UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| U.S. DEPARTMENT OF DEFENSE<br>DEFENSE COMMISSARY AGENCY<br>NORTHEAST REGION<br>NEW LONDON NAVAL SUBMARINE BASE<br>GROTON, CONNECTICUT<br><br>Respondent | |
| and<br><br>NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-100<br><br>Charging Party | Case No. BN-CA-02-0529 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 30, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: May 28, 2003
Washington, DC

UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 28, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
NORTHEAST REGION
NEW LONDON NAVAL SUBMARINE BASE
GROTON, CONNECTICUT

Respondent

and Case No. BN-CA-02-0529

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-100

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

# FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ 03-29
WASHINGTON, D.C.

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| U.S. DEPARTMENT OF DEFENSE<br>DEFENSE COMMISSARY AGENCY<br>NORTHEAST REGION<br>NEW LONDON NAVAL SUBMARINE BASE<br>GROTON, CONNECTICUT<br><br>Respondent | |
| and<br><br>NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO,<br>LOCAL R1-100<br><br>Charging Party | Case No. BN-CA-02-0529 |

Darrin Gibbons
For the Respondent

Donald Guindon
For the Charging Party

Amita J. Baman, Esquire and
Gerard M. Greene, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

## DECISION

### Statement of the Case

This case arises out of an unfair labor practice charge filed on June 7, 2002, by the National Association of Government Employees, SEIU, AFL-CIO, Local R1-100 (Union) against the U.S. Department of Defense, Defense Commissary Agency, Northeast Region, New London Naval Submarine Base, Groton, Connecticut (Respondent). On August 26, 2002, the Regional Director of the Boston Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing alleging that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by removing stools from the work stations of bargaining unit cashiers without providing the Union with advance notice and

the opportunity to bargain collectively to the extent allowed by law.

On November 19, 2002, a hearing was held in Groton, Connecticut at which the parties appeared with counsel, presented evidence and cross examined witnesses. The record remained open until February 14, 2003, in order to allow the parties to conduct depositions of additional witnesses.[1] This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses (other than the deposed witness) and of post-hearing briefs submitted by each of the parties.

**Preliminary Matters**

Respondent's Motion to Strike

In its post-hearing brief the Respondent moved to strike the transcript of the deposition of George L. Reaves, Jr., National Representative of the Union, on the grounds that the transcript was not submitted by the date when the record was closed.[2]

The Respondent has misinterpreted the ruling which kept the record open until February 14, 2003. That ruling did not apply to the date of the submission of the deposition transcript any more than the closing of the record at the end of the hearing would have barred the subsequent submission of the hearing transcript. The deposition was, in effect, an extension of the hearing and the deposition transcript is no more than an addendum to the transcript of the hearing. Therefore, the Respondent's motion to strike the deposition transcript is denied.

Respondent's Objections to Deposition Exhibits

The Respondent has objected to General Counsel's Exhibits 10 and 11, both of which were offered during the course of the Reaves deposition, on the grounds that they were not included in the pre-hearing disclosure and were not

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[1] The General Counsel took the deposition of George L. Reaves, Jr. on February 11, 2003. Although the Respondent had stated its intention of serving deposition subpoenas on one or more witnesses, it did not do so.

[2] The deposition transcript and exhibits were received by the Office of Administrative Law Judges on February 24, 2003. The hearing transcript and exhibits had been received on December 9, 2002.

disclosed to the Respondent until less than an hour before the deposition began.

Exhibit 10 is a memorandum dated January 11, 1995, from Bruce C. Schultz, a Commissary Officer for Respondent, to Roy N. Morrisette, President of Local R4-45 of the Union's parent organization. Exhibit 11 is a series of handwritten notes apparently taken by Reaves during the course of negotiations with the Respondent. Neither of those documents was listed in the General Counsel's pre-hearing disclosure, nor has the General Counsel offered any justification for his failure to provide the Respondent with prior notice that he intended to offer them into evidence. Therefore, the Respondent's objections are sustained.

General Counsel's Exhibits 10 and 11 are excluded from evidence and will not be considered in the formulation of this Decision. However, the exhibits will be kept in the record so that their exclusion may be reviewed by the Authority in the event that the General Counsel files exceptions to the Decision.

## Positions of the Parties

The General Counsel

The General Counsel maintains that the Respondent violated its statutory duty to bargain when it unilaterally and without notice removed stools which had previously been provided to bargaining unit cashiers at Respondent's commissary at the Navy Submarine Base in Groton, Connecticut. Henceforth, cashiers would only be allowed to have stools at their work stations after submission of satisfactory proof of medical necessity. The Respondent's action deprived the Union of the right to bargain over the change.

The General Counsel further maintains that the provision of stools at the cashiers' work stations was not covered by the collective bargaining agreement but was a past practice of long duration, thus obligating the Respondent to provide notice of the proposed change and to refrain from implementing the change until the completion of bargaining. Furthermore, the issue of the stools was substantively negotiable inasmuch as it did not affect the Respondent's management rights under § 7106 of the Statute. Even if that were not so, the Respondent was still required to delay the implementation of the change until the Union had an opportunity to bargain over its impact and implementation and to propose arrangements to reduce or eliminate adverse effects on members of the bargaining unit.

Although the Respondent allegedly promulgated a notice that the stools were prohibited[3], the General Counsel argues that the notice was inadequate inasmuch as it was not properly communicated to the Union and did not provide specific information as to the timing of the proposed action. The Union did not receive adequate notice until the stools were actually removed. Therefore, the unfair labor practice charge is not time barred.

Finally, the General Counsel argues that a *status quo ante* (SQA) remedy is appropriate. The effect of such a remedy would be to compel the Respondent to restore the stools to the checkers' work stations pending the completion of bargaining.

The Respondent

The Respondent maintains that the removal of the cashiers' stools was prompted by the report of an independent safety expert who determined that the use of stools at the work stations presented an "ergonomic risk" to the employees. In September of 2001, following the receipt of the report, the Respondent issued an agency-wide directive which prohibited the use of stools. Although the Union's local representative had access to the directive, the Union did not request information or initiate bargaining. Furthermore, the Union did not request bargaining on or after the date when the stools were actually removed.

The Respondent also maintains that the unfair labor practice charge was filed almost nine months after the issuance of the Respondent's directive and was therefore untimely.

## Findings of Fact

The Union is the certified representative of a collective bargaining unit which includes ten cashiers at the Respondent's commissary in Groton, Connecticut. The cashiers perform their work at check-out stations where they tally customers' purchases, primarily by optical scanning, and collect the purchase price.[4]

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[3] The notice was not offered in evidence by either party.

[4] It is unclear whether they perform other duties such as bagging.

The Union and the Respondent were parties to a collective bargaining agreement covering a number of bargaining units of the employees of the Respondent's parent organization who were represented by the Union's parent organization.[5] The agreement went into effect in March of 1996 for a term of three years after which it was to be renewed automatically each year unless either party gave notice of its intent to terminate. Automatic renewal occurred in 1999 and 2000. However, on February 2, 2001, the Civilian Personnel Management Service of the Department of Defense issued a memorandum to the Director of the Defense Commissary Agency, with a copy to Reaves on behalf of the Union, disapproving certain portions of the collective bargaining agreement (GC Ex. 4).[6] The memorandum further stated that the agreement, which was to expire on March 5, 2001, could not be renewed unless the disapproved portions were either deleted or remedied.

The evidence indicates that, during the course of national bargaining in 1995, the Respondent rejected language proposed by the Union which allowed for the use of stools by cashiers. According to the testimony of Michael T. Hoss, the Respondent's Regional Labor Relations Officer for the Northeast Region, the Respondent's opposition to stools, in addition to safety concerns, was that cashiers were not authorized to rest when they were not waiting on customers but were supposed to be engaged in such functions as cleaning their work stations and getting change (Tr., p. 206).[7] The Respondent also rejected the Union's proposal that the issue of stools be reserved for local bargaining. The Respondent has submitted evidence to the effect that rubber mats were placed at the cashiers' work stations as a compromise. However, there is no evidence of contract language which refers to stools either directly or indirectly.[8]

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5
The distinction between the parties and their respective parent organizations is not relevant to the issues in this case. Therefore, unless otherwise noted, the terms "Respondent" and "Union" will be used to designate both the national and the local organizations.

6
Neither party contends that the disapproved portions of the contract addressed the subject of stools for checkers.

7
Hoss did not indicate whether the latter reason was communicated to the Union during negotiations.

8
Neither of the parties offered the collective bargaining agreement in evidence.

Reaves testified that the Union did not press the issue of the stools because of representations by the Respondent that there would be new work stations for cashiers which included folding stools. The credibility of that testimony is diminished by the lack of any evidence that this information was ever disseminated to Union locals or members, nor did the Union ever press the issue in spite of the fact that newly installed work stations did not include the stools. In any event, there is no dispute that stools were provided to cashiers at the New London Commissary for about four years ending in May of 2002.

At some time prior to May 23, 2002, the Respondent commissioned a safety study and was advised to remove the stools from the checkout positions.[9] Some time in May of 2002 Day received a telephone call from John Blythe, Jr., the Commissary Officer of the New London Commissary, who informed her that the New London Commissary had been inspected by a safety officer who had identified the stools as a safety hazard.

By letter of May 23, 2002 (GC Ex. 2), Blythe informed Don Guindon, the President of the local Union, that, "effective immediately, cashiers will no longer be permitted to sit and scan groceries and the stools will be removed from the registers at the New London Commissary." The stools were removed on or about that date.

**Discussion and Analysis**

The Unfair Labor Practice Charge Was Not Untimely

The Respondent's argument as to lack of timeliness is without merit. § 7118(a)(4)(A) of the Statute prohibits the issuance of a complaint based upon an alleged unfair labor practice which occurred more than six months before the filing of the charge. The Union's receipt of adequate notice of a proposed change in working conditions triggered its responsibility to request bargaining[10]. In order for a notice to be adequate, it must provide information as to the scope and nature of the proposed change, the certainty of

[9] Janet Day, a Personnel Management Specialist for the Respondent, testified concerning the study and read portions into the record (Tr., p. 171, *et seq.*). There was no evidence as to the date of the study and it was not offered as an exhibit.

[10] The Respondent has not alleged that the removal of the stools had *no* effect on the cashiers' working conditions or that the effect was *de minimis*.

change and the planned timing, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997).

The Respondent's position is supported by no more than generalized testimony that an agency-wide directive was issued in September of 2001. There is no evidence as to the wording of that directive or of its delivery, whether actual or constructive, to the Union. Thus, there is no basis for a determination that the Union was charged with sufficient knowledge, or indeed of any knowledge, of the impending removal of the stools before they were actually removed without prior notice on May 23, 2002; that is when the unfair labor practice occurred. The unfair labor practice charge was filed on June 7, 2002 (GC Ex. 1(a)). Therefore, the charge was timely and the Complaint and Notice of Hearing was properly issued.

The Provision of Stools Was a Past Practice

In *United States Patent & Trademark Office*, 57 FLRA 185, 191 (2001), the Authority held that, in order to show the existence of a past practice, there must be evidence that the practice was consistently in effect over a significant period of time and that it was followed by both parties, or followed by one party and not challenged by the other. Such evidence clearly exists in this case. In spite of the Respondent's adamant opposition to stools during the 1995 contract negotiations, they were subsequently provided to bargaining unit cashiers for approximately two years.[11] Even if the Respondent actually issued an agency-wide directive in September of 2001 which prohibited the placement of stools at cashiers' work stations, their presence continued for another eight months, which is itself a significant period of time. It is ironic that, while the Respondent has attempted to charge the Union with knowledge of that directive, it has provided no explanation for the delay in its implementation.

The undisputed evidence shows that the Respondent provided stools to the cashiers and allowed the stools to remain at the work stations from 1997 to 2002. Furthermore, there is no evidence that the Respondent ever challenged the presence of the stools. In view of all of the evidence, I find that the provision of stools at the cashiers' work stations was an established past practice. The Respondent's right to depart from this past practice was no greater than

[11] The Respondent unilaterally removed the stools in 1997. The Union filed an unfair labor practice charge which was withdrawn after new stools were provided to fit the redesigned checkout stations.

its right to renounce a provision of the collective bargaining agreement.

The Removal of Stools Was Substantively Negotiable

Although the Respondent has not specifically alleged that the removal of stools was not negotiable, its emphasis on safety considerations suggests that it was entitled to take action unilaterally. Such a position may be maintained only under one of the following two circumstances.

One such circumstance is described in § 7117(a)(2) and (3) of the Statute. According to that provision, the Respondent would have been absolved of the duty to bargain if it had acted in accordance with a rule or regulation issued either by an agency or by one of its primary national subdivisions. Even if the Respondent had submitted sufficient evidence of such a rule or regulation, it would still have been under a duty to bargain if the Authority were to determine that there was no compelling need for the rule or regulation or if it were shown that the Union represents a majority of employees in the agency or subdivision which issued the rule or regulation.[12]

The second circumstance involves an exercise of a management right pursuant to § 7106 of the Statute. It is difficult to imagine how the Respondent's action would correspond with any of the functions enumerated in that section. While § 7106(a)(2)(D) refers to the maintenance of an agency's mission during emergencies, there is nothing in the record to indicate that such an emergency existed. Even when construed in a light most favorable to the Respondent, the evidence suggests only that the use of stools at the checkout stations might produce adverse ergonomic effects. There is no basis for a conclusion that any employee or customer was in imminent danger of a serious injury.

Whatever the merits of the Respondent's concern over the safety of employees, it was not absolved of its duty to bargain in good faith. An agency's belief that it was under no legal obligation to bargain does not detract from the willful nature of the refusal, *U.S. Dept. of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000).

The Union Did Not Waive Its Right to Bargain

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[12] It is undisputed that the parties now bargain on a national level. This is apparently a departure from the prior bargaining procedure.

The Respondent has emphasized the fact that, upon receipt of the May 23 letter from Blythe, the Union filed an unfair labor practice charge rather than accepting his invitation to contact Janet Day, the designated representative of the Respondent, with any "questions." Assuming that Blythe's equivocal statement was an invitation to invoke bargaining and to propose arrangements, the Union was under no obligation to do so. The Union was not required to propose arrangements because the issue of the stools was substantively negotiable. Furthermore, the Union was presented with a completed action rather than with a proposal or statement of intent. While it may be argued that it would have been a wiser strategy for the Union to have initiated discussions with the Respondent, its failure to do so cannot validly be construed as a waiver of its statutory right to bargain over proposed changes in a past practice.

**The Remedy**

In advocating the imposition of a SQA remedy the General Counsel argues that such a remedy is presumptively appropriate where, in the absence of special circumstances, an agency fails to bargain over changes in working conditions that are substantively negotiable.

In *Federal Correctional Institution*, 8 FLRA 604, 606 (1982), the Authority held that the appropriateness of an SQA remedy is to be determined on a case-by-case basis. The Authority identified five criteria which are to be considered among other factors in striking the necessary balance between the nature and circumstances of the violation and the impact of such a remedy on government operations. Those criteria and their application to the instant case are as follows:

Whether, and when, notice was given to the Union. Even if the alleged agency-wide prohibition against stools for cashiers were taken into account, the Respondent failed to give the Union meaningful advance notice of the removal of the stools. The stools were removed at or around the time when the Union received the letter of May 23, 2002.

Whether, and when, the Union requested bargaining. The General Counsel presented no evidence that the Union requested bargaining either as to the substance or the impact and implementation of the removal of the stools. Although the Union's failure to request bargaining is explained to some degree by the timing of the Respondent's action, the Union still could have at least attempted to resolve the dispute.

The willfulness of the Respondent's conduct in failing to discharge its statutory obligation to bargain. There is little doubt that the Respondent's action was motivated by a sincere desire to eliminate what it regarded (perhaps accurately) as a safety hazard. The Respondent's concern for safety does not absolve it of its duty to bargain, but it does not appear that the Respondent was motivated by a desire to circumvent the Union.

The nature and extent of the impact experienced by adversely affected employees. It is to be expected that certain of the cashiers experienced a degree of fatigue and discomfort because of the necessity of standing at their work stations. However, there is nothing in the record to indicate that those effects were especially severe. One of the cashiers testified that the Respondent refused to allow her to use a stool in spite of a letter from her physician[13], but there is no indication that such refusal was widespread or that the Respondent is predisposed to deny exceptions based upon medical factors.

Whether, and to what degree, a SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. The Respondent presented credible evidence that the cashiers' work stations are not designed to accommodate stools and that their presence might create a safety hazard. The existence of possibly unsafe conditions caused by the stools would undeniably detract from the Respondent's efficiency and effectiveness.

Taken as a whole, the weight of the evidence is against the allowance of a SQA remedy. If the stools are to be eventually restored, such a result should only occur after the completion of bargaining and, if necessary, the submission of the dispute to the Federal Service Impasses Panel.

After careful consideration of the evidence and of the post-hearing memoranda of the parties, I conclude that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by unilaterally and without notice to the Union removing stools from the work stations of bargaining unit cashiers.

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[13] The letter was not introduced into evidence but, according to testimony, merely stated that the cashier should be allowed to sit. She further testified that she had no diagnosed medical problem other than her age, which was 64. She was informed that the letter was insufficient because of a lack of specificity.

Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Defense, Defense Commissary Agency, Northeast Region, New London Naval Submarine Base, Groton, Connecticut, shall:

1. Cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Bargain upon request with the National Association of Government Employees, SEIU, AFL-CIO, concerning the use of stools by cashiers at the New London Commissary.

(b) Post at the New London Commissary copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commissary Officer and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 28, 2003.

PAUL B. LANG
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the U.S. Department of Defense, Defense Commissary Agency, Northeast Region, New London Naval Submarine Base, Groton, Connecticut, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

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

WE WILL bargain upon request with the National Association of Government Employees, SEIU, AFL-CIO, concerning the use of stools by cashiers at the New London Commissary.

_____

_ (Respondent/Agency)

Dated:_____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is: 617-624-5730.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-02-0529, were sent to the following parties:

_____

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**CERTIFIED MAIL & RETURN RECEIPT** **CERTIFIED NOS:**

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DATED: May 28, 2003
Washington, DC