UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 30, 1998

TO: The Federal Labor Relations Authority

FROM: Eli Nash, Jr.
Administrative Law Judge

SUBJECT: DEPARTMENT OF ENERGY, WESTERN AREA POWER ADMINISTRATION, GOLDEN, COLORADO

Respondent

and Case No. DE-CA-80417

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3824

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

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DEPARTMENT OF ENERGY, WESTERN AREA POWER ADMINISTRATION, GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3824 Charging Party	Case No. DE-CA-80417

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 1, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

Eli Nash,
Jr. Administrative Law Judge

Dated: December 30, 1998
Washington, DC

OALJ 99-11

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF ENERGY, WESTERN AREA POWER ADMINISTRATION, GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3824 Charging Party	Case No. DE-CA-80417

Douglas N. Harness, Esq.
For the Respondent

Mr. H. Paul Hirokawa
For the Charging Party

Matthew Jarvinen, Esq.
For the General Counsel

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION

Statement of the Case

On June 26, 1998, the Regional Director for the Denver Region of the Federal Labor Relations Authority (hereinafter called the Authority), pursuant to a charge filed on March 9, 1998 and an amended charge filed on June 24, 1998 by the American Federation of Government Employees, Local 3824 (hereinafter called the Union), issued a Complaint and Notice of Hearing. The Complaint alleged that the Western Area Power Administration, Golden, Colorado (hereinafter called Respondent or WAPA) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations

Statute since March 4, 1998 by its refusal to bargain with the Union concerning directed reassignments issued to bargaining unit employees Stephen S. McKenna and Henry J. Kientz on February 24, 1998 and March 3, 1998, respectively.

A hearing was held in Denver, Colorado, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The parties filed timely post-hearing briefs which have been carefully considered.[1]

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. The Transformation Negotiations

WAPA is a power marketing authority selling and distributing wholesale hydroelectric power to customers in 15 western states. The Union is the certified exclusive representative of a unit of employees of about 550 employees in approximately 51 duty locations in 15 states, appropriate for collective bargaining at the Respondent. WAPA and the Union are parties to a collective bargaining agreement effective May 28, 1997 (hereinafter called the CBA). While there are no provisions in the CBA addressing directed reassignment of unit employees, the 1997 CBA incorporates the Transformation Agreement at issue in this case.

Sometime in August 1995, Union President Glenn DePriest and Vice President Alan Adler received a three-ring binder o f around 300 pages outlining WAPA's Transformation Implementa-tion plan (hereinafter called the Plan), a plan to restructure and downsize WAPA over the following 2½ years. WAPA Corporate Communications Manager Robert Fullerton described the process by which Respondent developed the Plan and developed the "will be" organization (WAPA's vision for staffing, mission and purpose) which were unveiled in October 1995. The latter document summarized the staffing levels that formed the basis for negotiations with the Union.

Immediately thereafter, the Union requested bargaining over the Plan. Michael Hurley, a national representative of the Union, was brought in to assist with Plan negotiations.

[1] Counsel for the General Counsel's uncontested motion to correct transcript is granted.

Upon review of the Plan, the Union became concerned about the absence of detailed information on how WAPA would downsize its organization. The Union was interested in how many positions would be abolished and in what parts of the organization; the protection of employee rights in the event of employment reductions (i.e., that it is done fairly); if voluntary downgrades, involuntary downgrades and/or directed reassignments would be used, to what degree and in what organizations; how positions in the new organization would be classified (there were no position descriptions in the plan); and how to preserve unit employees' retention rights in the event a Reduction-in-Force (hereinafter called RIF) became necessary.[2] The Union was also concerned that WAPA planned to implement "zero-based staffing" under which a new organization would be created and all incumbent employees would be required to compete to fill the new positions. These unanswered questions convinced the Union, to seek the preservation of future bargaining rights wherever and whenever possible. Since neither the Plan nor WAPA identified the number of employees who would be adversely affected by Transformation, the Union's inclination was to reserve the right to bargain at such time as Respondent made up its mind. If WAPA did not agree to the preservation of future bargaining rights, the Union would have insisted that WAPA run a RIF. From the Union's view, a RIF provided a systematic approach under which employees would be afforded protections based on tenure and veterans preference.[3] According to Hurley, the language in proposal 10 "after the reorganization" meant after the new organization was determined as a result of the numbers, types and grades negotiations agreed to in proposal 31.

Negotiations started during the week ending October 20, 1995. Hurley and Fullerton served as Chief Negotiator's

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[2] An examination of WAPA's October 17, 1995 "will be" document discloses that it did not provide the Union with any position descriptions to go along with the "will be" positions. Further, as Fullerton conceded, the "will be" organization was not set in concrete since there would be changes depending on the results of the numbers, types and grades negotiations to which the parties agreed.

[3] During the first round of negotiations, Michael Watkins, WAPA Corporate Human Resources Manager suggested that instead of bargaining, WAPA would simply conduct a RIF. When the Union's negotiators immediately asked where they could sign, WAPA apparently thought better of this suggestion. The Union perception was that the RIF procedure afforded certain protections.

for their respective sides. DePriest and Adler were part of the Union's team, while Watkins, sat on WAPA's team.

On October 9, 1995, before the negotiation started, the Union submitted an initial set of 44 numbered bargaining proposals to WAPA. At their first meeting, the Union asked questions (from a list of approximately 40 questions) about the Plan and basically when it would happen and how it would affect unit employees. Hurley stated that, the problem was that the Plan was almost entirely hypothetical and WAPA was unable to furnish position descriptions which would be associated with projected new positions within the new organization. Thus, WAPA was unable to furnish the Union with any guarantees. The Union proceeded to explain the intent of each of its 44 bargaining proposals to WAPA's negotiators. The Union sought to answer any questions posed by WAPA, after which Respondent caucused and presented counterproposals to each of the Union's 44 proposals, many of which WAPA apparently agreed to "on-the-spot" with little further discus-sion. Subsequently, the Union presented its counterproposal for each of the 44 numbered proposals. After the parties initialed their agreement to several of the proposals on October 20, the Union submitted an additional set of 14 proposals, numbered 45 through 58. Again, the Union explained the intent of each of its additional proposals, but the 14 new proposals were not discussed until the next bargaining session. Among the proposals initialed by the parties on October 20, 1995 were the following:

> 10. The Union reserves the right to initiate bargaining after the reorganization if necessary, for things not foreseen prior to the reorganization.
>
> 21. The Union reserves the right to add to, delete, or amend the proposals to facilitate bargaining.
>
> 31. Procedures/methods for placement of [bargaining unit] employees will be negotiated.
>
> 32. Numbers, types, grades, and methods of doing work will be negotiated for each unit in Western that has [bargaining unit] employees.

The language initialed by the parties for proposals 10, 21 and 32 was the language originally proposed by the Union without modification.

During negotiations, the Union described the intent of proposal 10 by explaining that due to the uncertainty of the Plan, it wished to preserve future bargaining rights over

changes that would occur during the 2½ years process of implementing the Plan and which could not be predicted at the time of negotiations. Also the Union made known its unwillingness to waive bargaining rights over changes in the Plan which WAPA might decide to make in the future. Fullerton confirmed that certain provisions reserved the Union's right to initiate bargaining over things not foreseen and over matters that the parties did not know about at the time of the Transformation negotiations, including the shape of the organization which would be determined after completion of the numbers, types and grades negotiations. Other than the Union's description of the intent of its proposal, there was little discussion of proposal 10 at the bargaining table.

The Union described the intent of proposal 21 in terms of retaining its flexibility to bargain as changes were made throughout the Transformation process. When asked if this meant the Union could bargain every day of the week, the Union responded that theoretically, it did. The Union also explained that when Respondent formulated its plan under this proposal, the Union would be able to initiate additional bargaining and to modify its proposals as it learned more about Transformation. Adler described the discussion at the bargaining table, as the Union complaining that WAPA was showing the Union nothing, and the Union could not bargain over "water vapor."

Proposal 31 initially, contained slightly different language than that initialed by the parties on October 20, 1995. The language initially proposed by the Union was: "Assignment rights for [bargaining unit] employees will be negotiated." Although Respondent's initial counterproposal agreed to the Union's proposed language, the Union revised the language to avoid negotiability problems with respect to management rights, explaining that it wished to bargain over procedures and methods for placement of employees when that opportunity was presented in the future as WAPA made staffing decisions during implementation of the Transformation process.

WAPA's agreement to engage in "numbers, types and grades" negotiations in proposal 32 was of particular importance to the Union because at the time of the Transformation negotia-tions there was no tangible description of what the new organization would look like or to indicate how many employees would be affected by Transformation. The language initialed on October 20 was the language originally proposed by the Union. Fullerton, however, informed the Union that it was WAPA's full intent to honor Executive Order 12871, issued by President Clinton

in October 1993, directing agency management to bargain with labor organizations over subjects enumerated in section 7106 (b)(1) of the Statute, including the numbers, types and grades of employees who perform the agency's work.

A second set of bargaining sessions began during the week ending November 3, 1995 and ended with the parties initialing language agreed to for proposal 54 read as follows:

> Union and management agree that staffing levels agreed to as a result of bargaining will remain in effect throughout the transformation process. If there are Management proposed changes, the Union will be notified and given the opportunity to bargain over those proposed changes.

While the language agreed to by the parties was modified somewhat from that originally proposed by the Union on October 20, the intent of the proposal did not change, however. Thus, the Union explained that once staffing levels were agreed to in the "numbers, types and grades" negotiations, staffing levels would remain static so that employees could assess their position in the new organization and plan accordingly. The Union's original language was modified to address WAPA's concern about being locked permanently into the agreed-to organization, by allowing for changes, provided, however, that the Union would be notified and given the opportunity to bargain over any changes in those staffing levels.

At the conclusion of the November 3, 1995 bargaining session, tensions were high because little progress had been made over the major issue on how Respondent would staff the new organization. While WAPA wished to use merit promotion procedures, the Union, somewhat apprehensive about preselection, preferred the protections afforded by RIF procedures. The parties agreed to mediation and met with FMCS Mediator Kurt Saunders on December 7, 1995. It appears that very little progress was made during this mediation session.

The next meetings were initiated by Respondent. WAPA was apparently under a timetable to complete negotiations by January 1, 1996 and thus bargaining sessions were held on December 19 and 20, 1998. On December 19, the Union submitted a set of proposals that contained language that WAPA solicit volunteers from among qualified employees prior to issuing unit employees involuntary reassignments, and if there were no volunteers, that WAPA select the qualified

employee with the lowest service computation date (hereinafter called SCD) for the involuntary reassignment. The Union also proposed that if a RIF was conducted prior to September 30, 1998, the competitive area would be western-wide. Adler described how each time the Union asked WAPA how it would staff the new organization, Watkins became animated and stated that it was all in the Transformation book. When the Union asked Watkins to show it where, he was unable to do so. Even in those instances where the Plan showed, for example, a reduction from 13 to 8 Electrical Engineers, it did not contain any explana-tion of how the reduction would be accomplished. WAPA's counterproposal on December 19, offered to solicit volunteers, but insisted that if no qualified volunteers came forward, it would "assign the most qualified employee." WAPA also proposed deleting the Union's RIF proposal, contending that no RIF would be needed, but also proposing that no involuntary separations would be implemented prior to June 1, 1998.

The following day, December 20, 1995, the Union submitted a counterproposal to continue requiring use of inverse SCD for involuntary reassignments. This was done, it was explained, in order to avoid WAPA playing favorites, the Union would insist either on the protections afforded by RIF procedures or on the use of seniority. In its last counterproposal submitted in the afternoon, on December 20, WAPA agreed in proposal 1.c. to the Union's language regarding use of the lowest SCD and to the Union's proposal that if a RIF were needed, the competitive area would be western-wide. According to Adler, this was the first time that WAPA had ever agreed to incorporate seniority into an agreement with the Union. Adler also speculated that WAPA's change in position regarding use of lowest SCD was motivated by Fullerton's need to obtain an agreement before proceeding with implementation of the next phase of Transformation. This speculation appears to be confirmed by both Fullerton and Hurley. Fullerton, it seems made no secret that he was frustrated with the progress of negotiations as evidenced by his response to, Watkins telling him not to sign off on a matter and Fullerton's disregard for that advice and by gesturing for Watkins to sit down. With respect to the scope of employees from whom Respondent would solicit volunteers, as Watkins confirmed, the parties' understanding at the bargaining table was that volunteers would be solicited western-wide. The parties also apparently understood that selection of qualified employees based on the lowest SCD would be made western-wide. This was consistent with the western-wide competitive areas agreed to in the event a RIF was required.

Fullerton described the parties' agreement to proposal 1.c. as the real guts of the negotiations. Although neither Fullerton nor Watkins testified regarding any of the discussion, which led to the parties' agreement to provision 1.c., Fullerton testified that WAPA felt this represented the total of what was needed as far as protocol and format for directed reassignments. Hurley said, however, that the language of the December 20 agreement was not intended to be all-encompassing. There were issues remaining for consideration such as how much time an employee would have to decide whether to accept a directed reassignment (hereinafter called DR or DRs), whether employees would be permitted to submit a list of preferences for use in placement of employees, and the type of DR, that is, whether it was to a different commuting area and whether it involved an adverse action. Hurley also stated that the December 20 agreement did not fulfill WAPA's bargaining obligation under proposal 31 since the Union had protested throughout the Transformation negotiations that Respondent was unable to describe the scope of the adverse effect on unit employees or to identify how many employees would be let go, how many employees would face directed reassignments, and if so, the locations to which they would be assigned. Since these questions were not answered, the Union felt that it needed to, and did, preserve future bargaining rights to be exercised once the impact could be assessed. There was no discussion at the bargaining table regarding the effect of proposal 1.c. on whether Respondent had satisfied its October 20 agreement in proposal 31 to negotiate over "Procedures/methods for placement" of unit employees. Fullerton's position was that at least as far as directed reassignments were concerned, the December 20 negotiations fulfilled Respondent's obligation to negotiate with the Union over procedures for placement of employees.

In any event, negotiations concluded rapidly after WAPA submitted its December 20 counterproposal. Fullerton and Hurley initialed the last set of agreed-to proposals, but apparently, no single document embodied all of the proposals to which the parties had agreed during the Transformation negotiations. Hurley testified that much of what transpired during Transformation bargaining was part of the normal give and take of negotiations, but noted that it was unusual for Respondent to agree to the Union's preservation of future bargaining rights.

B. Numbers, Types and Grades Negotiations

Following negotiations of the Transformation Agreements, the parties embarked upon the numbers, types and

grades negotiations which are contained in proposal 32. Beginning in the Spring of 1996, the parties reached agreement on approximately 680 positions in May, but remained deadlocked over about 20 other positions. The Federal Services Impasses Panel (FSIP or Panel) issued a decision on November 5, 1996 resolving the parties' impasse concerning the 20 remaining positions sought by the Union.

During the period covered by the numbers, types and grades negotiations, WAPA made efforts to keep affected employees informed by conducting meetings and by issuing several bulletins in an attempt to update the status of the Transformation process and to answer employee questions on the matter. Each of the Bulletins prepared by WAPA, addresses procedures for directed reassignments. Examination of the "Transformation Bulletins" reveals that not even WAPA's information to employees was consistent with respect to the issue of directed reassignments. For example, in a Bulletin dated May 13, 1996, WAPA explained that it could fill unit positions using voluntary assignments/reassignments at any time, but that these "assignments/reassignments were limited to other positions at the same grade or basic salary that do not have higher promotion potential than an employee's current position." However, in the Bulletin dated November 20, 1996, WAPA "clarified the directed reassignment policy" to reflect that "For jobs advertised at more than one grade, directed reassignments will be given to the employee with the lowest [SCD] from all surplus employees at all eligible grades." According to Watkins, WAPA also distributed biweekly updated lists of surplus employees to the Union beginning in about May or June 1996.

C. Implementation of Transformation

WAPA commenced filling management positions "from the top down" prior to issuance of the FSIP decision. It was not until late 1996 after the Panel decision, however, that the Union first learned that WAPA had issued DRs to any bargaining unit employees when two employees, Viola Michaelis and Bob Wilson approached the Union for assistance. The Union was not notified of either DR. Although Wilson did not challenge his DR, Michaelis sought the Union's assistance, successfully fought not only the DR she received in late 1996, but also a later effort by WAPA to direct her reassignment. DePriest described the Union's actions in challenging the Michaelis DR based on her seniority (there were other qualified employees with a lower SCD) and her lack of qualification for the position. DePriest also prepared a letter for distribution to members

of the bargaining unit summarizing the Union's successful intervention on Michaelis' behalf. That document, "AFGE Bargaining Unit Letter #9," clarified the Union's understanding of the process for reassigning employees by use of the lowest SCD and described the need for position descriptions (PD's) to accurately reflect employees' qualifications.

In addition, the record is uncontroverted that the Union successfully intervened on behalf of several other bargaining unit employees who were issued DRs or whose jobs were in jeopardy due to placement on the surplus list. The record reveals that the Union succeeded in finding Royce Hicks a WAPA position in California instead of his initial reassignment to Fort Peck, Montana. In this same vein, the Union negotiated a MOU in September 1997 allowing Brian Bucks, who was issued a DR to Fort Peck, to take advantage of the Career Transitional and Assistance Program (hereinafter called CTAP) program. Adler explained that negotiation of that MOU arose from those provisions of the Transformation Agreement which preserved future bargaining rights and from the attempt to direct Buck's reassignment to Fort Peck. Adler also offered this MOU as an example of WAPA's recognition of its continuing obligation to bargain over issues related to DRs. Thus, the September 1997 MOU dealt not just with the availability of CTAP, but also incorporated language dealing with flexiplace, training, and the inclusion of language in separation letters concerning early out and discontinued service retirement options. In December 1997 the Union also negotiated a MOU allowing Gary Hoffman (an employee on the surplus list) to move to another position without a loss in grade by agreeing to raise the grade of a position in the new WAPA organization from GS-11 to GS-12. Similarly, an MOU involving saving Vicki Wilson's job in Montrose, Colorado in exchange for an agreement to create a position in Loveland, Colorado for Mike Sibal, a management official. On March 9, 1998, a MOU creating a job for Eugene Medina (then assigned to Golden, Colorado) in Loveland, Colorado. Again on April 2, 1998, an MOU on behalf of Oliver Perkins was negotiated as a GS-12 position in the "will be" organization to GS-13 and to moving Perkins who was a GS-14 into the position with "save pay and save grade." Other employees, whose DR's were brought to the Union's attention, decided to accept the directed reassignments.

It also appears that MOU's were negotiated creating positions for unit employees on the surplus list. An April 24, 1997 MOU changed 3 Electrical Engineering (EE) GS-12 positions to Engineering Technician positions grade banded from GS-8 to GS-11 in order to provide jobs to 3

employees who were unable to qualify for the EE positions. Similarly, a May 20, 1997 MOU changed an Engineering Technician position in Montrose, Colorado to a Computer Maintenance Management System Coordinator position in Loveland, Colorado, thus providing a job for an employee on the surplus list. Lastly, an MOU dated April 20, 1998 created 3 EE (two GS-12/13 and one GS-12) positions as a change to the positions agreed to in the numbers, types and grades negotiations to provide additional jobs for unit employees.

Watkins, on the other hand, saw the MOU's as simply covering issues dealing with the numbers, types (and grades) of positions or dealt with issues "completely unrelated to transformation." In any event, the record plainly demonstrated that the Union did, in some cases successfully intervene on behalf of several employee's who received DR letters.

D. Directed Reassignments of Kientz and McKenna

On February 24, 1998, WAPA Supervisory Electrical Engineer Wilbert Jacoby directed the reassignment of Stephen McKenna from his GS-14 EE position in Golden, Colorado to a GS-14 EE position in the Desert Southwest region, Office of the Regional Manager, with a duty station in Phoenix, Arizona. McKenna's refusal to accept the reassignment would have resulted in action to separate him from his WAPA position. McKenna accepted the DR to Phoenix and reported to his new position as Maximo Project Manager on April 16, 1998. His duties as Maximo Project Manager included managing and monitoring execution of the project, and ensuring that resources were available for completion of the project. McKenna's work over the preceding 17 years was as a technical specialist in the Protection and Control Branch. His prior duties involved research and development, new protection schemes and principles, analyses of power systems, and serving as a technical resource for the entire Branch. The DR not only removed him from the bargaining unit, but created the possibility of exacerbating his health problems that included severe allergies and risks from a prosthetic heart valve and removed him from medical care arrangements in Golden that eventually would have to be abandoned. McKenna also testified that he was not qualified for the Phoenix position as Maximo Project Manager. The record supports his claim that his job in Phoenix managing employees to ensure progress on the Maximo Project and to keep things going across 4 WAPA regions was different from McKenna's former job in Golden as a technical specialist

dealing with hardware, mathematics, the physics of power systems, research and development.[4]

McKenna testified that prior to his reassignment, he worked on 2 major projects developing new fault location methods for series-compensated high voltage lines and 3 other major projects. McKenna added that his former co-workers informed him that the projects were still ongoing and that there was more work that they could handle.[5] McKenna also speculated that his current job could be better performed in Colorado than in Phoenix since he now spends about half of his time in Golden and hardly ever interacts with his current supervisor, Regional Manager Tyler Carlson. Furthermore, he pointed out that most of the consultants and the primary federal employees working on the project are in Golden, and the software packages are being developed and coordination in Golden.

Around March 3, 1998, WAPA Supervisory Electronic Engineer Charles L. Clemans directed the reassignment of Henry Kientz from his EE position in Golden, Colorado to an EE position in the Upper Great Plains Region, Montana Maintenance Office, Transmission Lines and Substations, with a duty location of Fort Peck, Montana. Kientz had just 7

[4] McKenna filed a grievance on March 6, 1998 on his DR arguing, among other things, that he was not qualified for the Maximo Project Manager position, but at no time did McKenna (or the Union) contend that WAPA issued the DR without bargaining with the Union. In his brief, Counsel for the General Counsel addressed the application of section 7116(d) of the Statute regarding McKenna's grievance. Respondent did not raise such an issue in its defense but, relied on the fact that an arbitration decision had already issued concerning reassignments. It was that arbitration, Respondent argues that bars reconsideration of McKenna's claim in this case. Consequently, it is unnecessary for the undersigned to consider the section 7116(d) issue as posed by the General Counsel in resolving this matter.

[5] Jacoby testified that if WAPA brought McKenna back to his former position, most of the work would be charged to "overhead" (i.e. to the cost of doing business) as opposed to being "direct charge" work (which is paid by the customer or through WAPA's construction and rehabilitation work). Fullerton acknowledged that since McKenna is already working for WAPA in Phoenix, WAPA would have to carry his salary and benefits even if he was returned to his former position in Golden. Fullerton did not know whether McKenna's Maximo Project Manager position involved "direct charge" or "overhead."

days to accept or reject the DR. Kientz was advised that in the event he decided not to accept the reassignment, action would be initiated to separate him from his WAPA position. Prior to receiving his DR, Kientz worked as an EE at WAPA in Golden, Colorado since 1980. Although Kientz was aware that he was on the surplus list, he testified that based on his experience and work record and because other surplus employees had been placed in WAPA jobs, that he assumed WAPA would be able to place him in a position for which he was qualified. Kientz nevertheless made several inquiries about the availability of jobs in Golden in the Fall of 1997. When he met with Clemans and Dennis Shurman (Kientz' previous supervisor who now was a project leader under Clemans), to discuss other positions in Golden, however, Clemans told Kientz that he could not be considered for any other positions in Golden because he was needed in his current position to complete his work assignments. Then, prior to his receipt of the March 3, 1998 DR, Kientz was told by a co-worker that he was next to be targeted for the DR.

When he received the DR letter, Kientz discussed his options with the Union. When his request for an extension of time to accept or reject the DR was denied, Kientz obtained a copy of the position description for the Fort Peck job. He discovered that although his EE position in Golden was essentially a desk job with technical responsibilities in the field of transmission line maintenance and safety and with responsibility to represent WAPA on national and international committees in that field, the Fort Peck position was a field position requiring knowledge and experience in substation maintenance and oversight of employees. Experience which Kientz did not have. Although the DR would not change Kientz' GS-13 grade, he did not feel qualified for the position in Fort Peck.

Kientz finally declined the DR because he felt he lacked qualifications for the position, health problems experienced by his mother, the difficulty of finding meaningful employment for his wife in Fort Peck, and the difficulty of selling his home while it was in the process of major repair work. Technically, Kientz took a discontinued retirement (a forced retirement), effective June 3, 1998 which is tantamount to being fired. He has, however, received retirement benefits since that date. At the time of his departure from WAPA, Kientz was in the midst of several ongoing projects, none of which had been completed as of the time of his deposition testimony on August 20, 1998. In fact, when Kientz asked one of his former co-workers whether there would still be work for him to do, the response was, "hell yes."

E. Union Efforts to Bargain over the DRs issued to McKenna and Kientz

It is uncontested that the Union never received notice from WAPA concerning the DRs issued to Kientz and McKenna. The Union learned of the DRs from the affected employees. Prompted by the DRs issued to Kientz and McKenna, on or around March 3, 1998 Adler submitted a demand to bargain over the individual impact of the DR's and submitted an initial set of 12 bargaining proposals.[6] Adler testified that the Union's bargaining demand was based on the fact that the positions were not in the "will be" organization resulting from the numbers, types and grades negotiations, the placement of McKenna and Kientz into positions for which they were not qualified, and, with respect to McKenna's DR, removal of the Chief Steward from the bargaining unit. Adler also said that the Union's bargaining demand was consistent with its preservation of bargaining rights in the Transformation Agreement. Despite the language of proposal 1.c., Adler revealed his view, that the Union was nevertheless entitled to bargain over the DRs issued to Kientz and McKenna because it had specifically preserved the right to engage in such bargaining in the Transformation Agreement. As described by Hurley, the Union's preservation of such a bargaining right was premised on WAPA's inability to describe the precise impact on employees caused by Transformation. The Union explained that unless WAPA was able to explain how Transformation would unfold with respect to unit employees, the only way the parties could reach agreement over Transformation was for the Union to preserve its right to negotiate once WAPA identified the impact on unit employees.

In proposal 2 of its March 3 bargaining demand, the Union sought to re-emphasize that employees could only be issued a DR to a position for which they are qualified. Adler stated that he believed that qualifications had not been addressed in the Transformation negotiations. Proposal 9 was designed to ensure that any solicitation for volunteers be sent out western-wide and be posted for at least 2 weeks. Adler explained that, he thought the solicitation of volunteers had been addressed in the Transformation Agreement, but the Union learned that solicitations were not going to all WAPA employees. Adler

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6 Adler was aware of previous DRs issued to employees, but did not request to bargain prior to March 3, 1998 because the Union had good success when intervening in those instances where affected employees sought Union assistance.

also said that the Union's view was that anything less than 2 weeks was simply not enough time to reach potentially interested employees who might be on leave. Proposal 10 was designed to factor veterans preference into DRs, a protection built in to RIF procedures. However, the Union never had the opportunity to explain the intent of its bargaining proposals to WAPA because James Fisher's (labor relations officer) March 4, 1998 response took the position that it was under no obligation to negotiate reassignment procedures. Fisher's position was based on his contention that WAPA and the Union had previously negotiated and agreed to procedures to be followed in directing reassignments.[7] Adler disagreed with the position set forth in Fisher's March 4 response, arguing that the Union still had the right to bargain over DRs because it had specifically reserved the right to bargain over unforeseen issues (which, for Adler, included taking an employee out of the bargaining unit and assigning him to a position for which he was not qualified). In disputing Fisher's March 4 response, Adler noted that WAPA had in fact engaged in negotiations resulting in several MOU's concerning DR issues.

Around April 10, 1998 the Union submitted additional bargaining proposals in Adler's letter faxed to Fisher. These included proposals designed to accommodate McKenna's health problems. Again, however, the Union was not given an opportunity to explain its proposals. Instead, Fisher's April 10 response continued to assert the absence of any bargaining obligation.

F. Eaton's Arbitration Decision

Hurley served as the Union's representative at the January 8, 1997 arbitration of a Union grievance concerning management's failure to bargain over the implementation date for filling positions during the Transformation process as required by proposal 35 and by a November 3, 1995

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[7] Fisher acknowledged that directed reassignments constituted a "method of placing employees" and conceded that there was nothing in the language of the Transformation Agreements which in any way limited the Union's right to bargain over the procedures or methods of placing employees. While Fisher argued that this is what item 1.c. from the December 20, 1995 agreement accomplished, he recognized that he was not a participant, and, therefore had no firsthand knowledge of what was said at the bargaining table.

agreement.[8] Although Hurley argued in his opening statement before Arbitrator William Eaton that WAPA had failed to bargain over procedures to place employees into positions under Transformation as required by proposal 31 of the Transformation Agreement, Arbitrator Eaton did not address the merits of this Union contention in his March 24, 1997 award. Eaton dismissed the Union's proposal 31 arguments because they had not been raised at the initial stages of the grievance process.

Analysis and Conclusions

A. Whether the Authority is precluded by collateral estoppel or res judicata from consideration of any of the bargaining allegations raised in the instant case

At the outset, Respondent maintains that the instant action is barred from Authority consideration because of an arbitration decision in *Western Area Power Administration and American Federation of Government Employees, Local 3824*, FMCS Case No. 96-21395-A.[9] It argues, in essence, that the Authority is precluded from considering this matter since an arbitrator had already rejected the Union's claim

[8] As Watkins explained, after the parties reached agreement as a result of numbers, types and grades negotiations that 680 positions would be included in WAPA as a result of Transformation, Respondent immediately began to fill these positions. The Union objected that implementation should be delayed pending resolution of the numbers, types and grades impasse by the Panel and that the implementation date should be negotiated.

[9] Respondent advises that the obligation to bargain over midterm bargaining proposals is presently before the United States Supreme Court in *National Federation of Federal Employees, Local 1309 v. Department of the Interior*, Case No. 97-1184, and *Federal Labor Relations Authority v. Department of the Interior*, Case No. 97-1243. The undersigned does not view this matter as one involving midterm bargaining. Even assuming that the Union's request constituted a midterm bargaining request, existing Authority precedent is clear and until the United States Supreme Court decides otherwise, the undersigned is constrained to follow that law. Moreover, the mere fact that a matter is before a court does not prevent the processing of this case, since upon request of either party this matter would be reopened "[in] the event the FLRA or a court modifies the existing law. . . ." *Office of the General Counsel, National Labor Relations Board*, 22 FLRA 259 (1986).

that WAPA could not begin filling positions after the 1995 reorganization without Union consent because the Union had reserved future bargaining rights during the October – December 1995 negotiations. Thus, WAPA contends that the doctrine of *collateral estoppel* which prevents a second litigation before an administrative agency of the same issues of fact or law even in connection with a different claim or cause of action applies here. *U.S. Department of the Air Force, Scott Air Force Base, Illinois, and National Association of Government Employees, Local R7-23*, 35 FLRA 978 (1990). In order for collateral estoppel to apply five elements must be met: 1) the same issue must be involved in both cases; 2) the issue must have been actually litigated in the first case; 3) the resolution of the issue must have been necessary to the decision in the first case; 4) the prior decision on the issue to be precluded must be final; and 5) the party precluded must have been fully represented at the prior hearing on the precluded issue. *Id.* at 982-983.

WAPA also insists that a valid, final award by arbitration has the same effect under the rules of res judicata, as a judgment of a court. *Restatement 2d, Judgments*, § 84(1). Its argument, essentially is that, "[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner v. Sunnen*, 333 U.S. 591 (1948). The evidence discloses that

the arbitrator clearly rejected the Union's claim that proposal 31 of the Transformation agreement stating that: "Procedures/methods of placement of BU employees will be negotiated." Proposal 31 appears to the undersigned to be an integral part of the instant matter. The issue litigated in this case is whether WAPA violated section 7116(a)(1) and (5) of the Statute by its refusal to bargain over procedures and appropriate arrangements related to the McKenna and Kientz directed reassignments. Before the arbitrator, the issue as stipulated by the parties, was as follows: "Did management violate the Transformation Agreement when they began filling positions by various personnel methods on May 17, 1996, and if so, what should be the remedy?" While the Union sought to rely on proposal 31 of the Transformation Agreement to support its grievance, Arbitrator Eaton refused to consider proposal 31 because in his opinion, it was untimely raised. Thus, it is found that the issue herein was not necessary for the arbitrator to make a decision.

The record shows, in my opinion, that resolution of the proposal 31 issue was not necessary to Arbitrator Eaton's decision since he rejected the Union's contentions in that regard. Consideration of Proposal 31, however, appears to be pivotal in this case and must be considered in order to resolve the alleged unfair labor practice. Accordingly, since the arbitrator did not address what is regarded as a critical matter in the case, it is found that neither *collateral estoppel* nor *res judicata* apply hereinafter.

B. The Respondent's issuance of DRs to McKenna and Kientz created a bargaining obligation since the record reveals an actual or foreseeable impact on unit employees which was more than de minimis exists herein.

Counsel for the General Counsel acknowledged that the DRs to McKenna and Kientz involved the exercise of a management right under section 7106(a) of the Statute. It is well recognized however, that although the substance of a decision may not itself be subject to bargaining, an agency is nonetheless obligated to bargain the impact and implementation of that decision if the changes are more than de minimis. *Air Force Logistics Command, Warner Robbins Air*

Logistics Center, Robins Air Force Base, Georgia, 53 FLRA 1664, 1668 (1998). The instant case involves only the question of WAPA's alleged failure to bargain over procedures and appropriate arrange-ments for employees adversely affected by a change that had more than a *de minimis* effect on bargaining unit employees. *See, e.g., United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998)(*AFMC*); *General Services Administration, Region 9, San Francisco, California,* 52 FLRA 1107 (1997).

In *AFMC* and *Social Security Administration, Malden District Office, Malden, Massachusetts*, 54 FLRA 531, 536 (1998), the Authority recently reaffirmed its *de minimis* standard for determining whether a change in conditions of employment requires bargaining. That standard originally set out in *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 408 (1986), requires an examination of the particular facts and circumstances in each case, with principal emphasis placed on an assessment of "the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved."

Issuance of the DRs to Kientz and McKenna required each to make extremely tough career decisions between termination from employment and accepting new positions in different cities. With respect to Kientz, acceptance of an involuntary "discontinued" retirement in lieu of termination indeed ended his Federal employment. Accepting the reassignment would have forced him to move several hundred miles to a remote location to perform a job for which he lacked the requisite qualifica-tions. The record reveals that Kientz' position in Golden, Colorado was a desk job with technical responsibilities while the position to which he was reassigned required field responsibilities for oversight of substation maintenance, a specialty unfamiliar to Kientz. In Kientz' case, further hardship involved the marketing of his home in Colorado, along with the possibility that his wife would have found it difficult to find meaningful employment in Fort Peck.

McKenna accepted his DR to Phoenix, Arizona. The General Counsel submits that this acceptance created a severe situation for him. The record revealed that McKenna was reassigned from the bargaining unit to the Maximo Project Manager position. McKenna had essentially no knowledge or experience in the basic managerial components of his position description and the adverse impact is

readily apparent. Furthermore, it is uncontested that McKenna's reassignment to the Phoenix area was detrimental to his health. McKenna's testified in this regard, that his allergies were exacerbated by the relocation, thus increasing the risk that his prosthetic heart valve would be endangered by infection. Also, foreseeable was McKenna's risk of loss of his regular physician in Colorado, not a trivial matter for someone in McKenna's state of health. Assigning an employee to a position to which he brings no knowledge or experience shows a more than *de minimis* adverse impact. Apparently Respondent found qualifications for a position to have an impact in the successful intervention by the Union in employee Michaelis' case.

The record, in my view, supports a finding that the adverse impact on both unit employees Kientz and McKenna was more than *de minimis*. It is, therefore, concluded and found that issuance of their DRs gave rise to a bargaining obligation by the Respondent.

C. Whether by failing and refusing to provide the Union with prior notice and an opportunity to bargain over procedures and appropriate arrangements related to the directed reassignments issued to McKenna and Kientz, Respondent violated section 7116(a)(1) and (5) of the Statute

It is undisputed that Respondent did not provide the Union with prior notice of its intent to issue DRs to McKenna and Kientz on February 24 and March 3, 1998, respectively. Furthermore, after the Union submitted its March 3, 1998 letter requesting bargaining, Fisher's March 4 response took the position that Respondent had no obligation to bargain over reassignment procedures, thereby thwarting bargaining and preventing the Union from even explaining either its March 3 or April 10 bargaining proposals. WAPA instead implemented McKenna's DR to Phoenix effective April 16, 1998 and, upon Kientz' declining the Fort Peck DR, forced Kientz' involuntary "discontinued" retirement. Therefore, it is found that the DRs issued to McKenna and Kientz were clearly implemented without notice or any opportunity for the Union to bargain.

1. Whether Respondent's failure and refusal to provide the Union prior notice and an opportunity to bargain over the McKenna and Kientz DRs is "covered by" the Transformation Agreement.

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 47 FLRA 1004 (1993)*(SSA 1)*, the Authority reappraised its precedent regarding the impact of collective bargaining agreements on the duty to bargain. There it established the criteria for determining whether or not a matter is "contained in" or "covered by" a collective bargaining agreement. Thus, an agency may successfully defend what would otherwise be deemed a refusal to bargain violation by establishing that the matter is "covered by" an agreement. The Authority indicated that the framework should be "sensitive both to the policies embodied in the Statute favoring resolution of disputes through bargaining[10] and to the disruption that can result from endless negotiations over the same general subject matter." The Authority's three part test considers (1) whether "a reasonable reader would conclude that the provision settles the matter"; (2) whether "the negotiations are presumed to have foreclosed further bargaining over the matter"; and (3) whether the parties "reasonably should have contemplated that the agreement would foreclose further bargaining. . . ."

Respondent argues that a finding against it in this case would establish new law exempting the "covered by" doctrine when a union has reserved a future right to bargain and/or when there is a subsequent bargaining history. Essentially, Respondent contends that the parties had already bargained to agreement over the process for directed reassignments and furthermore bargained to agreement over which bargaining unit positions would be eliminated in the new organization, including the positions of McKenna and Kientz, and therefore, the Authority's "covered by" doctrine

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[10] The Authority also reviewed private sector precedent to conclude that "although bargaining agreements are intended to promote stability in the bargaining relationship, employers and unions in both the private and Federal sectors should be relatively unrestricted in their ability to resolve their disputes through collective bargaining." *SSA 1* at 1017. In so concluding, the Authority noted that the existence of a contract does not relieve an employer "of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." *Id.*, quoting *National Labor Relations Board v. Jacobs Mfg. Co.,* 196 F.2d 680, 684 (2d Cir. 1952).

applies.11 Again it also relied on the argument previously rejected by the undersigned that the prior arbitration decision militates against any finding that the Union reserved future bargaining rights.

Respondent's assertion that the subject of the instant complaint is "covered by" proposal 1.c. of the Transformation Agreement is, rejected. Although proposal 1.c. states that WAPA will solicit volunteers and then select employees for involuntary reassignments based on inverse SCD among qualified employees, it can not be read in isolation, but needs to be considered in combination with other proposals agreed to by the parties. Proposal 31, for example, specifically provides that "Procedures/ methods for placement of [bargaining unit] employees will be negotiated." Other provisions including proposals 10, 21 and 54 seem also to preserve future bargaining rights to the Union. In view of these seemingly conflicting provisions, it must be concluded and found that procedures and appropriate arrangements for employees adversely affected by the issuance of a DR are not "expressly contained in" or "covered by" the Transformation agreement. Accordingly, in the view of the undersigned, the reading of proposal 1.c. in isolation does not suggest to the "reasonable reader" that the provision settles this matter.

With respect to the second part of the Authority test, it will find a subject "covered by" the agreement if it is "inseparably bound up with and . . . thus [is] plainly an aspect of . . .a subject expressly covered by the contract." Numerous bargaining proposals submitted by the Union certainly must be considered before making any finding that the Union did not expressly preserve future bargaining, in this matter. These proposals suggest that the Transformation negotiations did not "foreclose[d] further bargaining over the matter." Actually, such negotiations occurred thus enhancing the General Counsel's argument that

11 Respondent cited three Authority cases that according to it represented findings that the agency had no obligation to bargain when implementing employee reassignments or details because such actions were inseparably bound up with the prior agreements (i.e., the second prong was satisfied). *U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California*, 48 FLRA 102 (1993); *USDA Forest Service, Pacific Northwest Region, Portland, Oregon, 48 FLRA 857 (1993); U.S. Department of the Air Force, 375th Combat Support Group Scott Air Force Base, Illinois, 49 FLRA 1444 (1994).* These cases all present the issue of whether the agency exercise was inseparably bound up with an existing agreement and are, therefore, distinguishable.

it would be reasonable to assume that other proposals suggest further bargaining over DR procedures could have been anticipated.

Under the third part of the Authority test, a matter is considered "covered" where an examination of all the record evidence reveals that the parties "reasonably should have contemplated that the agreement would foreclose further bargaining." The record evidence suggests that the parties "reasonably contemplated" that future negotiations over "Procedures/methods for placement of BU employee" would be necessary. In this regard, it appears that Union proposal 10 clearly sought to preserve the right to engage in future bargaining over matters "not foreseen" during Transformation negotiations. Thus, both Hurley and Adler credibly testified about their efforts to preserve future bargaining rights due to the lack of detailed information from WAPA concerning how bargaining unit employees would be affected by the Transformation. Respondent's witnesses Fullerton and Watkins, on the other hand, while offering their interpretation of the provisions in dispute, produced no evidence to support their interpretation.

Based on all of the foregoing, is found and concluded that the subject of the instant complaint was not "covered by" the parties' Transformation Agreement.

2. Whether a future right to bargain over issues arising during implementation of the Transformation process was preserved through negotiation of the Transformation Agreement. Whether the alleged preserved future right included procedures and appropriate arrangements, which could not be foreseen at the time the Transformation negotiations, as seen in DRs such as those issued to McKenna and Kientz.

The Authority reconsidered its approach to cases in which defenses to alleged interference with statutory rights were based on collective bargaining agreements in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993)*(IRS)*. In that case, it concluded that in unfair labor practice cases where the underlying dispute is governed by the interpretation and application of specific provisions of the parties' collective bargaining agreement, the Authority would no longer apply the "clear and unmistakable waiver" analysis previously utilized. Instead, the Authority decided it would determine the meaning of the parties' agreement in order to resolve alleged unfair labor practices. The Authority further indicated that it would resolve such matters by, "[applying] the same standards and

principles in interpreting collective bargaining agreements as applied by arbitrators. . . ." Also the Authority made it clear that parties' intent must be given controlling weight, "whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence." In giving controlling weight to the intent of the parties, caution should be exercised so that such intent "is not . . . discerned by reference to 'abstract definitions unrelated to the context in which the parties bargained," especially where bargaining history is crucial to an understanding of that intent. Further, the Authority affirmed that any alleged past practices that are relevant to such interpretation may be considered in determining the meaning of an agreement.

The General Counsel maintains that application of the standards and principles used by arbitrators in interpreting collective bargaining agreements requires a conclusion, in this case, that in determining the meaning of an agreement, the right to bargain over procedures and appropriate arrangements related to the 1998 DRs issued to McKenna and Kientz was specifically preserved by the Union herein.

As noted by the Authority, "the parties" intent must be given controlling weight. See also, Elkouri and Elkouri, *How Arbitration Works,* 5th edition (Martin M. Volz and Edward P. Goggin, eds., 1997)*(Elkouri)* at 479:

> Arbitrators seek to determine the intent of the parties from various sources, including the express language of the agreement, statements made at precontract negotiations, bargaining history and past practice.[12]

In addition, the intent of the parties should be construed from consideration of the parties' entire agreement. As noted:

> [T]he "primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties,

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[12] *Elkouri* quotes American Jurisprudence, section 227, pp. 746-48 in describing the "intent of the parties" rule: "Whatever may be the inaccuracy of expression or the inaptness of words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. *Elkouri*, at 480.

> and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions." "To the greatest extent, the Arbitrator must ascertain and give effect to the parties' mutual intent. That intent is expressed in the contractual language, and the disputed portions must be read in light of the entire agreement.

Finally, past practice is often relied upon by arbitrators to determine the intent of ambiguous contract language.

The General Counsel argues that the above principles of "contract interpretation," the bargaining history leading to adoption of the Transformation Agreement and the parties' practice under that agreement offers the best guide to the parties' intent in this matter.

Starting with proposal 10 of the Transformation Agreement, the bargaining history shows that the Union reserved the right to initiate bargaining over matters "not foreseen prior to the reorganization." As the Union explained at the bargaining table, this provision was intended to preserve future bargaining rights to address changes which, due to the uncertainties contained in the Plan, could not be anticipated at the time of negotiations. Indeed, Fullerton confirmed this was his understanding of proposal 10. That the reassignments of McKenna and Kientz could not be foreseen at the time of the Transformation negotiations was explained by Adler in connection with his March 3, 1998 request to bargain. Thus, Adler testified that neither of the positions to which McKenna and Kientz were reassigned had been included in the "will be" organization resulting from the numbers, types and grades negotiations; neither McKenna nor Kientz was qualified for the position to which he was reassigned; and, with respect to McKenna, WAPA had never before removed a Union Chief Steward from the bargaining unit. Adler's testimony is uncontradicted.

Similarly, the Union's explanation of the intent of proposal 21 to WAPA at the bargaining table, i.e., that the Union sought to retain flexibility to bargain as WAPA made changes throughout the Transformation process, is unrebutted. In response to Respondent's inquiry, the Union confirmed that this proposal theoretically meant that the Union could bargain every day of the week. In view of WAPA's ready acceptance of this proposal without further discussion or counterproposal, the intent, as described by the Union, is certainly appropriate.

The Union's proposal 54 must be read in conjunction with the parties' agreement in proposal 32 to engage in negotiations over the numbers, types and grades of positions for the "will be" organization. While the parties agreed that proposal 54 would not lock WAPA into the organization which came out of the numbers, types and grades negotiations, Respondent committed itself to maintaining the staffing levels agreed to in such negotiations so that employees would be able to assess their status in the "will be" organization and act accordingly. This is how the Union described the intent of proposal 54 at the bargaining table, and such testimony is uncontroverted.

The Union modified its original language for Proposal 31 to avoid negotiability problems associated with the term "assignment rights." Again, the only evidence of the parties' discussion at the bargaining table was that

provided by Adler and Hurley. Their unrebutted testimony establishes that the Union explained to Respondent that it wished to preserve the right to engage in future bargaining over procedures for placement of employees when that opportunity was presented as Respondent made staffing decisions during implementation of the Transformation process.

Proposal 1.c. was described by Fullerton as the real guts of the negotiations. Indeed, at the conclusion of the November 3 session, tensions were high as the parties remained deadlocked over how to go about staffing the "will be" organization. While Fullerton felt that proposal 1.c. represented the total of what was needed as far as protocol and format for directed reassignments he pointed to nothing in the Transformation Agreement or the bargaining history to support this assertion. In contrast, Hurley credibly testified that proposal 1.c. was not intended to be all-encompassing. In this regard, Hurley identified several issues which remained to be considered, including how much time an employee would have to decide whether to accept a DR, whether employees would be permitted to submit a preference list and different consequences for employees issued directed reassignments depending on whether they were to remain in the same commuting area and whether the reassignment involved an adverse action. That these additional issues were not addressed in negotiations is understandable for several reasons. First, Respondent apparently had a deadline to conclude an agreement by January 1, 1996, and the Christmas holidays were already upon the negotiators by the time they considered proposal 1.c. in late December 1995. Second, as Adler described, the Union was ecstatic that it finally obtained an agreement in which WAPA agreed to use seniority. Third, and most probably the most important, the Union obtained what it reasonably believed to be guarantees that it would be entitled to initiate future bargaining over unforeseeable matters. Finally, there was no discussion at the bargaining table concerning whether the parties' agreement to proposal 1.c. fulfilled Respondent's obligation to engage in future bargaining pursuant to proposal 31. In these circumstances, Hurley's testimony that proposal 1.c. was not meant to be all-encompassing is, in my opinion considerably more viable than Fullerton's claim.

Disputed contract provisions must be read in light of the entire agreement.

> It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract

> should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.

Elkouri at 493 (citation omitted). A reading of proposal 1.c. to preclude further bargaining over procedures and appropriate arrangements related to directed reassignments would tend to nullify not only the language of proposal 31, but also that language in proposals 10, 21 and 54 which preserved the Union's future bargaining rights.

In resolving the meaning of the above-described provisions of the Transformation Agreement, it is also necessary to examine the context in which the bargaining actually occurred. In this case, the Union was faced with a plan that had tremendous consequences for its bargaining unit members. The Plan involved the loss of large numbers of bargaining unit positions. Nevertheless Respondent was unable to provide specific explanations identifying which members of the bargaining unit would be affected or in what way. Without such answers from Respondent, it certainly would have been reasonable for the Union to either seek the known protections afforded by RIF procedures or to pursue the preservation of future bargaining rights whenever and wherever possible. Even Respondent's assent to "preservation of bargaining rights" proposals seems reasonable, particularly since Respondent seemed to be under a deadline to finish negotiations and it appeared to be opposed to the use of RIF procedures. In such circumstances, it would be reasonable to conclude that the Union preserved future bargaining rights to a sufficient extent to require negotiations on the matters involved herein. Otherwise, one runs the risk of narrowly reading the language of provision 1.c., and completely ignoring the parties' intent.

Moving to the parties' practice under the Transformation Agreement. That practice, in my opinion, supports a finding that the Union did preserve the right to bargain over the DRs such as those issued to McKenna and Kientz. Furthermore, the practice also makes Respondent's argument that provision 1.c. fulfilled its bargaining obligation under proposal 31 assailable. There is certainly evidence that a practice of Union intervention on behalf of employees who were issued DRs or whose jobs were in jeopardy due to placement on the surplus list existed. There is also evidence that the interventions were to some degree successful. When Michaelis sought Union assistance, the Union succeeded in convincing management not once, but twice, to rescind her directed reassignments. Further, the

Union succeeded in finding Royce Hicks a position in California and negotiated an MOU in September 1997 to allow Brian Bucks to make use of the CTAP program. Notwithstanding Watkins' opinion that the September 1997 MOU had nothing to do with DRs, a close reading of that MOU establishes that it addressed several procedural issues related to DRs, including the availability of flexiplace, training, and retirement options. The Union also negotiated an MOU in December 1997 which allowed Gary Hoffman to move to another position without a loss in grade and negotiated another MOU saving Vicki Wilson's job in Montrose, Colorado. On March 9, 1998, the parties negotiated an MOU creating a job for Eugene Medina. Even as late as April 2, the Union negotiated an MOU on behalf of Oliver Perkins, a GS-14 EE, specifically creating a GS-13 job for him with save grade and save pay. Other MOU's introduced into the record established the parties' practice of negotiating changes to the numbers, types and grades of positions in the "will be" organization to create positions for incumbent employees who were on the surplus list. In the terms quoted in *Elkouri*, the parties' context of practices gradually gave substance to the disputed provisions of the Transformation Agreement.

In sum, while the parties agreement to provision 1.c. addresses certain criteria to be applied in the event of Respondent's resort to involuntary reassignments, the parties practice revealed by the instant record gives full meaning and effect to the intent of provisions 10, 21, 31 and 54.

Ample precedent exists for such a finding. In *Social Security Administration, Area IX of Region IX*, 51 FLRA 357 (1995)*(Region IX)*, Judge Arrigo found that the agency violated section 7116(a)(1) and (5) by implementing the detail of an employee outside the commuting area to another city for a period of over 90 days without prior notice or bargaining with the Union. Judge Arrigo recognized there was extensive contract language dealing with the subject of details, but scrutinized the language of a Letter of Understanding (LOU) which the parties had negotiated to the effect that future bargaining would take place unless the

detail was 30 days or less in duration.[13] Judge Arrigo noted the Authority's "covered by" and "contract interpretation" precedent in *SSA 1* and *IRS*, respectively, but concluded that, "the presence of this express waiver, coupled with the stated preservation of Statutory rights, indicates the Union was consciously reserving the Statutory right to notice and an opportunity to bargain on all other forms of details." Judge Arrigo strengthened his conclusion by noting the bargaining history testimony to the effect that the understanding at the bargaining table was that the Union secured the right to notice and an opportunity to bargain on all details except for the single waiver identified in the LOU.

Similarly, it appears to the undersigned that regardless of any result which may obtain under *SSA 1*, provisions of the parties' Transformation Agreement and the underlying bargaining history and practice "reflect upon the parties' intent regarding future bargaining obligations," that is, to permit the Union to initiate future bargaining, including specifically matters as the DRs issued to McKenna and Kientz which could not be foreseen at the time of the Transformation negotiations.

Based on the foregoing, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to bargain with the Union concerning DRs issued to bargaining unit employees McKenna and Kientz on February 24, 1998 and March 3, 1998, respectively.

The Remedy

The General Counsel seeks a remedy which includes notice posting, *status quo ante* relief together with full make whole relief. The General Counsel relies on *Federal Correctional Institution*, 8 FLRA 604 (1982)*(FCI)* and its progeny.

Respondent urges that it should not be required to rescind the DRs to McKenna and Kientz if the Union requests

[13] The LOU provision stated as follows:

> Whether there is a duty to bargain on details or reassignments will be governed by 5 USC 71 and the new agreement. However, it is understood that notice to the Union and bargaining will not be required for the detail of a single employee for 30 calendar days or less within the commuting area.

such action. In this regard, Respondent notes that where an agency has unlawfully effected a unilateral change in working conditions, the Authority is tasked with restoring the *status quo ante* whenever possible, consistent with respect for management's prerogatives under section 7106(a) and the overall goal of agency efficiency. *National Treasury Employees Union v. Federal Labor Relations Authority*, 856 F.2d 293, 296 (D.C. Cir. 1988). In Respondent's view, however, allowing the Union here to decide whether the directed reassignments should be rescinded, the Authority would not only be abrogating its responsibilities, but it would also be providing no consideration to management rights and agency efficiency.

In addition, Respondent asserts that rescinding the DRs and returning McKenna and Kientz to their prior positions would unduly disrupt its operations. Respondent offered some evidence of disruption to its operation. Respondent insists, for example, that returning McKenna to his prior position in Denver would leave no one to manage two important projects, one of which McKenna admitted must be performed in Phoenix. Furthermore, it argues that such a remedy would likely cause Respondent competitive harm. Respondent, however, offered no evidence of what it meant by competitive harm. In *FCI,* the Authority indicated that it would balance "the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." *Id.* at 606 (footnote omitted). Among the factors considered by the Authority are 1) whether, and when, notice was given to the union concerning the change, 2) whether, and when, the union requested bargaining, 3) the willfulness of the agency's conduct in failing to meet its bargaining obligation, 4) the nature and extent of the impact experienced by adversely affected employees, and 5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of agency operations. *Id.* at 606.

The Authority requires that any assessment of the degree of disruption caused by *status quo ante* relief must be based on record evidence. *Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas*, 53 FLRA 749, 760 (1997) (Order Remanding Case)*(AAFES)*. In *AAFES,* the Authority remanded the case for the judge to receive evidence regarding the degree of disruption occasioned by an order directing the rescission of a RIF. The judge, in refusing the General Counsel's request for *status quo ante* relief had "found only that it was 'obvious' that 'rescinding the RIF . . . would produce significant disruption.'" *Id.* at 760. This fell short of the

requirement to base the assessment of disruption on record evidence. In *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky*, 38 FLRA 647, 649 (1990), the Authority approved the judge's direction of *status quo ante* relief which required rescission of a reorganization and RIF, noting, among other things, that the agency "has not supported its assertion that a *status quo ante* remedy would disrupt its operations with specific allegations or evidence concerning how, and to what degree, such disruption would occur."

The above precedent dictates, in the opinion of the undersigned, that the Respondent should be ordered to provide *status quo ante* relief. Not only did WAPA fail to provide the Union with advance notice of the directed reassignments issued to McKenna and Kientz, but WAPA also refused the Union's prompt request for bargaining. These actions certainly indicate that the Respondent's failure to fulfill its bargaining obligation was willful. In addition, there can be little dispute that the adverse effect on McKenna and Kientz was immediate and severe. McKenna was required to relocate out of state to fill a job which he was ill-equipped to perform. McKenna's allergies have worsened in Phoenix and his removal from the bargaining unit deprived him of the protections afforded based on such status. Kientz was also required to relocate out of state to perform a job for which he was less than qualified. Faced with the ultimatum presented by the directed reassignment letter, Kientz declined the reassignment to Fort Peck, leading directly to his involuntary retirement in lieu of termination. The severity of the adverse impact on their working conditions cannot be overemphasized. *See, United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 34 FLRA 1035 (1990)(change in job assignments found to be more than *de minimis)*; and *United States Department of the Treasury, Internal Revenue Service, 25* FLRA 843, 846 (1987), *aff'd sub nom., NTEU v. FLRA*, 910 F.2d 964 (D.C. Cir. 1990) *(en banc)* (change in work site found to be more than *de minimis).*

Finally, the only evidence presented by Respondent to suggest any disruption that would be occasioned by an *status quo ante* remedy relates to charging the cost of McKenna's and Kientz' salary and benefits to "overhead" rather than to "direct charge." Even Fullerton admitted, however, that whether or not McKenna was returned to his former EE position in Golden, WAPA would still be required to carry the expense of his salary and benefits. In this regard, there was no evidence offered regarding whether McKenna's Maximo Project Manager position involved "overhead" or "direct charge." The only figures regarding possible impact

on the efficiency and effectiveness of agency operations was presented by Kientz' former second-line supervisor, Phil Davis. Davis testified that of the approximately $40 million allocated for WAPA's construction budget, about 60% (or $24 million) involved "direct charge" expenses and the other 40% (or $16 million) involved "overhead." Even if one estimated the salary and benefits of McKenna and Kientz to be approximately $250,000, an increase in "overhead" of less than 2% would exist. While this may not be insignificant, such financial consequences pale in comparison to the adverse impact experienced by McKenna and Kientz as a result of their directed reassignments.

Even assuming their positions have been abolished, which they apparently have not been, the Authority will, in appropriate circumstances, direct restoration of such a position. In *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee,* 53 FLRA 79 (1997)*(COE)*, the Authority directed the agency to restore a Cook position which had been abolished following the Cook's departure under a VSIP. Although the judge erroneously applied the standard for directing *status quo ante* relief where the change was substantively negotiable rather than the *FCI* standard, the Authority nevertheless approved of the judge's *status quo ante* remedy since the agency failed to except to application of the incorrect standard and failed to meet its burden of establishing "special circumstances" warranting denial of *status quo ante* relief. Significantly, the agency in *COE* argued that restoration of the Cook position was "inappropriate because the resultant elimination of an occupied position would create an undue hardship on it. In support of this contention, the [agency] claim[ed], without more, that such elimination would force 'some aberration of staffing.' Nonetheless, the Authority found the agency's claim to be too vague to establish special circumstances. While *COE* involved the substantive bargaining *status quo ante* standard, the rationale for directing *status quo ante* relief applies equally in this case. Here, Respondent has not even suggested that reinstatement of McKenna and Kientz to their former EE positions in Golden would cause any disruption to WAPA's staffing scheme.

It also appears that the projects on which McKenna and Kientz were working at the time of their directed reassignment and retirement, respectively, remain to be completed. Authority precedent suggests that the availability of meaningful work may be critical to the propriety of *status quo ante* relief. In *United States Immigration and Naturalization Service, U.S. Border Patrol, Del Rio, Texas*, 47 FLRA 225, 233-34 (1993), the Authority rejected the General Counsel's request for *status quo ante*

relief requiring the agency to re-establish a work unit. There the Authority noted that such a remedy made no sense because there was little or no work to be done by such a unit if reinstated. Under similar circumstances, the Authority found that the burden placed on the efficiency and effectiveness of agency operations was significant. This suggests that if the converse is true, i.e., there is productive work to be performed by employees returned to their former positions, *status quo ante* relief may be appropriate. In *U.S. Department of Health and Human Services, Social Security Administration, Hartford District Office, Hartford, Connecticut,* 37 FLRA 278, 287 (1990)*(SSA Hartford)*, the Authority found *status quo ante* relief appropriate even though it required restoration of an employee to his former position even in the face of the agency's contention that there was no work remaining for the employee to perform in his field position.

Make whole relief is also warranted in this case since any loss of pay and benefits by Kientz and/or McKenna resulted directly from the Respondent's unwarranted personnel action, i.e., its refusal to bargain. *See, e.g. U.S. Department of the Interior, Bureau of Indian Affairs, Gallup, New Mexico,* 52 FLRA 1442 (1997); *Pueblo Depot Activity, Pueblo, Colorado* 50 FLRA 310 (1995); and *SSA Hartford*. The Authority has repeatedly recognized that remedies should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." *See, e.g., Department of Defense Dependent Schools*, 54 FLRA No. 37, 54 FLRA 259, 269 (1998).

Based on all of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Western Area Power Administration, Golden, Colorado shall:

1. Cease and desist from:

(a) Issuing directed reassignments to bargaining unit employees Stephen S. McKenna and Henry J. Kientz without first affording the American Federation of Government Employees, AFL-CIO, Local 3824, the exclusive collective bargaining representative of its employees, an

opportunity to bargain regarding the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the implementation of such directed reassignments.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of 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) Rescind the directed reassignments issued to Stephen S. McKenna on February 24, 1998 and to Henry J. Kientz on March 3, 1998.

(b) Offer to reinstate Stephen S. McKenna to the GS-14 Electrical Engineer position he occupied in Golden, Colorado prior to April 16, 1998.

(c) Offer to reinstate Henry J. Kientz to the GS-13 Electrical Engineer position he occupied in Golden, Colorado prior to June 2, 1998.

(d) Make Stephen S. McKenna and Henry J. Kientz whole to the extent they have suffered any reduction of pay and/or benefits as a result of implementation of their directed reassignments.

(e) Notify the American Federation of Government Employees, AFL-CIO, Local 3824 of any intent to direct the reassignment of Stephen S. McKenna or Henry J. Kientz and, upon request, negotiate over the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the implementation of such directed reassignments.

(f) Post at its facilities copies of the attached Notice to All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrator, Western Area Power Administration, Golden, Colorado, 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.

(g) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, within 30 days from the date of this Order, notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing, as to what steps have been taken to comply.

Issued, Washington, D.C., December 30, 1998

Eli Nash,
Jr. 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 Western Area Power Administration, Golden, Colorado 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 implement the directed reassignment of bargaining unit employees Stephen S. McKenna and Henry J. Kientz without first affording the American Federation of Government Employees, AFL-CIO, Local 3824, the exclusive collective bargaining representative of our employees, an opportunity to bargain regarding the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the implementation of such directed reassignments.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights assured by the Statute.

WE WILL rescind the directed reassignments issued to Stephen S. McKenna on February 24, 1998 and to Henry J. Kientz on March 3, 1998.

WE WILL offer to reinstate Stephen S. McKenna to the GS-14 Electrical Engineer position he occupied in Golden, Colorado prior to April 16, 1998.

WE WILL offer to reinstate Henry J. Kientz to the GS-13 Electrical Engineer position he occupied in Golden, Colorado prior to June 2, 1998.

WE WILL make Stephen S. McKenna and Henry J. Kientz whole to the extent they have suffered any reduction of pay and/or benefits as a result of implementation of their directed reassignments.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 3824 of any intent to direct the

reassignment of Stephen S. McKenna or Henry J. Kientz and, upon request, negotiate over the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the implementation of such directed reassignments.

(Activity)

Date: By:
(Signature)
(Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by Eli Nash, Jr., Administrative Law Judge, in Case No. DE-CA-80417, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Matthew Jarvinen
Counsel for the General Counsel
Federal Labor Relations Authority
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Certified Mail No. P 168 060 658

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Douglas N. Harness
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REGULAR MAIL:

Alan Adler, Vice President
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Employees, AFL-CIO, Local 3824
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National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: December 30, 1998
Washington, DC