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

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| DEPARTMENT OF THE AIR FORCE<br>MARCH AIR RESERVE BASE, CALIFORNIA<br><br>Respondent<br><br>and | Case No. SF-CA-00037 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3854, AFL-CIO<br><br>Charging Party | |

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 **JANUARY 2, 2001**, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: November 30, 2000
Washington, DC

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

MEMORANDUM DATE: November 30, 2000

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
MARCH AIR RESERVE BASE, CALIFORNIA

Respondent

and Case No. SF-CA-00037

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3854, AFL-CIO

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
Washington, D.C. OALJ 01-07

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| DEPARTMENT OF THE AIR FORCE<br>MARCH AIR RESERVE BASE, CALIFORNIA<br><br>Respondent<br>and | Case No. SF-CA-00037 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3854, AFL-CIO<br><br>Charging Party | |

John R. Pannozzo, Jr., Esquire
For the General Counsel

Monte E. Crane, Esquire
For the Respondent

Rudy A. Guedea, President, AFGE Local 3854
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

**DECISION**

**Statement of the Case**

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the San Francisco Regional Office, issued an unfair labor practice complaint on May 31, 2000, alleging that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by implementing a settlement agreement regarding a bargaining unit employee's EEO lawsuit without first notifying the Charging Party and giving the Charging Party an opportunity to bargain over the impact and implementation of the settlement agreement.

Respondent's answer denies that it violated the Statute in implementing the settlement agreement, and it further

asserts that the Authority is without power to order it to bargain concerning the implementation of a court-approved settlement agreement.

A hearing in this matter was scheduled for July 25, 2000. Prior to that date, however, the parties entered into a Stipulation of Facts and filed a joint motion to transfer the case to an administrative law judge for a decision based on the stipulated facts. By their joint motion, the parties have waived the right to a hearing and to present evidence, except for the Stipulation of Facts and its attached exhibits. The joint motion was granted, and the hearing was canceled. The General Counsel and the Respondent subsequently filed briefs in support of their positions.

Based on the Stipulation of Facts and the exhibits attached thereto, I make the following findings of fact, conclusions of law, and recommendations. The findings of fact represent my summary and organization of the stipulated facts, and the facts established by the exhibits, that are material to the disposition of the allegations of the complaint.[1]

**Findings of Fact**

The American Federation of Government Employees, Local 3854 (Charging Party/the Union) is a labor organization as defined by 5 U.S.C. § 7103(a)(4), and it is the exclusive representative of a unit of employees at March Air Reserve Base, California (Respondent/the Employer). This bargaining unit includes, *inter alia*, employees within the 452nd Civil Engineering Squadron and employees within the Civil Engineering Construction Management (CECM) section.

In early 1999, the CECM employed, *inter alia*, one GS-9 Construction Representative and three GS-8 Construction Inspectors. The duties of the Construction Representative include the administration of base engineering contracts and preparation of project designs and cost estimates, while the Construction Inspectors oversee the work being performed on construction and service contracts on the base (Stip. at ¶14-15 and Exh. 4-5).

John Thomas has been an employee of the Respondent and a member of the Union's bargaining unit for several years. Prior to December 1999, Mr. Thomas was employed as a WG-10 Boiler Plant Equipment Mechanic in the Operations Branch of

[1] References to the Stipulation of Facts will be cited as "Stip."

the 452nd Civil Engineering Squadron. He filed an equal employment opportunity (EEO) complaint against the Respondent at least as early as 1993, and his EEO dispute with the Respondent continued until late 1999. He alleged that the Employer had discriminated against him on the basis of his race and color, and he also alleged that the Employer had engaged in reprisals against him based on his EEO activity. Although the EEOC found in 1996 that the Employer had unlawfully discriminated against Mr. Thomas, the Employer refused to accept this decision, and Mr. Thomas filed a civil action in United States District Court in 1998 against the Secretary of the Air Force (Exh. 3).

Mr. Thomas and his lawyer participated in a settlement conference, along with representatives of the Air Force, at the U.S. District Court on August 5, 1999. During this conference, a settlement agreement was reached, pursuant to which the Employer agreed, *inter alia*, to promote or transfer Mr. Thomas to a GS-9 Construction Representative position in the CECM, pay him $15,000, credit him with 317 additional hours of annual leave, and provide him with on-the-job training and technical training on the computer software used in the CECM. (Stip. at ¶17; Exh. 6, 8). Although the settlement of the lawsuit was negotiated on August 5, paperwork concerning the settlement continued to be prepared after that date. The civil action was formally dismissed on September 27, 1999 (Exh. 7); a Declaration by the base's Civilian Personnel Officer was signed on November 8, 1999, and filed with the court, explaining in more detail the training that Mr. Thomas would need in order to become proficient in his new position (Exh. 8); and on December 7, 1999, Mr. Thomas and the Employer executed a Stipulation for Compromise Settlement, which set forth the terms of the settlement in more detail (Exh. 9). Mr. Thomas actually transferred to his new position on December 19, 1999.

Prior to the assignment of Mr. Thomas to his new position, the CECM had only one GS-9 Construction Representative. In May or June of 1999, the Employer's Base Civil Engineer decided that a second such position was needed, and in October 1999 the Employer began the process of filling a third Construction Representative position (Stip. at ¶14, 25). By naming Mr. Thomas to the first opening pursuant to the EEO settlement agreement, the Employer did not utilize the same posting and competition procedures it used in filling the second opening. For the latter opening, a candidate referral list containing nine employees' names, including CECM's three GS-8 Construction Inspectors, was sent in November 1999 to the supervisor who made the hiring decision. (Stip. at ¶25).

On August 12, 1999, several of the base's management officials, as well as the Assistant U.S. Attorney who had represented the Employer in the lawsuit, met with the bargaining unit employees of CECM to discuss the settlement agreement in which Mr. Thomas was to be assigned to CECM. Although the Employer did not notify the Union of the settlement agreement or invite the Union to send a representative to the August 12 meeting, the Union President attended the meeting at the invitation of a unit employee. At the meeting, the Union President asked why it had not been afforded the opportunity to negotiate concerning these matters, and the Assistant U.S. Attorney replied that the Employer was not required to negotiate, "because this was a Federal Judge's decision." (Stip. at ¶18).

The parties' stipulation further provides: "The Charging Party was not afforded prior notice nor an opportunity to bargain over the appropriate arrangements and procedures resulting from the implementation of the Federal District Court settlement by Respondent." (Stip. at ¶19). The parties also stipulated: "The decision to place Mr. Thomas into one of the two GS-9 Construction Representative positions adversely impacted the three GS-8 Construction Inspectors and two other GS-9 Construction Representatives in CECM. For example, the GS-8 Construction Inspectors were denied the opportunity to compete for that GS-9 Construction Representative opening, Mr. Thomas will receive two weeks of contract management and one week of SABER training that either Ms. Pietropaula or Mr. Tancrator could have attended and Mr. Thomas' large annual leave balance could impact on the five other CECM employees ability to schedule their annual leave." (Stip. at ¶20).

## Discussion and Conclusions

### A. Issues and Positions of the Parties

The essential issue to be resolved in this case is whether the Employer was obligated to negotiate with the Union over the appropriate arrangements and procedures resulting from the implementation of the settlement agreement between the Employer and Mr. Thomas.

The General Counsel takes pains to emphasize that the complaint does not allege that the Employer had an obligation to bargain over the contents of the EEO settlement itself, and that a *status quo* remedy is not being requested. The complaint attacks only the Employer's refusal to negotiate concerning the implementation of the settlement, and in this respect, the General Counsel argues that the law is settled. Specifically, he argues that an employer's bargaining obligation regarding a civil court

settlement or judgment is no different than its obligation concerning any type of management initiative which constitutes a reserved management right under section 7106 (a) of the Statute. Accordingly, although the substance of the management initiative may not be negotiable, the impact and implementation of the initiative is negotiable, if its impact on bargaining unit employees is more than *de minimis*. *Social Security Administration, Gilroy Branch Office, Gilroy, California*, 53 FLRA 1358, 1368 (1998).

The General Counsel cites two decisions as directly applicable to the current case: *U.S. Government Printing Office*, 23 FLRA 35 (1986)(*GPO*) and *Nuclear Regulatory Commission*, 29 FLRA 660 (1987)(*NRC*). In both of these decisions, it is argued, the Authority ruled that when the settlement of an EEO complaint results in a change in unit employees' conditions of employment, the union must be afforded the opportunity to bargain over the impact and implementation of that change.

The Respondent does not directly address the merits of the complaint or FLRA case law concerning the duty to bargain. It has stipulated that its settlement agreement with Mr. Thomas "adversely impacted" other bargaining unit employees, and that it refused to notify the Union of the settlement or to negotiate with the Union concerning its impact and implementation. However, the Respondent asserts a number of arguments to support its contention that it had no obligation to negotiate concerning the impact of the settlement. It argues that the Authority lacks subject matter jurisdiction over Federal court settlements; that the General Counsel lacks standing to attack a Federal court settlement; that the Authority and the Statute cannot "regulate" the implementation of Federal court settlements without violating the Constitution's separation of powers; and that requiring an agency to negotiate over the impact of a court settlement would produce "chaos" and would violate the principles of an efficient and effective government. Additionally, the Respondent argues that because Mr. Thomas' lawsuit was brought against the Secretary of the Air Force, who was represented in court by the United States Attorney, the Respondent itself did not commit an unfair labor practice, since it was "acting under a compulsion that it was not in a position to resist." (Resp. Brief at 23).

## B. Analysis

### 1. Background

It is almost as important to identify the issues that are *not* material to this case as it is to identify the issues that *are* involved.

First, this case does not pose the questions that have been raised in *Luke Air Force Base, Arizona,* 54 *FLRA* 716 (1998), *rev'd sub nom. Luke Air Force Base, Arizona v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied* 121 S.Ct. 60 (Oct. 2, 2000)(*Luke AFB*), and similar cases. In *Luke AFB*, the Authority held, consistent with its precedent, that a meeting between an agency and an individual employee for the purpose of discussing possible settlement of her EEO complaints constitutes a "formal discussion . . . concerning [a] grievance," within the meaning of section 7114(a)(2)(A) of the Statute, and that an agency commits an unfair labor practice if it conducts such a meeting without affording the union an opportunity to be represented. The issues surrounding a union's right to participate in EEO complaint and settlement discussions have been hotly contested, with both the Authority and the circuit courts reversing directions at various times.[2] In the current case however, the General Counsel appears to have gone to great lengths to avoid the legal issues of the *Luke AFB* line of cases. Although the Stipulation of Facts describes the many years of the Employer's EEO disputes with Mr. Thomas, and a series of meetings between Mr. Thomas and the Employer relating to his EEO complaints and lawsuit, the complaint does not allege that Respondent violated the Statute by failing to notify the Union of those meetings or by failing to allow the Union to be represented. The complaint only attacks the Respondent's refusal to notify or bargain with the Union before implementing the settlement agreement.

Second, this case does not involve the issue of whether the Employer was required to bargain with the Union over the substance of the EEO settlement agreement. The Respondent's

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[2] The Authority first held that such EEO meetings constituted formal discussions under section 7114(a)(2)(A). *Internal Revenue Service, Fresno Service Center, Fresno, California*, 7 FLRA 371 (1981). After the Ninth Circuit rejected this reasoning in *Internal Revenue Service, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983), the Authority adopted the court's view. *Bureau of Government Financial Operations, Headquarters*, 15 FLRA 423 (1984). Then, when the D.C. Circuit rejected the Ninth Circuit's reasoning and held that such meetings are formal discussions concerning grievances (*NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985)), the Authority returned to its original holding. *U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, (Ray Brook, New York)*, 29 FLRA 584 (1987).

brief repeatedly blurs the distinction between substantive bargaining and "impact and implementation" bargaining, to the point that the distinction disappears. For instance, in arguing that the Authority lacks subject matter jurisdiction over the alleged unfair labor practice, the Respondent asserts that "all challenges to District Court settlements be brought in the District Courts," (Resp. Brief at 17) and that the "Charging Party . . . sought by this action to void the District Court approved settlement." *Id.* Similarly, the Respondent asserts that the General Counsel "lacks standing
to bring a challenge to a District Court judgment or order." *Id.* at 18. At other points in its brief, the Respondent acknowledges that "the General Counsel is not seeking to change in any way the terms of the settlement agreement and judgment" or to impose a *status quo ante* bargaining order. *Id.* at 22, but its arguments inevitably return to the notion that implementation bargaining would modify the substance of the settlement agreement or constitute a "burden on the . . . Judiciary." *Id.*

My findings and conclusions in this case will be confined to the Employer's actions and obligations after it reached a settlement of Mr. Thomas' EEO case. My decision starts with the premise that the terms of the settlement agreement were a valid exercise of the Respondent's management rights and not subject to change through bargaining. The decision therefore addresses the Employer's obligation, or lack thereof, to bargain with the Union concerning the "procedures" to be observed by the Employer in exercising its management authority and "appropriate arrangements for employees adversely affected by the exercise" of management's authority. Section 7106(b)(2) and (3) of the Statute.

**2. Respondent was Obligated to Negotiate Concerning the Impact and Implementation of the Settlement**

As noted in my summary of the General Counsel's position, the law in this area is well established. Before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over, those aspects of the change that are within the duty to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas,* 55 FLRA 848, 852 (1999). The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. In some situations, a union may be entitled to bargain over the substance of the actual decision. *See, e.g., Department of the Navy, Puget*

*Sound Naval Shipyard, Bremerton, Washington*, 35 FLRA 153, 155 (1990). When the decision to change a condition of employment is an exercise of a management right under section 7106, the substance of the change is not negotiable, but the agency nonetheless is obligated to bargain over the impact and implementation of the change, if the change has more than a *de minimis* effect on conditions of employment. 55 FLRA at 852. *See also, Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-09 (1986), which explains how the *de minimis* standard is applied.

In this case, the Employer's settlement agreement with Mr. Thomas required, *inter alia*, that he be reassigned from his WG-10 Equipment Mechanic position in the Operations Branch to a GS-9 Construction Representative position in CECM; that he be paid $15,000 in monetary relief; that he have 317 hours of annual leave restored; and that he be given on-the-job training and off-site computer training. As noted in the Civilian Personnel Officer's Declaration in the civil court action, "The prospective supervisor has outlined a plan for training Mr. Thomas. It requires Mr. Thomas to work closely with that supervisor and the co-workers in that section. The training outline is flexible and may be adjusted according to the type of assignments that arise, Mr. Thomas' progress, and the availability of off-site training." (Exh. 8, ¶4).

The parties further stipulated that the terms of the settlement agreement "adversely impacted" Mr. Thomas' co-workers, in that "the GS-8 Construction Inspectors were denied the opportunity to compete for that GS-9 Construction Representative opening, Mr. Thomas will receive two weeks of contract management and one week of SABER training that either Ms. Pietropaula or Mr. Tancrator could have attended and Mr. Thomas' large annual leave balance could impact on the five other CECM employees ability to schedule their annual leave." (Stip. at ¶20).

In light of these facts, it was reasonably foreseeable that the settlement agreement would have a significant impact on the working conditions of employees in the unit, and that the impact was more than *de minimis*. For instance, the inability of other employees to compete for the position given to Mr. Thomas was a significant matter, and this is particularly clear in light of the procedure followed by the Employer for the second Construction Representative opening, which was filled shortly after Mr. Thomas was given the first opening. Although the Union may not have been entitled to negotiate a change concerning the method in which Mr. Thomas was named to the first opening, it was

certainly entitled to discuss with the Employer the ramifications of Mr. Thomas' hiring on the procedures to be employed in future situations. In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 278, 285 (1990), a violation of section 7116(a)(1) and (5) was found, based on the unilateral reassignment of a single employee from a field representative to a claims representative position. In *U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 858 (1997), the Authority held that it was improper for the agency to decide to fill certain vacancies through term appointments rather than career appointments, without negotiating the impact and implementation of that decision. Similarly, the Respondent here was obligated to negotiate the impact and implementation of Mr. Thomas' reassignment, and the implications of the procedures used for making that reassignment.

Moreover, the procedures to be followed by the Respondent in relation to Mr. Thomas' large annual leave balance, and the availability of training opportunities for other employees, in light of the settlement agreement, were significant issues that warranted bargaining. The base Civilian Personnel Officer clearly recognized the potential complications inherent in placing Mr. Thomas into a new unit and a new position when he executed his Declaration in Mr. Thomas' civil action (Exh. 8). He noted that while Mr. Thomas' supervisor had drafted a training plan, Mr. Thomas would need to work closely with his supervisor and co-workers, and that the training plan might require future adjustments. *Id*. Other employees might also be interested in receiving training, and they certainly would be interested in using leave during the month of December, and all of these interests could be compromised by the transfer into their section of an employee with 317 hours of leave and the need to receive considerable training. The appropriate mechanism for the Employer to accommodate such interests is through impact and implementation bargaining, not managerial fiat.

The two cases most closely on point to the facts of the instant case are the *GPO* and *NRC* decisions cited by the General Counsel, *supra*, and I conclude that the language of those decisions is controlling here. Although the Authority's discussion of impact and implementation bargaining in both cases was *dictum*, the underlying principle articulated by the Authority is nonetheless persuasive, and it is fully consistent with the Authority's precedent concerning implementation bargaining.

In both the *GPO* and *NRC* cases, the Authority dismissed unfair labor practice complaints based on the employer's refusal to notify the union of (or allow the union an opportunity to be present at) settlement meetings concerning an employee's EEO complaint.3 Notwithstanding the fact that the union had no right to be present at those EEO meetings, the Authority stated in *GPO* that the union "may have a role if the settlement gives rise to an impact on the bargaining unit." 23 FLRA at 40. Specifically, the Authority stated:

> "Accordingly, if the adjustment of an EEO complaint results in a change of unit employees' conditions of employment, the agency would have an obligation under the Statute to give prompt notice of that change to the exclusive representative of the unit employees and provide it with an opportunity to bargain to the extent required by the Statute." *Id.* at 40-41. (footnote omitted).

In the *NRC* case, the Authority reaffirmed the above-cited language from *GPO* and further explained how such an EEO settlement might affect unit employees. The example given in *NRC,* 29 FLRA at 665, "reassignment or promotion of the employee," is precisely the type of change which occurred in the current case. The settlement of Mr. Thomas' EEO complaint resulted in several changes in the working conditions of unit employees, by virtue of the method utilized for selecting Mr. Thomas for the vacant position and by virtue of the training, work assignment and leave issues created by Mr. Thomas' reassignment/promotion. Accordingly, the Respondent was obligated to notify the Union of these changes prior to implementation and to bargain over the procedures and arrangements necessary to implement the settlement agreement. Its admitted refusal to do so constituted a violation of section 7116(a)(1) and (5) of the Statute.

**3. Respondent's Defenses to its Obligation to Bargain Are Not Valid**

The Employer has stipulated that it did not notify or bargain with the union concerning the effects of its settlement agreement. The Employer has not claimed that the

3 As noted more fully in note 1, at the time of the *GPO* decision, the Authority had not yet taken its current position that EEO settlement discussions were encompassed by section 7114(a)(2)(A). In the *NRC* case, the union was not entitled to attend the EEO settlement meeting because the complaining employee was not a member of the bargaining unit.

impact of the settlement on unit members was *de minimis*. Instead, it has argued that requiring it to bargain over such matters would violate several legal principles. As I explained in the background section of the Analysis, most of the objections raised by the Employer are simply irrelevant or legally inapplicable.

For instance, the Employer has asserted that the Authority lacks subject matter jurisdiction here, because the exclusive method for "collateral attacks on a consent judgment" is through the courts, not through an executive agency such as the FLRA. But in fact, this unfair labor practice proceeding does not seek to attack the Employer's settlement agreement with Mr. Thomas in any way. As I have noted several times, and as the General Counsel has repeatedly stated, the terms of the settlement agreement are not in dispute in this case. The complaint alleges only that the Employer must bargain over the impact and implementation of the settlement agreement, and that is all that I find.

For this reason, the Employer's "preemption," "standing" and "separation of powers" arguments similarly lack merit. Nothing in the obligation to engage in "implementation" bargaining interferes with the District Court's judgment or the terms of the settlement agreement. Indeed, the current unfair labor practice proceeding carefully begins at the point where the court's proceeding ended. The Employer seems to be saying that because the terms of the settlement are fixed, discussing procedures for implementing those terms would somehow alter the settlement. However, the Employer provides no support, either legal or factual, for this assertion. As I explained above, the settlement agreement restored 317 hours of annual leave to Mr. Thomas and required that he be given certain training. The agreement doesn't explain how Mr. Thomas will be permitted to use his leave, especially since employees are normally permitted to carry over only 240 hours of annual leave to the next calendar year. With Mr. Thomas' reassignment to CECM in mid-December, many employees were likely to be interested in taking leave simultaneously. Similarly, while the settlement agreement requires the Employer to offer training to Mr. Thomas, it says nothing about the right of other employees to receive training, or how such competing claims would be handled. The Union was entitled to negotiate such issues with the Employer, and such negotiations would not alter the terms of the settlement or interfere with the jurisdiction of the district court in any way.

In Section G of its brief, the Respondent undertakes a broader attack on its alleged bargaining obligation: it argues that if Federal agencies were required to negotiate with unions every time a court or agency judgment affected employees, the result would be "inefficient and ineffective." The Respondent argues that "[r]equiring agencies to delay implementation of court and administrative decisions would result in nothing short of chaos." (Resp. Brief at 27). But it provides no legal precedent to support this argument, and the hypothetical examples it cites actually make the case for the General Counsel. For instance, the Respondent argues that the reinstatement of an employee through an adverse action appeal to the Merit Systems Protection Board would adversely affect other unit employees, and that it would be "inefficient and ineffective" to require agencies to bargain before implementing such an order. But indeed the Authority has held that while many aspects of adverse action and reduction-in-force procedures are fixed by statute or regulation, agencies must negotiate with their unions concerning those issues which are not fixed. *See, e.g., Department of the Air Force, Scott Air Force Base, Illinois*, 35 FLRA 844, 852-59 (1990) and cases cited therein. In *U.S. Patent and Trademark Office*, 31 FLRA 952, 981 (1988)(ALJ Decision), it was held that "if an agency makes a change in working conditions to conform to law or regulation, it is relieved from the obligation to bargain as to the *decision* to take such actions. . . . [but it] must bargain as to its impact and implementation." (emphasis in original). The other examples cited by the Respondent do not support a conclusion that such negotiations will result in "chaos." Unions negotiate with agencies regularly over issues such as smoking in the workplace, reassignment of employees, and the effects of Federal regulations and adverse action rulings. While there may be some inefficiencies inherent in such bargaining, the Respondent has not demonstrated any relevant case precedent to support its argument, which would essentially nullify most of the bargaining obligation of Federal agencies.

Finally, the Respondent argues that the unlawful actions alleged in the complaint were committed by the Department of the Air Force and the Department of Justice, not by officials of March Air Reserve Base; thus, it argues that Respondent March Air Reserve Base committed no unfair labor practice. Indeed, there is a line of cases in which the Authority has held that "[w]here a subordinate level activity merely carries out higher level instructions and acts ministerially and without discretion in the matter," the subordinate will not be found to have committed an unfair labor practice. *Headquarters, U.S. Air Force,*

*Washington, DC and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 126 (1992)(*Scott AFB*), and cases cited therein. But the principles enunciated in the *Scott AFB* decision also illustrate why such a result is unwarranted in the instant case.

In *Scott AFB* and similar cases, the subordinate activity acted "ministerially and without discretion." No such facts exist in our case, and it is highly disingenuous for the Respondent to argue that it was under a "compulsion" to refuse to bargain with the Union, or that bargaining would subject it to contempt proceedings in the District court. Although the Secretary of the Air Force was the named defendant in Mr. Thomas' civil action, and the U.S. Attorney represented the Secretary in the lawsuit, the alleged unfair labor practice here is the refusal to negotiate with the Union concerning the *implementation* of the settlement. As I have stated repeatedly, the Employer here is required to negotiate only over the implementation of the settlement, not the substantive terms of the settlement. Details such as the determining which employees will receive training, and when; and the balancing of competing leave requests, are encompassed within this bargaining obligation. Such details are handled by the supervisors and managers at March Air Reserve Base, not by the Secretary of the Air Force or in the U.S. Attorney's Office.

Although an Assistant U.S. Attorney did speak at the August 12, 1999 meeting with bargaining unit employees, at which she told the Union President that the Employer "did not have to negotiate with the [Union] because this was a Federal Judge's decision" (Stip. at ¶18), it was officials of March Air Reserve Base, not of the U.S. Attorney's Office, who were the primary actors in the refusal to bargain. Several officials from the base were present at the August 12 meeting, and it was conducted on the base. Additionally, it was Mr. Thomas' supervisor, and various management officials such as the Civilian Personnel Officer, who were responsible for establishing a training plan for Mr. Thomas and for modifying it, as necessary (Exh. 8). Unlike the *Scott AFB* case, there was no directive or written instruction from a higher authority ordering the Employer not to bargain. Officials at March Air Reserve Base were involved in the EEO litigation and preparation of the Thomas settlement agreement, and they had considerable discretion in how the settlement would be implemented. The Declaration of the base's Civilian Personnel Officer (Exh. 8, ¶4), one of the settlement documents in the litigation, expressly states that the training plan for Mr. Thomas was "flexible and may be adjusted according to the type of assignments

that arise" and other factors. Moreover, any bargaining over the implementation of the settlement would clearly be in the hands of persons at March Air Reserve Base. Therefore, the facts required, under the *Scott AFB* line of cases, for an employer to be exculpated from an unfair labor practice, are not present in this case. Respondent March Air Reserve Base must accept responsibility for their own officials' refusal to bargain with the Union.

With respect to the appropriate remedy for the Respondent's violation of the Statute, the General Counsel has stipulated that a *status quo ante* bargaining order is not appropriate, in the facts of this case. The terms of the settlement agreement were implemented pursuant to a court order, and those terms will not be disturbed. However, a prospective bargaining order relating to post-implementation issues is appropriate and warranted. The Employer will be required, among other things, to bargain with the Union concerning the procedures which the Employer will observe in carrying out the terms of its settlement agreement with John Thomas and the appropriate arrangements for employees adversely affected by that settlement agreement.

Based on the above findings and conclusions, I conclude that Respondent March Air Reserve Base violated section 7116 (a)(1) and (5) of the Statute, as alleged, and I recommend that the Authority issue the following Order:

**ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Air Force, March Air Reserve Base, California, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment, without first notifying and bargaining with the American Federation of Government Employees, Local 3854, AFL-CIO, the exclusive representative its employees, concerning the procedures which the Employer will observe in carrying out the terms of its Federal court settlement agreement with John Thomas and the appropriate arrangements for bargaining unit employees adversely affected by that settlement agreement.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights assured them by the Statute.

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

(a) Negotiate with the American Federation of Government Employees, Local 3854, AFL-CIO, concerning the procedures which the Employer will observe in carrying out the terms of its Federal court settlement agreement with John Thomas and the appropriate arrangements for bargaining unit employees adversely affected by that settlement agreement.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 3854, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, March Air Reserve Base, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

Issued, Washington, DC, November 30, 2000.

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RICHARD A. PEARSON
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 Department of the Air Force, March Air Reserve Base, California, 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 change conditions of employment of bargaining unit employees, which resulted from the implementation of a Federal District Court settlement agreement involving a bargaining unit employee, without first providing notification to the American Federation of Government Employees, Local 3854, AFL-CIO, the exclusive representative our employees, and an opportunity to bargain concerning the procedures to be observed in carrying out the terms of that settlement agreement and the appropriate arrangements for bargaining unit employees adversely affected by that settlement agreement.

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

WE WILL BARGAIN with the American Federation of Government Employees, Local 3854, AFL-CIO, concerning the procedures to be observed in carrying out the terms of that settlement agreement and the appropriate arrangements for bargaining unit employees adversely affected by that settlement agreement.

_____

(Respondent/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, Federal Labor Relations Authority, San Francisco Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415)356-5000.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. SF-CA-00037, were sent to the following parties:

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

John Pannozzo, Jr., Esquire P168-060-256
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103

Monte Crane, Esquire P168-060-257
AFLSA/CLLO
1501 Wilson Blvd., 7th Floor
Arlington, VA 22209

Rudy Guedea, President P168-060-258
AFGE, Local 3854
P.O. Box 6207
March ARB, CA 92518

**REGULAR MAIL:**

President
AFGE, AFL-CIO
80 "F" Street, NW.
Washington, DC 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: NOVEMBER 30, 2000
WASHINGTON, DC