relations" on line 2, page 2 is deleted and the words "Services Administration" are substituted therefor; (3) the word "respondent" is changed to "respondents" in the first line of paragraph 2, and lines 3 and 5 of the last paragraph on page 2, and the word "its" in line 2, paragraph 2, page 2 is changed to "their"; (4) the spelling of the name "Partrick" in line 5, page 9 is changed to "Patrick"; and (5) the last three lines of the Recommendation on the last page of the decision are changed to read as follows: "That the complaint against the Respondents National Labor Relations Board, Region 17, Kansas City, Missouri, and National Labor Relations Board, Case No. 60-3035 (CA) be dismissed in their entirety."

  
Rhea M. Burrow  
Administrative Law Judge

Dated January 30th, 1973  
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

REPORT AND RECOMMENDATIONS

Statement of the Case

NATIONAL LABOR RELATIONS BOARD  
REGION 17

Respondent

and

DAVID A. NIXON

CASE NO 60-3035

Complainant

David A. Nixon, Esquire  
National Labor Relations Board,  
Region 17  
601 East 12th Street  
Kansas City, Missouri 64117

For the complainant

George Norman, Counsel  
Room 1057  
National Labor Relations Board  
1717 Pennsylvania Avenue, N. W.  
Washington, D. C. 20570

For the Respondent

Before: Rhea M. Burrow  
Administrative Law Judge

Pursuant to a Notice of Hearing issued on July 5, 1972 by the Acting Regional Administrator of Labor-Management Relations, Kansas City Region, a hearing was held in the above-entitled matter before the undersigned on August 29, 30 and 31 and September 1, 5, 6 and 7, 1972 at Kansas City, Missouri. The reported Unfair Labor Practice arises from an original and two amended complaints filed May 2, 9 and July 19, 1972, respectively and an amendment to the complaint made during the hearing alleging violations of Section 19 a(1) and (4) of Executive Order 11491.

The complaint as amended alleges in substance that the respondent through its officers and agents, Thomas C. Hendrix, Regional Director, Harry Irwig, Regional Attorney and Bernard Ness, Assistant General Counsel, since on or about February 24, 1972 to June 14, 1972 failed and refused to accord complainant an appraisal and review regarding his work performance and rating with respect to the Agency's Supervisory Register by reason of the Agency's "consideration of Nixon's prior concerted, protected activity of filing exceptions and grievances under the collective bargaining agreement, and charges under Executive Order 11491, as amended, thereby violating Nixon's rights under Section 19(a)(1) and 19(a)(4) of said Order." Complainant further alleges that Respondents, beginning on or about September 29, 1971, engaged in daily reprisal activities against Nixon by reason of Nixon's exercise of the aforementioned concerted, protected rights by falsely and spuriously attributing mishandling of work to him in various aspects of his case work, including certain enumerated cases listed by the complainant as well as others. He further alleges that respondent subjected complainant to a "disparate, discriminatory, written 'professional appraisal' dated June 14, 1972," in regard to the matter in which Hendrix and Irwig went about preparing it (e.g., Irwig devoted a period of some three weeks to a discriminatory scrutiny of Nixon's case files, in search of pretextual grounds to provide a colorable basis to satisfy the fixed design to accord a negative appraisal to Nixon; and that complainant was denied "a fair and regular 'developmental' interview)." It was also alleged that the June 14, 1972 appraisal was "disparate and discriminatory in content" as Hendrix and Irwig rendered the appraisal with discriminatory motivation.

The complainant was further permitted to amend his complaint at the hearing to include an additional allegation that on or about August 21, 1972, Region 17, "promulgated a disparate and discriminatory rule prohibiting staff personnel to discuss with employee Nixon the subject matter of his testimony during office hours" for the purpose of frustrating complainant's "means" of preparing and presenting his case.

At the hearing the complainant who is an attorney, represented himself, and for a part of the hearing, an associate assisted him in the presentation. The respondent was represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross examine witnesses and to introduce evidence bearing on the issues herein. Only the respondent filed a brief for consideration by the undersigned.

From a review of the entire record including observation of the witnesses and their demeanor, and from all testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations.

I

MOTIONS PRESENTED AT HEARING

At the beginning of the hearing the complainant moved to amend his complaint on several grounds; he referred to a letter dated August 23, 1972 to counsel for respondent stating that the agency through the General Counsel and Region 17, management officers and agents violated Section 19(a)(1) and (4) by; (1) failing and refusing since January 25, 1972, to issue required written policies and regulations regarding implementation of the provision of Executive Order 11491, in derogation of the express terms of Section 23 and of employees rights to be fostered under such Order; (2) failing and refusing since July 25, 1972 to grant employee David A. Nixon reasonable provision for administrative leave for the purpose of preparing his case for trial; (3)(a) failing and refusing since July 25, 1972 to secure and provide Nixon with legal counsel from the Agency's staff in Washington, D.C. including administrative leave, trial expense and per diem expense for such counsel; and (b) by refusing his request for provision of administrative leave, travel expense and per diem allowance for a witness in Washington, D.C.

The above motions were denied, it being noted that the complainant had been advised on August 9, 1971 that no further amendments to his complaint would be accepted because of lack of time to investigate. Motion No. 1, was also denied as not being a substantive issue for determination of the violations alleged in the complaint. As to Motions 2 and 3, and apart from the fact that the merit of motions presented and referred to in the letter of intent had not been investigated, there was nothing in the Collective Bargaining Agreement, Order or Regulations providing for the assistance, time and expense requested for himself, counsel or witnesses other than what had been authorized or offered to the complainant by respondent agency. 1/

I indicated at the hearing that I was available to take deposition of any witness in Washington, D.C. whose testimony was material to the issues: further, the matters were not considered determinative of the issues of entitlement to an earlier appraisal and the alleged discrimination by the agency as to the appraisal given complainant on June 14, 1972.

1/ The record reveals that complainant was offered and authorized administrative leave for purpose of attending the hearing and presenting his case; his witnesses were authorized administrative leave to attend hearing. Complainant's request for legal counsel from the agency was not refused but it was made clear that such counsel must be selected by complainant and that counsel agree on a voluntary basis to represent him; it was stated that counsel so selected would be offered and granted administrative leave for the period he attended the hearing. (Tr. pp. 15 & 28).

The complainant referred to Assistant Secretary's decision A/SLMR 2/ No. 139 as authority for granting his motions.

II

BACKGROUND RESUME AND EMPLOYMENT HISTORY

The respondent National Labor Relations Board is an agency of the United States Government functioning under the National Labor Relations Act, as amended to (1) prevent statutorily defined unfair labor practices on the part of the employer and labor organizations or the agents of either, and (2) to conduct secret ballot elections among employees in appropriate collective bargaining units to determine whether or not they desire to be represented by a labor organization. Region 17 is the office of the National Labor Relations Board designated to effect its mission in the Kansas City Area. The staff in the office where complainant, Nixon is employed includes Regional Director, Thomas C. Hendrix, and an Assistant Regional Director; Regional Attorney, Harry Irwig, and Assistant Regional Attorney, Richard L. DeProspero; Compliance Officer, Patrick E. Rooney; (attorney) Group Supervisor, Frederick Herzog; and, (examiner) Group Supervisor, Jerry Cimburek. There are three attorney teams and one examiner team functioning under the supervision of the Regional Attorney, Assistant Regional Attorney and the Attorney and Examiner Group Supervisor. David Nixon, and Gerald A. Wacknov are attorneys working under the immediate direction of Regional Attorney, Harry Irwig.

The complainant was first employed as a GS-9 Field Attorney by the Agency in August 1965. He transferred from the Peoria, Illinois Office to Kansas City in 1967. When he left to secure other employment in August 1969, he was classified as a non-supervisory GS-13, Step 1, Field Attorney. When he was reemployed by the Agency's Kansas City Office in November 1969, he

2/ The Department of the Navy and the U. S. Naval Weapons Station case, A/SLMR No. 139, involved a unit determination issue which is investigatory in nature. It held that under Section 1(a) of the Executive Order providing the right, freely and without fear of penalty or reprisal, to assist a labor organization, places on agency management an affirmative obligation to facilitate the exercise of such right by making available on official time essential union witnesses at formal unit determinations held pursuant to the Regulations of the Assistant Secretary in order to enable the Assistant Secretary to render unit determinative decisions based on full and complete factual records. There is nothing incompatible in this proceeding from the A/SLMR No. 139 holding, since all witnesses were afforded administrative leave to attend the hearing; complainant was given annual leave for time spent in preparation of case and administrative leave during the period required for the hearing. In the absence of some type of enabling legislation or authority there is no provision under the Executive Order for extending in an adversary proceeding, the payment of attorney fees and or the benefits sought by complainant.

was interviewed and hired as a GS-13, Step 1, non-supervisory Field Attorney by respondent Thomas C. Hendrix, who had recently been promoted from Regional Attorney to Regional Director. Respondent, Hendrix had previously been Regional Attorney during complainant's tenure of employment with the agency; complainant was told by respondent Hendrix that he was being hired because he needed an attorney with experience. Complainant has continued employment with the Agency since he was rehired in November 1969; Regional Attorney, Harry Irwig has been his supervisor since January 1971. The record reveals that Mr. Nixon was promoted to GS-14 non-supervisory Field Attorney in February 1972. Throughout service since November 1969, respondent Hendrix has had the opportunity to observe and evaluate complainant and his work and since January 1971, respondent Irwig has been his immediate supervisor and has observed complainant and evaluated his work.

### III

#### CONTENTIONS AND ISSUES

Complainant at the hearing on August 29, 1972, stated that it was precisely his position that an appraisal and rating for placement on the supervisory roster was due in November 1971, but the allegation reads that "the agency acting by and through, et cetera, did on or about February 24, 1972, fail and refuse to accord an appraisal, and the operative word there is 'refuse' because on or about February 24, 1972, I made an express request that I forthwith be appraised, stating at that time that it had been due since November of 1971, and I am entitled to one immediately.

"For the next several months the agency refused to accord me a written appraisal and it is my contention that they did so by reason of discriminatory consideration of my rights. When they finally did accord me an appraisal on or about June 14, 1972, the appraisal, itself, with respect to the preparation of it, with respect to its content, was discriminatory, so my allegation is that they discriminatorily denied me a timely appraisal and at the time that they finally did accord me an appraisal, it was discriminatory in content."

The agency through respondents Hendrix and Irwig denied that the complainant's union activities and charges, grievances and unfair labor practice complaints after June 1971, had anything to do with their unfavorable appraisal of him in June 1972 as not being well qualified for the GS-14 supervisory register, and that earlier his name had been entered on the register in April 1971 following review of a previous appraisal by an Appraisal Review Panel as not well qualified for Field Attorney GS-13 supervisory register.

From the foregoing and the record, the issues presented for consideration include the following:

(a) Did respondents fail and refuse to accord the complainant a timely appraisal and review regarding his work performance and rating with respect to the agency's supervisory register because complainant filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491?

(b) Did respondents engage in reprisal activities against, the complainant by subjecting him to a disparate, discriminatory written professional appraisal dated June 14, 1972, by reason of complainant's filing of exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491?

(c) Was the June 14, 1972, appraisal disparate and discriminatory as to the manner in which it was prepared because complainant filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491?

(d) Was complainant denied a fair and regular "developmental interview" because complainant filed exceptions and grievances under the Collective Bargaining Agreement as charged under Executive Order 11491?

(e) Was the rule promulgated by Region 17 on August 21, 1972, requiring employees who are called to testify to take annual leave for pre-trial preparation, disparate and discriminatory as to the complainant, and, if so, was the rule promulgated because complainant filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491?

(f) Were the reasons for being appraised as not well-qualified for the supervisory register pretextual and due to union activity, filing of multiple charges and unfair labor complaints against the agency as alleged.

### IV

#### AGENCY POLICY, AND APPRAISALS

##### A

#### POLICY

Candidates for the Field Attorney GS-13 and GS-14 are selected on the basis of demonstrated job performance after the required time in grade, assessment of professional progress, determination of entitlement and job openings. Mr. Nixon has been appointed to the GS-14 Field Attorney, non-supervisory grade position. As to promotion, or consideration for managerial or supervisory positions, on the supervisory register, there is considerable sensitivity involved in terms of Regional Office operations and relations with the public; the positions are deemed to require an ability to effectively supervise and direct subordinates; to maintain close, harmonious, and effective relationships with supervisors; and; to deal effectively with many segments of the public; an employee's personal qualities, attributes and characteristics as revealed by actions in different employment circumstances and situations are also considered highly relevant to suitability for advancement to supervisory

and managerial positions. 3/ These elements are reflected on the employee's appraisal forms. (NLRB Form 1-67) Items Numbers 12, 14, 16, 18 and 20. Other factors considered may include education, technical skills and professional qualification.

An employee may be recommended for the Field Attorney supervisory register at any time if he meets the foregoing qualification requirements and his job performance warrants such action. Each employee is reviewed at least once a year through the appraisal system.

Appraisal recommendation for qualification on the supervisory register is made by the immediate supervisor and reviewed at the next level of supervision in the Regional Office for concurrence; if concurred in, it is then submitted to Washington and the final rating is made by an appraisal review panel.

Under the collective bargaining agreement 4/ where an employee is rated not well-qualified for promotion when first eligible, he may request and will be given an additional appraisal within six months after his first appraisal at that grade level; he must make such request no later than five months after his last appraisal and after the six month appraisal he will be rated on an annual basis.

From a review of the oral testimony and documentary evidence of record it is evident that an appraisal or rating for advancement to the GS-14 supervisory register encompasses elements such as ability to get along with others, ability to delegate authority, ability to direct others, ability to train and develop others and effectiveness of evaluation of others, that are either not or only minimally essential to adequate performance as a GS-14 Field

3/ Also reflected in background information following appraisals in November and December 1970. (Complainant Exhibit #13).

4/ Article IX Section 3 of the agreement provides that appraisals will be made annually, however, for GS-12 Field Examiners, the first appraisal will be given no later than the 16th month when an employee is first eligible to receive consideration for promotion in accordance with Part B, Section 2C. These appraisals will be forwarded to Washington for final determination as to rating and when appropriate, for placement on applicable promotion registers. In cases where the employee is not rated well-qualified for promotion when first eligible, he may, for any reason, request and will be given an additional appraisal six months after his first appraisal at that grade level, such request to be made no later than the fifth month after the last appraisal. Employees requesting a six month appraisal will be appraised on an annual basis after the first six month appraisal.

Attorney non-supervisory, but, which are particularly important and essential for consideration to entitlement to the GS-14 Field Attorney supervisory position. These elements were taken into consideration by the Agency in its June 1972 appraisal of Mr. Nixon.

B

#### APPRAISALS

Mr. Nixon's initial appraisal after his return to employment with the Agency in November 1969 was for consideration of an in-grade advancement to GS-13, Step 2, non-supervisory Field Attorney in May 1970. He was furnished a subsequent appraisal in November 1970, and after he filed exceptions or a grievance in reference to it a supplemental appraisal was issued in December 1970. 5/

Complainant remarked to the Deputy Assistant General Counsel with reference to his entitlement to promotion that: "If I were given a favorable appraisal, as I believe I am entitled to on the facts, then I would certainly seriously consider, and, in fact, I am quite sure that I would withdraw the grievance, because there wouldn't be any viable dispute at that point." Upon complainant's request an additional appraisal was furnished him on June 25, 1971. 6/ In the appraisal respondent Hendrix stated " ... I am recommending that Mr. Nixon not be promoted to the position of non-supervisory GS-14 Field Attorney at the present time. Furthermore, I see no reason to change his placement on the promotion register from not well-qualified for the position of GS-13 or GS-14 Supervisory Attorney." Complainant on cross-examination related that he filed a grievance against the agency in July or August 1971 and on September 17, 1971 he was furnished a supplemental appraisal. In an appraisal dated November 30, 1971 it was concluded and recommended that Mr. Nixon be promoted to a GS-14 non-supervisory Field

5/ This supplemental appraisal concluded he was not well-qualified for either the supervisory or non-supervisory GS-14 Field Attorney position. (Tr 859, 860, 984, 986).

6/ This appraisal was pursuant to a collective bargaining agreement then in effect. (Tr 863-865) and Exhibit C-7, Section 3(c) of the agreement.

Attorney position. 7/ Beginning in December 1971, complainant filed a second and third grievance and an unfair labor practice; in January 1972 he filed a fourth grievance and an amendment to the previously filed unfair labor practice; a fifth and sixth grievance followed in April 1972, the latter against a fellow employee compliance officer, Partrick E. Rooney, of Region 17; he filed a seventh and eight grievance in May 1972, and finally, the unfair labor complaint with the several amendments thereto leading to the present proceeding.

None of the appraisals after June 25, 1971 and prior to June 14, 1972, referred to him as having been evaluated or given consideration for the GS-13 or GS-14 Field Attorney supervisory register nor was there a timely appeal from the June 25, 1971 appraisal finding him not well-qualified for the GS-13 or GS-14 Field Attorney supervisory register.

The June 14, 1972 professional appraisal 8/ on which the complaint as amended, is partially based, evaluated him as not well-qualified for promotion to the GS-14 supervisory register. The appraisal contained a form for attorneys in Grade GS-12 and above with 20 evaluation factors to consider including ability to get along with others; ability to delegate authority; ability to meet and deal with the public; ability to direct others; ability to train and develop others; and effectiveness of evaluation of others. Provision was also made for narrative comment and in the eight pages of comment the respondent Irwig stated that he had been unable to check eighteen of the twenty appraisal items listed because Mr. Nixon's performance had been so erratic that this made supervising him rather difficult and more detailed supervising of him was required than should be for a staff attorney of his experience and length of service; he also stated Mr. Nixon was either unaware of customary operating procedures or considered himself free to deviate from them without reasonable justification whenever he saw fit to do so;

7/ Complainant Exhibit No. 18. The appraisal of November 30, 1971 was made following a decision dated November 15, 1971 by John S. Irving Associate General Counsel on a step two decision grievances filed by Local 17, NLRBU and field attorney David A. Nixon on the Regional Director's failure to recommend Nixon to GS-14 Field Attorney. The following was stated in footnote 6 of the decision: "Mr. Nixon's ratings for promotion to GS-13 or GS-14 supervisory positions have not been placed in issue by these grievances. The merits of the supervisory ratings were not addressed in the grievances, and Mr. Nixon states that he did not request an evaluation for and was not interested in supervisory positions at that time." It was further stated in the decision: "... I am unable to find and I do not believe that either Regional Director Hendrix or Regional Attorney Irwig intended any discriminatory treatment of Field Attorney Nixon. What does appear is that they accorded greater weight in certain matters than I deemed warranted..." (Complainant Exhibit #17).

8/ Complainant Exhibit No. 4.

closely related to this was his apparent unwillingness to follow instructions; he is unable to accept critical analysis of his work, has failed to reply responsively and has on occasion resorted to evasion; he seemed more interested in obtaining the best performance record possible than proper and expeditious case handling; it appears exceedingly difficult for him to operate within limitations inherent in employment in the agency since he is not practicing law by himself but, like all other staff members, he is part of the General Counsel's Office. Examples and comments were referred to in the appraisal and the supporting documentary reports. The appraisal forwarded by Respondent, Regional Director Hendrix, contains his additional comments as well as his statement of agreement with Mr. Irwig's evaluation and recommendation during the specified rating period; it was stated that complainant had not been accorded a rating with regard to the supervisory register because he requested and received an indefinite amount of time for filing comment on the appraisal.

Respondent Irwig testified that he spent an overall period of about two weeks preparing the appraisal but also performed duties of the office during that period. Group Supervisor Herzog testified that he took anywhere from three days to two weeks in preparing appraisals for employees under his supervision.

The Collective Bargaining Agreement does not call for piecemeal appraisal and ratings. In consideration of the agreement, the oral testimony and documentary evidence of record, I find: (1) that the appraisal in November 1970 constituted Mr. Nixon's annual appraisal under the agreement and that the supplemental appraisal in December 1970 was an extension of the annual appraisal; (2) the appraisal on June 25, 1971 was pursuant to Section 3 of the Collective Bargaining Agreement which covered consideration of both the GS-14 Field Attorney non-supervisory position and the GS-13 and GS-14 Field Attorney supervisory position; and (3) the next annual appraisal became due in June 1972 pursuant to the agreement.

It is not essential to the determination that I interpret the Collective Bargaining Agreement. However, I do not view Section 3c of the Agreement as requiring that the employee be eligible at the time of an annual appraisal for consideration to Field Attorney GS-13 and GS-14 positions, non-supervisory and supervisory. Appraisals frequently point out suggested deficiencies which can be corrected by employees before the time they qualify or are eligible for promotion or advancement to the supervisory register. It appears reasonable under the contract that where an employee is eligible for promotion to a higher grade or advancement to the supervisory register at or above his professional grade level when annual appraisal is made or he becomes eligible therefor within six months after appraisal is made, he thereafter is appraised on an annual basis. Such interpretation is liberal to the employee to permit qualification for promotion or advancement at the earliest date compatible with the appraisal evaluation and final rating establishing entitlement thereto; it also precludes long waiting periods where one may become eligible for promotion or advancement shortly after an annual appraisal and final rating.

The appraisals of Mr. Nixon between June 25 and November 30, 1971 related to matters put in controversy by grievance or complaint proceedings that did not involve consideration for advancement to the GS-14 Field Attorney supervisory register for which he had been appraised pursuant to the Collective Bargaining Agreement.

I do not view the Assistant General Counsel's memorandum of March 22, 1972 to complainant, as evidence that the June 1971 appraisal was null and void and that it was admitted Mr. Nixon was entitled to an appraisal for consideration of advancement to the supervisory register in November 1971 as he contends. Rather, I view its full context as concluding that the June 1971 appraisal was not untimely; it was not improper; and had there not been a June 1971 appraisal and/or other circumstances he would have been entitled to a regular annual appraisal in November 1971; that his next regular appraisal under all circumstances was due in June 1972, one year from the June 1971 appraisal and rating. The willingness of the agency to nullify the June 1971 ratings of the Appraisal Review Panel because they were based, in part, on an appraisal which became the subject of a grievance decided in complainant's favor did not affect the due date of his next appraisal and he was informed " ... However, this does not mean that the events which occurred during that appraisal period, to the extent they may be relevant, may not be considered in connection with future appraisals."

Certainly, in view of complainant's demands and allegations, it would be reasonably expected that careful consideration and time would be spent on appraisal of Mr. Nixon for consideration or advancement to the GS-14 Field Attorney supervisory register. It does not appear from the oral testimony and documentary evidence of record that the time spent on June 14, 1972 appraisal was excessive, or unusual under the circumstances in this case.

I therefore find that the respondents did not fail and refuse to accord the complainant a timely appraisal and review regarding his evaluation, performance and rating with respect to the agency's supervisory register because he filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491.

V

INCIDENTS LEADING TO  
UNFAIR LABOR PRACTICE COMPLAINTS AND HEARING

In December 1971, the complainant opined that the respondents were faulting his work even after he had been recommended for promotion to GS-14 Field Attorney and stated in his presentation that " ... Local 17 of the NLRB Union and I agreed that every time Mr. Irwig gave me an negative appraisal ... strike that ... negative memo, that we would ask for a clarification ... "

On February 14, 1972 Mr. Nixon was promoted to GS-14 Field Attorney non-supervisory. He immediately (the next day) requested another appraisal and that the previous one in June 1971 rating him as not well-qualified for GS-13 and GS-14 supervisory positions and Assistant Regional Attorney be found to have been untimely. He also raised a question as to the due date of his

next professional appraisal. It was concluded that in view of the strain complainant had undergone, a fact he readily admitted in his testimony, <sup>9/</sup> a reasonable period of time should pass before preparing his next appraisal. It was also concluded that under the Collective Bargaining Agreement, his next appraisal would be due in June 1972, a year since the last annual appraisal in June 1971. <sup>10/</sup>

In March 1972 he requested that he be permitted to serve as Acting Assistant Regional Attorney during the absence of the Assistant Regional Attorney. While provision had already been made for Gerald Wacknov, an attorney who had been with the Agency longer than Mr. Nixon to serve and fill the vacancy for the short period of time indicated, respondent Hendrix agreed to let the complainant serve <sup>11/</sup> after complainant stated "Well, Tom, if you do that (permit Wacknov to be Acting Assistant Regional Attorney) I just want you to know I intend to file a grievance over the matter today." <sup>12/</sup>

<sup>9/</sup> Complainant testified that "the grievances ... the complaints ... have made demands on my time and demands on my energies and demands on me ... a strain on my energy and my time." (Tr. 935)

<sup>10/</sup> In complainant's Exhibit #6, the Assistant General Counsel's memorandum of March 22, 1972 to Mr. Nixon states: "Although we do not agree that the action of the Regional Director and the Appraisal Review Panel in rating you for promotion to various competitive positions was untimely or improper, we are willing to nullify the June 1971 ratings of the Appraisal Review Panel in view of the fact that they are based, in part, on an appraisal which became the subject of a grievance which was ultimately decided in your favor. However, this does not mean that the events which occurred during that appraisal period, to the extent that they may be relevant, may not be considered in connection with future appraisals. With respect to the due date of your next appraisal which upon claim should have been rendered in November 1971, the following was decided: After carefully considering the circumstances of your situation and weighing the various alternatives, we have decided that the next annual appraisal will be due in June 1972. We do not think a professional appraisal should be submitted before then in view of the fact that your last complete professional appraisal was pending from July to November 1971 and a partial appraisal was submitted in November 1971 pursuant to the decision on the grievance. In the circumstances we believe it would be salutary to have a reasonable period of time pass since the grievance was resolved before preparing your next appraisal."

<sup>11/</sup> Respondent Hendrix stated in the June 14, 1972 appraisal that complainant performed on that job in a good manner and Irwig stated his performance was average.

<sup>12/</sup> Tr. p. 681.

On April 26, 1972, Compliance Officer Patrick Rooney contacted complainant requesting information about back pay and overage cases charged to Mr. Nixon. Several cases on the list are discussed in the narrative comment by Mr. Irwig in the June 14, 1972 appraisal. After the contacts between complainant and Compliance Officer Rooney were not fruitful, Mr. Nixon filed a grievance against Mr. Rooney referring to him derogatorily in the title of the grievance as a "de facto supervisor". Mr. Rooney testified that he had asked complainant on several occasions for information but, when he received no cooperation he felt it necessary to go to complainant's supervisor, Mr. Irwig, in order to process the case through compliance, which is Mr. Rooney's responsibility.

In late April or early May 1972, respondent Irwig made arrangements for Mr. Nixon to serve for a brief period as Acting Group Supervisor during the absence of Group Supervisor Fred Herzog. Mr. Herzog was asked to brief complainant on the duties and responsibilities of the job and after he did so complainant declined to serve. No reasons as to why he did not elect to serve were advanced.

Complainant's developmental interview pursuant to Article IX Section 3(a) of the Collective Bargaining Agreement was accorded him on June 8, 1972. He was permitted to take notes and at his request, John Hurley, Union President, was permitted to accompany him and sit in on the interview. Complainant testified that respondent Irwig told him he did not intend to give a lengthy review because details would be contained in the written appraisal which would be submitted the following week to respondent Hendrix. Respondent Irwig did tell him that it appeared complainant performed as if he were in business for himself, rather than being part of the Regional Office team, and that it was his impression that complainant was more interested in making a record for himself than in office handling of cases. It was further testified that Irwig said complainant only complied with instructions of his supervisors which were to his liking and not those which were not; that when complainant decided on a course of handling a case he did "everything in his power to adhere to that course of handling a case, rather than to follow the instructions of your supervisors."

Mr. Hurley testified that the developmental interview "was rather brief and there wasn't much discussion development." On redirect examination he referred to Mr. Irwig's general remarks to complainant stating: "I recall that it seemed like his main theme was that Mr. Nixon felt like or apparently felt like that he was a sole practitioner instead of working for the General Counsel, that he felt he could practice law the way he felt it should be practiced rather than on occasions following what the General Counsel and his inferior representatives wanted him to follow."

Other than the testimony that the developmental interview appeared to have been short, there was no evidence of antiunion animus on the part of respondents nor is it shown that there was a promise of benefits, threats of reprisal, physical assault, intimidation or harrassment of the

complainant. I do not find that complainant was denied a fair and regular developmental interview because he filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491.

At the suggestion of the union respondent Hendrix issued a memorandum dated August 21, 1972 concerning the subject of "Leave to Attend the Hearing in Mr. Nixon's Unfair Labor Practice Case." 13/ He advised that as to those persons who are called upon to testify administrative leave will be granted for the time spent at the hearing for such purpose but not for the purpose of pretrial preparation or for the period of time spent other than that necessary for them to give their testimony. Those persons who appear as witness and desire time off will be authorized annual leave for pretrial preparation provided they submit applications to their supervisors in advance of requested leave time and the supervisors determine that the time off can be granted consistent with the proper function of the office. As to non-witnesses, it was pointed out that public interest required continuation of work during the hearing but those desiring to attend would be permitted to do so on annual leave if they applied in advance to their immediate supervisor and obtained the supervisor's approval. It was stated that "The supervisors have the responsibility of being certain that we have an adequate work force on hand to accomplish the work that there is to be done."

Complainant urges that issuance of the memorandum constitutes a violation of Section 19(a)(1) of Executive Order 11491 because there had never before been any rule in effect in Region 17 prohibiting or limiting the right of employees to discuss during working time any subject without being charged for annual leave and requiring staff members to take annual leave to discuss their testimony with me at the impending hearing is disparate and discriminatory in purpose and effect to the complainant.

Each agreement between an agency and a labor organization is subject to the following requirements of Executive Order 11491, Section 12(b) which provides in part that management officials of the Agency retain the right, in accordance with applicable laws and regulations: (1) to direct employees of the Agency; (2) to hire, promote, transfer, assign, and retain employees in position within the Agency, and to suspend; demote, discharge, or take other disciplinary action against employees; (4) to maintain the efficiency of the Government operations entrusted to them; (5) to determine the methods, means, and personnel by which such operations are to be conducted and (6) to take whatever actions may be necessary to carry out the mission of the Agency in situations of emergency.

An examination of the August 21, 1972 memorandum shows that it was issued pursuant to a request by the union to advise all persons who desired to attend the unfair labor practice case of Mr. Nixon commencing on August 29, 1972, the leave provisions that would be applicable; the memorandum applied uniformly to all employee witnesses and non-witnesses regardless

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13/ Complainant's Exhibit #2



of union membership. Testimony at the hearing was to the effect that the leave provisions outlined in the memorandum were also applicable to all other Executive Order 11491 cases held in Region 17.

Under Section 19(a)(1) of the Order agency management is prohibited from interfering with, restraining, or coercing an employee in the exercise of rights guaranteed by the Order itself. A violation thereof will constitute an unfair labor practice. The rights which are assured to employees under the Order are set forth as a "Policy" under Section 1 thereof. As recited therein, employees are granted the right to form, join, and assist a labor organization. Further, the right to assist a union extends to participation in the management thereof, acting as its organization representative and presenting its views to appropriate authority.

There was no evidence presented that complainant's rights with regard to union membership or participation in union activities including the presentation of union views were in any way impaired. Further, each of the three Presidents of the NLRBU since its inception in 1969 were asked the question whether they had knowledge of any fact or evidence that would support or tend to support complainant's charges of discrimination against him by respondents because complainant had filed exceptions, grievances, or unfair labor complaints against the respondents. Each stated that he had no knowledge of any such discrimination against the complainant. Fred Herzog and Gerald Wacknov were the former presidents of the union making the above statement as well as the current President John Hurley. Patrick Rooney, Max Hochanadel and Joseph Logan testified to the effect that they had no knowledge and were not aware of any facts or evidence of any discrimination against the complainant.

In Department of the Navy and the U. S. Naval Weapons Station (A/SLMR No. 139), an investigatory proceeding involving a unit determination hearing, the Assistant Secretary held that the Agency was not obligated to make available on official time employees who appear solely as union representatives but not as witnesses at formal unit determinations.

The Assistant Secretary has also held that prohibition of employee distribution of union literature on activity premises in nonwork areas during nonwork time violates Section 19(a)(1) absent special circumstances.<sup>14/</sup> Prohibition of legitimate activity including solicitation of memberships on behalf of or against any labor organization by instructors during nonwork time with any employee, including students, provided there is no interference with the work of the agency, has also been held a violation of Section 19(a)(1) of the Order.<sup>15/</sup>

<sup>14/</sup> Charleston Naval Shipyard A/SLMR No. 1.

<sup>15/</sup> Department of Transportation, Federal Aviation Administration, Aeronautical Center, (A/SLMR No. 117).

I find that the August 21, 1971 memorandum by the Agency within the confines of Section 12(b) and did not violate Section 19(a)(1) of the Order for the following reasons: (1) Administrative leave was authorized and granted to all witnesses who testified in the proceeding; (2) annual leave was authorized to complainant and his witness for leave necessitated for pretrial preparation; (3) complainant and any witnesses desiring to testify or testifying in his behalf were not precluded from pretrial preparation during recess on off duty hours on the Agency premises; (4) it was obvious by August 21, 1972 that the hearing would likely be a prolonged one and necessity to maintain the efficiency of the government operation entrusted to the respondents and carry out the mission of the Agency were mandatory responsibilities for them to perform and the communication was a proper means for such accomplishment; (5) the fact that there may not have been any prior memorandum issued in Region 17 is not significant; what is significant is whether the content of the memorandum was discriminatory against the complainant. It does not appear that the memorandum went beyond Agency rights specified in Section 12(b) of the Order or were discriminatory against the complainant; (6) this is an adversary proceeding and time spent in pretrial preparation by complainant and his witnesses may not properly be charged to respondent government agency. In this connection, no reason is advanced and I perceive of none that would place a government employee and complainant in an adversary proceeding against the agency for whom he is working in a more favorable position than any other adversary litigant. Such would not be in the public interest; the public and the government agency have a right to expect that an employee will devote his working time to the agency mission and government operations and not to individual matters against those with whom he may have disagreements; (7) as an inherent part of its mission the government and/or its agencies must defend itself against adverse actions brought against it. Pretrial preparation of cases is an essential part of its mission and is accomplished on government time. The complainant's action was one of choice and not due to any proceeding brought against him by the respondents. His primary responsibility as a government employee is to carry out the duties that are given to him as his part of the agency mission.

I find that the issuance of the August 21, 1971 memorandum did not constitute a violation of Section 19(a)(1) of the Order as alleged by the complainant.

#### OTHER CONCLUDING FINDINGS

I find that the Agency's June 14, 1972 appraisal of the complainant as not well-qualified for the GS-14 Field Attorney supervisory register was not disparate or discriminatory with regard to the manner in which it was prepared, or as to its substance and content, or by reason of his having filed exceptions and grievances under the Collective Bargaining Agreement and charges under Executive Order 11491.

Under the Rules and Regulations of the Assistant Secretary for Labor-Management Relations, F.R. Vol. 37 No. 180, Section 203.14, entitled Burden of Proof, provides:

A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.

Section 19(a)(4) of the Order provides that Agency Management shall not:

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order.

In the first place, consideration for advancement to the GS-14 Field Attorney supervisory register was not in issue in December 1971 when complainant opined the respondents were faulting his work after he had been recommended for promotion to GS-14 Field Attorney, non-supervisory and he planned to ask for clarifying information on every memoranda the respondent agents or supervisors issued that he considered unfavorable to him. The record shows that he did in fact submit numerous memoranda pursuant to his announced intent. His request for an appraisal to the supervisory register was made in February 1972 and after his promotion to GS-14 Field Attorney, non-supervisory. The request was referred to the Assistant General Counsel who in March 1972 determined that his next appraisal would be due in June 1972. The appraisal and information reported as to the developmental interview show that what the Agency required in addition to performance at complainant's management level was primarily ability to demonstrate leadership in conformity with ability to follow legislative precedent, established regulatory procedure and ability to get along with other personnel. Mr. Nixon's actions were not those indicating any likelihood of his cooperation or abiding by suggestions of supervisory personnel requiring conformity with guidelines designed to maintain effective public and office personnel relationships nor were they such as would be calculated to win for him the friendship of fellow employees or supervisory approbation.

The record shows that rather than follow agency suggestions or recommendations with respect to expediting work, the complainant would often fence with his supervisors by notes and memoranda until given directions that provided no escape from compliance. His reluctance to voluntarily follow instructions, failure to reply responsively to directions on many occasions in oral and written communications and unwillingness to accept critical analysis of his work is supported by the oral testimony and documentary evidence including the appraisal narration. It is noteworthy that six witnesses including the three NLRBU Presidents since 1969 testified that they were not aware of any incident or evidence that supported or would tend to support Mr. Nixon's charge that he was discriminated against because he filed exceptions and grievances under the collective bargaining agreement and charges under the Order.

Complainant sought to bring out through respondent witness Gerald Wacknov, an attorney in the same grade and position as Mr. Nixon, and under the immediate supervision of Harry Irwig, that he also received memoranda from Mr. Irwig containing comments critical of his case handling. Mr. Wacknov responded:

"A. ... my answer is I don't know what you mean by 'critical'. I get memos and notes from Mr. Irwig with regard to case handling, with regard to what I have done on a particular case or what I am going to do. Whether or not Mr. Irwig regards these as 'critical' memos I don't know. I don't think I regard them as 'critical'.

Q. But in some memos or in some of those memos, Mr. Irwig notes that in some instances his recommended handling or his desired handling of some cases differ from that of yours, is that correct?

A. Dave, I don't think so much in memos. I think Harry calls me in his office and says he disagrees with me and he would do something different, and I may disagree with him. I would say that's not embodied in memos. I would say that is more of an oral communication between Harry and me. I think the notes I get from Harry are more on the order of what am I doing next, and what about this, and that sort of thing."

Neither the documentary evidence submitted or the oral testimony of witnesses who testified substantiate his claim that he was doing an outstanding job or cooperated well with associates, fellow employees and supervisors during the appraisal period from June 1971 to June 14, 1972; job discipline, exercise of mature judgment, getting along with others and leadership qualities commanding respect and ability to direct others are not demonstrated as his strong suits.

I credit the testimony of Compliance Officer Rooney as substantiating the back pay and overage cases referred to in the appraisal narrative comment by respondent Irwig and Hendrix on June 14, 1972. The compliance officer was referred to in the title of a grievance filed against him by complainant in 1972 as a de facto supervisor. Mr. Rooney was required at the hearing to produce the report 16/ he made at the request of respondent Irwig when complainant's appraisal was being prepared; after it was produced complainant dropped the matter without any questions. Max Hochanadel, a fellow attorney testified that complainant referred to him as "farm boy", "plow boy" and more recently as a person hailing from "rural regions". Joseph Logan field examiner in the Regional Office testified that on several occasions the complainant referred to respondents Hendrix and Irwig in derogatory and profane terms. 17/ Other incidents relating to complainants conduct in the office were also described.

16/ Respondents Exhibit No. 10.

17/ Tr. P. 1108.

I do not find the incidents relating to this phase of complainant's conduct essential to determination of the issues herein. While some incidents were within the appraisal period and could be considered others occurred before June 1971; too, it was not established that respondents were aware of the particular incidents at the time the June 1972 appraisal was made. The record is sufficient for credibility determination of the parties and witnesses separate and apart from the described incidents. I do credit the overall testimony of Patrick E. Rooney, Max Hochanadel, Frederick Herzog, Gerald Wacknov and Joseph Logan as supporting the appraisal findings of respondents Irwig and Hendrix that complainant had difficulty in maintaining close, harmonious and effective relationships with supervisors and getting along with others which encompasses ability to effectively supervise and direct subordinates. Complainant in his testimony and particularly throughout his cross-examination was reluctant to answer questions fully and often evasive and unresponsive. There was resort to fencing questions with respondent counsel; dilatory tactics to avoid or prolong answers; and furnishing of information at the last possible moment and often after having been directed to do so.

The complainant submitted numerous documentary exhibits purporting to show as background information why the appraisal findings were incorrect and that the appraisal findings regarding his performance were not justified. I find that the record does not support his position. The appraisal findings went beyond performance to include elements for supervisory positions not necessarily required or essential for adequate performance in a non-supervisory category and the evidence relating thereto was largely unrefuted. As to work performance some documents contain not only Mr. Nixon's work product but revisions and changes either directed or made by respondents Irwig and Hendrix. This was admitted by complainant on cross-examination and is illustrated by his testimony and certain exhibits introduced into the record. 18/ The oral and documentary evidence supports the appraisal findings that his work performance was erratic and he required considerable supervision to conform to agency standards and requirements.

The oral testimony and documentary evidence of record do not support the complainant's charge of disparate and discriminatory treatment against him by reason of his exceptions and grievances filed under the collective bargaining agreement and charges under the Order.

The contention has been made that because of the agency's consideration of Nixon's prior concerted protected activity of filing exceptions and grievances under the Collective Bargaining Agreement, and charges under Executive Order 11491, it failed to accord him an appraisal and review with respect to advancement or placement on the supervisory register. There are no provisions in Section 19 of the Order specifying that coverage of concerted activity as contrasted from union activities was intended. Further, it does not appear that there has been any official pronouncement as to intended coverage of concerted activity, I do not find it necessary in this case to make such determination because there was in fact no concerted activity shown and there was an appraisal with respect to consideration for

placement on the supervisory register without evidentiary showing of discriminatory treatment to complainant or violations of his rights under Section 19(a)(1) and (4) of the Order by the Agency as alleged.

I also find that the complainant was not deliberately harrassed or pressured on his job as trial Field Attorney. The strain that he found himself under after he had been recommended for and promoted to GS-14 Field Attorney non-supervisory, was generated by his own reaction or over-reaction to the Agency's refusal to give him an immediate appraisal for the supervisory register. He must have known that in view of the grievances, unfair labor practice charges and complaints that he had filed, the agency was in no position to overtly discriminate against him. The record does not show a promise of benefits, threat of reprisal, physical assault, intimidation or harrassment of the complainant by the respondents. When his record is viewed in connection with the collective bargaining agreement, the number of appraisals that he had in comparison with others during employment and the same appraisal period as complainant, it appears that respondents were somewhat indulgent in acceding to some of his demands when not bound to do so. In any event, there was no discriminatory or disparate treatment against the complainant established by the evidence of record.

Moreover, on the basis of the above, and the record as a whole, it is found that the reasons given Nixon by respondents June 14, 1972 appraisal evaluating him as not well-qualified for GS-14 Field Attorney supervisory register were not pretextual or discriminatory to discourage membership in and activities on behalf of the Union in violation of Section 19(a)(1) of the Order nor were such reasons shown to have been improperly motivated or given for the purpose of disciplining or otherwise discriminating against him because he had filed a complaint or given testimony in violation of Section 19(a)(4) of the Order.

The burden of establishing that Nixon's unfavorable appraisal was discriminatorily motivated has not been met. Unless there is some evidence such as close coincidence between union activity and disparate discipline as between union and non-union employees, statements or acts evidencing animus or other evidence to link disparate discipline with union activity, causal relationship between union activity and the unfavorable appraisal is not established. 19/

Also in the private sector, it is established, both by administrative decision and judicial opinion, that where discharge or other discipline is ostensibly imposed for an untainted reason but in fact had a dual purpose one legitimate and the other unlawful, the discipline cannot be sustained. N.L.R.B. v West Side Carpet Cleaning Co., 329 F.2d 758, 55 LRRM 2809, 2811 (6th Cir. 1964); N.L.R.B. v Hotel Conquistador, 398 F.2d 430, 68 LRRM

19/ Sys-T-Mation Inc., a Wholly owned subsidiary of the Salle Machine Tool, Inc. and Forest L. Beebe, 198 NLRB No. 119.

18/ Complainant's Exhibit No. 132 and Resp. Exhibit No. 8, Tr. 885 to 895.

2746 (9th Cir. 1968); Wood Bros. v N.L.R.B. \_\_\_\_\_ F.2d \_\_\_\_\_ 80 LRRM 2646 (9th Cir. 1972). As the Sixth Circuit has said, to find discriminatory action unlawful:

"It is not necessary that anti-union motivation be the only reason for discriminatory action complained of. It is sufficient if it is a substantial reason..."N.L.R.B. v Electric Steam Radiator Corp. 321 F.2d 733, 54 LRRM 2092, 2096 (6th Cir. 1963).

The Second Circuit has held:

"And even though the discharge may have been based on other reasons as well, if the employer was partly motivated by union activity the discharges were violative of the Act."N.L.R.B. v Great Eastern Corp., 309 F.2d 352, 51 LRRM 2410, 2412 (2nd Cir. 1962).

The tenth Circuit has used substantially the same language. Betts Baking Co. v N.L.R.B., 38 F.2d 199, 65 LRRM 2568, 2571, 2573 (10th Cir. 1967). The Fifth Circuit by way of dictum, goes even further:

"...an employer may discharge for no cause, or an unfounded cause so long as it was not in the least part precipitated by anti-union discrimination: General Tire v N.L.R.B., 332 F.2d 58, 56 LRRM 2183, 2184 (5th Cir. 1964)."

I differentiate these cases from the facts in complainant's case. Mr. Nixon was not discharged, reprimanded, threatened or otherwise disparately treated because of union activity. The Agency action in appraising him not well-qualified for the GS-14 Field Attorney supervisory register is not violative of the Order unless demonstrated to have been motivated by union activities or because he had filed a complaint or given testimony in violation of Section 19(a)(4) of the Executive Order.

In summary and apart from Mr. Nixon's feelings that his unfavorable appraisal was not justified, there is no evidence to show that the Agency's treatment of him, even assuming it to have been improper, was caused even in part by his union membership or activities. That is not sufficient: I make no determinations as to whether his appraisal was correct or incorrect; such conclusions would be relevant only if the conduct was motivated by his union membership or activities or by his having filed prior exceptions and grievances under the collective bargaining agreement and charges under the Order. No such discriminatory motivation is established from review of the entire record.

#### CONCLUSIONS OF LAW

I

Executive Order 11491, as amended and the Regulations of the Assistant Secretary of Labor issued pursuant thereto, are applicable to the National Labor Relations Board; an agency of the United States Government and to its officers, agents and employees.

- 21 -

II

The respondents Thomas C. Hendrix, Regional Director and Harry Irwig, Regional Attorney, are agents of the National Labor Relations Board Seventeenth Regional Office, located in Kansas City, Missouri.

III

David A. Nixon, the complainant is an employee of the National Labor Relations Board Seventeenth Regional Office.

IV

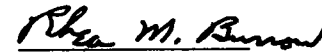
The complainant was not accorded disparate treatment or discriminated against within the purview of Executive Order 11491.

V

The complainant failed to prove by a preponderance of evidence violations of Sections 19(a)(1) and (4) of the Executive Order as alleged in the complaint, as amended.

#### RECOMMENDATION

Upon the basis of the entire record 20/ including the findings and conclusions, I recommend: That the complaint against the Respondent National Labor Relations Board Region 17, Kansas City, Missouri, Case No. 60-3035(CA) be dismissed in its entirety.

  
Rhea M. Burrow  
Judge

Dated at Washington, D. C. this  
23th day of January, 1973.

20/ Attached hereto as Appendix "A" are errata sheets showing changes in the transcript of items the complainant and respondent agreed required correction.

## APPENDIX "A"

(ERRATA SHEET)

CORRECTION IN THE TRANSCRIPT

<u>Page</u>	<u>Line</u>	<u>Presently Reads</u>	<u>Should Read</u>	<u>Page</u>	<u>Line</u>	<u>Presently Reads</u>	<u>Should Read</u>
				358	4	Norton	Norman
				416	22	expressed*	express
				475	19	R-e	R.A.
				518	2	Haines*	Haynes
8	21	it provided	I provided	533	16	in all respects.	with all respect.
28	1	annual leave	administrative leave	623	3	objective	subjective
28	19	in opposite	inapposite	715	4	noon before the	noon before, the
40	6	precluded	decided	719	15	underhanded	unevenhanded
47	8	was	did	720	2	MR. NIXON	(MR. NORMAN)
50	9	he	she	722	25	he said	I said
53	9	thà	that	749	1	moves	words
53	25	Jerry	Jerry Cimburek,	764	2	now, we	now, they
60	14	trier of facts*	trier of fact	777	1	25	24
75	5	my understanding and	my understanding the technical rules of evidence are not to be rigidly adhered to here and	783	17	His Honor	his lawyer
				789	11	you,	your functon,
				836	10	1971	1972
91	23	Well, it was	Well, if it was	875	25	anything	agreement
117	24	I expressed it limited -- to	I expressly limited it to	880	1	developing	protecting
				935	25	strain	drain
147	15	Hiers	Hirsch	978	4	March	December
166	22	thorough, on-going	thorough-going	1044	8	position	disposition
187	24	August 28 or August 24	April 28 or April 24	1078	4	connection	question
190	7	caret	carrot	1082	12	taunts	towards
198	4	urge	erred	1144	7;9	I felt	he felt
211	2	There is	That is				
348	13	fifty-six	66				

\*repeated error in transcript

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,  
 VETERANS BENEFITS OFFICE  
 A/SLMR No. 296

This case involved consolidated unfair labor practice complaints filed against the Veterans Administration, Veterans Benefits Office (Respondent), alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491 by terminating three employees for engaging in union activity.

Noting that two of the Complainants failed to appear at the hearing, the Administrative Law Judge recommended dismissal of their complaints. As to the remaining complaint, involving a probationary employee, the Respondent contended that as the employee's termination could be raised under an appeals procedure, Section 19(d) of the Order was applicable. More specifically, the Respondent contended that the issue of the employee's termination was raised and litigated pursuant to a complaint filed by him under an appeals procedure established under Executive Order 11478, concerning nondiscrimination in the Federal Government and, therefore, the Assistant Secretary had no authority under Section 19(d) to entertain the unfair labor practice complaint based on the same discharge. With respect to the merits, the Respondent contended that the employee's termination was premised on his overall employment record which was characterized by a history of tardiness and absences without leave and his insubordination as a result of his engaging in solicitation of union membership during duty hours in violation of Section 20 of the Executive Order after being warned, both in writing and orally, to discontinue such activity.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the appeals procedure available to the employee was not one in which the unfair labor practice issue properly could be raised and, therefore, it did not constitute an appeals procedure within the meaning of Section 19(d). With respect to certain deficiencies in the complaint raised by the Respondent, the Assistant Secretary noted that the technical deficiencies raised, which were unrelated to putting the Respondent on notice of the alleged violation or violations involved, did not warrant dismissal of the complaint.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge that the complaint be dismissed in its entirety on the basis that the employee involved was terminated for insubordination and that the evidence did not establish that the discharge was pretextual.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,  
 VETERANS BENEFITS OFFICE

Respondent

and

Case Nos. 22-3531(CA),  
 22-3532(CA), and  
 22-3533(CA)

NATIONAL ALLIANCE OF POSTAL AND  
 FEDERAL EMPLOYEES

and

RAYMOND HAMPTON (Individual)

and

FLONOIRAL MERRITT, JR. (Individual)

Complainants

## DECISION AND ORDER

On May 24, 1973, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints, and recommending that the complaints be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

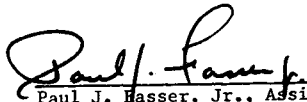
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial

error was committed. The rulings are hereby affirmed. 1/ Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject cases, and noting particularly that no exceptions were filed, I hereby adopt the findings, 2/ conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-3531(CA), 22-3532(CA), and 22-3533(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.  
August 15, 1973

  
Paul J. Hasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

1/ The Administrative Law Judge made several rulings on procedural matters raised by the Respondent, including the alleged failure to complete the complaint form in the manner prescribed. In this latter regard, it should be noted that the primary purpose of the complaint form is to put a respondent on notice of the alleged violation or violations involved. I agree with the Administrative Law Judge that the instant complaint was sufficient in this connection. As to alleged deficiencies in the complaint form raised by the Respondent which were unrelated to the matter of putting it on notice of the alleged violation or violations involved, in my view, such technical deficiencies on the complaint form will not serve as the basis for dismissal of a complaint.

2/ In reaching the disposition in the subject cases, it was considered unnecessary to decide whether, as found by the Administrative Law Judge, an appeals procedure, to come within the meaning of Section 19(d) of the Order, "must be an appeals procedure providing for third-party review of the unfair labor practice issue so raised."

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

.....  
VETERANS ADMINISTRATION :  
VETERANS BENEFITS OFFICE :  
Respondent :  
and :  
CASE NOS. :  
22-3531 (CA) :  
22-3532 (CA) :  
22-3533 (CA) :  
and :  
NATIONAL ALLIANCE OF POSTAL AND :  
FEDERAL EMPLOYEES :  
and :  
RAYMOND HAMPTON (Individual) :  
and :  
FLONOIRAL MERRITT, JR. (Individual) :  
Complainants :  
.....

John S. Mears, Norman Jacobs,  
and Howard Steinwandel  
Attorneys, Veterans Administration  
Washington, D.C., and  
Robert E. Coy and Stephen L. Shochet  
Attorneys, Veterans Administration  
Washington, D.C., on the brief for Respondent  
Erie R. Doyle and Wesley Young  
National Alliance of Postal and  
Federal Employees, 1644 Eleventh  
Street, N.W., Washington, D.C.,  
appearing for Complainants

Before: Francis E. Dowd, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding, heard at Washington, D.C. on October 3 and 4, 1972, arises under Executive Order 11491 (herein called the Order) pursuant to a notice of hearing on complaint dated August 9, 1972, issued by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Philadelphia Region. The complaint in Case No. 22-3531(CA) was filed by National Alliance of Postal and Federal Employees on behalf of Joseph Cleveland. The complaint in Case No. 22-3532(CA) was filed by Raymond Hampton. The complaint in Case No. 22-3533(CA) was filed by Flonoiral Merritt and he will be referred to as the Complainant in this decision. 1/ An Order Consolidating Cases was issued on August 9, by the Regional Administrator. The complaints alleged that Respondent violated section 19(A)(1) and (2) of the Order by terminating the employment of the above-named individuals because of their union or group activity and because they encouraged employees to join a union.

At the hearing, Respondent was represented by counsel and Complainant was represented by the National Alliance of Postal and Federal Employees. Both parties were afforded full opportunity to be heard, to present evidence, to examine and cross-examine witnesses and to make oral argument. Briefs were filed by Respondent and on behalf of the Complainant.

This case presents a number of issues: procedural, jurisdictional and substantive. The procedural issues are relatively simple and involve alleged defects in the complaint. The jurisdictional issue is quite novel and concerns the applicability of section 19(d) of the Order. Respondent contends that a notice of hearing should not have been issued because Complainant had already instituted proceedings under Executive Order 11498 and

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1/ Mr. Cleveland and Mr. Hampton failed to appear at the hearing. For this reason and in view of my decision on the merits, I recommend that Respondent's motion to dismiss Case Nos. 22-3531 (CA) and 22-3532(CA) be granted.

- 2 -

had filed a proceeding in the United States District Court. 2/ The substantive issue concerns the discharge of one employee and requires a determination as to the motivation for his termination. Respondent contends that he was discharged because of his total employment record. Complainant contends the stated reason for the discharge is merely a pretext and that the real reason is that this employee was a union officer actively engaged in recruiting employees to join a labor organization. The foregoing issues will be discussed more fully below.

Upon the entire record in this case, from my observation of all the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings and Conclusions

A. Procedural Issues--Alleged Defects in the Complaint

At the end of the hearing, 3/ Respondent moved to dismiss on several grounds, each of which were previously considered by the Acting Regional Administrator and denied by him on September 12, 1972, prior to this hearing. 4/ The various grounds for this motion are set forth below together with my rulings and reasons.

---

2/ In its motion, Respondent made reference to the fact that Complainant filed a suit in the United States District Court for the District of Columbia but did not specifically allege that he was precluded from so doing by 19(d). Since the matter was not mentioned in Respondent's brief, I assume it is not an issue in the case.

3/ The motion was first made at the beginning of the hearing and then withdrawn. It was renewed in toto at the end of the hearing.

4/ The written motion to dismiss is contained in Respondent's Exhibit No. 1.

- 3 -



1. Failure to comply with section 203.3(c) of the Rules and Regulations 5/ which requires that a complaint contain the following:

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice, including the time and place of occurrence of the particular acts and a statement of the portion or portions of the order alleged to have been violated;

Respondent contends that the complaint herein did not include the "time and place of occurrence of certain acts which constitute the alleged unfair labor practice." Specifically, Respondent contends that Complainant failed to state "when and where he encouraged other employees to join a union."

I find no merit to this argument. The purpose of section 203.3(c) is to inform an Activity of the facts constituting the alleged unfair labor practice so that the Activity can know what it is being charged with and prepare its defense accordingly. The complaint filed by Flonoiral Merritt, Jr., set forth facts concerning the time and place of his termination on March 10, 1972 and, in addition, stated as follows:

In general, the Executive Order makes it it (sic) illegal for an agency to discriminate in employment because of an employee's union or group activity within the protection of the order. I state emphatically, that my employment at the Veteran's Benefit (sic) office, was terminated because I encouraged other employees to join a union.

5/ When the complaint was filed, the Rules and Regulations of January 28, 1970 were in effect. Since then, revised Regulations were signed on September 6, 1972 and published in the Federal Register on September 15, 1972 to take effect 30 days after date of publication.

- 4 -

The last statement in the complaint (quoted above) was superfluous and even without it the complaint still met the requirements of section 203.3(c). When that section says "time and place of occurrence of the particular acts," it is obviously referring to the Activity's acts which are alleged to be unlawful. Contrary to Respondent's contentions, that section does not require the Complainant to set forth in the complaint each and every incident of his own activity on behalf of a labor organization. Moreover, it is clear from Respondent's presentation of this case that the complaint provided it with adequate notice of the alleged violations and basis for same.

Respondent also argues that the "failure to disclose essential facts with the specificity required may in many cases prevent the Area Administrator from adequately performing his duty to investigate the matter and report same to the Regional Administrator as required by section 203.5." In my opinion, the question of whether or not the complaint sets forth sufficient facts to enable the Area or Regional Administrator to adequately conduct his investigation is a matter to be decided by the Area or Regional Administrator, and not by me. For the foregoing reasons, the motion to dismiss on the ground of failure to comply with section 203.3(c) is hereby denied.

2. Failure to comply with section 203.3(d) by not including in the complaint a statement concerning "any other procedures invoked," That section requires that a complaint contain the following:

(d) A statement of any other procedures invoked involving the subject matter of the complaint and the results, if any, of their invocation including whether the subject matter raised in the complaint has been referred to the Council, Panel, or Federal Mediation and Conciliation Service for consideration or action;

In this regard, Respondent alleges that the complaint should have contained a statement that Complainant has (1) filed suit in the United States District Court for the District of

- 5 -

Columbia, in which suit he prays for various forms of relief, and (2) filed a formal complaint pursuant to Executive Order 11478 alleging his dismissal was due to racial discrimination. In its motion to dismiss dated June 12, 1972, Respondent states that both of these proceedings "are currently being processed." In making its motion on this ground, Respondent seems to be concerned with the applicability of section 19(d) of the Executive Order to this proceeding and seems to be assuming that the purpose of section 203.3(d) of the Rules and Regulations is to require full disclosure, so to speak, by Complainant of "any other procedure invoked." I find no merit in this argument.

The phrase "any other procedures" in section 203.3(d) does not mean any other procedures in the whole world; it means any other procedures under Executive Order 11491, as amended. Such a narrow construction seems required by the fact the "Complaint Against Agency" form prepared by the Labor-Management Services Administration to implement its Rules and Regulations does not provide any space for "other procedures invoked" nor does it suggest that such information be placed on the complaint form. Thus, section 3 of the form reads as follows:

3. (A) Attempts by the parties to resolve the alleged violation and the results. Attach particulars.
- (B) Has the subject matter raised in the complaint been referred to the Council, Panel or Service for consideration and action? ( ) Yes.  
( ) No.  
If yes, state the results.

In my opinion, 3(A) of the form requires information concerning settlement efforts, if any, between the parties prior to filing the complaint; 3(B) requires information concerning ancillary proceedings under the Executive Order involving resort only to the Federal Labor Relations Council, Federal Service Impasses Panel, or the Federal Mediation and Conciliation Service. Since the complaint form itself appears to have no relationship to section 19(d) of the Executive Order, I am not persuaded

that the phrase "other procedures" in section 203.3(d) bears any relationship to the phrase "appeals procedure" in section 19(d). Furthermore, section 203.3(d) of the Rules and Regulations (January 28, 1970) antedates the present language of section 19(d) of Executive Order 11616 (August 26, 1971) amending E.O. 11491.

Finally, I conclude that Complainant's failure to include such information in the complaint is, at most, a technical defect not so fatal as to warrant dismissal of the complaint. The motion to deny on these grounds is hereby denied.

3. Failure to comply with section 203.3(e) by allegedly not filing the report of investigation with the complaint. That section is as follows:

- (e) The entire report of investigation by the parties pursuant to §203.2 shall be filed with the complaint.

Section 203.2 states, in pertinent part, as follows:

The alleged unfair labor practice charge shall be investigated by the parties involved and informal attempts to resolve the matter shall be made by the parties. If informal attempts are unsuccessful in disposing of the matter ... a party may file a complaint ...

In my opinion, the foregoing sections of the Rules and Regulations, which were in effect at the time the complaints herein were filed, are decidedly unclear as to what constitutes a "report of investigation." If a rule is going to be strictly enforced to the point of dismissing a complaint, I believe the rule should be clear and unambiguous as to what is required by a party filing a complaint. I find that section 203.3(e) is sufficiently unclear as to warrant denial of the motion to dismiss on this ground. Moreover, subsequent to the filing of this matter, the Rules and Regulations were amended and the precise requirements of a report of investigation were spelled out in more detail. This adds further support to my denial of the motion to dismiss on this ground. It should be further noted that the Report of Investigation is for the

assistance of the Regional Administrator, not the Respondent, and since the Regional Administrator denied this motion originally, significant weight should be placed upon such ruling.

4. Failure to comply with section 203.7(a). Respondent moves to dismiss on the ground that the complaint does not set forth a prima facie case of an unfair labor practice. I reject this contention.

The Rules and Regulations do not require the Complainant to establish a prima facie case. Under section 203.7(a) it is only necessary that a reasonable basis for the complaint be established. That section provides, in pertinent part, as follows:

"If the Regional Administrator determines . . . that a reasonable basis for the complaint has not been established . . . he may dismiss the complaint."

Respondent contends that there was no reasonable basis for the complaint and that the Regional Administrator erred in denying Respondent's prehearing motion to dismiss the complaint. Except for the complaint and Respondent's denial that it discharged Complainant either because he was a union official or because of protected union activity, I do not know what facts were before the Regional Administrator when he denied the motion. Therefore, I am hardly in any position to substitute my judgment for that of the Regional Administrator. Nor was there any basis for me to recommend dismissal of the complaint without taking evidence at the hearing.

Since Respondent chose to wait until the end of the hearing to renew its original motion, I am treating such motion as a request to review an alleged erroneous ruling by the Regional Administrator. I conclude that the motion should be dismissed for the reasons previously stated, and for the reason that such a motion has now been rendered moot. In so ruling, I am not treating this as a motion to dismiss on the merits based upon evidence adduced at the hearing. The substantive issues concerning the merits of this case will be described later in this decision.

- 8 -

#### B. Jurisdictional Issues--Section 19(d)

In its motion to dismiss, Respondent asserts that Merritt filed a complaint with his employer pursuant to Executive Order 11478 6/ and, therefore, the Regional Administrator should have refused to take jurisdiction of the unfair labor practice complaint. Respondent contends that dismissal is warranted under section 19(d) of Executive Order 11491, as amended, on either of two theories. First, it is contended that Executive Order 11478 is an appeals procedure within the meaning of 19(d) and therefore is Complainant's exclusive forum. Secondly, it is contended in the alternative that Executive Order 11478, if not an exclusive forum, is at least an optional forum, and since Complainant first elected to seek redress under Executive Order 11478, such choice is irrevocable and he should not be permitted to now utilize the unfair labor practice procedures provided by Executive Order 11491. Accordingly, Respondent contends that the Regional Administrator should not have issued a Notice of Hearing. For reasons more fully discussed hereinafter, I deny this motion to dismiss.

A discussion of section 19(d) necessarily must commence with Executive Order 11491 before it was amended by Executive Order 11616. The original section 19(d) read as follows:

(d) When the issue in a complaint of an alleged violation of paragraph (a) (1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

6/ This factual allegation was not contested by Complainant.

- 9 -

The Study Committee Report and Recommendations 7/ which led to the issuance of Executive Order 11491 is in the nature of legislative history and indicates that the Study Committee clearly had in mind that some alleged unfair labor practices would be subject to the jurisdiction of the Assistant Secretary while other alleged unfair labor practices would be subject to the applicable grievance and appeals procedures. Therefore, as early as 1969 it was established that the Assistant Secretary was not the exclusive forum for the litigation and final resolution of alleged unfair labor practices. Moreover, in discussing case handling procedure, the Committee reported (at page 37) as follows:

If the Assistant Secretary finds that the matter at issue is subject to an applicable grievance or appeals procedure, ... he may dismiss the complaint.

The use of the words "subject to" would seem to indicate that the mere availability of a grievance on appeals procedure would be sufficient to warrant dismissal, whether or not an employee had resorted to the available procedure.

Thereafter, when Executive Order 11491 was amended by E.O. 11616 on August 26, 1971, the language of section 19(d) was changed to read as follows:

(d) Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary. (Emphasis supplied)

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7/ Report and Recommendations on Labor-Management Relations in the Federal Service, August 1969 at p. 37.

The revised section 19(d) eliminated the requirement that when an issue in an unfair labor practice complaint was subject to an established agency grievance procedure, it, i.e., the unfair labor practice issue, had to be resolved in that forum. This was done because the council believed there should be an opportunity to seek "third party adjudication" of any issue involving an alleged unfair labor practice rather than have agency management sit in final judgment of its own conduct. The amendment gave the employee an option between using the grievance procedure or the unfair labor practice procedure established under the Order. However, he could use only one, not both. The treatment of unfair labor practice issues subject to an established appeals procedure was not affected. Thus, in its Report and Recommendations (June 1971) on the Amendment of Executive Order 11491, after discussing the changes in the treatment of grievances, the Federal Labor Relations Council commented (at page 29) with respect to the amendment of section 19(d) as follows:

The existing rule that issues which can properly be raised under established appeals procedures may not be raised under unfair labor practice complaint procedures should be retained. Employees currently have the opportunity to seek third-party review of agency action under appeals procedures established by statute. (Emphasis supplied)

In its Report, the Council also expressed very clearly its desire to avoid overlap and duplication of remedies which apparently have resulted in some confusion and dissatisfaction among government employees and their union representatives. In amending section 19(d), therefore, it appears that the Council had two objectives: (1) providing employees with an opportunity for third-party review in situations when they didn't already have it, and (2) avoiding duplicate or multiple litigation before different forums. In my opinion, the reason why grievance procedures and appeals procedures are treated differently in 19(d) is because at least some appeals procedures are established by law or regulation and the Council has no authority to take away from an employee--by Executive Order--his right to file an appeal established by law. For the same reason, the Council could not require employees with statutory appeals rights to exercise an option as to forums, i.e., to choose between their statutory appeals procedure or the Assistant

Secretary. Still desiring to avoid duplicate or multiple litigation, then, the Council simply said in 19(d) that the Assistant Secretary would be precluded from taking jurisdiction when the Complainant had available to him an appeals procedure containing third-party review where the unfair labor practice issues arising from the same factual situation could be properly raised. On the other hand, since grievance procedures are not established by statute, the Council could go further, as it did, and require employees to make an irrevocable choice of forums, one of which presents an opportunity for third-party review.

From the foregoing, I would conclude, in agreement with Respondent, that in order for an appeals procedure to be of the kind envisioned by the Council for 19(d) purposes, it must provide an employee with independent third-party review of the final agency action. 8/ This does not mean, however, that third-party review is the sole criteria for an acceptable 19(d) appeals procedure. Of equal or perhaps greater importance is the subject matter being reviewed, namely, the issue concerning the unfair labor practice allegation.

In reading the Council's Report, I also note that whenever the term "appeals procedure" is used, it frequently is followed by words suggesting that the Council had in mind statutory appeals procedures. For example, the Council said in its Report at page 28 as follows:

Following a thorough examination of the issue, the Council concluded that there should be no change in the existing requirement that matters on which employees have appeal rights established by law should not be included in negotiated grievance procedures.  
(Emphasis supplied)

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3/ In this decision I have not endeavored to discuss such questions as the identity and independence of the third party and I will make only passing reference to the scope of such review.

- 12 -

Yet, when the Executive Order was amended the word "statutory" was used in section 13 but not in section 19. A ready explanation may be found in an Information Announcement issued by the Federal Labor Relations Council on March 22, 1972, in the form of "Questions and Answers" relating to section 13(a) of Executive Order 11491, as amended. 9/ The Council stated that the questions and answers were intended "to promote a better understanding" of section 13(a). 10/ Pertinent portions of the Information Announcement are as follows:

2. Q - Is the phrase "including matters for which statutory appeals procedures exist" intended as a further limitation on matters which may be covered by the negotiated grievance procedure?

A - Yes, it rules out coverage of any matters that are already covered by statutory appeals procedures. This prevents duplication or overlap in avenues of redress which could occur, for example, if a matter subject to a statutory appeals procedure also touches on provisions of the agreement.

3. Q - How would this work if an agreement has provisions concerning disciplinary actions?

A - The negotiated grievance procedure could not cover disciplinary actions which may be appealed under statutory appeals procedures (for example: removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay, when subject to the adverse action appeals system). It could cover other disciplinary actions, such as suspensions for 30 days or less, if they involve interpretation or application of agreement provisions.

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9/ GERR No. 445, March 27, 1972, p. A-5.

10/ According to its rules, the Council does not render advisory opinions.

- 13 -

4. Q - Does "statutory appeals procedures" refer only to procedures directly prescribed by statute?

A - No. It includes appeals procedures established by Executive Order or regulations or appropriate authorities outside the agency to implement or administer responsibilities assigned by statute with respect to the subject matter involved.

The term "statutory," as used here, means relating to or conforming to statute as well as created, defined or required by statute. (See definitions in Webster's Third New International Dictionary, Unabridged, 1966; Black's Law Dictionary, Revised Fourth Edition, 1968.)

The foregoing information issued by the Council--while not constituting an advisory opinion concerning a particular case--provides significant insight into the Council's view of the meaning of the term "appeals procedure." I certainly cannot overlook the fact that it was the Council which formulated Executive Order 11616 and issued the Study Committee Report previously referred to in this decision. Although the foregoing questions and answers concern section 13(a), it is my opinion that they apply equally as well to section 19(d). Therefore, even if 19(d) was intended to be restricted to "statutory" appeals procedures, the Council's definition of this term is broad enough to include appeals procedures established by Executive Order or other regulations. This does not mean, however, that all appeals procedures (as distinguished from grievance procedures) automatically come within the meaning of 19(d). Since the Council's Report did not identify the particular appeals procedure it had in mind, this will have to be done by examining various appeals procedures on a case-by-case basis.

In the case before me, it is only necessary that I decide whether the appeals procedure established pursuant to Executive Order 11478 comes within the meaning of section 19(d) as

- 14 -

contended by Respondent. In so doing, however, it will be necessary for me to draw some comparisons with other appeals procedures even though I make no finding concerning the applicability of 19(d) to such procedures. For purposes of this discussion, I am referring to the Equal Opportunity provisions of 5 CFR Part 713 and the corresponding FPM sections. Strictly speaking, therefore, this discussion is not limited to E.O. 11478 because Part 713 is also based upon other Executive Orders and statutes, the most recent being P.L. 92-261 signed on March 24, 1972. 11/

Again, the critical language of section 19(d) which is in issue in this case is as follows: "Issues which can properly be raised under an appeals procedure may not be raised under this section." Based upon my review of the matter, I conclude that in order for an appeals procedure to come within the meaning of 19(d) it must meet the following criteria: (1) it must be an appeals procedure in which the unfair labor practice issue "can be raised;" and (2) it must be an appeals procedure providing for third-party review of the unfair labor practice issue so raised. Certainly, it would be an anomaly to amend section 19(d) to provide employees with greater access to the Assistant Secretary and at the same time apply 19(d) to an appeals procedure--albeit with third-party review--which did not clearly state that unfair labor practice issues would be litigated, fully considered, and appropriately remedied in the same or substantially equivalent manner as customarily done by the Assistant Secretary. My analysis of FPM section 713 discloses that it fails to meet the criteria suggested above.

In its brief, Respondent set forth the hypothesis that if Flonoiral Merritt were a tenured employee, his discharge would be an adverse action governed by FPM section 752, subpart B, and his appeal would be processed pursuant to the section 771 appeals procedures. 12/ To this hypothesis, let me also add the additional supposition that if Merritt chose to allege discrimination based on an alleged unfair labor practice, this allegation would be "incorporated in the appeal" and also processed under Part 771 (see 771.106). Further, let me assume that if Merritt also chose to allege discrimination based upon

11/ See "Third Generation Equal Employment Opportunity," by Irving Kator, Civil Service Journal, Vol. 13, No. 1.

12/ In this regard Respondent assumes that section 19(d) is applicable to the adverse action appeals procedures of section 771 but I have found no case law or legislative history to persuasively support or contradict this assumption. Since this issue is not before me in this case, I make no finding in this respect.

- 15 -

race, that allegation would be referred to the Equal Employment Opportunity Officer for investigation in accordance with section 713.216 and the "allegation of discrimination" would be "incorporated in and become a part of the appeal under this subpart." (771.216) In other words, with the foregoing assumptions, it might be possible for Merritt, in one proceeding, to attempt to litigate and hopefully obtain answers to the following questions:<sup>13/</sup> (1) Was there good cause for the discharge as alleged by the Activity?; (2) Was his discharge based upon race?; (3) Was his discharge based upon lawful union activity?

The fact of the matter, of course, is that Merritt is a probationary employee whose discharge is not an adverse action and who therefore cannot file an appeal which will answer the first question dealing with "good cause."

He can, however, obtain an answer to the second question dealing with racial discrimination by either filing a complaint under section 315 or section 713. Section 315.806 gives probationary employees the right to appeal on grounds limited to the following: race, color, religion, sex, national origin, partisan political reasons, marital status, or physical handicap. Section 713.212 is limited to the first five just mentioned. Neither of these sections provides for consideration of discrimination based upon an alleged unfair labor practice. One can hardly expect a decision in a section 315 or 713 proceeding to resolve unfair labor practice issues, in the absence of a specific provision to that effect. To the extent that there is third-party review by the Civil Service Commission in section 713 cases, it is necessarily limited to the racial issues raised in that proceeding. Because Merritt is not a tenured employee and cannot file an adverse action appeal, he would have no related appeal with which his section 713 racial complaint could be consolidated as set forth in 713.236.

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<sup>13/</sup> The foregoing example is employed in order to raise these questions and also to illustrate how it is often necessary to weave one's way through a maze of regulations, cross-referenced to each other, in order to ascertain the nature of an employee's appeal rights and which regulations are applicable to a particular situation.

- 16 -

Since unfair labor practice issues may not be raised or receive third-party review in a section 713 proceeding, I conclude that section 713 is not an appeals procedure within the meaning of section 19(d). <sup>14/</sup> Because Merritt was a probationary employee whose section 713 complaint could not be consolidated with an acceptable 19(d) appeals procedure, his use of section 713 did not foreclose him from filing an unfair labor practice complaint with the Assistant Secretary under E.O. 11461, as amended. For all the foregoing reasons, I deny Respondent's motion to dismiss on the basis of section 19(d).

#### C. Substantive Issues--The Alleged Unfair Labor Practice

In determining whether Respondent violated section 19(d) (1) and (2) of the Order, it is necessary to consider, not only the facts occurring at the time of Flonoiral Merritt's discharge, but his entire employment record as well. My factual findings are as follows:

Flonoiral Merritt was employed by the Veterans Benefits Office on April 5, 1971, and assigned to work in section 1 of the File Room where, according to Supervisor Louis T. Dodd, he did an excellent job. However, he often had to be spoken to by Dodd who credibly testified that Merritt had a poor attendance record. Nevertheless, on August 17, 1971, Merritt was transferred to the Mail Room with a promotion to a supervisory position. His supervisor there was Almond H. Bowser, who credibly testified that Merritt was frequently tardy but if he had a reasonable excuse he was not charged with annual leave. However, if Merritt had no excuse or was substantially late, he was either charged AWOL or LWOP, depending upon the circumstances.

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<sup>14/</sup> Assuming, arguendo, that the adverse action appeals procedures of section 771 are also a 19(d) appeals procedure, and assuming further that a tenured employee filed a section 713 racial discrimination complaint, the basis for a 19(d) dismissal of any unfair labor practice complaint would be the availability of section 771 and not the use of section 713. Respondent's contention on this basis is rejected.

- 17 -

Bowser's testimony was corroborated by his superior, James Whitmeyer, who credibly testified that he talked to Merritt about his tardiness and attendance record and warned him that, if he didn't improve, disciplinary action would be taken.

On November 24, 1971, Merritt was given a written admonishment based upon his being AWOL for 3-1/2 hours on November 19 (see Respondent's Exhibit No. 4). According to Raymond Peterson, Chief of the Administrative Division, there is no requirement for giving admonishments to probationary employees in a trial period but it is done to warn an employee, "in a more forceful manner other than orally speaking to him" that he must improve his work habits. Therefore on January 7, 1972, Merritt was advised in writing (see Respondent's Exhibit No. 6) that he was being reduced in rank and compensation from a Mail Room Supervisor, GS-305.4/1, \$6,202 per year to a Mail and File Clerk, GS-305 3/2, \$6,022 per year, effective January 9. The memorandum stated, in pertinent part, as follows:

1. This action is being taken because you have failed to demonstrate that you possess the characteristic traits necessary for satisfactory performance as a supervisor.
2. Specifically, this action is based on your absence without approval of leave on two separate occasions and failure to set a good example for subordinate employees.

According to Raymond Peterson, he did not discharge Merritt because he wanted to give him another chance.

Miss Linda White, Chairman of the Youth Activities Committee from January to September 1972, testified that this Committee was established by the Administrator of the Veterans Administration to serve as liaison between management and employees under the age of 35. The Committee was comprised of representatives from the various Divisions at the Veterans Administration and met once or twice a month. The representatives would then return to their respective Divisions and conduct meetings with those employees under 35. Such a meeting was held in late February 1972, among employees of the Administrative Division during duty hours on the Activity's premises at

approximately 2:00 p.m. Percell Walker, a nonsupervisory employee, credibly testified that the meeting was called to order by Merritt who introduced a gentleman representing a labor organization who, in turn, explained how a union could be organized at the Veterans Benefits Office. Walker stayed throughout the entire meeting which lasted 50 minutes and was attended by about 20 persons. According to Walker, there was literature available on a table and, while he didn't read the literature, he could tell from the covers that it was union literature. I am satisfied, based on Walker's testimony and the entire record in this case, that union business was carried on at this meeting. I deem it unnecessary to make any finding as to whether an official union representative actually appeared at this meeting. I do find, however, that management was under the impression that a union agent was at the meeting and in February 1972 knew of Merritt's possible involvement with the union, at least to this limited extent.

Thereafter, Linda White was called into the office of Jumer Hubbell, then Director of the Veterans Benefits Office, and informed that a union representative had appeared at a YAC meeting and that this was illegal. According to White, Hubbell explained that under certain circumstances it would be legal to have union meetings at the office and that he was willing to hold the office open after regular working hours. He gave White a memorandum (Respondent's Exhibit No. 4) dated March 1, on the subject of "Conducting Union Activity" which reads, in part, as follows:

1. It has come to my attention that a Union Representative recently addressed a youth group during working hours.
2. I would appreciate your bringing the following information to the attention of VBO Youth Committee Members:
  - a. Solicitation of Union membership or dues and other internal Union business must be conducted during non-duty time.
  - b. Union representatives must secure approval from my office before conducting meetings,



soliciting membership or distributing Union literature in this building.

3. The policy governing union activity is contained in Federal Personnel and VA Personnel Manuals, Chapter 711.

4. The above references may be reviewed in the Personnel Office. Any questions pertaining to this subject or other personnel matters should be directed to the Personnel Division.

At a meeting on March 6 the above-quoted memorandum from Mr. Hubbell was read by Miss White to YAC representatives, including Mr. Merritt, who admits receiving a copy of the memorandum from White. Minutes of the meeting were prepared by a secretary, signed by Miss White, and introduced into evidence as Respondent's Exhibit No. 8. From the foregoing I find and conclude that Mr. Merritt was adequately apprised of the restrictions on conducting union business during duty hours.

On March 8 Mr. Merritt and Mr. Raymond Hampton asked permission of Mr. Peterson to hold a YAC meeting as soon as possible. They were told they could use the classroom the next afternoon provided the meeting did not last more than one hour and provided further that it was confined to youth activities and not union business. The meeting of the YAC of the Administrative Division took place on March 9 as scheduled. An account of what transpired at the meeting was given by Anthony Carilli, staff assistant to Peterson. Carilli's testimony was corroborated by another witness, supervisor Louis Dodd, who also attended the meeting at the request of Peterson. Both witnesses impressed me with their honest, straightforward account of the meeting and I credit their testimony. According to Dodd, the meeting began around 2:30 p.m. when Merritt said, "We have some uninvited guests, but go ahead and say what you want to say." Mr. Raymond Hampton then introduced the employees who were recently elected to union office. He then discussed the need to recruit members, and explained about the \$2.00 membership fee. Mr. Hillman, Secretary of the Union, passed out union literature. An application blank (Respondent's Exhibit No. 10) was handed to Carilli who then obtained the attention of Mr. Merritt and motioned for him to step outside of the meeting room. They

went outside, closed the door behind them, and Carilli reminded Merritt that it was against government regulations to conduct union activities during official duty hours. Merritt replied, "This is YAC activities, Youth Advisory Committee activities." Carilli testified that he pointed to the application blank and told Merritt "This doesn't look like YAC activities to me. You have got to stop it, or I will report it to the Director." Merritt's answer, according to Carilli, was, "Then go right ahead."

Thereupon Mr. Carilli reported what happened to Mr. James Hubbell, the Director of the Veterans Benefits Office. Hubbell then instructed Personnel Officer Raymond Toney to break up the meeting. Carilli and Toney went to the meeting room where Toney told those assembled to break up the meeting and return to their offices. Supervisor Dodd, who had remained in the meeting the entire time, testified, contrary to Merritt, that after Toney left, the meeting continued for another 15 to 18 minutes. (Merritt testified that the meeting was adjourned almost immediately.) Dodd also testified that union literature was passed out at the meeting. Toney corroborated Carilli's testimony.

A disputed question in this case is whether or not any union business was conducted at this meeting. I simply cannot credit Merritt's denial in the face of overwhelming evidence with respect to Respondent's Exhibit No. 5, an undated memorandum purporting to be the minutes of the very same YAC meeting of March 9. At the hearing, Merritt testified that the minutes were prepared by the secretary, signed by all three YAC representatives, including himself, and submitted to Peterson who previously established a requirement that YAC minutes be prepared and submitted to him. These minutes state, *inter alia*, as follows: "Mr. Hampton explained to the people about the union and he gave a small briefing on the procedure of the union." I find that union business was discussed at the March 9 meeting contrary to explicit instructions that this was not to be done. 15/

15 Although denying that union business was discussed at this meeting, Merritt testified it was at the end of this particular working day that he called the union to talk to Mr. Young and inform him that "we had enough membership now to apply for recognition at VBO" (emphasis supplied).

Toney went directly from the meeting to Hubbell's office where a decision was made to terminate the employment of Merritt and Hampton based upon their total employment record. Based upon the foregoing, I find that the termination decision took place on March 9. 16/

On March 10, at about 8:15 a.m., a meeting was held in Hubbell's office attended by Assistant Director Welsh, Personnel Officer Toney, and Administration Division Chief Peterson. Hubbell instructed Peterson to prepare termination letters immediately but not to present them to Merritt and Hampton until late that same afternoon. Peterson testified the letters were presented personally by him to Merritt and Hampton at 3:30 p.m.

The subject of the termination memorandum (Complainant Exhibit No. 2) was "Notice of Separation--Failure to Qualify During Trial Period." The only reason given for the termination was as follows: "This action is being taken because you have failed to demonstrate during your trial period that you possess the characteristic traits necessary for satisfactory performance as a career employee." After the unfair labor practice charge was filed, Respondent wrote to Merritt on April 21, 1972, and denied that the termination action was a violation of the Executive Order. The memorandum stated, in pertinent part, as follows:

Your separation was based on your total employment record. This included prior conduct necessitating disciplinary action and your more recent behavior and attitude

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16/ In view of my finding that the decision to terminate occurred on March 9, I find it unnecessary to discuss at any length the union's letter of March 10, informing Mr. Hubbell of the names of the local's officers. Apart from the suspicious circumstances surrounding the preparation and delivery of this letter, and whatever the union's real intention may have been, I find that the letter played no part in the Activity's decision to terminate Merritt.

- 22 -

associated with your conducting an unauthorized union organizing meeting and recruiting efforts at this office during duty hours on March 9, 1972, despite specific instructions to the contrary.

Thereafter, Merritt filed the complaint which resulted in this hearing.

#### Conclusions

The volumes of decisions issued by the National Labor Relations Board are replete with cases involving the discharge of employees for exercising their statutory right of engaging in activity on behalf of a labor organization. These decisions concerning labor relations in the private sector, however, do not serve as precedent for decisions by the Assistant Secretary involving government employees. Nevertheless, such decisions do offer criteria which can be considered in determining whether the discharge of an employee constitutes an unfair labor practice within the meaning of section 19(a)(2) and thereby a derivative violation of section 19(a)(1) of the Executive Order.

Section 19(a)(2) of the Order provides that agency management shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment" (emphasis supplied). To establish a violation of section 19(a)(2), a complaining employee must show that he was discriminated against in his employment because of the exercise of his rights guaranteed by section 1 of the Order and not because of conduct outside the protection of the Order. This raises a question as to whether particular conduct was of a protected kind, and whether the Activity, knowing that the employee engaged in the particular protected conduct, in fact discriminated against the employee because of that conduct rather than for some other reason. The necessary finding that the Activity's discrimination encouraged or discouraged union membership within the meaning of section 19(a)(2) does not depend on the Activity's motive, or on whether actual encouragement or discouragement occurred, but solely on whether the discrimination tended to influence the employee's acquisition, maintenance, or retention of union membership.

- 23 -

Section 20 of the Order reads, in pertinent part, as follows:

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned.

I am unaware of any legislative history which would indicate that the purpose of section 20 was to pin a label of "unprotected" on this particular conduct. A more reasonable interpretation of section 20 is that it was intended to establish a uniform "no-solicitation rule" for all government employees, rather than permit each government agency to establish its own rules, with myriad variations. Section 20, however, does not specify what sanctions should be imposed upon employees who fail to comply with its provisions.

Where it is necessary to maintain order and efficiency an Activity may, in my opinion, take appropriate disciplinary action. By appropriate I mean that the severity of the penalty must fit the severity of the offense. In other words, discipline meted out, whether in the nature of a warning, reprimand, suspension, or removal, must bear a reasonable relationship to the offense committed and should be consistent with applicable legal precedent established by the Civil Service Commission and the courts in adverse action proceedings.

Whereas, in the private sector, an employee might lose this statutory protection altogether by engaging in so-called unprotected activity, I am not convinced that this necessarily follows insofar as the Executive Order is concerned. By way of a hypothetical example, let us suppose an employee during official working hours solicits other employees to buy Girl Scout cookies, to contribute to a religious fund drive, to sign a petition favoring or protesting a political decision, to participate in a meat boycott, or to join a union. Is the latter solicitation so reprehensible that it warrants immediate discharge whereas the other rule violations may be the subject

- 24 -

of a warning, a suspension, or no disciplinary action at all? <sup>17/</sup> Frankly, I would answer this question in the negative and add the customary caveat--"but it depends upon the facts of each case."

Turning now to the facts of this case, the testimony of Respondent's witnesses makes clear that the Activity had knowledge of Merritt's union activity prior to the March 9 meeting and it is irrelevant whether its knowledge was derived from Merritt's union activity during working hours as distinguished from nonworking hours. Contrary to Respondent's defense, I find company knowledge on the part of the Activity, thus meeting one essential ingredient of a 19(a)(2) violation. But this is the only criteria that has been established and it is insufficient by itself to amount to an unfair labor practice.

I find no evidence on this record of any anti-union feeling demonstrated by the activity. When management representatives first learned that union business was discussed at a February 24 meeting, the Activity took appropriate steps to inform employees that their rights to engage in union activity were limited by regulation. I believe the Activity had a right and an obligation to so inform its employees of the requirements of section 20 of the Order. Indeed, the Activity even offered to make its facilities available for meetings before or after official working hours, or during the lunch period. Although the Respondent knew of Merritt's union involvement, it took no disciplinary action against him until he disobeyed specific instructions, both written and oral, not to discuss union matters at the March 9 meeting. Moreover, when he was called out of the March 9 meeting by Mr. Carilli and reminded that he was violating the rules, Merritt told Carilli to "go right ahead" and report it to the Director. Further, he continued to proceed with the meeting even after being told by Toney to stop the meeting. Thus, Merritt ignored warnings given to all employees, flouted the authority of his superiors in the presence of a significant number of other employees, and, in sum, was insubordinate.

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<sup>17/</sup> An activity which seizes upon a section 20 violation as the basis for an unreasonably severe disciplinary action runs the risk, it seems to me, of being accused of engaging in disparate treatment from which an anti-union motive might be inferred.

- 25 -

When Respondent terminated Merritt on March 10, the reason set forth in his notice of termination was that he did not possess the "characteristic traits necessary for satisfactory performance as a career employee." 18/ However vague and generalized this typical personnel language would appear to be, it must be remembered that this notice was prepared the day after the March 9 meeting. I agree with Complainant's contention that an essential element of this case--like numerous NLRB cases--is the timing of the discharge. 19/ The timing, however, relates to the fact that within an hour after Merritt was told to break up the "union" meeting, a management decision was made to terminate him. Moreover, I find that the real reason for Merritt's discharge was his insubordination in connection with the March 9 meeting. This was the event that triggered the discharge and, in my opinion, overshadowed the section 20 rule violation. Accordingly, I reject Complainant's contention that the stated reason for the discharge was a pretext, and that Respondent really was discharging Merritt because of his lawful protected union activity. On the record before me, the Complainant has not sustained his burden of proof.

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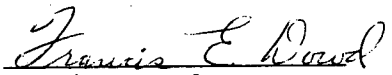
18/ Although probationary employees may be terminated at the very end of their one-year trial period, the normal practice--as set forth in the applicable regulations--is to give written notice 30 to 60 days prior to the end of the year. Notwithstanding Merritt's leave record, no action was taken to remove him or to advise him that this was in the offing. In the circumstances of this case, however, I need not make any finding as to whether Merritt would have been terminated anyway because of his total record prior to March 9. Accordingly, I make no finding with respect to Peterson's testimony that he had decided to recommend against Merritt's retention.

19/ I reject Complainant's contention that the timing of the discharge was related to the hand-delivered letter informing Respondent of the names of the union officers. (See footnote 16.)

#### Recommendation

In view of the findings and conclusions made above, I recommend that the Assistant Secretary of Labor for Labor-Management Relations dismiss the complaint.

Dated: May 24, 1973

  
Francis E. Dowd  
Administrative Law Judge

August 15, 1973

Corrections to the Transcript

<u>Page</u>	<u>Line</u>	<u>Presently Reads</u>	<u>Should Read</u>
70	13	will	will not
94	18	considered	concerted

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT  
 OF THE ASSISTANT SECRETARY  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,  
 UNITED STATES NAVAL WEAPONS CENTER,  
 CHINA LAKE, CALIFORNIA  
 A/SLMR No. 297

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On January 28, 1972, the Assistant Secretary issued a Decision and Order Clarifying Unit in A/SLMR No. 128, in which, among other things, he found that employees in the classification of Fire Captain, GS-7, were not supervisors within the meaning of the Order.

On May 25, 1973, the Federal Labor Relations Council (Council), issued its Decision on Appeal in which it remanded the subject case to the Assistant Secretary for a determination whether, based on the principles enunciated by the Council in its Decision on Appeal, the Fire Captains are supervisors within the meaning of Section 2(c).

Pursuant to the Council's Decision on Appeal, the Assistant Secretary reviewed the record in the case and found that Fire Captains, GS-7, adjust employee grievances within the meaning of Section 2(c) of the Order and, therefore, pursuant to the rationale contained in the Council's decision, are supervisors who should be excluded from the unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
UNITED STATES NAVAL WEAPONS CENTER,  
CHINA LAKE, CALIFORNIA

Activity

and

Case No. 72-2238(CU),  
A/SLMR No. 128,  
FLRC No. 72A-11

INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS, LOCAL F-32, AFL-CIO,  
RIDGECREST, CALIFORNIA

Petitioner

SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT

On January 28, 1972, the Assistant Secretary issued a Decision and Order Clarifying Unit in A/SLMR No. 128, in which he ordered, among other things, that the exclusively recognized unit be clarified by including in said unit the employee classification Fire Captain, GS-7, on the basis that the employees in such classification were not supervisors within the meaning of the Order.

Thereafter, the Activity requested the Federal Labor Relations Council, hereinafter called the Council, to review the Assistant Secretary's decision in A/SLMR No. 128. Subsequently, the Council advised the parties that it had accepted the Activity's petition for review.

On May 25, 1973, the Council issued its Decision on Appeal in the subject case, remanding it to the Assistant Secretary for a determination whether, based on the principles enunciated by the Council in its

Decision on Appeal, the Fire Captains are supervisors within the meaning of Section 2(c). 1/

Pursuant to the remand of the Council, and based upon the entire record in this case, including the briefs of the parties, the Assistant Secretary finds:

In its Decision on Appeal, the Council held, among other things, that if the evidence is sufficient to establish that individuals possess the authority to adjust grievances at the first step of the grievance procedure, such individuals are supervisors within the meaning of the Order, irrespective of whether the first step is characterized as an informal stage and irrespective of whether the decision at the first step is appealed and reversed.

The evidence herein indicates that the Fire Captains participate in the handling of employee grievances at the first discussion level of Step 1 of the parties' negotiated grievance procedure and that ninety-five percent of employee grievances are resolved at this level. In this regard, the parties' negotiated agreement provides, and testimony in the record establishes, that the Fire Captains may resolve employee dissatisfactions without the concurrence or necessary review of the Assistant Chiefs or the Chief. 2/ Further, the evidence does not establish that the Fire Captains' actions with respect to the processing of grievances at the first discussion level are of a routine or clerical nature not requiring the use of independent judgement.

1/ In its Decision on Appeal in the subject case, the Council concluded that Section 2(c) must be applied in the disjunctive and that, accordingly, any individual who possesses the authority to perform a single function described in Section 2(c), provided he does so in a manner requiring the use of independent judgement, is a supervisor and must be excluded from the unit. It should be noted that in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, issued December 23, 1971 (set aside, in part, by the Council in FLRC No. 72A-4 on other grounds), the Assistant Secretary adopted the Hearing Examiner's finding that "Since the various elements of supervision set forth in Section 2(c) are written in the disjunctive, if an employee's authority includes any one of these elements, he would be a supervisor."

2/ The parties' negotiated grievance procedure specifically provides that only "[i]f no acceptable settlement is achieved with the Captain. . . , the employee shall attempt to resolve the matter with first, the Assistant Fire Chief, and, if this fails, the Fire Chief."

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL  
WASHINGTON, D.C. 20415

United States Naval Weapons Center  
China Lake, California

and

Local No. F-32, International  
Association of Fire Fighters,  
AFL-CIO

A/SLMR No. 128  
FLRC No. 72A-11

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from a Decision and Order Clarifying Unit in which the Assistant Secretary held, among other things, that the GS-7 fire captains employed at the China Lake Naval Weapons Center were not supervisors within the meaning of section 2(c) of the Order.<sup>1/</sup> This holding raised certain questions with respect to the interpretation of section 2(c) which the Council determined are major policy issues warranting review. Specifically, the two issues raised are: should section 2(c) be applied in the disjunctive, and, secondly, does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective within the meaning of section 2(c). The facts giving rise to this appeal are set forth below.

Local No. F-32, IAFF, is the exclusive bargaining representative of all Fire Division employees at China Lake. Historically, the GS-7 fire captains had been included in the unit; but in 1970, the Navy excluded

1/ Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

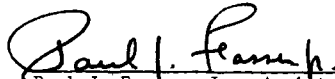
Under these circumstances, I find, pursuant to the rationale contained in the Council's decision, that employees classified as Fire Captains possess the authority to adjust employee grievances within the meaning of Section 2(c) of the Order and, therefore, are supervisors who should be excluded from the unit. 3/

ORDER

Pursuant to the Council's Decision on Appeal in FLRC No. 72A-11, the Order of the Assistant Secretary of Labor for Labor-Management Relations set forth in A/SLMR No. 128, is hereby modified as provided below:

The employee classification Fire Captain, GS-7, is hereby excluded from the unit in which exclusive recognition was granted on February 6, 1963, to the International Association of Fire Fighters, Local F-32, AFL-CIO, located at the United States Naval Weapons Center, China Lake, California.

Dated, Washington, D.C.  
August 15, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

3/ In view of the above finding with respect to the authority of the Fire Captains, GS-7, to adjust grievances, it was considered unnecessary to decide whether such employees possess other indicia of supervisory authority. See footnote 1 above.

them from the unit pursuant to section 24(d) of the then current Order.<sup>2/</sup> The union filed a clarification of unit petition, seeking the inclusion of the fire captains, contending that they were not supervisors with the meaning of section 2(c).

The Assistant Secretary found in favor of the union and directed that the fire captains be included in the unit. In so finding, he concluded, in essence, that the fire captains did not possess the necessary indicia of supervisory authority described in section 2(c). Specifically at issue herein are the Assistant Secretary's conclusions that the fire captains do not "effectively" recommend employees for promotion because their recommendations must be reviewed at several different levels before a final decision is made, and his conclusion that the decisions of the fire captains at the first step of the grievance procedure "are not determinative but are subject to multiple levels of appeal."

Contentions

The Navy contends that the Assistant Secretary's interpretation of section 2(c) in this case ignores both the literal language and the clear intent of the Order. Specifically, the Navy argues that section 2(c) must be applied in the disjunctive and, therefore, if the fire captains possess even one of the indicia set forth in section 2(c), they must be excluded from the unit as supervisors. Additionally, the Navy argues that the Assistant Secretary erred in concluding that the recommendations of fire captains are not effective recommendations simply because they are subject to review by higher ranking officials; for example, the review of recommendations for promotion and of grievance adjustments.

The union contends that section 2(c) need not be applied strictly in the disjunctive; and that the factual findings of the Assistant Secretary are supported by the record evidence and represent an appropriate interpretation of section 2(c).

Opinion

The two issues raised will be discussed separately:

1. Should section 2(c) be applied in the disjunctive?

Section 2(c) provides as follows:

<sup>2/</sup> Section 24(d) of Executive Order 11491, prior to the 1971 amendments, provided that "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition . . . ."

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

As apparent from the use of the conjunction "or", section 2(c) is written in the disjunctive. If applied as written, section 2(c) has the effect of excluding from the unit any individual who possesses the authority to perform even one of the functions described in section 2(c), provided he does so in a manner requiring the use of independent judgment. We believe section 2(c) should be so applied.

As a general rule of statutory construction, words are to be given the meaning commonly attributed to them in the absence of a legislative intent to the contrary.<sup>3/</sup> In this case, there is no indication of an intent contrary to the literal language of the Order, and indeed, the purposes of the Order fully support a literal application of section 2(c). As we have stated in previous decisions, the Order intended that supervisors be clearly identified and fully integrated into the management structure.<sup>4/</sup> Consistent with this objective, the Presidential Study Committee recommended that the present definition of supervisor be adopted. By applying section 2(c) as it is written -- in the disjunctive -- a clear delineation can be drawn between supervisory employees and nonsupervisory employees. Thus, the disjunctive approach is a very specific standard. It requires only that an individual possess one of the characteristics described in section 2(c); not some or most of those characteristics. This specific standard eliminates degree questions and, therefore, determinations as to the supervisory status of an individual can be made with more certainty and clarity. It was precisely this type of clarity and certainty which the Study Committee hoped to achieve by recommending that the present definition be adopted.

In view of the above, we find that section 2(c) must be applied in the disjunctive. Accordingly, any individual who possesses the authority to perform a single function described in section 2(c), provided he does so in a manner requiring the use of independent judgment, is a supervisor and must be excluded from the unit. We recognize that there may be

<sup>3/</sup> 50 Am. Jur., Statutes, ¶238 and §239 (1944).

<sup>4/</sup> United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4; Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, FLRC No. 72A-15.



factual situations wherein the nature and degree of the evidence is insufficient to establish the actual existence of such authority, and we leave these determinations to the discretion and judgment of the Assistant Secretary. However, once the possession of the authority to perform one of the functions set forth in section 2(c) has been established, we hold that the individual is a supervisor and must be excluded from the unit.

2. Does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective? Section 2(c) requires that an individual possess the authority actually to perform one of the tasks listed therein, or that an individual possess the authority "effectively to recommend such action." In our view, the mere fact that a recommendation is reviewed or approved by a higher ranking management official does not, in itself, render a recommendation ineffective. Rather, we hold that the Assistant Secretary must look to the nature and scope of the review in order to determine the effectiveness of the recommending authority within the meaning of section 2(c). Thus, as a general rule, the evidence must establish only that a recommendation is made on behalf of management, that it is based upon the independent judgment of the alleged supervisor, and that the recommendation -- either considered separately or in conjunction with the recommendations of other supervisors or management officials -- could result in a decision by management to hire, transfer, suspend, or take any of the other actions set forth in section 2(c). To be effective, it is not necessary that one recommendation by one individual be the sole criteria used by higher management in determining whether to take one of the actions listed in section 2(c).

As a practical matter, any other interpretation of the term "effective" would be clearly contrary to the realities of the exercise of authority in the Federal sector. For example, with respect to promotions, in the Federal sector virtually all decisions as to promotions to a higher grade level are made pursuant to established procedures which explicitly require that the recommendation of a lower level supervisor be reviewed or approved by higher officials before being put into effect. Therefore, the key to determining the effectiveness of an alleged supervisor's recommendation is not the mere fact of review, but the impact which that recommendation has upon the overall promotional procedures in force at an activity. In other words, the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level.

With respect to the review of first step grievance adjustments, we must first point out that a decision at the first or informal stage of a grievance procedure is the final and only decision at that level. If the decision at the first step is satisfactory to the grievant, no appeal is taken and the individual who possessed the authority to make the decision at the first step has, in fact, made the final decision as to that grievance. Moreover, even if the decision at the first step


is appealed and reversed, this does not alter the authority of the individual who made the first step decision. That individual still possesses the authority to adjust grievances at the first step. Grievance procedures commonly provide for the right of appeal to a higher level, and this right of appeal is a key element in most grievance procedures. Accordingly, if the evidence is sufficient to establish that individuals actually possess the authority to adjust grievances at the first step of the grievance procedure, those individuals are supervisors within the meaning of section 2(c).

Thus, section 2(c) must be interpreted in a manner consistent with the realities of the exercise of authority in the Federal sector. If only those individuals who possessed the unqualified authority to promote, or to make the final decision at the last stage of a grievance procedure were considered supervisors, only top officials would be supervisors and there would be no lower level supervisors in the Federal sector. We see no basis for adopting such a strained interpretation of section 2(c). Rather, we believe that a common sense interpretation of section 2(c) requires that the nature and scope of the review must determine the effectiveness of a recommendation, not the fact of review alone.

Section 6(a)(1) of the Order provides that the Assistant Secretary shall decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration. We leave to him the determination as to whether an individual possesses the authority of a supervisor, as described in section 2(c).

Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, we remand this case to the Assistant Secretary for a determination as to whether the fire captains are supervisors within the meaning of section 2(c) of the Order, consistent with the principles discussed herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: MAY 25 1973

August 15, 1973

A/SLMR No. 298

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD,  
VALLEJO, CALIFORNIA

DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD  
VALLEJO, CALIFORNIA  
A/SLMR No. 298

Activity

and

Case No. 70-1876(CU),  
A/SLMR No. 129,  
FLRC No. 72A-12

On January 28, 1972, the Assistant Secretary issued a Decision and Order Clarifying Unit in A/SLMR No. 129, in which he found that employees in the classification of Supervisory Firefighter (Structural), GS-7, and Supervisory Firefighter (Structural), GS-6, were not supervisors within the meaning of the Order.

On May 25, 1973, the Federal Labor Relations Council (Council) issued its Decision on Appeal in which it remanded the subject case to the Assistant Secretary for a determination whether, based on the principles enunciated by the Council in its Decision on Appeal, employees in the above classifications are supervisors within the meaning of Section 2(c).

Pursuant to the remand of the Council and based on the rationale of the Council's Decision on Appeal in the instant case and in a companion case, Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11, the Assistant Secretary found that the employees classified as Supervisory Firefighter (Structural), GS-7 and GS-6, possess the authority to adjust employee grievances within the meaning of Section 2(c) of the Order and, therefore, are supervisors who should be excluded from the unit.

INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS, AFL-CIO, LOCAL F-48  
VALLEJO, CALIFORNIA

Petitioner

SUPPLEMENTAL DECISION AND ORDER CLARIFYING UNIT

On January 28, 1972, the Assistant Secretary issued a Decision and Order Clarifying Unit in A/SLMR No. 129, in which he ordered that the exclusively recognized unit be clarified by including in said unit the employee classifications Supervisory Firefighter (Structural), GS-7, and Supervisory Firefighter (Structural), GS-6, 1/ on the basis that the employees in such classifications were not supervisors within the meaning of the Order.

Thereafter, the Activity requested the Federal Labor Relations Council, hereinafter called the Council, to review the Assistant Secretary's decision in A/SLMR No. 129. Subsequently, the Council advised the parties that it had accepted the Activity's petition for review.

1/ Both classifications are commonly referred to as "Captains."

On May 25, 1973, the Council issued its Decision on Appeal in the subject case, remanding it to the Assistant Secretary for a determination whether, based on the principles enunciated by the Council in its Decision on Appeal in the instant case and in its decision on Appeal in a companion case, Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, LRC No. 72A-11, the Captains are supervisors within the meaning of Section 2(c).

Pursuant to the remand of the Council, and based upon the entire record in this case, including the briefs of the parties, the Assistant Secretary finds:

In its Decision on Appeal in China Lake, cited above, and in its decision on Appeal in the instant case, the Council held, among other things, that if the evidence is sufficient to establish that the individuals involved possess the authority to adjust grievances, formally or informally, such individuals must be considered as supervisors within the meaning of the Order, irrespective of whether the step of the grievance procedure involved is characterized as an informal stage and irrespective of whether the decision at such step is appealed and reversed.

The evidence herein indicates that while Captains have no authority to resolve "formal" grievances, 2/ they participate in the first step of the grievance procedure and possess the authority to make a final adjustment of grievances at that level. Thus, the record establishes that it is the Captains' responsibility to handle employee complaints of an informal nature and that employee dissatisfactions have, in fact, been resolved at this level by the Captains. In addition, the evidence does not establish that the adjustment of such grievances is of a routine or clerical nature. 3/

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The evidence reveals that a "formal" grievance must be reduced to writing, whereupon the Captain is required to submit a letter stating the circumstances of the grievance. Thereafter, it is processed through the Assistant Chief, the Chief and the prescribed grievance procedure of the Shipyard.

In this regard, the record reflects that it is contemplated that the Captains will exercise independent judgement in settling disputes, such as in instances where it is alleged certain individuals are not doing their share of the work.

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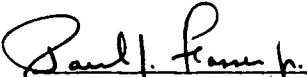
Under these circumstances, I find, pursuant to the rationale of the Council's decision in Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11, and in its Decision on Appeal in the instant case, that the employees classified as Supervisory Firefighter (Structural), GS-7, and Supervisory Firefighter (Structural), GS-6, possess the authority to adjust employee grievances within the meaning of Section 2(c) of the Order and, therefore, are supervisors who should be excluded from the unit. 4/

ORDER

Pursuant to the Council's Decision on Appeal in FLRC No. 72A-12, the Order of the Assistant Secretary of Labor for Labor-Management Relations, set forth in A/SLMR No. 129, is hereby modified as provided below:

The employee classifications Supervisory Firefighter (Structural), GS-7, and Supervisory Firefighter (Structural), GS-6, are hereby excluded from the unit in which exclusive recognition was granted on March 23, 1964, to the International Association of Fire Fighters, AFL-CIO, Local F-48, located at Mare Island Naval Shipyard, Vallejo, California.

Dated, Washington, D.C.  
August 15, 1973

  
Paul J. Fajser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

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4/ Inasmuch as I have concluded that the Fire Captains are supervisors because they possess the authority to adjust grievances, it was considered unnecessary to decide which such employees possess other indicia of supervisory authority.

-3-

Mare Island Naval Shipyard  
Vallejo, California

and

A/SLMR No. 129  
FLRC No. 72A-12

Local No. F-48, International Association  
of Fire Fighters, AFL-CIO

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from a Decision and Order Clarifying Unit in which the Assistant Secretary held, among other things, that the GS-6 and GS-7 fire captains employed at the Mare Island Naval Shipyard were not supervisors within the meaning of section 2(c) of the Order.<sup>1/</sup> This holding raised a question with respect to the interpretation of section 2(c) which the Council determined is a major policy issue warranting review. Specifically, the issue raised is whether the modifying terms adopted in the Assistant Secretary's decision are consistent with the intended meaning of the Order. The facts giving rise to this appeal are set forth below.

Local No. F-48, IAFF, is the exclusive bargaining representative of all Fire Division employees at Mare Island. Historically, both the GS-6 and the GS-7 fire captains had been included in the unit; but, in 1970, the Navy excluded them from the unit pursuant to section 24(d) of the Order.<sup>2/</sup> The union filed a clarification

<sup>1/</sup> Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

<sup>2/</sup> Section 24(d) of Executive Order 11491, prior to the 1971 amendments, provided that "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition. . . ."

of unit petition, seeking the inclusion of the fire captains, contending that they were not supervisors within the meaning of section 2(c).

The Assistant Secretary found in favor of the union and directed that the fire captains be included in the unit. In so finding, he concluded, in essence, that the fire captains did not possess the necessary indicia of supervisory authority described in section 2(c). Specifically at issue herein is the Assistant Secretary's finding that the fire captains are not supervisors "since they do not exercise sufficient authority requiring the use of independent judgment. . . ." [Emphasis added.] Also at issue are the following findings:

Thus, the record shows that Captains have no authority to hire or discharge or impose formal discipline; make permanent transfers; suspend, lay off, recall, or promote; dispose of formal grievances; and they may not grant leave except in emergencies. [Emphasis added.]

Contentions

The Navy contends that the Assistant Secretary has modified the literal language of section 2(c) by the imposition of qualifications to the indicia of supervisory status contained in that section. Specifically, the Navy argues that the Assistant Secretary's decision requires that a person impose "formal" discipline, adjust "formal" grievances, make "permanent" transfers, and exercise "sufficient" authority requiring independent judgment to be a supervisor within the meaning of the Order, and that such requirements are inconsistent with the purposes of the Order.<sup>3/</sup>

The union argues that the decision of the Assistant Secretary is consistent with the purposes of the Order and that the Navy is, in essence, seeking only a review of the Assistant Secretary's factual findings. In its view, the record evidence fully supports the Assistant Secretary's conclusion that the fire captains are not supervisors.

<sup>3/</sup> The Navy also contends that section 2(c) should be applied in the disjunctive. On this date, the Council issued its Decision on Appeal from Assistant Secretary Decision in the matter of United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11. For the reasons stated therein, we hold that section 2(c) must be applied in the disjunctive and, therefore, if the evidence is sufficient to establish that the fire captains in this case possess even one of the indicia of supervisory authority set forth in section 2(c), they must be excluded from the unit as supervisors.

Opinion

Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

As we stated in our decision in the China Lake case,<sup>4/</sup> in the absence of a legislative intent to the contrary, the language of section 2(c) should be given the meaning commonly attributed to it. If given its commonly accepted meaning, the term "grievance" includes both formal and informal grievances, and the term "discipline" includes both formal and informal discipline. Similarly, the term "transfer" includes all transfers whether permanent or temporary. Finally, the term "independent judgment" requires only that a decision or recommendation be based upon the opinion of an alleged supervisor, as opposed to being dictated by established procedures or higher authorities. We believe giving these terms their commonly accepted meaning is consistent with the purposes of the Order.

As we stated in the China Lake decision, interpretations of section 2(c) must be compatible with the realities of the exercise of authority in the Federal sector. Thus, if only those who adjust formal grievances, or formally discipline, or permanently transfer, or only those whose judgment is not influenced by any other procedures or authorities were to be adjudged supervisors, only top officials of government could be covered by the section 2(c) definition. Lower level supervisors who, for example, adjust employees' "informal" grievances, who give "informal" reprimands, and who make "temporary" transfers would not be supervisors as defined by the Order, notwithstanding the impact which these actions have upon the affected employees. Such a result, in our view, would be totally inconsistent with the realities of the exercise of supervisory authority in the Federal sector.

Since the indicia of supervisory status found in section 2(c) contains no qualifying terms, and because the adoption of an interpretation which would, in effect, add such qualifications, would conflict with

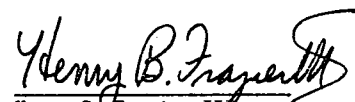
<sup>4/</sup> See note 3, supra.

the realities of the exercise of authority in the Federal sector, we conclude that such qualifications of the indicia of supervisory authority set forth in section 2(c) would be inconsistent with the purposes of the Order and may not be relied upon. If the evidence is sufficient to establish that an individual possesses the authority to adjust grievances or impose discipline, formally or informally, or that an individual possesses the authority to transfer employees for long or short periods of time, and that his decision to do so is based upon his own judgment, and not simply dictated by established procedures or directed by higher officials, then that individual is a supervisor within the meaning of section 2(c).

We recognize that there may be cases in which the evidence offered is insufficient to establish the existence of supervisory authority, e.g., that an individual's actions with respect to the processing of a grievance is of a routine or clerical nature. However, as we made clear in China Lake, we leave the determinations as to the sufficiency of the evidence to the discretion of the Assistant Secretary. We hold that the literal meaning of the indicia of supervisory authority set forth in section 2(c) of the Order may not be modified or qualified in a manner which is inconsistent with the purposes of the Order.

Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, we remand this case to the Assistant Secretary for a determination as to whether the fire captains are supervisors within the meaning of section 2(c) of the Order, consistent with the principles discussed herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: MAY 25 1973

August 15, 1973

A/SLMR No. 299

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ATOMIC ENERGY COMMISSION,  
IDAHO OPERATIONS OFFICE,  
IDAHO FALLS, IDAHO  
A/SLMR No. 299

Activity

and

Case No. 71-2482(CU)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 2300, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

This case involved a petition for clarification of unit filed by American Federation of Government Employees, Local 2300, AFL-CIO (AFGE), seeking clarification of the supervisory status of certain employee classifications in the Activity's Security Division, Fire Department Branch. The AFGE contended that the duties of individuals in the positions classified as Captain, Lieutenant, Inspector-Lieutenant, and Captain-Training Officer had not been clearly identified by the Activity. The Activity contended that employees in each of these positions are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit.

The Assistant Secretary found that employees in the disputed job classifications were supervisors within the meaning of the Order and, therefore, should be excluded from the exclusively recognized unit. In this regard, he noted, among other things, that they possess and exercise authority, in the interest of the Activity involved, to assign and direct employees under their jurisdiction, to evaluate their performance, and to recommend effectively candidates for promotion. In this connection, it also was noted that the evidence indicated that they utilize independent judgment in the exercise of their authority over their subordinates, and that their recommendations concerning the hiring and promotion of employees are effective.

Based on his finding that the employees in the disputed job classifications perform supervisory functions, the Assistant Secretary ordered that the unit be clarified by excluding such employees from the exclusively recognized unit.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the brief of the Activity, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, Local 2300, AFL-CIO, herein called AFGE, is the exclusive representative of certain employees of the Activity's Security Division, Fire Department Branch. In this proceeding, the AFGE seeks clarification of the supervisory status of certain employee classifications in the Fire Department Branch, i.e.- Fire Captain, Lieutenant, Inspector and Training Officer - which it contends have not been clearly identified by the Activity. The Activity contends that the employees in each of the above-noted classifications are supervisors within the meaning of Section 2(c) of the Order and that, therefore, they should be excluded from the exclusively recognized unit. 1/

1/ Exclusive recognition was accorded the AFGE under Executive Order 10988. The unit, as described in the parties' current negotiated agreement, is composed of "firefighters, alarm operators and pump operators within the AEC Idaho Operations Office Fire Department below the supervisory level."

DISPUTED JOB CLASSIFICATIONS

Captain, Fire Department Branch, Security Division, GS-7

The Atomic Energy Commission's Idaho Operations Office employs approximately 360 employees and consists of a headquarters building in Idaho Falls, Idaho and the National Reactor Testing Station, herein called NRTS. The NRTS is located approximately 40 miles west of Idaho Falls and covers an area in excess of 600 square miles. The area is reserved for experimental work in connection with reactor operations and chemical reacting plants. The Idaho Operations Office provides all of the security and fire protection at the NRTS. The Fire Department Branch, a component of the Security Division, is responsible for all of the Activity's fire protection functions.

The Fire Department Branch has a complement of approximately 41 employees and is headed by a Fire Chief (GS-11). Under the Fire Chief are a Deputy Chief (GS-9), 3 Captains (GS-7), 1 Captain-Training Officer (GS-7), 7 Lieutenants (GS-6), 1 Inspector-Lieutenant (GS-6), 2 Alarm Operators (GS-5), 1 Pump Operator-Alarm Operator (GS-5), 11 Pump Operators (GS-5), and 13 Fire Fighters (GS-4).

There are three fire stations and a training center at the NRTS. Each station is manned by a crew which works a 24-hour shift before being replaced by another crew. The main fire station is located in the Central Facilities Area of the NRTS. Located at this facility are 2 shift captains, 1 crew captain, 1 crew captain-training officer, 2 lieutenants, 2 alarm operators, 5 pump operators, 3 firefighters and 1 alarm-pump operator. Station No. 2 is located near one of the Experimental Breeder Reactor sites and is referred to as "EBR II." Station No. 3 is located in the Test Area North, which is referred to as "TAN." Each of the latter two stations have a total of 11 employees assigned: 3 lieutenants, 3 pump operators, and 5 firefighters.

The Fire Chief is responsible for the establishment and enforcement of the operational policies of the Fire Department Branch. He prepares and issues bulletins, memoranda, instructions and operating procedures required for its administration. The Fire Chief is assisted by a Deputy Chief, and both work a 40-hour week, 8:00 A.M. to 4:30 P.M., five days a week. <sup>2/</sup> The record indicates that, in addition to their administrative duties, both the Chief and the Deputy Chief spend a considerable amount of their work time advising the contractors at the NRTS on construction problems and other matters concerned with fire protection. These duties often take both the Chief and the Deputy Chief away from the central area of the NRTS and, therefore, they do not respond to every alarm even when they are on duty.

<sup>2/</sup> The Fire Chief and the Deputy Chief alternate Saturdays and Sundays in order that one or the other is on duty every day during their above-noted duty hours.

The record indicates that a Captain has direct responsibility for the enforcement of the operational policies and requirements of the Fire Department. It also indicates that this designation is used by the Activity for individuals serving as Shift Captains and as Crew Captains. The distinction between these two positions is that the Shift Captain is in charge of the day-to-day operations of the entire Fire Department Branch during the 24-hour period in which his crew is on duty, while, during the same period, the Crew Captain is in charge only of the Central Facilities Area Station. In addition, the Shift Captain routinely assumes complete command of the Fire Department Branch from 4:30 P.M. each day, when the Chief and/or Deputy Chief go off duty, until 8:00 A.M. the next day.

The Shift Captain responds to every alarm received through the regular alarm system. Upon arrival at the scene of a fire, he is, in the absence of the Chief or Deputy Chief, in charge of the fire fighting operations. In this capacity, he assigns and directs other members of the Fire Department Branch. When required, he also directs certain employees of the various contractors at the NRTS who have been trained to fight fires and have been organized into "brigades." Further, in the absence of the Chief and Deputy Chief, the Shift Captain determines the number of employees and the amount of equipment to be dispatched to render fire fighting assistance to neighboring communities pursuant to mutual aid agreements. The record indicates that the Shift Captain has the authority to transfer individual employees from station to station on a temporary basis in order that minimum manpower requirements may be attained and that this authority is exercised frequently. The record also indicates that the Shift Captain has the authority to recommend the permanent transfer of employees and that such a recommendation has been followed.

As noted above, the Crew Captain <sup>3/</sup> has the same job description as the Shift Captain. He is responsible for all activities of the Central Facilities Area Station during the 24-hour period his shift is on duty. Moreover, in the absence of the Shift Captain, the Crew Captain assumes the responsibility for the day-to-day operations of the entire Fire Department Branch. The record indicates that the Crew Captain spends approximately 30 percent of his time in this latter capacity.

<sup>3/</sup> The record indicates that the Crew Captain-Training Officer (GS-7) spends 70 percent of his on-duty time as a Crew Captain. Under these circumstances, I find that the disposition, discussed below, as to the Crew Captain classification, would be applicable to the Training Officer job classification.

The evidence establishes that while the Captains have no authority to hire, lay off, recall, or discharge employees, they are involved in evaluating the performance of the officers and men assigned to their respective shifts. 4/ Thus, the Captains are required to complete a "Personnel Evaluation and Appraisal" form at least once a year which lists at least 6 different elements on which an individual employee must be evaluated (e.g., initiative, general work habits, ability to get along with others, knowledge of job, participation in classwork and drill, and recommendation for promotion). The record reveals that these evaluations are discussed with the individual employee by the Captains, and at times, the Chief, and that they become a permanent record of the Fire Department Branch.

The record indicates also that the Captains serve on a Board of Officers for the purpose of determining who should be promoted when vacancies occur. In such a situation, the Chief asks each of the officers in the Fire Department Branch to recommend individual employees for consideration by the Board. The Chief and Deputy Chief then review these recommendations with the Board of Officers before reaching a decision. The evidence establishes that when the Chief makes the final decision, he recommends the individual he has selected for promotion to the Director of the Security Division, which recommendation generally is approved. The record indicates that the Chief has not selected any individual for promotion who had not been recommended by a majority of the Board of Officers.

Under all of these circumstances, I find that the Captains are supervisors within the meaning of Section 2(c) of the Order because they possess and exercise authority, in the interest of the Activity, to assign, direct and evaluate the performance of employees of the Fire Department Branch, to recommend candidates for promotion, and to recommend the transfer of employees from station to station. Thus, among other things, the record establishes that all of the Captains evaluate employees for promotion and that such evaluations are effective in that they have a substantial impact on the overall promotional procedures in effect at the Activity. Moreover, the record reveals that Captains effectively assign and direct employees in emergency situations, and that they possess the authority to make effective recommendations concerning the transfer of employees.

In these circumstances, and noting that the evidence establishes that when exercising the foregoing authority the Captains utilize independent judgment, I find that Captains, Fire Department Branch, Security Division, GS-7, are supervisors within the meaning of Section 2(c) of

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4/ While the record is not clear in this regard, it appears that Crew Captains only would be involved in evaluating the employees at the Central Facilities Area Station.

the Executive Order and, therefore, should be excluded from the exclusively recognized unit. 5/

Lieutenant, Fire Department, Security Division, GS-6

The record indicates that a Lieutenant must be knowledgeable in fire prevention and control. He directs personnel and is responsible for the activities of the station to which he is assigned. There are 7 Lieutenants and 1 Inspector-Lieutenant 6/ in the Fire Department Branch. Six of the Lieutenants serve at the outlying stations, which are located 28 miles and 22 miles from the Central Area Facilities, and 1 Lieutenant and the Inspector-Lieutenant serve at the Central Facilities Area Station.

The evidence establishes that when an alarm is received at one of the outlying stations, the Lieutenant at that station is responsible for getting men and equipment to the scene as quickly as possible. He is responsible for all operations at the scene, including the direction and assignment of men and equipment, until the Shift-Captain, Chief or Deputy Chief arrive. If, in his judgment, the fire is one that can be handled by the men and equipment on hand, he notifies the Shift Captain, who is enroute, to return to the latter's Station. He directs his crew as to the type and amount of extinguishing agent to be used, is responsible for seeing that the men have on the proper protective equipment, and assigns specific tasks to crew members as required by the situation encountered.

The evidence establishes that Lieutenants assign duties to the individuals in their stations during non-emergency periods and that they make effective recommendations concerning the hiring and promotion of employees. Further, Lieutenants are required to prepare written evaluations of the performance of the individuals in their respective crews at least once a year, 7/ and they may sit on the Board of Officers considering

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5/ See Department of the Navy, United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11, and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12; Cf. also U.S. Department of the Air Force, Holloman Air Force Base, Alamogordo, New Mexico, A/SLMR No. 235.

6/ The record indicates that the Inspector-Lieutenant spends more than 50 percent of his on-duty time as a Lieutenant. Under these circumstances, I find that the disposition discussed below as to the Lieutenant job classification would be applicable to the Inspector-Lieutenant job classification.

7/ The record indicates that these evaluations are made on the same "Personnel Evaluation and Appraisal" forms used by the Captains.



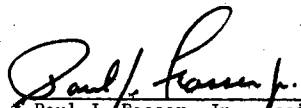
hiring and promotion. The record indicates also that while Lieutenants have no authority to transfer, lay off, recall or discharge employees, or to grant overtime or handle written grievances, they possess authority to make oral admonishments and order temporary suspensions.

Under all of the circumstances, I find that Lieutenants are supervisors within the meaning of Section 2(c) of the Order because, as noted above, they possess and exercise the authority, in the interest of the activity, to assign and direct employees under their jurisdiction and to evaluate their performance. Further, they have authority to recommend effectively the hiring and promotion of employees. Accordingly, and noting that the evidence establishes that in the exercise of the foregoing authority the Lieutenants utilize independent judgment, I find that Lieutenants, Fire Department Branch, Security Division, GS-6, are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit. 8/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted in 1963 to the American Federation of Government Employees, Local 2300, AFL-CIO, at the Atomic Energy Commission, Idaho Operations Office, Idaho Falls, Idaho, be, and hereby is, clarified by excluding from the said unit employees classified as Captain, Captain-Training Officer, Lieutenant, and Inspector-Lieutenant of the Fire Department Branch, Security Division.

Dated, Washington, D.C.  
August 15, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

8/ See footnote 5, above.

-6-

August 15, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,  
ATLANTA ATC TOWER  
A/SLMR No. 300

This proceeding arose upon the filing of an unfair labor practice complaint by the Professional Air Traffic Controllers Organization, Southern Region, (PATCO) against the Federal Aviation Administration, Atlanta ATC Tower (FAA), alleging that the FAA violated Section 19(a)(1) and (3) of Executive Order 11491 by distributing or allowing the distribution of literature of the Intervenor, the Air Traffic Control Association, Inc. (ATCA), on or about July 1, 1971, and continuing thereafter. In this connection, it was asserted that ATCA was a labor organization within the meaning of Section 2(e) of Executive Order 11491, as amended.

PATCO had represented exclusively the employees of the FAA since December 1969. In March 1971, the FAA and PATCO agreed that all material and/or solicitations of other employee organizations would be removed from the facility except as provided in Executive Order 11491. In August 1971, the President of the PATCO Local discovered three ATCA bulletins at one of the control positions. They were addressed to "ATCA Binder ATC Tower, 8th FL Atlanta Municipal Arpt Atlanta, GA," and contained the name of an individual handwritten across the top. The PATCO official contacted FAA officials who denied responsibility or knowledge for the bulletins.

The Administrative Law Judge found that no other incident of distribution of ATCA material was either alleged or shown, and that the evidence did not disclose that management distributed or permitted the distribution of the ATCA bulletins. Under these circumstances, the Administrative Law Judge concluded that PATCO failed to meet its burden of proving that the FAA violated Section 19(a)(1) and (3) of the Order, and, accordingly, he recommended dismissal of the complaint. He found further that ATCA was a labor organization under the Order rather than a professional association, noting that with respect to the status of ATCA prior to January 29, 1971, he was bound by the decision of the Assistant Secretary in Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10, issued January 29, 1971, in which ATCA was found to be a labor organization. It was his view that ATCA's structure had not materially changed since the issuance of that decision and that, during this period, ATCA engaged in activities which were typically those of a labor organization as distinguished from the type of consultations and dealings with an agency which a professional association may properly engage in pursuant to Section 7(d)(3) of the Order.

The Assistant Secretary agreed with the conclusion of the Administrative Law Judge that dismissal of the 19(a)(1) and (3) complaint was warranted. However, contrary to the Administrative Law Judge, he found that ATCA is not now a labor organization within the meaning of Section 2(e) of the Order. In this connection, he noted that ATCA has, in fact, materially changed its organization and operations since the issuance of A/SLMR No. 10, and that its current relationship with the FAA is consistent with that permitted a professional association under Section 7(d)(3) of the Order. In finding that the Administrative Law Judge had too narrowly interpreted the types of "consultations" and "dealings" which a professional association and an agency or activity may properly engage in under Section 7(d)(3) without causing the professional association to assume the characteristics of a labor organization within the meaning of Section 2(e) of the Order, the Assistant Secretary noted that ATCA's consultations and dealings with the FAA did not assume the character of formal consultation on matters of general employee-management policy. With respect to such dealings, he observed that the pertinent issue is not the amount of contact between a professional association and an agency or activity but, rather, the nature of their consultations and dealings. To put a more restrictive meaning on the consultations and dealings permitted a professional association under Section 7(d)(3) would, in the Assistant Secretary's view, render that Section nugatory and be inconsistent with the intent of the Order as expressed in the Report and Recommendations (1971) of the Federal Labor Relations Council.

A/SLMR No. 300

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
ATLANTA ATC TOWER

Respondent

Case No. 40-3470(CA)

PROFESSIONAL AIR TRAFFIC CONTROLLERS  
ORGANIZATION, SOUTHERN REGION

Complainant

AIR TRAFFIC CONTROL ASSOCIATION, INC.

Intervenor

DECISION AND ORDER

On March 30, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding finding that the Federal Aviation Administration, Atlanta ATC Tower, herein called FAA, had not engaged in the unfair labor practices alleged by the Complainant, the Professional Air Traffic Controllers Organization, Southern Region, herein called PATCO, and recommending that the complaint be dismissed in its entirety. Thereafter, the FAA and the Intervenor, Air Traffic Control Association, Inc., herein called ATCA, filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the parties' exceptions and briefs, as well as the brief of the National Society of Professional Engineers, I hereby adopt the Administrative Law Judge's finding, conclusions and recommendations to the extent consistent herewith.

The complaint in the subject case alleged that the Respondent violated Section 19(a)(1) and (3) of Executive Order 11491 by distributing

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1/ The National Society of Professional Engineers filed a brief with the Assistant Secretary as an interested party.

allowing the distribution of ATCA literature on or about July 1, 1971, and continuing thereafter. In this connection, it was asserted that ATCA is a labor organization within the meaning of Section 2(e) of Executive Order 11491, as amended. 2/

The record reveals that PATCO was granted exclusive recognition in December 1969, for a unit of nonsupervisory air traffic control specialists at the Atlanta Tower. In March 1971, the FAA and PATCO agreed, among other things, that "All material and/or solicitations of other employee organizations will be removed from the facility except as provided in Executive Order 11491." Thereafter, in August 1971, the president of the PATCO local at the facility discovered three ATCA bulletins at one of the control positions. The bulletins were addressed to "ATCA under Atlanta ATC Tower 8th FL Atlanta Municipal Arpt Atlanta GA," and contained the name of an individual handwritten across the top. The PATCO official contacted agency officials who denied responsibility or knowledge of the bulletins. In his Report and Recommendations, the Administrative Law Judge found that no other incident of distribution of ATCA material was either alleged or shown, and that the evidence did not disclose that management distributed or permitted the distribution of ATCA bulletins. Under these circumstances, the Administrative Law Judge concluded that PATCO failed to meet its burden of proving by a preponderance of evidence that the FAA violated Section 19(a)(1) and (3) of the Order, and, accordingly, he recommended dismissal of the complaint.

I agree with the conclusion of the Administrative Law Judge that, under the circumstances of this case, dismissal of the 19(a)(1) and (3) complaint is warranted. However, contrary to the finding of the Administrative Law Judge, I find that the evidence establishes that ATCA is not now a labor organization within the meaning of Section 2(e) of the Order.

In finding that ATCA was a labor organization under the Order, the Administrative Law Judge noted that with respect to the status of ATCA prior to January 29, 1971, he was bound by the decision of the Assistant Secretary in Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10, issued January 29, 1971, in which ATCA was found to be a labor organization. Accordingly, the Administrative Law Judge confined his examination of the status of ATCA to the period subsequent to the issuance of the above-noted decision. In this connection, it was his view that ATCA's structure had not materially changed since the issuance of the decision in A/SLMR No. 10, and that in this period ATCA engaged in activities which were typically those of a labor organization as distinguished from the type of consultations and dealings with an agency

Section 2(e) reads, in pertinent part: "'Labor Organization' means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees...."

which a professional association may properly engage in pursuant to Section 7(d)(3) of the Order. 3/

Contrary to the Administrative Law Judge, I find that ATCA has, in fact, materially changed its organization and operation since the issuance of A/SLMR No. 10, and that its current relationship with the FAA is consistent with that permitted a professional association under Section 7(d)(3) of the Order, as amended. In this connection, the record reflects that subsequent to the issuance of A/SLMR No. 10, ATCA discontinued performing certain functions which it had previously undertaken and which are normally associated with the functions of a labor organization. Thus, after the issuance of the decision in A/SLMR No. 10, ATCA advised the FAA by letter that it had not, and would not, in the future, seek recognition as a labor organization, that it was a professional society, and that it did not intend to become a labor organization. In addition, ATCA assured the FAA that it would not intervene in representation proceedings (and it has not) and would not seek to engage in collective bargaining or to act in any manner inconsistent with its desired status as a professional association under Section 7(d)(3) of the Order, as amended. Under these circumstances, ATCA requested that the FAA continue to regard it as a professional association. In my view, the evidence establishes that ATCA has acted in a manner consistent with these assurances. 4/

In finding that ATCA is a labor organization, the Administrative Law Judge noted, among other things, that most ATCA members are employees of the FAA; that ATCA relays requests for information from its members to appropriate contacts in the FAA and disseminates such information as it is received; and that ATCA gave certain comments to the FAA (generally in response to a request of the latter) on, among other things, employment of medically disqualified controllers, retirement rights of controllers, training and indoctrination of controllers, and their operating procedures techniques and responsibilities. In his view, such activities by ATCA demonstrated "that a substantial part of ATCA's function is to act as an advocate on behalf of controllers in its relationship with FAA, encouraging and attempting to influence FAA to adopt the position it espouses

3/ Section 7(d)(3) reads: "Recognition of a labor organization does not preclude an agency from consulting or dealing with a religious, social, fraternal, professional or other lawful association not qualified as a labor organization, with respect to matters of policies which involve individual members of the association or are of particular applicability to it or its members. Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees."

4/ ATCA's dues withholding privileges were cancelled by Civil Service Regulations in July 1971. Prior to the issuance of A/SLMR No. 10, ATCA enjoyed dues withholding privileges under Executive Order 10988.

(typically the role of acknowledged labor organizations)." He characterized ATCA's dealings with the FAA as, by no means, casual or sporadic and noted, among other things, that in much of ATCA's communications with the FAA it far exceeded the purpose of merely obtaining information for members and reporting news to its members.

I find that the Administrative Law Judge has too narrowly interpreted the types of "consultations" and "dealings" which a professional association and an agency or activity may properly engage in under Section 7(d)(3) without causing the professional association to assume the characteristics of a labor organization within the meaning of Section 2(e) of the Order. Under such a narrow stricture, a professional association would, in effect, be precluded from engaging in almost all forms of consultations and dealings on matters of interest to its members. Yet, it is clear that the intent of the Order is to permit professional associations to engage in consultations and dealings providing that they do not assume the character of formal consultation on matters of general employee-management policy.<sup>5/</sup> In my view, ATCA's consultations and dealings with the FAA did not assume the character of formal consultation on matters of general employee-management policy. Rather, its consultations and dealings dealt with the professional interests of its organization which might be affected by FAA policy. In this connection, the record shows that the FAA has a body of regulations, circulars, and handbooks which prescribe mandatory or advisory procedures for use by pilots, airports and other interested parties; that when changes are contemplated the FAA solicits comments from the aviation industry; and that the bulk of the comments solicited from ATCA by the FAA dealt primarily with such matters and were of a technical nature.

As to the Administrative Law Judge's conclusion that the dealings between ATCA and FAA were not casual or sporadic but, rather, they occurred on a frequent and ongoing basis over a substantial period of time, I believe that the pertinent issue is not the amount of contact between a professional association and an agency or activity but, rather, the nature of their consultations and dealings. For a professional association to realize its full potential to its members, it is necessary for the association, within the limitations noted above, to be free to engage in contact with the agency involved on a wide variety of subjects within the bounds of the association's interests and competence. As noted above, I do not believe that ATCA's dealings with the FAA assumed

<sup>5/</sup> In this connection, in the Report and Recommendations (1971), the Federal Labor Relations Council recognized the problem that, "In some instances, agencies may be overly fearful of violating the rights of recognized labor organizations and unnecessarily refrain from proper dealings with professional associations on purely professional matters. To maintain such communications and to avoid further misunderstandings, we recommend that 'professional' be explicitly included among the types of associations listed in section 7(d)(3) with which an agency may have limited dealings not inconsistent with the rights of recognized labor organizations."

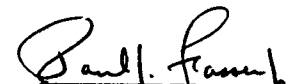
the character of formal consultation on matters of general employee-management policy so as to bring ATCA within the definition of Section 2(e) of the Order. Thus, the evidence indicates that none of the dealings between ATCA and the FAA took on the character of negotiations to seek binding agreements or commitments by the FAA and such dealings only incidentally touched on working conditions of its members. To put a more restrictive meaning on the consultations and dealings permitted a professional association under Section 7(d)(3) would, in my view, render that Section nugatory and be inconsistent with the intent of the Order as expressed in the Report and Recommendations of the Federal Labor Relations Council.

Under all of these circumstances, I find, contrary to the Administrative Law Judge, that the record does not support the conclusion that ATCA is a labor organization within the meaning of Section 2(e) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-3470(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 15, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

Preliminary Statement

FEDERAL AVIATION ADMINISTRATION :  
ATLANTA ATC TOWER, :  
Respondent :  
PROFESSIONAL AIR TRAFFIC :  
CONTROLLERS ORGANIZATION, : CASE NO. 40-3470 (CA)  
SOUTHERN REGION, :  
Complainant :  
AIR TRAFFIC CONTROL :  
ASSOCIATION, INC., :  
Intervenor :

William B. Peer, Esq., Bredhoff, Barr,  
Gottesman, Cohen & Peer,  
1000 Connecticut Avenue, Suite 1300,  
Washington, D. C. 20036, and  
James E. Hays, Vice President, PATCO  
Southern Region, Suite 206, 358 North  
Main Street, College Park, Georgia 30337,  
for Complainant.

Leonard A. Ceruzzi, Esq., Office of the  
General Counsel for the Federal Aviation  
Administration, Washington, D. C., and  
William Heinbach, Office of Labor Relations,  
Federal Aviation Administration,  
800 Independence Avenue, S.W., Washington,  
D.C., for Respondent.

James D. Hill, Esq., 444 Shoreham Bldg.,  
806 15th St. N.W., Washington, D.C. 20005, and  
Donald E. Francke, Executive Director, ATCA,  
Washington, D. C., for Intervenor.

Before: Salvatore J. Arrigo  
Administrative Law Judge

This proceeding held in Atlanta, Georgia, on August 15, 16, and 17, 1972, arises under Executive Order 11491 as amended, (hereinafter called the Order) pursuant to a Notice of Hearing on Complaint issued on June 6, 1972, by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Atlanta Region, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (hereinafter called the Assistant Secretary). The complaint, filed on October 18, 1971 1/ by James E. Hays, Vice President, Professional Air Traffic Controllers Organization, Southern Region (hereinafter called Complainant or PATCO) alleges that the Federal Aviation Administration (hereinafter called FAA, Respondent or the Facility) violated Sections 19 (a) (1) and (3) of the Order by distributing or allowing the distribution of literature of the Air Traffic Control Association (hereinafter called ATCA or Intervenor) on or about July 1, 1971 and continuing thereafter. The complaint was originally dismissed by the Acting Regional Administrator but upon consideration of a request for review of the dismissal, the Assistant Secretary directed the issuance of a Notice of Hearing in this matter. The Assistant Secretary specifically directed that the following issues should be explored at the hearing:

1. The extent to which an activity or agency may deal with a professional association without encroaching upon subjects within the scope of bargaining negotiations with an exclusive representative.
2. The line of functional demarcation to be drawn between labor organizations and professional associations as those terms are defined or used in the Executive Order.

1/ The complaint was subsequently amended on November 16 and November 19, 1971.

3. The conflict, on the one hand, between evidence submitted by the Complainant purporting to prove that ATCA has been acting as a labor organization, together with my finding in A/SLMR No. 10 that ATCA is a labor organization and, on the other hand, evidence of disclaimers by ATCA that it is or intends to be, a labor organization.

4. What responsibility, if any, does an activity or agency have to monitor or censor the content of bulletins or other publications of professional associations prior to posting or internal distribution of such material on activity or agency premises where there is an exclusive representative.

Accordingly, evidence relative to these matters was admitted into the record at the hearing and treated, in varying degrees, in the parties post-hearing briefs and has been duly considered.

During the hearing Respondent and Intervenor indicated that after the close of hearing they would submit various documents to me as late filed exhibits. Subsequently Respondent furnished to me the following documents, indicating that copies were also furnished to the other parties to this proceeding:

a letter dated 12 July 1972 to Kenneth T. Lyons, National President, National Association of Government Employees, from E. V. Curran, Director of Labor Relations, FAA;

a letter dated 20 July 1972 to E. V. Curran from Donald E. Francke, Executive Director, ATCA;

a letter dated 18 July 1972 to Edward V. Curran from Donald E. Francke, with a one-page attachment; and

a letter dated July 31, 1972 to Donald E. Francke from E. V. Curran.

- 3 -

No objection to the receipt of these documents has been received and accordingly the correspondence in question is admitted in evidence and is added to and included as part of Complainant Exhibit No. 10.

Intervenor's late filed exhibit is the Constitution and By-Laws of the Air Traffic Control Association as amended August 25, 1970. Similarly Intervenor indicated that copies of this exhibit were sent to the other parties. No objection to the receipt of the exhibit having been received, the document is admitted in evidence as Intervenor Exhibit No. 16.

At the hearing all parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Oral argument was waived and briefs were filed by all parties. 2/

Upon the entire record in this matter, from my reading of the briefs\*and from my observation of the witnesses and their demeanor, I make the following

#### Findings of Fact

##### I. Background

By letter dated December 19, 1969 Respondent granted exclusive recognition to PATCO as the collective bargaining representative in a unit of non-supervisory air traffic control specialists (Terminal) of all grades assigned to and whose primary duties are, the active control of air traffic at the Atlanta TRACON-Tower. Excluded from the unit were all supervisory, clerical and secretarial personnel, and all Data Systems Specialists and Facility officers. PATCO remained the exclusive representative at all times material hereto.

2/ Prior to the opening of the hearing, National Society of Professional Engineers (NSPE) filed with the Regional Administrator a motion to intervene in these proceedings. The motion to intervene was denied. At the hearing NSPE requested and was granted permission to file a brief in this matter. After the close of hearing NSPE timely filed a brief which I have duly considered.

\* Intervenor's Motion to Correct Brief is hereby granted.

- 4 -

By a Decision and Order in the PATCO case dated January 29, 1971 <sup>3/</sup> the Assistant Secretary found that ATCA is a labor organization within the meaning of Section 2(e) of the Order. The testimony reveals that shortly after this decision, Donald E. Francke, Executive Director of ATCA <sup>4/</sup> called the office of the Assistant Secretary in order to arrange a meeting to discuss the matter. It was Francke's impression that ATCA had intervened in the PATCO case on the grounds that any employee or group of employees could intervene in such a proceeding and that the finding that ATCA was a labor organization within the meaning of Section 2(e) of the Order went considerably beyond what ATCA had intended. On February 5, 1971 Francke and ATCA's General Counsel James D. Hill met with an official of the Department of Labor to discuss the matter. During the meeting Francke stated that ATCA was a professional association, had always professed to be a professional association and attempted to remain one throughout the whole process of Executive Orders. Francke inquired as to what steps or actions ATCA would have to take to convince people that ATCA was a professional association. According to Francke he was informed that the Department of Labor did not want to force any organization to be a labor union if they did not desire to be one and the suggestion was made that ATCA write or contact the agency or people it deals with and inform them of ATCA's intentions. Francke was further informed that ATCA's actions should reflect its desire to be treated as a professional association and not a labor organization.

Thereafter by letter dated February 16, 1971, addressed to Bertrand M. Harding, Associate Administrator for Manpower, FAA, Francke advised FAA that the letter was being sent pursuant to the aforementioned discussion at the Labor Department and informed FAA inter alia; <sup>5/</sup>

1. The Air Traffic Control Association has never sought recognition in any form under either Executive Order 10988 or Executive Order 11491 and has no intention of

<sup>3/</sup> Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10.

<sup>4/</sup> Francke became Executive Director of ATCA on January 1, 1971.

<sup>5/</sup> Intervenor Exhibit No. 4.

seeking such recognition in the future. We are a professional society and intend to remain as such. We do not intend to become a labor organization.

2. Since the time the testimony was taken in the PATCO case, our Association, at its last national convention held in Washington, D.C. September 27 - October 3, 1970, adopted a resolution confirming our intention to remaining a professional society and not to become a labor union under the Executive Order.

3. It was our primary contention, in seeking to intervene in the PATCO case, that any employee or group of employees had the right to intervene in a representation proceeding. The Assistant Secretary did not adopt this contention, and, we understand, is of the opinion that only a labor organization may intervene. In view of this, we do not intend to seek intervention again in any representation proceeding under the Executive Order.

4. The Association will not attempt to avail itself of any other provision of Executive Order 11491 which is reserved solely for recognized labor organizations.

5. It has always been the policy of this association not to represent individual employees or groups of employees in grievance appeals. However, we do not regard this as a province reserved exclusively for labor organizations. The language of Civil Service Commission Regulations provides that an employee is entitled to be represented by anyone of his choice, and it may be possible that our Association would at some time in the future, become involved in a matter which, although presented in the form of an individual grievance appeal, would affect our membership at large. It has not been our policy to do so, however, and that policy for the present remains unchanged.

6. Our Association will not seek to engage in collective bargaining, or negotiate agreements with the Agency, with respect to personnel policies and practices or matters effecting working conditions, under

Section II of the Executive Order. We intend to limit ourselves to our rights to engage in informed consultations with the Agency, as a lawful professional society, under Section 7(d)(3) of the Order.

The letter concluded "We request the Department to continue to regard us and to treat with us (sic) as a professional society."

On March 19, 1971, Francke met with K. M. Smith, Deputy Administrator, FAA, to discuss the matter. Francke was accompanied by ATCA's General Counsel Hill and Don Early, President of ATCA. Representing FAA was Smith, Bertrand Harding and Edward Curran, Director of Labor Relations for FAA. The ATCA representatives again discussed their meeting at the Labor Department and reiterated their position that they were never a labor organization and did not want to be one but rather wished to be dealt with by FAA on the basis of being a professional society. This arrangement was agreeable to FAA. ATCA indicated it had no desire to engage in any negotiations, enter into any bargaining agreements or represent individuals in grievance matters. During the meeting there was a question as to whether General Counsel Hill would represent any employees in matters where employees were injured on the job (BEC benefits claims). ATCA responded that Hill did not represent BEC cases but the organization wished to receive information on BEC matters for the purpose of responding to inquiries from ATCA members. ATCA was informed that FAA had an information program on BEC claims but further discussion in this area was aborted when Deputy Administrator Smith reacted "violently" indicating that the matter of BEC was a "big mess and a big problem." ATCA was further informed that it could not represent employees on grievance appeals if they intended to be treated as a professional society. Smith also suggested that Hill should not handle any grievance appeals of ATCA members as a private counsel in that such representation might give the appearance that ATCA was doing so. 6/

It was also decided that the dues withholding agreement between ATCA and FAA would be terminated in order to further distinguish ATCA from a labor organization. In addition the parties

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6/ ATCA has not since represented an employee on a grievance appeal nor has General Counsel Hill.

discussed certain "gray" areas--those areas in which an association under Section 7(d)(3) of the Order and a labor organization may both have an interest. The ATCA representatives indicated they would try to avoid these areas but acknowledged they had an obligation to their membership to keep them informed of various matters affecting the profession.

Thereafter by letter dated 29 June 1971 7/ Smith summarized to Francke the matters discussed at the March 19 meeting. The letter states as follows:

This letter will confirm the meeting held on 19 March with Don Early, Jim Hill and you to discuss your organization's intention and desire to operate solely as a professional society under FAA Order 1210.7, "FAA Relationships with Professional Societies."

At this meeting, the ATCA representatives stated that they desired to clear up any confusion which has existed in the past as to the status of ATCA. The ATCA representatives explained that it is the intention and desire of ATCA to function solely as a professional society and not to any way get involved in the traditional areas of labor-management relations as provided in Executive Order 11491. It was clearly understood that ATCA does not desire to deal with management on personnel policies and practices and other matters affecting the working conditions of FAA employees.

As you were advised in our meeting, the FAA has no objection to maintaining a professional society relationship with your organization as contemplated by FAA Order 1210.7. You were further advised that this relationship must be so limited that it does not assume the character of formal consultation on matters of general employee-management policy or extend to areas where recognition of the interests of ATCA may

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7/ Intervenor Exhibit No. 5



result in discrimination against or injury to the interests of other employees. It was agreed that FAA's relationship with ATCA would be similar to relationships we have had with organizations such as the Federal Bar Association, the American Medical Association and the Society for Personnel Administration.

In line with this professional relationship, we also discussed the matter of dues withholding. It was pointed out that, as of 1 July 1971, the previous withholding in behalf of ATCA would be discontinued. This further serves to differentiate the professional relationship from those with labor organizations.

On the basis of the above outlined understandings, FAA field representatives will be advised of the substance of our 19 March meeting. For your information, we are in the process of updating FAA Order 1210.7 and expect that distribution to the field will be made in the near future.

## II. Issues and Contentions of the Parties

The basic issues to be resolved herein are (1) whether ATCA is a labor organization as related to the Section 19 (a) (3) allegation and (2) whether FAA violated Sections 19 (a) (3) and (1) of the Order by distributing or allowing the distribution of ATCA literature at the Atlanta facility.

Briefly stated, PATCO contends that since the time the Assistant Secretary found ATCA to be a labor organization under Section 2(e) of the Order, 8/ ATCA has continued to "deal" with FAA within the meaning of Section 2(e) and accordingly is still qualified as a labor organization under the Order. PATCO also asserts that FAA distributed or allowed the distribution of ATCA literature at its Atlanta Tower facility which conduct, when considered together with the "special relationship" existing between ATCA and FAA, violated the Order.

8/ Section 2(e). "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees . . .

Respondent maintains that ATCA did not, in its relationship with FAA, engage in any of the recognized activities of a labor organization. Further, it takes the position that Complainant has completely failed to prove, demonstrate or show in any way that the presence of ATCA literature in the controller work area was in any way attributable to FAA management or supervision.

ATCA contends that it does not now nor has it ever intended to be regarded as a labor organization under Section 2(e) of the Order. To support its claim, ATCA inter alia points to various pronouncements of its intent made over the past years including a decision by its Executive Committee, policy statements, and various resolutions passed by its Counsel. ATCA further contends that it has not engaged in or does it intend to engage in collective bargaining or formal consultations. Rather ATCA asserts it has limited its dealings with agencies in a manner lawfully authorized by Section 7(d) (3) of the Order. 9/ It is also ATCA's position that no violation of 19(a) (1) or (3) has been established.

9/ Sec. 7(d) Recognition of a labor organization does not--  
\* \* \* \* \*

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, professional or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members. Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

III. The Status of ATCA 10/

ATCA has between one thousand to fifteen hundred members. Approximately 90 percent of its members are employees of FAA. About 60 percent of ATCA's members are journeyman controllers 11/ and the organizational structure of ATCA has not changed since the issuance of the decision in A/SLMR No. 10.

Article II of ATCA's Constitution sets forth the organization's objectives as follows:

"In order to promote and encourage the advancement of aviation and air traffic control of the kind and quality required by the commerce of the United States, the postal service, the national defense and general welfare, the objects of the Association are and shall be: (1) To promote, maintain, and enhance the stature of the air traffic control profession; (2) To promote, maintain and enhance the stature and well-being of the Air Traffic Control profession and the aviation community; (3) To develop and disseminate knowledge of the control of air traffic in all its phases and applications; (4) The intelligent and honorable cooperation with all persons, parties and agencies interested and concerned with the promotion and advancement of aviation and in particular the field of air traffic control. . . ."

11/ Testimony of General Counsel Hill when appearing before the Senate Committee on Post Office and Civil Service on March 13, 1972, as reported in the ATCA Bulletin, 72-4, April 1972.

10/ I consider myself bound by the finding of the Assistant Secretary in A/SLMR No. 10 that ATCA is a labor organization within the meaning of Section 2(e) of the Order. Accordingly, this decision treats only the status of ATCA since the issuance of that Order on January 29, 1971.

- 11 -

ATCA's Executive Director Francke testified that ATCA's activities include the publication of a Journal which is comprised of technical articles on all phases of air traffic control; participation in technical symposiums and forums, in which leaders in the aviation industry participate; the submission of technical papers to various other forums; the dissemination of air traffic knowledge and information, and affording its members an opportunity to participate in activities of a professional nature and bring them closer to members of the aviation community; promoting interest in aviation and air traffic control through assisting in the development of curriculum at colleges and junior colleges and assisting in the placement of these students; participation in National Transportation Safety Board hearings and forums; responding to requests for comments and recommendations from FAA on changes and modifications of operating procedures not only as to air traffic control but also with regard to flight safety matters concerning aircraft and pilots; and testimony before Congress on legislation and FAA budgets.

The Hearing Examiner's decision in A/SLMR No. 10 reveals that Francke's predecessor in office, Kriske, frequently received letters from individual members concerning personnel problems and working conditions in which other members, similarly situated, were interested. 12/ Francke testified that his approach varies from Kriske's in that when Francke receives an inquiry of a nature that is a personnel matter it is more in the nature of a request for an interpretation of a personnel order. In these cases Francke contacts the Agency and merely relays back the information to the individual.

A. ATCA's Other Activities

The evidence reveals that an editorial appeared in

12/ Hearing Examiner's Report and Recommendations, page 26.

- 12 -

The ATCA Bulletin of August 16, 1971 13/ entitled "FAA Does About-Face On Appropriateness Of 'National Unit,'." In that editorial ATCA took issue with FAA's reversing its previous position and withdrawing its objection to the concept of a nation-wide collective bargaining unit. After first citing at length FAA's position in 1970 in opposition to a petition for a national exclusive bargaining unit filed by PATCO, the editorial recited FAA's then current position in which it had no objection to the concept of a nation-wide unit as proposed by PATCO in a petition filed with the Labor Department on July 9, 1971. The article went on to state:

"FAA has not only failed to give supportable reasons, it has not even told its employees what it has done. It is just this kind of unexplained and unexplainable action which has so eroded FAA's credibility with its employees. It is difficult to have confidence in leadership which gives the appearance of not really knowing what it is doing.

"FAA's present decision favoring a national unit for collective bargaining purposes may subject thousands of FAA employees to representation which they oppose and do not want. But by the time the agency reaps the whirlwind caused by the uncontrollable desire of its present managers to toy with fire, they will be happily in retirement and some future agency's managers will have to live with the effects of today's mistake."

13/ Complainant Exhibit No. 9(a). The ATCA Bulletin, one of two of ATCA's regular publications, was published on a bi-weekly basis until January 1972, at which time it issued on a monthly basis. Its caption reads "Devoted to news and developments of significance in the air traffic control profession."

- 13 -

In a letter dated 14 September 1971 from FAA Administrator J. H. Shaffer to Donald E. Francke, 14/ FAA related that it interpreted the editorial to indicate that ATCA "still maintains an interest in dealing with labor relations matters under Executive Order 11491" and that this interest creates serious problems for FAA. Shaffer states, "Our relationships must be governed by the actions of your organization and not simply by your stated purpose. Therefore it is important to have a mutual understanding concerning your interest in FAA labor relations. ATCA's interest expressed to FAA work force is a determining factor in maintaining a pure professional society relationship with FAA."

Francke replied to Shaffer in a letter dated 30 September 1971 at which time Francke took the position that as a professional society ATCA should be able to express an opinion to its members or write a news article to its members on an item which is newsworthy and affects the membership of its association. Francke stated, "Further, we do not regard labor relations news as outside our legitimate sphere of interest, as it is intertwined with safety." Francke gave as an example a statement made by participant in another organization's safety forum who cited labor-management relations as one of the obstructions to air safety. Francke stated "...the same could be applied to air traffic controllers." He further stated, "ATCA does not intend to create a problem by showing interest in FAA labor relations, but we do desire to keep our membership abreast of newsworthy events that affect them."

Thereafter a meeting was conducted between ATCA and FAA representatives on November 11, 1971. Francke and General Counsel Hill represented ATCA and Bertram M. Harding, Associate Administrator for Manpower, and Edward Curran, Director of Labor Relations, represented FAA. Management was concerned about the disruptive atmosphere that might ensue from a professional society taking the type of position reflected in the editorial. ATCA contended that it was merely exercising its privilege of expressing newsworthy opinion. A letter from

14/ Complainant Exhibit No. 8(a).

- 14 -

Harding to Francke, dated 19 November 1971, summarizes the meeting. That letter states as follows:

"This letter will confirm the understandings reached in our meeting of 11 November 1971. Jim Hill of ATCA and Ed Curran of my staff were also present at this meeting.

"The question of the FAA relationship with professional societies such as ATCA is admittedly a complex one. FAA desires to encourage employees to belong to appropriate professional societies while insuring that such encouragement in no way infringes upon the rights of labor organizations.

"In the meeting you affirmed ATCA's status as a professional society and your desire to deal with FAA as such. It was agreed that FAA would deal with ATCA as a professional society as long as ATCA refrains from taking partisan positions in an effort to influence FAA employees on representation issues arising under EO 11491. It was further recognized that our relationship under the provisions of Section 7(d)(3) of EO 11491 must be confined to matters or policies which involve individual members of ATCA or are of particular applicability to it or its members, and shall be limited so that our relationship does not assume the character of formal consultation on matters of general employee-management policy.

"It was recognized in our meeting that there are difficult 'gray areas' between subjects on which we can properly deal and subjects that would infringe upon the rights of labor organizations. You stated that ATCA would endeavor to avoid these gray areas."

- 15 -

ATCA and FAA engaged in various other discussions subsequent to the issuance of A/SLMR No. 10. Some of the more significant conversations revealed at the hearing follow herein.

Sometime during 1971 Director of Labor Relations Curran had a conversation with Francke concerning the placement on other jobs of controllers who were medically disqualified from performing controller work. FAA had a past practice of attempting to locate other jobs for controllers who were no longer medically qualified to perform active controller duties. Francke encouraged Curran to expand employment opportunities for medically disqualified controllers and to do a better job in placing them. Curran acknowledges that the placement of medically disqualified controllers is a personnel matter and a matter affecting the working conditions of employees.

In 1971 and into 1972, Curran had numerous personal discussions with ATCA representatives concerning air traffic controller career legislation which was then pending in Congress and became effective August 14, 1972. Curran denied that during these conversations ATCA encouraged FAA to take a position on the legislation but admitted that ATCA and FAA had various communications along the lines of general inquiries from ATCA as to the progress of the bill and what FAA's position would be on various provisions of the bill. Curran also admitted that at some undisclosed time ATCA attempted to persuade FAA to include supervisors in the bill and "some other facets like that." Further in a letter dated 20 July 1972 from Francke to Curran 15/ in response to a letter sent to ATCA requesting their comments on a draft order implementing the controller career legislation, Francke stated inter alia:

"We observe from your proposed Paragraph 9, 'DEFINITIONS' that the agency intends to reject the suggestion of the Senate Committee on Post Office and Civil Service, that secondline supervisors be included within the definition

15/ Complainant Exhibit No. 8(b).

- 16 -

of an air traffic controller. The agencies complete intransigence on this issue, despite the suggestions of employee organizations, professional societies and congressional committees is impossible to understand." [Emphasis added.]

Francke acknowledges that coverage under a retirement plan is a personnel matter.

Around April 1972,<sup>16/</sup> the SF-160(FAM) program was terminated by FAA because of difficulties it was having as a result of highjacking. The SF-160(FAM) program is a program by which FAA is authorized to permit certain FAA employees access to the cockpit of commercial carriers for the purpose of becoming familiar with the duties "on the flight deck." <sup>17/</sup> Shortly after termination of the SF-160 program Francke had a conversation with an FAA representative and inquired whether the program was going to be reinstated in the future. Francke suggested that when FAA had an opportunity, the program should be reinstated. Francke also testified that sometime after he took office as Executive Director of ATCA in January 1971, he contacted FAA and sought to have the SF-160 program expanded so it would be available to assistant controllers. Francke understood the SF-160 program to be a training device.

The evidence reveals that FAA and ATCA frequently exchange correspondence on a wide variety of matters. It is the policy of FAA to send to ATCA, as well as other organizations, directives and proposed directives affecting air traffic controllers. The directives are sent for informational purposes. However the proposed directives are sent for comment before the final document is prepared. These comments and recommendations are taken into account and given consideration by FAA before final directives are issued. Frequently the directive relates to revisions in the controllers operational Handbooks, which Handbooks are

<sup>16/</sup> See Complainant Exhibit No. 9(a), The ATCA Bulletin, 72-4, April 1972, p.3

<sup>17/</sup> Curran characterized the SF-160 program as essentially a training operation.

for the purpose of standardizing the controllers operating procedures. The control manuals or Handbooks contain all the instructions that controllers abide by in controlling traffic, including separation standards and communication procedures. The Handbooks are in constant use by controllers in the day-to-day performance of their duties. Francke testified that these manuals bear on working conditions.

A review of the substantial correspondence which passed between ATCA and FAA from July 1971 to July 23, 1972, reveals the following communications which are illustrative of ATCA's continuing interest in a wide range of matters affecting air traffic controllers working conditions and are particularly significant. <sup>18/</sup>

Letter dated 28 July 1971, from Francke to ATCA Operations and Procedure Division, Air Traffic Service, FAA (hereinafter referred to as Air Traffic Service), stating ATCA's position with regard to procedures for communicating with an aircraft when primary radio failure or blockage has occurred.

Letter dated 9 August 1971, from Air Traffic Service to Francke regarding a proposal to revise Handbooks relative to the terms used by controllers when issuing radar traffic information. ATCA submitted comments to FAA in a letter dated 30 September 1971.

Letter dated 18 August 1971, from Air Traffic Service to ATCA regarding Handbook revisions relative to the use of visual separation and approaches under certain circumstances. ATCA responded to the proposal in a letter dated 30 September 1971.

Letter dated 2 November 1971, from Air Traffic Service to ATCA regarding a proposed Handbook amendment concerning controllers issuing "Expected Approach Clearance" times. In

<sup>18/</sup> Complainant Exhibit No. 8(a) and (b).

its letter Air Traffic Service reviewed the current procedures and stated, "This results in a considerable controller workload at both the center and terminal facilities . . . To reduce this workload and eliminate as much as possible time consuming coordination, many facilities had devised methods that establish predetermined EAC's..." ATCA responded to the proposed amendment by letter dated 12 January 1972, at which time it gave its full concurrence to the change in procedure.

Letter dated 22 November 1971, from Francke to the Air Space and Procedural Branch, FAA at JFK International Airport in response to a study regarding construction of antenna towers in the vicinity of a metropolitan airport. ATCA set forth its opposition to the construction of the towers and concluded, "Location of construction should not place additional burdens on pilots or controllers who must live with established criteria, by continuously making exceptions to the criteria."

Letter dated 24 November 1971, from Air Traffic Service to ATCA requesting recommendations regarding new Handbook procedures and material appearing as a "Terminal Automation Arts" section. ATCA responded to the proposal by letter dated 18 January 1972.

Letter dated 29 December 1971, from Francke to Air Traffic Service relaying to FAA information ATCA obtained as a result of a survey on the use of "RNAV" in air traffic control. Francke's letter concluded, "The information is also provided to alert you to some attendant problems regarding the training and indoctrination of air traffic controllers in the use of RNAV and its integration into the air traffic control system. It is obvious that the users of the systems, the companies and pilots with RNAV equipment installed in their aircraft are sold on this method of navigation. I believe that the FAA may be remiss if they do not provide timely RNAV training and indoctrination for the air traffic controller, and develop adequate plans to integrate RNAV procedures into the air traffic control system."

Letter dated 6 January 1972, from Air Traffic Service to ATCA regarding a proposal by FAA to revise Handbook procedures and practices relative to the "airport traffic area" rule. The FAA correspondence reads in part, "Historically, such practices have been considered simply as good controller technique. Recently, however, incidents have occurred in proximity to terminal areas which indicate a need to formalize such practices." ATCA's comments on the proposed revisions were contained in a letter from Francke to Air Traffic Service dated 28 February 1972.

Letter dated 24 January 1972, from Air Traffic Service to ATCA relative to a prior proposal to change "Procedures for Control of Aircraft Following Heavy Jet Aircraft" which had been previously submitted by Air Traffic Service and "coordinated" with ATCA.

Letter dated 25 January 1972, from Air Traffic Service to ATCA regarding a proposal to revise Handbooks relative to providing guidance services to aircraft in certain situations. ATCA concurred in the proposed revisions in a letter from Francke to Air Traffic Service dated 17 March 1972.

Letter dated 3 February 1972, from Air Traffic Service to ATCA regarding proposed changes in Handbook procedures concerning airport surveillance radar approach guidance services. Francke commented on the proposed Handbook provisions in a letter to Air Traffic Service dated 17 March 1972.

Letter dated 23 February 1972, from Air Traffic Service to ATCA soliciting ATCA's comments on proposed changes recommended by the "Controllers Operations/Procedures Committee," relative to a change in aircraft separation standards. Francke responded by letter dated 6 April 1972.

Letter dated 3 March 1972, from Air Traffic Service to ATCA regarding a proposed Handbook revision regarding

oceanic procedures in aircraft separation. In discussing the need for the revision, Air Traffic Service stated, "This condition often creates unnecessary workload on the controller and hardships on the succeeding aircraft." Francke submitted ATCA's comments to Air Traffic Service by letter dated 3 April 1972.

Letter dated 13 March 1972, from Air Traffic Service to ATCA regarding a Handbook revision concerning use of equipment to monitor instrument approaches. Francke responded to this proposal by letter dated 17 March 1972.

Letter dated 30 March 1972, from Air Traffic Service to ATCA concerning, among other things, controller techniques and attitudes with regard to speed adjustment and its application. Francke's response, dated 30 June 1972, contains the following comments: "We concur that it is necessary to implement a controller education program to provide them with an understanding of the inter-relationship of indicated airspeed, true airspeed, ground speed and MACH number. ... The operational characteristics of aircraft at higher flight levels, and the limitations of applying speed control without affecting critical cruising speeds of aircraft, should also be stressed in any controller education program."

Letter dated 17 April 1972, from Air Traffic Service to ATCA regarding procedures governing the handling of various aircraft practicing instrument approaches. Among Francke's comments, dated 10 May 1972, was the following statement: "The procedures proposed by the draft Order affords the controller the prerogative of authorizing, withdrawing authorization, or refusing to authorize practice instrument approaches depending on traffic conditions. This is understood to be a 'workload permitting' situation, and affords the flexibility needed to improve traffic control, not unduly restrict it."

- 21 -

By letter dated 17 May 1972, from Air Traffic Service to ATCA, Air Traffic Service sought ATCA's views and comments with regard to a revision in procedures designating aircraft type. In discussing the necessity for the change, Air Traffic Services notes: 19/ "...the workload for a controller to convert an arbitrarily chosen designator to useful aircraft characteristics and retain it in memory is no longer possible with the numbers of aircraft types involve. ... As air traffic control automation is increased within the system, it becomes evident that input data concerning aircraft operating characteristics is necessary for application in metering and spacing, flight plan aided tracking and conflict prediction and resolution, in addition to normal control usage."

ATCA's reply, dated 20 July 1972, reads as follows: 20/

This is in response to AT-322-72-7, dated 17 May 1972, regarding designating aircraft type. The comments received concerning the proposed system of designating aircraft type were all negative. Some of the reasons for the negative comments are:

1. The system makes the man work for the machine, instead of just the opposite. Generally, the traffic at a particular airport is made up of certain types of aircraft that frequent the airport, and the controller is familiar with these types at his airport. If there is a requirement for certain aircraft operating characteristics for follow-on automation of air traffic, then the controller should be able to continue input of the present designator and have a computer look-up program categorize the performance characteristics for him without having to unlearn and relearn a new system for the benefit of the computer.

19/ Complainant Exhibit No. 8(b).

20/ Complainant Exhibit No. 8(b).

- 22 -

2. Since there would still be the same call sign procedures and use of manufacturer model for air/ground communications, the controller would have to learn an additional system, thereby increasing his memory requirement rather than reducing it. With a computer look-up table, his data entry of the existing designators would automatically be converted to performance factors for use in the automation programs. Why have the controller go through these mental gymnastics?

3. There are times when it may be required to know the specific type aircraft, rather than as "LLA." Thus, it is conceivable that additional communications would be required.

4. Theoretically, there are 675 combinations of designators. Add to the acknowledged variations within categories, and it is difficult to see how the adoption of this proposal would simplify much for the controller.

5. Because of the controller's being given the responsibility to categorize aircraft by wingspan, loading, rate of climb, and approach speed at various maximum gross landing weights, it is conceivable that an error in this type categorization by the controller could result in complications to the wake turbulence criteria and responsibilities. Again, by having the controller enter the model of aircraft as he does now, a computer look-up table could accurately categorize the aircraft by performance characteristics, rather than have the controller go through look-up tables at his position and enter the proper letters.

6. The Corson Committee cited one cause of the en route controllers' alienation to their environment was their isolation from the real world of airplanes. The proposed type of categorization does not improve this situation.

We thank you for the opportunity to comment."

Letter dated 18 May 1972, from Air Traffic Service to ATCA proposing Handbook procedures regarding simultaneous departures off parallel runways in a radar environment. ATCA's response, dated 29 June 1972, included the following comments: "If simultaneous parallel departures with less than present standard separation are approved . . . the controller should not be the one responsible for the pilot's ability to hold a true tract. . . . the controller would be assuming the pilot's responsibility to maintain a true tract for separation on simultaneous departure . . . 'Should the departure controller assume the additional responsibilities for this type of separation without the pilot's having an instrument course-line indication in the cockpit to maintain a true track?' We think not."

Letter dated 28 June 1972, from Francke to Air Traffic Service forwarding to FAA "for appropriate action" the results of an informal ATCA's survey of "inadequacies of communications and navigation aid equipment currently used for air traffic control and/or air navigation." Francke notes some of the problems controllers had experienced, including a situation when certain frequencies failed in communications. The letter explains, "To resolve the failure, two positions were combined to free one of their frequencies, and that frequency used to replace the frequencies lost at three other positions. Result: Five control positions worked by two controllers. The unreliability of this system and the TELCO problems associated with it should be given immediate attention." The letter further suggest that the installation of dual TELCO lines should be continued.



Letter dated 28 June 1972, from Francke to Honorable John H. Shaffer, Administrator, FAA, relative to employing medically disqualified air traffic control personnel. After setting forth reasons to support his position, Francke concluded: "I strongly urge that you and the Federal Aviation Administration give every consideration to the ATCA Council's suggestion for placement of medically disqualified ATCA specialists in the newly created operations division of Airports Service as Airport Certifications Specialists." By letter dated July 17, 1972, 21/ E.V. Curran, Director of Labor Relations stated that he appreciated ATCA's suggestion and would pass them on to appropriate management officials.

By letter dated July 12, 1972, 22/ Curran supplied ATCA with a draft Order implementing Public Law 92-297 (air traffic controller career legislation). That letter stated as follows:

Enclosed for your review and comment is a copy of a draft Order implementing the recently passed ATCS legislation, Public Law 92-297. The Order provides for improved retirement benefits, job training, appeal procedures, and for maximum age for recruiting, and retention of air traffic control specialists. The training agreement referenced in the draft has not been finalized and is therefore unavailable at this time.

We would appreciate your comments and suggestions on the draft no later than July 20, 1972. We apologize for the short deadline but we have no real alternative as Public Law 92-297 becomes effective August 14, 1972.

21/ Complainant Exhibit No. 10.

22/ Complainant Exhibit No. 10. Identical letters were sent to PATCO, AFGE, and ATCA.

Francke's response to Curran, dated 20 July 1972, urged the inclusion of second-line supervisors within the definition of "Air Traffic Controller" under the Order; the inconclusion of assistant chiefs, controllers engaged in the experimental work and controllers in temporary assignment to a foreign government; a more liberal construction of creditable service under the Order; the establishment of a uniform standard in permitting a career controller to remain on duty after age 56; and clarification of some ambiguities and language in the Order. Francke also criticized FAA's proposals involving Board of Review procedures in adverse action situations and the failure of the Order to provide that a controller's request to receive training may be extended.

#### B. Discussion and Conclusion (The Status of ATCA)

ATCA claims that it is a professional organization and has not exceeded its right to consult and deal with FAA as permitted by Section 7(d)(3) of the Order. However, for an association to lawfully engage in "consulting or dealing" with an agency where recognition of a labor organization exists, the "association" must not be "qualified as a labor organization." Therefore it would appear that the first test to be applied is whether or not ATCA now qualifies to be a "labor organization" within the definition of Section 2(e) of the Order.

With regard to the first portion of the definition in Section 2(e) of the Order (a lawful association of any kind in which employees participate) the evidence reveals that neither ATCA's Constitution nor organizational structure has changed materially since the hearing which gave rise to A/SLMR No. 10. Further, no contrary evidence was adduced at the instant hearing to dispel the continuing inference which flows from the decision in A/SLMR No. 10 that ATCA is a lawful organization in which employees participate. Accordingly, I find that ATCA satisfies this portion of the definition.

Next it must be determined whether ATCA exists for the purpose, in whole or in part, of dealing with agencies on various matters specified in the Order including working conditions of employees. That "dealing" with FAA is at least part of ATCA's purpose for its existence is obvious from ATCA's stated objectives, an analysis of the source of its membership and the scope and frequency of its "dealings" with FAA as described herein.

A review of ATCA's activities and the discussions and communications between ATCA and FAA reveals a wide range of interest on ATCA's part in dealing with FAA in matters affecting controllers working conditions including the Agency's position as a collective bargaining unit; employment of medically disqualified controllers; retirement rights of controllers; training and indoctrination of controllers; and controllers operating procedures, techniques and responsibilities which, both expressly and impliedly, concern the workload of controllers. An evaluation of ATCA's activities in these matters (subjects typically the concern of acknowledged labor organizations) demonstrates that a substantial part of ATCA's function is to act as an advocate on behalf of controllers in its relationship with FAA, encouraging and attempting to influence FAA to adopt the position it espouses (typically the role of acknowledged labor organization). Dealings between ATCA and FAA in these matters can by no means be called casual or sporadic. Rather they have occurred on a frequent and ongoing basis over a substantial period of time. Indeed, the frequency and substantial scope of ATCA's "dealings" with FAA bely ATCA's protestation that its activities only "incidentally" touch the subject of personnel policies, practices or working conditions. Further, while some of the contacts between ATCA and FAA may have been merely to obtain information for members or in order to report news to its members, the evidence as stated above reveals that ATCA far exceeded such purposes in much of its communications with FAA. Although it may be that ATCA's primary concern in a portion of its correspondence with FAA relates to air safety procedures, many of these procedures often are intrinsically related to the controllers performance of his job which therefore must be considered a matter affecting his working conditions.

- 27 -

An apparent anomaly exists in that under Section 7(d)(3) of the Order an association not qualified as a labor organization may also deal in a limited fashion with an agency. The question then arises, "Would an association (not qualified etc.), by the mere fact of dealing with an agency on matters specified in Section 2(e) of the Order, thereby become a "labor organization" under 2(e) when Section 7(d)(3) permits such "dealings?" However, by the very language of Section 7(d)(3), a threshold test which examines the underlying or basic nature of the organization, including its interests, purposes, and overall relationships to government agencies must be applied to the organization. Applying the test, as demonstrated above, I find and conclude that ATCA clearly meets the definition of a labor organization under the Order and is therefore a "labor organization" within the meaning of Section 2(e) of the Order. Accordingly, this finding precludes an evaluation of the "character" of ATCA's dealings, as specified in Section 7(d)(3) of the Order.

#### IV. The Alleged Illegal Assistance

On March 12, 1971, representatives of FAA and PATCO met and agreed on certain matters relative to FAA's recognition of PATCO as the exclusive collective bargaining representative at the Atlanta Tower. Among other things the parties agreed that "All material and/or solicitations of other employee organizations will be removed from the facility except as provided in Executive Order 11491." 23/

Sometime in August 1971, Charles Josey, a controller in the Atlanta Tower and then PATCO's Atlanta Tower President,

23/ Complainant Exhibit No. 4.

- 28 -

returned to duty to the TRACON 24/ from a two-week vacation. Shortly after entering on duty Josey discovered three ATCA Bulletins at one of the control positions. 25/ Each of three Bulletins was addressed to "ATCA Binder Atlanta ATC Tower 8th FL Atlanta Municipal Arpt Atlanta GA." Each of the Bulletins also had the name "Foppiano" handwritten across the top. Only one of the controllers position was manned at this time, since Josey's discovery was made close to 8:00 A.M. when the day shift replaced the midnight shift. Three controllers manned the TRACON on the midnight shift and during the change of shift personnel are moving around and assuming their positions. Upon making his discovery, Josey asked a supervisor if he had any knowledge of the Bulletins and the supervisor responded in the negative. Thereupon Josey put the three Bulletins in his pocket. Later that morning, Lester Shipp, Chief of the Atlanta Tower, came into the TRACON. Josey showed Shipp the Bulletins and asked Shipp if he knew how they got in the control room. Shipp denied having any such knowledge. Josey told Shipp that he felt that since the Bulletins were addressed to the Facility, in his opinion, the Bulletins had gone through the Facility distribution system and that the presence of the three ATCA Bulletins, in effect,

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24/ TRACON is an abbreviation for the Terminal Radar Traffic Control facility and is a room that contains radar displays, communications equipment and other devices for communications with and control of air traffic by air traffic controllers. Normally there would be approximately 5 controllers and two supervisors in the TRACON during an average shift.

25/ Complainant Exhibit Nos. 1, 2, and 3.

- 29 -

violated the oral 26/ and written agreement between PATCO and Respondent. Shipp's response was that the Bulletins were addressed to an individual (Foppiano) who was not a member of the unit, and that he saw nothing wrong with it from what he knew of the circumstances.

Sometime during that same day, according to Josey, he questioned Foppiano as to his knowledge of the material and how it could have gotten to the TRACON. Josey related that Foppiano told him that he had not seen the documents. 27/

Thereafter on August 31, 1971, PATCO filed an unfair labor practice charge against the Respondent with regard to this incident.

Prior to March 1971, ATCA Bulletins were kept in a binder in a supervisor's room adjacent to the TRACON which is located on the 8th floor of the facility. As a result of the agreement between PATCO and FAA on March 12, 1971, as set forth above relative to removing all material of other employee organizations from the facility, the ATCA binder was discontinued sometime in March 1971. However, the ATCA Bulletins marked "ATCA Binder Atlanta Tower" continued to be received. After the termination of the ATCA binder, Shipp instructed his secretary to route the "ATCA Binder" copy of the Bulletin to the last known official of ATCA -- Foppiano. 28/ Shipp identified the

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26/ In July 1971, after Josey took office as PATCO's Atlanta Tower President, he met with management and agreed to certain ground rules with regard to the distribution of literature. Part of that agreement went to keeping literature out of the TRACON.

27/ Sometime during 1971 after the incident in question, Foppiano was transferred to another FAA facility. He was not called as a witness in these proceedings.

28/ Intervenor Exhibit No. 12, THE ATCA BULLETIN, 69-21, October 21, 1969, lists "Joe Foppiano, Vice President," in its heading.

- 30 -

writing of the name "Foppiano" on the Bulletin Josey discovered to be that of his secretary. 29/

During all times material herein Foppiano was classified as a Data Systems Specialist, a classification that was specifically excluded from the recognized bargaining unit. His pay level was GS 13, which was also the full performance rating for a fully qualified controller at the Tower. His office was located on the 7th floor of FAA's Atlanta facility and he was part of Shipp's management staff. He did not have responsibility to supervise other employees. A Data Systems Specialist was described as a programmer whose function it was to write computer programs, trouble shoot any existing computer program, and respond to request for assistance from air traffic controllers or supervisors when something went wrong with the data system within the facility.

A. Discussion and Conclusion (Alleged Assistance)

The allegation violation of Section 19(a)(3) of the Order, as framed in the complaint, is that on or about July 1, 1971, and continuing thereafter, Respondent violated the Order by distributing or allowing the distribution of ATCA literature. There is no evidence that other than the Josey incident, as stated above, ATCA literature was distributed or allowed to be distributed by management after March, 1971. Indeed there is not even a specific allegation of such conduct. There is no evidence as to how long the literature discovered by Josey was in the TRACON or whether

29/ Shipp's secretary was not called as a witness and accordingly there is no evidence as to what became of the Bulletins after Shipp's secretary wrote Foppiano's name on them. Although, after Foppiano left the Atlanta facility, a copy of the Bulletin marked "ATCA Binder" continued to be received by FAA, Shipp followed the practice of having his secretary discard that copy.

- 31 -

it had been seen by any controller other than Josey. Further, the preponderance of the evidence does not disclose that Foppiano, 30/ or any agent of management, distributed or allowed the distribution of the ATCA Bulletins in the TRACON.

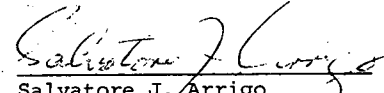
As to the other evidence adduced at the hearing with regard to ATCA's relationship with FAA, such matters were not encompassed in the complaint as being violative of the Order. Indeed counsel for Complainant states in his brief "It may well be that certain of the newly discovered facts will lead to further and new unfair labor practice charges. These new facts may be relied herein, not to establish independent violations not encompassed by the complaint, but to complete the picture of FAA's true relationship with ATCA."

Accordingly, in view of the entire foregoing, I conclude that Complainant has not met its burden of proving by a preponderance of the evidence that Respondent violated Section 19(a)(3) and (1) of the Order as alleged.

RECOMMENDATION

Upon the basis of the above findings and conclusions, I recommend that the Complaint herein against Respondent be dismissed.

Dated, Washington, D.C.  
MARCH 30, 1973

  
Salvatore J. Arrigo  
Administrative Law Judge

30/ Even assuming that the Bulletins were placed in the TRACON by Foppiano, I am not satisfied that Foppiano has been shown to be an agent of management by virtue of his position or that he acted with knowledge, consent, or encouragement of management or that his actions were condoned by management.

- 32 -

August 15, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,  
VETERANS ADMINISTRATION HOSPITAL,  
MUSKOGEE, OKLAHOMA  
/SLMR No. 301

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, Local 2250 (Complainant) against the Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma (Respondent). The Complainant alleged essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by establishing a Youth Advisory Committee (YAC) at the Respondent's facility; by not informing the Complainant of its existence until March, 1972; and by permitting meetings of the YAC on January 12, February 23, March 24 and April 12, 1972, in which personnel policies and working conditions of unit employees were dealt with.

The Respondent, in its exceptions, alleged, among other things, that the Administrative Law Judge erred in finding the complaint herein to be timely filed. In this regard, the Assistant Secretary concluded that the complaint should be dismissed insofar as it alleged that the establishment of YAC violated the Order because its establishment took place more than six months prior to the filing of the pre-complaint charge. Accordingly, in reaching the decision in this case, the Assistant Secretary considered the establishment of YAC only for the purpose of background in connection with the relevant events which occurred within the six-month period preceding the pre-complaint charge.

At all times material, the Complainant was the exclusive representative of Respondent's professional and nonprofessional employees. In August, 1971, the Respondent established the YAC, which consisted of 12 persons elected by an overall youth group of 35-year old and younger employees of the Respondent. The YAC was intended to serve as a steering committee for the activities and functions of the youth group. YAC representatives were allowed to attend and participate on various management staff committees of the Respondent Activity where personnel policies and practices were discussed and, although having no formal status and classified as observers in these management staff committees, YAC representatives were allowed to comment and make known their views.

The Assistant Secretary found that the Respondent, in effect, dealt directly with unit employees who were YAC representatives in the six-month period preceding the filing of the pre-complaint charge with respect to matters concerning employee safety, fire protection, training, utilization of manpower, finance, hiring, the transfer of personnel within

the facility and employee leave. He concluded that such conduct was inconsistent with the Respondent's obligation to deal with the employees' exclusive representative concerning, among other things, personnel policies and practices, or other matters affecting the general working conditions of unit employees. Such conduct was found to be a failure to consult, confer, or negotiate in violation of Section 19(a)(6) of the Order. It was also found to violate Section 19(a)(1) as it interfered with the Section 1(a) rights of employees.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions to remedy such conduct.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,  
VETERANS ADMINISTRATION HOSPITAL,  
MUSKOGEE, OKLAHOMA

Respondent

and

Case No. 63-4029(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2250

Complainant

DECISION AND ORDER

On April 13, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge to the extent consistent herewith.

The complaint herein, which was filed on September 5, 1972, 1/ and subsequently amended on September 15, 1972 and October 6, 1972, alleged

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1/ On page 2 of his Report and Recommendations, the Administrative Law Judge inadvertently stated that the instant complaint was filed on August 31, 1972, instead of September 5, 1972. This inadvertence is hereby corrected.

essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by establishing a Youth Advisory Committee (YAC), without informing the Complainant of its existence until March 1972, and by permitting meetings of the YAC on January 12, February 23, March 24 and April 12, 1972, in which it dealt with personnel policies and working conditions appropriate to young employees at the Respondent's facility.2/

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

The American Federation of Government Employees, Local 2250, herein called Complainant, has been the exclusive representative for all of the Respondent's professional and nonprofessional employees at all times material herein. On July 15, 1970, the Administrator of Veterans Affairs issued a memorandum to the heads of all departments, staff officers and field stations in the Veterans Administration urging each to consider the goals and suggestions outlined in the President's memorandum pertaining to enlarging the participation and involvement of young employees. Thereafter, on June 23, 1971, the Chief Medical Director's Office issued a letter to Directors, Veterans Administration Hospitals, Domiciliary, Veterans Administration Outpatient Clinics and Regional Offices with outpatient clinics requesting that they cooperate in establishing the mechanism for training and seasoning the Veterans Administration management potential of the future. Pursuant to the above-noted letter, the YAC was established by the Respondent during the summer of 1971 with its first meeting being held in August 1971. The YAC consisted of 12 persons elected by a youth group of 35-year old and younger employees of the Respondent; it was intended to serve as a steering committee for the activities and functions of the overall youth group.

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2/ In its exceptions, the Respondent alleged that the Administrative Law Judge erred in finding the complaint to be timely filed. Under the circumstances of this case, I find that the instant complaint should be dismissed insofar as it alleges that the establishment of the YAC violated Section 19(a)(1) and (6) of the Order. Thus, it is clear that the establishment of the YAC took place more than six months prior to the filing of the pre-complaint charge. See, in this regard, Section 203.2(a)(2) of the Assistant Secretary's Regulations. Accordingly, in reaching the decision herein, I have considered the establishment of the YAC only for purpose of background in connection with the relevant events which occurred within the six month period preceding the pre-complaint charge.

The evidence established that the YAC representatives were allowed to attend and participate on various management staff committees of the Respondent 3/ and, although having no formal status and being classified as merely observers on these management staff committees, the YAC representatives were allowed to comment and make known their views. 4/ The record revealed also that a suggestion made by a YAC representative at a management staff committee meeting could be accepted and placed into effect. 5/

The evidence disclosed that matters discussed at the Hospital Safety and Fire Protection Committee dealt with the safety of employees and fire protection; that the Training and Development Committee dealt with the training of supervisors and, on occasion, the training of employees; that the Manpower Management Committee, among other things, discussed the management and utilization of manpower and finances as well as hiring, and the transfer of personnel from one division to another; and that at the Hospital Director's Staff Meetings, the subjects for discussion included budget, new policies from the Central Office, and, on certain occasions, employee leave policy.

As the Assistant Secretary stated in United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42, once a bargaining representative has been designated by a majority of the employees in an appropriate unit, the obligation of the agency or activity to deal with such representative concerning grievances, personnel policies and practices, or other matters affecting working conditions of all employees within the unit becomes exclusive and carries with it a correlative duty not to treat with others. Moreover, to disregard the exclusive representative selected by a majority of employees and attempt to negotiate or deal with certain employees individually concerning

The YAC was granted seats on the following committees: (1) Viet Nam Era Committee; (2) Equal Employment Opportunity Committee; (3) Veterans Administration Staff Advisory Committee; (4) Hospital Safety and Fire Protection Committee; (5) Nursing Service Staff Meeting; (6) Middle Management Committee; (7) Training and Development Committee; (8) Annual Budget Briefings; (9) Blood Donor Program; (10) Chief of Staff Meeting; (11) Manpower Management Committee; and (12) Hospital Directors Staff Meetings.

The YAC representatives had no right to vote at the management staff committee meetings, unless they were members of the committee independent of their YAC membership.

The Respondent contended, however, that suggestions received from YAC representatives would be for the sole purpose of establishing a management position and would not be placed into effect without prior consultation with the Complainant.

grievances, personnel policies and practices, or other matters affecting the general working conditions of employees in the unit was found to violate the essential principles of exclusive recognition and to undermine the exclusive representative's status under the Order. In the instant case, the Respondent, in effect, dealt directly with unit employee representatives of the YAC in the six-month period preceding the filing of the pre-complaint charge on such matters as employee safety, fire protection, training, utilization of manpower, finance, hiring, the transfer of personnel within the facility, and employee leave. Clearly, this was inconsistent with the Respondent's obligation to deal with the employees' exclusive representative concerning personnel policies and practices or other matters affecting the general working conditions of unit employees. In my view, this disregard of the exclusive representative with respect to the above-noted matters was in derogation of the exclusive representative's rights established under the Order and, thereby, constituted a failure to consult, confer, or negotiate within the meaning of Section 19(a)(6) of the Order. 6/

Moreover, I find that such conduct also interfered with the Section 1(a) rights of employees and, therefore, violated Section 19(a)(1) of the Order.

#### CONCLUSION

By bypassing the exclusive representative and dealing directly with unit employees with respect to personnel policies and practices, or other matters affecting the general working conditions of employees in the unit, the Respondent has violated Section 19(a)(1) and (6) of Executive Order 11491, as amended.

#### THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, shall:

1. Cease and desist from:

(a) Dealing directly with unit employees on the Youth Advisory

6/ Cf. United States Army School/Training Center, Fort McClellan, Alabama, cited above.

Committee represented by the American Federation of Government Employees, Local 2250, with respect to personnel policies and practices, or other matters affecting the general working conditions of employees in the unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

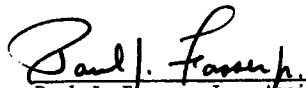
(a) Upon request, consult, confer or negotiate in good faith only with the American Federation of Government Employees, Local 2250, the exclusive representative of its employees, with regard to personnel policies and practices, or other matters affecting the general working conditions of employees in the unit.

(b) Post at the Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hospital Director and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1) and (6) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
August 15, 1973

  
\_\_\_\_\_  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT deal directly with unit employees on the Youth Advisory Committee, represented exclusively by the American Federation of Government Employees, Local 2250, with respect to personnel policies and practices, or other matters affecting the general working conditions of employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL, upon request, consult, confer, or negotiate in good faith only with the American Federation of Government Employees, Local 2250, with respect to personnel policies and practices, or other matters affecting the general working conditions of employees in the unit.

\_\_\_\_\_  
(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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.



Statement of the Case

.....  
VETERANS ADMINISTRATION :  
VETERANS ADMINISTRATION HOSPITAL :  
MUSKOGEE, OKLAHOMA :  
: Respondent :  
and : Case No. 63-4029(CA)  
: :  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL 2250 :  
: Complainant :  
.....

BEFORE: Rhea M. Burrow  
Administrative Law Judge

APPEARANCES:

Dolph David Sand  
Assistant Staff Counsel  
American Federation of Government  
Employees  
1325 Massachusetts Ave., N.W.  
Washington, D.C. 20005

For the Complainant

Stephen L. Shochet  
Veterans Administration  
Office of the General Counsel  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420

For the Respondent

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on December 8, 1972 by the Regional Administrator of Labor Management Services Administration, Kansas City Region, based on a complaint filed by the American Federation of Government Employees on behalf of Local 2250, American Federation of Government Employees (hereinafter called the Complainant) against the Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma (hereinafter called the Respondent). The complaint, dated August 31, 1972, alleged that the Respondent has engaged in and is engaging in violations of section 19(a) (1) and (6) of the Order 1/ by establishing a Youth Advisory Committee at Muskogee Veterans Hospital without it having earned recognition status under the Order, and not informing the Complainant of its existence until March 1972. It was further alleged that there were meetings of this Committee on January 12, February 23, March 24 and April 12, 1972, and it is clear this Committee deals with personnel policies and working conditions. In the amended complaints filed September 15 and October 6, 1972, it was alleged "the Committee deals obviously with job security, promotions, and other conditions appropriate to young employees at Muskogee V.A. This Committee was set up without prior consultation with AFGE, and represents a failure to accord appropriate recognition to the exclusive bargaining representative, as well as interference with the exclusive representative."

A hearing was held before the undersigned on January 23, 1973 at Muskogee, Oklahoma. Both parties were represented at the hearing and their representatives were afforded full opportunity to be heard and cross-examine witnesses and to introduce evidence bearing on the issues herein. Both parties filed briefs with the undersigned.

From a review of the entire record in this case, including observation of the witnesses and their demeanor, and from all testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations.

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1/ A violation of section 5 of the Order was also alleged but was withdrawn prior to the hearing.

Introduction

The American Federation of Government Employees, Local 2250, has been exclusively recognized as the collective bargaining representative for all the Respondent's regular work force employees, both professional and nonprofessional, at the Veterans Administration Hospital and Veterans Canteen Service, Muskogee, Oklahoma, 2/ at all times material herein.

The Veterans Administration is an independent agency established by the President under Executive Order 5398, in accordance with the Act of July 3, 1930 (46 Stat. 1016). The hospital at Muskogee, Oklahoma is an organizational element of the Veterans Administration under the Department of Medicine and Surgery, established to provide eligible beneficiaries with medical care. 3/

In March 1970, the President of the United States issued a Memorandum 4/ to the Heads of Executive Departments and Agencies pointing out that our society's greatest resource is its youth and their ideals, vision, sensitivity and energy, assuring our future, and it was incumbent on those directing the affairs in government to enlarge the participation and involvement of its young people. Methods, studies and suggestions were made for accomplishment of the goal. On July 15, 1970 the Administrator of Veterans Affairs issued a memorandum 5/ to the Heads of All Departments, Staff Officers and Field Stations in the Veterans Administration urging each to consider the goals and suggestions outlined in the President's memorandum. A letter from the Chief Medical Director's Office on June 25, 1971, Subject: Youth Advisory Committee, 6/ was

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2/ Respondent's Exhibit No. 2, Article IV, §1 and §2.

3/ U.S. Government Organizational Manual, 1971/72.

4/ Respondent's Exhibit No. 4.

5/ Respondent's Exhibit No. 5.

6/ Respondent's Exhibit No. 8.

directed to Directors, VA Hospitals, Domiciliary, VA Out-patient Clinics and Regional Offices with outpatient clinics adding to the concept of the Administrator's letter and asking all to cooperate in establishing this mechanism for training and seasoning the VA management potential of the future. (Underscoring supplied) The letter also stated:

"In the next five years, DM&S will lose substantial numbers of personnel in key executive and middle-management positions. Now is the time to expose appropriately qualified young people to management functioning, development of policy, and the decision making process. Management will be rewarded in turn by exposure to the motivations and viewpoints of the young. I am sure we all agree that our goal of achieving a marked increase in youth participation in the administration of our medical care programs is worthy-- so let us cooperate in pursuing this goal by developing the efficient and public spirited managers of the future." (Underscoring supplied)

Pursuant to the above a Youth Advisory Committee was established by the hospital administration at VA Hospital, Muskogee, Oklahoma, during the summer of 1971. The first meeting of the Committee was held in August 1971. 7/

The Youth Advisory Committee consists of 12 persons elected by a youth group of 35 year old and younger employees at the Muskogee VA Hospital. All employees 35 years old and younger are entitled to membership in the youth group. The Youth Advisory Committee, hereinafter referred to as YAC, serves as a steering committee for the activities function of the youth group.

It is conceded that as a part of its function YAC and the Youth Group were established by the hospital management without any consultation or negotiation with American

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7/ See Transcript, p. 141.

Federation of Government Employees, Local 2250, which at all times relevant hereto has been the exclusive representative for collective bargaining for employees at the hospital.

## II

### Timeliness of Complaint

Counsel for Respondent argues in his brief that the initial complaint filed on September 1, 1972 and the charge filed on June 22, 1972 were not timely. At close of Complainant's proof Respondent moved to dismiss the case because (1) the union has not proved that this Committee was instituted within the nine month period required by the rules and regulations of the Assistant Secretary, and (2) they haven't explained how this thing has been going on since August 1971 but they didn't notice it until March 1972. The motion to dismiss was not one considered appropriate to rule on from the bench and parties were advised it would be considered in my decision. For purposes of going forward with the proceeding it was denied.

Section 203.2 of the Assistant Secretary's Regulations provide:

A charge in writing alleging the unfair labor practice must be filed with the party or parties against whom the charge is directed . . . .

The charge must be filed within six (6) months of the occurrence of the alleged unfair labor practice.

If the parties are unable to dispose informally of the charge within thirty (30) days, the charging party may file a complaint.

If a written decision expressly designated as a final decision on the charge is served by the respondent on the charging party, that party may file a complaint immediately but in no event later than sixty (60) days from the date of such service.

A complaint must be filed within nine (9) months of the occurrence of the alleged unfair practice or within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time.

The complaint in effect alleged that Respondent had established a Youth Advisory Committee at the VA Hospital, Muskogee, Oklahoma, without it having earned recognition status. The Complainant first learned of the existence of the Committee in March 1972 and that there were meetings of the Committee on January 12, February 23, March 24, and April 12, 1972. Evidence at the hearing disclosed that there had been meetings of the YAC since August 1971 and also after April 12, 1972.

Although not a binding precedent on the Assistant Secretary in these proceedings, the policy of the National Labor Relations Board in interpreting and applying section 10(b) of the National Labor Relations Act commends itself and is applicable. The Board seems to consider the unfair labor practice charge as merely a mechanism whereby it enters a controversy. Subsequent amended charges and the complaint are considered timely so long as they are, even rather remotely, encompassed by any of the language of the original charge; e.g., Freemont Hotel, Inc., 162 NLRB 820 and Lubank Co., 175 NLRB 213.

The purpose of section 203.2 of the Rules and Regulations is to require the parties to attempt to deal with their disputes promptly and to prevent stale charges from being raised. Since Respondent contends there was no obligation on the part of management to consult with the union about the establishment of the Youth Advisory Committee it presumed the union must have officially learned of its existence by publications routinely routed to it. There was no evidence that anyone in management contacted any union official personally or otherwise about the establishment, continuation, or functioning of the YAC. The several specific meetings enumerated in the charge and the complaint were sufficient to apprise the Respondent of an alleged violation as to the continued existence of the Committee and the implementation of its policies both before and after union officials first learned of its existence.

Since the allegation was in the nature of a continuing violation related to the existence of the Youth Advisory Committee and implementation of its policies it was not incumbent upon the Complainant to explain why it was not officially notified of existence of the Committee since it was established by Respondent in August 1971. Certainly the evidence shows no attempt was made by the Respondent to officially notify Complainant anything about existence of the Youth Advisory Committee or its purpose. Rather, Respondent took the position that it was a management committee and it had no obligation to confer, consult or negotiate with the union regarding its establishment, purpose or policies.

In light of the foregoing, I find that there is lack of merit to Respondent's motion to dismiss as untimely the allegation that sections 19(a)(1) and (6) of the Order had been violated. I will recommend to the Assistant Secretary that the motion to dismiss the complaint as being untimely be denied.

### III

Counsel for the Respondent has assigned as error the Administrative Law Judge's ruling in not permitting him to question R.L. Cottrell, Personnel Officer, Muskogee VA Hospital to determine the truthfulness of a letter dated August 4, 1972 8/ from Wayne E. Sarius, Hospital Director, which had been submitted as Respondent's final answer to complaint and made an attachment to one of the Assistant Secretary's exhibits. It had been received into evidence without objection.

Section 203.9 of the regulations provides, among other things, that the Notice of Hearing shall include:

- (a) (4) a reference to the particular section of the Order and regulations involved.

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8/ Respondent's counsel in his brief referred to the letter as being dated October 4, 1972 and omitted to state it was written by the Muskogee VA Hospital Director and had been made a part of the record as part of one of the Assistant Secretary's exhibits.

(b) Attached to the notice of hearing shall be a copy of the complaint and the respondent's answer.

The truthfulness of the letter had not been questioned or put in issue by Complainant and the witness offered to attest to its truthfulness was not the Hospital Director who had signed and issued it. The Personnel Officer was permitted to testify in detail as to all matters within his knowledge as to the facts in the case. Under the circumstances, there appeared to be no necessity for the attempted line of questioning.

Section 203.9(c) of the Assistant Secretary's regulations provides that the Report of Investigation by the parties referred to in section 203.8 shall be furnished to the Hearing Examiner (Administrative Law Judge); however, the Report of Investigation will not be deemed as evidence, and any party wishing to rely on anything contained therein must make an appropriate submission at the hearing.

Respondent's counsel insists he attempted to make such appropriate submission but was precluded from doing so by the Administrative Law Judge, and this was clearly erroneous.

The Respondent's position is not considered well founded or consistent with the regulation. Section 203.9(b) of the regulations state: "Attached to the notice of hearing shall be a copy of the complaint and the respondent's answer." The letter in issue and in answer to the complaint was already a part of the official record; its authenticity had not been questioned and needed no affirmation for reliance as to its truthfulness. As an attachment to an exhibit of record the letter was not a part of the Report of Investigation which is not evidence until appropriately submitted.

It is not necessary for purposes of this decision to rely upon any of the attachments to the Assistant Secretary's exhibits to the record for determination of the issue. There is sufficient oral testimony and other documentary evidence upon which to predicate a decision without relying on the documents which Respondent questions. However, if the documents were essential for my decision, I would not hesitate to rely upon them and find the Respondent's argument and citation as to this matter inappropriate to this proceeding.

Basic Issue

Essentially, the basic issue to be resolved is:

Did the Respondent violate sections 19(a) (1) and (6) of the Order by creating and establishing a Youth Advisory Committee and implementing its policies at the VA Hospital, Muskogee, Oklahoma, without consulting, conferring or negotiating with the Complainant?

The Respondent denies that it had an obligation to confer, consult or negotiate. Rather, it insists that the YAC is a management committee and does not deal with personnel practices and employment conditions; that the evidence presented showed it involved itself with community activities such as (a) the walk for Mankind; (b) the Medical Specialty Group; and (c) the intensive care unit open house; additionally, the representatives of the Youth Advisory Committee attended the various hospital committee and staff meetings.

The Complainant urges that the Respondent's Youth Advisory Committee does deal with personnel policies and working conditions, thus infringing upon the exclusive recognition earned by complainant and the admitted failure to confer and consult is a violation of the Order.

Provisions in the Order

Section 19(a) of the Order provides that agency management shall not--

"(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

Section 10(e) provides that:

"When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices or other matters affecting general working conditions of employees in the unit."

Section 11(a) provides:

"An Agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order ... .

"(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an

organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of readjustment of work forces or technological change."

Section 12(b) of the Order provides that

"... management officials of the agency retain the right, in accordance with applicable laws and regulations--(1) to direct employees of the agency; (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees; (3) to relieve employees from duties because of lack of work or other legitimate reasons; (4) to maintain the efficiency of the Government operations entrusted to them; (5) to determine the methods, means, and personnel by which such operations are to be conducted; and (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; ..."

#### VI

##### Establishment and Activities of Youth Advisory Committee

Respondent and Complainant concede, and it was agreed at the hearing, that the Veterans Administration would be obligated to consult with the union about the formation and establishment of the Youth Advisory Committee if it dealt with personnel practices and employment conditions.

A summary of events leading to the complaint appears to be warranted and is as follows:

(a) The President's Memorandum in March 1970 urged the heads of all Executive Departments

and Agencies to enlarge the participation and involvement of its young people in governmental affairs;

(b) the Administrator of Veterans Affairs' memorandum of July 15, 1970 endorsed the suggestions and goals expressed by the President;

(c) the Chief Medical Director's letter of June 25, 1971 to Directors, VA Hospitals and others asked cooperation in establishing the Youth Advisory Committee mechanism for training and seasoning of the VA management potential of the future. (underscoring supplied)

(d) A Youth Advisory Committee elected by a youth group was set up sometime during the summer of 1971 with the first meeting of the Committee being held in August 1971.

(e) The Youth Group consisted of 35 year old and younger employees at the VA Hospital, Muskogee.

(f) The Youth Advisory Committee representatives were allowed to attend meetings of various hospital committees and to make known their views and make comments and statements at such committee meetings. <sup>9/</sup> The Youth Advisory Committee was granted seats on the following committees (1) Viet Nam Era Committee; (2) Equal Employment Opportunity Committee; (3) VA Staff Advisory Committee; (4) Hospital Safety and Fire Protection Committee; (5) Nursing Service Staff Meeting; (6) Middle Management Committee; (7) Training and Development Committee; (8) Annual Budget Briefings;

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<sup>9/</sup> Youth Advisory Committee representatives when attending other committee meetings had no right to vote unless they belonged to a committee other than the YAC which gave them that privilege.

(9) Blood Donor Program; (10) Chief of Staff Meeting; (11) Manpower Management Committee; and (12) Hospital Directors' Staff Meeting.

Other Concluding Findings

(g) The Personnel Officer at respondent hospital stated that matters discussed at the Hospital Safety and Fire Protection Committee dealt with working conditions; 10/ that the Training and Development Committee deals with the training of supervisors and it might also get involved in some training that would be station wide to all employees--in the broad context the purpose of training is to make better supervisors and better managers of civilian employees at the hospital; 11/ that the Management and Manpower Committee, among other things, discussed management and utilization of manpower, finance, hiring, transfer of people from one division to another; 12/ at the Hospital Directors' staff meeting the subjects for discussion included budget, new policies from Central Office, and on isolated occasions leave policy situations; 13/ also, that members of the Youth Advisory Committee are allowed to comment on issues brought before each committee and that such comments may be accepted and placed into effect as a result of their participation. A Personnel Management Specialist for the respondent hospital testified that one of the purposes of the Youth Advisory Committee in regard to promotions was to make people aware of promotion possibilities or of promotion potential without getting into actual phase of training. 14/

10/ Transcript p. 93.

11/ Transcript p. 94, 95.

12/ Transcript pp. 96 and 97.

13/ Transcript pp. 97 and 98.

14/ Transcript p. 177.

1. The community activities such as The Walk for Mankind, the Medical Specialty Group, and the Intensive Care Unit Open House sponsored by the Respondent are not shown to be other than those contemplated within Article XI, section 6 of the collective bargaining agreement between Complainant and Respondent wherein the parties agreed that in recognition of the respect and high esteem with which the hospital is regarded in the Muskogee community "both parties will publicize and take a positive attitude toward joint participation in community affairs and/or activities such as blood donation drive and others which improve the general image of the hospital." The evidence does not establish that the sponsorship of these programs by the Respondent was other than good faith policies, practices and rights of Respondent comprehended within the meaning of the collective bargaining agreement and were not in violation of sections 19(a)(1) and (6) of the Order.

2. Apart from the nonobjectionable YAC community projects the inescapable result of Respondent's establishment, continuation and implementation of policies of the YAC was to divide the hospital civilian employees into two distinct age groups thus undermining and undercutting the solidarity of Complainant's representation and destroying its effectiveness in the eyes of those it represents.

In the Chief Medical Director's letter of June 25, 1971, he stated ". . . Now is the time to expose appropriately qualified young people to management functioning, development of policy and the decision making process. Management will be rewarded in turn by exposure to the motivation and viewpoints of the young. . . ." He urged cooperation in establishing this mechanism for training and seasoning of the VA management potential by developing the efficient and public spirited managers of the future. I do not construe the above letter or the memoranda from the President and Administrator of Veterans Affairs as authorizing any exemption from the requirements of the Order.

Again, the inescapable result of Respondent's action was to permit members of a select group of employees on the YAC

Committee to attend, observe, make suggestions and discuss management functioning, development of policy and the decision making process on twelve staff committees at the hospital. The oral testimony and evidence of record establish that personnel policies and practices and matters affecting working conditions were subjects of discussion and decision at a number of the various staff committee meetings. The members of the YAC Committee attending the staff meetings were in fact participating in education and/or on-the-job training relating to personnel policies and practices and matters affecting general working conditions in the unit.

I therefore conclude that (a) the unilateral establishment and implementation of policies of the YAC by Respondent undercut and undermined the exclusive representative by dividing employees into two distinct groups only one of which elected officers and was afforded special educational or on-the-job privileges; such action destroyed Complainant's effectiveness in the eyes of those it represented and rendered meaningless the section 11(a) obligation Respondent had to meet and confer; 15/ (b) that the education and job training afforded YAC Committee members by attending, observing, commenting and participating in various staff committee meetings involved

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15/ For unilateral imposition of a new time deadline scheme that was considered a matter affecting working conditions within the ken of section 11(a) of the Order and a proper subject for collective bargaining the Assistant Secretary in National Labor Relations Board and National Labor Relations Board Professional Association, A/LSMR 246, January 24, 1973, stated: "The right to engage in dialogue with respect to a change in employee working conditions becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and ample opportunity to explore fully the matter prior to implementation of such change." For its unilateral imposition NLRB was judged to have rendered meaningless the section 11(a) obligation to meet and confer and undercut the exclusive representative, destroying its effectiveness in the eyes of those it represents.

personnel policies and practices and matters affecting working conditions. In fact, exposure to the staff meetings and decisions was the particular type exposure urged by respondent agency as the basis for providing experience and training for selection of future management officers.

3. Section 19(a)(6): The Assistant Secretary for Labor-Management Relations, in Veterans Administration Hospital, Charleston, South Carolina A/SLMR No. 87, concluded that the obligation of an agency or activity to consult, confer, and negotiate with an exclusive representative would become meaningless if a party to such relationship was free to make unilateral changes in the agreement negotiated. The Assistant Secretary held that respondent therein violated section 19(a)(6) by unilaterally changing agreed upon conditions of employment. I have evaluated the facts in this case and found that the Respondent unilaterally created and established the Youth Advisory Committee and permitted its members to attend, observe, comment and participate in staff meetings and decisions relating to personnel policies and practices and matters affecting working conditions. Respondent had an obligation to consult, confer, and negotiate with the Complainant union with respect to such policies, practices and working conditions. Having found that Respondent failed to fulfill this obligation by establishing and continuing the YAC Committee and permitting its membership to participate in meetings, discussions and decisions relating to personnel policies and practices, and matters affecting general working conditions, I conclude that Respondent violated section 19(a)(6) of the Executive Order. 16/

Also, the Respondent may not under the guise of a management committee discriminate against or exclude a whole segment or group of its employees over 35 years of age by withholding information, privileges, training and/or promotion opportunities that it is offering or affording the younger group without collective bargaining with the exclusive representative.

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16/ Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR 87; Long Beach Naval Shipyard, A/SLMR 154.



I find that the official meetings of the Youth Advisory Committee and participation by its representatives in the business agenda on the twelve enumerated committees on which they sat involved formal discussions and included employees and management regarding concerned personnel policies and practices affecting unit employees and is within the purview of section 10(e) of the Order. The right to be represented at formal discussions is one that flows directly to a labor organization which has been accorded exclusive recognition. <sup>17/</sup> By denying the union an opportunity to be represented, since it was not informed of the creation or establishment of the YAC or its function, purpose and participation on other committees, I conclude the Respondent violated section 19(a)(6) of the Order when it failed and refused to consult, confer or negotiate matters relating to personnel policies and practices which affect unit employees.

4. Section 19(a)(1): I further find that Respondent's action in unilaterally creating and establishing YAC and implementing its policies by permitting its members to become involved in personnel practices and policies and matters affecting working conditions without conferring, consulting or negotiating with the complainant union also constitutes a violation of section 19(a)(1) of the Order. Section 1(a) of the Order grants to employees the right to form, join or assist a labor organization and prohibits management from interfering with that right. The Respondent's course of conduct had the effect of evidencing to employees that respondent agency can act unilaterally with respect to establishing and implementing personnel policies and practices and terms and conditions of employment without regard to the exclusive representative. I find and conclude that the section 1(a) rights of employees have been interfered with in violation of section 19(a)(1) of the Order.

#### VIII

#### Recommendations

In view of the findings and conclusions above, I make the following recommendations to the Assistant Secretary:

<sup>17/</sup> U.S. Army Headquarters, U.S. Army Training Center, Infantry, Ft. Jackson, Laundry Facility, Ft. Jackson, South Carolina, LSMSR 242.

- 17 -

- A. That the Respondent's motion to dismiss the complaint as being untimely be denied.
- B. That Respondent be found to have engaged in conduct prohibited by sections 19(a)(1) and (6) of Executive Order 11491, and, accordingly, that Respondent be ordered to cease and desist therefrom and take specific affirmative action as set forth in the following order which is designed to effectuate the policies of Executive Order 11491.

#### Recommended Order

Pursuant to section 6(b) of Executive Order 11491 and section 203.25(a) of the Regulations, the Assistant Secretary of Labor-Management Relations hereby orders that Veterans Administration Hospital, Muskogee, Oklahoma, shall

1. Cease and desist from:

(a) Interfering with, restraining or coercing employees by dividing them into age groups so as to exclude the older and permit only those 35 years of age and under to serve as members on respondent staff committees at formal discussions and meetings with management concerning personnel policies and practices and other matters affecting general working conditions without conferring, consulting or negotiating with AFGE Union, Local No. 2250.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by section 1(a) of Executive Order 11491.

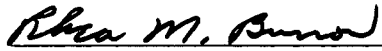
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Post at the VA Hospital, Muskogee, Oklahoma, copies of the attached notice

- 18 -

marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hospital Director and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.



Rhea M. Burrow  
Administrative Law Judge

Dated at Washington, D.C.

this 13<sup>th</sup> day of April, 1973.

APPENDIX

(Notice Recommended for Adoption by the Assistant Secretary)

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER OF THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS, AND IN ORDER TO EFFECTUATE THE POLICIES OF EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE,

We hereby notify our employees that:

WE WILL NOT refuse to consult, confer, or negotiate with American Federation of Government Employees, Local 2250, as the exclusive representative of our employees at the Veterans Administration Hospital, Muskogee, Oklahoma, by unilaterally excluding employees not members or officers in the Youth Advisory Committee from participating in formal staff meetings and discussions concerning grievances, personnel policies and practices and general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by section 1(a) of Executive Order 11491.

Veterans Administration Hospital  
Muskogee, Oklahoma  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 2511 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

August 15, 1973

A/SLMR No. 302

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,  
CHARLESTON NAVAL SHIPYARD  
SLMR No. 302

This case involved a petition for clarification of unit (CU) filed by the Federal Employees Metal Trades Council of Charleston, South Carolina, AFL-CIO (MTC), seeking to clarify the status of approximately 45 Physical Science Technicians in the Activity's Radiological Monitoring Division. The MTC represents exclusively the Wage Board (WB) employees of the Activity. The employees in question were at one time WB employees of the Activity. As a result of a reclassification action on December 24, 1972, they were placed on General Schedule (GS) employees. The Activity contended that the Physical Science Technicians had accreted or been added to an existing unit of GS employees represented exclusively by the American Federation of Government Employees, Local 1864, AFL-CIO, and that to divide the exclusive representation of GS employees between two labor organizations would not promote effective dealings and efficiency of agency operations.

Under all of the circumstances, including the fact that, despite the change in their designation and method of compensation, their duties had not changed substantially, that the majority of their job contacts were with WB employees, that they had apparently been represented effectively in the past by MTC, and that the MTC expressed a willingness to continue to represent them, the Assistant Secretary found that the employees in question continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the MTC. Accordingly, it is ordered that the MTC unit be clarified to include the GS Physical Science Technicians in the Activity's Radiological Monitoring Division.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
CHARLESTON NAVAL SHIPYARD 1/

Activity

and

Case No. 40-4621(CU)

FEDERAL EMPLOYEES METAL TRADES  
COUNCIL OF CHARLESTON, SOUTH  
CAROLINA, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer John L. Bonner. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

The Petitioner, Federal Employees Metal Trades Council of Charleston, South Carolina, AFL-CIO, herein called MTC, is the exclusive representative of certain employees of the Activity. 2/ In this proceeding, the MTC seeks to clarify the status of approximately 45 Physical Science Technicians employed in the Radiological Monitoring Division of the Activity's Radiological Control Office. Prior to December 24, 1972, these employees had

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1/ The name of the Activity appears as amended at the hearing.

2/ On December 6, 1971, the MTC was certified as the exclusive representative in a unit of "All ungraded employees of the Charleston Naval Shipyard, Charleston, South Carolina, including employees holding the rating of leader (except those who perform on a full-time basis the normal first full supervisory level functions), excluding GS employees, Patternmakers, Patternmaker apprentices, Planners and Estimators, Ship Progressmen, Ship Schedulers, Electronic Mechanics (cryptographic), management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards and supervisors as defined in the Order."

been classified as Radiation Monitors and, as such, were Wage Board (WB) employees represented by the MTC. As of that date they were reclassified as Physical Science Technicians and became General Schedule (GS) employees. <sup>3/</sup> The MTC contends that the duties performed by the employees in question are essentially the same as those they performed prior to their reclassification and that the change in the method of their compensation should not remove them from the MTC unit. The Activity takes the position that the Physical Science Technicians are technical employees and, in effect, have accreted or been added to the existing AFGE unit and that it would be improper to divide the exclusive representation of the Activity's GS employees between two labor organizations in that such a division of representation would not promote effective dealings and efficiency of agency operations.

The mission of the Activity is to provide logistic support for the Navy and to construct, repair and overhaul Naval ships, including nuclear ships. The record reveals that in the process of generating nuclear energy, radiation is emitted which can be lethal in sufficient amounts. Consequently, the Activity's Radiological Monitoring Division is responsible for, among other things, the detection and measurement of radiation in working areas and throughout the Shipyard, conducting continuing surveillance of work involving radioactive materials, ensuring compliance with radiological controls, assuring proper control of radioactive materials, and protecting Shipyard personnel and the general public from radiation and radioactive contamination.

The record reveals that the Activity instituted the employee classification of Radiation Monitor in 1961. Since that time, the amount of repair and overhaul work involving nuclear ships has increased greatly and at the present time there are approximately 45 employees performing radiological monitoring functions. Concurrent with the increased workload, the Activity has sought to upgrade the basic requirements of the Radiation Monitor position. Thus, in 1966 the Department of the Navy issued a manual setting forth the minimum knowledge requirements for Radiation Monitors and established a program of classroom training for such employees. It also was required that Radiation Monitors take periodic examinations to demonstrate their knowledge of radiological principles. The record further reveals that the Activity began concentrating its recruitment effort for Radiation Monitor positions on individuals who had received education in health physics and related fields at junior colleges, universities, and technical centers, rather than hiring individuals from craft-type positions within the Shipyard as had been done previously.

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<sup>3/</sup> The American Federation of Government Employees, Local 1864, AFL-CIO, herein called AFGE, holds exclusive representation in a unit of all GS employees of the Activity, excluding professional employees, cryptographic employees, supervisors, management officials, and employees engaged in Federal personnel work in other than a purely clerical capacity.

With respect to the specific duties performed by the disputed employees, the evidence establishes that the Physical Science Technicians in the Radiological Monitoring Division are responsible for maintaining radiological control in areas where work involving radioactive materials is being performed. In this regard, they conduct surveillance of radiologically controlled areas for compliance with established radiological work practices and procedures, and they use instruments to perform quantitative analyses of air, liquid and surface samples to determine radiation levels and amounts of radioactive materials. While it appears that the duties of the Physical Science Technicians have undergone certain changes due to increased workload and technological advances, the evidence indicates that they are performing essentially the same duties as they performed prior to the reclassification action.

The record reveals that the employees in question spend the preponderant share of their working time in areas of the Shipyard where work on nuclear ships is being performed and, in this connection, they come in contact with other WB employees including mechanics, inspectors, and other employees performing nuclear work. The evidence establishes that the majority of their work contacts are, in fact, with WB employees. The evidence further establishes that the MTC has represented the Radiation Monitors exclusively since 1963 and has bargained on their behalf and processed their grievances. <sup>4/</sup>

Based on the foregoing circumstances, I find that Physical Science Technicians employed in the Radiological Monitoring Division continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the MTC. Thus, as noted above, the duties of the employees in question have not changed substantially despite the change in their designation and method of compensation; <sup>5/</sup> the majority of their work contacts are with WB employees; and they have apparently been represented effectively in the past by the MTC. Moreover, the MTC has expressed a willingness to continue to represent these employees. Accordingly, I find that the existing exclusively recognized unit should be clarified to include the Physical Science Technicians in the Activity's Radiological Monitoring Division.

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<sup>4/</sup> The MTC has represented exclusively the employees in question since August 1963. Following an election conducted pursuant to Executive Order 11491, as noted above, the MTC was certified as the exclusive representative of the Activity's WB employees, including the employees in question, on December 6, 1971.

<sup>5/</sup> Cf. Department of the Army, Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 77 and ACTION, A/SLMR No. 207, where it was noted, among other things, that the variances between GS employees and either WB or Foreign Service employees were offset by the substantial evidence of their close working relationship.

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the Federal Employees Metal Trades Council of Charleston, South Carolina, AFL-CIO, was certified on December 6, 1971, be, and herein is, clarified by including in said unit the GS Physical Science Technicians in the Radiological Monitoring Division, Radiological Control Office, Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina.

ated, Washington, D. C.  
August 15, 1973

Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF  
AGRICULTURE, FOREST SERVICE,  
MARK TWAIN NATIONAL FOREST,  
SPRINGFIELD, MISSOURI  
A/SLMR No. 303

The subject case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3396 (AFGE), seeking a unit of all nonsupervisory professional and nonprofessional Class Act (GS) employees and Wage Grade (WG) employees employed at the Mark Twain National Forest, Springfield, Missouri. The Activity took the position that the unit sought would, under other circumstances, constitute an appropriate unit; however, the Activity noted that as of July 1, 1973, the Mark Twain National Forest and the Clark National Forest would be consolidated for administrative purposes. In this latter regard, the Activity took the position that after the consolidation takes place a unit encompassing employees of the consolidated organization would be appropriate. The Activity disagreed also with the proposed inclusion in and exclusion from the unit sought of certain classifications of employees.

Under all of the circumstances, the Assistant Secretary concluded that the petition should be dismissed. In reaching this determination, he noted that after the consolidation there will be only one Forest Supervisor and one headquarters' staff over employees of both Forests. He noted also that the consolidation resulted in, among other things, the merging of headquarters employees in the claimed unit with headquarters employees of the Clark National Forest. In these circumstances, the Assistant Secretary found that a unit limited to the Mark Twain Forest would not contain all employees who share a clear and identifiable community of interest within the consolidated Activity, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

In dismissing the petition, the Assistant Secretary noted the AFGE's expressed willingness to represent employees in the unit found to be appropriate and stated that he was dismissing the petition without prejudice to the AFGE, or to any other labor organization, to file a new representation petition covering employees of the consolidated Forests at any time the AFGE, or any other labor organization, is able to support such petition with the prescribed showing of interest.

The Assistant Secretary also made eligibility determinations with regard to certain classifications of employees for future guidance.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE, MARK TWAIN NATIONAL FOREST, SPRINGFIELD, MISSOURI

Activity

and

Case No. 62-3523(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3396

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Francis C. Clisham. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The American Federation of Government Employees, AFL-CIO, Local 3396, herein called AFGE, seeks an election in a unit consisting of all professional and nonprofessional Class Act (GS) employees and Wage Grade (WG) employees employed at the Mark Twain National Forest, Springfield, Missouri; excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended, and seasonal employees serving under limited appointments. 1/

The Activity agreed that prior to July 1, 1973, the unit sought would be appropriate. However, it noted that as of July 1, 1973, the Mark Twain National Forest will be consolidated for administrative purposes with the Clark National Forest. Thus, while both National Forests will retain their individual identities, after July 1, 1973,

1/ The unit appears as amended at the hearing.

the Activity stated that there will be one forest supervisor, and an attendant staff, in charge of administrative matters for both forests. 2/ The Activity takes the position that after the consolidation takes place, the consolidated organization will constitute an appropriate unit. 3/ Additionally, the Activity disagrees with the proposed inclusion in and exclusion from the unit sought of certain classifications of employees.

THE UNIT

The mission of the Forest Service is to conserve and utilize the resources of the National Forests. It is organized into three systems: Research, State Forestry, and the National Forest System. The National Forest System is headed by the Chief of the Forest Service, and is organized into various regions, each headed by a Regional Forester. Eastern Region 9 of the Forest Service, with headquarters in Milwaukee, Wisconsin, encompasses 15 National Forests, among which are included the Clark National Forest and the Mark Twain National Forest.

The Mark Twain National Forest is headed by a Forest Supervisor who is directly responsible to the Regional Forester. Under the Forest Supervisor is a headquarters' staff and six Ranger Districts, each of which is headed by a Forest Ranger. The headquarters' staff is organized into four staffs: (1) Business and Management Activities; (2) Engineering Services; (3) Resource Management; and (4) Planning.

As noted above, the Activity is sub-divided into six Districts, each of which is headed by a Forest Ranger, who reports directly to the Forest Supervisor. Because of the different sizes and workloads of each District, the organizational structure within each District varies. Basically, the District work force is comprised of foresters, forest leaders, forest workers and, from time to time, seasonal, temporary and casual employees. In addition, each District has a District clerk, and may also have a clerk-typist and other office workers.

Within the context of the overall mission of the Forest Service, the plans, goals and programs for each Forest are established by the Regional Forester. Thereafter, each Forest Supervisor, in consultation with the Forest Rangers under his supervision, establishes the plans and programs for his particular Forest which will conform with the goals and programs established by the Regional Forester. Basically, the Forest Ranger in each District is responsible for seeing that the plans and programs for the Forest are implemented. In order for each District to coordinate its activities with the overall goals of the Forest, technical assistance is provided to the District by the Forest Supervisor's headquarters' staff.

2/ At the present time, each forest has its own forest supervisor and attendant staff.

3/ The AFGE takes the position that, in the event that the Assistant Secretary finds that the consolidated unit is appropriate for the purpose of exclusive recognition, it would be willing to represent such unit but asks for a reasonable amount of time within which to secure an additional showing of interest sufficient to support its petition in the consolidated unit.

The hiring authority for personnel within the Forest is divided between the Forest Supervisor and the Regional Forester. Thus, the Forest Supervisor has hiring authority and responsibility for all professional and nonprofessional employees up to, and including GS-9, while the hiring responsibility and authority for all professional and nonprofessional employees, GS-10 and above, is vested in the Regional Forester. The personnel records for all personnel are maintained in the headquarters the hiring authority involved.

The evidence establishes that the Mark Twain and Clark National Forests share the same mission and are organized and operate in essentially the same manner. As noted above, as of July 1, 1973, the Activity herein merged administratively with the Clark National Forest, which also is located in the State of Missouri. The record reflects that this consolidation will affect primarily employees in the headquarters' staffs of the two Forests and that the various Districts of both the Activity and the Clark National Forest will remain unchanged. However, as noted above, after the consolidation there will be only one Forest Supervisor and one headquarters' staff over the employees of both National Forests. The record further discloses that the personnel for the new consolidated organization will be chosen primarily from the personnel of the existing organizations and that the net effect will be to reduce the total number of positions in the headquarters' staff, with some of the employees being transferred to other Forests or to other regions. As a result of this reorganization and consolidation, the headquarters' unit of the Mark Twain National Forest, which presently is located at Springfield, Missouri, will be eliminated, and the headquarters for the consolidated organization will be located at Rolla, Missouri, the site of the present headquarters of the Clark National Forest.

The evidence further establishes that the organization of the consolidated headquarters will be somewhat different from the existing headquarters at either the Activity or at Clark National Forest. Thus, following the reorganization there will be one Forest Supervisor for both National Forests and one Deputy Forest Supervisor; the four staffs under the Forest Supervisor will be reorganized to the extent that the staff positions for Planning and Resource Management will be eliminated; and the various activities of the Forest will be divided between two supervisory Foresters who will be responsible for the planning and execution of their respective areas of responsibility. The various Districts of the Activity and of the Clark National Forest will be assimilated into the new consolidated organization virtually untouched. 4/

In prior unit determinations, an activity-wide unit comprised of all nonprofessional employees of a National Forest, and an activity-wide unit comprised of all professional and nonprofessional employees of

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As a result of the consolidation, there will be a total of 13 Districts under the supervision of one Forest Supervisor.

consolidated National Forests have been found to be appropriate for the purpose of exclusive recognition. 5/ Thus, it was found that where, as in the instant case, prior to the consolidation, employees of a National Forest share a common mission, work under centralized supervision, are subject to common personnel policies and a unified system of policies and directives, and enjoy essentially the same terms and conditions of employment, they have a clear and identifiable community of interest, and such a unit will promote effective dealings and efficiency of agency operations. As noted above, however, the subject case presents special circumstances precipitated by the consolidation of the Activity with the Clark National Forest during the pendency of the petition herein. In view of the consolidation which, among other things, resulted in the merging of headquarters employees in the claimed unit with headquarters employees of the Clark National Forest, I find that a unit limited to the Mark Twain Forest would not contain all employees who share a clear and identifiable community of interest within the consolidated Activity. 6/ Moreover, in my opinion, such a fragmented unit would not promote effective dealings and efficiency of agency operations. Under these circumstances, I find that the claimed unit is not appropriate for the purpose of exclusive recognition and that, therefore, the subject petition should be dismissed.

As previously noted, the AFGE took the alternative position that in the event that a unit encompassing both National Forests was found to be appropriate, it would be willing to represent such a unit, subject to an opportunity to perfect a showing of interest in such unit. While, in my view, it would not be appropriate under the current circumstances to grant the AFGE's request for additional time to perfect its showing of interest, 7/ it should be noted that the dismissal of the petition herein is without prejudice to the AFGE, or to any other labor organization, to file a new representation petition covering the employees of the consolidated Forests at any time the AFGE, or any other labor organization, is able to support such petition with the prescribed showing of interest.

5/ See United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58; U. S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88, and United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, A/SLMR No. 227.

6/ Cf. Department of Agriculture Forest Service, Sierra National Forest, A/SLMR No. 156.

7/ See, in this regard, Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24. See also, Alaskan Exchange System, Southern District and Headquarters, Elmendorf Air Force Base and Fort Richardson, Anchorage, Alaska, A/SLMR No. 32, and Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107.

ELIGIBILITY ISSUES 8/

As stated above, the Activity disputes the inclusion in and exclusion from the proposed unit of certain classifications of employees.

EXCEPTED-INDEFINITE OR EXCEPTED-CONDITIONAL EMPLOYEES

These employees, classified as forest workers and forest work leaders, are employed to work in the Activity's various Districts during the spring and summer. The evidence establishes that they are employed season after season and are maintained on the permanent work roles of the Activity. There are approximately 40 such employees employed at the present time, and they are considered to be part of the permanent work force of the Activity hired through the Forest Supervisor's headquarters. The record reveals that these employees are subject to the same personnel policies, qualifications, and receive the same fringe benefits as do the regular full-time employees, and that they invariably work for the full period of their 180-day or 220-day appointments. In addition, these employees are guaranteed a minimum of 13 pay periods of full-time duty per year.

Under these circumstances, and noting the facts that these employees share common supervision and common terms and conditions of employment with regular full-time employees and have a reasonable expectation of employment from season to season, I find that they should be included in any unit found to be appropriate. 9/

SEASONAL EMPLOYEES

These employees are appointed by the Forest Supervisor to 180-day appointments, but the record reveals that their actual employment period usually does not exceed more than 30 days in any one year. In this latter regard, however, the record reveals that a substantial number of seasonal employees are reemployed year after year.

As it appears that the employees in this classification receive the same supervision and perform duties which are not substantially different from those of the regular full-time employees, and noting that a substantial number of these employees are reemployed each year, I find that they manifest a substantial and continuing interest in the terms and conditions

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8/ Although I am dismissing the subject petition, I find it appropriate to dispose of the eligibility issues raised herein for future guidance.

9/ See U. S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, cited above.

of employment along with the regular full-time employees, and should be included in any unit found to be appropriate. 10/

DISTRICT CLERKS

In each of the Activity's six Districts a District Clerk is employed who functions as the chief administrative employee in the District. The Activity contends that employees in this classification should be excluded from any unit found appropriate because they are confidential employees. The record discloses that an employee in this classification is responsible for, among other things, the typing and maintenance of files of all personnel, grievance and labor relations matters occurring within the District. Also, the record discloses that, in a significant number of instances, the District Clerk is consulted by the District Forest Ranger regarding personnel, disciplinary and grievance matters.

Under these circumstances, I find that District Clerks are confidential employees inasmuch as they act in a confidential capacity to officials who effectuate management policies in the field of labor relations. 11/ Accordingly, employees in this classification should be excluded from any unit found appropriate on the basis that they are confidential employees.

PERSONNEL CLERK-HEADQUARTERS

The Activity contends that an employee in this classification, located in the headquarters' staff, should be excluded from any unit found appropriate on the basis that such an employee is a confidential employee. The Personnel Clerk operates as the assistant to the Personnel Management Specialist and, in such capacity, maintains and is the custodian of all personnel records for the personnel located in the Activity. Also, an employee in this classification maintains the "For Official Use Only" file, which contains correspondence regarding promotions, adverse actions and grievances, and which is available for use only by the Personnel Management Specialist, the Administrative Officer and the Forest Supervisor and his secretary. The record discloses that the Personnel Clerk is the sole individual responsible in the headquarters' staff for the typing and maintenance of files regarding labor relations matters.

Under these circumstances, I find that the Personnel Clerk in the headquarters' staff is a confidential employee. Thus, the evidence establishes that an individual in this classification acts in a confidential capacity to officials who formulate and effectuate management policy in the

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10/ See U. S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, A/SLMR No. 116. See also, United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, cited above.

11/ See Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111. See also, Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69.



field of labor relations. Moreover, such individual has regular access to confidential labor relations materials. Accordingly, an employee in this classification should be excluded from any unit found appropriate. 12/

AVID LEE FULTON, THOMAS JOHN ALEY, ELDRED A. JOHNSON, ROBERT G. ARTIS AND THOMAS ARTHUR POULIN

The Activity contends that the above-noted employees should be excluded from any unit found appropriate on the basis that they are management officials and/or supervisors. The record discloses that they are assigned to the headquarters' staff in various classifications; i.e., Fulton is classified as a Landscape Architect; Aley is classified as a Hydrologist; Johnson and Artis are classified as Foresters; and Poulin is classified a Supervisory Civil Engineer. The evidence establishes that each of these employees exercises supervisory authority over at least one or more employees, and that, in the exercise of such authority, they assign work, evaluate performance, grant annual leave, and have the authority to initiate recommendations for promotion and/or outstanding performance awards. There is no evidence that the exercise of the foregoing authority is of a merely routine or clerical nature, or does not require the use of independent judgment.

Under these circumstances, I find that the above-named employees are supervisors within the meaning of the Order and should be excluded from any unit found appropriate. 13/

DONALD E. PHILLIPS, PAUL HANSON, CRAIG BEARDSLEY AND CLYDE D. HART

The Activity contends that the above-named employees should be excluded from any unit found appropriate on the basis that they are management officials and/or supervisors. The record discloses that all these employees are assigned to various Districts within the Activity, and are classified as follows: Phillips is a Forester, assigned to the Van Buren District; Hanson and Beardsley are Staff Assistants, assigned to the Winona District and the Van Buren District, respectively; and Hart is a Forest Technician, assigned to the Cassville District. The evidence establishes that all of the foregoing employees exercise supervisory authority over at least one employee, and that, in the exercise of such authority, they perform one or more of the following functions: assign work, evaluate work performance, grant annual leave, initiate recommendations for promotion and/or performance awards, and resolve grievances at the informal stage. There is no evidence that the exercise of the foregoing authority is of a merely routine or clerical nature, or does not require the use of independent judgment.

12/ See Portland Area Office, Department of Housing and Urban Development, cited above.

13/ In view of this disposition, it was considered unnecessary to decide whether these employees should be excluded from the unit on the basis that they are management officials.

Under these circumstances, I find that the above-named employees are supervisors within the meaning of the Order. 14/ Accordingly, I find they should be excluded from any unit found appropriate. 15/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 62-3523(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 20, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

14/ See Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11; Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129, FLRC No. 72A-12.

15/ In view of this disposition, it was considered unnecessary to decide whether these employees should be excluded from the unit on the basis that they are management officials.

August 21, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

CHARLESTON NAVAL SHIPYARD,  
CHARLESTON, SOUTH CAROLINA  
A/SLMR No. 304

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The proceeding arose upon the filing of separate unfair labor practice complaints by two employees (Complainants) of the Respondent Activity alleging that the latter violated Section 19(a)(1) of Executive Order 11491 by denying each of them their rights to choose a representative of their choice under Section 7(d)(1) at investigative discussions which resulted in disciplinary actions against them.

The Complainants contended that under Section 7(d)(1) they had a right to designate a representative of their own choosing to represent them without any limitation placed upon such right and irrespective of any provision in their exclusive representative's negotiated agreement with the Respondent. The Respondent argued that its refusal of the Complainants' request was in conformity with the provisions of the existing negotiated agreement between the Respondent and the exclusive representative.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) of the Order by denying the Complainants a representative of their own choice at their respective investigative discussions. The Administrative Law Judge reasoned that Section 7(d)(1) of the Order confers upon an individual employee the right to choose a representative of his own choice and that such right cannot be restricted or bargained away by agency management or by the exclusive bargaining representative.

The Assistant Secretary found that Section 7(d)(1) of the Order could not provide a basis for a finding of violation in the subject case. In this regard, the Assistant Secretary noted his finding in United States Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278, that Section 7(d)(1) of the Order does not establish rights which are enforceable under Section 19 of the Order. The Assistant Secretary noted also that pursuant to the parties' negotiated agreement, the Complainants were entitled to be represented during their respective investigative discussions and that the evidence established that one Complainant was represented by a Chief Steward and the other was afforded the opportunity to be represented by a steward, or another employee but, rather, chose to represent himself. The Respondent's conduct in not permitting the individual requested by the Complainants to represent them at their separate investigative discussions was not considered improper because the individual involved was not an "employee" within the meaning of the parties' negotiated agreement at the time of the investigative discussions having, in effect, been discharged.

Under these circumstances, the Assistant Secretary found that the Respondent's conduct in this matter was consistent with the parties' negotiated agreement and did not interfere with, restrain, or coerce employees in the exercise of rights assured under the Order. Accordingly, he ordered that the complaints be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CHARLESTON NAVAL SHIPYARD,  
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 40-4301(CA)

HARMON DUPREE (Individual)

Complainant

CHARLESTON NAVAL SHIPYARD,  
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 40-4305(CA)

WILLIE H. BLANTON (Individual)

Complainant

DECISION AND ORDER

On May 29, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Charleston Naval Shipyard, Charleston, South Carolina, herein called the Respondent, had engaged in certain unfair labor practices and recommending that it cease and desist from such conduct and take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this proceeding, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, as modified below.

On page 5 of his Report and Recommendations, the Administrative Law Judge inadvertently listed the wrong dates of the Complainants' investigative discussions. This inadvertent error is hereby corrected.

The Complainants alleged that the Respondent violated Section 19(a)(1) of the Order by denying each of them their rights to a representative of their choice under Section 7(d)(1) of the Order at the respective investigative discussions which resulted in the discipline that each Complainant subsequently received. The Respondent does not deny that it refused the request of the Complainants to be so represented, but asserts that its action was in conformity with the applicable provisions of the existing negotiated agreement between the Respondent and the Complainants' exclusive bargaining representative and that, therefore, such action did not constitute a violation of Section 19(a)(1). 2/

The Administrative Law Judge found that the Respondent's conduct violated 19(a)(1) of the Order. In reaching this conclusion, the Administrative Law Judge reasoned that Section 7(d)(1) of the Order confers upon an individual employee the right to choose a representative of his own choice and that such right cannot be restricted or bargained away by agency management or by the exclusive bargaining representative. I disagree with the Administrative Law Judge's finding in this regard. As I have held previously 3/, Section 7(d)(1) of the Order does not establish rights which are enforceable under Section 19 of the Order. Rather, this Section merely delineates those instances in which employees may choose a representative other than their exclusive representative in certain grievance or appellate actions. Accordingly, I find that Section 7(d)(1) of the Order cannot provide a basis for a finding of violation in the subject case.

Under Section 10(e) of the Order, a labor organization which has been accorded exclusive recognition "is entitled to act for and to negotiate agreements covering all employees in the unit." As noted above, the Respondent and the Complainants' exclusive representative were parties to a negotiated agreement which provided, in part, that in connection with investigative discussions, such as those involved in the instant case,

2/ Article XVI, Section 1 of the negotiated agreement between the Respondent and the Charleston Metal Trades Council provides, in part, that "When the Employer schedules an investigative discussion which may lead to disciplinary action against an employee in the unit, the Employer shall notify the employee, utilizing the notice form hereto affixed as Appendix II, of his right to be represented by a Council Chief Steward, Steward, or any employee of his choice during the investigative discussion and throughout disciplinary action proceedings which might result from such discussions. ...."

3/ See United States Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278. Cf also, Internal Revenue Service, Chicago District, A/SLMR No. 279, and U. S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280.

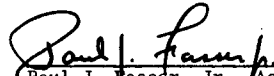
UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

the employee involved had a "right to be represented by a Council Chief Steward, Steward, or any employee of his choice during the investigative discussion and throughout disciplinary action proceedings which might result from such discussions." It is clear that pursuant to the foregoing provision, the Complainants were entitled to be represented during their respective investigative discussions. It is clear also that the Complainant Dupree, in fact, was represented by the Council Chief Steward, and that Complainant Blanton was afforded the opportunity to be represented by a steward or another employee, but, rather, chose to represent himself. Under these circumstances, I find that the Respondent's conduct in this matter was consistent with the parties' negotiated agreement and did not interfere with, restrain, or coerce employees in the exercise of rights assured under the Order. <sup>4/</sup> Accordingly, I shall order that the instant complaints be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 40-4301(CA) and 40-4305(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.  
August 21, 1973

  
Paul J. Hasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

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CHARLESTON NAVAL SHIPYARD :  
CHARLESTON, SOUTH CAROLINA :  
Respondent :  
: and :  
: HARMON DUPREE : CASE NO. 40-4301(CA)  
Complainant :  
: and :  
: CHARLESTON NAVAL SHIPYARD : 40-4305(CA)  
CHARLESTON, SOUTH CAROLINA :  
and :  
WILLIE H. BLANTON :  
Complainant :  
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Before: Rhea M. Burrow  
Administrative Law Judge

Appearances:

Jack G. Morris, Personal Representative  
2148 Clayton Drive,  
Charleston, South Carolina 29407  
For the Complainants

Stuart M. Foss, Esquire  
Labor Relations Advisor  
Office of Civilian Manpower Management  
Department of the Navy  
1735 North Lynn Street  
Arlington, Virginia 22209  
For the Respondent

REPORT AND RECOMMENDATIONS

The proceedings herein arose under Executive Order 11491 (herein called the Order) pursuant to an Order consolidating the above captioned cases and Notice of Hearing on the Complaints issued on January 16, 1973 by the Regional Administrator of the United States Department of Labor, Labor Management Services Administration, Atlanta Region. In the Notice of Hearing it was specified that "a hearing should be held with reference to alleged violations of Section 19(a)(1) of Executive Order 11491, in Case No. 40-4301(CA) and Section 19(a)(1) in Case No. 40-4305(CA)." A hearing was held in the above-entitled matters before the undersigned on March 15, 1973, at Charleston, South Carolina.

<sup>4/</sup> The evidence establishes that Jack G. Morris, the individual requested by the Complainants to represent them at their respective investigative discussions, was not an "employee" within the meaning of the parties' negotiated agreement at the time of the investigative discussions involved herein, having, in effect, been discharged on April 7, 1972. The fact that Morris subsequently filed an appeal from this personnel action which was pending at the time of the investigative discussions was not considered to require a contrary result.

The proceedings are based on separate unfair labor practice complaints, one by Harmon Dupree on July 26, 1972 and amended on August 16, 1972 and the other by Willie H. Blanton on July 27, 1972 and amended on August 16, 1972, each alleging that the Respondent had engaged in certain conduct in violation of Section 19(a) of the Order, as amended, by (1) disciplining the complainants because of their activities on behalf of the Federal Employees Metal Trades Council of Charleston, incumbent union, and herein-after called the Union and (2) denying each of the complainants their rights to a representative of their choice under Section 7(d)(1) of the Order at the investigative discussion stage which resulted in the discipline that each received. The Regional Administrator in separate letters dated December 5, 1972 had advised each of the complainants that all allegations except those concerning the respondents failure to accord them a representative of their choice at the investigative discussion, thus violating Section 19(a)(1), were dismissed. <sup>1/</sup>

At the March 15, 1973 hearing each of the complainants were represented by their designated personal representative and the respondent by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein. Only the respondent filed brief for consideration by the undersigned.

From the entire record in the case, including observation of witnesses and their demeanor, and all testimony adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations.

I

Background Resume

A. The Respondent Agency and Union's Collective Bargaining Agreement.

The respondent is an industrial shipyard operation responsible for providing logistical support for assigned ships and service craft; performing work in connection with construction, conversion, overhaul, repair, alteration drydocking, and outfitting of ships and crafts; performing manufacturing, test, research and development work; and providing services and material to other activities and units. <sup>2/</sup> It employs approximately 6300 civilian personnel <sup>3/</sup> who are represented in separate exclusive units by four labor organizations, the largest unit of which comprises approximately 4300 employees who are in the exclusive unit for which the incumbent union is the certified representative. Its collective bargaining agreements with the incumbent union dates back to 1964. A 1968-70 collective

<sup>1/</sup> Also, Tr. P. 46 and letter dated January 9, 1973, Complainant Exh. 6.

<sup>2/</sup> Tr. PP 71, 72 and Respondent Exh. 2.

<sup>3/</sup> Tr. p. 72.

bargaining agreement terminated on March 9, 1972, ninety days following the Department's recertification of the incumbent union, whose status had been challenged in January 1970 by another union. The terms, conditions and provisions of the 1968-70 contract continued to be honored by the parties until a new agreement was executed in December 1972. I find that at all times material to this case the rights and responsibilities of the respondent, the incumbent union and the unit employees were governed by the 1968-70 collective bargaining agreement.

B. Incidents Leading to Alleged Violations.

(1) Harmon Dupree: The complainant Dupree is an Operating Engineer employee at the Charleston Naval Shipyard and a member of Local Union 366, International Union of Operating Engineers, AFL-CIO, one of the affiliated labor organizations in the incumbent union. Employees do not belong to the incumbent union as such but rather join one of the 15 separate local unions representing other workers in their trade; each local is autonomous within its jurisdiction. <sup>4/</sup> On May 1, 1972 he was operating a portal crane and around 7:20 a.m. collided with a Reactor Access Enclosure (RAE), a structure used by employees who are working on nuclear ships. There was a preliminary investigation at the scene of the accident on the day that it happened. The following day Mr. Dupree was sent a Notice of Investigative Discussion and Reply scheduling him for an interview on May 4, 1972. The following statement was contained in the Notice:

"You are hereby directed to report for investigative discussion which could result in disciplinary action being taken against you. You are advised of your right to be represented by a Council Chief Steward, Steward, or any employee of your choice during the investigative discussion and throughout disciplinary action proceedings. A copy of this notice will be furnished your cognizant Chief Steward unless you indicate in writing or Part II of this form that you do not desire Council to be notified as you consider the matter personal and confidential."

Mr. Dupree designated Jack G. Morris as his representative in the space provided on the form. The record reveals that on May 3, 1972 when the Notice was returned to William F. Bendt, the Supervisory Personnel Assistant who processed them, he was informed that Mr. Morris was not eligible to represent him at the meeting since he was no longer an employee. Mr. Dupree was thereafter represented at the investigative discussion by L. P. Dangerfield the Council Chief Steward who had replaced Mr. Morris. A letter of reprimand given to respondent Dupree was later reduced at the second step to a verbal warning through the efforts of Council Chief Steward Dangerfield.

<sup>4/</sup> Respondent Exh. 1 Appendix 1 of 1968-70 Agreement and Tr. PP 23, 24 and 101.

is nothing in those facts which would support a violation of Section 19(a)(1) of the Order. Also, that insofar as this dispute involves an interpretation of the governing contractual language, that under the deferral policy of the Assistant Secretary, it must be dismissed; further, it should be dismissed on the ground that no right to a representative of one's choice in disciplinary actions is established by the Order.

B. Issues.

Issues presented for consideration include: (1) Did the respondent violate Section 19(a)(1) of Executive Order 11491 when it refused to permit Jack G. Morris, a discharged employee, to represent the complainants Blanton and Dupree at investigative discussions on May 4 and June 5, 1972 respectively? (2) Should the complaint be dismissed because it involves an interpretation of the negotiated agreement between the respondent and the incumbent union? (3) Did the respondent's refusal to permit Jack G. Morris from representing the complainants at the aforementioned investigative discussions contravene the requirements of Section 10(e) of the Order?

III

Requirements or Provisions of the Executive Order and Collective Bargaining Agreement.

Section 19(a)(1) of the Order provides: "(a) Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;"

Section 7(d)(1) of the Order states: "(d) Recognition of a labor organization does not - (1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in section 13;

Section 10(e) of the Order provides: "(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Article XVI, Section 1 of the Collective Bargaining Agreement effective March 19, 1968, between respondent and the Charleston Metal Trades Council provides: "When the Employer schedules an investigative discussion which may lead to disciplinary action against an employee in the unit, the

(2) Willie H. Blanton: Mr. Blanton is also an Operating Engineer and member of Local Union 366. On May 19, 1972, at about 10:30 a.m., he was observed operating his portal crane without another employee in position at the foot of the crane to act as pilot or track walker while it was in motion. This was reported to be a violation of Shipyard safety regulations. On May 31, 1972, Mr. Blanton was sent a Notice to report to the office of the Transportation Superintendent for an investigative discussion on June 5, 1972. The Notice contained the same information as that previously set forth as having been sent to Mr. Dupree. Mr. Blanton designated Jack G. Morris as his representative to represent him at the investigative discussion.

After returning the Notice to Mr. Bendt, Supervisory Personnel Assistant, Mr. Blanton spoke to him on June 2, 1972. He was accompanied by a Mr. Todd, a Council Chief Steward who was brought along as a witness. Mr. Bendt informed Blanton that Mr. Morris could not represent him in the investigative discussion because Morris was no longer an employee of the shipyard and thus not eligible under the terms of Article XVI, Section 1 of the collective bargaining agreement. He was informed that he could nominate another steward or employee to represent him and arrangements would be made for that person to be present. Complainant chose to represent himself and he, following the investigative discussion received a verbal warning as a result of the safety violation. There was no appeal from the disciplinary action nor was there a grievance filed because of it.

(3) Jack G. Morris: Mr. Morris is President of the Operating Engineers Local to which the complainants belong and until April 7, 1972 and as an employee of the respondent, he was functioning as a Council Chief Steward for the incumbent union. He was removed from his position as an Operating Engineer, WG-10 on April 7, 1972 and such removal action is the federal service equivalent of a discharge or permanent separation from employment for cause, of an employee. An appeal from the personnel action through channels provided by the Civil Service Commission has been initiated but has not been resolved.

II

A. Statement of Positions.

The complainants relying on Section 7(d)(1) of the Order contended that they had a right to designate a representative of their choice to represent them beginning at the investigative discussion stage and continuing throughout without any limitation placed upon it and irrespective of any collective bargaining agreement that the union might have in the matter.

The respondent contends that Article XVI and Section 1 of the 1968-70 collective bargaining agreement, not Section 7(d)(1) of the Order, is controlling in this case. Under the terms of that contractual provision Mr. Morris was ineligible to represent complainants Blanton and Dupree at their respective investigative discussions with management, and there

Employer shall notify the employee, utilizing the notice form hereto affixed as Appendix II of his right to be represented by a Council Chief Steward, Steward, or any employee of his choice during the investigative discussion and throughout disciplinary action proceedings which might result from such discussions. The notice form shall include the subject matter, the place, date, and time of such discussion. A copy of the notice form will be furnished the cognizant Chief Steward unless the employee indicates on Part II of the notice form that he does not desire Council to be notified as he considers the matter to be personal and confidential. Notices that investigative discussions will be held will be issued to employees at least two (2) work days in advance of such discussions. The employees reply will be returned to the employer at least one (1) work day in advance of the discussion. Where indicated, copies of notice forms will be furnished to the cognizant Chief Steward as early as is practicable in advance of the scheduled discussion.

"Section 2. Disciplinary actions shall be taken only for just cause and the employee will be notified of his rights to appeal and of the appropriate procedures available for appealing such actions."

IV

Concluding Findings.

1. Under Section 19(a)(1) of the Order agency management is prohibited from interfering with, restraining, or coercing an employee in the exercise of rights assured by the Order. <sup>5/</sup>

The complainants urge that the respondent violated Section 19(a)(1) of the Order by refusing to permit them to have a representative of their own choice at the investigatory discussions held on May 4, 1972 and June 5, 1972 respectively. As a basis for the contention, their representative refers to Section 7(d)(1) of the Order which states in part that: Recognition of a labor organization does not preclude an employee, regardless of whether he is in a unit of exclusive recognition from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in Section 13.

The respondent referred to Report No. 49 on a Ruling of the Assistant Secretary wherein it was stated that where a complaint involves essentially a disagreement over the interpretation of an existing collective bargaining agreement which provides a procedure for resolving the disagreement, the parties should pursue their contractual rather than unfair labor practice remedies. However, in a later case and situation, "he states that no withdrawal of jurisdiction was intended in those situations where, as here, at issue is the question whether a party to an agreement has given up rights granted under the Order." <sup>6/</sup>

<sup>5/</sup> The Executive Order No. 11491 is dated October 29, 1969.

<sup>6/</sup> NASA, Kennedy Space Center, Kennedy Space Center Florida, A/SLMR No. 223.

The nomenclature of the stages of discussion or development involving matters leading to disciplinary action or punishment appear to be immaterial under Section 7(d)(1) of the Order which permits an employee to choose his own representative in a grievance or appellate action. <sup>7/</sup> The right to choose a representative of his own choice was one granted to the individual employee and cannot be restricted or bargained away by agency management or by the exclusive bargaining representative. The individual employee is considered to have this right in addition to those that may be obtained for him by his exclusive bargaining agent or union representative. Such right of choice of representative by an employee under the Order is not limited to rights granted under a collective bargaining agreement.

Granting the dignity to the Executive Order and regulations promulgated thereunder, as is extended to statutory laws and regulations, it is basic that the parties to an agreement cannot change the requirements of such an Order, the law, or regulations. Likewise, a provision in an agreement that contravenes or is superseded by an Executive Order, statute or regulation, in the absence of some exemption, is rendered ineffective.

The term grievance as used in federal service means:

"...a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management." <sup>8/</sup>

The incidents herein involved as to each of the complainants when coupled with the Notice directing them to report for investigative discussion which could result in disciplinary action against them constituted a threat to their job safety, security and opportunity of potential advancement. Their demand in writing on the return Notice for a representative of their own choice to represent them at the scheduled discussion constituted under the circumstances of this case an expressed matter of concern and dissatisfaction comprehended in a grievance action for a right granted to them under the Order for one they felt could help them obtain personal relief. I do not construe Section 7(d)(1) as requiring that a complainant must wait and ascertain what penalty or punishment, if any, is proscribed before a complainant has the right to select his

<sup>7/</sup> I am aware that in the private sector there are cases that differentiate an investigation of facts where potential discipline of the employee is remote and those where the employee had reasonable grounds for believing disciplinary action might result from an employer's investigation. Cf. *Jacobe Pearson Ford, Inc.*, 172 NLRB No. 84; *Chevron Oil Co.*, 168 NLRB 574; *Illinois Bell Telephone Co.*, 192 NLRB No. 138; *Texaco, Inc.*, 199 NLRB 976; *Quality Manufacturing Co.*, 195 NLRB No. 42; *Mobil Oil Corp.*, 196 NLRB No. 144.

<sup>8/</sup> Federal Personnel Management, Chapter 771, Inst. 154, May 25, 1971, subch. 1, para. 1-2(7).

chosen representative. In fact, I find that this is the type of situation the Order was designed to correct; that is, where there is a scheduled discussion which could result in a penalty or punishment to an employee, he is entitled a representative of his choice at the beginning and throughout the proceeding. A denial of such request will constitute a violation of the Order absent justifiable circumstances. <sup>9/</sup>

2. Counsel for respondent at the hearing on March 15, 1973 moved to dismiss the cases of the complainants because each involved an interpretation of the negotiated agreement between the respondent and the incumbent union. The motion to dismiss was not considered one appropriate or necessary to rule on from the bench and the parties were advised it would be considered in my decision.

In view of my prior finding that the right under Section 7(d)(1) of the Order for an employee to choose a representative of his own choice was one to the individual employee and cannot be restricted or bargained away in agreements by Agency management, a bargaining agent or union representative, it follows that I consider it as involving a question of whether each of the complainants has given up a right granted by the Order. <sup>10/</sup> Having so found dismissal of the complaints is not found to be warranted. I will so recommend to the Assistant Secretary.

3. The actions herein are based on individual complaints by Harmon Dupree and Willie H. Blanton and no violation of the collective bargaining agreement is asserted or shown. Each of the complainants were afforded the opportunity to have a council chief steward, steward, or another employee to represent them and there was no contravention of the requirements of Section 10(e) of the Order by the Agency with regard to complainants and I find this provision of the Order inapplicable to the determination in this case.

4. The Order, unlike the collective bargaining agreement, does not limit the choice of a representative to an Agency employee. I find that Jack G. Morris, the designated representative of each complainant at the discussions held on May 4 and June 5, 1972 was not precluded from serving or representing them irrespective of his employee status with the Agency shipyard.

5. Section 19(a)(1). I find that Respondents' failure to accord each of the complainants a representative of their choice at the respective investigative discussions constituted an interference or restraint

<sup>9/</sup> The right to a representative of an employee's choice may not be as absolute as complainants' contend but where he is available in the geographical area and willing to serve as in this case, recognition is warranted.

<sup>10/</sup> See footnote 6, supra.

of their exercise of their rights assured by Section 7(d)(1) of the Order and was a violation of Section 19(a)(1) of the Order.

V

In view of the findings and conclusions above, I make the following recommendations to the Assistant Secretary:

a. That the respondent's motion to dismiss each complaint on the basis that it involved a disagreement over the interpretation of an existing collective bargaining agreement which provides a procedure for resolution, the parties should pursue their contractual rather than unfair labor practice remedy, be denied.

b. That by denying each complainant a representative of his choice at the designated investigative discussion, the respondent be found to have violated Section 19(a)(1) of the Executive Order by interfering with a right assured by the Order. Further, that the respondent be ordered to cease and desist therefrom and to take specific affirmative action as set forth in the following order which is designed to effectuate the policies of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor-Management Relations hereby orders that Charleston Naval Shipyard, Charleston, South Carolina, shall

1. Cease and desist from:

(a) Denying Agency shipyard employees from choosing their own representative in grievance or appellate actions including investigative discussions which may lead to disciplinary action.

(b) Interfering with, restraining or coercing employees by entering into or changing terms of agreements or conditions of employment that would deny an employee a representative of his own choice, regardless of whether he is in a unit of exclusive recognition.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Post at its facilities at Charleston Naval Shipyard, Charleston South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer, Charleston Naval Shipyard, Charleston, South Carolina, and shall be posted



and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily placed. The Commanding Officer shall take reasonable steps to insure that notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Rhea M. Burrow

RHEA M. BURROW  
Administrative Law Judge

Dated at Washington  
D. C. this 29th  
day of May, 1973

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse any employee in the units of which the Federal Metal Trades Council of Charleston, including Local Union 366, International Union of Operating Engineers, or any other labor organization permission to select a representative of his own choice in any grievance or appellate action, including investigative discussions where such employee is or may be subject to disciplinary action and for which he has been cited to appear. Further, we will not enter into any new agreements or enforce any agreement that now may exist which does not permit employees to exercise their right of choice in selecting a representative in grievance and appellate actions including investigative actions likely to result in disciplinary treatment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

Charleston Naval Shipyard  
Charleston, South Carolina  
(Agency or Activity)

Dated: \_\_\_\_\_ By \_\_\_\_\_  
Title

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is 1371 Peachtree Street, Northeast (Room 110), Atlanta, Georgia 30309.

September 12, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF INTERIOR,  
NATIONAL PARK SERVICE,  
NATIONAL CAPITAL PARKS,  
JOHN F. KENNEDY CENTER FOR THE  
PERFORMING ARTS  
A/SLMR No. 305

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This case arose as a result of a petition filed by the International Brotherhood of Electrical Workers, Local 27, AFL-CIO (IBEW) seeking an election in a unit of all the employees of the Division of Maintenance employed at the John F. Kennedy Center for the Performing Arts (Center). The International Brotherhood of Painters and Allied Trades, AFL-CIO (IBPAT), and the Activity contended that the claimed employees constituted an addition or accretion to the unit of all employees of the National Capital Parks of the National Park Service for which the IBPAT was certified as the exclusive representative on October 20, 1972, and that, therefore, a certification bar existed to the instant petition.

The Center was established as a National Cultural Center by Public Law 85-874. On November 12, 1972, the responsibility for maintenance, information, and interpretative services at the Center was transferred to the National Capital Parks of the National Park Service. The National Capital Parks provides these services through the Kennedy Support Group (Support Group) which consists of two divisions: the Division of Visitor Services and the Maintenance Division, the latter containing the employees in the claimed unit.

The Assistant Secretary found that the petitioned for employees of the Maintenance Division were not so thoroughly combined and integrated into the existing unit of National Capital Parks employees as to constitute an addition or accretion to the existing exclusively recognized unit. Thus, the majority of employees in the Maintenance Division were not on the Civil Service rolls prior to November 12, 1972; they continue to work at the same location performing the same work as prior to the transfer; they and the other employees of the Support Group are under the separate administrative direction and control of the Site Manager; and there has been no interchange between Maintenance Division employees and employees in the existing exclusively recognized unit. The Assistant Secretary also concluded that the employees of the Division of Visitor Services shared a clear and identifiable community of interest with the claimed employees and that a unit of all remaining unrepresented nonsupervisory employees of the National Capital Parks will promote effective dealings and efficiency of agency operations.

In view of the IBPAT's clear intention to have a substantial portion of the unit found appropriate included within its existing unit, the Assistant Secretary found that the employees in the Support Group should be given the opportunity to become part of the existing unit represented by the IBPAT, or included in the separate unit found appropriate. Because the unit found appropriate differed from the unit petitioned for, the Assistant Secretary directed that the IBEW should be given the opportunity to withdraw its petition. He directed, also, that in the event the petition is not withdrawn a Notice of Unit Determination be posted to permit possible intervention by other labor organizations for the sole purpose of appearing on the ballot.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,  
NATIONAL PARK SERVICE,  
NATIONAL CAPITAL PARKS,  
JOHN F. KENNEDY CENTER FOR THE  
PERFORMING ARTS

Activity

and

Case No. 22-3701(RO)

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS,  
LOCAL 27, AFL-CIO

Petitioner

and

INTERNATIONAL BROTHERHOOD OF PAINTERS  
AND ALLIED TRADES, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, amended, a hearing was held before Hearing Officer Madeline Jackson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, International Brotherhood of Electrical Workers, Local 27, AFL-CIO, herein called IBEW, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The IBEW seeks an election in the following unit:  
All nonsupervisory graded and ungraded employees  
(including temporary graded and ungraded employees

and any employees in a WS or WL position) employed within the Division of Maintenance of the Kennedy Support Group of National Capital Parks, excluding all managerial and supervisory employees, guards, employees engaged in administering a labor-management relations law or order, employees engaged in Federal personnel work in other than a purely clerical capacity. 1/

The Intervenor, International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called IBPAT, and the Activity contend that the National Capital Parks' employees at the John F. Kennedy Center for the Performing Arts constitute an addition or accretion to the existing activity-wide unit of National Capital Parks employees for which the IBPAT recently was certified as the exclusive representative. 2/ Under these circumstances, they assert that a certification bar exists to the petition in the subject case.

The National Capital Parks is a quasi-regional division of the National Park Service, which is one of seven major bureaus of the Department of the Interior. The Director of the National Capital Parks reports, along with the five Regional Directors of the National Park Service, to the Director of the National Park Service, and he is in charge of various national parks, historical locations, and cultural activities located in Washington, D.C., as well as in Virginia and Maryland. The record indicates that prior to November 12, 1972, there were some eight line organizations and various staff activities reporting to the Director of the National Capital Parks.

The John F. Kennedy Center for the Performing Arts, herein called the Center, was established by Public Law 85-874 as a National Cultural Center with funds provided by voluntary contributions. On November 12, 1972, pursuant to legislation enacted June 16, 1972, the responsibility for the maintenance, information, and interpretative services for the nonperforming arts functions of the Center was transferred to the National Capital Parks of the National Park Service. 3/ The National Capital Parks currently provides these services to the Center through

1/ The unit appears as amended at the hearing. While not expressly excluded from the claimed unit, it appears that there are no professional employees within the meaning of the Order within the claimed unit.

2/ On October 20, 1972, the IBPAT was certified as the exclusive representative of a unit of all nonprofessional employees of the National Capital Parks.

3/ The IBEW had represented a unit of electricians at the Center in the period prior to the National Capital Parks becoming responsible for certain functions of the Center and prior to the electricians and other maintenance workers of the Center becoming employees of the Federal Government.

the National Capital Parks, other than those at the Center, have been minimal. 6/

In determining whether a group of employees constitutes an addition or accretion to an existing bargaining unit, the primary consideration is whether the employees involved have been so thoroughly combined and integrated into the existing unit that they have no separate and distinct community of interest. 7/ Under the circumstances of this case, I find that the employees of the Maintenance Division have not been so thoroughly combined and integrated into the existing unit of National Capital Parks employees as to constitute an addition or accretion to the existing exclusively recognized unit. Thus, the record reveals that the majority of the employees in the Maintenance Division were not on the Civil Service rolls prior to November 12, 1972; they continue to work at the same location and perform the same job functions as prior to the transfer; they and the other employees of the Support Group are under the separate administrative direction and control of the Site Manager located at the Center; and there has been no interchange between Maintenance Division employees and employees in the exclusively recognized unit.

As indicated above, the Support Group at the Center includes a Division of Visitor Services, as well as the petitioned for employees of the Maintenance Division, both of which are under the direction of the Site Manager. The Division of Visitor Services contains seven employees, all of whom were hired from outside the National Capital Parks, who are supervised by a supervisory park ranger. These employees are designated either as park technicians or park aids, and they provide interpretive and information services with respect to the nonperforming aspects of the Center. The record reveals that, on occasion, employees of both divisions of the Support Group work together in connection with certain special events held at the Center. In addition, all employees of the Support Group share similar working conditions and eating facilities. The record reveals also that certain of the Visitor Services employees are designated as duty officer for the Center on weekends and during nonwork hours Monday through Friday and, in that capacity, they represent the Site Manager with respect to any problems that might occur in his absence. In this regard, the record shows that the duty officer has certain supervisory authority over those employees of the Maintenance Division, who are on an around-the-clock maintenance schedule, concerning minor maintenance problems that occur during a particular tour of duty.

6/ For the most part, any limited job contacts have been with employees of the Brentwood Maintenance Shop, which provides maintenance services for the National Capital Parks in the Washington, D.C., metropolitan area. In this regard, on occasion, Brentwood employees have been assigned to the Center to assist in jobs that the Maintenance Division employees are not capable of handling.

7/ Cf. Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282.

a unit called the Kennedy Support Group, herein called the Support Group.

The record reveals that the Support Group consists of two divisions: the Division of Visitor Services and the Maintenance Division, the latter containing the employees in the claimed unit. The Support Group is under the direction of a Site Manager who is responsible solely to the Director of the National Capital Parks. In this regard, the Site Manager has authority for most administrative matters for the Support Group as well as for most personnel matters affecting employees of the Support Group, such as hiring and the resolution of employee grievances.

The Maintenance Division of the Support Group performs preventive maintenance for the nonperforming arts functions of the Center. Within the Division are a Branch of Building Maintenance, a Branch of Grounds Maintenance, and a Central Repair Shop. Besides the Chief of the Division, the Chief of the Branch of Building Maintenance, and certain other supervisors, 4/ there are some 22 Wage Grade (WG) and 2 General Schedule (GS) employees in the Division, most of whom are building engineers, electricians, and plumbers. 5/ The evidence establishes that the majority of the WG employees currently employed in the Maintenance Division worked for the Board of Trustees of the Center prior to November 12, 1972, when the National Capital Parks became responsible for the maintenance functions of the Center. Those employees who transferred to the National Capital Parks, and who were placed on the Federal Civil Service rolls on November 12, 1972, received special tenure for the time they had worked prior to the transfer. The record reflects that the remaining positions in the Maintenance Division were filled by the reassignment and promotion of employees from within the National Capital Parks system, as well as by new hires. The evidence establishes that there has been no interchange or transfer of Maintenance Division employees to other units of the National Capital Parks. Moreover, the job contacts of the Maintenance Division employees with employees of

4/ The record reveals that in addition to the Chief of the Division and the Chief of the Branch of Building Maintenance there are five employees in the Maintenance Division who are designated as supervisors by the Activity: the Building Maintenance Foreman WS-8, the Carpenter Foreman WS-7, the Plumber Foreman WS-9, the Electrician Foreman WS-9, and the Building Engineer Foreman WS-9. As the evidence establishes that these employees have the authority effectively to recommend promotions, to discipline employees and to adjust grievances, and that they exercise independent judgment in the exercise of this authority, I find that employees in these classifications are supervisors within the meaning of the Order and should be excluded from any unit found appropriate.

5/ The record reveals that, in addition, the Maintenance Division contains employees in the following classifications: locksmith, carpenter, maintenance worker, gardener, and clerk-typist.

Based on the foregoing, I find that a clear and identifiable community of interest exists among all the employees of the Support Group located at the Center, including those of the Division of Visitor Services, and that such a unit of all the remaining unrepresented supervisory employees of the National Capital Parks will promote effective dealings and efficiency of agency operations. Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Board employees employed by the Kennedy Center Support Group of the National Capital Parks, National Park Service, Department of Interior, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 8/

In view of the IBPAT's clear intention to have a substantial portion of the unit found appropriate included within its existing unit, I find that the employees in the Support Group should be afforded the opportunity to choose whether or not they wish to become part of the existing unit represented by the IBPAT. Accordingly, if a majority of the employees in the unit found appropriate votes for the IBPAT, they will be taken to have indicated their desire to be included in the existing unit represented by the IBPAT and the appropriate Area Administrator will issue a certification to that effect. If, on the other hand, a majority of the employees votes for the IBEW, they will be taken to have indicated their desire to be included in the separate unit found appropriate and the appropriate Area Administrator will issue a certification to that effect.

#### DIRECTION OF ELECTION

In the circumstances set forth below, an election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any interventions in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military

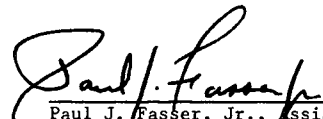
As noted above, the IBEW sought to include, among others, "temporary graded and ungraded employees." Because the record does not reflect whether employees in this classification have a reasonable expectancy of future employment, I shall make no finding with respect to their eligibility for inclusion in the unit.

-5-

service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the International Brotherhood of Electrical Workers, Local 27, AFL-CIO; by the International Brotherhood of Painters and Allied Trades, AFL-CIO; by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis; or by no labor organization.

Because the above Direction of Election is in a unit different than that sought by the IBEW, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision. If the IBEW desires to proceed to an election, because the unit found appropriate is different than it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot in the election among the employees in the unit found appropriate.

Dated, Washington, D.C.  
September 12, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-6-

September 12, 1973

A/SLMR No. 306

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
RESERVE COMMAND HEADQUARTERS,  
CAMP MCCOY, SPARTA, WISCONSIN,  
102ND RESERVE COMMAND,  
ST. LOUIS, MISSOURI  
A/SLMR No. 306

DEPARTMENT OF THE ARMY,  
RESERVE COMMAND HEADQUARTERS,  
CAMP MCCOY, SPARTA, WISCONSIN,  
102ND RESERVE COMMAND,  
ST. LOUIS, MISSOURI

and

Case No. 62-3157(CA),  
A/SLMR No. 256,  
FLRC No. 73A-18

On March 14, 1973, the Assistant Secretary issued a Decision and Order in A/SLMR No. 256 in which he held, among other things, that Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri (herein called Activity), had violated Section 19(a)(1) of the Order by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary.

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3154, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

The Activity subsequently filed a petition for review of the Assistant Secretary's decision which was accepted by the Federal Labor Relations Council (Council). On August 8, 1973, the Council issued its Decision on Appeal in the matter of Department of the Navy and the U. S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, FLRC No. 72A-20, in which the Council held that there is no obligation under the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, and an agency's failure to do so, and its policy against such a practice, cannot be violative of Section 19(a) of the Order. For the reasons stated in the latter decision, the Council set aside the Assistant Secretary's decision in A/SLMR No. 256.

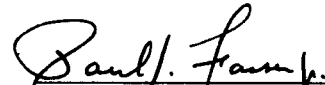
On August 8, 1973, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case setting aside the Assistant Secretary's finding that the Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, violated Section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing.

ORDER

Pursuant to the Council's Decision on Appeal, the Assistant Secretary issued a Supplemental Decision and Order in which he dismissed the complaint in the instant case.

IT IS HEREBY ORDERED that, pursuant to the Council's Decision on Appeal, the complaint in Case No. 62-3157(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
September 12, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL  
WASHINGTON, D.C. 20415

-2-

Department of the Army,  
Reserve Command Headquarters,  
Camp McCoy, Sparta, Wisconsin,  
102nd Reserve Command,  
St. Louis, Missouri

and

American Federation of Government  
Employees, Local 3154, AFL-CIO

A/SLMR No. 256  
FLRC No. 73A-18

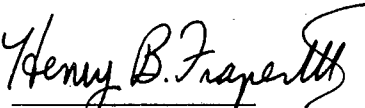
DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

This appeal, which was accepted for review by the Council, arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by American Federation of Government Employees, Local 3154, AFL-CIO (herein called the union) held, among other things, that Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri (herein called activity), had violated section 19(a)(1) of the Order by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary. In reaching his decision on this issue in the instant case, the Assistant Secretary relied exclusively on his decision in Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139.

On this date the Council has issued its Decision On Appeal From Assistant Secretary Decision in the matter of Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, FLRC No. 72A-20, in which it set aside the Assistant Secretary's finding that the agency violated section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing. For the reasons fully set forth in that Decision, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision

with respect to a finding of a violation of section 19(a)(1) of the Order to be inconsistent with the purposes of the Order, and, therefore, it is set aside.<sup>1/</sup>

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: AUG 8 1973

<sup>1/</sup> Another issue raised by the agency in its request for review involved the propriety of the Assistant Secretary imposing as precedent a decision which the Council had previously stayed. The Council did not grant review of this issue. While the agency, in its brief, in effect, requested reconsideration of the Council's determination, no persuasive reasons were advanced for such reconsideration and the request is denied.

September 12, 1973

A/SLMR No. 307

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY AND  
THE U.S. NAVAL WEAPONS STATION  
YORKTOWN, VIRGINIA  
A/SLMR No. 307

On August 8, 1973, the Assistant Secretary issued a Decision and Order in A/SLMR No. 139 in which, among other things, he found that the Activity had violated Section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing.

The Activity subsequently filed a petition for review of the Assistant Secretary's decision which was accepted by the Federal Labor Relations Council (Council). On August 8, 1973, the Council issued its Decision on Appeal setting aside the Assistant Secretary's decision on the grounds that there is no obligation under the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, and an agency's failure to do so, and its policy against such a practice, cannot be violative of Section 19(a) of the Order. Accordingly, the Council remanded the instant case to the Assistant Secretary for appropriate action consistent with its decision.

Pursuant to the Council's Decision on Appeal, the Assistant Secretary issued a Supplemental Decision and Order in which he dismissed the complaint in Case No. 22-2334(RO) in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY AND  
THE U.S. NAVAL WEAPONS STATION,  
YORKTOWN, VIRGINIA

and

Case No. 22-2334(RO),  
A/SLMR No. 139,  
FLRC No. 72A-20

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL R4-1


SUPPLEMENTAL DECISION AND ORDER

On August 8, 1973, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case setting aside the Assistant Secretary's finding that the Department of the Navy and the U.S. Naval Weapons Station, violated Section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing. Pursuant to its rules of procedure, the Council remanded the matter to the Assistant Secretary for purposes of compliance consistent with its decision.

ORDER

IT IS HEREBY ORDERED that, pursuant to the Council's Decision on Appeal, the complaint in Case No. 22-2334(RO) be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.  
September 12, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL  
WASHINGTON, D.C. 20415

-2-

Department of the Navy and  
the U.S. Naval Weapons Station,  
Portsmouth, Virginia

and

National Association of  
Government Employees,  
Local R4-1

A/SLMR No. 139  
FLRC No. 72A-20

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary, upon a complaint filed by National Association of Government Employees, Local R4-1, (herein called the union) held, among other things, that the Department of the Navy and the U.S. Naval Weapons Station (herein called the agency), jointly violated section 19(a)(1) of the Order by refusing to grant "official time" to witnesses who appear on behalf of a labor organization at a formal unit determination hearing. The agency appealed to the Council. The Council accepted the petition for review, deciding that this holding presented a major policy issue.

Decision of the Assistant Secretary

The Assistant Secretary's determination that the Order requires agencies to grant official time to union witnesses at unit determination hearings is premised upon his view of the scope of the rights accorded by section 1(a) of the Order, his views of the philosophy of the Order, his interpretation of the Council's Report and Recommendations on the amendments of Executive Order 11491 and his asserted needs for effective administration of the Order.

More particularly, with respect to the scope of the rights accorded by section 1(a) of the Order,<sup>2/</sup> the Assistant Secretary stated:

"Section 19(a)(1) provides that 'Agency management shall not - interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;'

Section 1(a) provides, in pertinent part, that 'Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.'

In my view, the right to assist a labor organization does not accord to Federal employees a protected right merely to present their views to the Assistant Secretary but places on agency management an affirmative obligation to facilitate the exercise of that right to present views on behalf of a labor organization where the right involved is directly related to the implementation of the processes of the Executive Order, including the development of full and complete factual records upon which I can render unit determination decisions.

Relying on language from the preamble to the Order which states that "the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment," the Assistant Secretary further concluded that there is an Executive Order philosophy of "encouraging such relationships." In his view, an application of that philosophy would,

. . . require necessarily that agency management make available on official time essential witnesses at non-adversary fact-finding proceedings held pursuant to the Regulations of the Assistant Secretary to assure a full and fair hearing based upon which I can fulfill the responsibility assigned me by the President under Section 6(a)(1) of Executive Order 11491.<sup>[3/]</sup>

Finally, as indicated in the above-quoted passages from his decision, the Assistant Secretary was of the opinion that establishing such an obligation on agency management would result in the "development of full and complete factual records upon which I can render unit determination decisions." This he reasoned would "assure a full and fair hearing based upon which I can fulfill the responsibility assigned me by the President under Section 6(a)(1) of the Executive Order."

Contentions

The agency filed a brief contending that this decision by the Assistant Secretary established a doctrine that "agency management has an affirmative obligation to facilitate the exercise of employee rights directly

<sup>3/</sup> Section 6(a)(1) provides that "The Assistant Secretary shall - decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration."

related to the implementation of the processes of the Executive Order." The agency argues that not only is there no basis in the Order for such a doctrine but that the Order mandates a totally opposite conclusion. Additionally, the agency contends that: (1) there is no evidence that union witnesses have not appeared at unit determination hearings and hence no evidence that the Assistant Secretary has been hampered in carrying out his responsibilities under section 6(a)(1) of the Order; (2) that the decision of the Assistant Secretary will foment additional litigation; and (3) that the Assistant Secretary's decision is contrary to private sector practice and precedent.

The union in its brief asserted that the policy of the agency which requires union witnesses at representation hearings to take annual leave or leave without pay while agency witnesses who testify at the same hearings are in a duty status is inherently discriminatory and punishes union witnesses solely for giving testimony under the Order. It contended, in this regard, that agency witnesses are always on official time at unit determination hearings. Additionally, the union argues that the majority practice by agencies before the decision was to carry union witnesses on official time and that private sector doctrine to the contrary is not applicable to the Federal labor relations program.

The American Federation of Government Employees, AFL-CIO, which was permitted to file a brief as an amicus curiae in behalf of itself, the International Association of Fire Fighters, the International Association of Machinists and Aerospace Workers, the Laborers International Union of North America and the International Brotherhood of Electrical Workers, urges the Council to sustain the decision of the Assistant Secretary.

Opinion

The conclusions and findings of the Assistant Secretary set forth above raise certain major policy questions with respect to the interpretation of section 1(a) of the Order and the philosophy of the Order as to management's obligations toward labor organizations. Additionally, a question is raised with respect to the Assistant Secretary's use of an unfair labor practice finding as the means of announcing a procedure which will enable him to fulfill his responsibilities under the Order.

The Assistant Secretary concluded that section 1(a) of the Order places on agencies an affirmative obligation to grant official time to union witnesses for participation at formal unit determination hearings. We do not agree with the Assistant Secretary's interpretation of section 1(a). As noted by the Assistant Secretary, section 1(a) does give employees a protected right to form, join and assist a labor organization or to refrain from such

activity. Further, section 1(a) places on heads of agencies an obligation to take action required to assure that no interference, restraint, coercion, or discrimination is practiced within their respective agencies to encourage or discourage membership in a labor organization. In the latter regard, section 19(a) further protects employees against unfair labor practices by management in the exercise of their rights under the Order. However, none of these protections of employee rights in section 1(a) places on agency management any "affirmative obligation to facilitate the exercise of [the] right to present views on behalf of a labor organization" as found by the Assistant Secretary. The underlying protected right of employees is a right to engage in or to refrain from union activity "freely and without fear of penalty or reprisal," and this right can hardly be deemed to import a duty of assistance to employees by management in their activity on behalf of a labor organization. Even if an agency grants official time to employees who appear in their official capacity as witnesses for the agency, it does not follow, as contended by the union, that the refusal to grant the same right to union witnesses constitutes improper "discriminatory" treatment. Again, the right protected by the Order is to engage in activity on behalf of the union, not the right to be assisted by management in such activity. Accordingly, section 1(a) provides no basis for finding an unfair labor practice because an agency failed and refused to grant official time to witnesses who appeared on behalf of a labor organization at a formal unit determination hearing.

Similarly, we find inconsistent with the Order the Assistant Secretary's statement of the "Executive Order philosophy" which he believes is reflected in that part of the preamble which provides:

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; (Emphasis added)

"Providing employees an opportunity" to participate in such formulation and implementation of personnel policies and practices through labor-management relationships does not reflect a policy of "encouraging such relationships." Rather, the Study Committee in recommending the issuance of Executive Order 11491 recognized a "need to provide an equitable balance of rights and responsibilities among the parties directly at interest - the employees, labor organizations, and agency management - and the need, above all, in public service to preserve the public interest as the paramount consideration."<sup>4/</sup> To that end, section 1(a) of the Order grants to employees the right to engage in union activity and the right to refrain from any such activity and mandates that the heads of agencies assure employees that no interference, restraint, coercion or discrimination is practiced within

<sup>4/</sup> Labor-Management Relations in the Federal Service, 1971, p. 36.  
(Emphasis added.)

the agency to encourage or discourage membership in a labor organization. Additionally, if a majority of employees selects a labor organization as their exclusive representative, agency management must comply with the letter and spirit of the obligations imposed on it by the Order concerning its relationship with the exclusive bargaining representative. These provisions provide the framework for constructive bilateral relationships, if a labor organization is selected by the employees. They do not reflect a philosophy of encouraging such bilateral relationships, but a philosophy of balancing rights and obligations. Accordingly, the preamble of the Order does not support a finding of an unfair labor practice because an agency failed and refused to grant official time to union witnesses at formal unit determination hearings.

In his decision the Assistant Secretary indicated that requiring agencies to grant official time to union witnesses would facilitate "the development of full and complete factual records upon which I can render unit determination decisions." The Assistant Secretary, in effect, has indicated that such a requirement was essential for him to fulfill his responsibilities under the Order. However, as concluded above, there is no express requirement in the Order that an agency grant official time to union witnesses at unit determination hearings. In that regard, the agency's failure to do so could not have been an unfair labor practice. We therefore hold that the agency in the instant case did not fail to comply with any existing obligation under the Order by its policy of refusing to grant official time to union witnesses.

Accordingly, as there is no obligation under the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, the agency's failure to do so in the instant case, and its policy against such a practice, cannot be violative of section 19(a) of the Order.

We have held herein that the Order does not require agencies to grant official time to union witnesses at formal unit determination hearings. However, the Assistant Secretary has indicated that, in order to fulfill his responsibilities under the Order, it is essential for agencies to grant official time to union witnesses at such hearings. Section 6(d) of the Order provides the Assistant Secretary with the authority to prescribe regulations needed to administer his functions under the Order.<sup>6/</sup> Accordingly, where the Assistant Secretary determines, based upon his experience, that, in order to administer those aspects of his functions which require a formal hearing, there is an established need for necessary witnesses to be on official time for the period of their participation

<sup>6/</sup> Section 6(d) provides that "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order."

at such hearings, we would view it as consistent with the Order for the Assistant Secretary to promulgate such a requirement by regulation so long as it is consistent with other provisions of law.<sup>6/</sup>

The issue of official time for witnesses in the instant case concerned only necessary union witnesses who appear at formal unit determination hearings. In reaching our conclusions in this case, we have also considered the issue as it pertains to other formal hearings held by the Assistant Secretary to administer his functions under the Order.<sup>7/</sup> Our view that it would be consistent with the Order for the Assistant Secretary to promulgate a regulation requiring that necessary witnesses be on official time for the period of their participation at formal hearings is predicated on the needs of the Assistant Secretary to facilitate the exercise of his functions under the Order. Therefore, where the Assistant Secretary determines, based upon his experience, that, in order to administer those aspects of his functions which require a formal hearing under section 6(a)(1), (2), (3), (4) and (5) of the Order, there is an established need for necessary witness to be on official time for the period of their participation at such formal hearings, we would view it as consistent with the Order for the Assistant Secretary to promulgate an appropriate regulation pursuant to his authority under section 6(d) of the Order.

<sup>6/</sup> During its 1971 review of the Federal labor relations program the Council considered a proposal to prescribe uniform policy regarding official time for employees representing labor organizations in third-party proceedings. At the time of the review there appeared to be no compelling reason for the Council to recommend a revision of the Order which would require uniformity of practice on this matter. However, in our view, the Assistant Secretary's exercise of his regulatory authority in this area when he finds an established need for such a requirement in order to discharge his functions is consistent with the present provisions of the Order and not inconsistent with our determination at the time of the review.

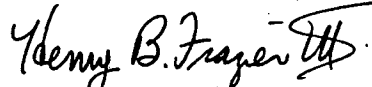
<sup>7/</sup> Section 6(a) provides: The Assistant Secretary shall--

- (1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;
- (2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;
- (3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council;
- (4) decide unfair labor practice complaints and alleged violations of the standards of conduct for labor organizations; and
- (5) decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement.

For the foregoing reasons, and pursuant to section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's finding that the Department of the Navy and the U.S. Naval Weapons Station violated section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing.

Pursuant to section 2411.17(c) of the Council's rules of procedure, we hereby remand this matter to the Assistant Secretary for purposes of compliance consistent with this decision.

By the Council.



Henry B. Frazier III  
Executive Director

Issued: AUG 8 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,  
PORTLAND, OREGON  
A/SLMR No. 308

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The subject case involved a representation petition filed by the Oregon Nurses Association (ONA) seeking a unit of all Staff Nurses, including Nurse Practitioners, employed at the Veterans Administration Hospital, Portland, Oregon, including the outpatient-clinic. The Activity took the position that the petitioned for unit was inappropriate for the purpose of exclusive recognition because it was part of a more comprehensive unit currently represented exclusively by American Federation of Government Employees, AFL-CIO, Local 2157 (AFGE). The Activity further asserted that the severance of the petitioned for unit from the more comprehensive unit would not promote effective dealings and efficiency of operations.

Applying the principles enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, the Assistant Secretary found that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In this regard, the Assistant Secretary noted that the evidence did not establish that the AFGE had failed or refused to render fair and effective representation to the employees in the unit sought. Rather, in the Assistant Secretary's view, the record disclosed that a harmonious bargaining relationship had been maintained for several years between the Activity and the AFGE with respect to all unit employees, including those in the petitioned for unit. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,  
PORTLAND, OREGON

Activity

and

Case No. 71-2369(RO)

OREGON NURSES ASSOCIATION

Petitioner

## DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel P. Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, the Oregon Nurses Association, herein called ONA, seeks a unit consisting of all Staff Nurses, including Nurse Practitioners, employed at the Veterans Administration Hospital, Portland, Oregon, including the outpatient-clinic; excluding all management officials, supervisors, including Head Nurses, Nurse Anesthetists, and Clinical Specialists, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards as defined in the Executive Order. 1/ The employees in the claimed unit presently are included in an Activity-wide unit exclusively represented by the American Federation of Government Employees, Local 2157, AFL-CIO, herein called AFGE.

The ONA contends that the employees sought have not been represented adequately by the AFGE and that a separate unit of registered nurses is appropriate for the purpose of exclusive recognition. The Activity takes

1/ The unit appears essentially as amended at the hearing.

the position that while the unit petitioned for herein might be appropriate under other circumstances, it is not appropriate under the present circumstances because it is part of an existing more comprehensive unit. In this regard, the Activity notes that the currently recognized unit of all professional and nonprofessional employees promotes effective dealings and efficiency of agency operations and the "unusual circumstances" required to warrant a "carve out" are not present in the instant case. 2/ Based on the foregoing contentions, the Activity asserts that the instant petition should be dismissed. 3/

The Activity is located in Sam Jackson Park, Portland, Oregon. It consists of approximately 500 beds for General Medical Service and 30 beds for Psychiatric Service. In addition, the Activity operates an outpatient-clinic located in downtown Portland which is separated physically from the main grounds of the Activity. Approximately 965 full-time employees and 170 part-time employees are employed by the Activity, including some 60 employees employed in the outpatient-clinic. Heading the Activity is a Hospital Director, who is assisted by an Assistant Director. Reporting directly to the Hospital Director is the Chief of Staff who is in charge of the Activity's various medical services, including the Nursing Services. Each of the medical services is headed by a Chief. The supervisory hierarchy of the Nursing Service includes the Chief of Nursing Service, two Assistant Chiefs, an Associate Chief, Nursing Supervisors, and Head Nurses. The latter employees supervise the Staff Nurses sought by the instant petition. On November 1, 1966, the Activity accorded exclusive recognition to the AFGE. 4/ The parties' most recent agreement covering the unit became effective on October 27, 1970, and by its terms, ran for a period of 2 years. The agreement also provided for automatic renewal for two-year periods in the absence of written notification by either party of an intent to modify or terminate. The record reveals that the AFGE filed written notice with the Activity of its intent to modify the agreement but that negotiations leading to a new agreement were suspended pending the disposition of the instant petition.

2/ See United States Naval Construction Battalion, A/SLMR No. 8, in which the Assistant Secretary stated, in part, that, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." (emphasis added)

3/ The Activity takes the alternative position that in the event the Assistant Secretary decides to conduct an election in the claimed unit, Nurse Practitioners should be excluded from such unit.

4/ The request by the AFGE to intervene in this matter was denied as untimely.

Since November 1967, the employees in the exclusively recognized unit, including those in the claimed unit, have been covered by negotiated agreements between the Activity and the AFGE. The record discloses that while the most recent agreement does not contain any provisions solely relating to nurses, a registered nurse always has served on the union bargaining committee which prepares proposals for the AFGE's negotiating team. Moreover, the Nursing Service, which includes Licensed Practical Nurses and Nursing Assistants as well as Staff Nurses, has had its own steward and currently a Staff Nurse is acting in that capacity. Testimony discloses that the AFGE has attempted to represent Staff Nurses in an effective manner. Thus, prior to 1970, a meeting solely for Staff Nurses was called by the AFGE for the purpose of discussing nurses' problems and, on another occasion, a meeting between nursing service employees and management officials was called by the AFGE's president. In this latter regard, a follow-up meeting between the AFGE's secretary, who was a registered nurse, the AFGE's national vice-president and the hospital director was held to continue the previous discussions. The record further establishes that within the past year, the AFGE processed a formal grievance filed by a Staff Nurse and that the grievance was resolved satisfactorily. Additionally, notices of union meetings are posted regularly on designated bulletin boards and a copy of the parties' negotiated agreement is posted on the Nursing Service bulletin board. The evidence establishes also that the AFGE has not refused to handle grievances of any unit employee, including Staff Nurses, nor has it refused to represent the petitioned for employees, or treated them in a disparate manner.

Under all of the circumstances, I find that the petitioned for unit of Staff Nurses is not appropriate for the purpose of exclusive recognition. Thus, the evidence does not establish that the AFGE has failed to represent such employees in a fair and effective manner. As noted above, in United States Naval Construction Battalion Center, it was held that, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." I find no such "unusual circumstances" in the instant case. 5/ Rather, the record reveals that a harmonious bargaining relationship has been maintained for several years between the Activity and the AFGE with respect to all unit employees, including those in the petitioned for unit. Based on these considerations, I find that the unit sought by the ONA is inappropriate for the purpose of exclusive recognition. Therefore, I shall order that the petition herein be dismissed. 6/

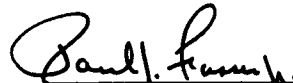
5/ The fact that the AFGE did not effect a timely intervention in this matter was not considered to require a contrary result. Thus, the primary issue in the instant case is whether the AFGE has fairly and effectively represented the claimed employees and not whether the AFGE should appear on a ballot in any unit found appropriate.

6/ See Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, affirmed FLRC 72A-24. See also Veterans Administration Center, Togus, Maine, A/SLMR No. 84, affirmed FLRC No. 71A-42; and Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89, affirmed FLRC No. 71A-45. In view of the disposition herein, it was considered unnecessary to decide the eligibility questions raised.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-2369(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
September 12, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

September 20, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
FRESNO SERVICE CENTER,  
FRESNO, CALIFORNIA  
FLMR No. 309

The case involved an unfair labor practice complaint filed by the National Association of Internal Revenue Employees (NAIRE) and Chapter 97, NAIRE (Complainant) against the Department of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California (Respondent) alleging violations of Section 19(a)(1) and (2) of the Executive Order.

Specifically, the complaint, as amended, alleged that the Respondent violated Section 19(a)(1) and (2) by: (1) denying annual leave to an employee for the period such employee was to participate as an official observer at a representation election; (2) denying administrative leave to four employees who were designated as official observers for the period they acted in that capacity; (3) denying administrative leave to an employee for the period in which he attended consent election conference; and (4) denying administrative leave to two employees for the period in which they attended a pre-election conference of observers conducted by a representative of the Department of Labor.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the evidence was insufficient to establish that the Respondent denied permission to an employee to take annual leave in order to participate as an observer at the representation election involved herein.

As to the remaining allegations, involving the denial of administrative leave to employees for the period in which they either attended consent election conference, attended a conference of observers conducted by a representative of the Department of Labor, or acted as observers at the election herein, the Assistant Secretary found, pursuant to the Decision on Appeal of the Federal Labor Relations Council (Council) in Department of the Navy and the U. S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, that further proceedings under Section 19(a) of the Order were unwarranted. The Assistant Secretary noted that the Council held that while the Order does not require agencies to grant official time to union witnesses at formal unit determination hearings, if the Assistant Secretary finds, based on his experience, that in order

to administer those aspects of his functions which require a formal hearing under Section 6(a)(1), (2), (3), (4), and (5) of the Order, an established need exists for necessary witnesses to be on official time for the period of their participation at such formal hearings, he could issue an appropriate regulation in this regard pursuant to his authority under Section 6(d) of the Order. Under these circumstances, the Assistant Secretary indicated that based on his experience and because there was an established need, he intended to promulgate a regulation granting official time status to necessary witnesses at all types of formal hearings held under Section 6(a)(1), (2), (3), (4), and (5) of the Order.

Further, in the Assistant Secretary's view, employees acting as official observers facilitate his responsibilities under the Executive Order to supervise elections and to assure that elections are conducted in a fair and impartial manner. He noted also that observers are not merely guardians of a particular sponsor's interests in an adversary forum but, rather, they protect the integrity of the election process and, as such, further the purposes and policies of the Order. Under these circumstances, and noting the Council's statement in FLRC No. 72A-20 that if the Assistant Secretary finds an established need to prescribe a uniform policy regarding official time in order to discharge his functions under the Order he may exercise his regulatory authority, the Assistant Secretary indicated that the regulation he will promulgate will include a provision for official time for authorized representation election observers.

Based on the rationale contained in the Council's Decision on Appeal in FLRC No. 72A-20, the Assistant Secretary ordered that the instant complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
FRESNO SERVICE CENTER,  
FRESNO, CALIFORNIA

Respondent

and

Case No. 70-2448

NATIONAL ASSOCIATION OF INTERNAL  
REVENUE EMPLOYEES (NAIRE) AND  
CHAPTER 97, NAIRE

Complainant

DECISION AND ORDER

On April 2, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceedings, 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. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, to the extent consistent herewith.

The complaint herein alleged that the Respondent violated Section 19(a)(1) and (2) of the Order based on its denial of annual leave to employee Donise Loftus for the period in which she was to participate as an observer for the Complainant at a representation election held on June 5, 1972. The complaint further alleged that employees Larry Polett, Paul Wood, Burke Jones, and Michael Keefer, who were appointed by the Complainant to act as observers at the above-noted election, were improperly denied administrative leave by the Respondent and were required to take annual leave to perform their duties at the election. At the hearing, the Complainant amended its complaint to include two additional allegations of violative conduct by the Respondent.

First, it was alleged that the Respondent's denial of administrative leave to employee Michael Keefer, on May 31, 1972, for the three hour period in which he attended a consent election conference regarding the above-noted election, violated Section 19(a)(1) and (2) of the Order. Secondly, it was alleged that the Respondent violated Section 19(a)(1) and (2) of the Order based on its denial of two hours of administrative leave to employees Larry Polett and Michael Keefer to attend a conference of observers held on June 2, 1972, conducted by a representative of the Department of Labor.

In agreement with the Administrative Law Judge, I find that the evidence is insufficient to establish that the Respondent denied permission to employee Donise Loftus to take annual leave in order to participate as an observer in connection with the June 5, 1972, election. As to the remaining allegations by the Complainant, involving the denial of administrative leave to employees for the period in which they either attended a consent election conference, attended a conference of observers conducted by a representative of the Department of Labor, or acted as observers at the election herein, I find that, pursuant to the Decision on Appeal of the Federal Labor Relations Council (Council) in Department of the Navy and the U. S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, further proceedings under Section 19(a) of the Order are unwarranted.

In its above-noted Decision on Appeal, the Council held that the Order does not require agencies to grant official time to union witnesses at formal unit determination hearings. The Council further held, however, that when the Assistant Secretary finds, based upon his experience, that in order to administer those aspects of his functions which require a formal hearing under Section 6(a)(1), (2), (3), (4), and (5) of the Order, an established need exists for necessary witnesses to be on official time for the period of their participation at such formal hearings, the Assistant Secretary could, consistent with the Order, promulgate an appropriate regulation in this regard pursuant to his authority under Section 6(d) of the Order. <sup>1/</sup> In reaching the latter conclusion, the Council noted that at the time of its 1971 review of the Federal labor relations program it had considered a proposal to prescribe a uniform policy regarding official time for employees representing labor organizations in third-party proceedings but at that time there appeared to be no compelling reason for the Council to recommend a revision of the Order which would require uniformity of practice on this matter. However, the Council added, "in our view, the Assistant Secretary's exercise of his regulatory authority in this area when he finds an established

<sup>1/</sup> Section 6(d) provides that "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order."



ed for such a requirement in order to discharge his functions is consistent with the present provisions of the Order and not inconsistent with our determination at the time of the review."

Clearly, as indicated by the Assistant Secretary in prior decisions, <sup>2/</sup> in order to fulfill his responsibilities under the Order, an established need was found to exist for necessary union witnesses to be on official time when participating in formal unit determination hearings held pursuant to Section 6(a)(1) of the Order. Accordingly, pursuant to the rationale contained in the Council's above-noted Decision on Appeal an appropriate regulation in this regard will be promulgated by the Assistant Secretary. Similarly, based on the substantial experience which has been gained under the Order since its inception on January 1, 1970, which indicates that there is an established need for necessary witnesses to be on official time for the period of their participation at other types of formal hearings held under Section 6(a)(1), (2), (3), (4), and (5) of the Order, the regulation which will be promulgated by the Assistant Secretary in connection with official time status at unit determination hearings will be broadened to include other formal hearings held by the Assistant Secretary in order that he may properly discharge his functions under the Order.

As noted above, the Council indicated that as of 1971 there appeared to be no compelling reason to prescribe a uniform policy regarding official time for employees representing labor organizations in third-party proceedings, but if the Assistant Secretary finds an established need for such a requirement in order to discharge his functions he may exercise his regulatory authority in this area. In the instant case, the respondent denied official time to employees for the period in which they attended a consent election conference, attended a conference of observers, and acted as observers at the election herein.

Under Section 6(a)(2) of the Executive Order, the Assistant Secretary is delegated the authority to supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit. Further, Section 10(d) of the Order requires that all elections under the supervision of the Assistant Secretary, or persons designated by him, shall be by secret ballot, and that each employee eligible to vote shall be provided the opportunity to choose the

See Department of the Navy and the U. S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256, and U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 281.

labor organization he wishes to represent him, from among those on the ballot, or "no union." In order to assure that these foregoing responsibilities are implemented in a fair and effective manner, consistent with the purposes of the Order, the Assistant Secretary seeks to assure that not only should the employees participating in the election have an opportunity to cast a secret ballot, but, also, that all employees and all parties are satisfied that the true sentiments of the employees have been demonstrated by the election. <sup>3/</sup>

In connection with obtaining the foregoing objectives, the Assistant Secretary's election procedures include provision for observers, selected from among the nonsupervisory employees of the Federal Government, who are to be stationed at polling places during the election to assist in its conduct, to challenge, for good cause, the eligibility of voters and to verify the tally of ballots. As stated in the Procedural Guide, the "observers' sole functions are to see that elections are conducted in a fair and impartial manner, so that each eligible voter has a fair and equal chance to cast a secret, uncoerced ballot."

In the context in which representation elections are held under the Assistant Secretary's Regulations, the importance of observers is paramount. Thus, under the Order, the Assistant Secretary does not conduct elections, but rather supervises their conduct. In this connection, arrangements for, and the conducting of, a representation election under the Order is the responsibility of the agency or activity. In this regard, among other things, the agency or activity reproduces the ballots and provides the facilities for the conduct of the election. Further, in elections in which several polling places are utilized, the Assistant Secretary generally does not have an agent at every polling place and, therefore, reliance is placed upon the observers to assure that the election procedures are implemented in a fair and impartial manner. It is particularly clear, therefore, in situations where an agent of the Assistant Secretary is not present at the polling place, that the observers at such polling place are directly assisting the Assistant Secretary in assuring that all employees are afforded the opportunity to vote and that employees believed to be ineligible to vote will be challenged for good cause. Moreover, even where an agent of the Assistant Secretary is present at the polling place, an observer is generally in a better position to handle substantive eligibility questions, if such questions arise, based on his greater familiarity with the employees of the agency or activity involved. Based on these factors, it is my view that authorized observers, in effect, facilitate the responsibilities of the Assistant Secretary under the Executive Order to supervise elections and to assure that elections are conducted in a fair and impartial manner.

<sup>3/</sup> In this regard, see the Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491, issued February 9, 1970.

In his Report and Recommendations, the Administrative Law Judge noted that an observer's function essentially is to protect the interests of the party whom he represents. In this regard, he characterized the election as being "adversary" in the sense that two parties are competing with each other for the votes of the employees and that an observer "is a guardian of his sponsor's interests."

Contrary to the Administrative Law Judge, I do not view the election procedures under the Order as presenting an adversary situation. Thus, the preamble of the Executive Order provides, in part, that "the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment" and that "the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials." In furtherance of these goals, it is clear that the Federal agencies and activities are required to maintain a neutral posture in the election procedures under the Order and that their sole interest in this context is to assure that all eligible employees have an opportunity to vote for or against representation. The challenged ballot procedures formulated by the Assistant Secretary in this regard are consistent with this interest. Thus, authorized observers, who are charged by the Assistant Secretary with the responsibility of assuring that elections are conducted in a fair and impartial manner, are expected to perform their functions, such as challenging employees, for good cause, for the purpose of protecting the integrity of the voting unit by assuring that eligible employees are afforded the opportunity to vote and that all ineligible employees, or those believed to be ineligible, are challenged. Noting these concepts and purposes, I do not view observers as individuals who are merely guardians of a particular sponsor's interests in an adversary forum. Rather, as noted above, I view observers as an integral part of the election process who, beyond representing the interests of a particular party at an election, protect the integrity of the election process as well as the voting unit and, as such, further the purposes and policies of the Order.

Under all of these circumstances, I find that in order to facilitate the exercise of the functions of the Assistant Secretary under the Order, and based on the experience which has been gained since the inception of the Order, an established need exists for a requirement that authorized representation election observers be on official time during the period in which they perform their observer functions. 4/

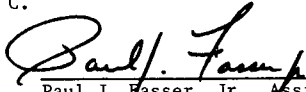
4/ I do not find that an established need has been demonstrated for the granting of official time to employees who act as union representatives at formal hearings held pursuant to Section 6(a) of the Order or conferences held for the purpose of attempting to obtain consent election agreements. Accordingly, the regulation which will be promulgated will not include a provision for official time in such circumstances.

Accordingly, the above-noted regulation which will be promulgated by the Assistant Secretary, pursuant to the rationale contained in the Council's Decision on Appeal, will include a provision for official time for authorized representation election observers.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-2448 be, and it hereby is, dismissed.

Dated, Washington, D. C.  
September 20, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

- 2 -

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PARTMENT OF THE TREASURY :  
INTERNAL REVENUE SERVICE :  
RESNO SERVICE CENTER :  
RESNO, CALIFORNIA, :  
Respondent :  
and :  
TIONAL ASSOCIATION OF INTERNAL REVENUE :  
EMPLOYEES (NAIRE) AND CHAPTER 97, NAIRE, :  
Complainant. :  
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CASE NO. 70-2448

Jerry Shaw, Esq.  
Office of Chief Counsel  
Room 4405, 1111 Constitution Ave., N. W.  
Washington, D. C. 20224  
on behalf of the Respondent

Robert M. Tobias, Esq.  
National Association of Internal  
Revenue Employees  
30 K Street, N. W., Suite 1101  
Washington, D. C. 20006  
on behalf of the Complainant

Before: William Naimark, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on September 14, 1972 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region.

National Association of Internal Revenue Employees (NAIRE) and Chapter 97, NAIRE, (herein called the Complainant) initiated the matter filing a complaint on August 2, 1972 against Department of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California (herein called the Respondent). The complaint alleged that employees

Larry Polett, Paul Wood, Burke Jones, and Michael Keefer, who were appointed by the Complainant to act as observers during a representation election to be held at the Fresno Service Center on June 5, 1972, were denied administrative leave by Respondent, and were required to take annual leave to perform their duties at the election. It was also alleged that employee Donise Loftus, who was designated by Complainant to act as an observer at the aforesaid election, was denied annual leave by Respondent to perform her duties thereat. The complaint alleged such denials by Respondent were violative of Sections 19(a)(1) and (2) of the Order.

At the hearing Complainant was permitted, over Respondent's objections, to amend its complaint substantially as follows: (1) that employee Michael Keefer, on May 31, 1972, attended a consent election conference regarding the aforesaid election for 3 hours, and Respondent denied him administrative leave to perform his duties thereat; (2) that employees Larry Polett and Michael Keefer, on June 2, 1972, attended a conference of observers for 2 hours with a representative of the Department of Labor, to be briefed on their duties as observers in the scheduled election, and Respondent denied said employees administrative leave to perform their duties thereat 1/- all in violation of Sections 19(a)(1) and (2) of the Order.

A hearing was held before the undersigned on January 10, 1973, at San Francisco, California. Both parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter, Respondent and Complainant filed briefs on March 22, 1973 and March 26, 1973 respectively which have been duly considered by the undersigned.

Upon the entire record in this case, from his observation of the witnesses and their demeanor, and from all of the testimony and evidence addressed at the hearing, the undersigned makes the following findings, conclusions and recommendations:

FINDINGS OF FACT

1. On April 3, 1972, Complainant filed a petition for representation election among Respondent's employees at the Fresno Service Center, Fresno, California with the United States Department of Labor.

1/ Respondent contended at the hearing it was prejudiced by being required to respond to the amendment without prior notification. Accordingly, and after the parties introduced evidence regarding the allegation in the complaint, the undersigned adjourned the hearing to give Respondent an opportunity to prepare its defense to the amendments. Subsequently the parties submitted to the undersigned a Joint Stipulation in respect to the amended matters in lieu of introducing testimony, and requested the hearing be closed. The request was granted, and the Joint Stipulation will be considered as part of the record.

2. A consent election conference was held on May 31, 1972 at which representatives of Complainant and Respondent attended.

3. Michael Keefer, an employee of Respondent at the Fresno Service Center, Fresno, California, who was designated by Complainant as its representative, attended the aforesaid consent election conference on May 31, 1972, and spent three (3) hours in attendance thereat.

4. The time spent by Michael Keefer on May 31, 1972, at the consent election conference, 3 hours, was charged to his annual leave, and Respondent denied a request that the time be charged to his administrative duties. The time spent by Respondent's representatives at the consent election conference was not charged to their annual leave, but was deemed official duty time.

5. Prior to June 2, 1972, Lee Smith, a representative of the U. S. Department of Labor, contacted Lance Casper, Respondent's representative, and urged that a meeting be held for the purpose of briefing those individuals designated by Complainant and Respondent to act as observers in the forthcoming consent election.

6. The representative of the Department of Labor did not contact Complainant's representative concerning the proposed meeting, because Lance Casper stated he would do so.

7. On June 2, 1972, a meeting or conference was conducted by Lee Smith, United States Department of Labor, for observers in a forthcoming consent election, and representatives of both Complainant and Respondent attended.

8. Michael Keefer and Larry Polett, employees of Respondent, who were designated by Complainant to act as its observers in the forthcoming election, attended the said meeting or conference of observers on June 2, 1972, and spent two (2) hours in attendance thereat.

9. The time spent by Michael Keefer and Larry Polett on June 2, 1972 at the meeting or conference for observers (2 hours) was charged to annual leave, and Respondent denied a request by Complainant that the time be charged to their administrative duties. The time spent by Respondent's representatives at the meeting or conference for observers was not charged to annual leave, but was deemed official duty time.

10. The meeting held on June 2, 1972, for the purpose of orienting election observers in their duties, was suggested by the Department of Labor, and such a meeting is sometimes requested when the Department of Labor representative concludes it will serve a useful purpose.

11. A meeting called by the Department of Labor of election observers to orient them to their duties in a forthcoming election is not a mandatory requirement of the Department of Labor, and either the union or management may decline to have their observers attend such a meeting without the approval of the Department of Labor.

12. A consent election was conducted by the Department of Labor on June 5, 1972 among Respondent's employees at the Fresno Service Center, Fresno, California at which representatives of Complainant and Respondent were present and acted as observers on behalf of each respective party.

13. Burke Jones, Michael Keefer, Larry Polett, and Paul Wood, employees of Respondent, who were designated by Complainant, attended the election held on June 5, 1972 and acted as observers on behalf of the Complainant. Said employees spent the following time at the election as observers attending to their duties:

Burke Jones	-	1 hour
Michael Keefer	-	2 hours
Larry Polett	-	9 hours
Paul Wood	-	8 hours

14. The time spent by employees Burke Jones, Michael Keefer, Larry Polett and Paul Wood, on June 5, 1972, as observers at the election, as set forth in paragraph 13 above, was charged to the annual leave of each said employee, and Respondent denied a request that the time be charged to the administrative duties of each said employee. The time spent by Respondent's representatives at the election as observers was not charged to annual leave, but was deemed official duty time.

15. Respondent refused all requests of the employees hereinabove mentioned to charge time spent at (a) the consent election conference on May 31, 1972, (b) the meeting on June 2, 1972 of observers for the forthcoming election, and (c) the election held on June 5, 1972, to administrative duties on the ground that Treasury Personnel Manual, Chapter 711-4, page 6, paragraph 4-8, 2/ prohibits the granting of official time for the purposes so requested.

16. Donise Loftus, a senior tax accountant technician, has been employed by Respondent at Fresno Service Center for one year. She is supervised by Irma Pilgreen.

17. Prior to the election conducted on June 5, 1972 Donise Loftus was asked by Michael Keefer to be an observer in said election, and she was also told by him she would be required to take annual leave for the time spent thereat.

18. On about June 1, 1972 Donise Loftus told Irma Pilgreen she was asked to be an observer in the forthcoming election, which would involve ten (10) hours of annual leave, and Donise Loftus requested such leave to attend the election as an observer.

19. The work in Respondent's tax accounting section, where Donise Loftus was employed, is at its peak in terms of caseload from April through

2/ Respondent's Exhibit 1.

of each year. At June, 1972 this section had between 3000-4000 cases which were handled by 16 employees, and about 10 additional employees were needed to adequately handle this caseload.

20. During the conversation between them on June 1, 1972 Irma Pilgreen stated to Donise Loftus that she would prefer if someone were pulled from a less critical area to act as an observer for the union in the forthcoming election. Irma Pilgreen also said, in response to the request by Donise Loftus to take annual leave to act as an observer in the scheduled election, that she should use her own judgment <sup>3/</sup> and if Donise Loftus wanted to take annual leave for said purpose, she should go ahead and take it."

21. Donise Loftus decided not to take annual leave to act as an observer in the election because (a) employees in that section had been requested, due to the heavy workload, not to take annual leave except in emergency situations, (b) Loftus had requested leave to take a week's trip later on, and she felt that taking annual leave for the election might affect Respondent's granting her leave for the planned trip.

ISSUES

1. Whether Donise Loftus, employee, was denied permission by Respondent to take annual leave in order to act as a union observer in representation election?

2. Did Respondent violate the Order by refusing to grant administrative leave to Michael Keefer, employee, for the time spent by him at a consent election conference, and charging his time to annual leave - all while granting official leave to employees who attended such conference on behalf of Respondent?

3. Did Respondent violate the Order by refusing to grant administrative leave to Burke Jones, Michael Keefer, Larry Polett, and Paul Wood, employees, for time spent by them as observers for the Complainant at a representation election involving Respondent's employees, and charging them annual leave for time so spent - all while Respondent granted official leave to employees who attended the election and acted as observers for Respondent thereat?

4. Did Respondent violate the Order by refusing to grant administrative leave to Michael Keefer and Larry Polett for time spent at a meeting, prior to the election, called for the purpose of orienting observers to their duties during the election, and charging them annual leave for such

<sup>3/</sup> While the supervisor denies she told Loftus to use her own judgment, her testimony that she preferred if another person were chosen is compatible with the testimony of Loftus in this regard. I find, in any event, that Pilgreen did not refuse permission to Loftus to take annual leave in order to act as a union observer at the election.

time spent at the meeting - all while Respondent granted official leave to employees who attended this meeting prior to acting as observers for Respondent during the election?

CONCLUDING FINDINGS

Alleged Refusal to Permit Donise Loftus to Take Annual Leave to Act as Observer at a Representation Election.

Complainant contends Donise Loftus was denied permission to take annual leave in order to act as an observer in the election on June 5, 1972, and hence it is alleged Respondent violated Section 19(a)(1) and (2) of the Order.

Record testimony lends no support to this contention. Accepting the testimony of Loftus herself, the facts demonstrate that her supervisor, Irma Pilgreen, told the employee to use her own judgment but go ahead and take such leave if she felt it necessary. Both individuals confirm that the election was held at a time when the caseload was at its peak, and the tax accounting section was critically short of help. While the supervisor would have preferred if another employee, from a section which was not so busy, could have been selected by the union, no testimony was adduced from either witness that served to show such a denial by Pilgreen of Loftus' request to take annual leave. Moreover, Loftus testified she decided not to take annual leave in view of the heavy caseload, and because she feared it might affect Respondent's granting her annual leave for a vacation trip already planned. Accordingly, and based on the record as a whole, I find and conclude there is insufficient proof to establish that Respondent denied permission to Donise Loftus to take annual leave in order to participate in the election as an observer.

Refusal by Respondent to Grant Administrative Leave to Employee Attending Consent Election Conference on Behalf of the Union.

Complainant maintains that Respondent should grant 3 hours administrative leave to Michael Keefer who attended, on behalf of the union, a consent election conference on May 31, 1972. Since time spent by Respondent's representatives at such conference was charged to official leave, Complainant objects to charging Keefer's time to annual leave.

This issue was involved in the recent case of United States Customs Service Chicago, Illinois, A/SLMR No. 257 where 4 employees of the activity represented AFGE at the meeting called to discuss details of a forthcoming election. A refusal by the activity to grant, inter alia, administrative leave for 2 days to these representatives resulted in a complaint and unfair labor practice hearing. The Administrative Law Judge concluded the 4 employees attended the meeting as representatives of the union. Their presence was not to enable the Assistant Secretary to perform his function under the Order, and no testimony was to be given by them to implement the processes of the Order. His recommendation that the complaint be dismissed was upheld by the Assistant Secretary.

In my opinion this decision is determinative of the precise question before me concerning Respondent's refusal to grant administrative leave to Keefer for the time spent by him at the consent conference herein. Since the Assistant Secretary has adopted the finding and conclusion that one who appears on behalf of the union at a consent conference is not entitled to such official leave, I conclude that such determination is controlling. Moreover, I also conclude that, under Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139, the attendance by Keefer at the consent conference was not directed toward enabling the Assistant Secretary to fulfill his responsibility under the Order. The presence of this employee is not related to the effectuation of the Order, as was perhaps true where a unit determination was predicated on the testimony of employee-witnesses appearing in behalf of a union at a representation hearing. Accordingly, I conclude Respondent did not violate the Order by denying 3 hours administrative leave to Keefer for time spent at the consent election conference on May 31, 1972.

Refusal by Respondent to Grant Administrative Leave to Employees Who Acted As Observers for the Union and Attended Observers' Meeting.

It is urged by Complainant that the 4 employees who acted as observers for the union should not have been required to take annual leave, but were entitled to official leave therefor. Further, it contends two of these individuals, who attended the meeting which was called to apprise observers of their duties, should likewise be granted administrative leave for time spent thereat - all in the same fashion as was accorded the observers for Respondent.

The position of Respondent is that Treasury Personnel Manual, Chapter 711-4, precludes its granting official leave to the employees who acted as observers, and attended an orientation meeting, since the regulation specifically states "at no stage of the representation process should official time be granted to employees to participate as union representatives in representation proceedings." These proceedings, under this provision, encompass elections, meetings and hearings. Respondent also relies on Golden Arrow Dairy, 194 NLRB No. 81 wherein the National Labor Relations Board found no violation where the employee did not compensate employees who acted as union observers, but did pay those workers who were observers on its behalf. The Board emphasized that the union could have appointed employees to act as observers outside regular working hours.

In Department of the Navy and the U. S. Naval Weapons Station case, supra, the Assistant Secretary had occasion to pass upon a situation where official leave should have been granted to employees of the activity. He concluded that employees who testified at a representation hearing, on behalf of the union, were helping to develop a complete factual record upon which a unit determination could be made by him. In this posture, requiring these employees to take annual leave to attend such a hearing would hinder the Assistant Secretary's ability to render meaningful unit determinations. It was declared to be significant that the

proceedings were non-adversary and fact finding, and witnesses who testified were enabling the Assistant Secretary to fulfill his responsibility under the Order.

The case at bar presents a situation not involving testimony by the employees, nor are we confronted with a unit determination. Whether observers are to be granted official leave will rest ultimately upon a decision as to their status while performing their duties. In this respect, I do not consider that Respondent may rely upon the Treasury Personnel Manual, since the cited regulation must fall if it runs counter to the spirit and intent of the Order. Moreover, the case decided by the National Labor Relations Board, Golden Arrow Dairy, supra, is not deemed decisive in view of the declarations by the Assistant Secretary in A/SLMR No. 139. Reference is made therein to the difference between the philosophical doctrine upon which the Order is premised and the purpose of the National Labor Relations Act. In respect to the former, the well being of employees and official administration of Government are paramount, whereas the private sector is concerned with the resolution of labor disputes by orderly adjudicatory procedures.

Under Section 10(d) of the Order the Assistant Secretary is charged with the supervision of elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit. However, the Procedural Guide for the Conduct of Elections recites that the responsibility for conducting an election - as well as the arrangements therefor - lies with the agency or activity. The latter is thus responsible for reproducing Notices of Election, ballots and other material, and for arranging adequate facilities. Although, in truth, the running of the election has been delegated to the activity, both parties are represented at the election by observers who have specific duties as set forth in the Procedural Guide. Essentially they are required to identify voters, check off their names, oversee the occupancy of the booth and the depositing of the ballot, safeguard the ballot box, challenge ineligible voters, and certify results of the election.

It becomes apparent that an observer is performing functions which must necessarily "assist" in the conduct of an election. But he also serves in another capacity, which is to protect the interests of the party whom he represents. That an observer is not present as an agent of the Assistant Secretary draws support from the Procedural Guide which states: "Observers are official representatives of the parties..." and from Section 202.18 of the Rules and Regulations which provides: "Any party may be represented at the polling place(s) by observers of his own selection..." Thus, the observer attends an election at the will of a particular party. Having an observer is not a mandatory requirement, and the union or activity must decide if its cause is served by choosing a representative to be present. While it is true that the observer's chief function is to see that an election is conducted in a fair and impartial manner, he does so as a protagonist for either the union or the activity. He is chosen as one in liaison with either the union or management who selects him. The Guide, in fact, cautions that "agency or activity

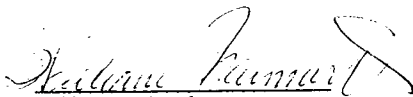
servers shall not be eligible voters or have any official connection with any of the labor organizations involved." (Emphasis supplied.)

In this posture, I find it difficult to escape the conclusion that servers are doing considerably more than aiding the Assistant Secretary perform his functions under the Order. While the Complainant characterizes their role as non-adversary, the election itself is "adversary" in the sense that two parties are competing with each other for the votes of the employees. To the extent that an observer looks out for the interests of the party he represents - challenging voters whom he considers not eligible, assuring that the other party gains no advantage - he is a guardian of the sponsor's interests. As such, one can scarcely doubt that the 4 employees in the case at bar were selected by the union to represent its interests at the election. Although these individuals assisted in the proper conduct of the election, I conclude they essentially represented the union herein. Under the rationale in A/SLMR No. 139 they are, in effect, working for the union and Respondent is not obligated to grant them official time therefor.

Accordingly, I would not find that Respondent violated Sections 19(a)(1) or (2) by denying official leave to Burke Jones, Michael Keefer, Larry Polett and Paul Wood for time spent by them as observers at the election herein. Moreover, I conclude and find a fortiori, that Michael Keefer and Larry Polett are not entitled to be granted official leave for time spent at the meeting called to orient observers to their duties, since they appeared thereat as representatives of the union preparatory to exercising their roles as union observers on June 5, 1972. The denial by Respondent to them of official leave for attending such meeting on June 2, 1972 does not violate Section 19(a)(1) or (2) of the Order.

RECOMMENDATIONS

In view of my findings and conclusions heretofore stated, I recommend that the complaint against Respondent be dismissed.



William Naimark  
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE MAPPING AGENCY  
TOPOGRAPHIC CENTER,  
PROVIDENCE OFFICE,  
WEST WARWICK, RHODE ISLAND  
A/SLMR No. 310

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 1884, AFL-CIO (AFGE), the exclusive representative of certain employees at the Activity. Specifically, the AFGE seeks to clarify the status of employees classified as project directors, requesting that they be included in its exclusively recognized unit located at the Activity. The Activity contends that employees in this classification are management officials within the meaning of the Order and that, therefore, they should be excluded from the exclusively recognized unit.

In determining whether project directors are management officials, the Assistant Secretary applied the criteria established in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. He concluded that the evidence did not establish that such employees were management officials. In this connection, the Assistant Secretary noted that the role of the project directors (general cartographers and cartographic engineer) had not been shown to extend beyond the role of an expert or professional rendering resource information or recommendations with respect to the policy in question. Under these circumstances, the Assistant Secretary found that the project directors are not management officials within the meaning of the Order and should be included in the existing unit.

Dated: April 2, 1973

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE MAPPING AGENCY  
TOPOGRAPHIC CENTER,  
PROVIDENCE OFFICE,  
WEST WARWICK, RHODE ISLAND 1/

Activity

and

Case No. 31-6113(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1884, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer James E. Cannon. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

The American Federation of Government Employees, Local 1884, AFL-CIO, herein called the Petitioner, is the exclusive representative of certain employees of the Activity. 2/ In this proceeding, it seeks to clarify the status of employees classified as project directors, requesting that they be included in its exclusively recognized unit 3/ located at the Defense Mapping Agency, Topographic Center, Providence Office, West Warwick, Rhode Island. The Activity contends that the employees in this

1/ The name of the Activity appears as amended at the hearing.

2/ The Petitioner was granted exclusive recognition in 1962.

3/ The exclusively recognized unit includes professional and non-professional employees.

classification are management officials within the meaning of the Order and that, therefore, they should be excluded from the exclusively recognized unit.

The Headquarters Defense Mapping Agency is an organization of the Department of Defense. Reporting to the Agency is the Defense Mapping Agency Topographic Center. 4/ Its mission is to prepare topographic products and allied materials and to make such materials ready for reproduction. The employees involved herein are located in the Topographic Center, Providence Office, West Warwick, Rhode Island. The Activity, which is headed by a Director, currently employs six project directors, 5/ five of whom are classified as general cartographers. The five general cartographers have the same job descriptions and have similar duties and responsibilities. The remaining project director is classified as a cartographic engineer. He has a different job description and different duties and responsibilities from the general cartographers.

The record reveals that the project director performs a staff function and is located, organizationally, in the Operations Division of the Activity. The Operations Division is headed by a Chief who reports directly to the Director of the Activity.

The record discloses that the project director (general cartographer) coordinates, expedites, programs and assists the operating Division Chiefs to accomplish the assigned mapping projects. He is responsible for insuring the most effective use of the office's production resources, and participates in the development of the quality assurance program and in the preparation of special technical reports. The record discloses that all mapping projects are determined by the Washington, D.C., Office. Accompanying all project assignments from the Washington, D.C., Office is a project assignment memo (PAM) or project assignment instruction (PAI), which consists of general instructions and specifications for the project, and a map preparation guide (MPG), which contains all of the source material for the project and instructions for their utilization. The project director reviews and evaluates these source materials to determine their completeness and quality, the utility of

4/ The record discloses that under the Defense Mapping Agency Topographic Center, which is located in Washington, D.C., there are four field offices located in Louisville, Kentucky; Kansas City, Missouri; San Antonio, Texas; and West Warwick, Rhode Island. Also, under the Defense Mapping Agency Topographic Center are two distribution centers: the Topographic Center Depot, Baltimore, Maryland, and the Topographic Center Depository, Omaha, Nebraska.

5/ The record discloses that all of the project directors are General Schedule employees at the GS-12 level, and are all classified as cartographers.



e data involved, and how the materials can best be utilized to  
complete the particular project. After review, the project director  
prepares recommendations for implementation of the project. These  
recommendations are reviewed at a project meeting attended by the  
Director, Assistant Director, Division Chiefs and Branch Chiefs before a  
final project assignment memo is prepared. This project assignment memo  
comes an operating guide and is transmitted to the various divisions  
involved in the project. The project director also conducts and attends  
other meetings subsequent to the initial project meeting concerning the  
progress of the project. He also may perform administrative assignments  
for the Director and draw up standard operating procedures for a  
particular situation involved. Although, in many instances, the original  
concepts developed by the project director are retained, the record  
reveals that their recommendations undergo close scrutiny and are not  
necessarily accepted or acted upon without change.

The evidence establishes that the employee classified as a project  
director (cartographic engineer) also is assigned to the Operations  
Division. He works under the general supervision of the Operations  
Division Chief, who makes assignments and gives direction principally  
through a discussion of the overall objectives, critical issues, and  
policy matters involved. His duties as an engineer include an independent  
determination of the technical action necessary in a particular matter  
and he has wide latitude in expressing his professional knowledge,  
skills and ideas to plan and carry out assignments. He acts as technical  
advisor to the Office Chief for building and equipment repairs, modifica-  
tions, or additions, including electrical, hydraulic, air conditioning  
and mechanical systems. Also, he acts as advisor to the Incentive  
Awards Committee determining the feasibility of suggestions involving  
proposed or existing equipment or materials. Moreover, he reviews  
proposals for equipment development and makes recommendations as to  
whether or not equipment should be purchased. As in the case of the  
project director (general cartographer), while in many instances it  
appears that the original concepts developed by the project director  
(engineer) are retained, his recommendations undergo close scrutiny and  
are not necessarily accepted or acted upon without change.

Under all of the circumstances, I find that the Activity's project  
directors (general cartographers and cartographic engineer) do not meet  
the criteria for a management official set forth in Department of the  
Air Force, Arnold Engineering Development Center, Air Force Systems  
Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. In that  
case, the Assistant Secretary found, among other things, that a  
"management official" within the meaning of the Order is an employee  
having authority to make, or influence effectively the making of,  
policy necessary to the Activity with respect to personnel, procedures,  
or programs. It was noted that in making a determination in this regard  
consideration be concentrated on whether the role performed by such an  
employee is that of an expert or professional rendering resource

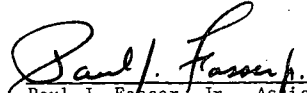
information or recommendations with respect to the policy in question,  
or whether the employee's role extends beyond this to the point of  
active participation in the ultimate determination as to what the  
policy, in fact, will be. In the instant case, I find that the role  
of the project directors (general cartographers and cartographic  
engineer) does not extend beyond the role of an expert or professional  
rendering resource information or recommendations with respect to the  
policy in question. Accordingly, I find that the project directors  
are not management officials within the meaning of the Order and should  
be included in the existing unit. 6/

In these circumstances, I find that the existing unit should be  
clarified to include project directors. 7/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein,  
in which the exclusive recognition was granted in 1962 to American  
Federation of Government Employees, Local 1884, AFL-CIO, located at the  
Defense Mapping Agency, Topographic Center, Providence Office, West  
Warwick, Rhode Island, be, and hereby is, clarified by including in the  
said unit all project directors.

Dated, Washington, D.C.  
September 28, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

6/ I reject the contention that I am bound to accept as determinative  
in this case the fact that an Area Administrator certified a unit  
which excluded project directors as "management officials." Army and  
Air Force Exchange Service, White Sands Missile Range Exchange, White  
Sands Missile Range, New Mexico, A/SLMR No. 25.

7/ I also reject the contention that I am bound to accept as determina-  
tive in this case Agency directives or policies defining a  
"management official." Charleston Naval Shipyard, A/SLMR No. 1.

September 28, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,  
EAST ORANGE, NEW JERSEY  
A/SLMR No. 311

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The American Federation of Government Employees (AFL-CIO), Local 2735 (AFGE), sought an election in a unit composed of all of the Activity's regular full-time and regular part-time nonprofessional General Schedule and Wage Grade employees at the Veterans Administration Hospital located in East Orange, New Jersey, and the Outpatient Clinic located in Newark, New Jersey. The Activity agreed that the claimed unit was appropriate. The National Federation of Federal Employees, Local 1154 (NFFE), which held an exclusive recognition for employees at the Hospital, claimed that the Outpatient Clinic constituted an accretion to its established unit and that its negotiated agreement covering the exclusively recognized unit, including the Outpatient Clinic, barred the AFGE's petition.

In the Assistant Secretary's view, the NFFE's current agreement was terminable at will by either party after sixty days notice was provided. Under these circumstances, he found that such an agreement did not constitute a bar to the petition herein.

With respect to the appropriateness of the claimed unit, the record revealed that, pursuant to a Veterans Administration order, the Outpatient Clinic had been transferred administratively from the jurisdiction of the Veterans Administration Regional Office in Newark to the Hospital in East Orange. As a result of the consolidation of services the responsibility for all medical services at the Outpatient Clinic was transferred to the Chiefs of Services located at the Hospital in East Orange who determined all staffing requirements at both duty stations and made effective decisions in any disciplinary matter. Further, personnel administration was centralized at the Hospital where all of employees' records are maintained and recruitment and disciplinary matters are processed. The record also revealed that the employees in the petitioned for unit share common skills, are subject to same personnel policies and are in the same areas of consideration for purposes of reductions in force or promotions.

Under all of these circumstances, the Assistant Secretary found that the petitioned for employees shared a clear and identifiable

community of interest and that such a comprehensive unit, encompassing employees who were covered by the same overall supervision and the same personnel policies and who were engaged in essentially the same job functions, will promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,  
EAST ORANGE, NEW JERSEY

Activity

and

Case No. 32-2583(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES (AFL-CIO), LOCAL 2735

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1154

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491,  
as amended, a hearing was held before Hearing Officer Laurence J.  
Redmond. The Hearing Officer's rulings made at the hearing are free  
from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs submitted  
by the Petitioner and Intervenor, 1/ the Assistant Secretary finds:

1/ The Petitioner moved that the brief filed on behalf of the  
Intervenor be disregarded based on the view that it was filed  
pursuant to an untimely request for an extension of time, which  
request, nevertheless, was granted by the Regional Administrator.  
Under the particular circumstances of this case and noting the  
fact that the Intervenor's brief was received during the extension  
period granted by the Regional Administrator, the Petitioner's  
motion is hereby denied.

1. The labor organizations involved claim to represent certain  
employees of the Activity.

2. The Petitioner, American Federation of Government Employees  
(AFL-CIO), Local 2735, hereinafter called AFGE, seeks an election in a  
unit composed of all regular full-time and regular part-time General  
Schedule and Wage Grade employees of the Veterans Administration Hospital,  
East Orange, New Jersey, and the Outpatient Clinic, Newark, New Jersey,  
including non-appropriated fund Canteen Service employees; excluding all  
professionals, managerial employees, supervisors, guards, purchase and  
hire employees, 2/ and employees of the Personnel Division whose work is  
other than clerical. 3/

The Activity agrees the petitioned for unit is appropriate. The  
Intervenor, National Federation of Federal Employees, Local 1154, here-  
inafter called the NFFE, which represents certain employees at the  
Activity, contends that it is party to an agreement with the Activity  
which constitutes a bar to the AFGE's petition in this matter. In this  
regard, it asserts that the employees of the Outpatient Clinic who are  
included in the petitioned for unit, have accreted to the NFFE's  
existing unit and, therefore, are covered by the above-noted agreement  
bar.

The record reveals that in 1965 the NFFE was granted exclusive  
recognition in a unit of all employees of the Activity, including those  
in the Canteen and the Restoration Center, 4/ and excluding professionals,  
management and supervisory employees, and employees in the Personnel  
Division whose work is other than clerical. A Basic Agreement covering  
this unit became effective November 17, 1968. Article X of the Agreement  
provided that it would have a two-year duration and would be subject to  
automatic renewal for additional two-year periods unless modified or  
terminated. Further, the Agreement provided that it could be modified  
at any time so long as notice was given at least 60 days prior to the

2/ The parties stipulated that purchase and hire employees do not  
share a community of interest with the employees in the petitioned  
for unit. In view of this stipulation and noting also the Assistant  
Secretary's decision in Veterans Administration Hospital, East  
Orange, New Jersey, A/SLMR No. 92, which dealt, in part, with such  
employees, I find that purchase and hire employees should be  
excluded from the unit found appropriate herein.

3/ The petitioned for unit appears essentially as amended at the  
hearing. At the conclusion of the hearing, the AFGE stated that  
it would represent any unit found appropriate by the Assistant  
Secretary.

4/ The record shows that, pursuant to a Veterans Administration  
order, the Restoration Center has been discontinued as a separate  
administrative entity.

anniversary of the Agreement's effective date. 5/ Article XI of the Agreement provided that "Either party may, after giving the other party 60 days notice, terminate this Basic Agreement and/or any Supplemental Agreement hereto after a period of two (2) years from the effective date."

In my view, the language of Article XI renders the Agreement terminable at will upon 60 days notice by either party at any time following a period of two years after the original effective date of the Agreement, November 17, 1968. As has been held previously, "it is the power to terminate an agreement at will, and not necessarily the actual exercise of that power, which creates the uncertainty which is inconsistent with the agreement bar principle." 6/ Under these circumstances, I find that the Agreement between the NFFE and the Activity does not constitute a bar to the petition herein. Accordingly, the NFFE's motion to dismiss the petition on the basis of an agreement bar is hereby denied.

#### The Unit

The Activity employs approximately 1950 professional, nonprofessional and supervisory employees. The petitioned for unit contains approximately 875 employees, 800 stationed at the Hospital in East Orange, and 75 stationed at the Outpatient Clinic located in Newark. The record reveals that of the 75 employees stationed at the Outpatient Clinic, approximately 50 are employed in the Medical Administration Service as stenographers and file clerks. On January 1, 1967, the Outpatient Clinic was transferred administratively from the jurisdiction of the Newark Regional Office of the Veterans Administration to that of the Activity. 7/

The record shows that presently the Activity is under the direction of a Hospital Director. Serving under the Hospital Director is an Assistant Hospital Director who, among other things, is responsible for the administrative and housekeeping details attendant to the operation of the Hospital, and who supervises such services as Personnel, Medical Administration and the Canteen. Directly under the Assistant Hospital Director is the Chief of Staff who is responsible for all of the

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5/ On June 19, 1969, pursuant to this latter provision, the parties entered into a Supplemental Agreement.

6/ See Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89.

7/ Prior to this date, no line relationship existed between these two facilities, which were characterized by similar organizational structures and offered many of the same medical services.

medical services including, among others, radiology, laboratory, nursing and dental. Since its consolidation with the Activity, the Outpatient Clinic is considered a medical service and is headed by a Chief who, like the other medical services chiefs, reports directly to the Chief of Staff. Also, since the consolidation, the Medical Administration Service employees at the Outpatient Clinic have been brought under the direction of a Supervisory Medical Administrative Specialist, GS-10, who reports to the Chief of the Medical Administration located at the Activity. It appears that other employees in the petitioned for unit at the Outpatient Clinic are under the general supervision of the Chiefs of particular service involved located at the Activity. These Chiefs have the authority to determine staffing requirements at the Outpatient Clinic and to make the effective decisions in any disciplinary matter arising at that facility based upon a recommendation by the immediate workplace supervisor.

The record discloses that the personnel administration for employees of both Hospital and the Outpatient Clinic has become centralized with all employee records being maintained, recruitment and discipline matters being processed, and position classifications being made at the Hospital. 8/ In addition, many of the same job classifications exist at both the Hospital and Outpatient Clinic and the employees at both locations are subject to the same personnel policies and are in the same area of consideration for purposes of promotion or reduction in force actions. It appears, also, from the record that on a "coverage basis," employees stationed at the Hospital in East Orange fill in temporarily for similarly classified employees at the Outpatient Clinic who may be on annual or sick leave. Further, Wage Grade employees, such as electricians or carpenters, stationed in East Orange perform work at the Outpatient Clinic.

Based on all of the circumstances noted above, I find that the employees in the claimed unit at the Hospital and the Outpatient Clinic share a clear and identifiable community of interest and that such a comprehensive unit, encompassing employees who are covered by the same overall supervision and the same personnel policies and who are engaged in essentially the same job functions, will promote effective dealings and efficiency of agency operations. 9/

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8/ One personnel officer of the Activity is designated as the liaison with the Outpatient Clinic and, in this regard, he travels to Newark to perform this function.

9/ In view of the disposition herein, I find it unnecessary to decide whether the Outpatient Clinic constitutes an accretion to the existing unit represented by the NFFE.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All regular full-time and regular part-time General Schedule and Wage Grade employees of the Veterans Administration Hospital, East Orange, New Jersey, and the Outpatient Clinic, Newark, New Jersey, including the Canteen Service employees, 10/ excluding professional employees, 11/ employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 12/

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who do not appear in person at the polls. Ineligible to vote are employees who

10/ The parties stipulated and the record supports that Canteen Service employees should be included in the unit. See also, in this regard, Veterans Administration Hospital, East Orange, New Jersey, cited above.

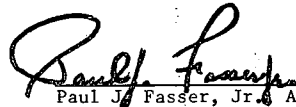
11/ The NFFE contended that an employee in the job classification Associate Social Worker was a professional employee and, therefore, should be excluded from the unit. The record reveals, however, that an employee in this job classification is required only to have a general academic degree and that the job functions associated with this position do not involve a consistent exercise of discretion and judgment. Accordingly, I find an employee in this classification is not a professional within the meaning of the Order. Cf. Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

12/ The parties stipulated and the record supports that "student employees" do not have reasonable expectancy of continued employment. Accordingly, I find that they should be excluded from the unit found appropriate.

-5-

quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees (AFL-CIO), Local 2735; the National Federation of Federal Employees, Local 1154; or by neither.

Dated, Washington, D.C.  
September 28, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-6-

October 1, 1973

A/SLMR No. 312

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE INTERIOR  
BUREAU OF MINES, WESTERN  
ADMINISTRATIVE OFFICE,  
DENVER, COLORADO  
A/SLMR No. 312

The Petitioner, National Federation of Federal Employees, Local 1546, (NFFE), sought an election in a unit composed of all professional and nonprofessional General Schedule (GS) and Wage Grade (WG) employees of the Bureau of Mines physically located in the Denver Metropolitan area, serviced by the Western Administrative Office (WAO) Branch of Personnel, headquartered in Denver. The parties were in essential agreement on the appropriateness of the claimed unit.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition under the Order. In reaching this conclusion, the Assistant Secretary noted that the claimed unit would include all employees of the Bureau of Mines in the Denver area; that the Chief of the WAO Branch of Personnel is responsible for administering personnel programs for all employees in the claimed unit; that any negotiated agreement covering the employees in the petitioned for unit would be negotiated and signed by the Chief of the WAO Branch of Personnel; that, for the most part, employees in the claimed unit are engaged in providing services and advice, rather than performing research functions; that employees in the claimed unit share common working conditions and facilities; that the area of consideration for reductions-in-force and certain promotions is the local commuting area of Denver; and that there has been substantial interchange between employees of the various organizations within the petitioned for unit. In addition, the Assistant Secretary found that employees of the Health and Safety Analysis Center, which was formerly within the Bureau, but which, due to a recent reorganization, is now part of the newly created Mine Enforcement and Safety Administration of the Department of the Interior, continued to share a community of interest with the employees of the Bureau serviced by the WAO, and should be included in the unit found appropriate.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR  
BUREAU OF MINES, WESTERN  
ADMINISTRATIVE OFFICE,  
DENVER, COLORADO

Activity

and

Case No. 61-1972(RO)

NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES,  
LOCAL 1546 1/

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Lyle F. Meyer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Petitioner, the National Federation of Federal Employees, Local 1546, hereinafter called NFFE, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The NFFE seeks an election in a unit of all professional and nonprofessional General Schedule (GS) and Wage Grade (WG) employees of the Bureau of Mines physically located in the Denver Metropolitan area, serviced by the Western Administrative Office Branch of Personnel headquartered in Denver, including all temporary employees with an expectation of employment for a period of 90 days or more, excluding all management officials, student aides, employees engaged in Federal

1/ The name of the Petitioner appears as amended at the hearing.

personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. 2/

The Activity and the NFFE are in essential agreement that the claimed unit is appropriate.

The Bureau of Mines, hereinafter called the Bureau, is a bureau of the Department of the Interior. Its primary mission involves energy, metallurgical and mining research and development, mine health and safety research, and mineral supply. The record indicates that in addition to the various administrative components of the Bureau which report to its Director, there are within the Bureau a number of programmatic functions performed under the supervision of the Deputy Director for Mineral Resources and Environmental Development (MRED). While certain of these administrative and programmatic functions are performed at the Bureau headquarters in Washington, D.C., others are located at various sites throughout the country, including Denver, Colorado.

The record reflects that the petitioned for unit encompasses all employees of the Bureau who are located in Denver. These employees are in certain administrative organizations of the Bureau, including the WAO and also are in a number of organizations of MRED.

The WAO, through its branches of personnel and procurement property operations, provides various administrative services for designated field organizations of the Bureau, including all the employees located in Denver. 3/ The record reveals that the Chief of the WAO Branch of Personnel is solely responsible for the administration of all personnel programs affecting the petitioned for employees of the Bureau in Denver, whereas the directors of organizations outside the Denver area, even though their organizations are within the WAO, have been delegated certain authority with respect to personnel actions, such as hiring and promotions. In addition, the evidence establishes that while any negotiated agreement pertaining to the employees in the claimed unit could be negotiated and signed by the Chief of the WAO Branch of Personnel, agreements for individual field organizations of the Bureau, which are

The claimed unit appears essentially as amended at the hearing. The unit as described would appear to exclude employees of the Health and Safety Analysis Center, located in Denver, which was formerly within the Bureau of Mines, but which, due to a reorganization, is now part of the newly created Mine Enforcement and Safety Administration of the Department of the Interior. In this regard, however, the record reveals that the NFFE, in fact, intended to include within the unit claimed appropriate, eligible employees of the Health and Safety Analysis Center which continues to receive its personnel services from the Bureau of Mines' Western Administrative Office (WAO) Branch of Personnel.

The Eastern Administrative Office, located in Pittsburgh, Pennsylvania, provides administrative services for other designated field organizations of the Bureau.

located outside the Denver area, may be negotiated and signed by the directors of those respective installations.

The record reveals that monthly staff meetings are held among all of the Denver area organizations of the Bureau; that most of the employees located in Denver are engaged in providing services and advice to other Bureau operations, while other employees serviced by the WAO, who are located outside of the Denver area, perform research functions; that all of the employees in Denver are located within the immediate area of Denver Federal Center and work uniform hours; and that for all the employees of the Bureau located in Denver, regardless of organization, the area of consideration for reductions-in-force, and for all promotions through GS-7 as well as all WG promotions, is the Denver commuting area. Moreover, the evidence indicates that while in the past two years there has been minimal interchange between employees of Bureau organizations located in Denver and those located outside Denver, there has been substantial interchange between employees of the Denver area organizations.

Under all of the foregoing circumstances and noting the agreement of the parties with respect to the appropriateness of the petitioned for unit, I find that the employees sought share a clear and identifiable community of interest, and that such a unit will promote effective dealings and efficiency of agency operations. In reaching the foregoing disposition particular note was taken of the fact that the claimed unit would include all of the employees of the Bureau in the Denver area; that the Chief of the WAO Branch of Personnel is responsible for administering personnel programs for all employees in the claimed unit; that any negotiated agreement covering the employees in the petitioned for unit would be negotiated and signed by the Chief of the WAO Branch of Personnel; that, for the most part, employees in the claimed unit are engaged in providing services and advice, rather than performing research functions; that employees in the claimed unit share common working conditions and facilities; that the area of consideration for reductions-in-force and certain promotions is the local commuting area of Denver; and that there has been substantial interchange between employees of the various organizations within the petitioned for unit.

Moreover, I find that the employees of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, noted above at footnote 2, continue to share a clear and identifiable community of interest with the employees of the Bureau in Denver who are serviced by the WAO, and that a unit consisting of both groups of employees would be appropriate for the purpose of exclusive recognition under the Order. In this connection the record reflects that the employees of the Health and Safety Analysis Center are still serviced by the Bureau of Mines' WAO Branch of Personnel; are located in the same geographic areas as other employees serviced by the WAO Branch of Personnel; and are performing the same job functions as they performed when they were part of the Bureau of Mines. In addition, they share common working conditions and facilities with the employees of the Bureau of Mines located in Denver, and the record indicates there has been extensive interchange

between employees of the Health and Safety Analysis Center and those of the Denver area organizations of the Bureau of Mines.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended.

All professional and nonprofessional General Schedule and Wage Grade employees of the Bureau of Mines located in the Denver metropolitan area, and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 4/

As noted above, the unit found appropriate includes professional employees. 5/ The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professional unless the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desire of the professional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All professional employees of the Bureau of Mines located in the Denver metropolitan area, and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

4/ As noted above, the petition herein sought to include all "temporary employees with an expectation of employment for a period of 90 days or more." However, the evidence does not indicate that there are any such temporary employees, with the possible exception of the "student aides" who are specifically excluded by the petition. Nor does the evidence show whether the exclusion of "student aides" is warranted in that they have no reasonable expectancy of future employment. In these circumstances, no finding is made as to the eligibility of these categories of employees.

5/ The parties stipulated that the claimed unit includes professionals. However, as the record does not set forth sufficient facts with respect to the employees alleged to be professionals within the meaning of the Order, I shall make no finding as to which employee categories within the claimed unit are professional.

Voting group (b): All nonprofessional employees of the Bureau of Mines located in the Denver metropolitan area, and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding all professional employees, all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled as to whether or not they wish to be represented by NFFE.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the NFFE. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether or not the NFFE was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following employees will constitute a unit appropriate for purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Bureau of Mines located in the Denver metropolitan area and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate



units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

October 1, 1973

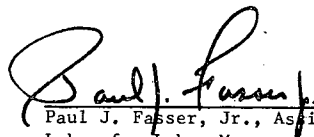
(a) All professional employees of the Bureau of Mines located in the Denver metropolitan area, and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding non-professional employees, all employees engaged in Federal personnel work other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional employees of the Bureau of Mines located in the Denver metropolitan area, and of the Health and Safety Analysis Center of the Mine Enforcement and Safety Administration, serviced by the Western Administrative Office Branch of Personnel; excluding professional employees, all employees engaged in Federal personnel work other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1546.

Dated, Washington, D.C.  
October 1, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION, FEDERAL  
AVIATION ADMINISTRATION, FLIGHT INSPECTION  
DISTRICT OFFICE, BATTLE CREEK, MICHIGAN  
A/SLMR No. 313

The subject case arose as the result of a representation petition filed by Local 3433, American Federation of Government Employees, AFL-CIO, (AFGE) seeking a unit of all employees of the Flight Inspection District Office (FIDO) at Battle Creek, Michigan. The Activity agreed that the unit, prior to a reorganization of July 8, 1973, was appropriate, but contended that a unit limited to employees of a FIDO [designated as a Flight Inspection Field Office (FIFO) after the reorganization] would be inappropriate after the reorganization and would not promote effective dealings and efficiency of agency operations. In this connection, the record indicated that, while before the reorganization employees of all FIDO's, including those in the petitioned for unit, were under the administrative and operational control of regional offices of the Federal Aviation Administration (FAA), the reorganization authorized the creation of a Flight Inspection National Field Office (FINFO) which would assume from the regions operational control of the flight inspection program.

The Assistant Secretary found that the petitioned for unit was appropriate for the purpose of exclusive recognition and he directed an election in such unit. In reaching this conclusion, he noted that after the reorganization there would, in fact, be no change in the physical location of the employees in the Battle Creek FIFO; the employees' duties and functions would be essentially the same and they would remain under the same supervisory structure; and the immediate day to day operations of the FIFO would remain substantially the same as before the reorganization.

The Assistant Secretary also found, among other things, that employees classified as Aircraft Commanders were supervisors within the meaning of Section 2(c) of the Order and that the Secretary to the Activity Chief was a confidential employee. Therefore, he excluded employees in these classifications from the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION, FEDERAL  
AVIATION ADMINISTRATION, FLIGHT INSPECTION  
DISTRICT OFFICE, BATTLE CREEK, MICHIGAN 1/

Activity

and

Case No. 52-4894

LOCAL 3433, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Hal W. Swain. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 2/

Upon the entire record in this case, including the brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The AFGE seeks a unit consisting of all professional and nonprofessional employees at the Battle Creek, Michigan, Flight Inspection District Office, excluding supervisors, managers, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. 3/

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1/ The name of the Activity appears as amended at the hearing.

2/ During the hearing the Activity moved to dismiss the petition on the grounds that the Petitioner, Local 3433, American Federation of Government Employees, AFL-CIO, herein called AFGE, was not prepared to present evidence. Noting that the AFGE did, in fact, proceed and the hearing was not delayed, I hereby deny the motion to dismiss the petition.

3/ Although the petition was not formally amended, the parties stipulated that, in fact, there were no professional employees employed at the Battle Creek facility involved herein.

The Activity conceded that, absent plans for a reorganization which was scheduled to occur on July 8, 1973, the unit petitioned for by the AFGE would be appropriate. However, the Activity took the position that because of the upcoming reorganization, such a unit would no longer be appropriate and would not promote effective dealings and efficiency of agency operations as required by Section 10(b) of the Order.

The record shows that prior to the reorganization of July 8, 1973, the Flight Inspection District Office (FIDO) at Battle Creek, Michigan, was one of 16 FIDO's under the administrative and operational control of five regional offices of the Federal Aviation Administration (FAA). The FIDO at Battle Creek was a component of the Central Region of FAA, headquartered in Kansas City, Missouri. Other FIDO's in the Central Region were located at Minneapolis, Minnesota, and Kansas City, Missouri. The basic mission of the Activity is the in-flight inspection of air navigational aids, the development of instrument flight procedures, and the maintenance of Activity aircraft. Each FIDO had a specific geographical area of responsibility, with the Battle Creek FIDO responsible for the States of Michigan, Ohio, Indiana and the eastern section of Illinois. The Battle Creek FIDO is composed of 39 employees, 5 of whom are acknowledged to be supervisors. 4/ The remaining employees are classified as clerical employees, aircraft crew members, maintenance employees and support personnel. 5/ The record reveals that all of the employees in the claimed unit have close day to day work contacts with each other and have access to all Activity facilities. Prior to the reorganization, the FAA regional office handled all matters relating to personnel, labor relations, and administrative matters for the FIDO's under its direction and issued all work assignments. Additionally, the area of consideration for promotions and reductions-in-force actions for all employees in a FIDO were limited to the FIDO's within the particular region involved.

The reorganization of flight inspection services was approved by the Secretary of Transportation on July 16, 1971. The record reveals that the reorganization plan authorized the creation of the Flight Inspection National Field Office (FINFO) and that the FINFO has been a part of the FAA since September 21, 1972. Under the reorganization plan, the regional concept was eliminated and operational control of the flight inspection program passed from the regions to the FINFO. Thus, work assignments would flow directly from the FINFO to the FIDO's [now designated as Flight Inspection Field Offices (FIFO's)] which, in turn, would report to, and receive direction from the FINFO. All personnel records were to be transferred to the Aeronautical Center Manpower Division

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4/ The alleged supervisory status of 6 Aircraft Commanders, GS-13, is discussed below.

5/ All of the Activity's employees are in the General Schedule (GS) category except for one Wage Board foreman and four Wage Board mechanics.

ated at Oklahoma City, Oklahoma, which would assume responsibility for providing personnel and labor-management relations support to the various FIFO's. At the same time, the area of consideration for promotions and reductions-in-force actions for all FIFO employees was to expand from FIFO's in a region to all FIFO's on a nationwide basis.

The record reveals that, although some of the above-described changes are to occur immediately after July 8, 1973, other changes contemplated in the reorganization would be implemented only over a substantial period of time. Thus, the evidence indicates that the eventual reduction from 7 FIFO's (including the Battle Creek facility), the overall reduction from 867 positions to 566 positions, and the planned reduction and conversion from 43 reciprocal engine aircraft to 23 light jet planes, will occur over at least a 2 year period. In this connection, testimony disclosed that employees at the Battle Creek FIFO will be performing the same duties following the reorganization as before; that the individual FIFO's will remain under the same supervisory structure as the FIFO's; that there will be little change in the employees' day to day activities for at least one year; and that the workload will remain basically the same, except that there will be a high degree of training for all personnel during this period of time. Further, the Battle Creek FIFO is not scheduled to receive its new aircraft until July and November 1974, and, although the reorganization will bring some employees from the various FIFO's into contact with other FIFO employees, the record indicates that, except for training details, only FIFO employees in aircrews would be subject to temporary details away from Battle Creek for maintenance or special projects, and there was no evidence that such limited details will be regular in nature.

Based on the foregoing, I find that the employees in the petitioned unit share a clear and identifiable community of interest. In this regard, noted particularly is the fact that subsequent to the reorganization the employees of the Battle Creek FIFO will remain at the same physical location as prior to the reorganization; that they will be performing essentially the same duties and functions under the same supervisory structure as before; and that the day to day operations of the FIFO will remain substantially the same. Under these circumstances, I find that the unit petitioned for is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended, and that the record does not establish that such a unit will hinder effective dealings and efficiency of agency operations. 6/

#### Aircraft Commanders, GS-13

The Activity contends that six Aircraft Commanders, GS-13, located at the Battle Creek FIFO are supervisors who should be excluded from any

Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC 71A-9, in which the Federal Labor Relations Council ruled that evidence on whether a requested unit will promote effective dealings and efficiency of agency operations is within the special knowledge of, and must be submitted by, the agency involved.

unit found appropriate. The record reflects the Aircraft Commanders are in charge of the aircrew which is composed of a Co-pilot, GS-12, and an Electronic Technician, GS-11. 7/ The Aircraft Commander is responsible for directing the work of his crew, which crew is scheduled to work together as much as is feasible. In connection with his duties, the Aircraft Commander decides whether overtime will be performed when a flight inspection mission is in progress, and he also prepares a performance rating for each aircrew member and makes initial recommendations for awards and disciplinary actions as to the aircrew members under his control. Further, the views and recommendations of the Aircraft Commander regarding the promotion of an aircrew member are solicited by the Activity and are given weight in determining whether a promotion is warranted. The Aircraft Commander also attends supervisory meetings and occasionally attends staff meetings.

Based on the foregoing, I find that the Aircraft Commanders, GS-13, are supervisors within the meaning of Section 2(c) of the Order as they possess the authority, in the interest of the Activity, to assign and direct work, evaluate aircrew members and initiate recommendations regarding aircrew members' performance. As the evidence establishes that Aircraft Commanders utilize independent judgement in the exercise of the above noted authority, I conclude that they should be excluded from the unit found appropriate. 8/

#### Confidential Employees

The Activity contends that the four clerical employees in the Battle Creek FIFO, i.e.-one Secretary to the FIFO Chief, GS-6; one Secretary, GS-5; one Aviation Procedures Clerk (Secretary, GS-5); and one Clerk-Stenographer, GS-3,-are confidential employees who should be excluded from any unit found appropriate.

The Secretary to the FIFO Chief, GS-6, is involved in handling records relating to personnel and labor relations matters of the FIFO employees. In this connection, she processes paperwork involving disciplinary actions, awards, recommendations, reduction-in-force actions, and matters relating to the FIFO Chief's responsibility for labor relations matters. The employees in the three remaining positions asserted to be confidential are assigned to a unit Chief and, among other things, they are involved in the routine typing and processing of materials relating to employee performance ratings, recommendations for awards, reprimands, and commendations or letters of appreciation to unit employees. 9/

7/ On infrequent occasions, two electronic technicians may be part of the crew.

8/ Cf. United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11, A/SLMR No. 297; Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12, A/SLMR No. 298; and Atomic Energy Commission, Idaho Operations Office, Idaho Falls, Idaho, A/SLMR No. 299.

9/ On occasion, all clericals fill in for each other during absences, illnesses and vacations.

In prior holdings, it has been determined that when an employee acts and assists persons who formulate and effectuate management policies in the field of labor relations, such an employee is a confidential employee who should be excluded from a bargaining unit. However, it also has been found that employees who merely have access to personnel or statistical records are not deemed to be confidential employees. 10/ In my view, the record herein indicates that the Secretary to the FIFO Chief should be excluded from the unit because she serves in a confidential capacity to a management official responsible for the formulation and effectuation of the Activity's labor-management relations policies. However, I find that the evidence fails to establish that the Activity's remaining clerical employees are confidential employees as their duties are routine in nature. Accordingly, I find that the Secretary, GS-5, the Aviation Procedures Clerk (Secretary), GS-5, and the Clerk-Typographer, GS-3, should be included in the unit found appropriate.

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All employees employed at the Battle Creek, Michigan, Flight Inspection Field Office, excluding the Secretary to the Chief, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 11/

#### DIRECTION OF ELECTION

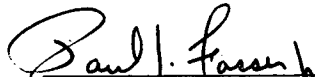
An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but no later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough including those in the military service who

10/ See Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69 and Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111.

11/ The name of the Activity appears as modified pursuant to the reorganization discussed above. As noted above at footnote 3, the parties stipulated there were no professional employees in the unit.

appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 3433, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.  
October 1, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

October 5, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SMALL BUSINESS ADMINISTRATION,  
MIAMI DISTRICT OFFICE  
SLMR No. 314

This case involved a representation petition filed by the American Federation of Government Employees, Local 99, AFL-CIO (AFGE), seeking an election in a unit of all nonprofessional employees of the Miami District Office of the Small Business Administration (SBA), which encompasses the Miami District Office and the Tampa Post-of-Duty Station. The Activity took the position that the petitioned for unit was inappropriate and that the appropriate unit would consist of all employees of Region IV of the SBA. The AFGE currently is the exclusive representative of a unit of "technical" employees of the Miami District Office consisting of certain professional and nonprofessional employees.

The Assistant Secretary concluded that, under all of the circumstances, the employees of the Miami District Office and the Tampa Post-of-Duty Station possessed a clear and identifiable community of interest. In reaching this determination, the Assistant Secretary noted (1) that all employees of the Miami District Office and the Tampa Post-of-Duty Station have a common mission; are subject to the same personnel practices and policies; are subject to the direction and guidance of the District Director in Miami; have limited work contacts with employees of other District Offices within the Region; and (2) that a unit comprised of employees of the Miami District Office and Tampa Post-of-Duty Station would be substantially consistent with the established bargaining history of the Miami District Office.

In view of the fact that the AFGE historically had represented both professional and nonprofessional employees of the Activity, and absent a showing that the AFGE had clearly and unequivocally disclaimed interest in representing employees in the existing Miami District Office unit, the Assistant Secretary found that the appropriate unit should include both professional and nonprofessional employees if they desire inclusion in a unit with non-professional employees. Accordingly, he directed an election in a unit of professional and nonprofessional employees. Because the election was in a unit substantially different than that sought by the AFGE, the Assistant Secretary directed that the Activity post a Notice of Unit Termination to afford potential intervenors an opportunity to intervene in this matter.

A/SLMR No. 314

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SMALL BUSINESS ADMINISTRATION,  
MIAMI DISTRICT OFFICE 1/

Activity

and

Case No. 42-2269(RO)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 99, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Hazel M. Ellison. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 99, AFL-CIO, hereinafter called AFGE, seeks an election in a unit of all employees of the Miami District Office of the Small Business Administration (SBA), which encompasses the Tampa Post-of-Duty Station, excluding professional employees, management officials, the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Order. 2/

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1/ The name of the Activity appears as amended at the hearing.

2/ The unit description appears essentially as amended at the hearing. The parties stipulated that the District Director's secretary was a confidential employee and, therefore, should be excluded from any unit found appropriate.

The Activity takes the position that the proposed unit is inappropriate because all employees of Region IV of the SBA, of which the Miami District Office is a component, share a community of interest. It asserts in this regard that personnel and labor relations authority rests with the Regional Director of Region IV, and that a unit consisting of only one District Office would not promote effective dealings and efficiency of agency operations. In the Activity's view, the appropriate unit would consist of all employees of Region IV of the SBA.

The mission of the SBA is to insure that small business concerns receive a fair proportion of Government purchases, contracts and subcontracts. In this connection, the SBA makes loans to small business concerns, state and local development companies, and victims of floods or other catastrophes. Further, it issues licenses and makes loans to small business investment companies; improves the management skills of small business owners, potential owners and managers; and conducts studies of the economic environment.

Region IV of the SBA encompasses the southeastern portion of the United States and is headquartered in Atlanta, Georgia. Within the Region, there are District Offices located at Birmingham, Alabama; Charlotte, North Carolina; Columbia, South Carolina; Jackson, Mississippi; Jacksonville, Florida; Louisville, Kentucky; Nashville, Tennessee; and Miami, Florida. There also are Branch Offices located at Gulfport, Mississippi and Knoxville, Tennessee; and Post-of-Duty Stations at Memphis, Tennessee and Tampa, Florida. The claimed unit herein consists of approximately 50 employees. 3/ The parties stipulated that program functions, job duties and job descriptions are the same throughout the Region.

The record reveals that in 1962 the AFGE was granted exclusive recognition in a unit of "technical" employees of the Miami District Office. Thereafter, on November 5, 1964, the AFGE and the District Office entered into a one year negotiated agreement covering the technical employees. The agreement was automatically renewable and the record reveals that it is still in effect. 4/ The existing unit numbers approximately 30 employees and includes the employee categories Attorney, Administrative Officer, Community Economic Industrial Planner, Loan Specialist, General Business and Industrial Specialist, and Economic Development Specialist. 5/ At the hearing, the parties

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3/ Region IV has approximately 318 eligible employees.

4/ At the hearing, the parties agreed to waive the agreement as a bar to the instant petition.

5/ Other "nontechnical" employees of the Miami District Office and the Tampa Post-of-Duty Station currently are not included in the existing unit.

stipulated that, with the exception of Attorneys, the employees in the existing unit were not professional employees within the meaning of the Order.

The record reveals that the Miami District Office is headed by a District Director who reports to the Regional Director in Atlanta. The District Director supervises the employees in the Miami District Office and the Tampa Post-of-Duty Station and is responsible for assigning work, approving leave, and determining office procedures, physical conditions, and emergency and safety procedures in the District Office. The record further discloses that personnel actions for employees in grades up to GS-12 are initiated by their immediate supervisors within the District Office, and are reviewed by the District Director. The final authority to approve or disapprove such personnel actions rests with the Regional Director. In this latter regard, however, the evidence establishes that the District Director's recommendations concerning personnel actions are virtually always followed. Personnel actions for employees in grades GS-13 and above are initiated by the District Director, with review by the Regional Director and final approval or disapproval by the SBA National Office in Washington, D. C. Working personnel files for the employees in the unit sought are maintained by the District Office. Official personnel files are maintained by the Regional Office for employees in grades up to GS-12, and are maintained by the SBA National Office for employees GS-13 and above.

The record establishes that the area of consideration for promotions with respect to grades GS-7 through GS-12 is regionwide and for promotions to grades GS-13 and above is agency-wide. The area of consideration for reductions-in-force is restricted to the Miami commuting area for the Miami District Office, and to the Tampa commuting area for the Tampa Post-of-Duty Station. The evidence establishes that contacts between employees of the various District Offices within Region IV are limited. In this regard, training sessions involving individuals from more than one District Office typically are restricted only to supervisory personnel or senior specialists, or involve training for individuals working in certain specialized fields, such as Equal Opportunity or Minority Enterprise programs.

Under all of the circumstances, I find that the employees of the Miami District Office and Tampa Post-of-Duty Station possess a clear and identifiable community of interest. Thus, as noted above, the evidence establishes that all employees of the Miami District Office and the Tampa Post-of-Duty Station have a common mission; are subject to the same personnel practices and procedures; and are subject to the direction and guidance of the District Director in Miami. Moreover, the evidence establishes that there are limited work contacts among the various District Offices within the Region and that a unit comprised of all employees of the Miami District Office and Tampa Post-of-Duty Station would be substantially consistent with the established bargaining history of the Miami District Office.

As noted above, it was stipulated that the existing recognized unit of technical employees is comprised of both professional and nonprofessional employees. However, by its petition in the instant case, the AFGE, in effect, is attempting to sever the nonprofessional technical employees from its existing professional-nonprofessional unit and combine them in a new unit with other currently unrepresented nonprofessional employees in the Miami District Office and the Tampa Post-of-Duty Station. Noting particularly the bargaining history in the Miami District Office in which professional and nonprofessional employees have been included in a single unit, I find that a unit limited solely to the nonprofessional employees of the Miami District Office and Tampa Post-of-Duty Station is inappropriate for the purpose of exclusive recognition under Executive Order 11491. In this regard, the evidence establishes that since 1962, AFGE, Local 99, has represented both professional and nonprofessional employees in the same unit, and that these employees have been covered by a single negotiated agreement since 1964. There is no evidence to indicate that an established and fair collective bargaining relationship has not been maintained with respect to all unit employees, including the professional employees. Nor is there any evidence that the claimed nonprofessional employees share a clear and identifiable community of interest separate from the professional employees in the existing unit. Under these circumstances, and noting also that the record does not contain evidence of a clear and unequivocal disclaimer of interest by the AFGE with respect to the latter's representation of the employees in the existing Miami District Office unit, I find that a unit of professional and nonprofessional employees of the Miami District Office and the Tampa Post-of-Duty Station is appropriate for the purpose of exclusive recognition and that such unit will promote effective dealings and efficiency of agency operations. 6/

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

United States Treasury Department, Bureau of Customs, Region V, New Orleans, Louisiana, A/SLMR No. 65, was considered to be factually distinguishable from the instant case. In that case the Assistant Secretary concluded that where a labor organization already represents exclusively the employees it has petitioned for, it would not effectuate the purposes of the Order to direct an election in the same unit because no question concerning representation exists as to such employees. In the instant case the AFGE is seeking to add to its existing unit a substantial number of non-professional employees not previously encompassed in its existing unit.

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting Group (a): All professional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding all non-professional employees, the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding all professional employees, the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the AFGE, or by any other labor organization which, as discussed below in the Direction of Election, intervenes in the proceeding on a timely basis.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented by the AFGE, or by any other labor organization which, as discussed below in the Direction of Election, intervenes in this proceeding on a timely basis. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessionals, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the AFGE or any other labor organization which, as discussed below in the Direction of Election, intervenes in this proceeding on a timely basis, was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

All professional and nonprofessional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

(a) All nonprofessional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding all professional employees, the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All professional employees of the Miami District Office and the Tampa Post-of-Duty Station of the Small Business Administration, excluding all nonprofessional employees, the District Director's secretary, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

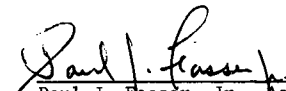
In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any intervention in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's

-6-

Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 99, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

Because the above Direction of Election is in a unit substantially different than that sought by the AFGE, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision. If the AFGE desires to proceed to an election, because the unit found appropriate is substantially different than the unit it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot in the election among the employees in the unit found appropriate.

Dated, Washington, D. C.  
October 5, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-7-



October 24, 1973

A/SLMR No. 315

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION ON OBJECTIONS AND  
DIRECTION OF SECOND ELECTION OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE U.S. ARMY,  
U.S. ARMY AVIATION SYSTEMS COMMAND,  
ST. LOUIS, MISSOURI  
/SLMR No. 315

DEPARTMENT OF THE U.S. ARMY,  
U.S. ARMY AVIATION SYSTEMS COMMAND,  
ST. LOUIS, MISSOURI

Activity

and

Case No. 62-3092(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3095

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1763

Intervenor

DECISION ON OBJECTIONS

AND

DIRECTION OF SECOND ELECTION

The subject case involved objections to an election filed by the  
Intervenor, National Federation of Federal Employees, Local 1763 (NFFE),  
alleging that certain conduct by the Petitioner, American Federation of  
Government Employees, AFL-CIO, Local 3095 (AFGE), and certain conduct  
by the Activity, interfered with the conduct of the election and warranted  
the setting aside of the election and conducting a second election.

The Administrative Law Judge dismissed one objection but found as to  
another objection that the publication by the Activity of a list of  
employee positions by job title, series and job number alleged to be  
ineligible to vote constituted objectionable conduct which warranted the  
setting aside of the election. In this regard, he noted that the publi-  
cation by parties to an election of eligibility and ineligibility lists  
could only have the effect of disrupting orderly procedures, creating  
confusion in the minds of employees, and thereby interfering with the  
conduct of the election.

Upon consideration of the Administrative Law Judge's Report and  
Recommendations, the exceptions thereto filed by the AFGE, and the entire  
record in the case, the Assistant Secretary adopted the findings, con-  
clusions, and recommendations of the Administrative Law Judge. Accordingly,  
he set aside the election of June 6, 1972, and directed that a second  
election be conducted.

On August 27, 1973, Administrative Law Judge Samuel A. Chaitovitz  
issued his Report and Recommendations in the above-entitled proceeding,  
recommending dismissal of Objection 8 and concluding, with respect to  
Objection 9, that the publication by the Activity of a list of employee  
positions by job title, series and job number alleged to be ineligible  
to vote constituted objectionable conduct which warranted the setting  
aside of the election held on June 6, 1972, and the conducting of a  
second election. 1/ In this regard, he noted that the publication by  
parties to an election of eligibility and ineligibility lists could  
only have the effect of disrupting orderly procedures, creating confusion  
in the minds of employees and thereby interfering with the conduct of the  
election.

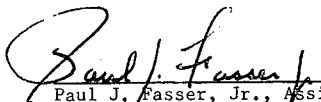
1/ Objection 9 is inadvertently referred to as "Objection 8" in the last  
sentence of the penultimate paragraph on page 8 of the Administrative  
Law Judge's Report and Recommendations. The error is hereby corrected.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, the exceptions thereto filed by the Petitioner, 2/ and the entire record in the subject case, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge. Accordingly, the election conducted on June 6, 1972, is hereby set aside and a second election will be conducted as directed below.

DIRECTION OF SECOND ELECTION

IT IS HEREBY DIRECTED that a second election be conducted, as early as possible, but not later than sixty (60) days from the date below, in the unit set forth in the Agreement for Consent or Directed Election approved on May 18, 1972. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Dated, Washington, D.C.  
October 24, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

2/ The Petitioner excepted to the Administrative Law Judge's recommendation that the election be set aside based upon the Activity's publication of a list of employees allegedly ineligible to vote in the election. It asserted that if an election could be set aside on this basis, "agencies everywhere will perceive that a means exists through which all elections can be voided. We submit agencies will act in the future to void elections through acts such as those used in the instant case." I reject the basis for the foregoing exception as being purely speculative and without factual support.

U.S. DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210

DEPARTMENT OF THE U.S. ARMY  
U.S. ARMY AVIATION SYSTEMS COMMAND  
ST. LOUIS, MISSOURI,

Activity

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL/CIO, LOCAL 3095,

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1763

Intervenor

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CASE NO. 62-3092 (RO)

William M. Whitten, Esq.  
12th and Spruce Streets  
St. Louis, Missouri 63166  
ATTN: MSAV-JN

For the Activity

William Martin, Jr., Esq.  
4830 Cupples Place  
St. Louis, Missouri 63113

For the Petitioner

David J. Markman, Esq.  
1737 H Street, N.W.  
Washington, D.C. 20006

For the Intervenor

BEFORE: Samuel A. Chaitovitz  
Administrative Law Judge

REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION

Statement

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Objections issued on January 9, 1973, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Kansas City Region.

The issue herein concerns the sufficiency of the objections filed by the National Federation Federal Employees, Local 1763 (herein called NFFE or Intervenor) to an election held on June 6, 1972, among a unit of employees of the Department of the United States Army, United States Army Aviation Systems Command (herein called the Activity). American Federation of Government Employees, AFL/CIO, Local 95 (herein called AFGE or Petitioner), is the Petitioner in the case and participated in the election.

All parties were represented by Counsel or other representatives, at the hearing which was held in St. Louis, Missouri, on February 27, and 28, 1973, before the undersigned duly designated Administrative Law Judge. The parties were afforded full opportunity to be heard, to produce evidence, and to examine as well as cross-examine witnesses, Mr. Arthur Henke, a necessary witness, was unable to testify at the hearings because of a heart condition. The record was kept open to permit the parties to agree upon interrogatories to be answered by Mr. Henke. The interrogatories together with Mr. Henke's answers were received and were made part of the record in this case by an Order issued on May 17, 1973. Both the Intervenor and the Activity filed briefs which have been duly considered by the undersigned.

Upon the entire record in this matter, from his observation of the witnesses and their demeanor and from all of the testimony and evidence adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations.

NFFE in its brief urges that the election be set aside because of the alleged failure of AFGE's representative to cooperate in obtaining Mr. Henke's responses to the interrogatories. Mr. Henke's responses have been obtained and therefore this request is moot and need not be ruled upon.

Findings of Fact

A. Background

Pursuant to the provisions of an Agreement for Consent or Directed Election approved on May 18, 1972, an election by secret ballot was conducted under the supervision of the Area Administrator, St. Louis, Missouri, on June 6, 1972. The results of the election were as follows:

- 1. Approximate number of eligible voters.....2,700
- 2. Void ballots..... 1
- 3. Votes cast for Local 3095, AFGE..... 493
- 4. Votes cast for Local 1763, NFFE..... 471
- 5. Votes cast for..... ----
- 6. Votes cast against exclusive recognition..... 715
- 7. Valid votes counted (sum of 3,4,5, and 6).....1,679
- 8. Challenged ballots..... 0
- 9. Valid votes counted plus challenged ballots (sum of 7 and 8).....1,679

Thereafter, on June 14, 1972, timely objections to the conduct of the election and conduct affecting the results of the election were filed by NFFE.

The Regional Administrator issued his Report and Findings on Objections on December 22, 1972. He concluded that Objections 1 through 7, and 10 through 16 had no merit. He concluded that Objections 8 and 9 might have merit and accordingly issued the Notice of Hearing on January 9, 1973, concerning Objections 8 and 9.

B. Objection 8:

"AFGE had an observer who had been determined as a Management Official by all parties and deleted from the list of eligibles. I informed Mr. Echols on the day prior to the election that Mr. Arthur Henke was ineligible to observe. He assured me that he would so inform him. However, it was learned on the day of the ballot count that Mr. Henke did in fact observe for AFGE."

The evidence reveals that approximately three meetings were held during the two weeks preceeding the election.<sup>2/</sup> Representative's of AFGE, NFFE, the Activity and the Department of Labor were present at these meetings. The three parties reviewed the payroll lists supplied by the Activity and agreed which names should be stricken

<sup>2/</sup> The first meeting was held on or about May 25, 1973.

from the eligibility list because the person named was ineligible to vote. Mr. Arthur Henke's name was one of those so stricken by the parties from the eligibility list. During the week prior to the election the parties exchanged observer lists and Mrs. Billie Werking, a NFFE National Representative, was advised that Mr. Henke, listed as an AFGE observer, was a management official. On or about June 1 or 2, 1972, Mrs. Werking advised Mr. Echols, the Activity's representative, of her objection to Mr. Henke's acting as an AFGE observer. Mr. Echols advised Mrs. Werking that he would advise the Department of Labor of her objection.

On June 5, a Department of Labor representative conducted a meeting to instruct observers. Although there is some conflict of evidence as to whether Mrs. Werking attended this meeting it is not necessary to resolve this conflict.<sup>3/</sup> At the meeting Mr. Echols advised the representative of the Department of Labor that one of the parties had an objection to a proposed observer.<sup>4/</sup> The Labor Department representative asked all those present if they had any objections to proposed observers and none were raised. Mr. Henke, during the course of the election, acted as an AFGE observer.

Mr. Henke's job description was introduced into evidence. He was not able to appear at the hearing for medical reasons and his testimony was submitted, by agreement of the parties, by means of written and sworn answers to written interrogatories. In his answers, Mr. Henke indicated that he was too new in his job to correlate the work he performed to his job description. His answers did not otherwise shed any appreciable light on his duties and responsibilities.

NFFE contends that Mr. Henke was a management official and that his presence as an observer interfered with the conduct of a fair election.

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<sup>3/</sup> Mrs. Werking testified that she spoke by telephone to the Department of Labor representative immediately prior to the meeting and did not raise her objection concerning Mr. Henke.

<sup>4/</sup> He did not name the objecting party or identify the observer.

The evidence, however, does not establish precisely the nature of Mr. Henke's work or otherwise establish that his duties and responsibilities were such as to establish that he was a "management official," within the meaning of the Order, as interpreted by the Assistant Secretary in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, A/SLMR Mp/135.5/

Section 202.20(h) of the Regulations provides, "At a hearing conducted pursuant to...this section the party filing the objections shall have the burden of proving all matters alleged in its objections by a preponderance of the evidence." It is concluded that the record does not establish that Mr. Henke was an official of management<sup>6/</sup> and therefore, that NFFE, the objecting party, did not meet its burden of proof of establishing that fact.<sup>7/</sup> Thus the Ojection 8 is without merit and it is recommended that it be dismissed.

C. Objection No. 9

"An employee, Mr. Richard Babbington called me at the Mark Twain Hotel on the day of the election informing me that Management had put out a letter with some 70 to 75 Series and Job Numbers who were ineligible to vote. His Series 1102, Job Number 11724 was one on the list of ineligibles. Since Mr. Babbington was an observer for NFFE he was concerned. I informed him that his name had not been deleted

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<sup>5/</sup> "When used in connection with the Executive Order the term management official means an employee having authority to make, or to influence effectively the making of policy necessary to the agency or activity with respect to personnel, procedures, or programs. In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be." Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, A/SLMR Mp/135.

<sup>6/</sup> See Veterans Administration Hospital, Downey, Illinois, A/SLMR, No. 81.

<sup>7/</sup> The fact that the parties during their reviewing of the eligibility lists struck Mr. Henke's name from the eligibility list does not establish that he is in fact a management official or ineligible to vote. It should be noted that the eligibility list was received after the Consent Election Agreement was approved and the Eligibility lists were not a part of that agreement.

by all parties as an ineligible voter and that furthermore that he could be an observer and could vote. I further checked my copy of the list of eligible voters and learned that only one Series 1102, Job No. 11724 was deleted on the official voting list as being ineligible to vote. This particular Series and Job No. is that of a GS-11 Contract Specialist. I asked Mr. Echols why these employees were informed that they could not vote and he informed me that it was decided that because of their job descriptions that they were all considered Management. I then asked why the GS-12 Contract Specialists were not excluded. He stated that they were not questioned. Management would not furnish us with the Grades of the employees making it impossible to come up with a true list of eligible voters. This is proof that some employees were denied their right to vote. After Management sent this letter of Job Series and Job Numbers out (copy of letter attached) many employees who were not certain what category they were in became discouraged and did not go to the polls."

The record establishes that on or about June 1, 1972, the activity issued a memorandum to all employees which set forth the unit in which the representation election was to be conducted. The memorandum went on to point out that management officials are excluded from the Unit.<sup>8/</sup> It then stated in part:

"Following is a list of positions by job title, and series and job number which were identified as management officials in meetings among representatives of the Headquarters and the two labor unions who are parties to the election...."

There then followed a list of approximately 56 job titles together with the series and job numbers for each such title. The memorandum then stated:

"All employees who are assigned to the job numbers of positions and series listed above are excluded as management officials and are ineligible to vote on June 6, 1972, by reason of their exclusion from that Unit."

The record established that this memorandum was issued because a number of employees had contacted management in order to determine whether they were eligible to vote.

Mr. Richard Babbington called NFFE representative, Mrs. Werking, on the day of the election to advise her that his job title, series, and job number appeared in this memorandum, although his name had not been stricken from the voter eligibility list. The names of 14 other persons whose job title appeared in the June 1 memorandum had also not been stricken from the eligibility list.

The question presented is whether the Activity, by publishing this memorandum listing ineligible voters engaged in conduct which would justify the setting aside of the election.<sup>9/</sup>

Section 3(b) of the "Procedural Guide for the Conduct of Elections" issued by the Assistant Secretary states, "Eligibility lists should not be posted, as eligible employees who were inadvertently omitted may be discouraged from voting."

NFFE contends that this provision would equally apply to the publication of a list of ineligible voters and that such a publication would require a finding of objectionable conduct sufficient to set aside an election. The Activity urges that the "Procedural Guide" should not be given the same force and effect as properly promulgated regulations and that the publication of the subject list was not sufficient to warrant setting aside the election.

It is concluded that the "Procedural Guide for the Conduct of Elections," is just that, a guide. It is an attempt to secure a certain uniformity of procedure, but it does not require that any departure from this uniform procedure would necessarily constitute objectionable conduct.<sup>10/</sup> If such a result had been desired the "Procedural Guide" would have been promulgated and published in the federal register in the same manner as other rules and regulations in this area.

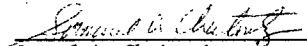
The foregoing conclusion does not mean that this conduct is not objectionable. In fact it is concluded that the publication of lists of those who are or who are not ineligible to vote would have the foreseeable effect of creating confusion in the minds of the voters and would thereby necessarily interfere with the conducting of a fair and representative election. In the instant situation certain jobs appeared on the ineligible list although the names of the people

<sup>9/</sup> The Report and Findings on Objections issued by the Regional Administrator, lists as a question whether the appearance of Mr. Babbington as a NFFE observer interfered with the election, if he is found to be a management official. In this regard, since NFFE is the objecting party basic principles of equity do not allow it to raise its own possible misconduct as an objection. In any event, because of the disposition of this objection, this issue need not be reached.

<sup>10/</sup> For a case that deals with a similar problem, see Polymers, Inc., 170 NLRB 333 and 174 NLRB 282.

holding the jobs had not been stricken from the eligibility lists. This situation would necessarily create confusion in the minds of prospective voters. The Department of Labor prints and has posted election notices that contain a description of the appropriate unit. If an employee has a question as to his eligibility he should be referred to the Department of Labor or present himself at the polling place where the various voting procedures, including procedures for challenging voters are available. The publication by the parties of these eligibility and ineligibility lists can only have the effect of disrupting these orderly procedures, creating confusion in the minds of the employees and thereby interfering with the conduct of the election. In sum, it is concluded that the publication of the ineligibility list as alleged in Objection 8 constituted objectionable conduct that warrants the setting aside of the election and the conducting of a second election.

Accordingly, it is recommended that Objection 9 of NFFE be sustained and that the election held on June 6, 1972, be set aside and a second election be directed under the terms of Executive Order 11491 and the applicable Rules and Regulations.

  
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 Samuel A. Chaitovitz  
 Administrative Law Judge

Dated: Washington, D.C.  
 August 27, 1973

UNITED STATES DEPARTMENT OF LABOR  
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
 SUMMARY OF DECISION AND DIRECTION OF ELECTION  
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL SCIENCE FOUNDATION,  
 A/SLMR No. 316

This case involved a petition filed by the American Federation of Government Employees, Local 3403, AFL-CIO (AFGE) seeking an election in a unit of all professional and nonprofessional General Schedule (GS) and Wage Grade (WG) employees employed by the National Science Foundation in the Washington, D.C. Metropolitan Area. The Activity and the AFGE agreed that the unit sought is appropriate, and the Labor-Management Services Administration Area Administrator concurred. However, the Area Administrator questioned the unit placement of a group of employees who are in an "excepted service" category. The statute which created the National Science Foundation provided for staffing by both employees in the competitive service and employees excepted from the competitive service. The Activity took the position that the excepted service employees should be excluded from the unit sought on the ground that they do not share a community of interest with the competitive service GS and WG employees in the claimed unit because of the "profound difference" in the permitted scope of bargaining for the two groups of employees. The AFGE indicated that although it had not sought to represent the excepted employees in its petition, it would represent them if the Assistant Secretary determined that they should be included in the unit.

In view of the agreement of the parties as to the scope of the unit sought, and the approval of the Area Administrator in this regard, and consistent with the established policy of the Assistant Secretary, the scope of the hearing was limited to the issue of the unit placement of the excepted service employees.

Under all of the circumstances, the Assistant Secretary found that the excepted service employees had a clear and identifiable community of interest with the other employees of the Activity. He noted that employees in both the competitive service and the excepted service perform the same type of work; work together under common supervision; are paid under the same pay schedules; share many common fringe benefits; and generally are subject to the same personnel policies.

Accordingly, the Assistant Secretary found a unit of all employees, including those in the excepted service, to be appropriate for the purpose of exclusive recognition and he directed an election in the appropriate unit.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL SCIENCE FOUNDATION,

Activity

and

Case No. 22-3870(RO)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 3403, AFL-CIO

Petitioner

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Madeline E. Jackson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the petitioner, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 3403, AFL-CIO, hereinafter called AFGE, seeks an election in a unit of all professional and nonprofessional General Schedule (GS) and Wage Grade (WG) employees in the Activity's Washington, D.C. Metropolitan Area offices, excluding management officials, supervisors, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and temporary employees of less than 90 days. 1/

The Activity and the AFGE agree that the unit sought is appropriate for the purpose of exclusive recognition. The record reveals that the Labor-Management Services Administration Area Administrator concurred that the unit sought was appropriate but questioned the unit placement of a group of employees who are in an "excepted service" category. In this

The parties stipulated that confidential employees and temporary employees of less than 90 days should be excluded from the unit.

connection, the statute which established the National Science Foundation 2/ provided that the Foundation would be staffed by both employees in the competitive service (those Federal employees subject to the provisions of Title 5, United States Code, and other statutory provisions regulating wages, hours, and conditions of employment), and employees excepted from the competitive service. The Activity takes the position that the excepted service employees should be excluded from the unit sought because they do not share a community of interest with employees of the competitive service in view of the "profound difference" in the permitted scope of bargaining for the two groups of employees. Thus, the Activity asserts that the ability to bargain in a meaningful manner on major conditions of employment would be severely limited if the two groups of employees were combined in a single unit. Although the AFGE indicated that it did not seek to represent the excepted employees, it stated that it would represent these employees if the Assistant Secretary determined that they should be included in the unit.

In view of the agreement of parties as to the scope of the unit sought, and the approval of the Area Administrator in this regard, the sole issue explored at the hearing was whether excepted service employees should be included in the unit in which an election is directed. 3/

The record indicates that, with the exception of one employee stationed overseas, the employees of the Activity are stationed at its three locations in the Washington, D.C. Metropolitan Area. It appears further that both the excepted service employees and the other Activity employees are employed throughout the various organizational subdivisions of the Activity and that both categories are located at each of the three locations. 4/

Excepted service employees of the Activity fall into the following two general groups: (1) those employees above the GS-15 level; and (2) those employees whom the Activity is authorized to hire on an excepted basis to fill jobs which normally would be performed by employees at the GS-15 level and below. All of the employees at issue herein fall within the latter group.

2/ National Science Foundation Act of 1950, 64 Stat. 149, as amended.

3/ Such a procedure was viewed as consistent with established policy. See, in this regard, Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230, Appendix A.

4/ The eligible GS and WG competitive service employees number some 648. The parties stipulated that a large number of the employees in the disputed excepted service category are managerial and supervisory employees. As a result of the parties' stipulation, there are some 22 excepted employees who would be eligible for inclusion in the agreed upon unit.

The record reveals that the excepted service employees in question often are recruited from universities or other institutions, and that they may be employed by the Activity for a specific term, an indefinite period, or on a permanent basis. Those employed for a specific period, and some who are employed for an indefinite period, retain their status as employees of the institution from which they came. Only those excepted service employees who have severed their prior employment relationship participate in the Federal retirement program, and many excepted service employees continue, by choice, to participate in programs and fringe benefits connected with their non-government organization rather than participating in comparable Federal programs. Because, by statute, excepted service employees are not subject to normal Civil Service rules, they could, in theory, receive different pay and receive promotions at different rates from other employees of the Activity, including other excepted service employees performing the same work. The record reveals also that excepted service employees are not in the same competitive area for reductions in force with other employees of the Activity.

The evidence establishes that excepted service employees and the other employees of the Activity generally are subject to the same personnel policies. Thus, both groups of employees accrue annual leave at the same rate and all employees use a common grievance procedure. Moreover, although different pay is possible because of the different statutes under which the two groups of employees work, the record reveals that, in fact, the policy of the Activity has always been to give equal pay for similar work. In addition, the record reflects that both groups of employees have common supervision, and it appears that supervisors come from the ranks of either group. Further, excepted service and other employees work side-by-side, often performing similar or identical jobs, and the record reveals that some excepted service employees have converted to the competitive service and that some competitive service employees have entered the ranks of the excepted service. Finally, it appears that, in certain instances, the only difference between competitive and excepted service positions is that the Activity has utilized its authority to make excepted appointments to hire desired individuals when the normal competitive service hiring methods would be, for some reason, inappropriate.

Under all of the circumstances, I find that the some 22 nonmanagerial, nonsupervisory excepted service employees involved herein should be included in the appropriate unit because, in my view, they have a clear and identifiable community of interest with the other employees of the Activity. Thus, the record reveals that all employees of the Activity, including those in the excepted service, perform the same type of work; work together under common supervision; are paid under the same pay

schedules; share many common fringe benefits; and generally are subject to the same personnel policies. 5/

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional General Schedule, Wage Grade, and excepted service employees, employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order:

As noted above, the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals, unless the majority of the professional employees votes for inclusion in a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All professional General Schedule, Wage Grade, and excepted service employees, employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding nonprofessional employees, confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All nonprofessional General Schedule, Wage Grade and excepted service employees employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding professional employees, confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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5/ It has been noted previously by the Assistant Secretary that day-to-day interests and working relationships are the key factors in determining community of interest. Thus, indicia of community of interest will be found where there is interchange and contact among employees; where there is similarity of work performed; and where there is common supervision. In this regard, the Assistant Secretary has indicated that, "standing alone, the lack of common benefits, pay scales, and ultimate control will not be considered dispositive as to the issue of community of interest." ACTION, A/SLMR No. 207; Cf. also Department of the Navy, Charleston Naval Shipyard, A/SLMR No. 302.



The employees in the nonprofessional voting group (b) will be led whether or not they desire to be represented by the AFGE. The employees in the professional voting group (a) will be asked two questions their ballots: (1) whether or not they wish to be included with the professional employees for the purpose of exclusive recognition, and whether or not they wish to be represented for the purpose of exclusive recognition by the AFGE. In the event that a majority of the ballots of voting group (a) are cast in favor of inclusion in the unit as nonprofessional employees, the ballots of voting group (a) will be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether or not the AFGE was selected by the nonprofessional employee unit.

The unit determination in the subject case is based in part, then, on the results of the election among the professional employees. However, we will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional General Schedule, Wage Grade and excepted service employees, employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional General Schedule, Wage Grade, and excepted service employees, employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding nonprofessional employees, confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

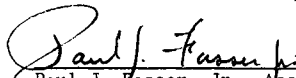
-5-

(b) All General Schedule, Wage Grade and excepted service employees employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding professional employees, confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3403, AFL-CIO.

Dated, Washington, D.C.  
October 24, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

-6-

October 24, 1973

A/SLMR No. 317

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION CENTER,  
TOGUS, MAINE  
A/SLMR No.317

The Petitioner, Franklin A. Ober, an employee of the Activity, sought the decertification of the Intervenor, National Federation of Federal Employees, Local 902 (NFFE) as the exclusive representative in a unit of all professional employees of the Activity. The NFFE contended that there was a current negotiated agreement which constituted a bar to the petition, while the Petitioner and the Activity contended that the negotiated agreement had been terminated and failed to renew itself in January 1971, in view of the NFFE's written request of October 26, 1970, to renegotiate the duration provisions.

The record revealed that the negotiated agreement of January 28, 1967, provided that it would be automatically renewed on an annual basis unless either party notified the other party in writing at least 90 days prior to the termination date of its intention to negotiate for modifications. On October 26, 1970, the NFFE made a written request to negotiate modifications of the agreement. However, no negotiations were conducted pursuant to this request because of certain pending petitions which, in the Activity's view, raised questions concerning representation. Subsequent to the disposition of those petitions there were no negotiations between the Activity and the NFFE and on March 12, 1972, the decertification petition in the instant case was filed.

The Assistant Secretary noted that it had been held previously that where a negotiated agreement provides for automatic renewal unless a party requests renegotiations, a party's request to renegotiate serves to terminate such a negotiated agreement, even if, in fact, no negotiations subsequently take place. Consistent with this rationale, the Assistant Secretary found, in the instant case, that the renegotiation request of October 26, 1970, served to terminate the negotiated agreement upon its January 27, 1971 anniversary date. Accordingly, the Assistant Secretary found that there was no agreement bar to the decertification petition and, therefore, he ordered an election in the appropriate unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION CENTER,  
TOGUS, MAINE

Activity.

and

Case No. 31-5587(E0)

FRANKLIN A. OBER

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 902

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Executive Order 11491, as amended, a hearing was held before Hearing Officer William Koffel. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ The Hearing Officer did not permit the Intervenor, the National Federation of Federal Employees, Local 902, herein called NFFE, to elicit testimony from witnesses concerning the Activity's motives in failing to meet and negotiate with the NFFE with respect to the modification of the parties' negotiated agreement. In addition, the NFFE was not permitted to adduce evidence in connection with its contention that the Petitioner, an individual, was acting in behalf of another organization in filing the petition in the subject case. In its brief, the NFFE moved that the case be remanded for the purpose of taking evidence on the relationship between the Petitioner, the Activity and the other organization allegedly involved herein. Under Section 19 of the Order, a party, at an appropriate time, may seek corrective action in situations where it has reason to believe that an unfair labor practice has been committed. However, unfair labor practice issues, such as those raised by the NFFE herein, cannot be resolved appropriately in the context of a representation proceeding. Cf. U.S. Army Engineer District, Philadelphia, Corps of Engineers, A/SLMR No. 80. Accordingly, the Hearing Officer's above-noted rulings are affirmed and the NFFE's post-hearing motion to remand the case for further hearing is hereby denied.

Upon the entire record in this case, including a brief filed by NFFE, the Assistant Secretary finds:

1. The Petitioner, Franklin A. Ober, an employee of the Activity, seeks the decertification of the NFFE as the exclusive representative employees in a unit of:

All professional employees of the Veterans Administration Center, Togus, Maine, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 2/

The NFFE asserts that a current negotiated agreement constitutes a bar to the petition. On the other hand, the Petitioner contends that the subject petition is not barred as the agreement negotiated by the parties in 1967 fails to meet the requirements of Section 13 of Executive Order 11491, as amended by Executive Order 11616, in that it does not contain the prescribed negotiated grievance procedure. In addition, the Petitioner takes the position that a request, made by the NFFE to the Activity on October 26, 1970, for negotiations on the duration provisions of the negotiated agreement, in effect terminated the annually renewable negotiated agreement on its anniversary date of January 28, 1971. The Activity agrees with the Petitioner that the negotiated agreement was, in fact, terminated and failed to renew itself in January 1971, because of the NFFE's written request of October 26, 1970, to renegotiate the duration provisions.

The record reveals the NFFE was recognized by the Activity on September 12, 1966, as the exclusive representative of the Activity's employees in two separate units, i.e. (1) professional employees; and (2) classified employees. Thereafter, the parties met and negotiated a single basic agreement covering the employees in both units, 3/ and also negotiated a supplementary agreement dated May 24, 1967. No subsequent negotiations occurred between the parties on any of the agreement's provisions. The basic negotiated agreement provided that it would be automatically renewed on an annual basis, subject to certain conditions fully discussed below. On October 26, 1970, the NFFE wrote to the Activity requesting that negotiations be opened on the duration article of the existing agreement, which by its terms was scheduled to be renewed automatically on January 28, 1971. However, before any negotiations took place, on November 4, 1970, the Maine State Nurses Association (MSNA) filed a petition seeking to sever nurses from the existing professional

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The unit appears as amended at the hearing.

The agreement was effective January 28, 1967. In this regard, it was noted that in Veterans Administration Center, Togus, Maine, A/SLMR No. 84, in which the NFFE was a party, it was found that the same negotiated agreement as is involved in the subject case was, in fact, entered into on January 28, 1967.

employee unit and, thereafter, the American Federation of Government Employees, AFL-CIO, Local 2610, filed a petition seeking to represent the existing unit of classified employees. Under these circumstances, the Activity refused to negotiate with the NFFE in accord with the latter's request because of the pending petitions which, in the Activity's view, raised questions concerning representation.

On July 22, 1971, the Assistant Secretary issued a Decision, Order and Direction of Election in Veterans Administration Center, Togus, Maine, A/SLMR No. 84, in which he dismissed the petition filed by the MSNA and ordered an election in the classified employee unit. Subsequent to the issuance of this decision, there have been no negotiations between the Activity and the NFFE. The instant petition, which as noted above, seeks to decertify the NFFE as the exclusive representative of the professional employees, was filed on March 12, 1972.

With respect to the NFFE's contention that there exists a current negotiated agreement which constitutes a bar to the petition in the instant case, the record reveals that Article 9, Section 1 of the agreement of January 28, 1967, reads as follows:

This Basic Agreement shall become effective upon receipt of the original Agreement approved by the department head. It shall remain in effect for a period of one year from its effective date and be automatically renewable from year to year unless either party shall notify the other party in writing at least 90 days prior to termination date of its intention to negotiate for modifications of this Agreement. Upon receipt of such notification from either party, they shall meet within 30 days of such notice to negotiate. There may be one conference during the calendar year upon request of either party to negotiate modifications of this Basic Agreement. (Emphasis supplied.)

The Assistant Secretary has held previously that where a negotiated agreement provides for automatic renewal unless a party requests renegotiations, a party's request to renegotiate serves to terminate such a negotiated agreement, even if, in fact, no negotiations subsequently take place. 4/ Consistent with this rationale, when, in the instant case, the NFFE requested negotiations concerning the duration provisions of the negotiated agreement, in my view, the above-noted provision in Article 9, Section 1 of the negotiated agreement served to terminate the negotiated agreement upon its January 27, 1971 anniversary date. As the agreement did not automatically renew itself after January 27, 1971, I find that there was no agreement bar to the subject petition filed March 12,

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4/ Cf. National Center for Mental Health Services, Training and Research, A/SLMR No. 55.

1972. 5/ Accordingly, I shall direct an election in the following unit, which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

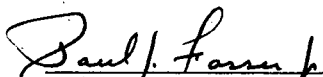
October 24, 1973

All professional employees of the Veterans Administration Center, Togus, Maine, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including the employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 902.

Dated, Washington, D.C.  
October 24, 1973

  
Paul J. Vasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

5/ In view of my finding in this regard, it was considered unnecessary to decide whether or not the negotiated agreement contained a negotiated grievance procedure within the meaning of Section 13 of the Order, as amended.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF INTERIOR,  
BUREAU OF RECLAMATION,  
LOWER COLORADO REGION  
A/SLMR No. 318

The Activity-Petitioner, following a reorganization involving a merger of the Lower Colorado River (LCR) Project into the Yuma Projects Office, filed an RA petition seeking an election in an overall unit consisting of all General Schedule (GS) and Wage Board (WB) employees of the Yuma Projects Office, and all WB employees of Parker-Davis Project, Lower Colorado Region, Bureau of Reclamation. Further an employee filed a decertification petition (DR) seeking the decertification of Local Union 640, Electrical Workers, IBEW, (IBEW) as the exclusive representative of the employees of the Yuma Projects Office.

Noting (1) the existence of a current two-year negotiated agreement between the Activity and the IBEW encompassing the WB employees at the Yuma Projects Office, (2) the fact that the DR petition was not filed within the 60-90 day period as provided for in Section 202.3(c) of the Assistant Secretary's Regulations, and (3) the absence of any evidence of unusual circumstances substantially affecting the Yuma Projects Office unit or the IBEW's representative status, the Assistant Secretary found that the DR petition was filed untimely and that dismissal was warranted.

As to the RA petition, the Assistant Secretary noted that, contrary to its position expressed prior to the hearing, the Activity, at the hearing, joined in a stipulation with the other parties, which stipulation was supported by the evidence, that the WB employees at the Yuma Projects Office and the WB employees at the Parker-Davis Project have been, and continue to constitute, separate and distinct units. Further, the Assistant Secretary found the evidence established that the merger of the LCR Project into the Yuma Project did not result in substantial changes in the job functions of the employees involved, including the former LCR Project employees who were assigned administratively to the Yuma Project, and that, for the most part, they were not physically moved and did not have their work assignments or supervision changed. In view of the stipulation of the parties at the hearing and the supporting evidence showing that the reorganization of August 20, 1972, did not substantially or materially change the scope or character of the units involved and that, therefore, such units remain viable and identifiable, the Assistant Secretary ordered that the RA petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF INTERIOR,  
BUREAU OF RECLAMATION,  
LOWER COLORADO REGION

Activity-Petitioner

and

Case No. 72-3964

LOCAL UNION 640, ELECTRICAL WORKERS,  
PHOENIX, ARIZONA

Labor Organization

and

LOCAL UNION 1487, NFFE,  
RIALTO, CALIFORNIA

Labor Organization

UNITED STATES DEPARTMENT OF INTERIOR,  
BUREAU OF RECLAMATION,  
YUMA PROJECTS OFFICE

Activity

and

Case No. 72-4067

JAMES SCHUSTER,  
RIALTO, CALIFORNIA

Petitioner

and

LOCAL UNION 640, ELECTRICAL WORKERS,  
PHOENIX, ARIZONA

Intervenor

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Linda Wittlin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby confirmed.

Upon the entire record in this case, including the parties' briefs, 1/ the Assistant Secretary finds:

In Case No. 72-3964 the Activity-Petitioner filed an RA petition seeking an election in an overall unit consisting of all General Schedule (GS) and Wage Board (WB) employees of the Yuma Projects Office, Lower Colorado Region, Bureau of Reclamation, herein referred to as the Yuma Project, and all Wage Board (WB) employees of the Parker-Davis Project, Lower Colorado Region, Bureau of Reclamation, herein referred to as the Parker-Davis Project, excluding, among others, all General Schedule (GS) employees of the Parker-Davis Project. In support of its petition, and prior to the hearing in this matter, the Activity contended that, as a result of an August 20, 1972, reorganization, employees of its Lower Colorado River Project, Blythe, California, herein referred to as the LCR Project, were merged into its Yuma Project, rendering inappropriate certain previously existing exclusively recognized units.

In Case No. 72-4067, James Schuster, a former employee, filed a decertification petition seeking the decertification of Local Union 640, Electrical Workers, IBEW, Phoenix, Arizona, herein called IBEW, as the exclusive representative of the employees of the Yuma Project. In a letter to the Hearing Officer in support of his petition, Schuster asserted, in essence, that as a result of the merger of the LCR Project into the Yuma Project, the primary objectives of the Yuma Project had changed.

The units affected herein include: (1) all nonsupervisory and non-professional employees assigned to the LCR Project represented exclusively by Local Union 1487, NFFE, Rialto, California, herein called the NFFE 2/; (2) all hourly WB employees in the trades and crafts engaged in operation and maintenance activities at the Parker-Davis Project represented exclusively by the IBEW 3/; and (3) all hourly WB

1/ The petitioner in Case No. 72-4067 did not appear at the hearing and did not file a brief.

2/ The NFFE's current basic two-year agreement covering LCR Project employees was effective on February 15, 1968, and provided for automatic renewal on each anniversary date thereafter.

3/ The record revealed that Lodge 1794, American Federation of Government Employees, AFL-CIO, which was not a party to these proceedings, is the current exclusive representative of all nonsupervisory, nonprofessional GS employees at the Parker-Davis Project.

employees in the trades and crafts engaged in operation and maintenance activities at the Yuma Project represented exclusively by the IBEW.

A current basic two-year agreement between the IBEW and the Activity, which became effective November 23, 1971, covers all WB employees at the Parker-Davis and Yuma Projects and provides for automatic renewal from year to year on its anniversary date. As a result of the separate exclusive recognitions granted at the Parker-Davis and the Yuma Projects, the basic negotiated agreement executed by the parties covering these locations provides for separate and independent supplementary agreements covering the wage schedules for the employees of each Project.

As noted above, the decertification petition in Case No. 72-4067, filed February 13, 1973, seeks the decertification of the IBEW as the exclusive representative of all WB employees at the Yuma Project. The current two-year agreement between the Activity and the IBEW encompassing the WB employees at the Yuma Project is effective from November 23, 1971 through November 22, 1973. Under these circumstances, because the decertification petition was not filed within the 60-90 day period as provided for in Section 202.3(c) of the Assistant Secretary's Regulations, and in view of the absence of any evidence of unusual circumstances substantially affecting the Yuma Project unit (as discussed below), or the IBEW's representation status, I find that the petition in Case No. 72-4067 was filed untimely and that, therefore, it should be dismissed.

The record reveals that prior to August 20, 1972, the Yuma Project's mission included irrigation as well as responsibility for the operation and maintenance of water control and drainage facilities along the lower Colorado River. The LCR Project's mission involved dredging, including the construction, operation and maintenance of the Colorado River channel and backwater areas along the Arizona, California, and Nevada border, and the re-channelization and re-opening of the existing channel and dredging of backwater areas for fish and wildlife recreation purposes. As a result of the merger of the LCR Project into the Yuma Project on August 20, 1972, the LCR Project was abolished administratively and its dredging operations were assigned to the Yuma Project. The evidence further establishes that the Parker-Davis Project was not affected by the merger. Thus, the Parker-Davis Project's mission was, and continues to be, the construction, operation and maintenance of the Activity's Transmission System providing hydroelectric energy to Southern Nevada, Southern California, and Arizona, except for the northeastern portion of the latter state.

Contrary to its position expressed prior to the hearing, the Activity, at the hearing, joined in a stipulation with the IBEW and the NFFE that the WB employees at the Yuma Project and the WB employees at the Parker-Davis Project have been, and continue to constitute, separate and distinct bargaining units. The record supports the parties' stipulation

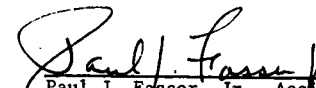
in this regard. Further, the evidence establishes that the merger did not result in substantial changes in the job functions of the employees involved herein, including the former LCR Project employees who were assigned administratively to the Yuma Project, and that, for the most part, they were not physically moved and did not have their work assignments or supervision changed.

In view of the stipulation of the parties at the hearing and the supporting evidence that shows that the reorganization of August 20, 1972, did not substantially or materially change the scope or character of the units involved herein, and that, therefore, such units remain viable and identifiable, I find that dismissal of the RA petition in Case No. 72-3964 also is warranted. 4/

ORDER

IT IS HEREBY ORDERED that the petitions filed in Case Nos. 72-3964 and 72-4067 be, and they hereby are, dismissed.

Dated, Washington, D.C.  
October 24, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

4/ Cf. Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, and Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282.

October 24, 1973

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE  
321st COMBAT SUPPORT GROUP,  
GRAND FORKS AIR FORCE BASE,  
NORTH DAKOTA 1/

Activity

and

Case No. 60-3219(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3379

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1347, INDEPENDENT

Intervenor

## DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Edmund L. Burke, for the sole purpose of determining whether the petition herein was filed timely. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by all of the parties, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3379, herein called AFGE, seeks an election in a unit of employees currently represented by the National Federation of Federal Employees, Local 1347, Independent, herein called NFFE. The claimed unit,

The name of the Activity appears as amended at the hearing.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE  
321st COMBAT SUPPORT GROUP,  
GRAND FORKS AIR FORCE BASE,  
NORTH DAKOTA  
A/SLMR No. 319

The subject case involves a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3379 (AFGE). The sole issue explored at the hearing and before the Assistant Secretary was whether the petition of the AFGE was filed timely.

The Activity and the Intervenor, National Federation of Federal Employees, Local 1347, Independent (NFFE), which was the incumbent exclusive representative, asserted that under Section 202.3(d) of the Assistant Secretary's Regulations they had 90 days subsequent to the dismissal on July 28, 1972, of an earlier AFGE petition, free from rival claim within which to negotiate an agreement. Accordingly, they contended that the agreement they signed on October 26, 1972, the 90th day after the dismissal of the earlier AFGE petition, barred the AFGE's petition filed on October 30, 1972. On the other hand, the AFGE contended that the Activity and the NFFE did not have a valid negotiated agreement until November 1, 1972, the day after the AFGE's petition in the instant proceeding was filed, because the Activity's Chief of Civilian Personnel who signed the negotiated agreement on October 26, 1972, did not have the authority to bind the Activity and, further, because the agreement signed on October 26, 1972, was not a complete agreement.

Under all of the circumstances, the Assistant Secretary found that the parties had entered into a binding agreement on October 26, 1972. In this connection, the Assistant Secretary noted particularly that in the instant situation, the Activity's Chief of Civilian Personnel had been authorized to negotiate and sign an agreement on behalf of the Activity. Furthermore, the Assistant Secretary found that the negotiated agreement signed on October 26, 1972, contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship. Thus, the parties were in full accord on 33 of the 35 clauses in the negotiated agreement signed October 26, 1972, and, with respect to the remaining 2 clauses, the only open question related to the selection of 1 of 2 alternative provisions, rather than the negotiation or renegotiation of these or any substantive provisions of the agreement.

Accordingly, the Assistant Secretary found that the AFGE's petition filed October 30, 1972, was untimely and he ordered that the petition be dismissed.

for which the NFFE was recognized as the exclusive representative in 1968, consists of all employees, including employees of the on-base tenant organizations, paid from appropriated funds and serviced by the U.S. Air Force Civilian Personnel Office, Grand Forks Air Force Base, Grand Forks, North Dakota, excluding supervisors, professionals, guards, management officials and employees engaged in Federal personnel work in other than a purely clerical capacity.

The Labor-Management Services Administration Area Administrator determined that the petitioned for unit was, in fact; the unit currently represented by the NFFE and that such unit was appropriate for the purpose of exclusive recognition. Under these circumstances, and in accordance with established policy, 2/ the sole issue explored at the hearing and before the Assistant Secretary in this matter is whether the AFGE's petition was filed timely.

The AFGE contends that its petition herein, filed October 30, 1972, was timely because no negotiated agreement existed at the time of filing which would constitute a bar. On the other hand, the NFFE and the Activity assert that a negotiated agreement signed on October 26, 1972, constitutes a bar to the AFGE's petition.

#### BACKGROUND

The record reflects that on March 20, 1972, during the open period of a negotiated agreement between the Activity and the NFFE, the AFGE filed a petition seeking an election in the unit represented by the NFFE. On July 28, 1972, that petition was dismissed on the basis that the showing of interest submitted in support of the petition was insufficient. Under the provisions of Section 202.3(d) of the Assistant Secretary's Regulations, the Activity and the NFFE thereafter were afforded 90 days free from rival claim within which to consummate an agreement. 3/ In this regard, because notice of the dismissal of the AFGE's petition was received by mail, the Activity and the NFFE contend that under the

2/ See, in this regard, Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230, Appendix A.

3/ Section 202.3(d) of the Regulations provides, in pertinent part, that when an activity and an incumbent exclusive representative have an agreement and a petition challenging the representation status of the incumbent exclusive representative is withdrawn or dismissed less than 60 days prior to the terminal date of the agreement, or any time thereafter, the activity and the incumbent "shall be afforded a ninety (90) day period from the date the withdrawal is approved or the petition is dismissed free from rival claim within which to consummate an agreement ----."

provisions of Section 206.2 of the Assistant Secretary's Regulations 4/ (Section 205.2 of the Regulations prior to the amendments of September 15, 1972), they were entitled to three days, in addition to the prescribed 90 day period, in which to negotiate an agreement free from rival claim. Moreover, because the addition of three days, as provided in Section 206.2 of the Assistant Secretary's Regulations, would result in the last day of the period falling on a Sunday, the Activity and the NFFE assert that under Section 206.1 of the Regulations 5/ (Section 205.1 of the Regulations prior to the amendments of September 15, 1972), the parties were entitled to an additional day in which to negotiate an agreement free from rival claim, or through Monday, October 30, 1972, the day on which the AFGE's petition was filed.

The record reveals that negotiation sessions between the Activity and the NFFE took place in September 1972, and that on October 26, 1972, the 90th day after the Regional Administrator's dismissal of the AFGE's petition, the Chief of Civilian Personnel of the Activity and the President of NFFE, Local 1347 signed a draft agreement. On October 29, 1972, the draft was signed by the NFFE's chief negotiator. Thereafter, the Chief of Civilian Personnel had a clean copy of the draft typed, along with a new signature page, which was signed by the President of NFFE Local 1347, the NFFE's chief negotiator, and the Activity's Chief of Civilian Personnel on October 31, 1972, and by the Base Commander of the Activity on November 1, 1972. 6/ The agreement then was forwarded to Air Force Headquarters for final approval. On October 30, 1972, the AFGE's petition was received by the Labor-Management Services Administration Area Office.

#### THE ALLEGED AGREEMENT BAR

At the hearing and in its brief, the AFGE contended that the date on which a complete agreement was signed by all parties was November 1, 1972, the date that the Base Commander signed the agreement, which was

4/ Section 206.2 of the Regulations provides, in part, that "Whenever a party has the right or is required to do some act pursuant to these regulations within a prescribed period after service of a notice or other paper upon him and the notice or paper is served by mail, three (3) days shall be added to the prescribed period..."

5/ Section 206.1 of the Regulations provides, in part, that in computing periods of time prescribed by or allowed by the Regulations, except in agreement bar situations prescribed in Section 202.3(c) and certain unfair labor practice situations, the last day of the period is included "unless it is a Saturday, Sunday, or Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or a Federal legal holiday."

6/ Although the clean draft was, in fact, signed on October 31 and November 1, 1972, the Chief of Civilian Personnel indicated on the second signature page that all four parties had signed on October 30, 1972.



October 29, 1973

Subsequent to the date the AFGE's petition was filed. In this connection, the AFGE argued that: (1) the Activity's representative who signed the agreement on October 26, 1972, did not have the authority to bind the Activity; and (2) the agreement signed on October 26, 1972, was not a complete negotiated agreement which would bar the petition herein because of the some 35 clauses of the agreement had not been finally resolved.

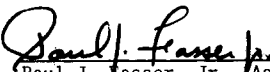
Under all of the circumstances, I find that the Activity and the NFFE entered into a binding negotiated agreement on October 26, 1972, within the 90 day period free from rival claim provided for by Section 2.3(d) of the Assistant Secretary's Regulations. In this regard, it is noted particularly that, although past negotiated agreements had been signed by the President of NFFE Local 1347 and the Base Commander, the evidence establishes that in the instant situation the Activity's Chief of Civilian Personnel had been authorized to negotiate and sign an agreement on behalf of the Activity. Further, in my view, the negotiated agreement signed October 26, 1972, was an agreement which properly could bar a petition because it contained substantial and unanalyzed terms and conditions of employment sufficient to stabilize the bargaining relationship. In this regard, the record reveals that the parties were in full accord with respect to 33 of the 35 clauses of the negotiated agreement signed on October 26, 1972, and that, with respect to the remaining 2 clauses, the only open question related to the selection of 1 or 2 alternative provisions rather than the negotiation or renegotiation of these or any other substantive provisions of the agreement. 7/ Under these circumstances, I find that the Activity and the NFFE had, on October 26, 1972, entered into a binding negotiated agreement and that the subsequent signing on October 31, 1972, and November 1, 1972, described above, did not change the actual date upon which the negotiated agreement became a bar to the petition filed by the AFGE.

Accordingly, inasmuch as the AFGE's petition was received on October 30, 1972, four days after the NFFE and the Activity had entered into a negotiated agreement, I find the AFGE's petition in the subject case to be filed untimely and I shall order that it be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 60-3219(RO) is, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 24, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

7/ With respect to the two clauses involved, the negotiators were in agreement on the acceptability of either of two alternative provisions, but the Activity's negotiator agreed to allow the President of NFFE Local 1347 to ask his chief negotiator to select either of the clauses. Thereafter, the chief negotiator chose the two alternative clauses for which the President of NFFE Local 1347 had expressed a preference.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. ARMY ELECTRONICS COMMAND,  
FORT MONMOUTH, NEW JERSEY  
A/SLMR No. 320

On June 27, 1973, the Assistant Secretary issued a Decision and Order in A/SLMR No. 281 in which he found that the Activity had violated Section 19(a)(1) of the Order by refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Assistant Secretary's Regulations. In view of the fact that the Federal Labor Relations Council (Council) had accepted review in two cases (A/SLMR Nos. 139 and 256) involving essentially the same issue, the Assistant Secretary deferred implementation of the remedial order in the subject case pending the Council's disposition of the two related cases.

On August 8, 1973, the Council set aside the Assistant Secretary's findings of violation in A/SLMR Nos. 139 and 256, concluding that there was no obligation under Section 1(a) of the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings. Under these circumstances, the Assistant Secretary concluded that the complaint in the instant case should be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY ELECTRONICS COMMAND,  
FORT MONMOUTH, NEW JERSEY

Respondent

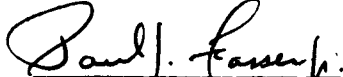
and

Case No. 32-2851(CA),  
A/SLMR No. 281,  
FLRC No. 73A-30

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 476

Complainant

Dated, Washington, D.C.  
October 29, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

SUPPLEMENTAL DECISION AND ORDER

On October 18, 1973, the Federal Labor Relations Council (Council) denied the Complainant's appeal from the Assistant Secretary's dismissal (in part) of the complaint herein on the basis that such appeal did not present a major policy issue or other ground to warrant Council review. Previously, on June 27, 1973, the implementation of the remedial order in the subject case was deferred by the Assistant Secretary pending the Council's resolution of the appeals in Department of the Navy and the U. S. Naval Weapons Station, A/SLMR No. 139, FLRC No. 72A-20 and in Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256, FLRC No. 73A-18, which cases involved essentially the same issue as is involved herein. On August 8, 1973, the Council set aside the Assistant Secretary's findings of violation in A/SLMR No. 139 and A/SLMR No. 256, concluding that there was no obligation under Section 1(a) of the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings.

Under all of the foregoing circumstances, it was concluded that, based on the Council's Decisions on Appeal in FLRC Nos. 72A-20 and 73A-18, the complaint in the subject case should be dismissed in its entirety. 1/

1/ In view of the disposition of the complaint herein, the issues previously raised by the Respondent with respect to compliance with the Decision and Order in A/SLMR No. 281 were considered to be moot.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415


October 18, 1973

-2-

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

Irving I. Geller  
General Counsel  
National Federation of  
Federal Employees  
37 H Street, NW,  
Washington, D.C. 20006

Re: U.S. Army Electronics Command, Fort Monmouth,  
New Jersey, A/SLMR No. 281, FLRC No. 73A-30

cc: A/SLMR  
Dept. of Labor

D. Cole  
USAEC

Dear Mr. Geller:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case, and, for the reasons indicated below, has directed that your petition be denied.

In his decision (as relevant to your appeal), the Assistant Secretary dismissed your complaint that the agency violated section 19(a)(1) of the Order by its refusal to maintain on official time an employee of the agency serving as a witness-in-waiting, union representative and assistant to union counsel at a formal unit determination hearing. You contend in your appeal that this decision presents a major policy issue for Council resolution.

In U.S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, decided August 8, 1973, (Report No. 43), the Council found that while there is no obligation under section 1(a) of the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, it would be consistent with the Order for the Assistant Secretary to promulgate a regulation under section 6(d) requiring that necessary witnesses be on official time for the period of their participation at formal hearings, if the Assistant Secretary determines that such a procedure is necessary to administer those aspects of his functions which require a formal hearing. In the absence of such a regulation, the Council found the agency's failure to grant such official time and its policy against such a practice were not violative of section 19(a) of the Order. The Council's decision in the Yorktown case, and the reasons set forth therein, while pertaining to union witnesses, are clearly dispositive of your appeal in the instant case relating to official time for an employee acting as a witness-in-waiting, union representative and assistant to union counsel. Consequently, your appeal from the Assistant Secretary's dismissal of your complaint presents no major policy issue or other ground to warrant Council review.

November 5, 1973

A/SLMR No. 321

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,  
UNITED STATES NAVAL STATION  
ADAK, ALASKA  
A/SLMR No. 321

This case involved a petition for clarification of unit filed by American Federation of Government Employees, Local 2542, AFL-CIO (AFGE), seeking clarification of the status of certain employee job classifications in the existing exclusively recognized bargaining unit, namely: Clerk-Typist, GS-3; Leader Electrician (Lineman), WL-10; Leader-Electrician (Telephone), WL-10; Leader Boilermaker, WL-10; and Leader, Heating Equipment Mechanic, WL-9. The Activity contended that the employees in each of the disputed classifications, except the Clerk-Typist, are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit. It also contended that the Clerk-Typist, who is employed in the Personnel Office, should be excluded from the unit because the incumbent is engaged in Federal personnel work of other than a routine nature, and also because the incumbent is a confidential employee. The AFGE contended that the employees in the above-noted classifications should be included in the unit.

The Assistant Secretary found that the Clerk-Typist, GS-3, performed essentially clerical work of a routine nature and, moreover, was not a confidential employee. In addition, he found the Leader Boilermaker, WL-10; the Leader Electrician (Lineman), WL-10; the Leader Electrician (Telephone), WL-10; and the Leader, Heating Equipment Mechanic, WL-9 were not supervisors within the meaning of Section 2(c) of the Order.

In accordance with his findings, the Assistant Secretary clarified the exclusively recognized unit by including within the unit the positions of Clerk-Typist, GS-3; Leader Boilermaker, WL-10, Leader Electrician (Lineman), WL-10, Leader Electrician (Telephone), WL-10, and Leader, Heating Equipment Mechanic, WL-9.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
UNITED STATES NAVAL STATION  
ADAK, ALASKA

Activity

and

Case No. 71-2322(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2542, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, 1/ the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, Local 2542, AFL-CIO, herein called AFGE, filed a petition for clarification of unit in the subject case seeking clarification of an existing exclusively recognized bargaining unit. Specifically, the AFGE seeks to clarify the status of certain employee job classifications: Clerk-Typist, GS-3; Leader Electrician (Lineman), WL-10; Leader Electrician (Telephone), WL-10; Leader Boilermaker, WL-10; and Leader Heating Equipment Mechanic, WL-9. The Activity contends that, with the exception of the Clerk-Typist, the employees in each of these classifications are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit. With respect to the Clerk-Typist, who is employed in the Personnel Office of the Activity, the Activity takes the position that the incumbent in this position should be excluded from the unit as an employee engaged in Federal personnel work in other than a purely clerical capacity, and also because the incumbent in this position is a confidential employee. The AFGE takes the position that the employees in the above-noted classifications should be included in the unit.

1/ The Activity submitted an untimely brief which has not been considered.

The record indicates that the AFGE was granted recognition on May 23, 1966, as the exclusive bargaining representative of a unit of all eligible employees at the U.S. Naval Station, Adak, Alaska. Thereafter, the parties negotiated two agreements.

The Activity is located some 1,200 air miles southwest of Anchorage, Alaska, in the Aleutian chain of Islands. It is a shore installation of the U.S. Navy whose mission is to maintain and operate facilities and to provide services and materials in support aviation activities and other operations. It also provides support services for several tenant activities. At the time of the hearing in this matter, there were approximately 153 civilian employees at the Activity, of whom approximately 110 were included in the exclusively recognized unit.

#### DISPUTED JOB CLASSIFICATIONS

##### Clerk-Typist, GS-3

This position is located in the Civilian Personnel Office of the Activity. The job description for the position states that the incumbent will perform general clerical and typing duties associated with civilian travel and the civilian personnel program. The Activity takes the position that the incumbent in this position performs clerical duties which are other than of a routine nature in that she is privy to labor relations matters and other work of a confidential nature which makes it inconsistent and inappropriate for her to be in the unit. The AFGE, on the other hand, contends that the major duties of this position are those of a travel clerk and that the incumbent should be included within the recognized unit.

The record indicates that the Civilian Personnel Office is responsible for the Activity's civilian personnel program, including labor-management relations. The Office is staffed by a Personnel Officer, GS-11, a Staff Assistant, GS-7, a Personnel Clerk, GS-4, and the position in question. The desks of these employees are in an open area in a single room and are within a few feet of each other with the exception of the Personnel Officer who has a small office opening into this room. All active personnel files, including those containing matter pertaining to labor-management relations, are located in this Office.

The record indicates that the duties performed by the incumbent in the position in question are basically two, namely, travel clerk and general personnel clerk. During the three summer months, travel to and from the Island of Adak is heavy and the incumbent in the position in question spends 90 percent of her time assisting employees of the Activity with their travel problems. This involves typing travel authorizations and orders, making arrangements for the transportation of the property of employees being transferred into and out of the Activity, and advising employees of their rights concerning these matters

under applicable regulations and agreements with the Activity. In addition to performing these travel clerk functions, the Clerk-Typist prepares and types a bi-weekly Employee Bulletin, which is a news sheet containing information intended to keep employees informed as to what is happening at the Activity; acts as a receptionist; picks up and delivers the mail; and maintains files, including personnel files. The Activity asserts that because of the small size of the Office involved, the Clerk-Typist is privy to all matters in the Office, and that the employee in this classification has been trained in the duties of the other two employees in the Office in order to fill in for them if necessary.

In my view, the record reveals that the job functions performed by the Clerk-Typist, GS-3, as set forth above, involve essentially clerical work of a routine nature. Accordingly, the employee in this classification may not be properly excluded from the unit as an employee engaged in Federal personnel work in other than a purely clerical capacity. Moreover, the record does not support the Activity's contention that the employee in this classification is a confidential employee. Even though the incumbent may have access to files which include labor relations materials, the mere access to such materials does not warrant the exclusion of an employee from an appropriate bargaining unit. <sup>2/</sup> Under these circumstances, I find that the employee in the classification of Clerk-Typist, GS-3, should be included in the unit.

##### Leader Boilermaker, WL-10

The position of Leader Boilermaker is in the Steam Generation Branch, Utilities Division, Public Works Department. This Branch is under the direction of a General Foreman, WS-12. In addition to the Leader Boilermaker, the record indicates that there are ten Boiler Plant Operators, WG-10, and several military personnel in the Branch. The mission of the Branch is to operate and maintain the boilers in Steam Plants No. 3 and 4 which supply heat to housing units, hangers and other buildings at the Activity.

The record indicates that the Leader Boilermaker's principal responsibility is the maintenance of the boilers. He works alongside a crew which consists of three members of the military who are classified as boiler technicians. He has no authority with respect to the ten civilian Boiler Plant Operators, except during the short periods of time when a particular boiler, which is under the responsibility of a civilian operator, is undergoing maintenance or repair. Because of the small size of the Leader Boilermaker's military crew and their lack of experience, the Leader Boilermaker spends 95 percent of his time with the crew at the job site working with tools a substantial portion of the time. In addition, he spends some time in training the members of the crew, instructing them in safety matters, and securing the necessary materials

<sup>2/</sup> See Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69.

and parts required to do the job. 3/ He also is responsible to see that a detailed record concerning the maintenance and repair of the boilers is kept.

Testimony indicates that the Leader Boilermaker has no authority to hire, suspend, promote, reward or discipline any member of his crew, nor may he authorize overtime or call civilian or military personnel to work, even in emergency situations. He does not establish job priorities and has not handled any grievances. Moreover, he does not evaluate the performance of the military personnel in his crew, as such evaluations are the responsibility of the Chief Petty Officer who is a member of the crew. While the Leader Boilermaker assigns work to the members of his crew during the day to day operations at the job site, the record indicates that such assignments are dictated by the type of the work involved and are routine in nature.

Under these circumstances, and as the record reveals that the incumbent does not exercise any supervisory authority requiring the use of independent judgement, or have the authority effectively to recommend any action within the meaning of Section 2(c) of the Order, I find that the Leader Boilermaker, WL-10, is not a supervisor within the meaning of the Order, and that an employee in this classification should be included in the unit.

Leader Electrician (Lineman), WL-10

This position is in the Power Generation and Distribution Branch, Utilities Division, Public Works Department. A General Foreman, WS-12, is in charge of the Branch which generates and distributes electricity to the Island of Adak. The Branch consists of an alarm Maintenance Center, a Power Generation Work Center and a Power Line Center. An electronics mechanic, eight civilian electricians and an indeterminate number of military personnel with electrical ratings work in the Branch. The Power Line Center consists of one civilian Electrician Lineman, WG-10, four to six military personnel, and the position in question.

The record indicates that the Power Line Center crew, handles preventative maintenance, emergency repairs, and specific job orders such as the installation of a new transformer or the stringing of a new line. The Leader Electrician spends 99 percent of his time at the job site working with, training, and instructing the crew members. He also prepares orders for the materials required to be used on the job and provides the General Foreman with the information the latter needs to prepare the payroll cards and labor distribution report. The General Foreman gives the daily work assignments to the Leader Electrician who passes them on to the crew. While on the job site, questions concerning established procedures and policies may be directed to the Leader Electrician. The

3/ The crew is visited by the General Foreman at least once a day.

record reveals however, that the General Foreman visits the work site daily and also maintains direct radio contact with the Leader Electrician. 4/

The record indicates that the Leader Electrician does not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees. While he directs crew members in carrying out their assignments, the record reveals that such direction is in the nature of a more experienced employee assisting a less experienced employee as distinguished from supervision of the employees. The Leader Electrician does not evaluate the performance of the crew members. 5/ While the record indicates that he may handle problems arising within the crew, there is no evidence that such handling requires the use of independent judgement or that it would extend to other than problems of a routine nature. Similarly, while the incumbent has recommended members of his crew for an award, and has recommended that a crew member be transferred, the evidence does not establish that his recommendations in this regard are effective.

Under all of the circumstances, I find that the evidence is insufficient to establish that the authority vested in the Leader Electrician (Lineman), WL-10, or actions taken by him, are of other than a routine or clerical nature, require the exercise of independent judgement, or are not dictated by established procedures or directed by higher officials. Accordingly, I conclude that the Leader Electrician (Lineman), WL-10, is not a supervisor within the meaning of Section 2(c) of the Order, and that an employee in this classification should be included in the unit.

Leader Electrician (Telephone), WL-10

This position is in the Telephone Maintenance Branch, Utilities Division, Public Works Department. The Branch is responsible for the maintenance and repair of the Adak Telephone System as well as for the installation of new equipment and cable. The Branch, or crew, consists of one civilian electrician, WG-11, five military personnel, and the position in question.

The incumbent in the position in question has a desk in the central telephone exchange. The one civilian member of the crew is a skilled electrician who works full time on the central office dial and switch-board equipment at the central exchange. The Leader Electrician works at the exchange part of the time but spends a considerable amount of his

4/ The record indicates that the Power Line Crew has three vehicles equipped with radios and that the General Foreman can be contacted from these vehicles if any problem arises.

5/ The record reflects that the General Foreman is responsible for the evaluation of the performance of the civilian electrician in the crew and the Chief or Leading Petty Officer in the Utilities Division rates the military members of the crew.

me working with the maintenance crew on the job site. In this regard, the record indicates that he spends 70 percent of his time working with boilers. It also indicates that he routinely assigns work to both the civilian and military members of the crew when necessary. Further, the Leader Electrician is responsible for some of the training of new crew members. 6/

The evidence establishes that the Leader Electrician (Telephone) reports to the Utilities Division Director and that he does not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees. Nor does the record indicate that he has ever made a recommendation concerning any of these matters except on one occasion when he recommended the transfer of a military crew member. He does not evaluate the performance of either the civilian or military members of the crew although he furnishes certain data to those responsible for such evaluations. Further, the record indicates that he routinely approves time cards, can recommend approval of leave for the civilian electrician and can suggest, subject to review, the modification of work shifts because of job requirements.

Under all of the circumstances, I find that the Leader Electrician (Telephone), WL-10, is not a supervisor within the meaning of Section 2(c) of the Order because the record does not establish that the authority vested in the Leader, or the actions taken by him, are other than routine or clerical in nature. Nor does the evidence establish that the authority vested in the Leader or the actions taken by him require the exercise of independent judgement or that his recommendations are effective. Rather, it appears that any such authority or actions in this connection are dictated by established procedures or by the direction of higher officials. Accordingly, I find that an employee in this classification should be included in the unit.

Leader, Heating Equipment Mechanic, WL-9

This position is in the Plumbing and Heating Shop, Metal Trades Branch, Maintenance Division, Public Works Department. The incumbent in this position works with a crew of eight military personnel which is responsible for the installation, maintenance and repair of some 23 "package boilers" designed to heat individual buildings. 7/

The record indicates that a military man, a Chief Petty Officer, is the overall supervisor of the Plumbing and Heating Shop. The Leader, Heating Equipment Mechanic, WL-9, is responsible for the heating function

8/ The military personnel under his direction are divided into two crews.

9/ The record indicates that these boilers are located in individual buildings throughout the Activity and are small in comparison with those discussed above, in connection with the Leader Boilermaker position, which are located in the steam plants operated and maintained by the Utilities Division.

-6-

which consists primarily of preventative maintenance of the heating equipment. He selects and assigns crew members to the roving patrol which makes around the clock checks on the boilers. 8/ He also provides certain training for the members of his crew, most of whom are on their first assignments after basic military training, and such training is performed both on the job and in the classroom.

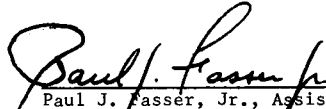
The record indicates that the Leader, Heating Equipment Mechanic, has no authority to hire, transfer, suspend, promote, discharge, or discipline any member of his crew or handle grievances. In one instance, he recommended the transfer of a member of his crew. The Chief Petty Officer is responsible for evaluation of crew members although he may consult with the Leader Heating Equipment Mechanic on this matter before making his evaluation.

Under all of the circumstances, I find that the evidence is insufficient to establish that the authority vested in the Leader, or the actions taken by him, are other than routine or clerical in nature, require the exercise of independent judgement, or are not dictated by established procedures or the direction of higher officials. Nor is the evidence sufficient to establish that his recommendations concerning his crew members are effective within the meaning of the Order. Accordingly, I find that the Leader, Heating Equipment Mechanic, WL-9, is not a supervisor within the meaning of Section 2(c) of the Order, and that the employee in this classification should be included in the unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, Local 2542, AFL-CIO, on May 23, 1966, at the United States Naval Station, Adak, Alaska, be, and hereby is clarified by including in said unit the position in the Personnel Office classified as a Clerk-Typist, GS-3, the position in the Steam Generation Branch, Utilities Division, Public Works Department classified as Leader Boilermaker, WL-10, the position in the Power Generation and Distribution Branch, Utilities Division, Public Works Department classified as Leader Electrician (Lineman), WL-10, the position in the Telephone Maintenance Branch, Utilities Division, Public Works Department classified as Leader Electrician (Telephone), WL-10, and the position in the Plumbing and Heating Shop, Metal Trades Branch, Maintenance Division, Public Works Department classified as Leader, Heating Equipment Mechanic, WL-9.

Dated, Washington, D.C.  
November 5, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

8/ The remaining crew members perform whatever repair or installation jobs are required.

-7-

November 13, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE  
AIR FORCE DEFENSE LANGUAGE INSTITUTE,  
ENGLISH LANGUAGE BRANCH,  
LACKLAND AIR FORCE BASE, TEXAS  
A/SLMR No. 322

This unfair labor practice proceeding involved an alleged violation of Section 19(a)(6) of the Executive Order by the Respondent Activity based on its alleged unilateral implementation of Defense Language Institute Regulation 690-2.

The Respondent contended that it was not obligated to bargain as to the new Regulation because it was merely implementing a directive issued by national headquarters to achieve regulatory conformance and equality in the assignment of all similarly situated employees for overseas positions. Further, it contended that there was no obligation to consult because the system previously in existence violated Civil Service regulations, and that, moreover, the Complainant had never made written suggestions objecting to the Regulation.

The Assistant Secretary found, contrary to the Administrative Law Judge, that under the circumstances of this case, the Respondent was not obligated to meet and confer with the Complainant over the adoption of DLI Regulation 690-2. In this connection, the Assistant Secretary noted that in United Federation of College Teachers, Local 1460 and the U. S. Merchant Marine Academy, FLRC No. 71A-15, the Federal Labor Relations Council stated that "higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations. . . ." Thus, he found that DLI Regulation 690-2 was not inconsistent with Section 11(a) of the Order since it was issued "to achieve a desirable degree of uniformity and equality. . . common . . . to employees in more than one subordinate activity." He further found that while, in his opinion in the circumstances of the instant case, it would have been better practice for Agency headquarters, prior to the issuance of DLI Regulation 690-2, to have notified the Complainant of its intention to issue a new regulation and to have sought the views of the Complainant with respect thereto, once the Agency headquarters issued the Regulation applicable to employees of other branches of DLI as well as those DLIEL employees at Lackland Air Force Base, the matters contained therein in effect were removed from the scope of negotiations at the local level. Accordingly, the Assistant Secretary found that the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2.

Nor did the Assistant Secretary find that the Respondent sought to by-pass and undercut the Complainant by causing a new regulation to be issued by Agency headquarters. In this regard, he noted that the parties negotiated over and concurred in the need to change or reverse the rotation roster system in existence prior to the issuance of DLI Regulation 690-2. Further, following rejection of the proposed revised rotation system by Agency headquarters and receipt of DLI Regulation 690-2, the Respondent informed the Complainant of the new Agency-wide regulation and the reasons why it was considered necessary. And, although requested to do so, the Complainant did not submit written comments on the new Regulation, nor did it accept the Respondent's offer to submit in writing any recommended changes or revisions which would be forwarded to DLI headquarters for consideration. The record also disclosed that in July 1972, the Complainant declined to consider or comment on standard operating procedures presented to it which were designed to implement the provisions of DLI Regulation 690-2. In the Assistant Secretary's view, the foregoing evidence demonstrated that the Respondent was not seeking to by-pass and undercut the Complainant but, rather, was attempting to meet and confer in good faith with the Complainant on any matters remaining open with respect to the new Regulation. The Assistant Secretary found such conduct by the Respondent was consistent with the purposes and policies of the Order.

Accordingly, under all of the circumstances, the Assistant Secretary found that the Respondent's conduct was not violative of Section 19(a)(6) and he ordered that the complaint be dismissed.

-2-



## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE  
 AIR FORCE DEFENSE LANGUAGE INSTITUTE,  
 ENGLISH LANGUAGE BRANCH,  
 LACKLAND AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-4218(CA)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL UNION 1367

Complainant

## DECISION AND ORDER

On June 15, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Department of Defense Air Force Defense Language Institute, English Language Branch (DLIEL), Lackland Air Force Base, Texas, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, to the extent consistent herewith.

The complaint herein alleged that the Respondent violated Section 19(a)(6) of the Order by unilaterally implementing Defense Language Institute Regulation 690-2 on April 14, 1972, 1/ and failing to confer, consult, or negotiate with the Complainant in respect thereto.

As discussed in detail below, this Regulation established a new procedure for the selection of personnel for overseas duty.

The Administrative Law Judge concluded that the system or manner in which selection is made for overseas assignment is a matter affecting working conditions within the meaning of Section 11(a) and that the Respondent's failure to confer in this regard violated Section 19(a)(6) of the Order. In reaching his decision, the Administrative Law Judge rejected the Respondent's contention that it was not obliged to bargain as to the new regulation because it was merely implementing a directive issued by national headquarters which was written to achieve regulatory conformance and equality in the assignment of all similarly situated employees to overseas positions. Further, he rejected the contentions that there was no obligation to consult because the system previously in existence violated Civil Service regulations and that, moreover, the Complainant had never made written suggestions objecting to Regulation 690-2.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

Between July 20, 1970 and April 14, 1972, a rotation roster system existed at Respondent Activity governing the selection of instructors for overseas duty as reflected in DLIEL Memorandum 690-1 dated July 20, 1970. 2/ Under this rotation system, instructors with the most experience were the last to be assigned overseas duty. In March 1971, a new Commandant assumed command at the facility involved herein. In reviewing the existing rotation roster system established under DLIEL Memorandum 690-1, the Commandant concluded that, contrary to the terms of that Memorandum, the rotation system should be in reverse order so that instructors with the most experience would be assigned overseas duty first. Subsequently, this proposal was discussed with the Complainant and the parties concurred in the need to change or reverse the rotation roster system. Following these discussions, the Commandant prepared a revised draft of DLIEL Memorandum 690-1, 3/ which retained a

2/ The Respondent excepted to the Administrative Law Judge's finding that the subject matter of DLIEL Memorandum 690-1 "had been determined after discussion and negotiation between management and the union." Because the record clearly supports a finding that the rotation system pursuant to DLIEL Memorandum 690-1 had become a term or condition of employment with respect to the unit employees herein, it was not considered pertinent, for the purpose of this decision, as to whether or not the subject matter of DLIEL Memorandum 690-1 had been determined pursuant to bilateral discussions and negotiations. Accordingly, no finding with respect to the above-noted exception was considered necessary.

3/ On page 7 of his Report and Recommendations, the Administrative Law Judge inadvertently stated that the Commandant prepared a revised DLIEL 690-2 instead of DLIEL 690-1. This inadvertence is hereby corrected.

rotation system, and submitted the draft to headquarters "for review and inspection." The revised draft was not shown to the Complainant prior to its being forwarded to headquarters. 4/

Upon review of the draft, Defense Language Institute headquarters officials determined that any rotation system based solely upon tenure was contrary to Civil Service regulations as well as the Federal Personnel Manual. Accordingly, they prepared a new regulation, designated DLI Regulation 690-2, which was to supersede DLIEL Memorandum 690-1. The new Regulation became effective April 14, 1972, and the evidence establishes that it was applicable to employees of other branches of the Defense Language Institute as well as those DLIEL employees at Lackland Air Force Base. 5/ DLI Regulation 690-2 established a new procedure for the selection of DLIEL personnel for overseas duty based on experience and an evaluation of the best qualified men for overseas duty. The selection and designation procedure was predicated on the prior rating and ranking of eligibles and a determination of basic eligibility by the servicing Civilian Personnel Officer.

The Respondent received the new Regulation from headquarters on April 14, 1972, the same day it was to become effective. On that same afternoon, the Commandant held a meeting with representatives of the Complainant and informed them of the new Regulation which now governed the selection of personnel for overseas duty. The Complainant's representatives also were advised that the new Regulation would be announced to the staff on Monday, April 17, 1972, at which time it would be implemented. The Commandant asked for comments and whether the Complainant disagreed with the new Regulation in any respect. The Complainant objected both to the fact that it did not have time to read

4/ The Respondent excepted to the Administrative Law Judge's finding that the Commandant of DLIEL at Lackland did not show the revised draft to the Complainant, since, among other things, he was not aware of Executive Order 11491. The record disclosed that, while not necessarily unaware of the Order, the Commandant did not think that there was a need to discuss the matter with the Complainant at the time of its submission to headquarters.

5/ In describing the scope of the Regulation, the Respondent's civilian personnel advisor, in uncontradicted testimony, stated as follows: "It applies to, as mentioned, outside employees outside of DLIEL; as a matter of fact outside of DLI and it also applies to our West Coast, East Coast, and Southwest Branch; that is, any persons within these other branches that are qualified and come up on the best qualified list will also be included on the referral."

the Regulation and that it had not been consulted in regard thereto. The Commandant advised the Complainant that higher headquarters considered the rotation roster system illegal and that it was felt that it was not necessary to consult with the Complainant since it was a DLI regulation. Thereafter, the new Regulation was announced at a general meeting of instructors and the Regulation was posted on bulletin boards on April 17, 1972. Selections for overseas duty under DLI Regulation 690-2 commenced in May 1972.

On several occasions between April 14, 1972, and December 31, 1972, the Respondent and the Complainant met to discuss DLI Regulation 690-2. The Complainant throughout asserted that it wanted the Regulation rescinded unless a fair and equitable method of overseas selection could be adopted. The Respondent, although stating that it would accept written suggestions which would be forwarded to DLI headquarters for consideration, contended that the Regulation could not be changed at its level. Additionally, in July 1972 the Respondent presented to the Complainant for the latter's consideration and comment, standard operating procedures for the implementation of DLI Regulation 690-2. The Complainant responded that such procedures were irrelevant since the Regulation was unfair and adopted without its consent.

Contrary to the Administrative Law Judge, I find that, under the particular circumstances of this case, the Respondent was not obligated to meet and confer with the Complainant over the adoption of DLI Regulation 690-2. In United Federation of College Teachers, Local 1460 and U. S. Merchant Marine Academy, FLRC 71A-15, the Federal Labor Relations Council (Council) stated that "higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations. . . ." In this regard, the Council noted that "the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity." 6/ Based on the foregoing

6/ Section 11(a) provides that: "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiations; and execute a written agreement or memorandum of understanding."

rationale of the Council, I find that DLI Regulation 690-2 was not consistent with Section 11(a) of the Order since it was issued "to achieve a desirable degree of uniformity and equality . . . common . . . to employees of more than one subordinate activity." While, in my opinion, under the circumstances of the instant case, it would have been better practice for Agency headquarters, prior to the issuance of DLI Regulation 690-2, to have notified the Complainant of its intention to issue a new Regulation and to have sought the views of the Complainant with respect thereto, once the Agency headquarters issued the Regulation applicable uniformly to employees of other branches of DLI as well as those DLI/EL employees at Lackland Air Force Base, the matters contained herein, in effect, were removed from the scope of negotiations at the local level. Accordingly, the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2.

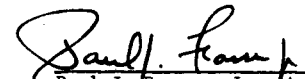
Nor does it appear from the record that the Respondent sought to by-pass and undercut the Complainant by causing a new regulation to be issued by Agency headquarters. In this regard, it was noted that the parties negotiated over and concurred with respect to the need to change and reverse the rotation roster system prior to the issuance of DLI Regulation 690-2. Further, following rejection of the proposed revised rotation system by Agency headquarters and the receipt of DLI Regulation 690-2, the Respondent informed the Complainant of the new Agency-wide regulation and the reasons why it was considered necessary. Thereafter, the Respondent requested the Complainant to submit written comments on the new Regulation which were not forthcoming. Nor did the Complainant accept the Respondent's offer to submit in writing to Agency headquarters any recommended changes or revisions by the Complainant. Moreover, in July 1972, the Complainant declined to consider or comment on standard operating procedures presented to it which were designed to implement the provisions of DLI Regulation 690-2. In my view, the foregoing evidence demonstrates that the Respondent was not seeking to by-pass and undercut the Complainant, but, rather, was attempting to meet and confer in good faith with the Complainant on any matters remaining open with respect to the new Regulation. Such conduct by the Respondent clearly was consistent with the purposes and policies of the Order.

Accordingly, under all of the circumstances, I find, contrary to the Administrative Law Judge, that the Respondent's conduct herein was not violative of Section 19(a)(6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-4218(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
November 13, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

.....  
DEPARTMENT OF DEFENSE :  
AIR FORCE DEFENSE LANGUAGE INSTITUTE :  
ENGLISH LANGUAGE BRANCH :  
LACKLAND AIR FORCE BASE, TEXAS :  
Respondent :  
and :  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, :  
LOCAL UNION 1367 :  
Complainant :  
.....

CASE NO. 63-4218(CA)

Captain David R. DeWall  
Office of the Solicitor STA Office  
HQ, Ft. Sam Houston  
On behalf of Respondent

Glen J. Peterson, National Representative  
10th District AFGE  
On behalf of Complainant

Before: William Naimark, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a Notice of Hearing issued on March 23, 1973, by the Regional Administrator of the Labor-Management Services Administration, Kansas City Region, a hearing was held in the above-entitled matter before the undersigned on April 10, 1973 at San Antonio, Texas.

This proceeding was initiated under Executive Order 11491 (herein called the Order) by the filing of a complaint on December 18, 1972 by American Federation of Government Employees, AFL-CIO, Local 1367 (herein called Complainant) against Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas (herein called Respondent or DLIEL). The complaint alleges Respondent violated Section 19(a)(6) of the Order by unilaterally implementing Defense Language Institute (herein called DLI) Regulation 690-2 on April 14, 1972 and failing to confer, consult, or negotiate with the union in respect thereto. Respondent

denies a violation of the Order and contends: (a) DLI headquarters has authority to issue regulations - which may apply to more than one of its sections - and to supersede regulations of its lower commands; (b) the previous policy of DLIEL sending men overseas through a rotation roster, and as set forth in DLIEL memorandum 690-1, was illegal; (c) Respondent attempted to consult with Complainant in the summer of 1972 re the new DLI regulation, 690-2, and asked the union to submit objections in writing. The union failed to do so, insisting upon a rescission of DLI 690-2 - and this was improper conduct on the union's part; (d) DLI has no obligation to consult with the local union in implementing or drafting its regulations.

At the hearing representatives appeared on behalf of both Complainant and Respondent. The parties were afforded full opportunity to be heard, 1/ to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Neither party filed a brief with the undersigned.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At its Lackland Air Force Base in San Antonio, Texas, Respondent employs instructors to teach English to foreign military students preparatory to technical or professional training. In foreign countries, where DLIEL has detachments, the instructors assist host countries to develop programs and train instructors to teach English to others.

1/ Respondent moved to dismiss the complaint on the ground that Complainant did not in good faith attempt to resolve the matter as required under Section 203.2(a)(4) of the Rules and Regulations. The acceptance of a complaint filed with the Area Administrator results in the issuance of a notice of hearing by the Regional Administrator if the latter determines there is reasonable cause to believe a violation has occurred. While Section 203.2 of the Rules and Regulations sets forth steps to be taken before a complaint is filed, a determination as to whether the complainant took such action is, in my opinion, an administrative decision and not an issue before me for resolution. Since the Regional Administrator issued a notice of hearing herein, I am constrained to conclude it was thereby determined - and particularly since it was not raised directly by Respondent prior to the hearing - that complainant satisfied the requirements of the cited section of the Rules and Regulations. The motion is accordingly denied.

2. Complainant union has been the collective bargaining representative since about February 1971 for all English language school instructors at the Lackland Air Force Base of Respondent. There is no existing collective bargaining agreement between the parties.

3. Between July 20, 1970 and April 14, 1972, a rotation roster system existed at Respondent's base governing the selection of instructors for overseas duty, as reflected in DLIEL memorandum 690-1 dated July 20, 1970.

4. Under the rotation system referred to in paragraph 3 above, instructors with most tenure were going overseas last, and as a result thereof individuals with least experience were apt to be sent overseas in an advisory capacity.

5. On March 31, 1971, Colonel John K. Abbott became Commandant of DLIEL at Lackland. Shortly thereafter he reviewed memorandum DLIEL 690-1 dealing with the selection of men for overseas duty. Abbott concluded the rotation system should be in reverse order so that the most experienced be sent overseas first, and he met with Major Dyer and Edward A. Zeman, President of Local 1367, to discuss the proposed change. All of them concurred in the need to change or reverse the rotation roster system.

6. Colonel Abbott prepared a revised draft of DLIEL 690-1, which still contained a rotation system, and sent the draft to the Civilian Personnel Officer at DLI headquarters, Washington, D. C. for review and inspection. Abbott did not show the revised draft to Zeman, since he was not aware of Executive Order 11491 and did not think he had to discuss the matter with the union.

7. DLI officials in Washington, D. C. discussed the draft with the Deputy Chief of Staff of Personnel of the Department of the Army, and it was decided that any rotation system based on tenure alone was illegal and contrary to Civil Service regulations as well as the Federal Personnel Manual.

8. DLI prepared a new regulation governing selection of Respondent's instructors for overseas duty, which was dated April 14, 1972 and designated DLI 690-2. DLI officials deemed the regulation as applicable to employees in its other branches as well as those at Lackland Air Force. DLI did not believe it was obliged to consult with a labor union which had local recognition, since the regulation was issued by national headquarters.

9. The DLI regulation 690-2, by its terms, applied to all DLIEL employees who have career or career conditional status and who are serving in positions classified in the 1700 Education and Training Occupational Group. It is also provided that simultaneous consideration must be given to both voluntary Army applicants outside the minimum area of consideration and applicants outside of DA as required by FPM Chapter 335 and CPR 100 (Ch. 12), Chapter 335.

10. Regulation DLI 690-2 established a new procedure for selection of DLIEL personnel for overseas duty based on experience of employees and an evaluation of the best qualified men for overseas duty. The selection and designation procedure was predicated on the prior rating and ranking of eligibles and a determination of basic eligibility by the servicing Civilian Personnel Officer. The rotation roster system was thus abolished by national headquarters in Washington, D. C.

11. Colonel Abbott received the new regulation on April 14, 1972 at 2 p.m. He understood it to be in effect at that time, and called a meeting of other management officials and union representatives. Appearing on behalf of the activity were Abbott, Major Dyer, and Major Bun Bray; representing the union were Zeman, Vice-President Charles Perkins, and 2nd Vice-Presidents Arthur Bower and William Hunter.

12. At the April 14, 1972 meeting Abbott told the union agents that the new regulation now governed the selection of men for overseas duty, and he would announce it to the staff on Monday, April 17th at which time it would be implemented. Abbott did not have copies for all present, but asked for comments thereon and whether the union disagreed with it in any respect. Zeman objected to not having had time to read the regulation and to the fact that the union had not been consulted in regard thereto. Abbott stated that the rotation roster system had been deemed illegal by higher headquarters, and he informed the union agents that DLI told him they could not have a rotation roster. Further, management did not deem it necessary to consult with the union since it was a DLI regulation. There was some discussion and comments by the union officials regarding the medical deferments as well as the selection procedures to be utilized under the new regulation.

13. The instructors were notified of 690-2 on April 17, 1972 at a general meeting, and the regulation was then posted on bulletin boards.

14. In May 1972, Zeman suggested to Abbott that a committee be set up to discuss the new policy and prepare a revised 690-2. By letter dated June 21, Abbott wrote Zeman this request could not be granted, but offered the union an opportunity to submit, in writing, any recommended changes or revisions which would be forwarded to DLI headquarters for consideration.

15. Selections of personnel for overseas duty under DLI 690-2 commenced in May 1972 and the first man was sent overseas in June of that year. Four men have been selected from outside DLI to go overseas in accordance with the new regulation.

16. In July 1972 a standard operating procedure (SOP) was presented to the union for its consideration and comments. This SOP was designed to implement 690-2 and establish procedures in respect thereto. The union responded that this was irrelevant, since the regulation was unfair and not adopted with its consent.

17. Between April 14, 1972 and December 31, 1972, Respondent and Complainant met at various times to discuss 690-2. The activity sought comments from the union in writing, but they were never submitted in written form. Union representatives continued to state they felt bypassed by Respondent's adopting DLI 690-2, and told management they wanted it rescinded unless a fair and equitable method of overseas selection could be adopted. Management replied the regulation could not be withdrawn, although it stated in October 1972 that DLIEL would accept suggestions made by the union and ask higher headquarters to consider them. However, Respondent informed the union the regulation would not be changed.

#### Concluding Findings

##### Respondent's Refusal to Consult, Confer, or Negotiate With Complainant

Executive Order 11491 provides, under Section 19(a)(6), that agency management shall not refuse to consult, confer, or negotiate with the labor organization as required by said Order. A failure in this respect constitutes an unfair labor practice. Further, Section 11(a) of the Order requires that an agency and a labor organization which has been accorded exclusive recognition shall meet at reasonable times and confer in good faith with respect to personnel policies and practices, and matters affecting working conditions of unit employees.

The system or manner in which instructors are chosen for overseas duty is clearly a matter affecting the working conditions of the employees represented by the union. It involves, in effect, a seniority system in which standards or criteria are to be employed in shifting certain employees from their unit locale at Lackland. The union has a legitimate interest in bargaining, in this respect, on behalf of these instructors, and I conclude the Respondent is required, under Section 11(a) of the Order, to confer as to this matter.

Limitations upon the obligation of management to consult with a union are expressed in Sections 11(b) and 12 of the Order. Thus, the former section does not impose a duty upon an activity to meet and confer, inter alia, with respect to the numbers, types, and grades of positions or employees assigned to a unit work project or tour of duty. Management retains the right, under Section 12 of the Order, to, inter alia, transfer, assign and retain employees to positions within the agency. In my opinion, neither Section 11(a) or 12 is operative herein, nor applicable to the facts at bar, so as to relieve Respondent from its obligation to consult or confer under the Order. <sup>2/</sup> The union does not question the right of

<sup>2/</sup> Respondent has not contended, nor raised as a defense, that either section of the Order relieved it of such obligation.

DLIEL to assign employees to overseas duty, nor does it seek to limit the number of personnel to be so assigned. The bargaining agent does seek a voice in the method of selecting particular instructors for overseas duty, and as the representative of the employees it is concerned that the selection be conducted in a fair and equitable manner. Until April 14, 1972 the system of choosing which men should be sent overseas as instructors had been determined after discussion and negotiation between management and the union. It had resulted in a jointly prepared memorandum, DLIEL 690-1, establishing a rotation roster for selection purposes. Accordingly, I do not conclude Respondent was privileged under Section 11 (a) or 12 of the Order to discontinue consulting with the union as to this matter.

Respondent contends it is not obliged to bargain as to DLI 690-2 since it was issued by the national headquarters, and, further, it is also applicable to others outside Lackland. This contention is rejected. The regulation manifestly applies to DLIEL instructors - all of whom are in the unit for which Complainant is the bargaining representative - and it affects one of their conditions of employment. That other individuals outside DLIEL may, as provided in the regulation, be selected as applicants for overseas duty does not render the regulations beyond the scope of bargaining between these parties. Its purpose is to establish policies and procedures by which DLIEL personnel will be selected for overseas assignments. As such, it deals with eligibility requirements or restrictions, overseas personnel availability list, overseas selection and designation procedures and deferments - all pertaining to DLIEL personnel at Lackland. Neither does the fact that DLI headquarters issued the regulation redound to the advantage of Respondent and excuse its obligation herein. Any meaningful requirement to confer with the union calls for discussions re proposed conditions of employment of unit employees irrespective of whether they are formulated locally or in Washington. Any other conclusion would enable an employer to escape responsibility by causing regulations to be issued by higher commands.

In respect to the position maintained by Respondent that the rotation roster system utilized previously was illegal, I do not consider that such a factor vitiates the duty incurred by the employer herein. Apart from the legality or illegality of DLIEL 690-1, the Respondent was obliged to bargain with Complainant about the adoption of a new regulation. Assuming, arguendo, the rotation system was contrary to Civil Service regulations, this did not operate to permit Respondent to change the system without consulting the union and discussing the terms of the new regulation. It did not afford the Employer the right to by-pass the bargaining representatives irrespective of the reasons for substituting a new system for the previous one, and I reject the argument that 690-1 was illegal and thus warranted Respondent's refusal to confer with Complainant.

It is also urged by Respondent that the union never made written suggestions or objections to 690-2. But this would have been of little value since the regulation was already in effect on April 14, 1972. It is a fait accompli, and Colonel Abbott stated the regulation could not be changed or withdrawn. Comments by the union agents were, in effect, a vain gesture, although the union officials did discuss certain aspects of the regulation with management after its implementation. In any event, Colonel Abbott testified he was not aware of his obligation to consult with Complainant and made no effort to do so when he prepared revised DLIEL 690-2 for submission to national headquarters.

The action by Respondent on April 14, 1972 constituted a unilateral change in the system of selecting men for overseas duty. As the Assistant Secretary has said in previous cases, if an exclusive bargaining representative were free to make unilateral changes in working conditions of its employees, the obligation under Section 11 (a) to meet and confer on working conditions with an exclusive bargaining representative would come meaningless. National Labor Relations Board, A/SLMR No. 246; Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87. In the case at bar Respondent made no attempt to confer with complainant in respect to the new system of sending men overseas. It substituted a new system on its own, completely by-passing the bargaining representative. Such conduct undercuts the authority of the union and early flouts the requirement to bargain with the representative of the employees. Thus, I find and conclude the Respondent's unilateral conduct falls within the ambit of the doctrine enunciated in the cited cases, Idra, and to be violative of Section 19(a)(6) of the Order.

#### Recommendations

Having found that Respondent has engaged in conduct which is violative of Section 19(a)(6) of the Order, I recommend the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491.

#### Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, shall:

1. Cease and desist from:

Unilaterally changing the method or system of selecting unit employees, stationed at the Lackland Air Force Base, Texas, for overseas

- 7 -

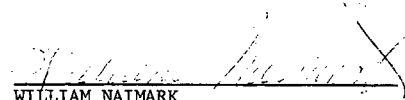
duty or assignment without consulting, conferring, or negotiating with American Federation of Government Employees, Local Union 1367, the exclusive bargaining representative of its unit employees.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Upon request, consult, confer or negotiate with the American Federation of Government Employees, Local Union 1367, with respect to the method or system of the selection of unit employees for overseas duty or assignment.

(b) Post at its Lackland Air Force Base, San Antonio, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commandant of Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commandant shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated, Washington, D. C.  
June 15, 1973

- 8 -

## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the method or system of selecting unit employees for overseas duty or assignment without consulting, conferring, or negotiating with American Federation of Government Employees, Local Union 1367, the exclusive bargaining representative of our unit employees.

WE WILL, upon request, consult, confer, or negotiate with American Federation of Government Employees, Local Union 1367, with respect to changes in the method or system of selecting unit employees for overseas duty or assignment.

Dated \_\_\_\_\_ by \_\_\_\_\_  
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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,  
STATE OF NEW JERSEY  
A/SLMR No. 323

This unfair labor practice proceeding involved an alleged violation of Section 19(a)(1) and (6) of the Executive Order based on the Activity's refusal to permit the Complainant labor organization, in connection with the processing of an employee grievance, access to documents which reflected an evaluation panel's assessment of "Best Qualified" candidates.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order based on its refusal to permit the Complainant, in connection with the processing of a grievance, access to certain documents. The Assistant Secretary stated that, absent the Respondent's defense that the Federal Personnel Manual prohibits the disclosure of such information, he would adopt the Administrative Law Judge's recommendation. He noted that a labor organization's responsibility, under Section 10(e) of the Order, for representing the interests of all employees in the unit cannot be met if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances.

Finding that the Respondent's defense raises a major policy issue - i.e., whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude the Respondent from disclosing to the Complainant, in the context of a grievance proceeding, certain relevant and necessary documents - the Assistant Secretary referred the issue to the Federal Labor Relations Council for decision.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,  
STATE OF NEW JERSEY

Respondent

and Case No. 32-2833(CA)

NATIONAL ARMY AND AIR TECHNICIANS  
ASSOCIATION, I.U.E., AFL-CIO

Complainant

ORDER REFERRING MAJOR POLICY ISSUE TO THE  
FEDERAL LABOR RELATIONS COUNCIL

On July 13, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Department of Defense, State of New Jersey, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Hereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

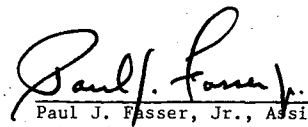
In support of its exceptions, the Respondent asserted, among other things, that certain portions of Subchapters 3 and 5 of Chapter 335 of the Federal Personnel Manual prevented the Respondent from disclosing supervisory appraisals and other information used by an evaluation panel in assessing the qualifications of the grievant, unit employee Vincent Tallone, and five other employees included on the "Best Qualified" list of candidates.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order based on its refusal to permit the Complainant, in connection with the processing of Tallone's grievance, access to the documents which reflect the evaluation panel's assessment of Tallone and the other "Best Qualified" candidates. In my view, absent the issue as to whether the Federal Personnel Manual prohibits the

disclosure of information used by the panel in assessing the qualifications of the six "Best Qualified" candidates, I would adopt the Administrative Law Judge's Report and Recommendations in this regard. Thus, under Section 10(e) of the Order, a labor organization is given the responsibility for representing the interests of all employees in the unit. Clearly, it cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances.

However, as noted above, the Respondent herein has raised as a defense to the complaint the allegation that the Federal Personnel Manual prohibits the disclosure of the information sought by the Complainant. In my view, this contention raises a major policy issue i.e., whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude the Respondent from disclosing to the Complainant, in the context of a grievance proceeding, certain relevant and necessary documents used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment, including the grievant. 1/ Accordingly, pursuant to Section 2411.4 of the Rules of the Federal Labor Relations Council and Section 203.25(d) of the Assistant Secretary's Regulations, the above issue is hereby referred to the Federal Labor Relations Council for decision.

Dated, Washington, D.C.  
November 16, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

1/ In an unpublished order involving the National Labor Relations Board, Region 17, and National Labor Relations Board, Case No. 60-3035(CA), dated September 28, 1973 (copy attached), a similar issue was referred by the Assistant Secretary to the Federal Labor Relations Council for decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD,  
REGION 17, AND NATIONAL LABOR  
RELATIONS BOARD

Respondents

and

Case No. 60-3035(CA)

DAVID A. NIXON

Complainant

ORDER DENYING MOTION, REFERRING CROSS MOTION  
AND RESPONSE, AND STAYING REMAND

On August 9, 1973, the Complainant filed a Motion requesting that Administrative Law Judge Rhea M. Burrow be replaced by another Administrative Law Judge in connection with the conduct of the hearing on remand ordered in the Decision and Remand in A/SLMR No. 295; that the complaint in Case No. 60-3449(CA), which currently is pending before the Labor-Management Services Administration Area Administrator, be consolidated for hearing with the above numbered case; and that the Assistant Secretary reconsider rendering any final rulings or conclusions, pending "a full and fair hearing," as to those portions of the decision in A/SLMR No. 295 in which he dismissed certain allegations in the complaint in the subject case. On August 31, 1973, the Respondents filed an Opposition to Complainant's Motion and a Cross Motion to Reconsider Decision and Remand.

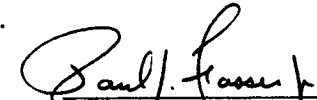
Upon careful consideration of the Complainant's Motion, and the Respondents' Response thereto, it is hereby ordered that the said Motion be, and it hereby is, denied.

In their Cross Motion the Respondents moved that the Assistant Secretary reconsider the portion of his Decision and Remand in the above cited case in which it was ordered that the record be reopened to permit the Complainant to introduce into evidence the appraisal of the other employee supervised by the Complainant's immediate supervisor and to adduce testimony as to its contents. In support of this Cross Motion, the Respondents asserted (for the first time) that certain portions of the Federal Personnel Manual prohibited the release of the appraisal of the other employee without the latter's consent.

Upon careful consideration of both the Respondents' Cross Motion and the Response in Opposition thereto by the Complainant, dated September 5, 1973, I find that major policy issues have been raised in the context of the above cited proceeding - *i.e.*, (1) whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding held pursuant to Section 6(a)(4) of Executive Order 11491, as amended, and (2), if an employee or his representative is so precluded from seeing and adducing evidence with respect to the appraisal of another employee, does such prohibition apply also to the Assistant Secretary, his representatives and/or Administrative Law Judges acting pursuant to their responsibilities under the Order? Accordingly, pursuant to Section 2411.4 of the Rules of the Federal Labor Relations Council and Section 203.25(d) of the Assistant Secretary's Regulations, the above issues are hereby referred to the Federal Labor Relations Council for decision.

In view of the above referral to the Federal Labor Relations Council, it is hereby ordered that the Order in A/SLMR No. 295, remanding the subject case to the Administrative Law Judge for further hearing be, and it hereby is, stayed, pending disposition of the above issues by the Federal Labor Relations Council.

Dated, Washington, D.C.  
September 28, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

- 2 -

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DEPARTMENT OF DEFENSE :  
STATE OF NEW JERSEY :  
Respondent :  
and : CASE NO. 32-2833 (CA)  
NATIONAL ARMY AND AIR TECHNICIANS :  
ASSOCIATION, I.U.E., AFL-CIO :  
Complainant :  
-----

Capt. William S. Greenberg, Esquire  
Eggert Crossing Road, Trenton,  
New Jersey 08625, for Respondent

Baruch Wellman, Esquire  
Vladeck, Elias, Vladeck & Lewis  
1501 Broadway, New York,  
New York 10036, for Complainant

Before: Salvatore J. Arrigo, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Preliminary Statement

This proceeding, heard in Trenton, New Jersey on  
October 19, 1972 arises under Executive Order 11491, as  
amended (hereafter called the Order). Pursuant to the Regu-  
lations of the Assistant Secretary for Labor-Management Relations  
(hereafter called the Assistant Secretary), a Notice of Hearing  
and Complaint issued on July 28, 1972 with reference to alleged

violations of Section 19(a)(1), (5) and (6) of the Order.  
The Complaint, filed on June 7, 1972 by National Army and  
Air Technicians Association, I. U. E., AFL-CIO (hereinafter  
called Complainant or the Union) alleged that the Department  
of Defense, State of New Jersey (hereinafter called Respondent  
or the Activity) violated Section 19(a)(1) (5) and (6) of the  
Order by refusing to disclose to the Union the point score  
received by employee, Vincent Tallone from an evaluation panel  
of the Activity when considering Tallone's application to fill  
a vacant position. At the hearing the Union amended the  
Complaint by alleging that the Order was violated by the  
Activity's refusal to provide the Union with all information  
the evaluation panel relied on in ranking the six individuals  
(including Tallone) who were placed in the "Best Qualified"  
category for consideration to fill the vacant position.

At the hearing all parties were represented by counsel  
and were afforded full opportunity to adduce evidence, call,  
examine and cross-examine witnesses, and argue orally. A  
brief was filed by Respondent.

Upon the entire record in this matter, from my reading  
of the brief and from my observation of the witnesses and  
their demeanor, I make the following:

FINDINGS OF FACT

I. Introduction

Since August 13, 1970, the Union 1/ has been the certified  
exclusive collective bargaining representative of various  
technicians employed by the Activity at New Jersey Army  
National Guard installations. At the time of the hearing a  
collective bargaining agreement had not yet been put into  
effect.

1/ The Union is comprised of five local unions, among which  
is Local 375.

In response to a vacancy announcement (No. 72-5) issued by Respondent, Vincent Tallone and thirteen other employees applied for two vacant Supply Clerk, GS-6 positions. Pursuant to appropriate regulations an evaluation panel, appointed by the Chief of Staff, reviewed the candidates qualifications and ranked six employees, including Tallone, as "Best Qualified" candidates. In addition, three employees were ranked as "Other Qualified" and five were ranked as "Not Sufficiently Qualified". Thereafter the selecting official, Lt. Colonel Ralph Di Naples, selected two applicants from the "Best Qualified" category to fill the two vacancies.

On February 16, 1972 Tallone, a GS-5 Purchasing and Contracting Clerk and a member of the collective bargaining unit filed a grievance with the Activity contending inter alia that the selection was unfair in that one of the individuals selected failed to meet the minimum standards for eligibility specified in the vacancy announcement. Tallone contended in his grievance that he should be placed in the GS-6 Supply Clerk position because he possessed "the grade level and experience requirements, superior to any other candidate." Tallone also requested that the method the Activity employed in filling position vacancies be improved by including a personal interview of applicants by the evaluation panel. Tallone indicated that he wished to have the Union represent him in the matter, and the parties agreed to meet and discuss the grievance on March 28, 1972.

## II. The Alleged Unfair Labor Practice

At the meeting held on March 28, 1972 Lt. Colonel David W. Liscom, Supervising Personnel Management Specialist, represented the Activity. Tallone was present and was represented by Charles J. Siegfried, President of Local 375, and Aime Fiore, I. U. E. International Representative. Siegfried was spokesman for the Union and the grievant.

The discussion <sup>2/</sup> lasted approximately an hour. When the meeting opened Liscom took the position that non-selection for promotion was not a grievable matter under the Federal Personnel

<sup>2/</sup> This account of the meeting is based upon a composite of testimony given by Liscom, Siegfried and Fiore. Although some variances exist in their recollections of the discussion which occurred much of their testimony did not conflict in material respect.

Manual or the Agency's regulations and the Activity had the right to select whomever it wanted from the list of "Best Qualified" candidates. <sup>3/</sup> The Union agreed with this position and Liscom proceeded to explain the procedures which followed posting the vacancy announcement including an explanation of the evaluation panel's scoring applicants with numerical points based upon the panel's evaluation of various factors such as the applicants' basic qualifications; prior experience; quality of past performance; training and self development; and potential for advancement. The panel had access to the applicants' personnel files which includes the applicants' supervisors' appraisal of the employees performance.

At some point during the meeting the Union explained that Lt. Colonel Di Naples told Tallone that he always selected the individual whom the evaluation panel recommends to him as the "number one" candidate in the "Best Qualified" group. The Union felt that rating within the "Best Qualified" group and the alleged manner of Di Naples selection was "against procedure" and requested Di Naples presence at the meeting. Liscom telephoned but Di Naples could not be reached. During the latter part of the meeting Fiore asked to see the point scores of the six individuals placed in the "Best Qualified" group. He indicated that he wanted to see the point scores so he could "evaluate where Tallone stood in regard to the six and see if the selecting official had acted properly or had made an arbitrary selection." Liscom refused to divulge this information, or any information relative to point scores contending it was "privileged". Siegfried testified that during the discussion on this subject he requested and was refused the "sheets" used by the evaluation panel in rating the six "Best Qualified" candidates. While Liscom testified that the Union requested only the point scores of the six "Best Qualified"

<sup>3/</sup> The Union had previously been informed of the Activity's position sometime prior to the meeting. Liscom stated that since Tallone had questioned the qualifications of those who were selected for the vacancy he decided to afford Tallone an opportunity to discuss the matter more fully.

ndidates, he acknowledged that the Union might have requested e point score "sheets". I credit Siegfried's testimony in is regard. 4/

While recollections as to the precise language used varies th the testimony, it is abundantly clear from the testimony d the nature of the discussion that the Union was seeking and e Activity refused to provide access to whatever documents the aluation panel used which reflected the panel's assessment of e six "Best Qualified" candidates, in points or otherwise. It similarly clear that the Union was seeking this information in der to facilitate its' inquiry into whether all of Tallone's alifications vis a vis the other "Best Qualified" candidates were lly and properly evaluated and considered.

I. Positions of the Parties

The Complaint herein, filed June 7, 1972 is posited on the tivity's refusal to disclose the total amount of points given Tallone by the evaluation panel. However, the Union amended e Complaint at the hearing by alleging that Respondent violated e Order by refusing its request to provide the Union with any d all information that the evaluation panel used in ranking llone, and the other five individuals who were placed in the est Qualified" category. 5/ The Union's alternate position is at if it is found that the Union requested and was refused only e total points given to Tallone and any of the other "Best alified" candidates, then it would allege that such a refusal milarly violated the Order.

Siegfried also testified that Liscom refused to allow e Union access to the personnel files of Tallone and the her "Best Qualified" candidates. I credit Liscom's estimony that no such request was made.

The Union does not contend it was entitled to see the tire contents of the personnel files, except of course, those rptions thereof which the evaluation panel may have relied on in ranking the candidates. Accordingly, I make no findings s to whether a refusal to produce such files would consitute a olation of the Order.

The Union alleges that the information sought is related to working conditions and the Activity's refusal to make such information available constitutes a refusal to confer and negotiate violative of Section 19(a)(6) of the Order. The Union also alleges that such refusal also violates Section 19(a)(5) of the Order in that the Activity's failure to provide this information constitutes non-recognition of the Union in a particular "area" of representation whereby the Union is precluded from fully representing unit employees. The Union does not allege that Section 19(a)(1) was independently violated by the refusal. Rather, it alleges a "derivative" violation in this regard.

At the hearing the Union asserted that the information sought was necessary to properly process Tallone's grievance and determine how Tallone's points compared with the candidates that were selected, and to determine; whether all of Tallone's qualifications were considered; whether Tallone's supervisor had given Tallone a good rating as the Union had been led to believe; whether the selecting officer made an arbitrary selection; whether the ranking procedures were fair and equitable; whether all six candi-dates were properly ranked in the "Best Qualified" category; and to determine if the ranking procedures were properly carried out. The Union also expressed a need for the information in order to have an informed position as to whether it should further pursue Tallone's grievance.

Respondent contends that the information sought by the Union contained supervisory appraisals and accordingly, was privileged from disclosure by virtue of provisions in the Federal Personnel Manual and Agency regulations. Further, Respondent contends that even if the Federal Personnel Manual did not prevent disclosure, the Agency was not required under the Order to reveal such information to the Union.

IV. Discussion and Conclusions

Section 10(e) of the Order broadly sets forth an exclusive representative's rights and responsibilities under the Order. 6/ A union is specifically given the right to represent employees in matters concerning "grievances, personnel policies and practices as other matters affecting general working conditions of employees in the unit". While these are the express rights of a union, they may also be construed as a union's responsibilities to the employees it represents. However, a union can hardly effectively exercise its rights or fulfill its responsibilities if it is denied information necessary to intelligently act in these matters.. To deprive a union of necessary and relevant information deprives the employees of effective representation. Such is not in conformity with the purposes or policies of the Order.

In the instant case, Respondent refused to permit the Union access to the documents which reflected the evaluation panel's assessment of the six "Best Qualified" candidates. Such information was clearly relevant to the resolution of Tallone's grievance and necessary for the Union's intelligent considerations of whether or how it should proceed with the grievance. Accordingly, I find that the Union was entitled to access to these documents.

6/ Section 10(e) provides: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Since the Activity withheld all information relative to point scores, it is apparent that the Union was unable to pursue, in an intelligent fashion, an inquiry into what information the evaluation panel relied on in scoring the applicants. Further such a pursuit would obviously have been a futility. Under these circumstances I find that, although not specifically requested, the Union, in the exercise of its rights and responsibilities under the Order, is also entitled to access to whatever information the panel used in assessing the qualifications of the six "Best Qualified" candidates. 7/

I reject Respondent's contention that the Federal Personnel Manual (FPM) and the Agency's regulation prevent disclosure of the information in question. My review of the FPM and the Agency's regulations which were received in evidence at the hearing failed to reveal any prohibition against disclosure of the information I have concluded the Union is entitled to receive. FPM Chapter 335, Subchapter 5, Section 5-2g(2), states that "... the formal means for resolving promotion complaints is through the grievance procedure". 8/ While nonselection for promotion from a group of properly ranked and certified candidates may not be covered by an agency grievance procedure, 9/ the dispute herein goes to the question of whether the candidates were "properly ranked and certified." In determining whether Tallone and the other candidates were "properly ranked and certified", an inquiry into the nature of the panel's conclusions and a review of whatever the panel relied on in reaching its evaluation is clearly relevant.

7/ In order to determine whether Tallone was properly evaluated, or whether he was evaluated in an arbitrary or invidious manner, the Union is entitled to access to information on all "Best Qualified" candidates so that it might fully review if it so desires, what the evaluation panel considered and how the panel assessed the candidates.

8/ Respondent Exhibit No. 3.

9/ Respondent Exhibit No. 1 [FPM Chapter 771, Subchapter 5, Section 3-2b(3)] and Respondent Exhibit No. 2 (NJARNR 600-313)

I also reject Respondent's contention that the FPM and agency regulations prevents the facility from disclosing the Union the supervisory appraisals of Tallone and the other "Best Qualified" candidates. 10/ FPM Chapter 5, Subchapter 3, Section 3-6d(3)(4) sets forth the criteria by which candidates for a promotional position are to be evaluated. In pertinent part, that section provides as follows: 11/

(3) Supervisory appraisals of performance must be obtained for all basically eligible candidates and used in evaluating the candidates. Care must be taken to assure the objectivity and relevancy of the appraisals by using appraisal forms carefully tailored to factors in the employee's job that are important for success in higher-level work, by training supervisors in the appraisal process, and by requiring either higher level review of the appraisals or multiple appraisals. When records of production also are used, the supervisory appraisals may be brief and limited to those abilities and personal characteristics not reflected in these records.

(4) An employee is entitled to see, upon his request, any production record or any supervisory appraisal of past performance which was used or which may be used in considering him for promotion. An employee, however, is not entitled to see a supervisory report on potential, that is, a recorded judgment of the supervisor's estimate or prediction of how well the employee is likely to do at a level or in a kind of work different from one in which he has already performed. (See also Section 5-2d(2))

11/ The Agency's regulations treat the matter of disclosure supervisory appraisals only by reference to the FPM.

12/ Respondent Exhibit No. 3.

Subchapter 5 of FPM Chapter 335, "Relations with Employees and Employee Organizations" presents guidelines to be adhered to by federal agencies in dealing with individual employees and their representatives. Agencies are directed to provide information on vacancies and about criteria to be utilized in filling such vacancies. Section 5-2d(2) of this particular Subchapter provides as follows: 12/

An agency must show an employee, upon his request any record of production or any supervisory appraisal of past performance, which was used or which may be used in considering him for promotion. An agency is not, however, required to show an employee a supervisory judgment of potential which is predictive of his performance in a higher-level position. Discussion with the employee by his supervisor of the employee's performance can be useful in pointing out to the employee his strengths and weaknesses for higher-level work and can increase mutual understanding between the employee and his supervisor. An employee is not entitled to see an appraisal of another employee. Nevertheless the representative of an employee (even though an employee himself) may see the employee's appraisal, and an employee may see the appraisal of other employees when dictated by his official responsibilities, for example, as a member of a promotion board. [Emphasis added]

I construe the foregoing language to mean that a representative of an employee (the Union herein) is entitled to see the "Best Qualified" candidates supervisory appraisals including a supervisory judgment of potential. The last above quoted FPM section places representatives of employees and employee members of a promotion board in the same category. Since members of a promotion board undeniably are permitted to see a supervisory judgment of an employee's potential, it follows that a union representative is accorded that same right.

12/ Ibid.

On May 23, 1973, the Federal Labor Relations Council (FLRC) issued a decision on a negotiability issue in the matter of Federal Employees Metal Trades Council of Charleston, and Charleston Naval Shipyard, Charleston, S.C., FLRC No. 73A-7. In that case a dispute arose between the parties during negotiations concerning the negotiability of union proposals which would have given the union access to a document entitled the "Internal Qualification Guides for Trades and Labor Jobs" which is an issuance of the Civil Service Commission. The sole issue presented to the FLRC was whether the Civil Service Commission has prohibited the review by a labor organization of the document in question. The FLRC requested an interpretation by the Commission of its regulations relative to the question presented. The Commission's reply to the FLRC stated, in pertinent part: 13/

"... While availability of the guides is restricted to appropriate Government officials engaged in rating candidates for trades and labor jobs, this policy does not prohibit rating information being made available as needed in resolving specific appeals and grievances subject to the use of adequate precautions to preserve its continued confidentiality."  
[Emphasis added]

It would appear therefore that the Commission does not have a policy, express or otherwise which prohibits "rating information" in general from being made available where needed in the resolution of grievances.

While they are not controlling, it is useful to consider decisions of the National Labor Relations Board in cases involving similar issues. 14/ The Board has frequently held, with court approval, that where information sought by a union is relevant and reasonably necessary to intelligently discharge its collective bargaining duties, an employer

13/ The FLRC's ultimate disposition of the case is not relevant to the issues presented herein.

14/ See Charleston Naval Shipyard, A/SLMR No. 1, page 3 (1970).

violates its duty to bargain with the union by refusing to provide such information. 15/ Further, defenses against supplying relevant information which rely on the claimed confidentiality of the information sought have generally been rejected by the Board. 16/ Cases cited by Respondent in its brief wherein Board orders were denied enforcement by the Ninth Circuit, U. S. Court of Appeals are clearly distinguishable. 17/ Thus, the court in Emeryville held that where the employer raised bona fide objections to the form in which information was requested by the union and offered to provide information sufficient to meet the union's needs in mutually satisfactory form, the union had to state uses to which the information was to be put so that the employer would be afforded an opportunity to provide it on mutually satisfactory terms. Accordingly, the court held that the unfair labor practice charge was not supported where the union, without more declined to state its needs thus frustrating employer's offer to provide the information in an alternate form.

In Shell Oil, the court held that the employer's refusal of a union's request for the names and addresses of all employees was not an unfair labor practice where the employer expressed concern over prior harassment of nonstriking employees and the possibility that the list might come into irresponsible hands. In addition, the

15/ N.L.R.B. v Acme Industrial Co., 385 U.S. 432 (1967). Timken Roller Bearing Company v N.L.R.B., 325 F. 2d 746 (C.A. 6), cert. denied, 376 U.S. 971; J. I. Case Company, 118 N.L.R.B. 520, enfd. 253 F. 2d 149 (C.A. 7).

16/ Weber Veneer & Plywood Co., 161 N.L.R.B. 1054; KCMD Broadcasting 145 N.L.R.B. 550; Boston Herald-Traveler Corporation, 110 N.L.R.B. 2097, enfd 223 F. 2d. 55.

17/ Emeryville Research Center v N.L.R.B., 441 F. 2d. 880 (1971); Shell Oil Co., v N.L.R.B., 457 F. 2d 615 (1972).



employer offered an alternate arrangement to the union, but the union did not take up the offer to discuss the alternate arrangements.

Respondent asserts in its brief that "... the employer met with the representative of the complainant and attempted in good faith, to provide as much information as the complainant desires, consistent with its desires to protect both the evaluating supervisor and other employees, whose personnel records the complainant is now demanding." However, essentially the Activity has provided Complainant with little more than what Tallone, an individual, could have demanded be produced. Moreover, the party raising a defense of confidentiality has the burden of establishing the need for confidentiality when a union has established the necessity and relevancy of the information it seeks. Even if the need for confidentiality is established it then must be weighed against a union's right to have sufficient information to carry out its duties as a representative of all the unit employees. 18/ I find that no requirement or need for confidentiality of the information referred to herein has been established, nor do I perceive any compelling need for confidentiality which would outweigh the Union's need for such information.

Based upon the entire foregoing, I conclude that Respondent, by its refusal to permit the Union access to the documents which reflect the evaluation panel's assessment of Tallone and the other "Best Qualified" candidates, refused to consult, confer or negotiate with a labor organization as required by the Order and thereby violated Section 19(a)(6) of the Order. I also conclude that by this same conduct, Respondent violated Section 19(a)(1) of the Order in that such conduct inherently interferes with, restrains and coerces unit employees in their right to have their exclusive representative act for and represent their interests in matters concerning grievances and personnel policies and practices as assured by Section 10(e) of the Order.

Further, it cannot merely be assumed that a union would not be responsible in the use of such information. Indeed, adequate safeguards could be arranged with regard to the dissemination of such information.

I further find and conclude that Complainant's allegation that the Activity did not accord appropriate recognition to the Union within the meaning of Section 19(a)(5) of the Order is unsupported. The Assistant Secretary has previously held, in essence that a violation of Section 19(a)(6) of the Order is not ipso facto a violation of Section 19(a)(5). 19/

RECOMMENDATIONS

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491 as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order. I also recommend that the Section 19(a)(5) allegation be dismissed.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Defense, State of New Jersey shall:

1. Cease and desist from:

(a) Refusing to permit National Army and Air Technicians Association, I.U.E., AFL-CIO access to the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5.

(b) Interfering with, restraining or coercing its employees by refusing to permit National Army and Air Technicians Association, I.U.E., AFL-CIO access to the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed

19/ Long Beach Naval Shipyard, A/SLMR No. 154 (1972); United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42 (1971)

in the "Best Qualified Candidate" category pursuant to Vacancy Announcement 72-5.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

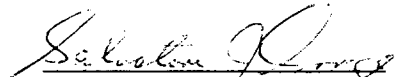
(a) Upon request permit National Army and Air Technicians Association, I.U.E., AFL-CIO, access to:

(1) The documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5; and

(2) Whatever information the evaluation panel used in assessing the qualifications of the six applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5.

(b) Post at its Trenton, New Jersey facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated at Washington, D. C.  
July 13, 1973

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit National Army and Air Technicians Association, I.U.E., AFL-CIO access to the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5.

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 Executive Order.

WE WILL, upon request, permit National Army and Air Technicians Association, I.U.E., AFL-CIO, access to:

(1) the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5, and

(2) whatever information the evaluation panel used in assessing the qualifications of the six applicants who were placed in the "Best Qualified Candidate" category pursuant to Vacancy Announcement No. 72-5.

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

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Title)

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

employees have any questions concerning this Notice or compliance  
h its provisions, they may communicate directly with the Regional  
Administrator of the Labor-Management Service Administration, U. S.  
Department of Labor, whose address is Room 3515, 1515 Broadway,  
New York, New York 10036.

November 16, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

ANAHEIM POST OFFICE,  
U.S. POSTAL SERVICE,  
ANAHEIM, CALIFORNIA  
A/SLMR No. 324

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This case involved an unfair labor practice complaint filed by National Association of Letter Carriers, Branch 1470 (Complainant) against the Anaheim Post Office, U. S. Postal Service, Anaheim, California (Respondent), alleging that by refusing to consult, confer, or negotiate with the Complainant regarding the cancellation of annual leave during periods of route inspection, the Respondent violated Section 19(a)(1), (5), and (6) of Executive Order 11491. The Respondent contended that there was no obligation to confer, consult, or negotiate since the collective-bargaining agreement in effect between the parties gave management a unilateral right to control and restrict annual leave during all pay periods, including periods of route inspection. The Respondent further asserted that even if it had an obligation to confer, consult, or negotiate, the Complainant's protest of the change was "too late" as the "time to object to it had passed."

In agreement with the Administrative Law Judge, the Assistant Secretary found that the granting of annual leave during the route inspection period constituted a condition of employment about which the Respondent had an obligation to consult, confer, or negotiate. Having failed to fulfill its obligation to bargain by unilaterally changing its policy with respect to the granting of annual leave during periods of route inspection, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent's conduct was violative of the Order.

However, in the particular circumstances of this case, including the fact that the Respondent is now subject to the jurisdiction of the National Labor Relations Board and that any future conduct such as that involved in the subject case would come within the purview of the National Labor Relations Board's jurisdiction for appropriate remedial action, the Assistant Secretary found that the recommended remedial order, including posting of a notice to employees, issued by the Administrative Law Judge would no longer effectuate the purposes of Executive Order 11491 and is therefore not necessary under the present circumstances.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ANAHEIM POST OFFICE,  
U. S. POSTAL SERVICE,  
ANAHEIM, CALIFORNIA

Respondent

and

Case No. 72-CA-2560(26)

NATIONAL ASSOCIATION OF LETTER  
CARRIERS, BRANCH 1470

Complainant

DECISION AND ORDER


On December 19, 1972, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had violated Section 19(a)(1) and (6) of Executive Order 11491 and recommending, among other things, that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge also found that further proceedings on the Complainant's Section 19(a)(5) allegation were unwarranted. Thereafter, the Respondent filed exceptions and supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions, statements of positions and briefs, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge except as modified below.

I agree with the Administrative Law Judge's finding that the Respondent's conduct herein violated Section 19(a)(1) and (6) of Executive Order 11491 inasmuch as such improper conduct occurred prior to July 1, 1971, the date on which the U. S. Postal Service became subject to the jurisdiction of the National Labor Relations Board. 1/

However, in the particular circumstances of this case, including the fact that the Respondent is now subject to the jurisdiction of the National Labor Relations Board and that any future conduct such as that involved in the subject case would come within the purview of the National Labor Relations Board's jurisdiction for appropriate remedial action, I find that the recommended remedial order, including posting of a notice to employees, issued by the Administrative Law Judge would no longer effectuate the purposes of Executive Order 11491 and is therefore not necessary under the present circumstances.

Dated, Washington, D.C.  
November 16, 1973

  
Paul J. Fasser, Jr., Assistant Secretary  
of Labor for Labor-Management Relations

1/ See Section 5(c) of the Postal Reorganization Act which states, in effect, that no cause of action by or against the Post Office Department shall abate by reason of the enactment of the Postal Reorganization Act.

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
OFFICE OF ADMINISTRATIVE LAW JUDGES

ANAHEIM POST OFFICE  
S. POSTAL SERVICE  
ANAHEIM, CALIFORNIA

Respondent

and

CASE NO. 72-CA-2560(26)

NATIONAL ASSOCIATION OF LETTER  
CARRIERS, BRANCH 1470

Complainant

Wolfe Cuthbert, Labor Law Attorney  
United States Postal Service  
631 Howard, San Francisco,  
California 94106, for the Respondent.  
Jack Koszdin, Attorney  
1520 Wilshire Blvd., Los Angeles  
California 90017, for the Complainant.

Before: Francis E. Dowd, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding, heard at Los Angeles, California on July 31, 1972, arises under Executive Order 11491 (herein called the Order)<sup>1/</sup> pursuant to a Notice of Hearing on

<sup>1/</sup> The complaint was filed on May 21, 1971 prior to Executive Order 11491 being amended by Executive Order 11616.

Complaint issued on May 23, 1972, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region. National Association of Letter Carriers, Branch 1470, (herein referred to as the Union or the Complainant) initiated this case by filing a complaint on May 21, 1971 against the Anaheim, California Post Office of the U. S. Postal Service <sup>2/</sup> (herein called the Respondent or the Activity). The complaint alleged that the Respondent violated Sections 19(a)(1), (5) and (6) of the Order by failing and refusing "to meet its obligations under the law to consult, confer and negotiate with Branch 1470 regarding the unilateral cancellation of annual leave for carriers." At the hearing, both parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. Briefs were filed by both Complainant and Respondent.

Upon the entire record in this case, from my observation of all the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, including briefs filed by the parties after the hearing, I make the following findings, conclusions and recommendations:

Findings

Essentially there are two basic issues that must be resolved in this matter. They are as follows:

1. Whether Respondent had an obligation to confer, consult or negotiate with Complainant before changing its past practice of granting annual leave during the route inspection period?

<sup>2/</sup> Prior to passage of the Postal Reorganization Act of August 12, 1970, Public Law 91-375, revising and reenacting Title 39 of the United States Code, the U. S. Postal Service was known as the United States Post Office Department. The complaint herein was filed prior to July 1, 1971, the date the Postal Service became subject to the jurisdiction of the National Labor Relations Board.

2. If so, whether Respondent actually failed to fulfill this obligation in violation of Sections 19(a)(1), (5) and (6) of Executive Order 11491?

With respect to the first issue, Respondent denies that it had an obligation to confer, consult or negotiate. Rather, Respondent contends that under the 1968-71 National Agreement and the Local Agreement then in effect between the parties,<sup>3/</sup> Respondent had the unilateral right to control and restrict annual leave during all pay periods, including periods of route inspections.

With respect to the second issue, Respondent asserts that even if it did have an obligation to confer, consult or negotiate, Respondent met this obligation in December, 1970. In this regard, Respondent contends that Complainant initially "agreed" that the change was necessary but later reversed its position after the change was implemented. Elsewhere in its brief, however, Respondent asserts that at the time the annual leave change was "announced and implemented," the Complainant "did not contest" management's right to make such change, but only asked for individual exceptions which were granted. Respondent further asserts that Complainant's subsequent protest on January 12 was "too late" and "the time to object to it had passed."

I. Collective Bargaining History

Branch 1470 of the National Association of Letter Carriers is the collective bargaining representative of a unit of employees at the Anaheim, California Post Office. This relationship has existed since at least 1966. The employees in this unit work at four locations: Main Office, Sunkist Station, Brockhurst Station and Federal Station. Pertinent provisions of the National and Local Agreements are set forth below.

<sup>3/</sup> The National Agreement (Resp. Exhibit 8) was between the United States Post Office Department and 7 labor organizations, including the National Association of Letter Carriers, AFL-CIO. The Local Agreement was between the Anaheim, California Post Office and Branch 1470 of the National Association of Letter Carriers.

A. The National Agreement

The National Agreement between the United States Post Office Department and six labor organizations was effective from March 9, 1968 to March 8, 1970, and was extended to July 20, 1971.

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ARTICLE XVI

Leave

A. Basic Agreement

It is agreed to establish a nationwide program for vacation planning for regular and career substitute employees with emphasis upon the choice vacation period(s) or variations thereof.

B. Formulation of Leave Program

The formulation of the leave program within a local installation shall be a subject of (1) negotiation with employee organizations having exclusive recognition for the craft at that level, and (2) consultation with the employee organization(s) having formal recognition for the craft at that level; and shall be within the following general framework:

1. Installation heads and supervisors shall be responsible for scheduling and granting annual leave on an equitable basis with due regard for the needs of the service and the welfare of employees. Care shall be exercised to assure that no employee is required to forfeit any part of his annual leave.

3. Establishment of the choice vacation period(s) shall be determined by local negotiations or consultation, as appropriate, before December 1 for the following year, and may cover one or more designated choice periods during the leave year. Local agreements may exclude specific periods, in addition to December, from the choice vacation period(s) because of known local service requirements for such periods.

7. The number of employees granted annual leave during any given period shall be governed by service requirements and the number of employees available for necessary replacement.

C. Implementation

The following general rules shall be observed in implementing the vacation planning program:

3. The installation head shall:

b. Determine the maximum number of employees that may be granted leave each week during the choice vacation period(s). In making this determination consideration must be given to mail volume and other workload data for comparable periods in preceding years as well as anticipated workloads and current volume trends.  
\*\*\*\*

The Local Agreement

Like the National Agreement, the Local Agreement was executed on March 9, 1968 and extended to July 20, 1971. This contract was not placed in evidence by either of the parties. Postmaster Marshall McFie, Postmaster at the Anaheim Post Office for 16 years, testified that the 1968 agreement was the entire agreement as he understood it at the time, and that it contained no provision specifically dealing with annual leave during route inspection periods. Kenneth Vliestra, Union Vice President, testified that Section C-1 of the local agreement provided that vacation periods would be from January 1 to December 31, with the month of December excepted. I find that the Local Agreement excluded the month of December and did not contain a provision specifically dealing with annual leave during the period of the route inspection.

III. The Route Inspection Period

On an annual basis, postal carriers are subject to a route inspection lasting about one week's time. The inspection is conducted by an examiner (usually a supervisor) who records the volume of mail and the time spent by the carrier in the office and out on the route. The purpose of the

inspection is to determine whether the carriers' routes are of the proper size and volume. After the inspection is completed, the routes may be adjusted to deliver more or less mail, depending upon the inspection results.

The M-39 Manual, a document produced by management headquarters in Washington, D. C., is a methods handbook containing guidelines of supervision for the administration of delivery service. Section 215.21 thereof states as follows:

"Avoid carrier absences during the week of the count and inspection as much as possible. Leaves of absences for other than emergencies should not be authorized,..."

The latest edition of the M-39 Manual apparently was published in 1966.

It is undisputed that for a number of years - going back sometime prior to 1965 - it was an established practice for management to grant requests for annual leave during the route inspection. According to Respondent, this practice did not interfere with the inspection prior to 1965 because at that time, if a particular carrier was absent, his route could easily be inspected later since the supervisors conducting the inspection were from the Anaheim Post Office. In 1965, the Sectional Center Route Inspection Program was introduced on an experimental basis. This new system utilized supervisors from surrounding post offices. Under the old system, an inspection could take several weeks; under the new system, the entire procedure could be accomplished in one week.

Although the new inspection system has been in effect since 1965, the practice of granting annual leave during the route inspection period continued up to and including calendar year 1970. No evidence was presented by Respondent requests to take annual leave during the route inspection period were ever denied prior to January 1971. From the foregoing, I find that the granting of annual leave to employees during the route inspection period was a long-established practice and that it was a term and condition of employment agreed to by the parties although not set forth in a written agreement.

There is no dispute that if an inspection indicated the need for a route adjustment, the M-39 Manual required that such adjustment be made within 45 days after completion of the inspection. There is also no dispute that the Union complained on numerous occasions - particularly after completion of the inspection in April 1970 - about management's failure to make the route adjustments within the requisite 45 day time limit.

There is a dispute, however, as to whether or not there is any causal relationship between the granting of annual leave during the route inspections and management's alleged failure to make all route adjustments within 45 days. Respondent's position is that this is one of the reasons for delay in making route adjustments. Complainant's position, as testified by Union President Paul Bourgeault, is that post office management simply was not expeditiously processing the necessary paperwork involved.

Bourgeault testified, and no contrary evidence was introduced, that a person taking annual leave during the route inspection sometimes had his particular route inspected in advance of the regularly scheduled inspection, rather than afterwards. But even when the postponed inspection occurred within a week or two following the regular inspection, it would seem to the undersigned that this alone obviously could not account for delays up to 90 days.

By letter of November 10, 1970, the Anaheim Post Office was informed by higher headquarters of the 1971 schedule of route inspections. The schedule indicated that the Main Office would be inspected the week of April 12-16, and the other sub-stations would be inspected on different dates in 1971. As will be noted later, the week of April 12-16 was the week that some parochial schools had their Easter vacations and, as a result, some employees were planning on taking vacation at that time.

III. The Decision to Change Established Policy

According to Mr. Marshall McFie, a decision was made in December, 1970 (he could not recall the exact date) to change the past policy of granting annual leave during the route inspection period. Postmaster McFie testified that

to the best of his knowledge there were no discussions about the change in policy prior to December. He also stated that the subject had not come up before in negotiations concerning leave. According to McFie, the decision was made jointly with Mr. Howard Bates, Superintendent of Delivery and Collections for the past six years. Superintendent Bates oversees the annual leave program, the schedule of days off, bidding on routes, route examinations, route adjustments, and city service matters. From the foregoing, I find that in early December of 1970, probably during the first two weeks of that month, management officials of the Anaheim Post Office made a decision to change the long-established practice of permitting employees to take annual leave during the route inspection period.

IV. Notification of Change and Protest by the Union

Superintendent Bates testified that the first meeting he had with the Union concerning the change in annual leave policy occurred in his office with Paul Bourgeault 4/ during the latter half of December 1970 between December 17 and December 25. 5/ Bates' version of this conversation is as follows:

I explained to him the problems we had, one of them had been on the mutual exchange of leave over the years and then I told him the problems we had on the scheduling of route inspections, having to reschedule route inspection for those who were not on leave, and we determined that they were not allowed to bid on the annual leave in the unit for the week we were holding route inspections.

Bourgeault's response, according to Bates, was as follows:

- 
- 4/ Bourgeault, President of Branch 1470, has been a letter carrier at the Anaheim Post Office since March 4, 1957. He was the chief negotiator for Branch 1470 in negotiations in 1964, 1966, 1968 and 1971.
  - 5/ Bourgeault testified that the meeting took place between Christmas and New Years.



I believe I pointed out that section which quoted that during the week of route inspection that annual leave should not be scheduled, as far as practicable.

Bourgeault's version of this conversation is as follows:

Mr. Bates informed me that he was not going to allow the carriers to bid for vacation during route inspection weeks.

Bourgeault testified that he told Bates he sympathized with them but didn't agree with the decision or its necessity and he protested this general change of policy for all of the sub-stations and not merely for specific individuals involved. 6/

From the foregoing, I find that when Respondent communicated its change of policy to Union President Bourgeault, the Union was being presented with a final decision and that Respondent - fully convinced that it was doing what it had a management right to do - had a closed mind with respect to any negotiation on this subject. I find that Respondent, insistent with its management's rights defense, conveyed to the Union but one thought, namely, that Respondent had already made up its mind to change its policy and the Union was expected to accept this decision without questioning management's stated reasons for the decision.

Based upon my observation of Bourgeault, his demeanor on the witness stand, and an evaluation of his entire testimony, I find that he was a credible witness. Accordingly, I find that he did protest management's decision in his meeting with Bates. Moreover, I believe this is essentially corroborated by Bates who testified that Bourgeault "objected only to the fact that he didn't like it and everything." I find it difficult to believe that a volatile person like Bourgeault would object as mildly as stated by Bates when presented with such a significant reversal of long-established policy.

#### V. Implementation of New Policy; Further Union Protest

Under the local agreement then in effect, leave could be taken anytime during the leave year (from February 1 through January 31), except the month of December. Bidding for leave was done on the basis of seniority. For the 1971 leave year the opening day for bidding was January 5, 1971. It was stipulated at the hearing that on January 5, Mr. Donald George, one of the senior carriers, came into Mr. Bates' office, asked for leave during the week of April 12, and was turned down because this was the week of the route inspection. Mr. Kenneth Vliestra, Union Vice-President, testified that George came to him on about January 5 and complained about not being granted his requested leave because he had planned a vacation to coincide with the vacation of his relatives who were coming to California from the East. Immediately after this conversation, Vliestra and George together went to see Mr. Bates and asked that the decision be reversed. According to Vliestra, Bates replied that he would give the request consideration. Later, Vliestra learned through George that Bates again denied the request for leave. Bourgeault stated that he also talked to Bates about George, although the person actually handling the complaint was Vliestra.

Like George, Bourgeault also submitted a written request for leave during the route inspection. This request was dated January 6, and was denied. On the same day, according to Bates, Bourgeault met with him to complain about management's denial. According to Bourgeault it was at this meeting that he complained about the new rule on behalf of the carriers generally and told Bates that he was going to see the Postmaster.

On January 7, Bourgeault met with Postmaster McFie and they discussed a number of items, including the change of policy. According to Bourgeault, he accused McFie of changing the policy in order to punish the Union for its frequent complaints about the delay in making route adjustments. Bourgeault testified:

I told him, "I sort of sympathize with you on that, but I don't think that's the crux of the problem. The problem is the paperwork laying in the office, and that's why

you can't comply with the 45-day time limit."

Bourgeault also testified that he offered suggestions at this time as to how the paperwork problem could be solved.

The only dispute as to this conversation seems to be whether Bourgeault was protesting management's right to change its policy, or whether he was accepting the new policy and merely requesting that exceptions be made for certain employees (himself included) who had special reasons for desiring annual leave during the 1971 route inspection period. 7/ McFie's testimony in this respect is as follows:

Q. (By Mr. Cuthbert:) At that meeting of January 7th, did Mr. Bourgeault make any statement to you that would have led you to believe that he was questioning your right to make this general policy change?

A. I did 8/ not take it that way at all. I took it as a request to make some exceptions for those people who were being caught in this change and were being inconvenienced, because they wouldn't be able to get off with their children.

On cross examination, Bourgeault denied that he was objecting only on behalf of certain individuals. At this meeting on January 7, according to Bourgeault, McFie was advised that the Union would file a formal protest. From the foregoing I find that the Union further protested the new policy when Bourgeault met with Bates on January 6 and with McFie - who by now had returned from vacation - on

7/ There is no dispute that Respondent granted the Union's request to grant leave to those employees whose children were on Easter vacation the same week as the route inspection. As noted in Respondent's Exhibit 2, however, this was regarded by management as an exception to the new policy.

8/ The transcript is amended accordingly.

January 7. McFie's testimony, related above, does not convince me to the contrary.

VI. Written Protest by Union and Respondent's Reply

On January 12, President Bourgeault wrote a letter (Resp. Exh. 4) to Postmaster McFie protesting the change in policy and requesting that the old policy be reinstated. The letter reads as follows:

It has been the practice in the Anaheim Post Office to allow carriers to bid for annual leave, including weeks that route inspections were scheduled.

This year, however, we are informed that carriers would not be allowed to bid for annual leave, during those weeks at the units the route inspection have been scheduled.

For more than five (5) years, Anaheim letter carriers have been bidding for annual leave during scheduled route inspections. Now, we are told we cannot bid for these periods because its in the M-39. (215.21 Methods Handbook Series M-39).

We vigorously protest this change in past practice and we respectfully request that since management has not seen fit to enforce a rule that has been in effect for this period that we return to the practice that has been in effect for so many years.

In response thereto, Postmaster McFie wrote to Bourgeault on January 15 (Resp. Exh. 5) as follows:

Your request that this office disregard the instructions given in Handbook M-39, Part 215.21, which clearly state that carriers must 9/ not be given leave during route inspection periods, cannot be granted.

9/ The word "must" does not appear in Part 215.21 and is apparently McFie's interpretation of this rule.

This matter was discussed with you and you agreed that only a relatively small number of employees will be effected by the rule. The periods effected are not usually desirable for vacations.

I am sure you understand the desirability of having the regular carriers on their respective routes during inspections. Not only can we get a better inspection, but the entire unit can be completed more quickly. Delays in route adjustments have been one of your most common complaints and this is one way to minimize this delay in adjustments.

Regeault testified that his January 12 protest was processed as a grievance as far as the Regional level, but no further. Thereafter, the Union filed the complaint which led to the hearing in this matter.

I find that the Union's letter of January 12 was a clear unambiguous protest of the decision by Respondent to change its policy concerning annual leave during the route inspection.

#### Discussion and Analysis

##### Respondent's Obligation to Consult, Confer or Negotiate

Respondent advanced several arguments in support of its contention that it had no obligation to consult, confer or negotiate with Complainant about changing its policy of granting annual leave during the period of the route inspections. I reject this defense. These arguments, which I find unpersuasive, are as follows:

First of all, Respondent asserts that since the local agreement was for a duration of two years, and since leave periods were to be determined annually (according to the National Agreement), the determination of leave periods was outside the scope of the local agreement. From this non sequitur, Respondent argues that "the question of whether leave could be taken during the week of the route inspection is a reserved management right, which right was to be

exercised yearly." This argument has no support in the record. As will be discussed in more detail later, management had a right to process leave requests and determine who qualified and how many qualified for leave but the only limiting contractual clause as to when leave could be taken was the clause prohibiting leave during the month of December. Article XVI, Section B, Paragraph 3 of the National Agreement permits Local Agreements to "exclude specific periods, in addition to December." Obviously, the national negotiators envisioned the possibility that in different parts of the nation, local post offices and local unions might desire to negotiate for the exclusion of other periods of time besides December. At Anaheim, there were no local negotiations on the subject of permitting or prohibiting annual leave during the route inspection period. While the local agreement was not placed in evidence, there is testimony that December was the only period during which annual leave could not be taken and from this I conclude that annual leave could be taken at any other time of the year, including the period of the route inspection. This conclusion is further supported by the undisputed evidence that, indeed, annual leave was routinely granted for a number of years, even before the Sectional Center Route Inspection Program was initiated in 1965. Furthermore, Respondent introduced no evidence to show that prior to January 1971 it had ever denied leave requests during the route inspection period. I cannot accept Respondent's argument that it had a management right, which it exercised yearly, to grant or deny annual leave during the route inspection period. In my opinion, the evidence is to the contrary.

Secondly, Respondent contends that, under Article XVI, Section B, Paragraph 1, it had "the sole right to determine the number of employees granted annual leave during any period and this would therefore include route inspection periods. This is correct as far as it goes. For example, if seventy percent of the carriers at Anaheim had requested annual leave during the week of the route inspection, Respondent could have determined that leave should not be granted to such a large number of employees at one time and that only twenty percent, for example, could be permitted to take leave at this particular time. The same would hold true for a similar request during the summer months. Thus, a proper interpretation of Article XVI, Section B, Paragraph 7 should place emphasis on the number of employees requesting leave in relation to the number of employees available

for replacement. But this contract provision does not, in my opinion, give Respondent the right to unilaterally declare that no carrier can take leave during the route inspection period anymore than Respondent could unilaterally prohibit taking annual leave during the month of July.

Thirdly, Respondent relies on Section 215.21 of the M-39 Manual which states as follows: "Avoid carrier absences during the week of the count and inspection as much as possible." Respondent, in its brief and through the testimony of Bates (previously quoted herein), interprets this provision as "prohibiting" the taking of annual leave during that period. In my view, this is a weak argument. If the writers of the M-39 wished to prohibit taking leave during this period, they easily could have said so in clear and unambiguous language by using such phrases as "leave must not be taken" or "the taking of leave is prohibited." I conclude that the use of the word "avoid," which is permissive in nature, was intentional. I suggest that a proper interpretation of this provision is as follows: "Although carrier absences may be permitted during the week of the count and inspection, such absences should be avoided as much as possible." Indeed, this interpretation is much closer to the facts of this case. Even if Respondent's interpretation were correct, I would conclude that Section 215.21 could not be invoked unilaterally where, in the circumstances of this case, the rule had not been previously enforced for so many years.

## II. Respondent's Failure to Consult, Confer or Negotiate

On the basis of my factual findings set forth above, it seems quite clear that Respondent's change of policy was not preceded by any collective bargaining between the parties. To the extent that the policy change was discussed at all, it was among members of management alone. The Union was not even informed that the Respondent was considering such a policy change until a decision had been reached. When Superintendent Bates, on behalf of the Postmaster, met with Union President Bourgeault in December, it was for the purpose of notifying or informing the Union of the decision arrived at by management without Union participation in any form. The entire tone of Bates' testimony demonstrates that he was not presenting the Union with a tentative decision which was subject to change. Nor was he asking the Union for its ideas, its reaction, or for

any counterproposals. Instead, he was informing Bourgeault of a final decision and explaining the reasons underlying the policy change. Indeed, Bates himself testified that he told Bourgeault "we had determined" (past tense used with an aura of finality) "that they were not allowed to bid on the annual leave in the unit for the week we were holding route inspections." I find nothing in the testimony of Bates to warrant the conclusion that this meeting was for the purpose of fulfilling Respondent's bargaining obligation. On the contrary, I conclude that this meeting was for the sole purpose of notifying the Union of the decision already made by management consistent with its basic position that it had no duty to bargain. Accordingly, I further find and conclude that the Respondent thereby exhibited a "closed mind" and presented the Union with a fait accompli so that it would have been futile to make a specific bargaining request at this point in time.

From the foregoing, I conclude that Respondent did, in fact, have an obligation to consult, confer or negotiate with Complainant about its proposal to change the long-established policy of granting annual leave during route inspections. I specifically reject, for the reasons already cited, the defense that Complainant had waived its right to bargain by virtue of the collective bargaining agreements, National and Local, in existence at that time. In this regard, the record contains no evidence of a clear and unmistakable waiver by the Union.

## III. Complainant's Alleged Failure to Protest

Respondent further contends that when Bates informed Bourgeault of management's decision, Bourgeault did not protest the decision. I find that Bourgeault credibly testified that he did protest, not once but at least three times. He protested orally to both Bates and McFie, and he protested formally in writing by letter of January 12. It is quite clear from Bourgeault's testimony that while he understood the Respondent's alleged reasons for changing the policy, he did not agree with the reasons and did not accept the policy change.

During the hearing Respondent went to great lengths to attempt to explain the reasons for its decision to change its policy. Allegedly, management felt that granting annual

leave during the route inspections was a factor or at least one reason why it could not comply with the 45 day deadline for post-inspection reports. Now it seems to me that if this were true, it would have been a simple matter for Respondent to introduce documentary evidence clearly showing that the biggest percentage of overdue 45-day reports occurred among that group of employees who took leave during the route inspection in contrast with those employees who worked during the route inspection. Even if such evidence existed, however, it would not necessarily justify such a drastic change of policy but it would at least lend some credence to Respondent's alleged reasons for changing its policy. Bourgeault, of course, contends that the real reason for the Respondent's action was in retaliation for the Union's repeated complaints about management's failure to meet the 45-day deadlines. I found no evidence to support Bourgeault's suspicion of Respondent's motives. In any event, I find it unnecessary to pass upon the propriety of Respondent's reasons for the change of policy. The point is that Respondent had an obligation to bargain and failed to fulfill it, for whatever the reason.

#### IV. Subsequent Conduct of the Parties

In various offers of proof, Respondent attempted to show that subsequent conduct of the parties has rendered this issue moot. In support of this contention, Respondent cites AFGE Local 1960 and Naval Air Research Facility, FLRC 70A-6, a case which is clearly inapplicable. I rejected the proffered evidence as irrelevant to the question whether the Executive Order was violated in December 1970 as alleged in the complaint. I adhere to this ruling. The offers of proof concerned the following:

A. A new local agreement relating to annual leave and executed on December 17, 1971, a year after the unfair labor practice. While such agreement did not contain any provision about annual leave during the route inspection period, Respondent believes it pertinent to point out that it insisted during bargaining that it had a management right to do what it did. I can understand why Respondent would want to take a position consistent with its defense in the investigation of this case which was then pending before the Regional Administrator, and I can also understand why Respondent would adhere to its management rights position

in 1971 just as it did the year before in 1970, if it really believed that its position was a lawful one. But this does not make Respondent's position correct and lawful, and it does not make it relevant to this proceeding. Nor is the mere absence of a contract provision concerning annual leave during route inspections evidence that the Union has waived its right to bargain on this subject, absent a clear and unmistakable waiver. CF. NASA, Kennedy Space Center, Florida, A/SLMR No. 223.

B. With respect to the new local agreement executed in 1971, Respondent offered to show that thereafter the Union allegedly filed no protests or grievances contesting Respondent's right to prohibit leave during the weeks of the route inspection, thus confirming its acceptance of Respondent's position. Assuming these facts to be true, it does not necessarily follow that the Union accepted Respondent's position. I can well understand the futility of the Union's filing a grievance knowing management's attitude, and realizing that the resolution of this entire issue depended on the outcome of its complaint filed with the Regional Administrator. I likewise fail to see the relevance of this conduct in 1971 to the unfair labor practice in 1970 which is the subject of this proceeding.

C. A Postal Bulletin dated January 13, 1972 addressed to certain management officials of the Post Office allegedly containing the text of negotiated items apparently being added to the National Agreement, including Article 59, the leave article. According to Respondent, this new agreement fully retains management's right to control leave during the vacation week periods. Having already concluded that the 1969 National Agreement did not contain a clause giving management the right to control leave to the extent argued by Respondent, I certainly am not impressed by the fact that the same clause has been retained in the 1971 Agreement which, in any event, is irrelevant to this proceeding.

#### Conclusions

##### I. Section 19(a)(6)

The Assistant Secretary for Labor-Management Relations, in Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87 concluded that the obligation of an agency or

activity to consult, confer and negotiate with an exclusive representative would become meaningless if a party to such relationship was free to make unilateral changes in the agreement negotiated. The Assistant Secretary held that the Respondent therein violated Section 19(a)(6) by unilaterally changing agreed upon conditions of employment. I have found on the facts of this case that it was an agreed upon condition of employment for employees to be granted annual leave during the period of the route inspection and that Respondent had an obligation to consult, confer and negotiate with the Union with respect to changing this policy. Having further found that Respondent failed to fulfill this obligation by unilaterally changing the policy in December 1970, I conclude that Respondent violated Section 19(a)(6) of the Executive Order. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87; Long Beach Naval Shipyard, A/SLMR No. 154.

II. Section 19(a)(1)

I further find that Respondent's action in unilaterally changing agreed upon conditions of employment also constitutes a violation of Section 19(a)(1) of the Executive Order. <sup>10/</sup> Section 19(a)(1) grants to employees the right to form, join or assist a labor organization and prohibits management from interfering with that right. The Respondent's course of conduct in this case - unilaterally changing annual leave policy a few weeks before bids for annual leave in 1971 were to be submitted - clearly had the effect of evidencing to the employees that the Activity can act unilaterally with respect to terms and conditions of employment without regard to their exclusive representative. Such conduct undermines the exclusive representative and, accordingly, I further find and conclude that the Section 1(a) rights of employees have been interfered with in violation of Section 19(a)(1) of the Order.

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<sup>10/</sup> This conclusion is based upon an independent evaluation of the facts of this case and not on any theory that a Section 19(a)(1) violation is derivative of a Section 19(a)(6) violation. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

III. Section 19(a)(5)

The complaint further alleges that Respondent, by its unilateral change of annual leave policy during the route inspection period, also violated Section 19(a)(5) of the Executive Order. Section 19(a)(5) provides that it is an unfair labor practice for agency management to "refuse to accord appropriate recognition to a labor organization qualified for such recognition." Complainant presented no specific reasons at the hearing or in its brief as to its legal theory why Respondent violated Section 19(a)(5).

My review of the decision issued by the Assistant Secretary leads me to conclude that a violation of Section 19(a)(5) does not flow automatically from a violation of Section 19(a)(6). To establish a violation of Section 19(a)(5), a Union has the burden of showing some connection between the Agency's conduct and the language of the Executive Order.

For example, in Long Beach Naval Shipyard, A/SLMR No. 154, the Assistant Secretary concluded that the evidence was insufficient to establish that the Activity's unilateral cancellation of an arbitrate proceeding was violative of its Section 19(a)(5) obligation to accord recognition to the Union. On the other hand, the Assistant Secretary found a violation of Section 19(a)(5), but not Section 19(a)(6), in a case involving the unilateral termination of a negotiated agreement and revocation of dues allotments. United States Department of Defense, Department of Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106.

Respondent's activity in the instant proceeding was confined to this single aspect of the bargaining relationship and while it may have undermined the Union's status in the eyes of employees so as to violate Section 19(a)(1), I believe it would be stretching a point to conclude that Respondent was thereby refusing to accord recognition to the Union in violation of Section 19(a)(5). Accordingly, I will recommend that the Assistant Secretary dismiss this allegation of the complaint.

Recommendations

In view of my findings and conclusions above, I make the following recommendations to the Assistant Secretary:

- A. That the Section 19(a) (5) allegation in the complaint be dismissed.
- B. That Respondent be found to have engaged in conduct prohibited by Sections 19(a) (1) and (6) of Executive Order 11491, and, accordingly, that Respondent be ordered to cease and desist therefrom and take specific affirmative action as set forth in the following order which is designed to effectuate the policies of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25 (a) of the Regulations, the Assistant Secretary of Labor-Management Relations hereby orders that Anaheim Post Office, U. S. Postal Service, Anaheim, California shall:

1. Cease and desist from:

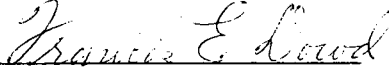
- (a) Changing its established policy of granting requests for annual leave during the period of the route inspection, or any other terms and conditions of employment, without consulting, conferring or negotiating with National Association of Letter Carriers, Branch 1470.
- (b) Interfering with, restraining or coercing employees by changing terms and conditions of employment without consulting, conferring or negotiating with their exclusive bargaining representative.
- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order.

- (a) Post at its Anaheim, California Post Office facility, including the Main Office, the Sunkist Station, the Brockhurst Station, and the Federal Station, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Postmaster

and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Postmaster shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

  
 FRANCIS E. DOWD  
 Administrative Law Judge

Dated at Washington, D. C.  
December 19<sup>th</sup>, 1972

(Notice recommended for adoption by the Assistant Secretary)

## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to consult, confer, or negotiate with National Association of Letter Carriers, Branch 1470, as the exclusive representative of our employees at the Anaheim Post Office, by unilaterally changing our annual leave policy for the route inspection period, or any other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

ANAHEIM POST OFFICE  
U. S. POSTAL SERVICE  
Anaheim, California  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor whose address is Room 9061, Federal Building 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF THE ARMY,  
ROCKY MOUNTAIN ARSENAL,  
DENVER, COLORADO  
A/SLMR No. 325

This matter arose pursuant to a petition filed by the International Federation of Federal Police (Ind.) (IFFP) seeking to represent a unit of all guards assigned to the Rocky Mountain Arsenal. The Activity took the position that the unit petitioned for was not appropriate since it excluded employees whose community of interest is not separate and distinct from that of the employees in the claimed unit and, further, that such a unit would not promote effective dealings and efficiency of agency operations. The American Federation of Government Employees, AFL-CIO, Local 2197 (AFGE), which currently represents the employees in the petitioned for unit in a mixed unit of guards and nonguards, contended that the Order does not provide for the severance of guards from an existing mixed unit absent a breakdown in the existing collective bargaining relationship. In the alternative, the AFGE contended that, if the Assistant Secretary finds the claimed unit appropriate, the employees should be afforded the opportunity to continue to be represented by the AFGE in the existing bargaining unit.

Under all the circumstances, and relying on the principles enunciated in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, the Assistant Secretary found that where, as here, a timely petition is filed seeking to sever a unit of guards from an existing mixed unit of guards and nonguards, such unit is appropriate for the purpose of exclusive recognition, and will promote effective dealings and efficiency of agency operations.

As to the alternative position taken by the AFGE, the Assistant Secretary found, in accord with the decision in Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above, that the placement of the AFGE's name on the ballot is not warranted. However, the Assistant Secretary further concluded, based upon Sections 10(b)(3) and 10(c) of the Order, and the Study Committee's Report and Recommendations, (1969), that neither the filing of the instant petition, nor the direction of election herein, terminated the existing mixed unit and the existing collective bargaining relationship. Accordingly, and noting that nothing in the Order or its "legislative history" required that employees voting in a severance case be afforded the opportunity to return to unrepresented status, the Assistant Secretary concluded that, in the absence of an affirmative vote of the majority of employees in the unit sought in favor of the IFFP, the existing mixed unit and the representation thereof may continue.

Under all of the circumstances, the Assistant Secretary directed that an election be conducted in the unit sought.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE ARMY,  
KEY MOUNTAIN ARSENAL,  
DENVER, COLORADO

Activity

and

Case No. 61-2035(RO)

INTERNATIONAL FEDERATION OF  
FEDERAL POLICE (IND.)

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 2197

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Patricia L. Wigglesworth. Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this instant case, the Assistant Secretary directs as follows:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, International Federation of Federal Police (Ind.), herein called IFFP, seeks an election in a unit consisting of all regular full-time and regular part-time guards, including temporary guards with an expectation of employment of over 90 days, employed by and assigned to the Key Mountain Arsenal, Department of the Army, Denver, Colorado, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by Executive Order 11491, as amended.

The Activity takes the position that the petitioned for unit is not appropriate for the purpose of exclusive recognition based essentially on the view that such a unit embraces employees whose community of interest is not separate and distinct from other employees of the Activity who are excluded from the claimed unit and, further, that such a unit would not promote effective dealings and efficiency of agency operations.

The Intervenor, American Federation of Government Employees, AFL-CIO, Local 2197, herein called AFGE, which currently represents exclusively, in a mixed unit of guard and nonguard employees, the guards sought in the instant petition, contends that, in the absence of a breakdown in an existing collective bargaining relationship, the Order did not intend to allow for the severance of a unit of guards from an existing unit of guards and nonguard employees. In the alternative, the AFGE takes the position that, if the Assistant Secretary finds that the claimed unit is appropriate for the purpose of exclusive recognition, the guard employees should be afforded the opportunity to continue to be represented by the incumbent labor organization in the existing unit.

The record discloses that the AFGE was granted exclusive recognition in a mixed unit of guard and nonguard employees of the Activity in July 1965. Specifically, the unit is comprised of all nonsupervisory employees of the Activity, excluding management officials, professional employees, supervisors, and employees engaged in Federal personnel work in other than a purely clerical capacity.<sup>1/</sup> Since the grant of exclusive recognition, the AFGE and the Activity have negotiated two agreements, the most recent of which expired June 14, 1973.

The Activity is headed by a Commander assisted by a Deputy Commander. Reporting directly to the Deputy Commander, together with other components of the Activity, is the Special Staff which is composed of the Office of the Adjutant, the Security Office, and the Headquarters Company. The guards sought by the petition herein are located organizationally in the Security Office, which is headed by the Provost Marshal. The guard force is composed of approximately 66 employees, of whom nine are classified as Shift Supervisors, Shift Captains, or Shift Lieutenants.<sup>2/</sup>

The record establishes that the guards are uniformed, carry weapons, and are authorized to enforce regulations, to issue citations for violations of regulations, and to detain and hold employees and nonemployees for

<sup>1/</sup> The unit description appears as described in the parties' most recent negotiated agreement.

<sup>2/</sup> All of the parties stipulated that these nine employees are supervisors within the meaning of Section 2(c) of the Order, in that they have the authority effectively to recommend the hiring, suspension and/or discipline of employees, and have the authority to assign and transfer the employees under their supervision.

violations of regulations. Further, they generally are responsible for the protection and preservation of property on the Activity's premises. 3/

With respect to whether the claimed unit herein is appropriate for the purpose of exclusive recognition, the Assistant Secretary previously held in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, that where, as here, a timely petition seeks to sever a unit of all guard employees from an existing mixed unit of guard and nonguard employees, such unit of guards is appropriate for the purpose of exclusive recognition, and will promote effective dealings and efficiency of agency operations.4/ Accordingly, I shall order an election in the unit sought herein.

With regard to the alternative position taken by the AFGE in the instant proceeding, the essential argument advanced is in two parts: First, that as the incumbent labor organization representing a unit of all of the Activity's employees, including both guards and nonguards, the AFGE should have its name placed on the ballot so that those voting in the election will have the option of remaining in the existing bargaining unit; and second, in the event that the Assistant Secretary does not place the AFGE's name on the ballot, there should be some provision made whereby the existing bargaining unit would continue unaltered in the event that a majority of employees voting in the unit found appropriate does not indicate a desire to be represented by the IFFP.

As to the AFGE's first contention, I find that, in accordance with the reasons enunciated in Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above, at footnote 13, the placement

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3/ All parties stipulated that the employees sought by the petition herein are guards within the meaning of Section 2(d) of the Order.

4/ In A/SLMR No. 45, the Assistant Secretary stated, in part, that "Section 10(b)(3) and 10(c) of Executive Order 11491 clearly reflect the view that appropriate units should not be composed of mixtures of guards and nonguards and that nonguard labor organizations should not represent guards. In view of this clear mandate, I find that despite a history of representation in a combined unit, severance of the guard employees from the unit represented currently by the Intervenor is not precluded by my previously announced policy in U. S. Naval Construction Battalion Center, cited above." (footnotes omitted) See also, in this regard, Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107 and General Services Administration, Region 2, New York, New York, A/SLMR No. 220.

of the AFGE's name on the ballot is not warranted.5/ With regard to the second aspect of the AFGE's position, in my view, the Order clearly indicates that a unit should not be established if it includes any guard together with other employees.6/ Nor may an agency accord exclusive recognition to a labor organization for a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.7/ However, the Order does not preclude the continued existence and representation of mixed units of guards and nonguards by nonguard labor organizations where such units were in existence on the effective date of the Order. Thus, the "legislative history" of the Executive Order 11491, as set forth in the Study Committee's Report and Recommendations (1969) states:

"We recommend that the new order provide for separate units for guards; and for guards to be represented only by organizations which do not admit to membership, and are not affiliated directly or indirectly with organizations which admit to membership, employees other than guards. These requirements would not affect existing units or representation but should be applied in all unit and representation determinations under the new order." (emphasis added) 8/

Under these circumstances, I find that the prohibitions regarding mixed units of guards and nonguards relate to the establishment of new guard units and new representation determinations relating to guards. Thus, until some event has occurred which could be said to terminate the existing mixed unit or representation, such mixed unit or representation is free to continue in existence as constituted. In this regard,

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5/ In A/SLMR No. 45, at footnote 13, the Assistant Secretary stated that the Executive Order provides that, "an agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. It is undisputed that the American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization which admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. In these circumstances, since the AFGE is precluded by the Order from being certified as the representative of guard employees, the placement of its name on the ballot is not warranted."

6/ See Section 10(b)(3) of the Order.

7/ See Section 10(c) of the Order.

8/ See Section B(6) of the Report and Recommendations.

filing of the instant petition is not, in my view, an event which, standing alone, effectively terminates the existing bargaining unit or representation thereof. Nor, in my view, would the determination by the Assistant Secretary, standing alone, that a segment of the existing unit is an appropriate unit for the purpose of exclusive recognition constitute an event which terminates the existing unit or the representation thereof. I find that under the Order a new unit of guards is created and a representation relationship is newly established only by a majority of the employees in the unit involved for a labor organization appearing on the ballot. Thus, in the circumstances herein, only in the event that a majority of employees voting in the unit found appropriate their votes for the IFFP would a new unit of guards and new representation relationship be established; and by the same token, would the existing mixed unit of guards and nonguards and the existing representation relationship as to the guard employees be terminated.

Further, it would follow that, in the event that a majority of those employees does not choose the IFFP as their new representative in a new guard unit, the existing mixed unit and the representation thereof would continue. It should be noted in this latter regard that the question raised by the instant petition is not whether all of the employees in the existing mixed unit wish to continue to be represented by their current exclusive representative in the currently recognized unit, but, rather, as discussed above, the question of representation raised by the instant petition is limited solely to whether or not a majority of the employees in the guard unit found appropriate, which constitutes a portion of the exclusively recognized unit, to be represented separately by the IFFP in a new guard unit. Thus, unless a majority of the employees in the guard unit found appropriate herein their votes for representation by the IFFP in a new unit, I find that it would be inappropriate to permit a portion of the employees in the existing mixed unit to become unrepresented, which, in effect, would constitute a partial decertification of such mixed unit. In United States Naval Construction Battalion Center, A/SLMR No. 8, affirmed in FLRC No. 72A-24, the principles under which severance of a group of employees from an existing unit would be permitted were clearly stated. For the reasons enunciated in Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above, I have found herein that the unit claimed in the instant petition is appropriate for the purpose of exclusive recognition and I shall order an election for such unit. Inasmuch as I have determined that the placement of the petitioner's name on the ballot is not warranted, the choice on the ballot in the forthcoming election in this case will be limited to a "yes" or "no" vote for the IFFP. In determining the results of the election, a "no" vote must be construed as a vote against severance not against representation by the unit in the existing mixed unit. To construe it otherwise, would permit a possible decertification in a unit smaller than the recognized comprehensive unit. In this regard, I find nothing in the Order or its "legislative history" which requires, expressly or impliedly, that employees voting in a severance case be afforded an opportunity to return to unrepresented

status.<sup>9/</sup> Accordingly, I find that if a majority of the employees does not vote for the IFFP, they will be taken to have indicated their desire to remain in the existing recognized mixed unit represented by the AFGE.

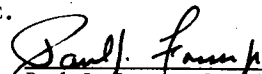
Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All regular full-time and regular part-time guards, including those classified as "temporary," with an expectation of employment of over 90 days,<sup>10/</sup> employed by and assigned to the Rocky Mountain Arsenal, Department of the Army, Denver, Colorado, excluding employees engaged in Federal personnel work in other than a clerical capacity, professional employees, management officials, and supervisors as defined in the Order.<sup>11/</sup>

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented in a separate unit for the purpose of exclusive recognition by the International Federation of Federal Police (Ind.).

Dated, Washington, D. C.  
November 27, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

- <sup>9/</sup> In my view, Section 10(d) of the Order, which prescribes a "no union" choice on the ballot, is not applicable in a severance case and, therefore, would not require a contrary result herein.
- <sup>10/</sup> The parties stipulated that such "temporary" guards shared a clear and identifiable community of interest with the regular full-time and regular part-time guards in the claimed unit.
- <sup>11/</sup> Although the record discloses that employees in the classifications, Security Specialist, Investigator, and Personnel Security Specialist are employed in the Security Office, no evidence was adduced with respect to the duties of these employees. Accordingly, I make no findings with respect to their eligibility for inclusion in the proposed unit.

November 27, 1973

A/SLMR No. 326

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. NAVAL STATION,  
NEWPORT, RHODE ISLAND  
A/SLMR No. 326

This case arose as a result of a representation petition filed by the Fraternal Order of Police, U. S. Naval Station, Lodge #29 (FOP), seeking an election in a unit of all civilian police personnel and guards employed in the security department at the U. S. Naval Station, Newport, Rhode Island.

The parties presented two issues for decision by the Assistant Secretary: (1) Whether the Intervenor, Local 190, American Federation of Government Employees, AFL-CIO, (AFGE), which currently represents a unit of guard and nonguard employees, may continue to represent the guards if they fail to cast a majority of the ballots for the FOP; and (2) whether the AFGE "should be placed on the ballot to obtain a clear, precise, definitive result of the employees' full choice of bargaining representative."

With respect to the first issue raised, the Assistant Secretary found, in accord with United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, that where, as here, a unit of guards is sought to be severed from an existing exclusively recognized unit of guard and nonguard employees, in the event that a majority of the guard employees votes against representation by the FOP, which is seeking to represent them separately, the AFGE, the incumbent exclusive representative, shall continue to represent such employees in the existing recognized mixed unit.

As to the second issue raised, for reasons set forth in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, the Assistant Secretary found that the placement of the AFGE's name on the ballot was unwarranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. NAVAL STATION,  
NEWPORT, RHODE ISLAND

Activity

and

Case No. 31-6127(EO)

FRATERNAL ORDER OF POLICE,  
U. S. NAVAL STATION, LODGE  
#29

Petitioner

and

LOCAL 190, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Acting Regional Administrator William O'Loughlin's August 23, 1973, Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Regulations.

Upon consideration of the entire record in the subject case, which includes the parties' stipulation of facts and accompanying exhibits, 1/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, Fraternal Order of Police, U. S. Naval Station, Lodge #29, herein called FOP, seeks an election in a unit of all civilian police personnel and guards employed in the security department at the U. S. Naval Station, Newport, Rhode Island, excluding management officials, professional employees, fire-protection employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

1/ The parties did not file briefs.

Two issues were presented for decision in this matter: (1) Whether the Intervenor, Local 190, American Federation of Government Employees, AFL-CIO, herein called AFGE, which currently represents exclusively the employees in a mixed unit of guard and nonguard employees, should continue to represent the guards in such mixed unit should the guards vote to cast a majority of their ballots for the FOP; and (2) whether the incumbent exclusive representative "should be placed on the ballot to obtain a clear, precise, definitive result of the employees' full choice of bargaining representative."

The record reveals 2/ that in 1966, under Executive Order 10988, the AFGE was granted exclusive recognition in an Activity-wide unit of all employees including guards. Since the grant of exclusive recognition, the AFGE and the Activity have been parties to a series of negotiated agreements, the most recent of which expired on March 19, 1973.

The Activity is engaged in, among other things, providing logistic support for the operating forces of the Navy. It is headed by a commanding officer, and, organizationally, is divided into 6 departments: military, operations, special services, supply, magazine, and security. The security department, headed by a security officer, consists of various divisions, including the civilian guard division which employs a total of 43 police and guard personnel, 43 of whom are nonsupervisory employees. The guards are responsible for protecting the property of the Activity and of other tenant commands at the Naval Base, and are assigned to enforce orders to protect property. The police have similar responsibilities and, additionally, are required to protect the safety of persons and to maintain law and order on the premises of the Activity and of other tenant activities at the Naval Base. In the performance of their duties, the guards and police wear uniforms and carry weapons.

The evidence establishes that the appropriateness of the unit sought herein is not disputed. Under these circumstances, and for the reasons mentioned in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, I find that the employees in the claimed unit constitute an appropriate unit for the purpose of exclusive recognition.

With respect to the first issue raised herein, I found in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, SLMR No. 325, that where, as here, a unit of guards is sought to be removed from an existing exclusively recognized unit of guard and nonguard employees, in the event that a majority of the guard employees in the unit voted appropriate votes against representation by the labor organization seeking to represent them separately, the incumbent exclusive representative shall continue to represent such employees in the existing recognized mixed unit.

All of the facts are derived from the parties' stipulation and accompanying exhibits.

As to the second issue raised, for the reasons set forth in Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above, I find that the placement of the AFGE's name on the ballot is unwarranted.<sup>3/</sup>

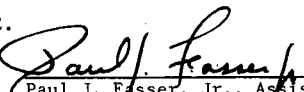
Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All civilian police personnel and guards employed in the security department at the U. S. Naval Station, Newport, Rhode Island, excluding management officials, professional employees, fire-protection employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented in a separate unit for the purpose of exclusive recognition by the Fraternal Order of Police, U. S. Naval Station, Lodge #29.

Dated, Washington, D. C.  
November 27, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

<sup>3/</sup> See also, in this regard, United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, cited above.

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OF THE ASSISTANT SECRETARY

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE,  
FORT SNELLING OFFICERS OPEN MESS,  
NON-COMMISSIONED OFFICERS CLUB,  
SLEEPING QUARTERS, TEMPORARY PERSONNEL  
AND FISCAL CONTROL OFFICE,  
FORT SNELLING, MINNESOTA <sup>1/</sup>

UNITED STATES AIR FORCE,  
FORT SNELLING OFFICERS OPEN MESS,  
NON-COMMISSIONED OFFICERS CLUB,  
SLEEPING QUARTERS, TEMPORARY PERSONNEL  
AND FISCAL CONTROL OFFICE,  
FORT SNELLING, MINNESOTA  
A/SLMR No. 327

Activity

and

Case No. 51-2360

MINNEAPOLIS LOCAL JOINT EXECUTIVE BOARD  
OF HOTEL AND RESTAURANT EMPLOYEES AND  
BARTENDERS INTERNATIONAL UNION, AFL-CIO,  
LOCALS 152, 458 and 665

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner, Minneapolis Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Local 152, 458 and 665, sought to represent a unit of all nonsupervisory regular full-time and regular part-time nonappropriated fund employees of the Fort Snelling Officers Open Mess, Non-Commissioned Officers Club, Sleeping Quarters, Temporary Personnel (BOQ) and Fiscal Control Office. The Activity contended that the claimed unit was inappropriate in that the appropriate unit should include intermittent, temporary part-time and off-duty military employees as well as regular full-time and regular part-time employees.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Charles Gupton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary found that the claimed unit should include employees classified as intermittent and temporary part-time, as well as off-duty military employees. In this regard, he noted that all employees within a particular fund activity, whether regular full-time, regular part-time, intermittent, temporary or off-duty military, have a common mission, overall supervision and working conditions, and that, in many instances, they perform the same job duties irrespective of their employment categories. Moreover, he noted that a majority of intermittent, temporary part-time and off-duty military employees work a substantial number of hours per week, work many weeks during the year, and have a reasonable expectancy of continued employment.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

Accordingly, the Assistant Secretary ordered an election among the regular full-time, regular part-time, temporary part-time, intermittent and off-duty military nonappropriated fund employees of the Activity, if the appropriate Area Administrator finds that the Petitioner's showing of interest is adequate with the addition of the temporary part-time, intermittent and off-duty military employees.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Minneapolis Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Locals 152, 458 and 665, seeks an election in a unit of all regular full-time and regular part-time nonappropriated fund employees at the Fort Snelling Officers Open Mess, Non-Commissioned Officers Club (NCO Club), Sleeping Quarters, Temporary Personnel (BOQ) and Fiscal

The Assistant Secretary also made eligibility determinations with respect to the supervisory status of certain individuals.

<sup>1/</sup> The name of the Activity appears essentially as amended at the hearing.

control Office 2/; excluding temporary or casual employees, management officials, employees engaged in Federal personnel work in other than a solely clerical capacity, and supervisors and guards as defined in Executive Order 11491, as amended.3/

The Activity takes the position that the petitioned for unit is appropriate in that it fails to include all nonappropriated fund employees with common employment skills, interests and qualifications. In this regard, it contends that the appropriate unit should include employees classified as intermittent and temporary part-time, as well as off-duty military nonappropriated fund employees.

Nonappropriated fund employees at the Activity are placed within one of several employment categories when initially hired depending upon their foreseen period of employment and workweek schedule. Regular full-time employees are hired for a period having no foreseen termination within one year and they work regularly scheduled hours of at least 35 hours per week. Regular part-time employees are hired for a period having no foreseen termination within one year and they work regularly scheduled hours of 20 or more hours but less than 35 hours per week. Temporary part-time employees are hired for a period having a foreseen termination within one year and they work regularly scheduled hours of 20 or more hours but less than 35 hours per week. Intermittent employees are those who either work a regularly assigned tour of duty of less than 35 hours per week or have no regularly assigned hours and are hired on a "as required" or "on call" basis. Off-duty military employees are those who, in addition to performing primary, full-time military duties, are employed by a nonappropriated fund activity on an intermittent or temporary basis for a variable number of hours per week.

The record reveals that the majority of the Activity's nonappropriated fund employees are classified as intermittent. Thus, the Officers Open Mess employs 10 regular full-time, 4 regular part-time, 4 temporary part-time, 38 intermittent and 2 off-duty military employees; and the NCO Club employs 7 regular full-time, 1 regular part-time, 32 intermittent and 2 off-duty military employees. The BOQ and Fiscal Control Office each employ two regular full-time employees.

The evidence establishes that all employees within a particular fund activity have a common mission. Intermittent, temporary part-time and off-duty military employees work side by side with regular full-time employees in the performance of their duties and, in many instances, perform the same job duties irrespective of their

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The record indicates that these are the only subdivisions of the Activity employing nonappropriated fund employees. Units encompassing employees of all subdivisions of nonappropriated fund activities have, in the past, been found appropriate. See, in this regard, United States Army Infantry Center, Non-Appropriated Fund Activity, Fort Benning, Georgia, A/SLMR No. 188, and United States Air Force, Non-Appropriated Fund Activities, Tyndall Air Force Base, Florida, A/SLMR No. 226.

The unit description appears essentially as amended at the hearing.

employment categories. All employees within a particular fund activity are subject to the same overall supervision and working conditions. Moreover, they are all eligible for overtime pay and premium pay, although only regular full-time and regular part-time employees receive annual and sick leave.

Although the Activity's definition of intermittent employee indicates that employees in this category are hired on an "on call" basis, the evidence reveals that there are no employees at the Activity who are, in fact, "on call." Rather, all employees are scheduled in advance and know when they will be working. Further, it is clear that a majority of intermittent, off-duty military and temporary part-time employees work a substantial number of hours during the week and work a substantial number of weeks during the year. Moreover, the record establishes that intermittent, temporary part-time 4/ and off-duty military employees have a reasonable expectation of continued employment.

Under all of the circumstances, I find that Activity employees classified as intermittent or temporary, as well as off-duty military employees 5/, should be included in the unit found appropriate. Thus, as noted above, the record reflects that employees in these classifications have a reasonable expectation of continued employment; that a majority of intermittent, temporary part-time and off-duty military employees work a substantial number of hours during the week and work a substantial number of weeks throughout the year; and that they share with regular full-time and regular part-time employees a common mission, supervision, job duties and working conditions.

Testimony also was adduced at the hearing concerning the duties of the following individuals who were alleged to be supervisors: manager, assistant manager, head bartender, chef and hostess at the Officers Open Mess; manager, assistant manager, head bartender, hostess and night manager at the NCO Club; operating accountant; and the supervisor of the employees of the BOQ. The evidence establishes that the employees in the foregoing classifications have the authority to perform one or more of the following functions in a manner requiring the use of independent judgement: the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees, or the authority to responsibly direct them, evaluate their performance, adjust

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4/ In this regard, it appears that while in theory, temporary part-time employees have a foreseen termination within one year, in actuality they may return from year to year.

5/ I find that, once hired, off-duty military personnel stand in substantially the same employment relationship with the Activity as do other Activity employees, and that their exclusion from the unit based solely on their military status is unwarranted. See, in this regard, Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24, Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, and United States Army Infantry Center, Non-Appropriated Fund Activity, Fort Benning, Georgia, cited above.

their grievances, or effectively recommend such actions. Under these circumstances, I find that they are supervisors within the meaning of the Order.

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All regular full-time, regular part-time, temporary part-time, intermittent and off-duty military nonappropriated fund employees employed by the Fort Snelling Officers Open Mess, Non-Commissioned Officers Club, Sleeping Quarters, Temporary Personnel (BOQ) and Fiscal Control Office, Fort Snelling, Minnesota, excluding professional employees 6/, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION 7/

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive

6/ While not expressly excluded from the petitioned for unit, it is clear that the claimed unit does not include professional employees within the meaning of the Order.

7/ The record in the subject case is unclear as to whether the inclusion of the intermittent, temporary part-time and off-duty military employees in the petitioned for unit renders inadequate the Petitioner's showing of interest. Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of certain employees in the above named categories, the Petitioner's showing of interest is inadequate, the petition in this case should be dismissed.

recognition by the Minneapolis Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Locals 152, 458 and 665.

Dated, Washington, D. C.  
November 27, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations



November 27, 1973

A/SLMR No. 328

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF ARMY, HEADQUARTERS,  
U.S. ARMY TRAINING CENTER ENGINEER  
AND FORT LEONARD WOOD,  
FORT LEONARD WOOD, MISSOURI  
SLMR No. 328

DEPARTMENT OF ARMY, HEADQUARTERS,  
U.S. ARMY TRAINING CENTER ENGINEER  
AND FORT LEONARD WOOD,  
FORT LEONARD WOOD, MISSOURI

Activity

and

Case No. 62-3655(RO)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R14-32, INDEPENDENT

Petitioner

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 738, INDEPENDENT

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Eugene T. Reedy. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed, except as modified below. 1/

1/ The Hearing Officer referred to the Assistant Secretary a motion by the Intervenor, the National Federation of Federal Employees, Local 738, Independent, herein called NFFE, in which the NFFE asserted that the petition herein was untimely filed. In this connection, the record reflects that the petition was filed timely during the prescribed 60-90 day open period of the negotiated agreement between the NFFE and the Activity, but that, inadvertently, it was marked as a petition for Decertification of Exclusive Representative (DR) rather than as a petition for Certification of Representative (RO). After the expiration of the open period, a new petition form was filed in order to correct this inadvertent error. The NFFE contended that the second submission was tantamount to filing a new petition which petition was untimely. Under the circumstances outlined above, I conclude that the submission of a second petition form clearly was intended, and was treated as, an amendment of the original petition as distinguished from a new petition.

(continued)

The National Association of Government Employees, Local R14-32, Independent (NAGE), sought an election in a unit composed of all of the Activity's General Schedule (GS) employees for which unit the National Federation of Federal Employees, Local 738, Independent (NFFE), is the present exclusive representative. The NAGE amended its unit at the hearing to include "temporary" GS employees, who were not currently included in the existing unit.

The Activity contended that the GS employees of the Army Strategic Communications Command and the Army Health Services Command located at Fort Leonard Wood should be excluded from the unit found appropriate because, due to a recent reorganization, they are no longer under the administrative control of the Base Commander and, therefore, as part of separate tenant activities at Fort Leonard Wood, they do not share a community of interest with other GS employees at Fort Leonard Wood. The NAGE asserted, on the other hand, that the reorganization had no effect on the unit petitioned in that it was merely a paper reorganization. The NFFE asserted that the impact of the reorganization on the claimed unit employees will not be felt immediately and, therefore, a determination at this time would not be appropriate.

The Assistant Secretary found that the GS employees of the Army Strategic Communications Command and the Army Health Services Command located at Fort Leonard Wood continue to share a community of interest with other GS employees of Fort Leonard Wood. Thus, the GS employees of both the Medical Communication units have remained in essentially the same physical location, performing the same work, under the same immediate supervision and working conditions as prior to the reorganization. Also, they continue to receive administrative services such as personnel, labor relations, and grievance handling from Fort Leonard Wood.

With respect to the issue of the inclusion or exclusion of the temporary employees at Fort Leonard Wood, the Assistant Secretary found that the temporary GS employees should be included in the unit found appropriate. In this connection, he noted that they had a reasonable expectancy of future employment and that they shared with other GS employees common pay scales, supervision, job assignments, working conditions, and labor relations policies.

Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

Upon the entire record in this case, including briefs filed by the Petitioner, National Association of Government Employees, Local R14-32, Independent, herein called NAGE, and the NFFE, 2/, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The NAGE seeks an election in a unit composed of all nonsupervisory General Schedule (GS) employees, including "temporary" employees, of the Department of the Army, Headquarters United States Army Training Center Engineer and Fort Leonard Wood, with duty stations at Fort Leonard Wood, Missouri; excluding managerial officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, professionals in accordance with applicable regulations, and employees in the Commissary Sales Store and the Fire Prevention and Protection Division of the Directorate of Facilities Engineering. 3/

The NAGE contends that a reorganization by the Department of the Army, which was effective on July 1, 1973, had no effect on the unit petitioned for in that it was, in fact, "merely a paper reorganization." On the other hand, the Activity contends that the GS employees assigned to the Army Health Services Command and the Army Strategic Communications Command at Fort Leonard Wood should be excluded from the recognized unit because, as a result of the reorganization, they no longer share a community of interest with other employees in the recognized unit. Moreover, in the Activity's view, the claimed unit would not promote effective labor-management relations and would not contribute to the efficiency of agency operations. The NFFE contends that the impact of the reorganization on the claimed unit will not be known immediately and that, therefore, a unit determination would not be appropriate until the facts of the impact are known.

1/ Accordingly, and noting the absence of evidence that any party was prejudiced by the subsequent amendment of the petition, I find that the petition herein was filed timely and that the NFFE's motion to dismiss the petition should be denied.

The Hearing Officer rejected an Activity exhibit (an organization chart) which purported to show the effects of a reorganization on the unit in question. In my view, the evidence contained in the exhibit is relevant to the issues involved herein. Accordingly, I have considered this exhibit, along with the other evidence adduced at the hearing, in reaching my decision herein.

2/ The Activity filed an untimely brief which has not been considered.

3/ Except for "temporary" GS employees, who, at the hearing, the NAGE amended its petition to include, the petitioned for unit is essentially identical to the unit for which the NFFE is the current exclusive representative.

With respect to the inclusion of "temporary" GS employees, the NFFE notes that its current exclusively recognized unit excludes temporary employees. It asserts in this regard, that such an inclusion raises serious community of interest questions. On the other hand, both the NAGE and the Activity agree that the "temporary" GS employees should be included in any unit found appropriate.

The United States Army Training Center Engineer and Fort Leonard Wood are under the direction of a General who is the Base Commander. On May 21, 1970, the NFFE was certified as the exclusive representative for a Base-wide unit of all nonprofessional GS employees, except those in the Commissary Sales Store and in the Fire Prevention and Protection Division of the Directorate of Facilities Engineering. 4/ Included within the exclusively recognized unit were the GS employees of the Directorate of Communications and Electronics, and of the Army Medical Department Activity, which, prior to reorganization, were under the direction of the Base Commander at Fort Leonard Wood. On July 1, 1973, as the result of a reorganization, the Medical unit and the Communications unit at Fort Leonard Wood were placed under the command of the Army Health Services Command and the Army Strategic Communications Command respectively. Both units are now tenant organizations of Fort Leonard Wood, but continue to receive administrative services from Fort Leonard Wood, including the services of the Civilian Personnel Office. Although broad agreements regarding the services to be provided to the units by Fort Leonard Wood were signed at the Department of the Army level of command, agreements between the local commanders of the Army Health Services Command and the Army Strategic Communications Command at Fort Leonard Wood, and the Base Commander of Fort Leonard Wood on such matters as areas of consideration for promotions and reductions in force and average grade control goals had not been reached at the time of the hearing. However, the record indicates that the Fort Leonard Wood Civilian Personnel Office will act as agent for both the Health Services Command unit and the Strategic Communications Command unit at Fort Leonard Wood for all personnel matters, including grievance handling and labor relations. Moreover, the record reveals that the Fort Leonard Wood payroll office will provide its services for the new tenant activities.

The record reflects that all employees of the Health Services Command unit and the Strategic Communications Command unit at Fort Leonard Wood remain in essentially the same physical location and perform the same job functions as prior to the reorganization and that there has been no change in employee working conditions, leave policies or pay plans. Moreover, the immediate supervision of these employees remains the same as before the reorganization, although the chiefs of these two units at Fort Leonard Wood now report upward to their respective commands, rather than to the Base Commander. Furthermore, the Chief of the Strategic Communications Command unit at Fort Leonard Wood indicated that he foresaw no problems if the employees in his unit remained in a Base-wide unit and, indeed, stated a preference for the "status quo."

4/ The parties entered into a negotiated agreement on June 16, 1971, covering the recognized unit.

Based on the foregoing circumstances, I find that the GS employees at Fort Leonard Wood employed in the Army Health Services Command and the Army Strategic Communications Command continue, after the reorganization, to share a community of interest with the other GS employees of Fort Leonard Wood. Thus, as noted above, the evidence demonstrates that the GS employees of the Medical unit and the Communications unit have remained essentially the same physical location, performing the same work, under the same immediate supervision and working conditions, as prior to the reorganization. In addition, these employees will continue to receive administrative services from Fort Leonard Wood, including the services of the Fort Leonard Wood Civilian Personnel Office, which will continue to provide assistance on personnel matters, labor relations, and grievances to all GS employees at Fort Leonard Wood. Accordingly, I find the petitioned for Base-wide unit of all GS employees, including GS employees of the Health Services Command and the Strategic Communications Command, to be an appropriate unit for the purpose of exclusive recognition. 5/

#### TEMPORARY EMPLOYEES

The record reveals that as of July 14, 1973, there were some 63 "temporary" GS employees employed at Fort Leonard Wood. Most of these employees occupied positions, such as clerk-typist, nursing assistant, and licensed practical nurse, which also are occupied by permanent GS employees. The record indicates that, with one exception, all of these "temporary" GS employees work full-time. Further, the majority of the "temporary" employees perform the same work, under the same job descriptions, and under the same supervision as permanent employees, and in many cases work alongside permanent employees. Also, while "temporary" GS employees are not entitled to retirement credits, life insurance, and health benefits, the evidence establishes that they receive the same pay as permanent GS employees performing the same work. The record reflects also that while most of the "temporary" employees are appointed for periods not-to-exceed one year, many have received more than one such appointment. 6/

Under these circumstances, and noting particularly that the "temporary" employees have a reasonable expectation of continued employment, and that they share with other GS employees common pay scales, supervision, job assignments, working conditions and labor relations policies, I find that "temporary" GS employees should be included in the unit found appropriate. 7/

Cf. AMC Ammunition Center, Savanna, Illinois, A/SLMR No. 291.

The record shows that at least 52 "temporary" GS employees received career conditional appointments in Fiscal Year 1973 alone.

Cf. United States Army Training Center and Fort Leonard Wood at Fort Leonard Wood, Missouri, Non-Appropriated Fund Branch, Directorate of Personnel and Community Activities, Building 344, Fort Leonard Wood, Missouri, A/SLMR No. 27.

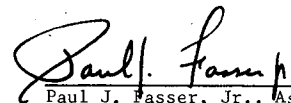
Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule employees, including those classified as "temporary," of the Department of the Army, Headquarters United States Army Training Center Engineer and Fort Leonard Wood, and all General Schedule employees of the United States Army Health Services Command and the United States Army Strategic Communications Command with duty stations at Fort Leonard Wood, Missouri; excluding General Schedule employees of the Commissary Sales Store and the Fire Prevention and Protection Division of the Directorate of Facilities Engineering at Fort Leonard Wood, Missouri, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards, as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military services who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees, Local R14-32, Independent; the National Federation of Federal Employees, Local 738, Independent; or by neither.

Dated, Washington, D.C.  
November 27, 1973



Paul J. Passer, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

November 28, 1973

A/SLMR No. 329

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES  
EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY  
A/SLMR No. 329

FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES  
EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY

Respondent

and

Case No. 32-3082(CA)

This unfair labor practice proceeding involves a complaint filed by Local 1340, National Federation of Federal Employees, alleging that the Respondent Activity violated Section 19(a)(1), (2), (5), and (6) of the Order by unilaterally reassigning four electronic technicians to new positions at the Activity without consulting or conferring with the exclusive bargaining representative of the unit employees.

LOCAL 1340, NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES

Complainant

The Administrative Law Judge granted Complainant's motion during the hearing to delete the 19(a)(2) allegation from the complaint, and further found that the conduct herein was not violative of Section 19(a)(5) of the Order as it did not constitute a refusal to accord appropriate recognition. The latter finding was adopted by the Assistant Secretary.

DECISION AND ORDER

With respect to the 19(a)(1) and (6) allegations, the Assistant Secretary adopted the Administrative Law Judge's findings that the Respondent Activity improperly failed to meet and confer with the Complainant concerning procedures to be followed in selecting employees for reassignment. In this regard, the Administrative Law Judge cited Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, where it was held by the Assistant Secretary that negotiations were required, to the extent consonant with law and regulations, as to the procedures management intended to observe in choosing which employees were to be subject to a reduction-in-force action. Also adopted was the Administrative Law Judge's finding that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by not affording the Complainant an opportunity to meet and confer over the impact of the Respondent's decision on those employees adversely affected.

On September 14, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/

1/ With respect to the remedy in the instant case, the Complainant did not except to the failure of the Administrative Law Judge to recommend a return to the status quo. Under all of the circumstances, including the failure to file exceptions in this regard, it was concluded that a remedial order requiring the return to the status quo was unwarranted.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, shall:

1. Cease and desist from:

Instituting a reassignment of employees represented exclusively by Local 1340, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1340, National Federation of Federal Employees, or any other exclusive representative, and denying such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

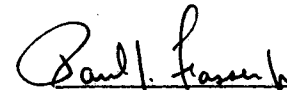
(a) Notify Local 1340, National Federation of Federal Employees, or any other exclusive representative, of any intended reassignment of employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

(b) Post at its facility at the National Aviation Facilities Experimental Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of Section 19(a)(5) and an additional violation of Section 19(a)(6), be, and it hereby is, dismissed.

Dated, Washington, D.C.  
November 28, 1973

  
Paul J. Passer, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX  
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a reassignment of employees exclusively represented by Local 1340, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1340, National Federation of Federal Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL notify Local 1340, National Federation of Federal Employees, or any other exclusive representative, of any intended reassignment of employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Executive Order.

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

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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 Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515, 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

FEDERAL AVIATION ADMINISTRATION )  
NATIONAL AVIATION FACILITIES )  
EXPERIMENTAL CENTER )  
ATLANTIC CITY, NEW JERSEY )  
Respondent )

and ) CASE NO. 32-3082(CA) 1/

LOCAL 1340, NATIONAL FEDERATION )  
OF FEDERAL EMPLOYEES )  
Complainant )

Appearances:

Jane Golden, Esq.  
On behalf of Respondent

Michael Forscey, Esq.  
On behalf of Complainant

Before: William Naimark, Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

A hearing was held in the above-entitled matter on June 19, 1973 at Atlantic City, New Jersey pursuant to a Notice of Hearing issued on March 30, 1973 by the Regional Administrator of the Labor-Management Services Administration, New York Region.

1/ Cases No. 32-2900, 3057 and 3095 were consolidated with the instant case on March 30, 1973. In each case Local 1340, National Federation of Federal Employees alleged violations of the Order by Federal Aviation Administration, National Aviation Facilities Experimental Center. At the hearing the parties expressed a willingness to settle 32-2900, 3057 and 3095 and to proceed with 3082. Subsequent to the hearing herein Complainant requested withdrawal of complaints in cases 32-2900, 3057 and 3095. By Order dated July 26, 1973 this request was granted and these cases were severed from the instant matter.

This proceeding was initiated under Executive Order 11491 (herein called the Order) by the filing of a complaint on December 12, 1972 by Local 1340, National Federation of Federal Employees (herein called the Complainant) against National Transportation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey (herein called the Respondent). The complaint herein alleges Respondent violated Sections 19(a)(1), (2), (5) and (6) of the Order by unilaterally reassigning several electronic technicians, on or about November 9, 1972, to new positions in the Activity and without consulting with the Complainant, the collective bargaining representative 2/. Respondent filed a response dated December 22, 1972 denying an obligation to consult with the union, and averring no basis existed for the complaint.

At the hearing representatives appeared on behalf of both Complainant and Respondent. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Briefs were filed by Complainant and Respondent and have been fully considered.

Complainant contends Respondent violated Section 19(a)(6) of the Order by failing to consult with the Union regarding the reassignment of four electronic technicians and the impact of such reassignments on the employees. In respect to its failure to request Respondent to consult as to the impact of the action taken, Complainant maintains it is relieved of such duty since the Employer never gave notice of the reassignment to the union. It is also contended that Respondent violated Section 19(a)(1) by instituting unilateral changes without consultation. 3/

While conceding it did not consult with Complainant in respect to the reassignments, Respondent takes the position that under the Order (Section 11 b) it has no obligation to do so since the matter is not negotiable. Further, the Employer acknowledges the duty to consult on the impact of reassignment, but insists this duty is restricted to personnel policies and practices, as well as matters affecting working conditions. It argues that a personnel policy re assignments

At the hearing Complainant moved, with no objection by Respondent, to delete the 19(a)(2) allegation in the complaint, and the motion was granted.

Although alleged in the complaint, the Union does not urge a violation of Section 19(a)(5) of the Order.

does exist, and that no obligation remains to consult as to individual personnel actions absent a proposed change in that policy. Respondent also contends that no refusal to bargain can be found in view of the Union's failure to request consultation.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

#### Findings of Fact

1. At all times material herein, and for the past three to four years, Complainant has been the collective bargaining representative for all electronic technicians employed by Respondent at its location in Atlantic City, New Jersey.

2. No written collective bargaining agreement exists between the parties governing said electronic technicians, of whom there are about 250 in the represented unit.

3. At all times material herein, including during 1972, Respondent was handling, and working upon, a project known as ATRCBS, Air Traffic Control, Radar Beacon System. This is a secondary radar beacon surveillance system used in support of air traffic control. Approximately 19 workers were assigned to this program prior to July 31, 1972.

4. By letter dated July 31, 1972, Respondent's Director of Office of Systems Engineering Management in Washington, D. C., David R. Israel, wrote the Director at Atlantic City, New Jersey, C. A. Commander, stating that the ATRCBS program was of extreme importance and should be given highest priority for timely completion.

5. As a result of receiving this letter of July 31, 1972 from Israel, a review was conducted of the program under the direction of Joseph Del Balzo, Chief of Engineering Management Staff. It was determined that 21 additional men were needed to complete the ATRCBS program. Accordingly, a list of 30 names of employees qualified to work on the project was submitted to Del Balzo who discussed the staffing with the employees' supervisors, as well as the effects the reassignment would have on other programs. At least 20-25 of the men on the list were talked to by supervisors regarding a possible reassignment and its resultant effects.

6. Del Balzo decided to transfer seven workers - four electronic technicians and three engineers - to the ATRCBS program, concluding this number would cause a minimum impact

upon Respondent's other working projects, and could thus be spared. Accordingly, Del Balzo wrote Israel that seven employees could be so reassigned.

7. By letter dated October 19, 1972 Israel wrote that the seven men should be transferred into ATRCBS as soon as possible, and that the program should proceed immediately. Accordingly, a letter dated November 7, 1972 was sent by the Director, Commander, to Respondent's supervisors notifying them that the seven employees should be reassigned immediately. It was contemplated by Del Balzo that the transfers would become effective on the Monday following this letter to the supervisors.

8. Although the plan called for seven men to be reassigned, Del Balzo cut the number to six transferees. The electronic technicians who were transferred were: Joseph Francis Crowe, Ernie Corsack, John C. Roberts, and John Stanks. The engineers who were transferred did not belong in the unit herein.

9. Although the record date of Crowe's reassignment was November 26, 1972, he was notified officially of his reassignment by his section chief on December 18, 1972, and told he was supposed to be in Building 14 where he accordingly started to work on that date. He testified, and I find that he was never interviewed by his supervisor re the transfer, or contacted previously in regard thereto. Crowe had, prior to the reassignment, worked in Building 9 - air traffic control - on an analog simulator. This equipment was removed as obsolete which necessitated, in any event, a reassignment of him to another section of NAFEC. Since his transfer, Crowe works on live beacon systems, and has a different supervisor than previously.

10. While the papers for his transfer showed an effective date of November 12, 1972, Roberts started work on November 27 or 29. He had never been spoken to by his supervisor re the reassignment, and finally confronted his supervisor after hearing a rumor that he might be transferred. Roberts worked, before the change, in communications guidance division on communications equipment. He now works in radar equipment, performing similar functions but of higher frequency. He is located in the same building but has a different supervisor.

11. Corsack formerly worked in the calibration laboratory, checking and calibrating test equipment. Since his transfer he uses the equipment in performing his duties, and is involved with different electronic tasks. Corsack is located in a new area and does not have the same supervisor.

12. Stanks performs similar work since his transfer or reassignment. He continues to work as a navionics technician but on different electronic test equipment. He has been assigned to a different building as well as a new supervisor.

13. Michael J. Massimino, president of Complainant, never received any official word from management re the reassignment of the four technicians. He learned of the proposed plan in early November from the employees, and the Activity never discussed it with him.

14. Complainant never requested Respondent to consult about the reassignment of the four technicians, either before or after it took effect. Massimino testified he never knew the specifics of the proposed reassignments, that it came to him as a rumor, and he felt management was going to call him about it. He did not ask to consult since he did not know what to question Respondent about.

15. The labor relations officer, Lionel Landry, customarily contacted Massimino re the initiation or promulgation of policy, personnel practice or procedure, and invited his comment thereon. He did not pursue this procedure in the instant case, having decided there was no obligation to consult with the union. Thus, no attempt was made by Respondent to consult, confer, or negotiate with Complainant as to the four reassignments heretofore mentioned.

16. Agency Order No. 3710.7B CHG 1 provides under Chapter 5 Consultation, in pertinent part:

"...Where a labor organization has been accorded exclusive recognition, the unit head IS OBLIGATED to seek and consider the views of the labor organization in the formulation and implementation of personnel policies and practices, and matters affecting working conditions which are within his administrative decision..." (Section 500)

"Once policies are established, management officials are not required to seek the views or advice of labor organizations or their representatives on each individual application of a policy. If a labor organization believes that a particular policy is not being properly implemented or applied, it may seek consultation with the head of the unit or his designated representative or the employee concerned may seek redress through the grievance procedure, if appropriate." (Section 502)

17. An agency handbook, 3330.9, covers internal placement of employees, which includes reassignments and relocations. It provides, inter alia, that the agency may reassign employees to different positions, locations, or duties in the best interest of the agency and after considering the desires of the employees.



employees are to be advised of the reassignment and the reasons therefor. If an employee is not satisfied with the administrative reassignment, he may appeal through the agency grievance procedure.

Conclusions

Respondent's Refusal to Consult, Confer, or Negotiate With Complainant.

The Order imposes, under Section 11(a) thereof, a requirement that an agency and a labor organization, which accorded exclusive recognition, meet at reasonable times and confer in good faith with respect to personnel policies and practices, as well as matters affecting working conditions of unit employees. This duty is expected of the parties to the extent that it is appropriate under applicable laws and regulations, policies set forth in the Federal Personnel Manual, agency policies and regulations, a national agreement at a higher level, and the Order itself.

There are, however, certain limitations upon the obligation of an agency to consult with a bargaining representative. Not every matter is bargainable or negotiable on the part of the employer, and even where it is so determined, there may be instances where an activity has been relieved of the duty to bargain as prescribed by the Order. In the case at bar, Respondent admits it reassigned four unit employees unilaterally and without notification to Complainant. Conceding that it did not consult with the Union herein to the reassignment, the Employer asserts it has been excused from doing so by the Order and its established procedures. In respect to its failure to consult concerning the impact of the reassignment on employees affected thereby, Respondent avers the union made no demand for it to bargain thereon and hence no obligation exists to do so.

Respondent's Obligation to Consult re Reassignment of Four Technicians.

It is expressly provided in Section 11(b) of the Order that the obligation to meet and confer does not include matters in regard to the organization of an agency, the number of employees, and the numbers, types and grades of positions or employees assigned to a unit, work project, or tour of duty. Further, management is accorded the right, under Section 12(b)(2) of the Order, to transfer and assign employees to positions within the agency.

That assignments by an agency fall within management's reserved rights has been enunciated in several cases to

appear before the Federal Labor Relations Council. Thus, where the Union has sought work assignment proposals - albeit a work preservation type clause or transfer to a particular supervisor - it has been held that management is not obliged to bargain about such proposals. The Council emphasized the provision in Section 12(b)(5) of the Order wherein management retains the right to determine the methods, means and personnel by which such operations are to be conducted.

The reassignment by Respondent of the four electronic technicians must necessarily fall within the rights reserved to management under the Order. Staffing is a matter within the discretion of the Employer, and Complainant does not question the right of Respondent to transfer or reassign the four employees involved herein. Accordingly, I conclude that under Section 11(b) and 12 of the Order this agency was not obliged to consult or confer with the union in regard to the reassignment of employees Crowe, Corsack, Roberts or Stanks.

B. Obligation of Respondent to Bargain re Procedures In Effecting Reassignments.

Although the Employer may be absolved from a duty to consult re the transfer of the four employees to the ATRCBS program, consideration must be given to whether it is required under the Order to bargain as to the procedure involved in effecting the reassignment. Respondent, pointing to Agency Order 3330.9, maintains there already exists a published procedure respecting reassignments, and that - absent a proposed change in policy - no duty arises to consult on each reassignment of an employee. Further, while the Union did not receive notice of the reassignment, there was no attempt to change the established procedure and therefore notification to the Union was not required.

Despite the retention of rights under Section 12 of the Order, management cannot escape an obligation to bargain with the Union as to the procedures to be followed in assigning or transferring employees. The Federal Labor Council clearly stated in Veterans Administration Research Hospital, Chicago, Illinois 71A-31 that the reservation of decision making and action authority is not intended to bar negotiation of procedure to the extent consonant with law and regulations. <sup>4/</sup> The Assistant Secretary followed this principle, which it enunciated and applied in Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289. In the latter case the agency issued reduction in force (RIF) notices to 33 employees without notification to the Union. While concluding that the employer was

<sup>4/</sup> See also Naval Public Works Center FLRC No. 71A-56.

not obliged to consult on the RIF decision, it was held that consultation was mandatory as to the procedures management intended to observe in choosing which employees were to be subject to the RIF action.

The contention by Respondent that a procedure exists herein for reassignment, thereby rendering it unnecessary to confer with respect to each personnel action, is rejected. Agency 3330.9, while purporting to govern the procedure for assigning and transferring employees, is scarcely satisfactory in determining either the criteria to be followed, or the standards to be observed in selecting men for transfer within the agency. It merely provides for consideration to be given to the best interests of the agency and the desires of the employees, whenever possible. Provision is made for reasonable notification to employees before the assignment, but no specific time is required. Apart from the fact that this was not a negotiated arrangement, which might lend more validity to Respondent's argument that it would only have to bargain regarding the change thereof, agency 3330.9 does not really set forth a procedure which may be followed to select those employees to be reassigned. It serves no useful guide to determine which electronic technicians should be transferred to the ATRCBS program. There are, in fact, no procedures established to make that selection. Considering the best interests of the agency, as well as the employees' desires, are laudable considerations, but they are not objective standards and do not suffice as established procedures for effecting the reassignments.

Nor do I find that the failure by Complainant to request Respondent to meet and confer in this regard was a deficiency so as to relieve the employer of its obligation. The case cited by Respondent, U. S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261, is readily distinguishable since the Union therein was notified of the intended action by the Employer before it unilaterally acted to eliminate a working shift. Hence, in the cited case, the failure by the Union to request bargaining was deemed fatal to finding a violation by the agency. But the Respondent in the case at bar never informed the Complainant of its intended action and that four electronic technicians were to be reassigned to the ATRCBS project. There was, therefore, no opportunity for the Union to seek consultation as to how the men would be chosen by the Agency for assignment to this project. The Union herein may well wish to offer suggestions concerning the basis of selecting technicians for transfer. Indeed, its responsibility to the unit employees calls for bargaining with management in this regard. If the Union cannot have a voice in the process of assigning employees in any respect whatsoever, its capacity to act as a bargaining representative is rendered futile and meaningless.

Accordingly, I find and conclude that the Respondent herein was under a duty to bargain with the Complainant in respect to the procedures to be observed in selecting which electronic technicians were to be reassigned to the ATRCBS program.

C. Obligation of Respondent to Consult re Impact of Reassignment.

The language in the Order, as well as the case law itself, make it clear that an agency is obliged to bargain as to the impact flowing from an assignment or reassignment of employees. Thus, Section 11(b) of the Order provides that the parties are not precluded from:

"...negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." (underscoring supplied)

The Federal Labor Council also recognized this obligation on the part of management, asserting in Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11 that while the agency did not have to consult on the establishment of tours of duty for employees, it would be required to bargain regarding the impact of such action on the employees involved 5/. While recognizing that management must consult as to the impact of a privileged decision, the Assistant Secretary found no violation for failure to so consult where the Union had not requested that the activity meet and confer on the impact of such decision. Department of Navy, Bureau of Medicine & Surgery, Great Lakes Naval Hospital, Illinois, supra.

In the instant matter Respondent never communicated with the Complainant in regard to the decision to reassign employees Crowe, Corsack, Roberts and Stanks to the ATRCBS program. It saw no need to consult with the Union in respect to the transfer, and thus never advised the bargaining representative of its intention to take this action. Complainant's president, Massimino, learned of the proposed reassignment after management had decided to effect same, and his information came from rumors circulated by other employees.

The factual circumstances in the case at bar are, in my opinion, quite different from those prevailing in the Great Lakes Naval Hospital case. In the latter situation the president of the union, a unit employee, received a RIF notice

5/ See also Naval Public Works Center, Norfolk, Virginia, supra.

ong with other employees two months before the effective ce of the RIF itself. No request was made by the union herein to confer on the impact of the RIF decision despite advance notification. Here the Respondent at no time notified the Union president of the impending reassignment, and thus it was scarcely possible for Complainant to request consultation as to the impact of the move on employees adversely affected. 6/ Moreover, since the transfer involved certain changes in duties, new work locations and different supervisors, the bargaining representative had a legitimate interest in discussing the decision with management.

Nor, as indicated hereinabove, am I persuaded that Respondent is excused from notifying Complainant so as to give it an opportunity to request consultation on the impact of the reassignment. Not only is there no established procedure for the action taken, but the Union would be hard pressed to engage in bargaining with the Agency on the effect of the transfer absent knowledge thereof. Once it is concluded that management is obliged to consult with a union re the impact of its unilateral action, it follows that some notification to the Union must be given before the action is taken. Hence it becomes a fait accompli, and the bargaining representative's status has been eviscerated insofar as representation of employees is concerned.

Accordingly, I am convinced that Respondent should have notified Complainant in respect to its intention to transfer employees Crowe, Corsack, Roberts and Stanks, and further, the Employer should have consulted with the Union herein on the impact of the reassignment of these four employees on all who are adversely affected.

The failure and refusal by Respondent to consult with Complainant regarding the procedures to follow in selecting the employees to be reassigned to the ATRCBS program, as well as the impact upon the employees selected for the reassignment, constitute a violation of Section 19(a) (6) of the Order. 7/

Cf. also Norton Air Force Base, supra, where notification was given prior to the contemplated action, but the union still did not request to meet and confer in respect thereto.

The refusal to consult with Complainant re procedures and impact of its unilateral action is not a refusal to accord appropriate recognition under Section 19(a) (5) of the Order.

Further, such refusal to consult with their bargaining representative necessarily has a restraining influence upon the employees, and, moreover, has a concomitant effect upon their right to feel free in joining and assisting labor organizations. Accordingly, I find that the refusal to consult with Complainant in regard to procedures and impact of the reassignment interfered with and restrained employees in the exercise of rights assured by the Order, and thus violated Section 19(a) (1) of the Order. 8/

Recommendations

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

1. The alleged violation by Respondent of Section 19(a) (5) of the Order, as set forth in the Complaint herein, be dismissed.
2. The alleged violation by Respondent of Section 19(a) (1) and (6) of the Order by virtue of its unilateral reassignment of employees Joseph Francis Crowe, Ernie Corsack, John C. Roberts and John Stanks, to the ATRCBS project without consulting or conferring with Complainant, be dismissed.
3. That in light of the conclusions that Respondent, by reason of its failure and refusal to consult and confer with Complainant as to the procedures in selecting employees for reassignment to the ATRCBS project, as well as the impact on the employees reassigned, engaged in conduct violative of Sections 19(a) (1) and (6) of the Order, the following Order, which is designed to effectuate the policies of Executive Order 11491, be adopted.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, shall:

1. Cease and desist from

Instituting a reassignment of employees represented exclusively by Local 1340, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1340, National Federation of Federal Employees, or any other exclusive representative, and affording such

8/ Federal Aviation Administration, Atlanta Airway Facility, Sector 12, Atlanta, Georgia, A/SLMR No. 287.

representation the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify Local 1340, National Federation of Federal Employees, or any other exclusive representative, of any intended reassignments of employees, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

(b) Post at its facility at the National Aviation Facilities Experimental Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps have been taken to comply herewith.

WILLIAM NAIMARK  
Administrative Law Judge

Dated, Washington, D. C.  
this 11th September, 1973.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE.

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a reassignment of employees exclusively represented by Local 1340, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1340, National Federation of Federal Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL notify Local 1340, National Federation of Federal Employees, or any other exclusive representative of any intended reassignment of employees, and upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Executive Order.

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

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

(Signature)

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 Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515, 1515 Broadway, New York, New York 10036.

November 28, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION, ORDER AND DIRECTION OF ELECTIONS  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

TRANS ADMINISTRATION HOSPITAL,  
A, FLORIDA  
MR No. 330

Local 3402, American Federation of Government Employees, AFL-CIO (AFGE),  
ht to represent a unit of all professional and nonprofessional employees  
the Activity. The Florida Nurses Association, American Nurses Associa-  
(FNA), sought a separate unit of all registered nurses (RN's),  
uding nurse anesthetists. Although the Activity and the Intervenor,  
l 896, National Federation of Federal Employees (NFFE), in the unit  
ht by AFGE, agreed with the AFGE that an Activity-wide unit was appro-  
te, they also conceded that separate units of RN's had been found  
opriate by the Assistant Secretary. The FNA contended that nurse  
sthetists should be included in its claimed unit because their interests  
e more allied with those of RN's than with other professional employees  
the Activity. The Activity, the AFGE and the NFFE disagreed. The  
ensed Practical Nurses Association of Florida, Inc., NFLPN, (LPNA) sought  
eparate unit of all licensed practical nurses (LPN's). The Activity,  
E, and NFFE maintained that a unit of LPN's is inappropriate in that  
ir interests lie with other nonprofessional employees and further that  
eparate unit of LPN's would not promote effective dealings and efficiency  
agency operations.

With respect to the appropriateness of the unit sought by the AFGE,  
Assistant Secretary found that an Activity-wide unit was appropriate  
the purpose of exclusive recognition. As to the appropriateness of a  
arate unit of all RN's, the Assistant Secretary noted that all staff  
ses perform essentially the same functions, have a supervisory structure  
rt from other professionals, have specific educational and training  
uirements, do not interchange with other classifications, and work under  
arate Civil Service Regulations and salary schedule from professionals  
er than doctors and dentists. Under these circumstances, it was concluded  
t the nurses constitute a functionally distinct group with a clear and  
ntifiable community of interest and, therefore, would constitute a unit  
ropriate for exclusive recognition.

The Assistant Secretary also concluded that nurse anesthetists did not  
re a community of interest with the other RN's so as to warrant their  
clusion in a unit of staff nurses in this case. He noted that the skills

and education of nurse anesthetists differed from those of staff nurses,  
that their work site was almost exclusively confined to the operating room  
area rather than the wards, that they did not share common supervision with  
other RN's, that their promotional ladder was different from that of the  
staff nurses, and that they worked in constant contact with doctors and  
other professional technicians. The Assistant Secretary found in these  
circumstances that the nurse anesthetists shared commonality of interests  
with the other professionals in the unit sought by the AFGE, and included  
them in that unit.

With regard to the unit requested by the LPNA, the Assistant Secretary  
found that a separate unit of LPN's was inappropriate. In this connection,  
he noted that the duties of this group of employees are similar to those  
of the nursing assistants (NA's) who are included in the unit petitioned  
for by the AFGE. Thus, the LPN's and the NA's are subject to the same  
supervision, work on the same "team" in the same location, and their pay  
scales overlap. Further, both the LPN's and the NA's share the same  
benefits and are governed by the same personnel policies as other non-  
professional employees in the unit sought by the AFGE. Under these circum-  
stances, the Assistant Secretary concluded that the LPN's have a community  
of interest with the other nonprofessional employees sought in the unit  
petitioned for by the AFGE, and accordingly, dismissed the LPNA's petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,  
TAMPA, FLORIDA

Activity

and

LOCAL 3402, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 42-2273(RO)

Petitioner

and

LOCAL 896, NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES

Intervenor

VETERANS ADMINISTRATION HOSPITAL,  
TAMPA, FLORIDA

Activity

and

FLORIDA NURSES ASSOCIATION,  
AMERICAN NURSES ASSOCIATION

Case No. 42-2283(RO)

Petitioner

VETERANS ADMINISTRATION HOSPITAL,  
TAMPA, FLORIDA

Activity

and

LICENSED PRACTICAL NURSES ASSOCIATION  
OF FLORIDA, INC., NFLPN 1/

Case No. 42-2284(RO)

Petitioner

1/ The name of this Petitioner appears as amended at the hearing.

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Seymour X. Alsher. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including briefs submitted by the parties, 2/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 42-2273(RO), the Petitioner, Local 3402, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit consisting of all permanent and temporary 3/ professional and nonprofessional employees, including canteen workers, 4/ employed by the Veterans Administration Hospital, Tampa, Florida, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Order. 5/

In Case No. 42-2283(RO), the Petitioner, Florida Nurses Association, American Nurses Association, herein called FNA, seeks an election in a unit of all full-time and regularly scheduled part-time registered nurses employed at the Veterans Administration Hospital, Tampa, Florida, including

2/ The Intervenor, Local 896, National Federation of Federal Employees, herein called NFFE, did not file a brief.

3/ The parties are in agreement that 700-hour employees, summer aids, residents, interns, and audiology and speech pathology trainees should be excluded from any unit found appropriate because they have no reasonable expectancy of continued employment.

4/ The Activity, the AFGE and the NFFE stipulated that canteen workers historically have been included in Activity-wide units in other Veterans Administration (VA) hospitals; that these employees come in frequent contact with other VA employees; that there are similarities with respect to their grievance procedure and that of other VA employees; and that no other labor organization is seeking to represent them in a separate unit.

5/ The parties are agreed that the secretaries of the Hospital Director, the Assistant Director, the Personnel Officer, the Chief of Staff, and the Administrative Assistant to the Chief of Staff, respectively, should be excluded from any unit found appropriate on the basis that each secretary is a confidential employee.

The parties are also in agreement that those employees classified as professional employees by the Activity are professional employees within the meaning of the Order.

clinical nursing specialists, nursing training instructors, and nurse anesthetists, excluding management officials, all other professional and nonprofessional employees, employees engaged in Federal personnel work in excess of a purely clerical capacity, and supervisors 6/ and guards as defined in the Order.7/

In Case No. 42-2284(RO), the Petitioner, the Licensed Practical Nurses Association of Florida, Inc., National Federation of Licensed Practical Nurses, hereinafter called LPNA, seeks an election in a unit of all full-time and regularly scheduled part-time licensed practical nurses employed at the Veterans Administration Hospital, Tampa, Florida, excluding all other nonprofessional employees, professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Order.

In agreement with the AFGE, the Activity and the NFFE maintain that the Activity-wide unit constitutes an appropriate unit which would promote effective dealings and efficiency of agency operations. While the NFFE takes no position with respect to the unit of registered nurses (RN's) sought by the FNA, both the AFGE and the Activity concede that separate units of RN's petitioned for in circumstances similar to those herein have been found appropriate by the Assistant Secretary.8/ However, the Activity contends that the nurse anesthetists sought by the FNA should be included in the Activity-wide unit sought by the AFGE because they do not share a community of interest with other RN's employed by the Activity. With regard to the claimed unit of LPN's, the Activity contends that such a unit lacks a community of interest separate and apart from other nonprofessional employees of the Activity and that the resulting fragmented negotiations would not promote effective dealings and efficiency of agency operations. The AFGE and the NFFE also contend that a separate unit of LPN's is inappropriate.

The FNA asserts that nurse anesthetists should be included in its claimed unit of RN's, on the ground that these employees are RN's with

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The parties stipulated that evening and night supervisors, patient coordinators, head nurses, and the Associate Chief of Nursing Education are supervisors within the meaning of Section 2(c) of the Order.

The unit description appears essentially as amended at the hearing.

See The Veterans Administration Hospital, Augusta, A/SLMR No. 3;  
The Veterans Administration Hospital, Lexington, Kentucky, A/SLMR  
No. 22; and Department of Health, Education, and Welfare, U. S.  
Public Health Service Hospital, Boston-Brighton, Massachusetts,  
A/SLMR No. 267.

a certified speciality similar to the clinical nursing specialists who the parties agreed should be included in the unit sought by the FNA. It further maintains that the interests of the nurse anesthetists are more allied with those of registered staff nurses than with other professional employees of the Activity. On the other hand, the Activity, the AFGE, and the NFFE claim that nurse anesthetists do not have a community of interest with RN's but rather have commonality of interests with other professional employees employed by the Activity.

The Activity is located in Tampa, Florida. Its mission is to provide general medical and surgical services to eligible veterans in the area in which the Hospital is located. The Activity began operations two years ago and, at the time of the hearing, had approximately 55 percent of its bed capacity and 75 percent of its ultimate staff. It is equipped to accommodate approximately 700 patients. Total employment at the Activity amounts to approximately 1100 employees of whom between 900 and 1000 are eligible for inclusion in exclusive bargaining units. Overall direction of the Activity is vested in the Hospital Director. Reporting directly to him is the Assistant Hospital Director, who has primary responsibility for the Hospital's administrative services which include engineering, building management, fiscal, voluntary and personnel functions. Also reporting to the Director is the Chief of Staff, who exercises overall direction of all employees engaged in performing the functions in the services specifically related to patient care, namely, medical, surgical, audiology, psychiatric, nursing, and the radiological laboratory. Each service is headed by its own chief. The employees sought by the AFGE are employed in both the administrative and the patient care services, while the employees sought by the FNA and the LPNA are employed only in the Nursing Service. There is no prior history of bargaining at the Activity.

The Nursing Service of the Activity is headed by the Chief of Nursing Service. Under the Chief is the Assistant Chief who is responsible for the "everyday" activities of the Service. Under her supervision are the patient coordinators, head nurses, RN's, LPN's and Nursing Assistants (NA's). The record reveals that the Nursing Service is divided into nursing units or wards. Currently, there are 3 medical, 3 surgical, and 2 psychiatric wards, as well as 1 spinal cord ward. Additionally, there are speciality units, e.g., coronary and intensive care, hemodialysis, operating and recovery rooms, clinics and admission areas. There are approximately 393 employees employed in the Nursing Service of whom 88 are LPN's, 115 are NA's, and 190 are RN's.

Nursing care is provided continuously on a 24-hour basis to each ward by a "team" consisting of RN's, LPN's, and NA's assigned by the head nurse and responsible to her. The supervision and direction of these employees flow from the Chief of the Nursing Service through the Assistant Chief of the Nursing Service, the patient coordinators and the head nurses. The RN's prepare the work schedule for the team, and are considered team leaders.

With respect to the unit of RN's sought by the FNA, the record establishes that all RN's have the same conditions of employment and are governed by the same salary schedule. There is no interchange between them and other classifications at the Activity, although the staff nurses come in contact with other Hospital employees involved in patient care. The evidence reveals that there are specific educational and training requirements for RN's, and that they are appointed under separate rules and regulations contained in Title 38 of the U.S.Code, Chapter 73. Further, all staff nurses perform essentially the same type of duties which are distinguishable from those of other professionals employed by the Activity.<sup>9/</sup>

Under these circumstances, and noting that Section 10(b) of the Order provides specifically, in part, that a unit may be established on a functional basis, I find that a self-determination election in the unit sought by the FNA is warranted inasmuch as such employees constitute a functionally distinct group with a clear and identifiable community of interest, and inasmuch as there is no evidence that such a unit would fail to promote effective dealings and efficiency of agency operations.

#### Nurse Anesthetists

As noted above, the Activity, the AFGE, and the NFFE oppose the inclusion of nurse anesthetists in the unit of RN's sought by the FNA, contending that these employees do not share a community of interest with other RN's employed by the Activity.

The record establishes that there are 4 nurse anesthetists employed by the Activity. They are not part of the Nursing Service, but rather are under the supervision of the Chief Anesthetist whose direct supervisor is the Chief of Surgery, who, in turn, reports to the Chief of Staff. Nurse anesthetists are RN's who are certified in anesthesiology after completing required training in a certified School of Anesthesiology. Their professional competence with respect to promotions is determined by the Chief Anesthetist and the Physicians Professional Standards Board, as distinguished from the Nurses Professional Standards Board which evaluates the competence of RN's employed in the Nursing Service. The record indicates that, although their basic education is similar to that of the RN's, their additional training in anesthesiology qualifies them for a higher salary and grade than that of the staff nurses. Also, their duties differ from those of the staff nurses in that they do not constitute part of the nursing team on the wards, and their work site for approximately 80 percent of the time is in the operating room area with their duties confined primarily to administering anesthesia. There is no interchange between the staff nurses and nurse anesthetists. The remaining 20 percent of their time is spent outside the operating room area and is concerned with pre-operation visits to ascertain the anesthesia required

<sup>9/</sup> The parties are in agreement that the RN's are professional employees within the meaning of the Order.

for the patient who is about to undergo surgery. The "pre-op" reports they prepare are submitted to the Chief Anesthetist for review. Nurse anesthetists do not attend staff meetings of the Nursing Service staff nurses, but rather attend the staff meetings which are held by the Chief Anesthetist. Although the nurse anesthetists may confer with the staff nurses regarding questions which may arise either "pre-op" or "post-op", it is clear from the record that such questions are related to anesthesia and its pre-operative or post-operative effects on the patient. Further, on occasions when the nurse anesthetists take over in the recovery room, it is only in the absence of the recovery room nurse, and the former's function is limited to her primary responsibility of evaluating the effects of the anesthesia on the patient.

Based on the foregoing, I find that the nurse anesthetists do not share a clear and identifiable community of interest with other RN's. Thus, there is no interchange with other RN's even on an emergency basis; they do not partake in the general medical care of the patient on the ward; their primary functions relate only to anesthesiology; they are not a part of the Nursing Service as are all other RN's; they are separately supervised by the Chief Anesthetist; they have a different and distinct promotional ladder from that of the other RN's; they do not attend staff meetings held by the Nursing Service; and they are evaluated by the Chief Anesthetist and the Physicians Professional Standards Board which utilize similar rating standards as are used in rating doctors. Moreover, the nurse anesthetists are in constant contact with doctors and professional technicians during the performance of their duties.<sup>10/</sup> In these circumstances, I conclude that the nurse anesthetists do not share a clear and identifiable community of interest with other RN's of the Activity but rather share commonality of interests with the other professionals in the unit sought by the AFGE. Accordingly, I shall include them in the unit sought by the AFGE.

In seeking a unit of licensed practical nurses,<sup>11/</sup> the LPNA contends that separate representation of LPN's is warranted because LPN's are a

<sup>10/</sup> As to the contention of the FNA that nurse anesthetists are analogous to clinical nursing specialists who are included in the unit and who are certified in a speciality, the evidence establishes that, as distinguished from nurse anesthetists, clinical nursing specialists are under the Nursing Service and have the same supervision as the other RN's.

<sup>11/</sup> Chapter 464, Florida Statutes: "The Law Governing the Practice of Nursing and Nursing Education in Florida" defines a licensed practical nurse as one who "shall meet the performance of nursing acts in the care of the ill, injured, or infirm under the direction of a licensed physician or a licensed dentist, or a registered nurse; provided, however, that all such acts do not require the specialized skill, judgment, and knowledge required in professional nursing." It is further provided that the requirements for a qualifying examination in this regard are attainment of 18 years of age, completion of two years of high school and a prescribed course in an accredited school of practical nursing.



craft and, as such, constitute a unit whose community of interest separate from other nonprofessional employees employed by the Activity. argues that public and private hospitals in other states have recognized that LPN's may constitute separate appropriate bargaining units. It asserts further that the Activity already treats LPN's as a distinct class, and that separate representation would, contrary to the Activity's position, enhance the efficiency of agency operations and lead to more effective dealings.

The Activity, the AFGE, and the NFFE take the position that the unit of LPN's sought herein is inappropriate in that their interrelationship with other nonprofessional employees of the Activity as well as their similarity of the job functions, working conditions, and benefits establish a community of interest among all of the nonprofessional employees in the comprehensive unit sought by the AFGE. Additionally, the Activity argues that no separate units of LPN's have been established in any VA hospitals, and that such separate units of LPN's would impair effective dealings and efficiency of agency operations.

The record indicates that the LPN's, in addition to their regular duties with regard to patient care, may administer medication following a required course of pharmacology; they may be assigned to the coronary care unit; and may fill in for RN's on occasion when no RN is available, but not for an entire shift. In this regard, LPN's differ from NA's. On the other hand, however, the evidence establishes that the LPN's and the NA's are part of the "team" on the wards; are classified by the Civil Service Commission under the same classification services; and perform many of the same job functions, such as bathing the patients, turning them, taking their blood pressure, pulse, and temperature, and admitting and discharging them. LPN's, together with RN's and NA's, attend the same reporting meetings at the beginning and end of each shift and LPN's and NA's attend classes together at the Activity. Further, supervision is common to LPN's and NA's without distinction as to their license status. Although the grade scale for NA's ranges from GS-2 to GS-6, and for LPN's it ranges from GS-3 to GS-6, the evidence establishes that NA's also could enter at the GS-3 level if qualified.

Under all of the circumstances, I find that the unit of LPN's sought by the LPNA is not appropriate for the purpose of exclusive recognition under the Order. Thus, it is clear that the duties of this group of LPN's are identical to those of the NA's (who are included in the non-professional employee unit sought by the AFGE) with the exception of the administering of medication, assignment to the coronary unit, and the occasional temporary filling in for the staff nurses for short periods of time. Moreover, LPN's are subject to the same supervision as NA's and their pay scales overlap. Additionally, the record reveals that the LPN's share the same benefits and are governed by the same personnel policies as other nonprofessional employees of the Activity in the unit sought by the

AFGE. Accordingly, in my view, the LPN's do not constitute a functionally distinct group with a clear and identifiable community of interest, and do not share commonality of interests sufficiently distinct from the other nonprofessional employees in the unit sought by the AFGE to warrant separate representation. To permit such separate representation would, in my judgment, lead to excessive fragmentation of units in the health care service which clearly would not promote effective dealings and efficiency of agency operations as required by the Order.<sup>12/</sup> Consequently, I find that the unit sought by the LPNA is not appropriate for the purpose of exclusive recognition, and I shall therefore order that its petition be dismissed.

Having found that employees petitioned for by the FNA, if they so desire, may constitute a separate appropriate unit, I shall not make any final unit determination at this time, but shall first ascertain the desires of the employees by directing an election in the following group:

Voting Group (a): All full-time and regularly scheduled part-time registered nurses employed at the Veterans Administration Hospital, Tampa, Florida, including clinical nursing specialists and nursing training instructors, excluding nurse anesthetists, all other professional employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

I find further that the Activity-wide unit of professional and non-professional employees sought by the AFGE may constitute a unit appropriate for the purpose of exclusive recognition under the Order. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following groups.

Voting Group (b): All professional employees of the Veterans Administration Hospital, Tampa, Florida; excluding all employees voting in Group (a), all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (c): All employees of the Veterans Administration Hospital, Tampa, Florida, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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<sup>12/</sup> Cf. United States Public Health Service Hospital, Department of Health, Education, and Welfare, A/SLMR No. 82.

The employees in professional voting group (a) will be asked two questions on their ballots: (1) whether they wish to be represented for the purpose of exclusive recognition by the FNA, the AFGE, the NFFE or none, and (2) whether or not they wish to be included with the non-professional employees for the purpose of exclusive recognition. If in response to question (1) a majority of the employees in voting group (a) selects the FNA, the labor organization seeking to represent them separately, they will be taken to have indicated their desire to constitute a separate appropriate unit and the Area Administrator supervising the election is instructed to issue a certification of representative to the labor organization (FNA) seeking to represent them separately. However, if a majority of the employees voting in group (a) does not vote for the FNA, which is seeking to represent them separately, an appropriate certification of results shall be issued to the FNA and the ballots of the employees in voting group (a) will be pooled with those of the employees in voting group (b).

The employees in the professional voting group (b) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the AFGE, the NFFE, or neither.<sup>13/</sup>

In the event that a majority of the valid votes of voting group (b), including any votes pooled from voting group (a), are not cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the AFGE or the NFFE was selected as the exclusive representative for the professional employee unit.<sup>14/</sup> The ballots of voting group (c) will then be counted and an appropriate certification will be issued indicating whether or not the AFGE or the NFFE has been selected as the exclusive representative for the nonprofessional unit. In the event that a majority of the valid votes of voting group (b) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (b) shall be combined with those of voting group (c) and counted and the results certified.<sup>15/</sup>

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<sup>13/</sup> Petitioner FNA does not seek to represent any professional classifications other than those in voting group (a).

<sup>14/</sup> As the FNA did not seek to represent employees in voting groups (b) and (c) it shall not have standing to raise a challenge as to eligibility with respect to employee classifications in those groups.

<sup>15/</sup> The ballots of professional voting group (a) will be included with those of professional voting group (b) if a majority of the employees in voting group (a) did not vote for the FNA which is seeking to represent them separately. If the votes of voting groups (a) and (b)

(Continued)

The unit determinations in the subject cases are based, in part, then, upon the results of elections among the RN's and among the other professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the RN's votes for representation by the FNA, the labor organization seeking to represent them separately, I find that the following unit is appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All full-time and regularly scheduled part-time registered nurses employed at the Veterans Administration Hospital, Tampa, Florida, including clinical nursing specialists and nursing training instructors, excluding nurse anesthetists, all other professional employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the RN's votes for representation by the FNA, the labor organization seeking to represent them separately, and if a majority of the other professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Veterans Administration Hospital, Tampa, Florida, excluding all registered nurses, clinical nursing specialists, nursing training instructors, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All employees of the Veterans Administration Hospital, Tampa, Florida, including canteen workers, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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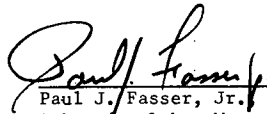
<sup>15/</sup> are pooled with the votes of voting group (c), they are to be tallied in the following manner: the votes for the FNA, the labor organization seeking a separate unit in voting group (a), shall be counted as part of the total number of valid votes cast but neither for nor against the AFGE or the NFFE, the labor organizations seeking to represent the Activity-wide unit. All other votes are to be accorded their face value.

IT IS HEREBY ORDERED that the petition filed in Case No. 42-2284(RO) be, and it hereby is, dismissed.

## DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately proceeding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in voting group (a) shall vote whether they desire to be represented for the purpose of exclusive recognition by the Florida Nurses Association, American Nurses Association; by Local 3402, American Federation of Government Employees, AFL-CIO; by Local 896, National Federation of Federal Employees; or by none. Those eligible in voting groups (b) and (c) shall vote whether they desire to be represented for the purpose of exclusive recognition by Local 3402, American Federation of Government Employees, AFL-CIO; by Local 896, National Federation of Federal Employees; or by neither.

Dated, Washington, D. C.  
November 28, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

3. If a majority of the RN's votes for representation by the FNA, the labor organization, seeking to represent them separately, and if a majority of the other professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Veterans Administration Hospital, Tampa, Florida, including canteen workers, excluding all registered nurses, clinical nursing specialists, nursing training instructors, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

4. If a majority of the RN's votes against representation by the FNA, the labor organization seeking to represent them separately, and if a majority of the professional employees, including RN's, does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Veterans Administration Hospital, Tampa, Florida, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All employees of the Veterans Administration Hospital, Tampa, Florida, including canteen workers, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

5. If a majority of the RN's votes against representation by the FNA, the labor organization seeking to represent them separately, and if a majority of the professional employees, including the RN's, votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order.

All professional and nonprofessional employees employed by the Veterans Administration Hospital, Tampa, Florida, including canteen workers, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

November 28, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTIONS OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF COMMERCE,  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,  
NATIONAL WEATHER SERVICE, CENTRAL REGION,  
A/SLMR No. 331

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This case arose as a result of representation petitions filed by the National Association of Government Employees, Council of NWS Central Region Locals (NAGE) and the American Federation of Government Employees, AFL-CIO, Local 2476 (AFGE).

The NAGE requested a unit of all nonsupervisory professional and non-professional employees assigned to the Central Region, National Weather Service, Department of Commerce, including employees assigned to Central Region Headquarters, but excluding those employees in units subject to certification bars and grants of exclusive recognition held by other labor organizations. The AFGE requested four separate units of all nonprofessional General Schedule employees assigned to the Central Region and stationed respectively at the National Weather Service Offices at Bismarck and Fargo, North Dakota; and St. Cloud and International Falls, Minnesota.

The Assistant Secretary found that the unit petitioned for by the NAGE was appropriate for the purpose of exclusive recognition, as the employees of the Regional Office and the field offices worked together to accomplish the basic missions of the National Weather Service, are subject to the same promotional areas of consideration, enjoy the same fringe and other job benefits, and are in frequent contact with each other. He also noted that the Regional Director, who is responsible for the accomplishment of the overall Regional program, exercises ultimate authority and control over the operations of the Region, including the ultimate responsibility with respect to personnel matters, such as the hiring and discharging of employees, the handling of grievances, the disciplining and transfer of employees, and that he has the authority to execute negotiated agreements within his particular Region.

The Assistant Secretary further found that the separate units of employees in the individual Weather Service Offices petitioned for by the AFGE also may be appropriate for the purpose of exclusive recognition. In this connection, particular note was taken of the facts that the employees in each such station are engaged in performing a particular weather function mission; that they are under the immediate supervision of a Meteorologist-in-Charge or an Official-in-Charge located at the particular Weather Service Office involved; that these offices are physically separated from other Weather Stations in the Central Region; and that there has been little or no employee interchange. In addition, he noted that although all National Weather Service employees are covered by a centralized personnel program and all share certain

working conditions, there is minimal day-to-day contact between the employees of the proposed AFGE units and other National Weather Service field office employees in the Central Region.

Accordingly, the Assistant Secretary ordered elections in the units found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF COMMERCE,  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,  
NATIONAL WEATHER SERVICE, CENTRAL REGION 1/

Activity

and

Case No. 60-3261(RO)

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES, COUNCIL OF  
S CENTRAL REGION LOCALS 2/

Petitioner

WEATHER SERVICE OFFICE,  
SMARCK, NORTH DAKOTA

Activity

and

Case No. 60-3262(RO)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
L-CIO, LOCAL 2476

Petitioner

WEATHER SERVICE OFFICE,  
ARGO, NORTH DAKOTA

Activity

and

Case No. 60-3263(RO)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
L-CIO, LOCAL 2476

Petitioner

WEATHER SERVICE OFFICE  
ST. CLOUD, MINNESOTA

Activity

and

Case No. 51-2501(25)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 2476

Petitioner

WEATHER SERVICE OFFICE,  
INTERNATIONAL FALLS, MINNESOTA,

Activity

and

Case No. 51-2502(25)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 2476

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Marjorie Thompson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, including briefs filed by the NAGE and by the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2476, hereinafter called AFGE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In its petition in Case No. 60-3261(RO), the NAGE seeks an election in a unit of all nonsupervisory professional <sup>3/</sup> and nonprofessional employees of the National Weather Service's Central Region, including those assigned to Regional Headquarters, but excluding managerial employees, employees engaged in Federal personnel work of other than a purely clerical

3/ At the hearing, the parties stipulated that Hydrologists, Meteorologists, and Engineers are the only professional employees employed by National Weather Service in the Central Region.

The names of the Activities herein appear as amended at the hearing.

The name of Petitioner, National Association of Government Employees, Council of NWS Central Region Locals, hereinafter called NAGE, appears as amended at the hearing.

nature, supervisors and guards as defined by the Order, and employees in units subject to certification bars and grants of exclusive recognition held by other labor organizations. 4/

In Case Nos. 60-3262(RO), 60-3263(RO), 51-2501(25), and 51-2502(25), the AFGE seeks an election in four separate units of all General Schedule (GS) employees employed by the National Weather Service, Central Region, and stationed respectively at the National Weather Service Offices at Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota, excluding professional employees, employees engaged in Federal personnel work except in a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 5/

The Activity, in agreement with the NAGE, maintains that a Region-wide unit is appropriate. However, at the close of the hearing, it modified its position to indicate that it preferred to exclude from the unit employees assigned to Central Region Headquarters. At present there are approximately 458 employees in various established units in the Central Region who are covered by negotiated agreements between the Activity and the NAGE, the AFGE, or the National Federation of Federal Employees, herein called NFFE.

4/ At the hearing, the NAGE designated the following stations as excluded from its petitioned for unit: Weather Service Forecast Office, Denver, Colorado; Weather Service Forecast Office, Minneapolis, Minnesota; Weather Service Office, Omaha, Nebraska; Weather Service Office, South Bend, Indiana; Weather Service Office, Chicago, Illinois; Weather Service Meteorological Observatory, Chicago, Illinois; Weather Service Office, O'Hare International Airport, Chicago, Illinois; Weather Service Office, Midway Airport, Chicago, Illinois; Weather Service Office, Rapid City, South Dakota; Weather Service Office, Des Moines, Iowa; professional employees at the Weather Service Office, Sioux Falls, South Dakota; nonprofessional employees at the Weather Service Office, Lincoln, Nebraska; and the Weather Service Meteorological Observatory, North Omaha, Nebraska.

It appears that among the above listed stations, which the NAGE would exclude from its petitioned for unit, that there are several in which the NAGE became the certified exclusive representative within a year of the filing of its petition in Case No. 60-3261(RO), i.e. the units at the Weather Service Meteorological Observatory, Chicago, Illinois; the Weather Service Office, Midway Airport, Chicago, Illinois; and the Weather Service Forecast Office, Denver, Colorado. The record reflects also that included within the petitioned for unit are a number of other individual stations for which the NAGE is the currently recognized representative and which are covered by negotiated agreements. In this latter regard, the Activity and the NAGE have agreed to waive the negotiated agreements covering these stations and include the employees covered by such agreements within the petitioned for unit. Cf. U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110 and Veterans Administration, A/SLMR No. 240.

5/ The above four claimed units appear essentially as described at the hearing.

The National Weather Service, hereinafter called NWS, is divided into six Regional Offices, each of which is under the supervision of a Regional Director who is responsible to the National Director. Under each of the Regional Offices are a number of weather stations. The evidence indicates that weather forecasting is a group effort which concerns all NWS offices. Thus, all NWS offices have access to weather information gathered throughout the country by individual offices, the dissemination of which necessitates substantial communication between the NWS offices located in the same geographic area. Moreover, particularly in the areas of specialized forecasting and consultation, and the forecasting of severe weather, there is frequent contact between the respective Regional Offices and their field offices.

The six Regional Directors, who report directly to the National Director, are subject to NWS guidelines, and exercise substantial control over their regional operations. Thus, they have the authority to hire and promote employees in the technical and administrative areas, and they handle all final personnel actions within their respective regions, such as hiring, firing, disciplining of employees, promotions, awards, transfers and grievances. Moreover, the Regional Directors have the authority to negotiate and execute collective-bargaining agreements with labor organizations covering units within their respective regions.

There are different types of weather stations within each region; a Weather Service Forecast Office, herein called WSFO; a Weather Service Office, herein called WSO; and a Weather Service Meteorological Observatory, herein called WSMO. These offices are under the overall control of the Regional Director; however, all such offices are under the immediate supervision of a Meteorologist-in-Charge (MIC) or an Official-in-Charge (OIC) 6/ who is on the premises and is responsible for the effective operation and immediate supervision of the particular office involved.

A WSFO is one of the larger NWS offices and one WSFO is found in each state. Such an office uses weather data gathered by its own meteorologists as well as other resources, compiles it, and then proceeds to issue the forecast (and warnings where appropriate) to the public within its own geographic area. 7/ The WSMO's primary function is the observation of upper and surface air, while the WSO's prepare and issue warnings of severe weather of a short-term nature. The record reflects that the WSMO's and the WSO's use the WSFO's forecast, in addition to their own data, in order to determine the weather for their own immediate areas. The WSO's also act as a clearing house for all NWS information to the public. The personnel of the WSMO's and WSO's are included in the following classifications: Senior Meteorologist, Journeymen Forecaster, Weather Service Specialist, Meteorological Technician, and Electronics Technician.

6/ This classification is usually that of a Supervisory Meteorological Technician.

7/ Some of the WSFO's have clerical employees.

The Central Region of the NWS encompasses 14 states: Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, Indiana, and Kentucky. The Regional Headquarters conducts the technical and service programs and the administrative support functions for the Region, as well as the training programs of the National Weather Service Technical Training Center in accordance with National Oceanic and Atmospheric Administration (NOAA) NWS policies. Further, it adjusts plans, policies and resources affecting NWS programs; manages all operational and scientific meteorological and hydrological programs of the Region, including observing networks, other services and forecasting, climatology and hydrology; and engages in the review and updating of scientific programs and procedures in the field offices. The Central Region contains approximately 1,009 employees. Offices within the Region include 14 WSFO's, 5 WSMO's and 58 WSO's with the average employee complement in each office totalling 5 employees and one supervisor.

The record indicates that all of the offices in the Region are operated pursuant to directives issued by the Regional Office concerning personnel procedures, and the work to be performed. However, the MIC or OIC in each office provides the day-to-day supervision, assures that procedures are adhered to, and is held responsible for any departure from procedures. All field and Regional Office employees have the same fringe benefits, retirement plans, leave structure, holidays, promotional policy, overtime system and shift differential. The record reveals also that personnel from the Headquarters of the Central Region are sent to various stations for purposes of auditing and observing the various programs. In addition, bi-monthly consultation meetings are conducted between Regional personnel and the various MIC's or OIC's within the Region concerning personnel and technical problems which may arise.

The record indicates that the four WSO's petitioned for herein by AFGE are engaged in missions similar to all WSO offices of the NWS and that from 5 to 10 persons are employed at each of the four offices. Further, an MIC or OIC is the supervisor of each of these WSO's with each having responsibility to the Regional Director for their operation. The evidence establishes that the work schedules of the individual employees of the petitioned for WSO's are subject to the approval of the MIC or OIC, based on his experience and judgement, sometimes changes such schedules, prepares them himself, depending on the needs of the office. Although most of the offices are run by directives issued by the Regional Office in respect to procedures and work performed, the MIC's or OIC's are solely responsible for adherence to and modification of such schedules when need arises. The record indicates also that they may recommend the discipline of employees as well as promotions, awards, transfers and the disposition of grievances. And although the final authority for such actions rests with the Regional Office, the record reveals their recommendations given substantial weight, and are usually followed. The authority of the MIC or OIC also extends to the detailing of employees up to 30 days; completing employee appraisals under the merit promotion program; approving annual and sick leave; issuing of reprimand letters; and issuing requests

for medical treatment of employees injured on the job. Additionally, each MIC or OIC prepares, drafts and finalizes a "station duty" manual which is tailored to fit the particular functions or requirements at the particular WSO, WSFO, or WSMO involved. Finally, the record reflects that each of the petitioned for offices is approximately 250 miles apart and that the workforce of these offices is highly stable, with the average tenure of an employee in a particular office being 15 years or more.

Based on all of the foregoing circumstances, I find that the unit petitioned for by the NAGE in Case No. 60-3261(RO), encompassing all unrepresented nonsupervisory professional and nonprofessional employees of the Central Region of the NWS, including Regional Headquarters employees and certain employees currently in units represented by the NAGE, is appropriate for the purpose of exclusive recognition. <sup>8/</sup> In this connection, particular note was taken of the facts that employees of the Regional Office and the field offices of the Central Region work together to accomplish the basic missions of the NWS; they are subject to the same promotional area of consideration; both field and Regional Office employees enjoy the same fringe and other job benefits; and there is frequent contact between the field offices and the Regional Office. Moreover, the record reflects that the Regional Director, who is responsible for the accomplishment of the overall Regional program, exercises ultimate authority and control over the operations of the Region, including the ultimate responsibility with respect to personnel matters, such as the hiring and discharging of employees, the handling of grievances, the disciplining and transfer of employees and, further, that he has the authority to execute negotiated agreements within his particular Region.

Moreover, I find that separate units of employees in the individual WSO's petitioned for by the AFGE in Case Nos. 60-3262(RO), 60-3263(RO), 51-2501(25), and 51-2502(25) also may be appropriate for the purpose of exclusive recognition. In this connection, particular note was taken of the facts that the employees in each such station are engaged in performing a particular weather function mission; that they are under the immediate supervision of an MIC or OIC located at the particular WSO involved; that the WSO's are physically separated from other weather stations in the Central Region; and that there has been little or no employee interchange between the WSO's. Moreover, although all NWS employees are covered by a centralized personnel program and all share certain working conditions, there is minimal day-to-day contact between the employees of the proposed AFGE units and other NWS field office employees in the Central Region. Under these circumstances, and noting also the fact that currently there are a number of exclusively recognized units in the Central Region, most of which are covered by negotiated agreements, and the absence of any specific countervailing evidence that units proposed by the AFGE would not promote effective dealings and efficiency of agency operations, I reject the

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<sup>8/</sup> Cf. National Weather Service, Central Region, A/SLMR No. 151.

Activity's contention that establishing such units will not promote effective dealings and efficiency of agency operations. 9/

As noted above, the Region-wide unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained.

Having found that the employees petitioned for by the AFGE, and by the NAGE, may, if they so desire, constitute separate, appropriate units, I shall not make any final determination at this time, but shall first ascertain the desires of the employees by directing elections in the following voting groups:

Voting Group (a): All General Schedule employees employed by the National Weather Service, Central Region, and stationed at the Bismarck, North Dakota, National Weather Service Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All General Schedule employees employed by the National Weather Service, Central Region, and stationed at the Fargo, North Dakota, National Weather Service Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (c): All General Schedule employees employed by the National Weather Service, Central Region, and stationed at the St. Cloud, Minnesota, National Weather Service Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (d): All General Schedule employees employed by the National Weather Service, Central Region, and stationed at the International Falls, Minnesota, National Weather Service Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (e): All professional employees of the National Weather Service, Central Region, including those assigned to Regional Headquarters,

9/ Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9 and General Services Administration Region 5, Chicago, Illinois, A/SLMR No. 265.

excluding all nonprofessional employees, employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Omaha, Nebraska; the WSO, South Bend, Indiana; the WSO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, O'Hare International Airport, Chicago, Illinois; the WSO, Midway Airport, Chicago, Illinois; the WSO, Rapid City, South Dakota; the WSO, Des Moines, Iowa; nonprofessional employees of the WSMO, North Omaha, Nebraska and the WSO, Lincoln, Nebraska; professional employees at the WSO, Sioux Falls, South Dakota; employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (f): All nonprofessional employees of the National Weather Service, Central Region, including those assigned to Regional Headquarters, excluding all employees in voting groups (a), (b), (c), and (d), professional employees, employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Omaha, Nebraska; the WSO, South Bend, Indiana; the WSO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, O'Hare International Airport, Chicago, Illinois; the WSO, Midway Airport, Chicago, Illinois; the WSO, Rapid City, South Dakota; the WSO, Des Moines, Iowa; nonprofessional employees at the WSO, Lincoln, Nebraska and the WSMO, North Omaha, Nebraska; professional employees at the WSO, Sioux Falls, South Dakota; employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in voting groups (a), (b), (c), and (d), shall vote whether they desire to be represented by the AFGE, the NAGE, or neither. If a majority of employees in any or all of these voting groups selects the AFGE, the labor organization seeking to represent them in separate units, they will be taken to have indicated their desire to be represented separately in such units and the appropriate Area Administrator is instructed to issue a certification of representative to the labor organization seeking to represent them separately. However, if a majority of employees in any or all of these voting groups does not vote for the AFGE, the labor organization seeking to represent them in separate units, the ballots of the employees in these voting groups will be pooled with those of the employees in voting group (f).

The employees in professional voting group (e) will be asked two questions on their ballots; (1) whether or not they wish to be included with the nonprofessional employees in voting group (f), for the purpose of exclusive recognition; and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the NAGE. In the event that a majority of valid votes of voting group (e) are cast in favor of inclusion in the nonprofessional employee unit in voting group (f), the ballots of voting group (e) shall be combined with those of voting group (f).

Unless a majority of the votes of voting group (e) are cast for inclusion in the same unit as the nonprofessional employees in voting group (f), they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the



appropriate Area Administrator indicating whether or not the NAGE was elected by the employees in the professional unit.

December 4, 1973

The employees in voting group (f) shall vote whether or not they desire to be represented by the NAGE. 10/

#### DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in voting groups described above, as early as possible, but not later than sixty (60) days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote in voting groups (a), (b), (c), and (d), shall determine whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2476; by the National Association of Government Employees, Council of Central Region Locals; or by neither. Those eligible to vote in voting group (e) shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the National Association of Government Employees, Council of NWS Central Region Locals. Those eligible to vote in voting group (f) shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the National Association of Government Employees, Council of NWS Central Region Locals.

Bremerton, Washington, D.C.  
December 28, 1973



Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

If the votes of voting groups (a), (b), (c) and/or (d) are pooled with the votes of voting group (f) they are to be tallied in the following manner: In voting groups (a), (b), (c) and/or (d), the votes for the AFGE, the labor organization seeking the separate units, shall be counted as part of the total number of valid votes cast but neither for nor against the NAGE, the labor organization seeking to represent the Region-wide unit. All other votes are to be accorded their face value. I find that, under the circumstances, any unit resulting from a pooling of votes as described above constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

-9-

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PUGET SOUND NAVAL SHIPYARD,  
DEPARTMENT OF THE NAVY,  
BREMERTON, WASHINGTON  
A/SLMR No. 332

This proceeding arose upon the filing of an unfair labor practice complaint by the Bremerton Metal Trades Council, AFL-CIO, on behalf of its affiliate, Lodge 282, International Association of Machinists and Aerospace Workers, AFL-CIO (Complainant). The Complainant alleged that the Puget Sound Naval Shipyard (Respondent) violated Section 19(a)(1) and (6) of the Order by its unilateral decision that two grievances were not grievable under the parties' negotiated grievance procedure.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent's unilateral decision not to process the two grievances violated Sections 19(a)(1) and (6) of the Order. In this connection, the Administrative Law Judge had noted that the positions of the parties regarding the grievability of the two grievances were grounded on divergent interpretations of the terms of their agreement, and that the contractual method for resolving this type of dispute was the negotiated grievance procedure. The Administrative Law Judge found dispositive the decisions of the Assistant Secretary in Norfolk Naval Shipyard, A/SLMR No. 290 and Long Beach Naval Shipyard, A/SLMR No. 154. In those cases the Assistant Secretary held, in similar circumstances, that an agency's unilateral determination of what was arbitrable constituted a unilateral modification of the negotiated agreement and thereby violated Section 19(a)(1) and (6) of the Order. In reaching his decision in the instant case, the Administrative Law Judge rejected the Respondent's contention that one of the grievances, concerning the rate of pay received by a group of employees, was subject to an appeals procedure and, therefore, was dismissable under Section 19(d) of the Order. He noted, in this regard, that the issue herein, the Respondent's unilateral interpretation of the agreement, could not be resolved through any appeals procedure.

The Administrative Law Judge also rejected the Respondent's contention, with regard to the refusal to process the supervisory assignment grievance, that the management rights flowing from Section 12(b) of the Order constituted a bar to finding an unfair labor practice. In this connection, he noted that Section 12(b) does not relieve an agency from the obligation of consulting, conferring, or negotiating on the procedures used in reaching the decision or taking the action involved. The Administrative Law Judge also rejected the Respondent's contention

that the procedures set forth in Section 13(d) were the exclusive procedures for resolving the disputes herein, noting that the negotiated agreement herein was executed October 10, 1969, and that Section 13(d) is inoperative where the negotiated agreement involved was entered into prior to the effective date of the amendment of the Order, November 24, 1971.

A/SLMR No.332

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,  
DEPARTMENT OF THE NAVY,  
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-2260(CA)

BREMERTON METAL TRADES COUNCIL,  
AFL-CIO, ON BEHALF OF ITS AFFILIATE,  
LODGE 282, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO

Complainant

DECISION AND ORDER

On September 12, 1973, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 1/ Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the exceptions and supporting brief filed

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1/ In its exceptions, the Respondent contended that the Administrative Law Judge did not rule specifically on a Motion to Dismiss made by Respondent at the hearing. In my view, it was unnecessary for the Administrative Law Judge to make a specific ruling on the Motion to Dismiss, as his Report and Recommendations, in which he concluded that the Respondent had engaged in certain unfair labor practices, clearly reflects that the Motion to Dismiss was, in fact, denied.

the Respondent, I hereby adopt the findings, conclusions and commendations of the Administrative Law Judge. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Puget Sound Shipyard, Department of the Navy, Bremerton, Washington, shall:

1. Cease and desist from:

a. Unilaterally determining the grievability or arbitrability of the layer-out grievance or the supervisory assignment grievance pursuant to its negotiated agreement, executed on October 10, 1969, with the Bremerton Metal Trade Council, AFL-CIO.

b. Interfering with, restraining, or coercing its employees unilaterally determining the grievability of the layer-out grievance or the supervisory assignment grievance pursuant to its negotiated agreement, executed on October 10, 1969, with the Bremerton Metal Trades Council, AFL-CIO.

c. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

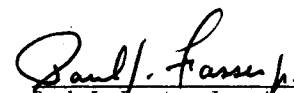
a. Upon request, proceed to Step 3 of the negotiated grievance procedure, set forth in the negotiated agreement executed on October 10, 1969, on the layer-out grievance and the supervisory assignment grievance. If these matters are unresolved thereafter, upon request, proceed to supervisory arbitration on the grievances.

b. Post at its Bremerton, Washington Facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander and they shall be posted and maintained by him for 60 consecutive days hereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

On page 22 of his Report and Recommendations, the Administrative Law Judge inadvertently noted that the effective date of Executive Order 11616 was November 24, 1972, rather than November 24, 1971. This inadvertence is hereby corrected.

c. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
December 4, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX  
NOTICE TO ALL EMPLOYEES

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
WASHINGTON, D.C. 20210

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD  
DEPARTMENT OF THE NAVY  
BREMERTON, WASHINGTON,

and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED

Respondent

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

v.

We hereby notify our employees that:

BREMERTON METAL TRADES COUNCIL,  
AFL-CIO, ON BEHALF OF ITS AFFILIATE,  
LODGE 282, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO,

CASE NO. 71-2260 (CA)

Complainant

WE WILL NOT unilaterally determine the grievability or arbitrability of the layer-out grievance and the supervisory assignment grievance pursuant to our negotiated agreement, executed on October 10, 1969, with the Bremerton Metal Trades Council, AFL-CIO.

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 Executive Order.

WE WILL, upon request, proceed to Step 3 of the negotiated grievance procedure set forth in the negotiated agreement executed on October 10, 1969, on the layer-out grievance and the supervisory assignment grievance. If these matters are unresolved thereafter, we will, upon request, proceed to advisory arbitration on the grievances.

BEFORE: Salvatore J. Arrigo  
Administrative Law Judge

Richard C. Wells, Esq. Labor Relations Advisor,  
Regional Office of Civilian Manpower  
Management, Department of the Navy,  
760 Market Street, Suite 836,  
San Francisco, California,

For Respondent

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

Lawrence E. Soriano, Esq. No. 16, Professional Bldg.  
Fourth and Pacific  
Bremerton, Washington,

For Complainant

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, whose address is 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

REPORT AND RECOMMENDATIONS

Preliminary Statement

This proceeding, heard in Seattle, Washington, on November 14, 1972, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), a Notice of Hearing on complaint issued on August 7, 1972, with reference to alleged violations of Section 19(a)(1) and (6) of the Order.<sup>1/</sup>

On March 28, 1972, a complaint was filed by Bremerton Metal Trades Council, AFL-CIO, on behalf of its affiliate, Lodge 282, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter jointly called Complainant or the Council). The complaint, as amended on June 28, 1972, alleges that Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington (hereafter called Respondent or the Activity) violated Section 19(a)(1) and (6) of the Order by its unilateral decision that two grievances were not proper for processing under the parties' negotiated grievance procedure.

At the hearing both parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Oral argument was waived and briefs were filed by both parties.

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On October 12, 1972, the hearing was ordered rescheduled by San Francisco Regional Administrator, H.D. Huxley.

- 2 -

Upon the entire record in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Introduction

At all times material hereto the Council has been the exclusive collective bargaining representative of all employees in the Puget Sound Naval Shipyard with the exception of various specified employees and those employees included in other recognized units. Complainant and Respondent are parties to a collective bargaining agreement which was executed on October 10, 1969, and which was in effect at all times material herein.<sup>2/</sup> The agreement provides, inter alia, for a three (3) step grievance procedure and advisory arbitration of unresolved grievances upon the request of either party.

II. The Alleged Unfair Labor Practices

This case involves the Activity's refusal to process two grievances past the second step of the negotiated grievance procedure. One grievance concerns the rate of pay received by a group of employees. The other grievance concerns an assignment to a supervisory position. To a large extent, the facts are not in dispute.

(a) The layer-out grievance.

On August 20, 1971, a group grievance under the negotiated grievance procedure was filed by eleven (11) machinists.<sup>3/</sup> The grievance stated: "We feel that management

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<sup>2/</sup> Joint Exhibit No. 16.

<sup>3/</sup> Joint Exhibit No. 1(a).

- 3 -

is in violation of Article 27, Section 10<sup>4</sup>/ and FPM subchapter 6-5 by not establishing the rate of Marine Machinist Layer-Out. We feel we are performing the duties of the rate and should be receiving the appropriate compensation." The grievants sought the following corrective action: "That management immediately take steps to establish the proper machinery for promoting Shop 938 employees, who are performing these duties, to the position of Layer-Out."

The grievance was denied at the first step by the employees' immediate supervisor. The denial indicated that an audit had been made on the work in question and the rating was found to be proper.<sup>5</sup>/ Thereafter, the grievance was pursued to the second step of the grievance procedure and on September 20, 1971, representatives of the Council and the Activity met to discuss the matter. By letter dated September 23, 1971,<sup>6</sup>/ the Council informed Respondent inter alia:

"In regard to our second step grievance hearing on September 20th, I have had time to review the opinions brought forth by the Industrial Relations representatives and the Classification Division. It is the opinion of these Management representatives that this grievance be processed through a classification appeals procedure. After considerable study, I feel that this approach is not in the best interests of the employees and that the grievance should be continued through the negotiated procedure.

"Our experience with classification appeals has been very poor, to say the least. They are unnecessarily time consuming and would delay an opinion on this problem for many months, thus, creating an unfair hardship for

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<sup>4</sup>/ Reference to Article 27 of the agreement was subsequently corrected to read Article 17. Article 17 is entitled "Promotions" and Section 10 thereof reads: "When an employee is assigned to a higher level nonsupervisory position for one full pay period or more, a temporary promotion will be made."

<sup>5</sup>/ Joint Exhibit No. 1(a).

<sup>6</sup>/ Joint Exhibit No. 2.

the employees. We must stand on the statement contained in our grievance that Management is in violation of Article 17 Section 10 of the Metal Trades Agreement and because this is a contract violation, the employees have every right to process this under the negotiated procedure.

"I would appreciate it very much if you could render a second step decision on this grievance taking into consideration the points that were brought forth substantiating the claims of the employees."

The Activity denied the second step grievance on October 18, 1971 <sup>7</sup>/ stating:

"The rate of Machinist Marine Layer-out has been established for several months as a result of Merit Promotion Announcement No. 191-70 dated 3 November 1970. Therefore the proper machinery for paying employees lay-out pay when engaged in lay-out work has been in existence for quite some time.

"The matter is probably more accurately described as the administration and classification of lay-out pay for certain types of work. To the best of my knowledge Article 17, Section 10 of the Metal Trades Council has not been violated.

"During the discussion on 20 September 1971 regarding the grievance concerning the violating of Article 17 Section 10 of the Metal Trades Agreement, it appears there is a difference of opinion on what constitutes lay-out work in the area of using alignment scopes. It is my opinion the scope is a tool of the trade and its use does not fall in the category of laying-out. This

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<sup>7</sup>/ Joint Exhibit No. 1(b).

fact was further substantiated by a study conducted by the Industrial Relations Department. Their decision as a result of the study was that this work was not lay-out work.

"Since it has been determined that the use of an alignment scope is not lay-out work, the Metal Trades Agreement has not been violated. therefore (sic) Machinists Marine engaged in work requiring the use of an alignment scope will continue to be paid their regular Machinist Marine rate of pay. The scope has in fact merely replaced the tight wire and weight method formerly used for alignment purposes."

Subsequently, Complainant requested that the grievance processed to the third step of the grievance procedure and further requested that a meeting be arranged to discuss the matter. In its letter of response dated November 15, 1971, the Activity refused to process the grievance any further. The Activity's letter follows:

"This letter is in response to the Council's request of 2 November 1971 that the group grievance initiated by eleven (11) Shop 938 employees be processed at the 3rd step of negotiated grievance procedure, Article XXIX of the Agreement.

"The grievance as initiated by the employees is their belief that title and wage level of Shop 938 employees engaged in optical alignment work is incorrect. These employees feel that the rating of Machinist (Marine) (Layer Out) WG-11 is the appropriate rating for Shop 938 employees performing optical alignment work assignments. Further, the employees request they be temporarily promoted when performing such duties for one or more pay periods.

"The Industrial Relations Office conducted a survey of optical alignment and related optical lay out work performed by Shop 938 personnel. On 4 August 1971, this office reported to the Group Superintendent (Machinery) that the criteria for the rate of Machinist (Marine) (Layer Out) was not met. Therefore, the Layer Out rating for optical alignment work was not appropriate. A copy of this memorandum was provided to Mr. Flynn on 31 August 1971 and the findings stated in the decisions given at the 1st and 2nd step. These findings are again emphasized as follows: (1) the optical alignment work performed by Shop 938 had been reviewed; (2) the review reveals that the employees performing the work are properly graded as Machinists (Marine); and (3) the rating of Machinist (Marine) (Layer Out) is inappropriate. If these employees believe that this job grading determination is incorrect, the procedure for resolution is the Job Grading Appeals System. A job grading appeal should be submitted in writing to the Office of Civilian Manpower Management via my office. The Council's attention is invited to NAVSHIPYDBREM Instruction 12512.1E of 3 April 1970 for details concerning submission of a job grading appeal.

"The Council and Shipyard recognized that a rating determination appeal is not an appropriate matter for the negotiated grievance procedure and is excluded from Article XXIX. Since group grievance has reduced itself to an issue over the proper grade level for optical alignment work, it is not appropriate for further processing and is returned

- 7 -

without further action. The issue will be accepted as a job grading appeal if the employees wish to submit it through the appropriate appeals procedure." 9/

10/  
By letter dated December 17, 1971, the Council again sought to have the grievance considered at the third step contending that:

"In this grievance, we state that we feel that management is in violation of Article 17 Section 10 of the Metal Trades Agreement which states that if an employee is assigned to work of a higher level for one pay period or more, a temporary promotion will be made. We realize that every employee has the right to file a classification appeal using the appeals procedure covering job appeals but we feel that an employee also has the right to process this grievance as a violation of the contract.

"We wish to request that you reconsider your decision concerning the request for the third step grievance. If after your review of this situation we are still in disagreement as to the employee's right to pursue this problem through the negotiated grievance procedure, we respectfully request that the matter be referred to advisory arbitration for a decision."

9/ Article XXIX of the Agreement is entitled "Grievance Procedure" and Section 1 thereof states, in relevant part: "Appeals resulting from the following types of actions shall not be considered under this Article, or Article XXX, Arbitration:

\* \* \*

(7) Ungraded rating determinations, wage determinations, and wage alignments;"

10/ Joint Exhibit No. 6.

- 8 -

The Activity, by letter dated December 30, 1971 11/ declined to reconsider its previous decision or accept the Union's proposal for advisory arbitration. It's final response to the Council read:

"This letter is in response to the Council's request of 17 December 1971 concerning the group grievance initiated by 11 Shop 938 employees. Your request asks that I reconsider my decision not to accept this grievance at the third step. As an alternative, you propose that this dispute be submitted to advisory arbitration if I do not accept the grievance as proposed.

"I have considered the facts as documented on the group's grievance form. The facts remain the same; they dictate that their dispute be processed as a job grading appeal. The employees allege violation of Article XVII, Section 10, because they are not being temporarily promoted to the rating of Machinist (Marine) (Layer Out), WG-11 when assigned to duties they maintain are typical of the WG-11 rating. The shipyard has reviewed the duties in question and has determined that they are typical of the rating of Machinist (Marine), WG-10. Since a job grading determination has confirmed the work in question to be properly graded at the WG-10 level and all 11 employees are rated at the WG-10 level, I must refute the alleged violation of our agreement. Article XXIX, Section 1 excludes complaints resulting from ungraded rating determinations, or as they are now known, job grading appeals.

"If the employees still believe that this work assignment is properly allocated at a higher level than their Machinist

11/ Joint Exhibit No. 7

- 9 -



(Marine) rating, their dispute must be resolved through the Job Grading Appeals System. As I have previously indicated, such an appeal should be submitted to the Office of Civilian Manpower Management via my office. NAVSHIPYDBREM Instruction 12512.1E of 3 April 1970 details the procedures to be followed in submitting a job grading appeal.

"I must decline the Council's suggestion that the employees' dispute be placed before an arbitrator. I feel that it is inappropriate for an arbitrator to consider a job grading appeal. The U.S. Civil Service Commission's Coordinated Federal Wage System has established the Job Grading Appeals System for resolution of employees' questions concerning the proper wage grade level of their work.

"I wish to re-emphasize that the issue will be accepted as a job grading appeal if the employees will submit it through the appropriate appeals procedure."

b) The supervisory assignment grievance.

On October 26, 1971, a grievance under the negotiated grievance procedure was filed by two (2) employees, both of whom were classified as inspectors. That grievance stated: "assigning an associate supervisor, electrical, to fill the position of associate supervisor, MNP, for the purpose of supervising MNP inspectors is in violation of the Metal Trades Council contract Article 17 and FPM 335." The corrective action sought was "That the position that was created by an increase work situation that required an additional associate supervisor for the MNP division be filled with a qualified employee who is on the MNP associate supervisor register."

- 10 -

The grievants immediate supervisor denied the grievance at the first step, stating: 12/

"The grievance lacks specific detail as to the alleged violation of Article XXVII - Publicity of the Bremerton Metal Trades Council Agreement or Chapter 335 of the Federal Personnel Manual. The Bremerton Metal Trades Council recognizes that the Employer retains the right to maintain the efficiency of the operations by determining the methods, the means, and the personnel by which such operations are conducted. (See Article II, Section 1). Therefore, the assignment of supervisors is a non-negotiable right of the Employer. Investigation reveals that selection and assignment of the Associate Supervisory Inspector (Ships Electrical System-Nuclear) has not violated the agreement, specifically, Article XVII-Promotion. The assignment of Associate Supervisory Inspector to direct and exercise supervisory control over a crew of inspectors from two or more trade backgrounds is an acceptable personnel management practice. The Employer will assure that only qualified personnel are so assigned." 13/

12/ Joint Exhibit No. 8.

13/ Although originally there may have been some confusion as to whether the grievants were alleging a violation of Article XVII (Promotions) or Article XXVII (Publicity), it is apparent that Respondent was aware, at all times material herein, that the grievants were alleging a violation of Article XVII of the agreement.

- 11 -

The grievance was pursued to the second step and on November 10, 1971, the parties met to discuss the matter. The Agency's written response to the second step grievance dated November 19, 1971, 14/ states as follows:

"1. A meeting was held 10 November to hear the case for both sides. This hearing resulted in a restatement of the original allegation by Mr. Finneman and a further comment that the individual involved had not been reassigned from the best qualified group of either Mechanical and Piping or Structural candidates and that management was trying to circumvent (sic) the Merit Promotion Policy.

"2. The staffing pattern of associate supervisors was reviewed among the three options - ship's electrical system, ship's mechanical system and piping, and ship's structures and is balanced. The ratio of associate supervisor to inspectors in each of these three options is one to six. This indicates a good balance has been maintained in the associate supervisory ranks.

"3. The associate supervisor involved is considered by Code 139 to be qualified for the position into which he was placed. However, the selection of an electrical associate for supervision of a predominately mechanical and structural crew is questionable unless the experience and background of the individual is sufficient to assure his ability to perform the task. This individual has the background through mechanical and piping experience to perform the role of associate supervisor over the crews involved.

"4. I reviewed Code 139 supervisory assignments with the Industrial Relations Office. This review showed that a supervisor may direct a crew composed of personnel from various options or trades. Therefore, Code 139's position is an acceptable personnel management practice and the staffing action in question does not violate FPM 335.

14/ Joint Exhibit No. 9.

- 12 -

"5. Article II Section 2 specifies that the assignment of personnel is a right of the employer. Since the action questioned by the MTC is a matter of the reassignment of an employee, it cannot be considered a grievable item and your grievance form is therefore returned." 15/

Thereafter the Council requested a third step meeting on the grievance. On December 14, 1971, the Shipyard Commander informed the Council that the matter would not be processed further, 16/ stating, inter alia:

"Your letter of 1 December 1971 in the matter of a grievance submitted by the International Association of Machinists has been carefully considered.

"In the meeting of 10 November 1971 between Mr. Finneman and Mr. Prebula, the merits of the complaint were fully discussed. Mr. Prebula's answer to the complainants was dated 19 November. I consider the decision as contained in paragraphs 4 and 5 of that decision as being proper. Clearly,

15/ It is obvious that Respondent, in paragraph 5 above meant to say "Article II Section 1" which states, in relevant part: "It is agreed that the customary and usual rights, powers, functions, and authority of management are vested in management officials of the Employer. Included in these rights in accordance with applicable laws and regulations is the right to direct the work force; the right to hire, promote, retain, transfer, and assign employees in positions; the right to suspend, discharge, demote, or take other disciplinary action against employees; and the right to release employees from duties because of lack of work or for other legitimate reasons. The Employer shall retain the right to maintain efficiency of the operations by determining the methods, the means, and the personnel by which such operations are conducted and shall also have the right to take whatever actions may be necessary to carry out assigned missions in an emergency situation...."

16/ Joint Exhibit No. 11.

- 13 -

the issue relates to the promotion and assignment of employees, a management right as contained in Article II, Section 1 of the agreement.

"Accordingly, the grievance form which you have submitted is returned as a matter not appropriate for further processing as a grievance."

The Council replied on January 4, 1972 17/ requesting that the Shipyard Commander reconsider his decision and stated as follows:

"In reference to your letter of December 14, 1971, the Bremerton Metal Trades Council feels that this grievance is proper for processing through the negotiated grievance procedure. The Metal Trades Agreement, Article 17 Section 8, states, 'The formal means for resolving complaints is through the grievance procedure.' We feel that the contract has been violated by Management and due to this circumstance, we have the right to pursue this problem to a satisfactory conclusion via the negotiated grievance procedure.

"We wish to request that you reconsider your decision concerning the request for the third step grievance. If after your review of this situation we are still in disagreement as to the employee's right to pursue this problem through the negotiated grievance procedure, we respectfully request that the matter be referred to advisory arbitration for a decision.

"Your consideration of this request will be greatly appreciated." 18/

17/ Joint Exhibit No. 12.

18/ Article 17 Section 8 of the agreement states:

"Questions or complaints about the promotion program should be resolved informally if possible with immediate supervisors. The formal means for resolving complaints is through the grievance procedure."

By letter dated January 18, 1972, 19/ the Shipyard Commander replied, inter alia:

"This assignment was a temporary detail of an employee to perform work at his existing pay level and no promotion was involved. Such an assignment is clearly a management right as outlined in Article II, Section 1 of the agreement.

"Accordingly, I must reaffirm my earlier decision that the matter is not appropriate for further processing."

On January 28, 1972, the Council charged that the Activity's decision concerning the two grievances violated the Executive Order. 20/

Subsequently, on March 7, 1972, representatives of the Council and the Activity met to discuss the matter. Larry G. Finneman, Lodge 282 Business Representative testified that he was present at the March 7 meeting and at this time the Council while discussing both grievances ". . . argued. . . that the grievance should go to arbitration, and the management had a right at that time to argue before the arbitrator if this grievance was properly before him or not. . . ." According to Finneman, the Agency disagreed with this approach.

A.L. McFall, head of the Labor-Management Division of the Activity testified that he was present at the March 7, 1972 meeting and the matter of submitting the question of the arbitrability of the grievances to an arbitrator was not mentioned at this time nor, to his knowledge, at any other time prior to the hearing. I credit Finneman's testimony in this regard. As hereinbefore set forth, the Council had previously expressed its desire to have both grievances

19/ Joint Exhibit No. 13.

20/ Joint Exhibit No. 14.

decided by an arbitrator which request the Agency declined. Accordingly it is reasonable to assume that arbitration of the grievances would have been discussed at the final meeting. It is further reasonable to assume that the Council would have suggested that an arbitrator could decide the threshold question of arbitrability of the grievances and point out, by way of encouragement to management, that by agreeing to proceed to arbitration the Activity would not be relinquishing its right to argue before the arbitrator the threshold question of arbitrability.

McFall further testified that although the supervisory grievance "didn't get too much play" at this meeting, the Agency took the position that the matter involved only a single reassignment of a supervisor, no one was "hurt" by the reassignment, and there was no violation of the agreement, relying on Article XVII, Section 2.<sup>21/</sup> In any event, the meeting of March 7 did not resolve the grievances, the parties positions remained unchanged and the Complaint herein was filed by the Council.

### III. Contentions of the Parties

The Council alleges that Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally determining that the grievances in issue were not proper for continued processing within the grievance procedure. It urges that Respondent be ordered to arbitrate the threshold question of whether the grievances submitted by Complainant are proper for processing to the third step of the grievance procedure.

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<sup>21/</sup> Article XVII, Section 2 of the Agreement reads: "The Council recognizes that the Employer has the option of filling positions by repromotion, or by methods other than promotion such as appointment, reinstatement, reassignment, or transfer provided the person selected is in the best qualified group using the same qualification standards as for evaluating applicants for promotion."

Respondent contends that, with regard to the layer-out grievance:

(a) The subject matter of the grievance concerns a rating determination and such matters are specifically excluded from the grievance-arbitration provisions of the agreement by the terms of Article XXIX, Section 1(7);

(b) Section 19(d) of the Order provides, in relevant part that "Issues which can properly be raised under an appeals procedure may not be raised under this section." Accordingly, since an appeal under the Job Grading Appeals procedure<sup>22/</sup> will resolve the matter which gave rise to the grievance, the unfair labor practice complaint should be dismissed.

With regard to the supervisory assignment grievance, Respondent contends that by virtue of Article II, Section 1, and Article XVII, Section 2, of the contract the Agency had the unfettered right to make the assignment herein. According to Respondent, Article II, Section 1, merely reaffirms rights established by Section 12(b) of the Order which is not subject to modification or diminution by any negotiated agreement.<sup>23/</sup>

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<sup>22/</sup> Federal Personnel Manual, Chapter 532, Subchapter S7; Joint Exhibit No. 17.

<sup>23/</sup> Section 12(b) of the Order provides:

"Section 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

(b) Management officials of the agency retain the right, in accordance with applicable laws and regulations:

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency." (cont'd.) - 17 -

Further, with regard to both grievances, it is Respondent's position that by virtue of Section 13(d) of the Order<sup>24/</sup> the threshold question of the arbitrability of the grievances, must be submitted to the Assistant Secretary and is the exclusive procedure for resolving the disputes herein. In addition, Respondent contends that absent a showing of bad faith, no violation of Section 19(a)(6) of the Order may be found.

#### Discussion and Conclusions

The record reveals that the parties positions on the arbitrability of the grievances herein are grounded, in substantial part, on divergent interpretations of the terms of their collective bargaining agreement, both parties relying on specific terms of the agreement to support their respective positions. Thus, with regard to the layer-out grievance, Complainant, while acknowledging that the matter could be resolved through the Job Grading Appeals procedures, nevertheless argues that this grievance can be resolved as a contract violation matter as it interprets Article XVII Section 10 of the agreement. Respondent argues that the language of Article X clearly puts the layer-out grievance outside the scope of the grievance procedure. As to the supervisory assignment grievance, Complainant interprets Article XVII Section 8 to permit it to process a grievance on the matter. Respondent, relying on Article II Section 1 and Article XVII Section 2 of the agreement, sees no violation of the agreement in its refusal to process the grievance.

Footnote 23 continued:

Section 12 also provides that:

"The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization."

Section 13(d) of the Order provides:

"Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under the agreement, may be referred to the Assistant Secretary for decision."

The parties have by contract agreed that the method of resolving questions involving the interpretation or application of the agreement shall be through the negotiated grievance procedure and, if necessary, by resort to advisory arbitration. Respondent's refusal to process the grievances herein was based, in large measure, on its unilateral interpretation of the contract and its unilateral determination as to what is grievable (and inferentially arbitrable) under the contract. However, the negotiated agreement does not accord Respondent this broad privilege.

The Assistant Secretary has previously held, in circumstances similar to those herein, that an agency's unilateral determination of what is arbitrable under a negotiated agreement constitutes a unilateral modification of substantial terms of a contract and thereby violates Section 19(a)(1) and (6) of the Order.<sup>25/</sup> The rationale for this holding is equally applicable where an agency unilaterally determines that a dispute is not grievable under a negotiated agreement.<sup>26/</sup> Accordingly, I conclude that Respondent's unilateral determination that under the terms of the negotiated agreement the grievances herein were not proper for further processing into the 3rd step of the grievance procedure or advisory arbitration violated Section 19(a)(1) and (6) of the Order.

Respondent contends that various provisions of the Order preclude an unfair labor practice finding on its refusal to process the two grievances. With regard to the layer-out grievance, Respondent argues that since the proper pay classification of those employees who claimed to be performing layer-out work could have been resolved by recourse to the Job Grading Appeals procedure, under Section 19(d) of the Order, as amended, it was privileged to refuse to process the grievance.<sup>27/</sup> Complainant argues that 19(d) of the unamended

<sup>25/</sup> Norfolk Naval Shipyard, A/SLMR, No. 290; and Long Beach Naval Shipyard, A/SLMR, No. 154.

<sup>26/</sup> Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR, No. 87; and U.S. Army School/Training Center, Fort McCallan, Alabama, A/SLMR, No. 42.

<sup>27/</sup> Section 19(d) provides:

"Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice (cont'd.)"

Order was in effect when the layer-out grievance was filed and therefore is controlling. According to Complainant, the unamended Order does not bar consideration of this matter as an unfair labor practice.<sup>28/</sup>

The layer-out grievance was initially filed on August 20, 1971. Thereafter, on November 15, 1971, Respondent refused to process the grievance any further. Therefore, if applicable, the provisions of Section 19(d) of the unamended Order would control since Respondent's unequivocal refusal to process the grievance further occurred prior to November 24, 1971, the effective date of the amendments to the Order. However, from my reading of both the amended and unamended versions of Section 19(d), I conclude that neither provision is applicable to the issues presented herein. Thus, both versions of this section limit the availability of the complaint procedure under the Order where an appeals procedure exists which would resolve the issue in question. Under neither version of Section 19(d) is Complainant expressly or by implication precluded from filing a grievance on a matter where an appeals procedure might resolve the dispute. Moreover, the issue herein--Respondent's unilateral interpretation of the contract and its refusal to process the grievance--cannot be resolved through any appeals procedure. Accordingly, I reject Respondent's contention that Section 19(d) of the Order is a bar to the action herein.<sup>29/</sup>

(con't.)

decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary.  
<sup>28/</sup> Executive Order 11616 dated August 26, 1971, and effective November 24, 1971, amended Section 19(d) of the Order. Prior to the amendment, Section 19(d) provided:

"When the issue in a complaint of an alleged violation of paragraph (a), (1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary."

<sup>29/</sup> Norfolk Naval Shipyard, supra.

I also reject Respondent's contention that the management rights which flow to Respondent by virtue of Section 12 (b) of the Order constitute a bar to finding an unfair labor practice on its refusal to process the supervisory assignment grievance.

A review of the contract discloses that Respondent herein has previously agreed that certain subjects, broadly enumerated in Section 12(b) of the Order and Article II, Section 1 of the negotiated agreement, are matters appropriate for consultation and negotiation (e.g. promotion plans and demotion practices).<sup>30/</sup> Further, other provisions of the parties negotiated agreement impose certain limitations on management's right to make overtime assignment;<sup>31/</sup> temporarily promote to a non-supervisory position;<sup>32/</sup> and to re-promote a demoted employee.<sup>34/</sup>

It is apparent therefore that Respondent has heretofore not interpreted Section 12(b) of the Order so as to insulate it from negotiating on provisions related to matters broadly encompassed by the language of Section 12(b) of the Order.

Moreover, while every collective bargaining agreement in the federal service must contain a management rights clause embracing the specific rights set forth in Section 12(b) of the Order, this does not mean that in all matters which in any manner relate to the subjects mentioned in Section 12(b), an agency may act unilaterally and is released from any

<sup>30/</sup> Joint Exhibit No. 16, Article VI entitled "Appropriate Matters for Consultation and Negotiations."

<sup>31/</sup> Article IX, Section 1.

<sup>32/</sup> Article XVII, Section provides:

"When practicable the duties of a supervisor who is absent for a time less than one pay period will be assumed by another supervisor. When this is not practicable, a qualified employee will be assigned as acting supervisor. When an employee is so assigned for one full pay period or more a temporary promotion will be made under applicable rules and regulations."

<sup>33/</sup> Article XVII, Section 10.

<sup>34/</sup> Article XVIII, Section 2.

- 21 -

obligation to consult, confer, or negotiate thereon.<sup>35/</sup> Indeed the Federal Labor Relations Council in deciding negotiability questions has held that the procedures used in "reaching the decision or taking the action involved" on subjects within the ambit of Section 12(b) of the Order are not restricted from negotiations.<sup>36/</sup>

Complainant herein does not challenge the Activity's right to make a supervisory assignment. Rather the underlying matter in dispute is the proper procedure to be followed in making the assignment i.e. unilaterally by the Activity or with a qualified employee who is on the MNP associate supervisor register," as suggested in the grievance. Based upon the foregoing I conclude that a determination of this question under the grievance-arbitration machinery is not precluded by the provisions of Section 12(b) of the Order.

I further reject Respondent's argument that the procedure set forth in Section 13(d) of the Order (referral of grievability issues to the Assistant Secretary) is the exclusive procedure to resolve the disputes herein. The Assistant Secretary has held that the provisions of Section 13(d) of the Order are inoperative where the negotiated agreement involved was entered into prior to November 24, 1972, the effective date of Executive Order 11616.<sup>37/</sup> Accordingly, since the negotiated agreement herein was entered into on October 10, 1969, Section 13(d) of the Order is inapplicable when considering the grievability questions presented in this case.

Respondent's contention that no violation of the Order can be found in this matter absent a showing of "bad faith" on the part of Respondent is equally without merit. This contention, previously raised in other cases, has been consistently rejected by the Assistant Secretary.<sup>38/</sup>

35/ Cf. United States Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR, No. 289.

36/ Veterans Administrations Independent Service Employees Union, and Veterans Administration Research Hospital, Chicago, FLRC, No. 71 A-31.

37/ Norfolk Naval Shipyard, supra, Footnote No. 2.

38/ Norfolk Naval Shipyard, supra; Veterans Administration Hospital, Charlestown, South Carolina, supra, and U.S. Army School/Training Center, Fort McClellan, Alabama, supra.

### Remedy

Because of the unfair labor practice conduct as found herein--Respondent's unilateral determination that the layer-out and supervisory assignment grievances were not proper for continued processing within the grievance procedure--Respondent refused to consider the matter at the third step of the grievance procedure. Therefore, I shall recommend that, upon request, the grievances be considered by the Activity at the third step. Respondent has also evidenced a predisposition to refuse to submit the grievances to advisory arbitration. Accordingly, I shall also recommend that if the parties are not able to resolve the grievances at the 3rd step of the grievance procedure, upon request, the entire matter be submitted for advisory arbitration at which time Respondent may put forth its contractual defenses with regard to the grievability of the two grievances, if it so desires.

### Recommendation

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

### Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Puget Sound Shipyard, Department of the Navy, Bremerton, Washington, shall:

1. Cease and desist from:

a. Unilaterally determining the grievability or arbitrability of the layer-out grievance or the supervisory assignment grievance pursuant to its negotiated agreement with the Bremerton Metal Trade Council, AFL-CIO.

b. Interfering with, restraining, or coercing its employees by unilaterally determining the grievability of the layer-out grievance or the supervisory assignment grievance pursuant to its negotiated

agreement with the Bremerton Metal Trades Council, AFL-CIO.

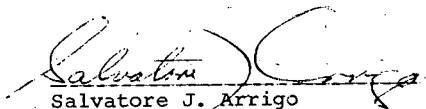
c. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

a. Upon request, proceed to Step 3 of the negotiated grievance procedure on the layer-out grievance and the supervisory assignment grievance. If these matters are unresolved thereafter, upon request, proceed to advisory arbitration on the grievances.

b. Post at its Bremerton, Washington Facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

c. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply herewith.

  
Salvatore J. Arrigo  
Administrative Law Judge

Dated at Washington, D.C. this 12th day of September 1973.

- 24 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE,

We hereby notify our employees that:

WE WILL NOT unilaterally determine the grievability or arbitrability of the layer-out grievance and the supervisory assignment grievance pursuant to the negotiated agreement with the Bremerton Metal Trades Council, AFL-CIO.

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 Executive Order.

WE WILL, upon request proceed to Step 3 of the negotiated grievance procedure on the layer-out grievance and the supervisory assignment grievance. If these matters are unresolved thereafter, we will, upon request, proceed to advisory arbitration on the grievances.

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

Dated \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

This notice must remain posted for sixty (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 directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



December 4, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTIONS  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,  
REGION 9,  
SAN FRANCISCO, CALIFORNIA  
SLMR No. 333

This case involved a representation petition filed by the International Federation of Federal Police (IFFP) seeking an election in a unit of all guards and Federal Protective Officers (FPO's) employed by and assigned to the General Services Administration, Region 9. The Activity agreed that the claimed unit was appropriate. Four locals of the American Federation of Government Employees, AFL-CIO (AFGE), which had exclusive recognition for four units within the Region, which units included guards and FPO's, raised questions pertaining to agreement and recognition bars as well as the appropriateness of the petitioned for unit.

The Assistant Secretary found that the existence of negotiated agreements between the Activity and AFGE Locals 2530 and 2163 barred the inclusion of certain guards and FPO's in existing units located in Phoenix, Arizona, and Sacramento, California, in the petitioned for unit. With regard to AFGE Locals 2424 and 2396, he found that neither of these Locals entered into a negotiated agreement with the Activity encompassing their respective units. Under these circumstances, the Assistant Secretary found no procedural bar to the processing of the subject petition with regard to the guards and FPO's represented by AFGE Locals 2424 and 2396 in existing units.

With respect to the appropriateness of the claimed unit, the Assistant Secretary found that the petitioned for employees shared a clear and identifiable community of interest and that such a comprehensive unit, encompassing guards and FPO's who were covered by the same overall supervision and the same personnel policies and who were engaged in essentially the same job functions, will promote effective dealings and efficiency of agency operations.

Noting, among other things, the absence of a collective bargaining history with respect to a unit of all the Activity's guards and FPO's located in Los Angeles, California, represented by AFGE Local 2424, the Assistant Secretary found such unit to be inappropriate and, based on the holding in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, included such employees under the IFFP petition.

With respect to the mixed unit of the Activity's guards and non-guards located in Las Vegas, Nevada, represented by AFGE Local 2396, the Assistant Secretary found in accordance with Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, that severance of the guard employees was warranted and that AFGE Local 2396, a nonguard labor organization, would not be placed on the ballot. However, consistent with his rationale in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, the Assistant Secretary determined that if the guard employees in the Las Vegas unit did not choose the IFFP as their exclusive representative, they will be viewed to have indicated their desire to remain in the existing mixed unit of guards and nonguards represented by the AFGE Local 2396. If, on the other hand, the majority of the guard employees in the Las Vegas unit voted for the IFFP, there would be a pooling of the ballots with those voting in the residual Regionwide election.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
REGION 9,  
SAN FRANCISCO, CALIFORNIA

Activity

and

Case No. 70-2486

INTERNATIONAL FEDERATION OF FEDERAL POLICE

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCALS 2530, 2424, 2396, and 2163

Intervenor

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Marilyn Koslow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, International Federation of Federal Police, herein called IFFP, seeks an election in a unit of all guards and Federal protective officers (FPO's) employed by and assigned to the General Services Administration, Region 9, excluding supervisors, management officials, professional employees, and employees engaged in Federal personnel work in other than a purely clerical capacity. 1/

1/ The unit description appears as amended at the hearing.

The Activity takes the position that the petitioned for unit is appropriate. The Intervenor, American Federation of Government Employees, AFL-CIO, Locals 2530, 2424, 2396, and 2163, herein called AFGE, raised questions pertaining to agreement and recognition bars as well as the appropriateness of the petitioned for unit. 2/

The General Services Administration (GSA) is responsible for the management of Federal buildings. Region 9 of GSA, which is headquartered in San Francisco, California, encompasses the states of California, Nevada, Arizona, and Hawaii. All of the employees in the claimed unit are employed in the Federal Protective Service Division of the Public Buildings Service of the Activity which is responsible for the protection of personnel and property under the control or jurisdiction of GSA. The majority of the Activity's petitioned for Federal protective personnel are located in Los Angeles and San Francisco with the remainder dispersed throughout the various GSA field offices in Region 9.

ALLEGED BARS TO THE PETITION

AFGE Local 2530 is the exclusive representative of a bargaining unit encompassing guards and nonguards at the Activity's facility in Phoenix, Arizona. The record reveals that an initial basic agreement between the Activity and Local 2530 had an effective date of February 24, 1966, and that, thereafter, a supplemental agreement was entered into by the parties on February 28, 1968. The most recent renewal of these agreements occurred on February 24, 1973.

The Activity asserts that the agreements between it and AFGE Local 2530 are defective and, therefore, do not constitute a bar to the IFFP's petition in this matter. In essence, the Activity alleges that the

2/ Additionally, at the hearing, the AFGE moved to dismiss the IFFP's petition asserting that the IFFP had failed to serve simultaneously its petition on the AFGE in contravention of Section 202.2(e)(4) of the Assistant Secretary's Regulations. The Assistant Regional Director previously had denied the AFGE's motion on the ground that all four of the affected AFGE Locals had intervened timely and were fully participating in this proceeding, thereby suffering no prejudice as a result of not having been served simultaneously with the petition. In agreement with the Assistant Regional Director and noting particularly that no interested parties were designated by the IFFP on the latter's petition, I find that the IFFP was not obligated under the Regulations to make simultaneous service of the petition on the AFGE Locals involved therein. Accordingly, the AFGE's motion is hereby denied. See, in this regard, United States Air Force, Non-Appropriated Fund Activities, Tyndall Air Force Base, Florida, A/SLMR No. 226, at footnote 1.

c and supplemental agreements are unclear as to their termination and, further, that such agreements, although having automatically extended twice since Executive Order 11491 was amended, do not include a bilaterally negotiated grievance procedure as required by Section 13 of the amended Order.

With respect to the contention that the agreements involved have near termination dates, it was noted that in its opening paragraph supplementary agreement specifically provides that it be incorporated part of the parties' basic agreement. Further, it was noted that Article V, Section 3 of the basic agreement provides, in pertinent part, that the provisions of supplementary agreements entered into by the parties will remain in effect until the basic agreement is terminated. That Article V, Section 1 of the basic agreement provides that the agreement shall be effective for a one-year period from its initial effective date with an additional provision for automatic renewal. In the circumstances, I find that the duration language in the basic agreement is sufficiently clear to establish a definable "open period" which both the basic and supplementary agreements in which the existing agreement could be challenged. Also, I reject the Activity's contention that the agreements involved do not contain a grievance procedure as required by Section 13 of the Order. Thus, the record reveals that the supplemental agreement involved herein contains a grievance procedure, divided into various steps which, in my view, satisfies the requirements of the Order. Moreover, in my judgment, a substantial doubt exists as to the Activity's standing herein to question the propriety of its own negotiated agreement.

Under all of these circumstances, and noting that the IFFP's petition in the subject case was filed less than 60 days prior to the terminal date of the parties' negotiated agreements, I find, in accordance with Section 202.3(c) of the Assistant Secretary's Regulations, that an agreement bar exists with respect to the guards and FPO's employed by the General Services Administration, Region 9, in Phoenix, Arizona. Accordingly, I shall exclude such employees from any unit found appropriate herein. 3/

AFGE Local 2163 is the exclusive representative of a unit of GSA employees, including guards and nonguards, located in Sacramento, California. The record reveals that an initial basic agreement between the Activity and AFGE Local 2163 was effective as of August 27, 1964, and that the most recent renewal of such agreement occurred on August 27, 1973. The Activity asserts that its negotiated agreement with AFGE Local 2163 does not constitute a bar because it does not include a bilaterally negotiated grievance procedure as required by

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Cf. General Services Administration, Region 2, New York, New York, A/SLMR No. 220.

Section 13 of the amended Order. Contrary to the Activity's contention, in my view, the evidence herein establishes that AFGE Local 2163's negotiated agreement contains a grievance procedure which is consistent with the criteria set forth in Section 13 of the Order. Moreover, as noted above, there is a substantial doubt as to whether the Activity herein has standing to question the propriety of a negotiated agreement to which it is a party.

Under these circumstances, and noting the fact that the IFFP's petition in the subject case was filed more than 90 days prior to the terminal date of the parties' negotiated agreement, I find, in accordance with Section 202.3(c) of the Assistant Secretary's Regulations, that an agreement bar exists with respect to those guards and FPO's employed by the General Services Administration, Region 9, in Sacramento, California. Accordingly, I shall exclude such employees from any unit found appropriate herein. 4/

AFGE Locals 2424 and 2396. On January 8, 1966, AFGE Local 2424 became the exclusive representative of a unit of the Activity's guards located in Los Angeles, California. Also, on April 9, 1969, AFGE Local 2396 became the exclusive representative of a unit including guards and nonguards located in Las Vegas, Nevada. Neither of these locals entered into a negotiated agreement with the Activity encompassing their respective units.

Under these circumstances, I find that no procedural bar exists as to the processing of the subject petition insofar as it encompasses the Activity's guards and FPO's located in Los Angeles, California, and Las Vegas, Nevada.

#### APPROPRIATE UNITS

The Federal Protective Service Division of the Activity has an authorized staffing pattern of 249 Federal protective personnel (guards and FPO's). Of this number, 101 are authorized for Los Angeles and 78 for San Francisco--the two central protective forces of the Region. These two central protective forces are each headed by a Captain who is responsible for providing protective services to the four building managers in his respective area. Outside of the Los Angeles and San Francisco areas, the building managers exercise supervision over the Federal protective personnel under the jurisdiction of their particular field office. 5/ The Operations Branch of the Division provides technical guidance and direction to the building managers in the form

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4/ Cf. General Services Administration, Region 2, New York, New York, cited above.

5/ Such supervision includes control over such matters as leave, discipline, performance evaluations, etc.

of policies and procedures pertaining to the Federal protective personnel under their control. The Division also reviews and approves personnel assignments recommended by the building managers in the outlying field offices and by the central protective force Captains.

The Federal Protective Service Division receives its personnel services from the Region's Personnel Division. Federal protective personnel are governed by the same promotion, reduction-in-force, classification, placement, selection, grievance, and labor relations policies and procedures as are provided by the Personnel Division to all other employees in the Region. The evidence establishes that all Federal protective personnel in GSA Region 9 perform essentially the same duties and are under the same supervisory structure. The record reveals further that Federal protective personnel wear different uniforms, work a different tour of duty 6/, and operate under different standardized practices and procedures from other employees in the Region. Moreover, they possess special arrest authority and may carry firearms if qualified.

Under all of the circumstances, I find that all the nonsupervisory guards and FPO's employed in GSA Region 9 share a clear and identifiable community of interest, and that such a comprehensive unit will promote effective dealings and efficiency of agency operations. In reaching this conclusion, noted particularly were the facts that all employees in the claimed unit share a common mission, have the same working conditions, perform the same job functions, and are covered by the same personnel and labor relations policies promulgated by the Personnel Division at the Regional level. Further, they are all subject to the direction and guidance emanating from the Director of the Federal Protective Service Division. Accordingly, except as modified below, I shall direct an election in the petitioned for unit which I find to be appropriate for the purpose of exclusive recognition under the Order. 7/

As noted above, since January 8, 1966, AFGE Local 2424 has been the exclusive representative of a unit of all the Activity's guards and FPO's located in Los Angeles, California. It appears from the record that the Local has not entered into a negotiated agreement with the Activity encompassing the unit in question since its initial recognition in 1966. In addition to the above-noted factors relied upon in finding a Regionwide unit of guards and FPO's appropriate, the record reveals that there is some interchange between Los Angeles Area guards and FPO's

6/ Their tour of duty is 8 hours of continuous duty with 3 shifts during each 24-hour period.

7/ Cf. General Services Administration, Region 2, New York, New York, cited above.

and other guards and FPO's in the Region. 8/ Based on these particular circumstances, and noting the fact that effective dealings resulting in a negotiated agreement have not occurred, I find that the Los Angeles unit of guards and FPO's is not appropriate for the purpose of exclusive recognition. Thus, in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, the Assistant Secretary found, with respect to those exclusively recognized units in which the evidence did not establish the existence of a negotiated agreement or a recently expired negotiated agreement, that the appropriateness of such units for the purpose of exclusive recognition under the Executive Order may be considered without regard to a prior grant of exclusive recognition upon the filing of a petition encompassing the units involved. It was also found that "if such exclusively recognized units are deemed to be inappropriate, the employees in these units would be included properly under the . . . [comprehensive] petition and, accordingly, would vote in any election conducted pursuant to that petition, without regard to their prior inclusion in less comprehensive exclusively recognized units." Under these circumstances, I will include the guards and FPO's in the Los Angeles area in the petitioned for unit in the subject case.

With respect to the mixed unit of the Activity's guards and nonguards located in Las Vegas, Nevada, and currently represented by AFGE Local 2396, the Assistant Secretary previously held in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, that where, as here, a timely petition seeks to sever a unit of all guard employees from an existing unit of guard and nonguard employees, such unit of guards is appropriate for the purpose of exclusive recognition. 9/ Under these

8/ The Los Angeles and San Francisco central protective forces each make available to the Federal Protective Service Division a specially trained group of Federal protective personnel who respond to emergencies occurring in the Region.

9/ In A/SLMR No. 45, the Assistant Secretary stated, in part, that "Sections 10(b)(3) and 10(c) of Executive Order 11491 clearly reflect the view that appropriate units should not be composed of mixtures of guards and nonguards and that nonguard labor organizations should not represent guards. In view of this clear mandate, I find that despite a history of representation in a combined unit, severance of the guard employees from the unit represented currently by the Intervenor is not precluded by my previously announced policy in U. S. Naval Construction Battalion Center, cited above." (Footnotes omitted.) See also, in this regard, Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107 and General Services Administration, Region 2, New York, New York, cited above.

umstances, I find that the following employees in voting group (a) would be afforded the opportunity to express their desire as to whether or not they wish to be included within the petitioned for Regionwide unit of guards and FPO's:

Voting Group (a): All guards and Federal Protective Officers located in Las Vegas, Nevada, employed by and assigned to the General Services Administration, Region 9, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

Further, based on the foregoing, I find that the following employees in voting group (b) constitute a unit appropriate for the purpose of exclusive recognition within the meaning of the Order:

Voting Group (b): All guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, in Phoenix, Arizona, and Sacramento, California, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

In these circumstances, I will not make any final unit determination at this time, but shall first ascertain the desires of the claimed employees in the voting group (a). As noted above, Sections 10(b)(3) and 10(c) of Executive Order 11491, as amended, indicate that appropriate units established under Executive Order 11491 should not be composed of mixtures of guards and nonguards and that nonguard labor organizations should not represent guards. Accordingly, although AFGE Local 2396 intervened timely with respect to the mixed unit of guards and nonguards located in Las Vegas, Nevada (voting group (a)), I will not permit AFGE Local 2396's name to be placed on the ballot. 10/ However, consistent with the rationale in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, if a majority of the

See, in this regard, Treasury Department, United States Mint, Philadelphia, Pennsylvania, cited above. At the hearing, the AFGE contended that in the event that it was precluded from appearing on the ballot in this matter and the IFFP did not secure a majority of the votes cast, it should be permitted to retain its exclusive recognition status in those units in which it currently holds exclusive recognition.

-7-

employees in voting group (a) does not choose the IFFP as their exclusive representative, they will be viewed to have indicated their desire to remain in the existing mixed unit of guards and nonguards represented by the AFGE. 11/

The unit determination in the subject case is based in part, then, upon results of the election in voting group (a). However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of employees in voting group (a) votes for the IFFP, the following employees would constitute a unit appropriate for the purpose of exclusive recognition under the Order:

All guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, in Phoenix, Arizona, and Sacramento, California, professional employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

2. If a majority of employees in voting group (a) does not vote for the IFFP, the following employees would constitute a unit appropriate for the purpose of exclusive recognition under the Order:

All guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 9, in Phoenix, Arizona, Sacramento, California, and Las Vegas, Nevada, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

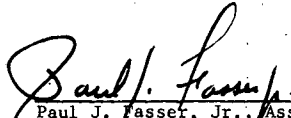
11/ If, on the other hand, the majority of the employees in voting group (a) votes for the IFFP, the labor organization seeking to represent a Regionwide unit of guards and FPO's, such votes will be pooled with those in voting group (b) with the votes for the IFFP being accorded their face value and the votes against severance from the mixed unit of guards and nonguards being counted as part of the total number of valid votes cast but neither for nor against the IFFP. Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6.

-8-

December 4, 1973

Elections by secret ballot shall be conducted among the employees in the voting groups described above as early as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in voting groups (a) and (b) shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the International Federation of Federal Police.

Dated, Washington, D.C.  
December 4, 1973

  
Paul J. Fasset, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS  
A/SLMR No. 334

This proceeding arose upon the filing of three unfair labor practice complaints. Two of the complaints (Case Nos. 50-5999 and 50-8198) were filed jointly by an individual employee of Respondent Activity and by his exclusive representative, Local 2816, American Federation of Government Employees, AFL-CIO (AFGE), and alleged that the Respondent Activity had violated Sections 19(a)(1) and (2) of the Executive Order by failing to process certain grievances filed by or in behalf of the employee involved, and by circulating certain memoranda pertaining to these grievances to various levels of management. The complaint in Case No. 50-8924 was filed by the AFGE and alleged that the employee involved was denied an outstanding performance rating and a quality increase because of his union activities and his criticism of management, in violation of Section 19(a)(1) and (2) of the Order. The Assistant Regional Director consolidated the cases for hearing and decision by the Assistant Secretary.

The Administrative Law Judge issued a separate Report and Recommendation in Case No. 50-8924 in which he recommended that the complaint be dismissed. In a second Report and Recommendation in Case Nos. 50-5999 and 50-8198, the Administrative Law Judge recommended the dismissal of the complaint in Case No. 50-8198, and of certain of the allegations in Case No. 50-5999, but he found that the Respondent had violated Section 19(a)(1) of the Order by failing to process, under the Agency grievance procedure, all or part of certain of the employee's grievances.

In finding that the Respondent's failure to process the grievances constituted a violation of Section 19(a)(1), the Administrative Law Judge relied on the Assistant Secretary's decisions in Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, and Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 154, and he concluded that while these two cases involved the failure to follow a negotiated grievance procedure, the question whether the grievance procedure was, or was not, a negotiated one was relevant only with respect to whether Section 19(a)(6) of the Order was violated, and was not determinative with respect to a Section 19(a)(1) allegation.

The Assistant Secretary found, contrary to the Administrative Law Judge, that different considerations apply when the grievance procedure is a negotiated procedure rather than a procedure established unilaterally by the agency. Thus, unilateral conduct in failing to apply the terms and conditions of a negotiated agreement in A/SLMR No. 87 and A/SLMR No. 154,

e., a grievance procedure which resulted from bilateral negotiations), constituted an improper refusal to consult, confer, or negotiate with the exclusive representative and also constituted interference with employee rights assured under the Order. The finding of Section 19(a)(1) violations in those cases was premised on the fact that the Respondent had interfered with employee rights secured through the process of negotiations. The Assistant Secretary noted, however, that an agency grievance procedure, such as the one under which the grievances in this matter were processed, does not result from any rights accorded individual employees or labor organizations under the Order, and that such a procedure is applicable to all employees of the agency not covered by a negotiated grievance procedure, whether or not they are in exclusively recognized units. The Assistant Secretary concluded, therefore, that even if an agency improperly fails to apply its own grievance procedure, such failure, standing alone, cannot be said to interfere with rights assured under the Order. He noted, in this regard, that the policing and enforcing of agency grievance procedures are the responsibility of the agency involved and of the U.S. Civil Service Commission. Accordingly, and as the evidence did not establish that the Respondent's conduct was motivated by anti-union considerations, the Assistant Secretary found that the failure to process the Complainants' grievances under the agency grievance procedure did not constitute a violation of Section 19(a)(1). Moreover, in the absence of evidence of discriminatory motivation or disparity of treatment based on union membership considerations, the Assistant Secretary, in agreement with the Administrative Law Judge, found that the Respondent's conduct was not violative of Section 19(a)(2) of the Order.

In accordance with those findings and recommendations of the Administrative Law Judge which he adopted, and with his own findings and conclusions, the Assistant Secretary dismissed all of the complaints in their entirety.

-2-

A/SLMR NO. 334

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-5999

MICHAEL BOTTIGLIERO, AND LOCAL 2816,  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

Complainants

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-8198

MICHAEL BOTTIGLIERO, AND LOCAL 2816,  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

Complainants

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-8924

LOCAL 2816, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On July 19, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in Case No. 50-8924 finding that the Respondent had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed. Thereafter, the Complainants filed

exceptions to the Administrative Law Judge's Report and Recommendation, together with a supporting brief.

On August 10, 1973, Administrative Law Judge Kramer issued a separate Report and Recommendation in Case Nos. 50-5999 and 50-8198 finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint in Case No. 50-8198, but that it had engaged in certain unfair labor practices alleged in the complaint in Case No. 50-5999, and recommending that it take certain affirmative actions to remedy such violations of the Order. Thereafter, the Complainants filed exceptions to the Report and Recommendation, together with a supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. 1/ The rulings are hereby affirmed. Upon consideration of both of the Administrative Law Judge's Reports and Recommendations and the entire record in the subject cases, including the Complainants' exceptions and briefs, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

Case Nos. 50-5999 and 50-8198

The complaints in Case Nos. 50-5999 and 50-8198 alleged that the Respondent violated Sections 19(a)(1), (2), (4) and (5) of the Order

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1/ Because all of the above designated cases involved the same parties and were concerned with certain alleged rights of the Complainant, Michael Bottigliero, the Assistant Regional Director consolidated the cases for hearing and decision by the Assistant Secretary. Thereafter, as indicated above, the Administrative Law Judge, in effect, severed Case No. 50-8924 and issued a separate Report and Recommendation in that case. Section 203.15 of the Assistant Secretary's Regulations sets forth the duties and powers of the Administrative Law Judge. Such duties and powers do not include the authority to sever cases which previously had been consolidated for hearing by the Assistant Regional Director for Labor-Management Services pursuant to the latter's authority under Section 206.6 of the Assistant Secretary's Regulations. Accordingly, I find that the Administrative Law Judge improperly severed Case No. 50-8924 from Case Nos. 50-5999 and 50-8198 and, in my review of the two Reports and Recommendations issued by the Administrative Law Judge, both of which are attached herewith, I have considered all of the evidence adduced at the hearing as it may apply to the allegations in each complaint.

based on its alleged failure or refusal to process properly certain grievances filed by the Complainant Michael Bottigliero, an employee of the Respondent. 2/ Specifically, the complaint in Case No. 50-5999 alleged that the Respondent violated the Order by failing to process certain grievances filed by or on behalf of Bottigliero on March 26, 1971, June 14, 1971, and June 30, 1971, and, further, that the Respondent violated the Order by circulating certain memoranda pertaining to these grievances to various levels of management. In Case No. 50-8198, it was alleged that the Respondent, because of Bottigliero's active unionism and his outspoken criticism of management as a union member, failed to process a grievance dated November 1, 1971, in which Bottigliero asserted that the Respondent had defrauded him of specified amounts of annual, sick and compensatory leave. It is asserted that the Respondent's refusal to process these grievances constituted a systematic attempt to drive Bottigliero and other employees out of the Complainant labor organization by denying them and the Union Grievance Committee access to the agency grievance procedure.

The Respondent does not dispute the fact that the Complainants filed the grievances in question; that such grievances were not withdrawn or mutually disposed of; and that such grievances were not finally decided in accordance with the Staff Instructions of the Office of Economic Opportunity. However, the Respondent asserts that its actions do not constitute a violation of the Order as none of the rights assured the Complainants under the Order require that an agency follow a regulatory agency grievance procedure or prohibit it from deviating from such a procedure.

In his Report and Recommendation, the Administrative Law Judge recommended that the complaint in Case No. 50-8198 be dismissed. With respect to the complaint in Case No. 50-5999, the Administrative Law Judge found that the Respondent had violated Section 19(a)(1) based on its failure to process that part of a March 26, 1971, grievance concerning Bottigliero's request for a within-grade quality increase and its failure to process a part of a June 14, 1971, grievance and a June 30, 1971, grievance. He also recommended the dismissal of the remainder of the complaint in Case No. 50-5999, including the allegation that the Respondent's actions constituted a violation of Section 19(a)(2) of the Order.

The record reflects that, at all times material herein, there was no negotiated grievance procedure covering the unit employees represented by the Complainant, Local 2816, American Federation of Government Employees, AFL-CIO, the exclusively recognized representative. Thus, the grievance procedure the Complainants sought to utilize in this matter was one established by agency instruction or regulation. Further, at the time the grievances involved in Case No. 50-5999 were filed, this procedure

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2/ The Assistant Regional Director dismissed the allegation that the Respondent had violated Section 19(a)(4) and (5) of the Order. No request for review of this action subsequently was filed with the Assistant Secretary.



provided for reference to a hearing committee for investigation if internal attempts at settlement were unsuccessful. No time limits for resolution were provided under this procedure. By the time the grievance Case No. 50-8198 was filed, the procedure had been amended to provide for a grievance examiner instead of a hearing committee. The amended procedure excluded from coverage of the grievance procedure, among other matters, the non-adoption of a suggestion for a quality increase. It also provided that where a grievance was not resolved in a manner acceptable to the grieving employee within ten days, the deciding official would refer the matter to the Director of Personnel of the Office of Economic Opportunity for inquiry by an examiner. The record reveals that the Respondent began processing some of the allegations contained in certain of the grievances herein, and moved to settle others, in accordance with the agency grievance procedure. However, the Respondent did not follow the established grievance procedure to conclusion in any instance and the complainants did not agree that any of the grievances had been resolved to their satisfaction.

In finding that the Respondent's failure to process certain parts of the Complainants' grievances constituted a violation of Section 19(a)(1) of the Order, the Administrative Law Judge relied on the Assistant Secretary's decisions in Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87 and Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 154. He concluded that, while these two cases involved the failure to follow a negotiated grievance procedure, the question whether the grievance procedure was, or was not, a negotiated one is relevant only with respect to whether or not Section 19(a)(6) of the Order was violated, and was not determinative with respect to a Section 19(a)(1) allegation.

In my view, the Administrative Law Judge has misconstrued the Assistant Secretary's decisions in A/SLMR No. 87 and A/SLMR No. 154. As indicated above, in those cases the grievance procedures, which the Respondents unilaterally failed to proceed under, were negotiated grievance procedures. Thus, the issue presented was whether the labor organizations involved were entitled to have the terms of their respective negotiated agreements followed, and whether the failure to do so resulted in a violation of Section 19(a)(1) and (6) of the Order. In both situations, the Assistant Secretary found, in effect, that the unilateral conduct in failing to apply the terms and conditions of the negotiated agreement, constituted an improper refusal to consult, confer, or negotiate with the exclusive representative and also constituted an improper interference with employee rights assured by the Order. It is clear that the finding of violations of Section 19(a)(1) in the above-named cases was premised on the fact that the Respondents had interfered with employee rights

secured by their respective exclusive bargaining representatives through the process of negotiations. 3/

On the other hand, where, as here, the grievance procedure which allegedly has been violated by the agency involved, is a procedure established by the agency itself rather than through the process of bilateral negotiations, I find that different considerations apply. Thus, an agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order. Moreover, such a procedure is applicable to all employees of an agency not covered by a negotiated grievance procedure, regardless of whether or not they are included in exclusively recognized bargaining units. Under these circumstances, I find that, even assuming that an agency improperly fails to apply the provisions of its own grievance procedure, such a failure, standing alone, cannot be said to interfere with rights assured under the Order and thereby be violative of Section 19(a)(1).4/

Based on the foregoing, and noting the Administrative Law Judge's finding, which I adopt, that the evidence does not establish that the Respondent's conduct herein was motivated by anti-union considerations, I find that the Respondent's failure to process the Complainants' grievances under the former's grievance procedure did not constitute a violation of Section 19(a)(1) of the Order. And, in the absence of evidence of discriminatory motivation or disparity of treatment based on union membership considerations, I find, in agreement with the Administrative Law Judge, that the Respondent's conduct herein was not violative of Section 19(a)(2) of the Order. Accordingly, I shall order that the complaints in Case Nos. 50-5999 and 50-8198 be dismissed in their entirety.

3/ In both Veterans Administration Hospital, Charleston, South Carolina, cited above, and Long Beach Naval Shipyard, Long Beach, California, cited above, the Assistant Secretary stated that where "an activity engages in a course of conduct which has the effect of evidencing to employees that it can act unilaterally with respect to negotiated terms and conditions of employment without regard to their exclusive representative," (emphasis added) the rights of employees established under Section 1(a) of the Order have been interfered with in violation of Section 19(a)(1) of the Order.

4/ This is not to say that no remedy is available if there is a failure to apply the provisions of an agency grievance procedure. However, the policing and enforcing of agency grievance procedures are the responsibility of the agency involved and the U.S. Civil Service Commission.

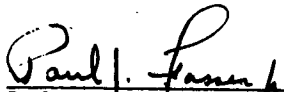
The complaint in Case No. 50-8924 alleged that Bottigliero was denied an outstanding performance rating and a quality increase because of his union activities and his criticism of management in violation of Section 19(a)(1) and (2) of the Order.

Under all of the circumstances, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge dismissing this complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 50-5999, 50-8198 and 50-8924 be, and they hereby are, dismissed.

Dated, Washington, D.C.  
December 4, 1973

  
Paul J. Fasser, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Case No. 50-8924

Local 2816, American Federation of Government  
Employees, AFL-CIO,

Complainant

and

Office of Economic Opportunity, Region V,  
Chicago, Illinois,

Respondent

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

Charles Barnhill, Jr.  
22 East Huron St.,  
Chicago, Illinois 60611  
For the Complainant

Eugene Ring, Regional Counsel  
Office of Economic Opportunity, Region V  
300 South Wacker Drive  
Chicago, Illinois 60606  
For the Respondent

Before: Milton Kramer, Administrative Law Judge

## Statement of the Case

This case arises under Executive Order 11491. It is initiated by a complaint of Local 2816 dated and filed April 17, 1972 alleging a violation by Respondent of Section 19(a)(1) and (2) of the Executive Order. The alleged violation is predicated on the allegation that Michael Bottigliero, an employee of Respondent, performed his official duties in a manner substantially exceeding normal work standards but was denied a performance rating of "Outstanding" for "his truly exceptional level of performance" and was denied a "Quality Increase" because of his union activism and outspoken criticism of Region V management".

The Area Administrator investigated the complaint and reported to the Regional Administrator. On May 2, 1972 Respondent filed with the Compliance Officer a motion to dismiss the complaint on various grounds. On October 31, 1972 the Regional Administrator formally stated that he would consolidate this case with certain other cases involving Bottigliero for hearing. On December 4, 1972, the Regional Administrator denied the motion to dismiss and consolidated this case with Case No. 50-5999 and Case No. 50-8198. The same day he issued a Notice of Hearing on the three cases to be held January 16, 1973. Case No. 50-5999 and Case No. 50-8924, alleging violations of the Executive Order with respect to matters pertaining to Bottigliero unrelated to this case, will be the subjects of separate report and Recommendation.

Hearings were held in Chicago, Illinois on the three cases on January 16, 17, 22, and 23, 1973. The parties were represented by counsel. Complainant's motions for extensions of time for filing briefs, consented to by Respondent, were granted for good cause. The parties filed timely briefs which were received April 9 and 12, 1973.

### Facts

Michael Bottigliero is employed by Respondent as an Audit Review Specialist, GS-12. He is a member of Local 2816, having become a member in 1967 when it was first organized.

The American Federation of Government Employees, AFL-CIO represents employees of the Office of Economic Opportunity, including those in Region V covered by Local 2816. He was an active union member.

In the course of his employment by O.E.O., Bottigliero filed numerous requests for a quality step increase because of claimed superior performance. Included among them was his request on January 18, 1972 for a "merit step increase". That request was in the form of a notation by him under "Employee's Comments" on his "Official Performance Rating" (OEO Form 200) for the period December 14, 1970 to December 14, 1971. The form called for a rating of "outstanding", "satisfactory", or "unsatisfactory". The rating given Bottigliero was "satisfactory". The date of the rating is September 27, 1971. It was signed on January 3, 1972 by Martin Kozak, Bottigliero's supervisor and his rating official. The form was reviewed by Samuel W. Robinson as the Reviewing Official on January 19, 1972, the day after Bottigliero's request. Mr. Bottigliero's request, noted on that form, was not granted. The failure to grant the request for a quality increase was not made the subject of a grievance. The only issue here is whether the failure to grant the requested increase was prompted, as alleged, by Bottigliero's union activism.

The record contains evidence on the basis of which it is argued that some supervisory officials of Region V harbored an anti-union animus. There is no evidence in the record on the basis of which it is or could be argued that Kozak, the supervisor of Bottigliero, had a hostile union animus.

Martin Kozak is an Audit Review Specialist who supervises other Audit Review Specialists, including Bottigliero. The highest grade of those supervised by Kozak is GS-12, which was Bottigliero's grade. There were three employees supervised by Kozak in that grade.

Kozak testified that when Bottigliero entered his request for a merit step increase on the performance rating form, Kozak told him that he would not recommend it and Bottigliero

would not get it. Kozak was of the view that such an increase was normally initiated by the supervisor and not by the employee. He believed it was unnecessary for him to do anything about the requested increase; he believed that if he did not recommend it, Bottigliero would not get it.

Kozak testified that in his opinion Bottigliero's performance did not justify a merit increase. He considered Bottigliero, although technically competent, the least competent of the three GS-12's he supervised. Bottigliero was the least productive of the three. Initially, all three were assigned the same case load. Gradually Kozak had to reduce Bottigliero's case load until it was about one-half of each of the others, and even then his production continued to be less expeditious than the others. One of the other two was far superior to Bottigliero in quality of work and substantially superior in productiveness. The other performed work of about the same quality as Bottigliero but was more productive. None of this was contradicted.

In addition, Kozak testified, also without contradiction, that Bottigliero did not get along as well as the others either with his colleagues or with the field representatives. He constantly complained, about his fellow employees, the working conditions, and everything pertaining to his employment. He was unable to handle conferences with grantees and their auditors, unlike the other Audit Review Specialists, and required more assistance in such duties than the others.

The only attempt made to impeach any of Kozak's testimony was a showing that on February 15, 1972 Kozak recommended that his unit be granted a group award in the form of a cash award for superior performance. Kozak testified that he made such recommendation for the unit as a whole, that the unit as a whole had made a superior contribution, but that Bottigliero was one of the "also rans" in the unit and was not himself worthy of special recognition. There was no attempt to refute this. Kozak's recommendation for the unit award was not adopted.

#### Discussion and Conclusion

The complaint alleges that Bottigliero was not given a rating of "outstanding" and was not given a quality increase because of his union activism. It alleges also that the head of the Activity was retaliating against Bottigliero for his union activism and outspoken criticism of management.

The evidence does not show that the head of the Activity had anything to do with the incidents involved in this complaint other than to disapprove Kozak's recommendation that his unit be given an award. There is nothing in the record to show, and I do not find, that Verduin, the Regional Director of Region V, disapproved that recommendation because he disliked one member of the unit, Bottigliero. And with respect to the allegation that Verduin was retaliating against Bottigliero because of his outspoken criticism of management, even if it were proven there is nothing in the Executive Order that would prohibit it. The Executive Order is not a panacea for everything in employee relations.

There is nothing in the record to show that Verduin had anything to do with Kozak's rating of Bottigliero or the denial of his request for a quality increase. The record shows that the rating and the denial of the request were entirely attributable to Kozak. There is nothing in the record to indicate any animus against unionism or Bottigliero by Kozak other than the fact that Kozak thought Bottigliero complained interminably about his fellow employees and working conditions. Kozak testified with sincerity and candor. I believe his testimony that his rating of Bottigliero and his refusal to recommend him for a quality increase were based solely on his opinion that Bottigliero's work was only mediocre and inferior to the work performed by the others in the unit in the same grade.

There was no testimony concerning the quality of Bottigliero's work other than that given by Kozak. The only attempt to contradict any of Kozak's testimony was the showing that Kozak had recommended a special award for the entire unit.

ozak's explanation that he made that recommendation (which  
as rejected by Verduin) because he believed the unit as a  
whole had shown superior performance because of superior  
work by others in the unit, without Bottiglierio contributing  
to that superiority, was credible, and I believe it.

I conclude the allegations of the complaint have not  
been proven.

Recommendation

The complaint should be dismissed.



MILTON KRAMER  
Administrative Law Judge

July 19, 1973

- 5 -

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D. C.

Cases Nos. 50-5999  
50-8198

Michael Bottiglierio and O.E.O. AFGE Local 2816,  
Complainants

and

Office of Economic Opportunity, Region V, Chicago Region,  
Respondent

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Charles Barnhill, Jr.  
22 East Huron Street  
Chicago, Illinois 60611  
For the Complainants

Eugene Ring, Regional Counsel  
Office of Economic Opportunity, Region V  
300 South Wacker Drive  
Chicago, Illinois 60606  
For the Respondent

Dated: August 10, 1973

Table of Contents

	Page
I. Statement of the Case	1
II. Facts	1
A. The Grievant	1
B. The Complaints	2
C. Anti-Union Bias	3
D. The March 26, 1971 Grievance	5
1. Failure to Show Bottiglierio OEO Form 81	5
2. The Processing of One of Bottiglierio's Requests for a Within-Grade Merit Increase	6
3. Advance Authorization of Overtime	6
4. Further Processing of this Grievance	7
E. The Alleged Practice of Respondent Publicizing Bottiglierio's Grievances	8
F. The June 14, 1971 Grievance	10
G. The June 30, 1971 Grievance	11
H. Case No. 50-8198; the November 15, 1971 Grievance	13
III. Discussion and Conclusions	15
A. Scope of the Complaints	15
B. Respondent's Motivation	15
C. The March 26, 1971 Grievance	17
1. Items on Which the Grievance was Granted	17
2. The Request for a Quality Increase	18
D. The Publicizing of Grievances	19
E. The June 14, 1971 Grievance	21
F. The June 30, 1971 Grievance	22

G. Case No. 50-8198	23
IV. Recommendation	25
The Remedy	25
Proposed Order	26
Proposed Notice	28

Michael Bottigliero and O.E.O. AFGE Local 2816,  
Complainants

and

Office of Economic Opportunity, Region V, Chicago Region,  
Respondent

### I. Statement of the Cases

These cases arise under Executive Order 11491. Case 50-5999 was initiated by an undated complaint, filed January 18, 1972, alleging violations by Respondent of Sections 19(a)(1), (2), (4), and (5) of the Executive Order failing to process three grievances of Bottigliero and publicizing Bottigliero's grievances. Case No. 50-8198 was initiated by an undated complaint, filed March 1, 1972, alleging violation of the same provisions of the Executive Order by Respondent in failing to process an additional grievance of Bottigliero because of Bottigliero's union activities.

The Area Administrator investigated the complaints and reported to the Regional Administrator. Respondent filed motions with the Regional Administrator to dismiss the complaints. By Order of October 31, 1972, the Regional Administrator dismissed the complaints insofar as they alleged violations of Subsections 19(a)(4) and (5). No appeal was taken from that Order. By Order of December 4, 1972 the Regional Administrator consolidated these two cases and Case No. 50-8924 for hearing. The same day he issued a Notice of Hearing on the three cases to be held on January 16, 1973 in Chicago, Illinois on alleged violations of Sections 19(a)(1) and (2). Case No. 50-8924, alleging unrelated violations of Subsections 19(a)(1) and (2), is the subject of a separate Report and Recommendation issued July 19, 1973.

Hearings were held in Chicago, Illinois on January 16, 17, 22, and 23, 1973 at which the parties were represented by counsel. Complainants' motions for extensions of time for filing briefs, consented to by Respondent, were granted for good cause. The parties filed timely briefs which were received on April 9 and 12, 1973.

### II. Facts

#### The Grievant.

Michael Bottigliero is an Audit Review Specialist, Grade GS-12, employed by Respondent. He is a member of

Local 2816, having become a member in 1967 when it was first organized. The American Federation of Government Employees, AFL-CIO, represents employees of the Office of Economic Opportunity including employees in Region V covered by Local 2816. Bottigliero was in the unit covered by the national and the local. He was an active union member and regularly attended and spoke at union meetings. He was never a union officer and was once a candidate for union office. He filed a large number of grievances concerning himself, more than any other employee in Region V. He filed also a large number of requests that he be given a promotion or a within-grade increase based on merit. These requests were denied. <sup>1/</sup>

#### B. The Complaints.

The complaint in Case No. 50-5999 alleges violations of the Executive Order in failing to process three grievances and in circulating Bottigliero's grievances among management.

The first of the three grievances, dated March 26, 1971, complains about three separate alleged mistreatments. When the position of Regional Auditor became vacant, a number of people, at least 26, including Bottigliero, bid for it. The applicants were rated on qualification for the position on OEO Form 81. Bottigliero was not shown the Form 81 filled out for him. This was claimed to be a violation of the Federal Personnel Manual. The second subject of the first grievance was the failure to process a request for a merit increase within grade. The third subject was the failure to authorize overtime in advance of the overtime worked. These matters had been discussed informally, and the Grievance Committee asked that a Grievance Panel be formed immediately.

The second formal grievance referred to in Case No. 50-5999 is dated June 14, 1971. When the position of Chief of Personnel became vacant, Bottigliero and several other "in house" candidates applied for it as well as at least five "out house" candidates. The grievance complained that the applications had been improperly handled in contravention of the Merit Placement Promotion Guidelines of OEO Instructions and requested that further processing should be done differently. The complaint in Case No. 50-5999 alleges that management refused to process this grievance.

The third grievance referred to in Case No. 50-5999 is dated June 30, 1971. It involved a complaint by Bottigliero that the refusal of an "approved training agreement" to Bottigliero, a GS-12, to enable him to qualify for

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<sup>1/</sup> One of these requests is the subject of my Report and Recommendation in Case No. 50-8924, issued July 19, 1973. Another is the subject of one of the grievances in Case No. 50-5999.

a GS-14 vacancy, was discriminatory. The grievance requested that a Grievance Panel be convened immediately.

The fourth alleged violation of the Executive Order alleged in Case No. 50-5999 alleged that Respondent gave undue publicity to grievances filed by or on behalf of Bottigliero.

The complaint in Case No. 50-8198 alleges that Respondent arbitrarily deprived Bottigliero of a large amount of leave and refused to process a grievance concerning it because of Bottigliero's active unionism and his having filed a large number of grievances and because of his outspoken criticism of management as a union member.

The parties did not have a negotiated grievance procedure. Grievances and their processing were covered by OEO Regulations.

#### C. Anti-Union Bias.

Complainants urge that Respondent's misconduct alleged in these complaints was motivated by a general anti-union bias and specifically by a bias against Bottigliero because of his union membership. There is an implication by Complainants that it was motivated also by hostility toward the union steward, Wayne Kennedy, who processed more than twenty of Bottigliero's grievances. The evidence concerning such bias is summarized below.

When Bottigliero first joined Local 2816 when it was organizing, in 1967, he told his supervisor he was doing so. He testified his then supervisor told him it would serve no purpose, would confuse matters (Bottigliero was then a supervisor), and suggested he stay with the management team and not join the union. His immediate supervisor at the time was Ellis D. Robertson, who retired early in 1970 and did not testify at the hearing. Bottigliero testified also that while he was the chief budget and accounting officer, at a meeting of executives of other agencies at which he and Respondent's Regional Counsel were present the Regional Counsel referred to him as a "bookkeeper," and that he referred to him in such demeaning manner because of his union membership. This was before the grievances here involved arose. Bottigliero testified also that after a time Respondent's officials came to understand that the union was necessary and was good for management as well as the employees. But he testified also that the Regional Director's alleged mistreatment of him was because of his union membership.

The union steward, Wayne Kennedy, testified that Ellis Robertson, Bottigliero's supervisor before his retirement

early in 1970, was angry because of the multiplicity of grievances and complaints filed by or on behalf of Bottigliero, and said many of them were frivolous.

Stanley Stern was Deputy Regional Director from June 18, 1970 to March 2, 1972 and Special Assistant to the Regional Director thereafter. Kennedy testified that Stern had told him in 1970 that the Regional Director and others were angry because of the numerous complaints and grievances made by or for Bottigliero, that management (not including Stern) would "come down hard" if Bottigliero did not stop his complaints and requests for raises and promotions and special training, that Bottigliero would get nothing until he stopped complaining, and Kennedy could be fired, and that Stern said he thought most of Bottigliero's grievances were frivolous and should be dropped. Kennedy testified that Stern was not angry, as Robertson was, and was only passing on information and apparently sincerely wanted to settle the matters. Stern denied he made any of the statements attributed to him by Kennedy except that he thought some of the Bottigliero grievances would be hard to sustain. Stern testified impressively with sincerity and candor. Kennedy was less impressive. So was Bottigliero. Insofar as there is a conflict in the testimony of Stern and others, I accept Stern's testimony as the more accurate.

Bruce Carroll began in January, 1971 as a Special Assistant for the Regional Director. In July, 1972 he became Special Assistant to the Regional Director employed as an expert. Prior to coming to OEO he was a lawyer, in private practice, who spent about half his time in the field of labor relations. Soon after he came to OEO the Regional Director asked him to get into the Activity's labor relations work, and he had the responsibility for handling grievances until about April, 1972.

Kennedy ran into troubles as an employee of Respondent. On January 28, 1972 he was suspended for 60 days for reasons unrelated to any issue in these cases, and then was fired for reasons unrelated to the reasons for his suspension or to this case. Until his suspension there were no restrictions on his acting as a union representative. After his suspension restrictions were placed on him. Kennedy testified Carroll absolutely barred him from coming on the premises for any purpose. There is contradicting testimony that he was not permitted to come to Respondent's offices without making a request to be permitted to enter. The day after his suspension he nevertheless entered upon the premises without a request, and with about ten employees went to the Regional Director's office to see him. When his secretary said he was busy and could not see him just then, a minor disturbance occurred. After about two and a half months there were no restrictions placed on Kennedy coming on the premises as a union representative. There is



contention that this treatment of Kennedy was a violation Section 19(a)(5) or (6); there is no such allegation in complaints and the Regional Administrator's dismissal of contention that 19(a)(5) had been violated was not revealed. Respondent's counsel stated at the hearing that the sole purpose of showing the temporary restrictions on Kennedy was to show anti-union animus on the part of management. 2/ I find that whatever restrictions were temporarily placed on Kennedy's access to the Respondent's offices were imposed because of his union position.

In a conversation Stern had about January, 1971 with Ken Kaplan, a Regional Vice-President of AFGE, Stern suggested to Kaplan that Kennedy was having troubles as an employee and was heading toward possible disciplinary action and suggested that Kaplan might use him effectively on the Vice-President's staff. Kaplan said he would like to do so.

The foregoing was offered to show a general anti-union animus.

The March 26, 1971 Grievance.

1. Failure to Show Bottiglierio OEO Form 81.

A number of people, including Bottiglierio, applied for the position of Regional Auditor. Bottiglierio applied for at least twenty-six different positions; his applications, the other twenty-five are not here relevant except for the other discussed below with respect to another Bottiglierio grievance. It was the practice when vacancies were posted that supervisors of each applicant prepare a rating of the applicant based on their appraisal of his qualifications. This was done on OEO Form 81. Bottiglierio and Local 2816 filed a grievance over his not having been shown the Form applicable to him for this position. Carroll agreed that Bottiglierio could see all the Forms 81 applicable to him which he was entitled to see, both those prepared in the past and those that might be prepared in the future. It was decided that parts of the Form 81 were confidential. This arrangement took some period, about six weeks, but at the time there were no time limitations on the steps to be taken in handling grievances. Bottiglierio's supervisor read to him the appropriate parts of the Form 81. Carroll thought that he settled this grievance, but Bottiglierio and Kennedy, the Chief Steward, insisted it was not settled because Kennedy wanted a decision that every employee would be shown his Form 81 every time there was one. Carroll took the position that such relief was beyond the scope of the grievance

that had been filed and continued to consider the matter closed.

2. The Processing of One of Bottiglierio's Requests for a Within-Grade Merit Increase.

Bottiglierio and Local 2816 filed a grievance, included in the March 26, 1971 grievance, over one of his requests for a quality increase not being granted. 3/ OEO regulations in effect at the time did not expressly make such a grievance non-grievable, but while this matter was pending new regulations were issued on July 19, 1971, in accordance with amendments to the Federal Personnel Manual in May, 1970, expressly making such a matter non-grievable. 4/ Carroll consulted with OEO's Washington headquarters and was told that such matter was non-grievable. Carroll could find nothing in the old regulations making such matter grievable. Initially he treated it as grievable, but after receiving advice from Washington wrote to Bottiglierio and the grievance committee on November 8, 1971 that he had decided that a request for a quality increase was not a proper subject for the grievance procedure.

3. Advance Authorization of Overtime.

It was the practice in Region V, when it was necessary for an employee to work overtime, for the employee to do so and have the overtime formally authorized the next day. Whenever Bottiglierio worked overtime he was credited with it without it being authorized in advance. The record contains no indication that other employees were treated differently. There were no difficulties about this arrangement. Compensatory leave was given for overtime.

Bottiglierio was asked by his supervisor to work overtime on March 6, 1971, a Saturday. He had found in the Federal Personnel Manual a provision entitling an employee to advance formal authorization, and demanded it. One other employee did the same. Martin Kozak, Bottiglierio's supervisor, concluded that Bottiglierio was right, but was reluctant to change the practice in the Region, and did not obtain the advance authorization. The failure to give Bottiglierio advance authorization for his March 6, 1971 overtime was included as one of the three items in the March 26, 1971 grievance concerning Bottiglierio.

Upon receiving the grievance, management was faced with deciding whether to continue with its old practice, which had been working satisfactorily, or to follow the Federal

3/ This was not the same request as the one involved in Case No. 50-8924.

4/ Exh. C1, Item 5, a, (6).

Personnel Manual. It was decided to give Bottigliero advance authorization regardless of how such matter was treated with respect to other employees. This decision was communicated to Bottigliero and Kennedy, within a month after the grievance. Kennedy wanted the procedure changed for the entire office, although the grievance had been made only on behalf of Bottigliero. Accordingly, this item of the grievance was not terminated at that time.

4. Further Processing of This Grievance.

This grievance when originally filed as a formal grievance asked that a Grievance Panel be formed immediately since there had already been informal discussions. The Regulations then provided for a three-member Panel, one appointed by the union, one by management, and those two to select a third member. The union named William English as its member of the Panel.

On September 12, 1971, Carroll wrote to English, stating that the Regulations had been changed since the filing of the grievance, 5/ that because of such change they had not known whether to proceed under the old regulations or the new regulations thereby delaying further processing, that since the grievance had been filed under the old regulations they had decided to proceed under them, that they appointed Chris Christenson as management's member of the panel, and that he understood English and Christenson would select a third member.

On October 11, 1971, Bottigliero and Kennedy sent a telegram to Carroll contending that a three-member panel was incorrect because of the amendments to the Federal Personnel Manual but that if Carroll illegally insisted on the three member panel they nominated Mrs. Lorelei Rockwell as the union's member in place of Mr. English. It continued with a request that Carroll "carry out your bureaucratic caretaker duties by moving this long overdue grievance to the next state of the grievance procedure. Your reactionary policy of suppressing legitimate employee grievances has no place in the public sector." 6/

Upon her appointment to the Panel, Mrs. Rockwell asked Carroll whether there were written instructions for the Panel. He told her there were none. She spoke to Christenson, the other member of the Panel, and asked him if he knew what they were supposed to do, but he said he had no instructions. The full Panel was never constituted.

5/ The new regulations provided for a single hearing officer.

6/ Exh. C19.

On November 2, 1971 the Charge 7/ of an unfair labor practice was filed. On November 8, 1971, Carroll sent a memorandum to Bottigliero and the Grievance Committee. He reiterated his decisions concerning the Form 81 and Bottigliero request for advance overtime authorization, and stated that he considered those items of the grievance resolved. With respect to the request for a quality increase, he stated that he had originally thought it a grievable matter, but that on further consideration he had concluded it was not a grievable matter. He stated that he therefore considered that grievance file closed, but that if Bottigliero and the Grievance Committee had any questions they should communicate with him.

There were no further communications until the complaint was filed.

E. The Alleged Practice of Respondent Publicizing Bottigliero Grievances.

Bottigliero testified that correspondence and memoranda concerning his grievances were sent through the intra-office mail not in envelopes and left in open boxes on secretaries' desks. He considered this a breach of confidence. He testified also that some of the memoranda were sent to some officials who were not involved in processing the grievances thereby defying the confidence of the grievances, such as the Regional Counsel and other senior officials outside the division in which Bottigliero was employed. Some employee grievances, not including Bottigliero's, were posted on bulletin boards by the union; Bottigliero did not want his posted.

Carroll made an appointment to meet with Kennedy and Bottigliero at 2:00 p.m. on July 29, 1971. On that day they learned informally that Carroll was out of town and would not be back for two or three days. Kennedy and Bottigliero sent a joint memorandum to Carroll on July 30 complaining of Carroll not keeping the appointment and containing the following language: 8/

"...Why are you treating us like a bunch of Democrats from Grand Rapids, Michigan? United Fund contributors like ourselves deserve much better treatment than this. At least the poor people get a lecture on why OEO can't do anything at their appointments here. Couldn't you at least devise a self-service flip chart showing why we don't have any legitimate grievances here at OEO, why except for a few troublemakers everyone here is happy and content, and why the Union is a menace to the whole operation? This way we won't get the

7/ 29 C.F.R. Section 203.2(1).

8/ Exh. C13.

impression we are carrying some kind of social disease, and are being avoided like those who believe in community organizations....

Without being inflammatory, I would like to remind you that you haven't accomplished a damn thing on the following Bottigliero cases:"

The memorandum then listed five Bottigliero grievances including three involved in Case No. 5999, followed by additional accusatory language.

On August 9, 1971, Carroll wrote a reply memorandum to Kennedy and Bottigliero. 9/ He apologized to both for not keeping the appointment. The rest of his memorandum was addressed to Kennedy on the assumption that Kennedy had drafted the July 30, 1971 memorandum. It accused Kennedy of having a short or convenient memory. It stated that the first of the five listed grievances (not involved in this case) had been disposed of by Carroll and that Kennedy had not pressed it further. It stated that the second of the listed grievances, concerning the Personnel Chief position, was complicated by one of the grievants resigning from OEO, that it was being processed, and that Respondent was well within the ninety days allowed for a decision. The third case, he said, was not a case at all and did not involve a grievance or other proceeding. The fourth, concerning the requested Training Agreement for Chief of Personnel, Carroll said was complicated and Respondent was well within the ninety days. The fifth included the Form 81 matter, a merit step increase, and advance authorization of overtime. Carroll said each side had named a member of a hearing panel and that Kennedy knew they were about to meet to form a full panel, and that it was nonsense to state that it was not being processed.

Carroll sent copies of his memorandum to the Regional Administrator, Stern, the Regional Counsel, and three others. This was the only memorandum which Bottigliero testified specifically had been sent to officials not involved.

On August 16, 1971, the President of Local 2816, Mela Juarez, wrote a memorandum to Carroll reciting that Carroll had written his August 9 memorandum to Kennedy and delivered copies through intra-office mail without placing them in envelopes and stating that such distribution violates the confidentiality of grievances. Juarez stated that while the Local was not planning to charge misconduct, it expected that Carroll would be more careful in the future in matters of confidence. 10/

9/ Attachment to Exhibit AS-4.

10/ Exhibit C17.

On August 25, 1971, Carroll replied to Juarez. He began by stating that not only had he distributed his memorandum in a non-confidential manner but had placed a copy in the "reading file" and was going to do so also with the instant memorandum. 11/ It stated that there were four defects in Juarez' criticism: there was nothing in the regulations making grievances confidential; Carroll's memorandum did not discuss the details or merits of the grievances and his comments about them were addressed to Kennedy and specifically not to Bottigliero; Bottigliero's claims and grievances had been widely "published" in and out of the office, and could therefore not be confidential; and the union had on occasion posted grievances on its bulletin board. (The union had never posted Bottigliero's grievances on the bulletin board because Bottigliero objected to their doing so.) Copies of this memorandum were sent to Department Heads and presumably placed in the reading file.

The "reading file" in Region V of OEO is a file distributed to Region officials of the rank of branch chiefs or higher to keep them informed of what was going on in the Region.

Nothing further was done about this matter until it was included in an unfair labor practice Charge of November 2, 1971 and in the complaint in Case No. 50-5999 as a claimed violation of the Executive Order. Carroll's memorandum of August 9, 1971 was the only item concerning which there was testimony in support of the allegation of the complaint that there was a practice of excessive publicity of Bottigliero's grievances.

F. The June 14, 1971 Grievance.

The Respondent posted a notice of vacancy in the position of Chief of Personnel, Grade GS-14. Bottigliero and one other employee in the Chicago office were among the thirteen applicants for the position. A committee certified to the selecting official the five candidates it considered the best qualified for the position. Such certifying procedure was the practice and policy in the office. Neither Bottigliero nor the other employee in the Chicago office were among the five. The record does not show that Bottigliero had had any experience in personnel work. He was in grade GS-12.

On June 14, 1971 the two Chicago office applicants and the Grievance Committee filed a grievance over the certification of the five "out house" applicants and requested that all eligible candidates be certified to the selecting official. It requested the immediate appointment of a Panel. Carroll and Kennedy met many times on this and Kennedy persuaded

11/ Exhibit C18.

Carroll that it would be better practice to give the selecting official a wider choice and certify all the eligible candidates. Carroll tried to persuade management to do so, and they finally agreed.

Before the new certification could be made, on August 15, 1971, Executive Order 11615 froze new hirings for ninety days; it did not freeze promotions within an agency. Because Respondent was not limiting itself to selecting an in-house candidate, although it was the policy to prefer such candidates, Respondent decided to defer further action and not fill the vacancy. On November 8 or 9, 1971, the Acting Chief of Personnel wrote to all the applicants and advised them that it had been decided not to fill the vacancy. On November 8, 1971, Carroll wrote to Bottigliero that since it had been decided not to fill the vacancy, and to have a new posting when it should be decided to fill the vacancy, the grievance requesting that all applicants under the previous posting be certified had become moot and that the grievance file was considered closed. Bottigliero and Kennedy continued to feel that the grievance was not moot. The requested Panel was never convened on the question of certifying all thirteen applicants because Carroll felt it would be a waste of time since the issue was moot.

Later, after the freeze, there was a new posting of the vacancy. Levi Anderson, the Acting Personnel Chief who prior thereto had been Assistant Personnel Chief, was the only applicant and he was appointed to fill the vacancy.

#### G. The June 30, 1971 Grievance.

A Vacancy Announcement was posted stating that some vacancy existed in grade GS-14. The vacancy is not identified in the record except that it is unrelated to the June 14, 1971 grievance. The announcement limited applicants to those who had been in grade GS-13 for one year except that the one year requirement might be waived for those who were selected to be trained for the position by the Civil Service Commission pursuant to an "approved training agreement" between the agency and the Commission.

Bottigliero believed he was fully qualified for the position, but he was a grade GS-12. On April 2, 1971, he wrote a memorandum to the Acting Personnel Director requesting "explanation and guidance" concerning the statement in the announcement about the exception to the requirement of one year in grade GS-13. On May 1, 1971 he sent a copy of his April 2 memorandum to Stanley Stern, his fourth tier supervisor, noting thereon that he had not received a reply to his original request.

On June 16, 1971 he discussed this matter with Martin Kozak, his immediate supervisor. Bottigliero raised four questions concerning the matter. The first three pertained

to the authority and justification for waiving the one-year requirement and the details of the approved training program; the fourth question was a justification of his not having been counselled as he requested.

On June 25, 1971 Kozak wrote a memorandum to Bottigliero. Kozak stated he had discussed the four subjects with the Personnel Officer who had advised him that certain named sections of the Federal Personnel Manual answered the first three questions; as to the fourth, the Personnel Officer had stated that he had intentionally not replied because Bottigliero was not a GS-13, could not have been affected by the notice, that his request for counselling must therefore have been prompted by idle curiosity, and that he did not have the time or inclination to respond to such inquiries. Kozak concluded with the suggestion that if that response was not satisfactory, Bottigliero should advise him by memorandum by July 1, 1971.

The June 30, 1971 grievance was then filed by Bottigliero and the union's Grievance Committee. It stated that Kozak's response was not satisfactory and charged discriminatory use of the "approved training agreement" by not making it available to Bottigliero, that it could have been made available to a GS-12 like Bottigliero, and it charged a number of violations of the Federal Personnel Manual.

Carroll told Bottigliero he thought the matter was not grievable. On August 30, 1971 he wrote a memorandum to Bottigliero setting forth the reasons. For some reason, including the fact that Respondent's offices were moved from one building to another, the memorandum was misplaced and not sent until it was discovered in November and was sent to Bottigliero on November 15, 1971. In the memorandum dated August 30 (not sent until November 15), Carroll called Bottigliero's attention to new regulations of July 19, 1971 which provided that if a grievance was not resolved by Carroll in a manner acceptable to the grievant, Carroll should refer it to the Director of Personnel for inquiry by an Examiner. Carroll requested that if Bottigliero was not satisfied he should so notify Carroll.

The same day (November 15) the Grievance Committee advised the Regional Director that Carroll's memorandum was not satisfactory. The Charge of an unfair labor practice had already been filed November 2, 1971. <sup>12/</sup> Carroll referred the matter to the Director of Personnel on February 29, 1972, after this complaint was filed.

On November 8, 1971 Carroll wrote to Kennedy stating that since they were both going to be in Dallas for national

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<sup>12/</sup> Attachment to Exh. AS-4.

negotiations beginning November 10 he assumed that it was satisfactory to the Grievance Committee that they suspend meeting on pending unfair labor practice matters in the Charge of November 2, 1971 until their return, and requested that if such arrangement was not satisfactory he should be so advised. Kennedy agreed. The national negotiations continued intermittently during November, December, and January. The complaint was filed January 18, 1972.

Case No. 8198; the November 15, 1971 Grievance.

Respondent gave employees, including Bottigliero, compensatory leave for working overtime. A change in regulations changed the amounts of the different kinds of leave that could be accumulated and the use of accumulated compensatory leave before using annual leave. Bottigliero perhaps lost some credits on his leave records. It was stipulated that this complaint is not that Bottigliero lost leave credit but that his grievance was not processed allegedly because of his union activities.

On September 30, 1971 Bottigliero was informed of his leave status. He believed it was wrong and took up the matter with several of Respondent's officials, including Stern and the Regional Director. On November 1, 1971 he and the Grievance Committee filed a formal grievance alleging that he was "defrauded" out of 35 hours annual leave, 16 hours sick leave, and 32 hours compensatory leave. The grievance was stated to be against Ralph Woodley (Chief, Program Management and Support Division) and Stanley Stern. On November 15, 1971, the grievance was amended to make it one also against the national headquarters of OEO defrauding him of leave. After the filing of the grievance, additional discussions were had by Bottigliero with various officials, including Carroll. When this grievance was filed, the only pending grievances were those pertaining to Bottigliero.

When Carroll received the grievance, he took the matter up with Woodley who told him that audits concerning the problem were being conducted by headquarters in Washington. The headquarters office received a copy of the grievance. On November 8, 1971, Woodley had furnished Bottigliero with a detailed audit of his leave records.

Thereafter, Bottigliero and Kennedy made several telephone calls to the Washington Personnel Office and if the individual they were calling was not available discussed the matter with whomever was available, sometimes with someone who had little information or comprehension of the matter. On December 14, 1971 Walter O. Jacobson, the Director of Personnel in Washington, wrote to Bottigliero telling him that Kennedy had told "members of my staff on November 30 and December 13,

1971" that only "minor discrepancies" remained 13/ between the audit and Bottigliero's position. 14/ He suggested that if Bottigliero wanted further action under his grievance with respect to those minor discrepancies, he should advise of any specific errors and submit "OEO Form 113, Salary and/or Leave Discrepancies."

On December 20, 1971, Kennedy and Bottigliero sent a telegram to "Dick Parisi" in the labor relations office of national headquarters (not otherwise identified) stating that pursuant to a telephone conversation with "Ann Bradle" (not otherwise identified) on November 30, 1971 they requested that Parisi propose a fair settlement of Bottigliero's loss of 70 hours of leave time. 15/ It requested that if Parisi could not settle he dispatch a hearing Examiner. The same day Bottigliero made a telephone call to Jacobson's office in Washington and spoke to Jacobson's secretary; the contents of the call are not explicitly shown in the record but apparently revealed some misunderstandings. On December 29 Jacobson wrote to Bottigliero stating that he had his secretary's notes of the conversation, that confusion was arising from handling the matter in that manner at long distance, and that thereafter he would handle it only through Carroll and that communications be in writing, and that the latest misunderstanding arose because of a telephone communication with a member of Jacobson's staff who had no knowledge of the matter.

A hearing Examiner was not appointed. Carroll testified one was not appointed because headquarters was awaiting a reply to Jacobson's letter of December 14, 1971 requesting the specific alleged errors, if any, and a Form 113, "Salary and Leave Discrepancies," and thought they never received them. Bottigliero testified that he filed a Form 113 with his original grievance (on November 1, 1971) and every two weeks thereafter for more than a year in various offices; he testified he filed them with both local and national headquarters. He testified he filed one copy with Jacobson, Director of Personnel in national headquarters; one with the Finance Division in Region V; one with Stanley Stern in Region V until Stern told him to stop because he could do nothing about it; sometimes with Woodley (Chief, Program Management and Support Division); sometimes with Verduin,

13/ Kennedy denied that he ever made such statement.

14/ Exh. C-23.

15/ Apparently reduced from the 83 hours originally claimed.

the Regional Director; and sometimes with Carroll. The contents of these filings are not sufficiently shown in the record to ascertain whether they answered Jacobson's request of December 14 to Bottiglierio that if he desired further processing of his grievance he should advise of specific errors.

The unfair labor practice Charge was filed January 17, 1972 against the Regional Director and Jacobson, the Director of Personnel in the national office. The complaint was filed on March 1, 1972 against Region V.

III. Discussion and Conclusions

A. Scope of the Complaints.

Although these complaints are primarily over grievances, the merits of those grievances are not before us for decision. The complaints are over the alleged failure or refusal to process the grievances, not over their merits. It is contended that the failure or refusal to process the grievances constituted unfair labor practices in violation of Sections 19(a)(1) and (2) of the Executive Order. Thus it is not for us to decide whether Bottiglierio was entitled to see his supervisors' appraisal of his qualifications for a posted vacancy, or whether he was entitled to a merit within-grade step increase for superior performance, or whether another posting of a vacancy should have been opened to bidding by GS-12's as well as GS-13's, and the like. Those were the subjects of grievances, and those subjects are for resolution elsewhere.

The complaints do not raise the question whether Respondent's conduct that gave rise to the grievances were unfair labor practices. But the alleged failure or refusal to process the grievances, presented by the union, may constitute unfair labor practices, and the questions before us are (with one exception) whether there were such failures or refusals and, if there were, whether they were unfair labor practices in violation of Sections 19(a)(1) or (2).

B. Respondent's Motivation.

We need not decide whether there was failure to process the grievances because, as alleged, of anti-union animus on the part of Respondent or because of Bottiglierio's union activities. If Respondent failed to process grievances, presented by the union, with reasonable expedition, that in itself, without regard to union animus, would tend to denigrate the union. 16/ To an even greater extent than in the

16/ V.A. Hospital, Charleston, S. C., A/SLMR No. 87.

private sector, a union's handling of grievances of an employee is a major portion of its activities. Government employee unions cannot bargain effectively on some subjects that are among the most important subjects of bargaining in the private sector, such as rates of pay, the amount of paid vacations, the number of paid holidays, and others. 17/ To flout the established grievance procedure thus thwarts what is perhaps the principle activity of government unions, and thus discourages membership and restrains the employee in his right, given by the Executive Order, to have his union represent him in grievances. 18/

This is so regardless of management's purpose in refusing to process a grievance. The effect on the union and the employees is the same, or almost the same, whether the agency's conduct is motivated by the purest of motives or the most reprehensible. Thus motive is not relevant to deciding whether the agency's conduct is in violation of the Order in this kind of case.

But if it should be considered that motive is relevant, I find that it has not been established that the complained-of conduct was motivated by an anti-union animus of Respondent or by Bottiglierio's or Kennedy's union activities. There may have been some dislike of Bottiglierio and Kennedy. But if there was it was not based on their union activities. There was evidence that the then Chief of the Program Management and Support Division was angry because of what he considered the unreasonable multiplicity of Bottiglierio grievances many of which he considered frivolous. If there was such displeasure, it was directed at Bottiglierio as an employee apart from his union membership or activities. The only union activities of Bottiglierio revealed in the record are his regular attendance at meetings, his serving as an election official in one of the union elections, and his participation in a baseball game between union members and management officials. And there probably was some displeasure with Kennedy. He was suspended and then fired. The record does not show the reasons except that they were for reasons unrelated to each other and unrelated to anything involved in these cases. And even if it be assumed that there was dislike of Bottiglierio and Kennedy, for whatever reason, there is nothing to show that Respondent's conduct here involved was motivated thereby, even in part, and I conclude it was not so motivated.

17/ See also E.O. 11491, Sec. 12(b).

18/ E.O. 11491, Sec. 10(e); Dept. of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278.

The March 26, 1971 Grievance.

In filing this grievance, Bottigliero and the Local requested that a Grievance Panel be formed immediately. OEO Regulations at the time provided for grievances and reference grievances to a hearing committee after earlier handling; employees were entitled to a hearing only in a grievance over suspension while in other grievances the committee would investigate and report to the Regional Director. 19/ On July 19, 1971 the Regulations were amended to provide for an Examiner instead of a hearing committee and expressly excluded from the grievance procedure the nonadoption of a suggestion for a quality salary increase. The new regulation provided that if the grievance were not resolved in a manner acceptable to the employee, the deciding official would refer it to the Director of Personnel in Washington within ten days for inquiry to an Examiner. 20/

1. The Items on Which the Grievance was Granted.

That part of this grievance pertaining to the Form 81 was allowed by first reading to Bottigliero and then showing him the part of the Form that was not considered confidential. There is no complaint now over not being shown the entire Form. It was decided also that Bottigliero could see all such forms applicable to him, both past and in the future. This was all that was asked for; the grievance was specifically filed on behalf of Bottigliero. Carroll considered that part of the grievance satisfied, but Kennedy and Bottigliero did not; they wanted every employee shown his Form 81 every time there was one. This attitude asked for remedying more than the grievance presented.

The situation was similar with respect to the grievance over prior authorizations of overtime. The grievance was allowed to the full extent presented in the grievance, and Carroll considered this item closed. But Kennedy wanted everyone given advance authorization every time, although only Bottigliero and one other had asked for it and only Bottigliero was complaining about his not being given advance authorization, and the prior system had worked satisfactorily.

It should be remembered that there was no negotiated grievance procedure. Carroll had authority to decide grievances prior to their being considered by a Grievance Panel or the hearing committee. The grievance procedure was prescribed by agency regulation. I conclude that Respondent did not violate the Executive Order in not processing these items in the grievance beyond the point of allowing in full these

20/ Exh. C2, Sec. 2d.

20/ Exh. C1, Sec. 8f.

items as presented. By not processing these items beyond the relief called for by the grievance they were not refusing to process the grievance; they were refusing to process grievances that had not been presented.

2. The Request for a Quality Increase.

The situation with respect to the request for a quality increase is different. At the time the grievance was filed the Regulations were not specific on whether such matter is subject to the grievance procedure, and Carroll at first considered it grievable. The Regulations at that time did not specify time limits on the steps in handling a grievance. While this item was pending unresolved, the Regulations were changed to make it expressly non-grievable. No contention is made that Respondent did not have the right unilaterally to amend its Regulations in this respect.

Whether the request for a quality increase was a grievable matter when filed was not clear from the Regulations in effect at that time. Carroll treated it as grievable, and even appointed a member of the hearing committee. Whether the change in the Regulations while the matter was pending made what had been grievable (if it was) into a matter non-grievable, or whether the new Regulations applied only to grievances thereafter filed, is a matter on which reasonable persons can differ. 21/ With respect to the procedure changing review from a three-member committee to a single examiner, Carroll thought the procedure in effect when the grievance was filed should govern.

I conclude that the unilateral decision of Respondent not to process the grievance further constituted a violation of Section 19(a)(1) of the Order. 22/ The Regulations gave Bottigliero the right to file a grievance, and the Order gave him the right to have it handled on his behalf by the union. 23/

21/ There was no agreed grievance procedure and no argument is made that Section 13(d) of the Executive Order has any bearing on this question.

22/ Cf. V.A. Hospital, Charleston, S.C., A/SLMR No. 87; Long Beach Naval Shipyard, A/SLMR No. 154.

23/ E.O. 11491, Sec. 10(e); Dept. of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278. Section 10(e) of the Order is not limited to cases in which there is a negotiated grievance procedure.

By refusing to follow the procedures they prescribed for handling this item of grievance because they unilaterally determined an unsettled and debatable question, Respondent denied the employee his right, guaranteed by the Executive Order, to be represented by his union in having his grievance duly processed. This violated Section 19(a)(1). For such a violation there need not be, as discussed above, a discriminatory or otherwise bad intent.

The cases cited in footnote 22 both involved the failure to follow a negotiated procedure, while here we do not have a negotiated procedure. But whether or not the grievance procedure is the result of negotiations should not be determinative of whether Section 19(a)(1) is violated. Such consideration is relevant to whether there was also a violation of Section 19(a)(6), as was found in those cases, on the theory that the violation of the agreement is of such magnitude or so blatant as to constitute a repudiation of the agreement or a purported unilateral change in the agreement. In these cases there is no allegation of Section 19(a)(6) violations.

I conclude that the conduct I have found violative of Section 19(a)(1) is not also a violation of Section 19(a)(2). That Section proscribes encouraging or discouraging membership in a labor organization by discrimination in hiring, tenure, promotion, or conditions of employment. Refusing to process a grievance has a tendency to discourage membership. 24/ But in this case the discouragement was not by way of the discrimination proscribed in Section 19(a)(2). I have found that the conduct of Respondent was not invidiously discriminatory.

D. The Publicizing of Grievances.

Although the complaint in Case No. 50-5999 alleges an agency "practice of circulating Mr. Bottigliero's grievances among the management and other staff", the evidence falls far short of sustaining such allegation.

Bottigliero testified generally that correspondence and memoranda concerning his grievances were transmitted intra-office not in envelopes, so that secretaries and others could see them, and that copies of some memoranda were sent to officials not involved in processing the grievances. Bottigliero did not testify, as alleged in the complaint, that the grievances themselves were "circulated", nor did anyone else. But even giving the complaint a more expansive reading, to include documents pertaining to Bottigliero's grievances, I find no violation of the Executive Order in the record.

24/ Actual discouragement need not be shown. See Environmental Protection Agency, A/SLMR No. 136 (1972).

There were only three documents that were shown specifically to have been "circulated" to anybody, or at least which Bottigliero or the union claimed were improperly circulated.

On August 9, 1971 Carroll wrote to Kennedy a reply to a rather insulting memorandum from Kennedy and Bottigliero dated July 30, 1971. In Kennedy's memorandum he referred to five matters concerning Bottigliero, referring to them only very generally, concerning which Kennedy said Carroll had not "accomplished a damn thing". In Carroll's reply 25/ denying Kennedy's accusations, Carroll also referred to the five matters only in the most general terms. Carroll's memorandum discussed for the most part the extent to which the matters had been processed. Carroll sent copies of his memorandum to six people, including the Regional Director (one of the five matters dealt with a decision of the Regional Director), the Deputy Regional Director for Administration, the Regional Counsel, the Division Chief of Bottigliero's Division, and two other senior officials. A copy was also placed in the "reading file", which meant distribution to officials who were branch chiefs or higher to keep them informed of what was going on in the office.

On August 16, 1971, the then President of Local 2816, Mela Juarez, wrote a memorandum to Carroll complaining of Carroll's distribution of his August 9 memorandum and his dispatching of copies through the intra-office mail without placing them in envelopes. She complained that such conduct violated the confidentiality of an employee's grievance and might impede his advancement in the office. 26/ On August 25, Carroll replied. 27/ He denied a violation of any rights of Bottigliero by his distribution on four grounds: there was no regulation concerning the confidentiality of grievances; his memorandum of August 9 did not go into the details or merits of Bottigliero's grievances; Bottigliero's grievances and claims had been given the widest circulation by Kennedy, in and out of the office, including Congressmen 28/ and he could hardly "fail to keep confidential" something already so widely publicized; and the union had sometimes itself posted grievances on bulletin boards. Neither Juarez' memorandum nor Carroll's even described the grievances and claims. A copy of Juarez' memorandum was attached to Carroll's and copies of both sent by Carroll to Department Heads and placed in the reading file.

25/ Exh. AS4, attachment.

26/ Exh. C-17.

27/ Exh. C-18.

28/ None of this was denied.



With respect to the memoranda from and to Juarez, I find nothing in the Executive Order that was violated by Respondent. These memoranda did not even vaguely describe the grievances except to identify them with Bottigliero, and the union first identified them. I find nothing that contravenes the Order. Carroll advising the senior officials of Region V of the Union's objection to Carroll not having kept confidential these five grievances or claims of Bottigliero, and his response thereto. Indeed, as Respondent's official with responsibility for handling grievances, he might have been subject to valid criticism had he not done so.

His limited "publicizing" of his memorandum of August 9, Kennedy and Bottigliero is in the same category. I find no violation of the Order that was violated by Carroll making available to other senior officials his response to what he considered an unjustified and intemperate criticism by the Union's chief steward of Carroll's handling of grievances. Especially is this so when there was no indication theretofore that the union or Bottigliero thought the grievances should be kept confidential. What indications there were indicated the contrary.

With respect to the claim that the intra-office memoranda could not have been sent without being enclosed in envelopes, I reach the same conclusion. Absent perhaps some unusual circumstances not present here, I suggest it would be inappropriate for the Assistant Secretary to direct the agencies on what memoranda sent by intra-office mail must be, and which should not be, sent in envelopes, sealed or unsealed.

The June 14, 1971 Grievance.

This grievance 29/ was not limited to Bottigliero but requested that "the current certification of five out-house candidates for Chief of Personnel" be overturned and all eligible candidates be certified to the selecting official for consideration. The grievance contended that the certification of the five had been improperly arrived at, improper for stated reasons. Carroll persuaded management to accede to the grievance insofar as it asked for affirmative action, i.e., insofar as it requested that the certification of the five be rescinded and all eligibles be certified for consideration by the selecting official. But before they did so, an Executive Order temporarily freezing new hiring prompted Respondent to decide not to fill the vacancy for the time being and to have a new posting when they should decide to fill it. Although the Executive Order did not freeze promotions, Respondent did not want to be limited to "in house" applicants although it was its policy to prefer such candidates.

/ Exh. C-7.

Carroll thereupon wrote to Bottigliero and the Grievance Committee advising them of the decision not to fill the vacancy and to have a new posting when it should again be decided to fill it. He stated that in view of those facts the grievance was moot and the grievance file considered closed.

Insofar as the grievance asked for affirmative action, it was moot. On the basis of those considerations, there was no violation of the Executive Order insofar as the grievance asked for the affirmative action referred to by Carroll. The reasoning, supra, under Point III, C, 1 would be applicable; there was no obligation to process a moot grievance under a non-negotiated grievance procedure, and no violation of the Executive Order in not doing so.

But the grievance was not so limited, or should not be read so narrowly. The draftsmen of grievances are not, and should not be expected to be, draftsmen trained with the skills of a common law conveyancer or a draftsman of a corporate trust indenture. The grievance fairly is read as complaining also of the procedure that had been followed in arriving at the determination of the five who were certified. It contends that the procedure followed violated OEO Regulations. Such contention is a typical basis of a grievance.

This grievance implicitly asked for a determination of such contentions. Presumably Respondent was of the view that the procedure it followed was in accord with its Regulations, and thus disagreed with the grievance to that extent. This disagreement over whether the procedure violated the Regulations, in a matter which was likely to recur frequently,-- selecting candidates to be certified for a posted vacancy,-- did not become moot with the decision not to fill the immediate vacancy. The failure to constitute a Grievance Panel or appoint an Examiner 30/ thus constituted a violation of Section 19(a)(1) for the reasons given above under Point III, C, 2. For the reasons also given there, it was not a violation of Section 19(a)(2). No contention of a violation of any other provision is before us.

F. The June 30, 1971 Grievance.

As is seen under Facts, supra, Point II, G, the Charge with respect to this grievance may have been premature. But if it was, this was not the fault of Complainants. The fact

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30/ The grievance was filed when the old Regulations were in effect, and Carroll's decision of mootness was made after the new Regulations became effective.

that Carroll's memorandum of August 30, 1971 was lost and not sent until November 15 left Complainants in the understandable position of believing they had had no response to this grievance when they filed the Charge.

But whether the Charge was premature or not, Respondent's Regulations called for Carroll to refer this grievance to the Director of Personnel (in Washington) for inquiry by an Examiner within ten days of November 15, 1971 at the most conceivably latest. This was not done until February 29, 1972, after this complaint had been filed with the Area Administrator.

Respondent's decision that the matter was not grievable was specifically not acceptable to Complainants. <sup>31/</sup> The Regulations are not specific on whether a decision of non-grievability is itself subject to consideration by an Examiner. <sup>32/</sup> Until the formal grievance was filed the matter was treated as grievable through two steps. The unilateral determination thereafter that it was not grievable, and the refusal to refer the matter to an Examiner for that reason would, if valid, render the grievance procedure meaningless <sup>33/</sup> and deprive the union of its right to present the grievance meaningfully. Respondent thus violated its own Regulations in not even referring this dispute to the Director of Personnel until two and a half months after Carroll's decision that it was not grievable was communicated to Complainants and specifically not accepted by them.

For the reasons stated above in Point III, C, 2, and especially the reliance there on Long Beach Naval Shipyard, A/SLMR No. 154 and V.A. Hospital, Charleston, S. C., A/SLMR No. 87, this was a violation of Section 19(a)(1). It was not, for the reasons also given there, a violation of 19(a)(2).

G. Case No. 50-8198.

The facts are set forth in some detail above, II, H. It is noted that the grievance was filed on November 1, 1971 against Woodley and Stern, and was amended November 15, 1971 to add the national headquarters. Most or almost all the processing was done in Washington. The charge was filed January 17, 1972 against Verduin (the Regional Director) and Jacobson (the Director of Personnel at national headquarters). The complaint was filed March 1 against Region V. These facts

<sup>31/</sup> Exhibit C-16.

<sup>32/</sup> See Footnote 21.

<sup>33/</sup> Long Beach Naval Shipyard, A/SLMR No. 154.

are set forth not because I believe them dispositive or even significant, but because others may think so. I believe that in this area, where pleadings and other governing documents are generally prepared without the assistance of lawyers, we should not insist on legalistic adherence to refinements of "proper parties", "necessary parties", "indispensable parties", and the like. Where the nexus between the parties grieved against, the parties charged, and the party named as Respondent is as close as it is here, it should be considered sufficient compliance with orderly process in this area.

Although this grievance was not processed with what could be considered haste, it involved considerable work and preparation of audits covering leave records of a number of employees over a period of years. The question of a "reasonable time" to take various steps must be determined on a case by case basis; <sup>34/</sup> rigid adherence to time schedules in a grievance procedure prescribed by agency regulations cannot always be insisted on. Especially is that true here, where the grievant and his representative were in Chicago; an important, probably the most important, party grieved against was in Washington; and almost all the processing of the grievance was in Washington. I conclude that because of the unusual nature of the problem, there was not undue delay in the actions taken.

But one action was not taken at all. A hearing Examiner was asked for and not appointed. The request was made of Parisi and we do not even know who he is except that he worked in the labor relations office in Washington. There is no indication he was the "deciding official" on the grievance.

The Regulations in effect at that time provided <sup>35/</sup> that if the "deciding official" could not resolve the grievance in a manner acceptable to the employee, he should refer it to the Director of Personnel for inquiry by an Examiner. It did not provide he should do so only if he was requested to do so. The Examiner had authority only to recommend a disposition. Exh. C-1, Sec. 10. In this case the deciding official was the Director of Personnel himself. He did not appoint an Examiner.

But the record is not clear that he was apprised that his decision was not satisfactory to the employee. On December 14, 1971, he wrote to Bottigliero indicating he thought the grievance was satisfactorily resolved and that if any further processing was desired he should be furnished with certain specific information and specific contentions of errors in

<sup>34/</sup> Cf. V.A. Hospital, Charleston, S.C., A/SLMR No. 87, p.7.

<sup>35/</sup> Exh. C-1, Sec. 8f.

e audit of Bottigliero's leave records. I have found above, Point II, H, that the record is not clear on whether this information was ever furnished. Accordingly, the record is not clear on whether the deciding official was ever apprised at what he thought was the disposition was not satisfactory to the employee and thus that the time had come, pursuant to the Regulations, to appoint an Examiner.

There has thus been a failure to sustain Complainant's burden of proof. 36/ And I find that if there was a failure properly to process this grievance, it was not because of Bottigliero's union activity, as alleged in the complaint. There is no evidence that the Director of Personnel, who was so the deciding official, even knew of Bottigliero's union activities.

IV. Recommendation

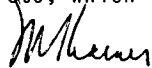
I recommend that Complaint No. 50-8198 be dismissed.

With respect to Complaint No. 50-5999, I recommend that Respondent be held to have violated Section 19(a)(1) of the Executive Order insofar as the complaint alleges a failure to process that part of the March 26, 1971 grievance concerning one of Bottigliero's requests for a within grade quality increase and insofar as it alleges a failure to process a part of the June 14, 1971 grievance and the June 30, 1971 grievance. I recommend that the remainder of the complaint be dismissed.

The Remedy

Although the Respondent apparently acted in accordance with what it believed to be its obligations, I have found violations of Section 19(a)(1) by Respondent in failing to process a part of the March 26 grievance, a part of the June 14 grievance, and the June 30 grievance. As observed above, good faith does not excuse a violation of Section 19(a)(1), although bad faith may exacerbate it. But it would not be appropriate to order that those parts of those grievances should therefore be allowed. The violations were the failures to process the grievances, not the conduct that gave rise to the grievances. Thus the remedy should be related to the processing of the grievances or those parts of them.

All three of the violations I have found were failures to process grievances of Bottigliero. Mr. Bottigliero is apparently sensitive about having references to his formal grievances publicized. Accordingly, I suggest that the Assistant Secretary issue the Order attached hereto and require the posting of the Notice attached thereto, which minimize references to the grievances as his.



MILTON KRAMER  
Administrative Law Judge

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations thereunder (29 C.F.R. Sec. 203.25(b)), the Assistant Secretary of Labor for Labor-Management Relations orders that Office of Economic Opportunity, Region V, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing or failing to process in accordance with its Regulations grievances properly presented to it by Local 2816, American Federation of Government Employees, AFL-CIO, on behalf of an employee or employees in the collective bargaining unit represented by it beyond the decision of the deciding official when further processing is requested and provided for, unless the grievance is granted or is resolved to the satisfaction of the employee or employees on behalf of whom the grievance is presented.

(b) Refusing the request that the grievances of Michael Bottigliero, presented by him and Local 2816 and described in Parts II, D, 2, II, F, and II, G of the Report and Recommendation accompanying the attached Decision, be referred to further review to the extent required by Parts III, C, 2, III, E, and III, F of said Report and Recommendation, if Local 2816 again requests such reference within 30 days of the date of this Order.

(c) Interfering with, restraining, or coercing Michael Bottigliero or any other employee in the collective bargaining unit by denying him or them the right to be represented by the American Federation of Government Employees, AFL-CIO, in presenting grievances through all the steps permitted by Respondent's regulations.

2. Take the following affirmative actions:

(a) If request therefor is made by Michael Bottigliero or Local 2816 within 30 days after the date of this Order, refer the grievances described in Parts II, D, 2, II, F, and II, G of the Report and Recommendation for further processing to the extent required by Parts III, C, 2, III, E, and III, F of the Report and Recommendation.

(b) Post copies of the attached Notice on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations at its offices in Chicago, Illinois. Upon receipt of the forms they shall be signed by the Regional Director and posted and maintained for thirty consecutive days at all places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty days of the date of this Order what steps have been taken to comply herewith.

PAUL J. FASSER  
Assistant Secretary of Labor  
for Labor-Management Relations

August , 1973

NOTICE TO ALL EMPLOYEES

Pursuant to  
A Decision and Order of the  
Assistant Secretary of Labor for Labor-Management Relations  
and in order to effectuate the policies of  
Executive Order 11491, as amended  
Labor-Management Relations in the Federal Service

We hereby notify our employees that:

WE WILL NOT refuse to process grievances presented to us by the American Federation of Government Employees concerning the manner of determining and making recommendations to the appointing official of candidates for a position for which there has been a posted vacancy.

WE WILL NOT refuse to process grievances presented to us by the American Federation of Government Employees, which have been accepted as grievances and remain unresolved after being processed through the initial steps of the grievance procedure, through the subsequent steps of the grievance procedure if AFGE requests such further processing.

WE WILL NOT interfere with, restrain, or coerce Michael Bottigliero or any other employee in the bargaining unit represented by American Federation of Government Employees in the exercise of their rights under Executive Order 11491, as amended, by denying them the right to be represented by AFGE in presenting grievances through all the steps permitted by the grievance procedure.

REGIONAL DIRECTOR

Dated:

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

If employees have any question concerning this Notice or compliance with it, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Room 848, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604.

**REPORTS ON RULINGS**  
**OF THE**  
**ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS**

**Nos. 53 - 55**

**January 1, 1973, through December 31, 1973**



March 12, 1973

June 22, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
REPORT ON A RULING OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
REPORT ON A RULING OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 53

Problem

A question was raised as to whether an employee, who claims to be eligible to vote but whose name does not appear on the voter eligibility list, may cast a ballot notwithstanding the fact that one or more of the parties contend that the employee is ineligible to vote.

Ruling

An employee whose name does not appear on the voter eligibility list, nevertheless, may cast a challenged ballot, upon request for such ballot, if the employee claims to be eligible to vote.

Report Number 54

Problem

The question was raised whether an exclusive recognition which was granted under Executive Order 10988 may be clarified or amended by the mutual agreement of the parties without utilizing the procedures set forth in the Assistant Secretary's Regulations.

Ruling

While units for which exclusive recognition was granted under Executive Order 10988 continue to exist under Executive Order 11491, the only means by which such recognition now can be clarified or amended in a manner which would be binding on the Assistant Secretary or any other parties in another proceeding, is by the filing of an appropriate petition pursuant to Part 202 of the Assistant Secretary's Regulations. A contrary conclusion would be inconsistent with the purposes and policies of Executive Order 11491 under which a third-party process was established in Section 6(a)(1) to "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues....."

September 6, 1973

UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
REPORT ON A RULING OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491 AS AMENDED

Report Number 55

Problem

The question was raised as to whether an activity was obligated to negotiate with a labor organization holding exclusive recognition during the pendency of a petition filed by the activity raising a good faith doubt that the exclusive representative represents a majority of the employees in an appropriate unit, or raising a question in good faith as to the appropriateness of the existing unit because of a substantial change in the character and scope of the unit.

Decision

While awaiting the resolution of a petition in which an activity has raised a good faith doubt as to the exclusive representative's majority status or a good faith doubt as to the appropriateness of the existing unit, there is no obligation on the part of the activity to negotiate with the exclusive representative.









