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

DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE Respondent and	Case No. WA-CA-00463
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 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 **OCTOBER 9, 2001**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 5, 2001
Washington, DC

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

MEMORANDUM DATE: September 5, 2001

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON AIR FORCE BASE

Respondent

and Case No. WA-CA-00463

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-188

Charging Party

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

Enclosures

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

OALJ 01-57

DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 Charging Party	Case No. WA-CA-00463

Monte Crane, Esquire
Capt. Tabitha G. Macko, Esquire
For the Respondent

Thomas F. Bianco, Esquire
For the General Counsel

Mr. George L. Reaves, Jr.
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether, as the Complaint alleged, Respondent

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as "§ 16(a)(5)".

violated §§ 16(a)(5) and (1) of the Statute by repudiating Article II of the parties' collective bargaining agreement by implementing Air Force Instruction 36-1001 and Air Force Instruction 36-1004, compliance with which was mandatory, which replaced a five-tier annual performance rating system under the 1984 Air Force Regulation 40-452, with a two tier system, thereby eliminating the connection between employee performance ratings and eligibility for performance awards. (G.C. Exh. 1(a)).

This case was initiated by a charge filed on May 3, 2000 (G.C. Exh. 1(a)), which alleged violation of §§ 16(a)(1), (5), (7), and (8) of the Statute. The Complaint issued on September 29, 2000, but alleged violations only of §§ 16(a)(1) and (5), and set the hearing for December 13, 2000, at a location to be determined. (G.C. Exh. 1(b)). On October 18, 2000, Notice of Location of Hearing issued (G.C. Exh. 1(d)) and pursuant thereto a hearing was duly held on December 13, 2000, in Goldsboro, North Carolina, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce evidence bearing on the issues involved. At the conclusion of the hearing, Respondent's oral motion to dismiss the Complaint was granted, subject to consideration of the parties' post-hearing briefs, which were to be mailed by January 26, 2001. Respondent, General Counsel and the Charging Party each timely mailed a helpful brief, received on January 30, 2001, which have been carefully considered. Based on the entire record[2], including my observation of the witness and his demeanor, I make the following findings and conclusions:

FINDINGS

1. The National Association of Government Employees, Local R5-188 (hereinafter "Union") is the certified exclusive representative of bargaining unit employees at the Respondent Seymour Johnson Air Force Base, Goldsboro, North Carolina. (G.C. Exhs. 1(b), 2).

2. The Union and Respondent are parties to a collective bargaining agreement that first became effective July 30, 1991 (G.C. Exh. 2), for an initial term of 3 years, and has been renewed, by its terms, every 3 years since 1994. The Agreement contains fifty-four articles covering a number of different conditions of employment for unit employees, but does not make any reference to a five-tier

2/ Page 24 of the transcript is wholly extraneous to this proceeding and, in fact, is page 24 from the transcript of another case I heard involving the same parties on December 12, 2000, in Goldsboro (Case Nos. WA-CA-00424 and WA-CA-00425).

performance rating system. Indeed, Article XXV, entitled "Performance Appraisal" has only very general provisions and in its entirety reads as follows:

"ARTICLE XXV

"Performance Appraisal

"Section 1. A unit employee's annual performance appraisal will be given by the employee's rating supervisor.

"Section 2. The rating supervisor will discuss with the employee his/her performance appraisal prior to making it a part of the employee's record.

"Section 3. A unit employee has a right to grieve his/her performance appraisal. In the event an employee grieves his/her performance appraisal, the employee has a right to a Union representative.

"Section 4. All evaluations of performance will be applied in a fair and objective manner. An employee's signature on an evaluation, where signature is provided for, indicates only that the evaluation has been received, and does not indicate an employee's agreement or disagreement with the evaluation.

"Section 5. Supervisors will counsel their employees in relation to their overall performance on an as-needed basis. When a narrative recordation results from such counseling, the affected employee will have the right to make written comments concerning any disagreement with the recordation." (G.C. Exh. 2, Art. XXV).

Article XXVIII, entitled "Incentive Awards Programs", is equally general and provides as follows:

"ARTICLE XXVIII

"Incentive Awards Program

"Section 1. The Employer, through the newsletter, by internal communication, and other available means, will urge supervisors to recognize employees who sustain a level of

performance significantly above reasonable expectations. Such recognition will be in accordance with regulatory guidelines. Supervisors will be urged to use Letters of Appreciation, Letters of Commendation and Honorary awards to the maximum extent possible in such recognition.

"Section 2. Quality Step Increases (QSI) and Performance Awards (PA) should be used to recognize individuals or groups for meritorious personal efforts, acts, services, or scientific achievement performed within or outside assigned job responsibilities.

"Section 3. The Union may nominate a member for appointment to the Incentive Awards Committee." (G.C. Exh. 2, Art. XXVIII).

3. Article II of the parties' Agreement states as follows:

"It is agreed and understood by the Employer and the Union that in the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities; by published agency policies and regulations in existence at the time this agreement is approved and subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities." (G.C. Exh. 2, Art. II)(Emphasis supplied).

4. Mr. George L. Reaves, Jr., a National Representative of the Union (Tr. 8), stated that he had served as the Union's Chief Negotiator for the 1991 Agreement (G.C. Exh. 2). Mr. Reaves first said that he negotiated Article II; but then he said that the present text of Article II had been in the prior contract (". . . which basically left what you see here was in the contract before this one." (id. 10-11)), except, ". . . another phrase on the end concerning agreements at high agency level. So we wanted to eliminate that as part of the union's proposal to make sure that first of all they (sic) were no higher agency agreements negotiated. So we felt no need for that. So we took it off, which basically left what

you see here was in the contract before this one." (id. 10-11)3 (Emphasis supplied).

It does not appear that Mr. Reaves was present at the negotiation of the balance of the original Article II, since he said he became involved with the Union, ". . . around 1990, maybe a little prior to that, 1989 time frame." (Tr. 9). I neither credit nor give any probative value to his testimony concerning the meaning of Article II or to his assertion that in Article II, "appropriate authorities" meant only "government-wide." (Tr. 19, 21), for the reasons that his testimony in this regard is wholly contrived and self-serving, is inconsistent, ignores the clear and unambiguous language of Article II, and is contrary to the Union President's (Mae Howell) memorandum of August 31, 1999, in which she stated, in part, "In accordance with the Negotiated Agreement, NAGE Local R5-188 requests to bargain impact and implementation of the new and revised instructions." (G.C. Exh. 3)(i.e., "Package dated 29 July 1999 containing AFI 36-1001" (id.).

General Counsel Exhibit 6 (Air Force Regulation 40-452 (1 July 1984)) was in effect when the 1991 Agreement became effective and Part 2-17c provides for five ratings: Superior, Excellent, Fully Successful, Minimally Acceptable, and Unacceptable (G.C. Exh. 6, Part 2-17c). As noted above, Article XXV of the 1991 Agreement contained only very general statements concerning "Performance Appraisal" e.g., "A . . . performance appraisal will be given by the employee's rating supervisor"; "The rating supervisor will discuss with the employee his/her performance appraisal . . . ."; "A unit employee has a right to grieve his/her performance appraisal . . . ."; "All evaluations of performance will be applied in a fair and objective manner . . . ."; "Supervisors will counsel their employees in relation to their overall performance on an as-needed basis. . . ." (G.C. Exh. 2, Art. XXV)

Mr. Reaves liked the provisions of General Counsel Exhibit 6 and tried to distort Article II to preserve Air Force Regulation 40-452 and to reject Air Force Information 36-1001 (July 1, 1999)(G.C. Exh. 4) and Air Force Information 36-1004 (July 1, 1999)(G.C. Exh. 5).4 Thus, Mr.

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3/ Neither the language of the prior Article II nor the language of the deleted "phrase on the end" was offered as an exhibit. All the record shows is Mr. Reaves' statement of the phrase.

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4/ Air Force Information 36-1004, also dated July 1, 1999 (G.C. Exh. 5), was submitted to the Union on July 29, 1999, together with AFI 36-1001 (Res. Exh. 1).

Reaves said that "appropriate authorities" meant, "government wide" (Tr. 19). But Article II provides:

> "It is agreed . . . that . . . all matters covered by this agreement . . . are governed by existing or future laws and regulations of appropriate authorities . . . ." (G.C. Exh. 2, Art. II).

Plainly, this portion of Article II provides that all matters covered by this agreement are governed by: existing or future laws and by existing or future regulations of appropriate authorities. If the Air Force was an appropriate authority for AF Regulation 40-452, it was no less an appropriate authority for AF Instruction 36-1001 and AF Instruction 36-1004. Nothing in this portion of Article II makes any reference whatsoever, directly or by implication, to "government wide", and the words, "appropriate authorities" are wholly neutral and include any and all appropriate authorities, which could, by way of example, be: DoD or AF or OPM or, in some circumstances, a combination. The 1991 Agreement in Article III sets forth definitions but does not define "appropriate authorities" (G.C. Exh. 2, Art. III); however, it is interesting that subsection b. reads as follows:

> "b. Condition of Employment. Personnel policies, practices, and matters whether established by rule, regulation . . . ." (id.)(Emphasis supplied).

Article II continues (following the portion set forth above) as follows:

> "; by published agency policies and regulations in existence at the time this agreement is approved and subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities." (Emphasis supplied) (G.C. Exh. 2, Art. II).

The first quoted portion of Article II referenced, succinctly, "existing or future laws and regulations of appropriate authorities" (emphasis supplied), while this portion is more wordy and references:

> "published agency policies and regulations in existence . . . and subsequently published agency policies and regulations required by

law or by the regulations of appropriate authorities."(id.)(Emphasis supplied)

This portion first refers to existing agency policies and regulations and then, again, makes applicable: subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities. As noted above, "appropriate authorities" is wholly neutral. Subsequently published agency policies required by regulations of appropriate authorities certainly includes regulations of the Department of the Air Force, DoD, OPM, etc. Paraphrasing the provision as to "regulations" it would read,
"by published agency . . . regulations in existence . . . and subsequently published agency . . . regulations required . . . by the regulations of appropriate authorities." (Emphasis supplied). Again, Air Force, as well as DoD, OPM, etc., could be an appropriate authority or authorities. For example, the "paid parking" scenario a few years ago, began with an Executive Order of the President; a government wide Directive by OMB; a government wide Regulation by OPM; a service-wide Regulation by DoD; and, inter alia, a Regulation by the Department of the Air Force. Here, the Department of the Air Force in 1999, issued AF Instruction 36-1001 and AF Instruction 36-1004, to supersede its 1984 AF Regulation 40-452 and compliance with each was mandatory. Accordingly, existing regulations were superseded by subsequently published agency regulations and compliance with AF Instruction 36-1001 and AF Instruction 1004 was required by Air Force Regulations. Thus, not only were there subsequently published agency regulations but Respondent's compliance therewith was required by regulations of the Air Force.

As noted above, Ms. Howell, President of the Union in her memorandum of August 31, 1999 (G.C. Exh. 3), requested, ". . . to bargain impact and implementation of the new and revised instructions" (id.). Although Ms. Howell designated Mr. Reaves, ". . . as our chief negotiator and representative on this issue." (id.), Mr. Reaves' letter of December 17, 1999, to Mr. Thomas R. Cruddas, Respondent's Civilian Personnel Officer (G.C. Exh. 7), misrepresented the "issue" and the Union's request to bargain. The Union on August 31, 1999, requested ". . . to bargain impact and implementation of the new and revised instructions" (G.C. Exh. 3) and Mr. Reaves was designated as representative on this issue (id). There was no mutual agreement to reopen the Agreement. Rather, Mr. Cruddas had informed the Union by memorandum dated July 29, 1999, that the Air Force was changing its civilian performance appraisal system and attached a copy of AF Instruction 36-1001; had published

policy and guidance on civilian awards in AF Instruction 36-1004, a copy of which was attached; that Air Force had completed consultation on these changes with the unions, including NAGE, that have national consultation rights; and any recommendations or proposals were requested by August 31, 1999 (Res. Exh. 1). Ms. Howell responded on August 31, 1999, with her request to bargain impact and implementation.

5. In response to Respondent's letter of July 29, 1999, the Union submitted a number of bargaining proposals concerning implementation of the new regulations. The parties met on October 18, 1999 (Tr. 26.); Respondent declared a number of proposals to be outside the scope of its I&I bargaining obligation, and offered to negotiate on the remaining proposals (id.). Mr. Reaves, at the October 18th session, declared an impasse in the negotiations and announced his intention to initiate efforts to obtain a mediator (Tr. 29). Respondent, by Mr. Cruddas, advised the Union that Respondent believed the involvement of a mediator was premature, since negotiability disputes existed between the parties (Res. Exh. 5).

6. During the period from October 18, 1999, to December 17, 1999, the parties exchanged letters setting out their positions. By memorandum dated October 25, 1999 (Res. Exh. 2), Respondent notified the Union that the change,

> ". . . must be implemented in December 1999 in order for employees to be rated under the revised procedures during this rating cycle. Therefore, we would like to meet again as soon as possible to discuss those proposals that are related to the change." (Res. Exh. 2).

Again, by memorandum dated November 17, 1999 (Res. Exh. 3), Respondent reviewed the matter; again informed the Union that the change must be implemented in December, 1999, in order for employees to be rated under the revised procedures during this rating cycle and further that,

> ". . . Our proposed implementation date is 13 December 1999. Therefore, we would like to meet again as soon as possible to discuss those proposals that are related to the change. . . ." (Res. Exh. 3).

Mr. Reaves replied to Mr. Cruddas by letter dated November 30, 1999 (Res. Exh. 4), and stated, inter alia, that he had contacted FMCS Commissioner Cheatham but had not received

confirmation from him as to mediation. Mr. Cruddas replied to Mr. Reaves' November 30, 1999, letter by memorandum dated December 7, 1999, and, inter alia, again, informed him of the proposed December 13, 1999, implementation date (Res. Exh.4).

7. Respondent implemented the performance appraisal system on April 1, 2000 (G.C. Exh. 8).

8. General Counsel made it clear at the hearing that no claim whatsoever was made concerning the negotiations of the parties, i.e., whether, or not, there had been good faith bargaining. Thus the record shows:

> "MR. BIANCO: Well, your Honor, we're not alleging good faith or bad faith bargaining, except to the extent that we're alleging that there is a repudiation.
>
> "JUDGE DEVANEY: Of what?
>
> "MR. BIANCO: Not bad faith; repudiation.
>
> "JUDGE DEVANEY: Of what?
>
> "MR. BIANCO: Of the performance appraisal system in effect at the time this contract was approved. Because that was appropriated (sic) [incorporated] by reference into the contract, and it was not permitted to be changed, absent bargaining to agreement.
>
> . . .
>
> "MR. BIANCO: Now, we're not alleging good faith, or bad faith, as I said, except to the extent that repudiation is an act of bad faith under the statute.
>
> . . .
>
> "MR. BIANCO: And I would just say, therefore, for our purposes, the actual communications between the parties are irrelevant, except to the extent that there was a proposal to make a change, and the union, on December 17th, said we do not with (sic) to bargain over this during the term of the contract. Everything else is irrelevant in the General Counsel's view." (Tr. 55-56)

"JUDGE DEVANEY: And you don't want to - - you're making no contention about good or bad faith bargaining.

"MR. BIANCO: No, your Honor. The complaints (sic) based on repudiation, and we're not amending the complaint." (Tr. 58).

CONCLUSIONS

§ 16(a)(7) of the Statute states that it shall be an unfair labor practice for an agency,

> "(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed;" (5 U.S.C. § 7116(a)(7)) (Emphasis supplied).

Quite early, the Authority, noting the provisions of § 16(a)(7), supra, stated, in a negotiability determination,

> ". . . while the duty to bargain under section 7117 . . . does not extend to matters which are inconsistent with existing Government-wide rules or regulations or agency-wide rules or regulations for which a compelling need is found . . . once a collective bargaining agreement becomes effective, subsequently issued rules or regulations . . . [except Government-wide rules or regulations issued under 5 U.S.C. 2302], cannot nullify the terms of such a collective bargaining agreement." National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983, 984-985 (1982)(Emphasis supplied) (hereinafter referred to as, "Customs").

One of the union's proposals, which the Authority found negotiable, was:

"Article 2, Sections 1A and B

"A. In the administration of all matters covered by this Agreement . . . are governed by existing or future laws; and Government-wide and Treasury Department rules or

regulations in effect upon the effective date of the Agreement.

"B. Should any conflict arise . . . between the terms of this Agreement and any government-wide or agency rule or regulation . . . issued after the effective date of this Agreement, the terms of this Agreement will supersede and govern." (id. at 993).

Another of the Union's proposals, which the Authority found negotiable, was a provision which defined "regulations of appropriate authorities" to mean, "Government-wide rules and regulations". The proposal was,

"Article 32, Section 10A

"A. . . . In the issuance of any award under this Article, the arbitrator shall be governed by:

> "1. existing and future laws;
>
> "2. the regulations of appropriate authorities (i.e., Government-wide rules or regulations), . . . in existence at the time this Agreement was approved;
>
> "3. future regulations of appropriate authorities . . . to the extent that they do not conflict with the provisions of this Agreement; and,
>
> "4. the regulations of the Agency and/or the Employer in existence at the time this Agreement was approved - and future regulations of the Agency and/or the Employer - to the extent that they do not conflict with the provisions of this Agreement." (id. at 996).

In a similar case, National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 13 FLRA 554 (1983), the Authority found the following provision negotiable,

"Section 8

> "Any conflict between the terms of this agreement and a relevant master agreement or non-government-wide regulation will be resolved by relying on the terms of this agreement." (id.).

In American Federation of Government Employees, AFL-CIO, Local 1815 and U.S. Army Aviation Center and Fort Rucker, Alabama, 29 FLRA 1447 (1987), the Authority, inter alia, found negotiable the union's provision 3 which provided as follows:

"ARTICLE 16

"SALARY

> "Section 1. Rates of pay will be in general accord with pay schedules for similar positions in comparable school systems as determined by applicable Federal law and regulations." (id. at 1457)(Emphasis supplied).

Chairman Calhoun, concurring on Provision 3, noted,

> ". . . the proposal binds the Agency only to 'applicable Federal law and regulations', it recognizes that Agency regulations concerning salary schedules may change during the life of the . . . agreement." (id. at 1463) (Emphasis supplied).

Obviously, the parties may make an agreement subject to future regulations; they may include agency regulations or they may limit changes to government-wide regulations; and, of course, they may define terms, e.g. "regulations of appropriate authorities" to mean "government-wide regulations". But here, Article XXV of the 1991 Agreement, entitled, "PERFORMANCE APPRAISAL" makes no reference whatever to a five-tier performance rating system nor to AF Regulation 40-452. Article III of the 1991 Agreement, "DEFINITIONS", does not mention or define, "appropriate authorities"; and Article II, "PROVISIONS OF LAWS AND REGULATIONS", provides that,

> ". . . all matters covered by this agreement . . . are governed by existing or future laws and regulations of appropriate authorities; by published agency policies and regulations in existence at the time this

agreement is approved and subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities."

Unless limited, as in "Customs", supra, "appropriate authorities" means any agency authorized by law to issue policy and regulations and there can be no question that the Department of the Air Force is authorized by law to issue policy and regulations. Thus, as Respondent states, "The Department of the Air Force is defined as a 'military department' in 5 U.S.C. § 102. The Department of the Air Force was redesignated as a 'military department' by the National Security Act Amendments of 1949, P.L. No. 81-216. § 4, 63 STAT. 578 . . . This act also created the Department of Defense. In enacting this legislation, Congress stated that . . . [the military departments] would be separately administered by the respective Secretaries under the direction, authority, and control of the Secretary of Defense . . . The Department of the Air Force is headed by a Secretary . . . [10 U.S.C. § 8013(a)(1) . . . responsible for, and has the authority necessary to conduct, all affairs of the Department of the Air Force 10 U.S.C. § 8013(b). The Secretary of the Air Force is . . . granted the power by law to prescribe regulations . . . 10 U.S.C. § 8013(g)(3). . . ." (Res. Brief, pp. 7-8) and is an appropriate authority to issue regulations. The Department of Defense is an Executive Department of the United States, 10 U.S.C. § 111, and has authority to control and conduct all affairs of the Department (10 U.S.C. § 113) including the issuance of regulations, see: 32 C.F.R. § 2.1, et seq. (Part 336, for example, which concerns publication of proposed and adopted regulations affecting the public). Accordingly, because the Department of the Air Force is under the direction and control of the Department of Defense, the Department of Defense is an appropriate authority to issue regulations which would control the Department of the Air Force. Of course, agencies, such as OPM, which issue government-wide regulations, would also be an appropriate authority to issue regulations.

The first phrase of Article II, "existing or future laws and regulations of appropriate authorities", by its terms includes, present and future regulations of the Air Force. The second phrase of Article II, "subsequently published agency policies and regulations, required . . . by the regulations of appropriate authorities", also, by its terms specifically includes subsequently published agency regulations required by regulations of an appropriate authority. The published agency regulation (AF Instruction 36-1001) was made mandatory and, consequently,

was "required . . . by the regulations of appropriate authority", i.e., the Department of the Air Force. If it had been intended that "regulations of appropriate authorities" mean "only" government-wide regulations, the parties easily could have so provided; but they did not. The presence of the words "agency regulations" and "regulations of appropriate authorities" in the second phrase are entirely compatible because "subsequently published agency . . . regulations required . . . by the regulations of appropriate authorities" necessarily means those agency regulations required by the Air Force or the Department of Defense for the reason that no other "appropriate authority" could mandate agency regulations.

Moreover, the Union implicitly agreed that Article II, meant existing and subsequently published agency regulations required by Air Force Regulations because it, by its President, on August 31, 1999 (G.C. Exh. 2), requested ". . . to bargain impact and implementation of the new and revised instructions." (id.).

For the foregoing reasons, I affirm my decision to dismiss the Complaint because Article II of the Agreement specifically made applicable existing and future regulations of the Air Force and, therefore, the sole allegation of the Complaint, that Respondent repudiated Article II of the Agreement, is without basis. In so concluding, I have found the language of Article II to be clear and unambiguous. If it were deemed otherwise and Article II were interpreted to prohibit Air Force regulations published after the date of renewal of the Agreement, the terms of Article II would be unclear and ambiguous because subject to different interpretations.

In Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996) (hereinafter, "375th Mission Support Squadron"), the Authority stated the following with respect to whether a refusal to honor a contract provision constitutes a repudiation of that agreement,

> "We find that the nature and scope of the failure or refusal to honor an agreement must be considered, in the circumstances of each case, in order to determine whether the Statute has been violated. Because the breach of an agreement may only be a single instance, it does not necessarily follow that the breach does not violate the Statute. . . . Rather, it is the nature and

> scope of the breach that are relevant. Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute. [Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1218-1219 (1991)].
>
> . . . See Cornelius v. Nutt, 472 U.S. 648, 664 (1985) if the violation of an agreement provision constitutes a clear and patent breach of the terms of the agreement, then the union may file an unfair labor practice charge with the Authority), citing Iowa National Guard and National Guard Bureau, 8 FLRA 500, 510-11 (1982); Panama Canal Commission, Balboa, Republic of Panama, 43 FLRA 1483, 1507-09 (1992), reconsideration denied, 45 FLRA 1075 (1992) (the respondent's actions in unilaterally terminating employees' negotiated right to appeal adverse actions through the administrative appeals procedures went to the heart of the parties' agreements and constituted a repudiation of the agreement provisions). See also Department of Defense Dependents Schools, 50 FLRA 424, 426-27 (1995).

"Consistent with the foregoing, two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?). The examination of either element may involve an inquiry into the meaning of the agreement provision allegedly breached. However, for the reasons that follow, it is not always necessary to determine the precise meaning of the provision in order to analyze an allegation of repudiation. (footnote omitted)

"Specifically, with regard to the first element, it is necessary to show that a respondent's action constituted 'a clear and patent breach of the terms of the agreement[.]' Cornelius v. Nutt, 472 U.S. at 664 (citation omitted). In those situations where the meaning of a particular agreement term is unclear, acting in accordance with a reasonable interpretation of

> that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement. (footnote omitted) Cf., e.g., Crest Litho, Inc., 308 NLRB 108, 110 (1992)(NLRB will not find a violation if the record shows that 'an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.') (citing Vickers, Inc., 153 NLRB 561, 570 (1965)). . . ." (375th Mission Support Squadron, 51 FLRA at 861-863).

Here, Respondent's interpretation of Article II was reasonable, Respondent notified the Union on July 29, 1999, that the Air Force was changing its civilian performance appraisal system and policy and guidance on civilian awards and attached copies of AF Instruction 36-1001 and AF Instruction 36-1004; advised the Union that the Air Force had completed consultation on these changes with unions, including NAGE, that have national consultation rights; the Union on August 31, 1999, requested to bargain impact and implementation of the new and revised instructions; the Union submitted proposals; and the parties entered upon I&I bargaining. Accordingly, even if Respondent breached the Agreement, the breach was not clear and patent and no repudiation occurred. 375th Mission Support Squadron, supra.

Because Respondent did not repudiate Article II of the Agreement, it did not violate §§ 16(a)(5) or (1) and it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-00463 be, and the same is hereby, dismissed.

_____
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 5, 2001

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-00463, were sent to the following parties:

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