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 GOLDSBORO, NORTH CAROLINA Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R5-188 Charging Party	Case No. WA-CA-02-0285

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 **DECEMBER 1, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 300
Washington, DC 20424-0001

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 31, 2003
Washington, DC

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

MEMORANDUM DATE: October 31, 2003

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON AIR FORCE BASE
GOLDSBORO, NORTH CAROLINA

Respondent

and Case No. WA-CA-02-0285

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU,
AFL-CIO, 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 transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

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

DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE GOLDSBORO, NORTH CAROLINA Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R5-188 Charging Party	Case No. WA-CA-02-0285

Major Ferdinando P. Cavese, USAF
Major Troy R. Holroyd, USAF
For the Respondent

Philip T. Roberts, 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 issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by filling three vacant positions in the Heat Plant, at the point it was subject to Competitive Sourcing (contracting out), with term employees without notice to the Union.

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[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)".

This case was initiated by a charge filed in the Washington Region on February 6, 2002 (G.C. Exh. 1(a)); on February 22, 2002, the Washington Region transferred this, and other cases, to the Atlanta Region (G.C. Exh. 1(c)); the Atlanta Region issued the complaint on July 26, 2002 (G.C. Exh. 1(e)); and on the same day, July 26, 2002, the Atlanta Region transferred this, and two other cases, to the Chicago Region (G.C. Exh. 1(g)). The Complaint set the hearing for January 30, 2003, at a place to be determined in Raleigh, North Carolina; on January 15, 2003, Notice of Hearing Location set the hearing in Goldsboro, North Carolina (G.C. Exh. 1(k)), pursuant to which a hearing was duly held on January 30, 2003, 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 and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, March 3, 2003, was fixed as the date for mailing post hearing briefs, which time subsequently was extended, on Motion of Respondent to which there was no objection, to March 14, 2003. Respondent and General Counsel each timely filed, or mailed, an excellent brief, received on, or before, March 19, 2003, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The National Association of Government Employees, Service Employees International Union, AFL-CIO, Local R5-188 (hereinafter, "Union") is the certified exclusive representative of an appropriate unit of Respondent's employees (G.C. Exh. 1(e)), including employees of the Heat Plant (Tr. 14).

2. On March 11, 1998, Ms. Mae Howell, President of the Union requested copies of revisions or up-dates of a laundry list of Federal Personnel publications and Air Force publications (Tr. 73, Res. Exh. 3). Included on this list were Air Force Regulations (hereinafter, "AFR") 40-112 and 40-312 which had been replaced by Air Force Instruction 36-502 (hereinafter, "AFI") on March 30, 1994 (Tr. 40), this being the AFI directly involved in this proceeding.

3. On March 13, 1998, Mr. Thomas R. Cruddas, then Civilian Personnel Officer, informed the Union that because of the extensive number of publications listed it could not provide the data requested until about April 17, 1998 (Res. Exh. 4).

4. On April 14, 1998, Mr. Cruddas responded to the Union's March 11, 1998, request and stated: (a) All Federal Personnel Manual System Letters and Bulletins listed were obsolete and have not been replaced; (b) noted material rescinded; noted change of AFRs to AFIs and attached copies of all current AFRs and AFIs. As noted above, AFR 40-112, 25 October 1973 and AFR 40-312, 20 February 1980, were replaced by AFI 36-502, on March 30, 1994 (Res. Exh. 5; Tr. 40).

5. On April 23, 1998, Ms. Howell asked, Mr. Cruddas,

". . .

"NAGE Local R5-188/AF requests a deadline of 30 June 1998 to request negotiations and submit our counter proposals for each publication in turn. This is necessary due to the bulk of material to review and the number of publications the Agency has belatedly provided for our perusal.

"As we complete each publication, we will submit any requests or proposals rather than wait to submit all at one time.

. . . ." (Res. Exh. 6).

6. On May 6, 1998, Mr. Cruddas responded as follows:

"1. In your memo you requested a deadline of 30 June 1998 to request negotiations and submit proposals on the publications we recently sent you. We believe that this is a reasonable due date for all requests and proposals related to these publications.

"2. Regarding your comment that we 'belatedly provided' these publications to you, we would like to remind you that we provided you a copy of the Air Force publications index on 22 April 1996 and asked that you identify those publications for which you had a need. You did not identify your requirements until 11 March 1998.

. . . ." (Res. Exh. 7).

7. Ms. Pamela T. Hawley, who has been in the civilian personnel office of Seymour Johnson since May, 1975 (Tr. 72) and in 1998 was a personnel management specialist dealing in labor and management relations, testified that the Union had made no response by July 2, 1998, and she had so noted on

the bottom of Mr. Cruddas' May 6, 1998, memorandum (Res. Exh. 7; Tr. 78); and she further testified that the Union had made no response by July 28, 1998, which she also noted on the bottom of Respondent Exhibit 7.

8. The March 29, 1996, memorandum of Mr. Cruddas to the Union gave notice of ten organizations that had been identified as candidates for contracting out, including the Heating Plant (G.C. Exh. 3). Lieutenant Colonel Stewart Cox, Chief of the Manpower Office at Seymour Johnson, testified, both credibly and without contradiction, that identifying candidates for contracting out does not set in motion the procedures for contracting out; that, as the memorandum stated, these candidates must be studied before any firm decision can be made (G.C. Exh. 3; Tr. 105); and the procedures for contracting out the Heating Plant were not set in motion until on, or about, March 21, 2001 (Res. Exh. 12, Attachment, 4th page of Exhibit) when the Fourth Fighter Wing requested approval of Headquarters, USAF to proceed with competitive sourcing (direct conversion) of the Heat Plant. By memorandum dated October 24, 2001 (Res. Exh. 1), Respondent notified the Union that the direct conversion of the Heat Plant had been approved by Headquarters USAF on October 15, 2001, and was projected to be completed by October 1, 2002, with the potential contract starting on April 1, 2003.

9. Mr. Randy Keith Houston, Human Resources Specialist - Labor Relations, in Civilian Personnel at Seymour Johnson since September, 1980 (Tr. 37) and currently acting Civilian Personnel Officer (id.), testified credibly, and without contradiction, that around July, 2001, Manpower had advised Personnel that the Heat Plant had definitely been selected for a contracting out study (Res. Exh. 12, Memoranda dated March 21, 2001 and August 3, 2001; Tr. 120, 121, 127, 128) and, being so advised it was required that vacant positions at the Heat Plant be filled on a temporary basis (Tr. 53), i.e., less than permanent, and, because it was believed to be for more than one year, as term employees (two years, three years or four years) (Tr. 41). Therefore, pursuant to Air Force Instruction 36-502, page 2 (Res. Exh. 2, p. 2), "matching" the projected length of the workload (time before a decision on contracting out, if made, became effective) (Tr. 59), the three employees hired for the Heat Plant in July, August and December, 2001, were hired for two year terms; however, the term was "not more than 2 years" and employment could be terminated prior to the end of the term (Tr. 42, 43, 44, 46). Thus, Mr. Roger W. Strickland was employed July 24, 2001, effective date of employment August 13, 2001 (Res. Exh. 9; Tr. 30, 33-34, 43, 44, 45); Mr. Steven R. Stanton, employed August 3, 2001, effective

date of employment August 13, 2001 (Res. Exh. 10; Tr. 45) and Mr. Jimmy J. Davidson, employed December 3, 2001, effective date of employment December 2, 2001 (Res. Exh. 11; Tr. 46).

10. Mr. Houston testified that it had been the practice since 1980, ". . . since I've been here we've had a number of functions like this identifying it for a contract study, and once they're officially identified for a contract study then it's been our practice, ever since 1980, that if we had to fill a vacant position that it would be filled on a temporary basis." (Tr. 53; see, also, Tr. 67-68). Mr. Houston further stated, ". . . we've never bargained with the Union" (Tr. 55). Ms. Howell candidly admitted that she was aware of the prior use of term employees (i.e., before 2001) at Seymour Johnson (Tr. 19) but was not given notice of the use of term employees (Tr. 20, 83) and had never bargained on the use of term employees (id.).

11. Before August, 2001, all employees hired at the Heat Plant had been permanent employees (Tr. 86-87, 88, 89).

12. Respondent did not give the Union notice of the hiring of the term employees at the Heat Plant (Tr. 68, 69) and did not give the Union notice of the Competitive Sourcing (direct conversation) of the Heat Plant until October 24, 2001 (Res. Exh. 1) following approval by Headquarters, USAF on October 15, 2001 (Res. Exh. 1; Tr. 71, 126, 128), and, of course, after two term employees had been hired for the Heat Plant.

13. There currently are five employees at the Heat Plant: two permanent and three term employees (Tr. 16). Mr. Houston testified that he, ". . . saw no impact whatsoever on bargaining unit employees because to me the only impact with bargaining unit employees that (sic) which (sic) [we] had on board at the time of hire would have been the impact of hiring them as permanent employees[.] {T}here would have been potential adverse impact later if we had to run a reduction in force on these new employees that were being hired. Then there would be plenty of potential adverse impact. . . . By hiring them as term employees if, if the decision were later made to contract out this function and we had to run a reduction in force . . . these people cannot compete with our permanent employees in reduction in force, so there would be no adverse impact on our regular permanent employees. But had we hired them as permanent employees then they would have the adverse impact, the potential adverse impact . . . that being veterans they

could displace non-veterans who had been working with us for many years." (Tr. 56-57).

Mr. George L. Reaves, Jr., National Representative of the Union, questioned Mr. Houston as to whether a permanent wage grade employee could apply for a temporary promotion and Mr. Houston said yes. (Tr. 69-70). Ms. Howell testified, ". . . If you've got some WG 8s . . . and they're eligible for these WG 10 jobs, and the WG 10 job is no longer there because it's been converted to a term, then these employees can't progress. So that's a major impact to the bargaining unit." (Tr. 22). The record shows that Roger W. Strickland was hired as a WG-11, Step 1 (Res. Exh. 9); Steven R. Stanton was hired as a WG-10, Step 1 (Res. Exh. 10); and Jimmy J. Davidson, who came from a permanent position elsewhere, was hired as a WG-11, Step 5 (Res. Exh. 11). Mr. Scott Conway, apparently the only non-supervisory permanent employee of the Heat Plant, Mr. Terry Wooly the other permanent employee is a supervisor (Tr. 16, 17, 87, 88; compare G.C. Exh. 4 which included Plant Foreman Jones and Mr. Wooly succeeded Mr. Jones), testified and stated that he was hired in 1996 as a WG-8 (Tr. 90); but Mr. Conway was not asked what his present grade was and there is no evidence that shows that any permanent employee of the Heat Plant was less than a WG-11.

CONCLUSIONS

Air Force Instruction 36-502 actually issued on March 30, 1994 (Res. Exh. 2); however, it was one of the documents furnished the Union on April 14, 1998, and the Union requested an extension (see, Res. Exh. 8, Section 3) to June 30, 1998, ". . . to request negotiations and submit our counter proposals for each publication in turn. . . ." (Res. Exh. 6) to which Respondent agreed (Res. Exh. 7). The Union had made no response by July 28, 1998. Accordingly, the Union had notice on, or about April 14, 1998, that Air Force Instruction 36-502 required that,

> "2.1. All managers and supervisors:
>
> "Match civilian appointments (permanent, term, or temporary) to the projected length of the workload and the available funding. . . ." (Res. Exh. 2)

but made no response notwithstanding that it asked for and was given until June 30, 1998, to do so. General Counsel asserts, "The AFI is simply too slender a reed to base a finding that the Respondent put the Union on clear notice of Respondent's intention to fill vacant bargaining unit positions with term employees instead of permanent

employees . . .” (General Counsel’s Brief, pp. 6-7). I do not agree. The statement appears at the top of page 2; is highlighted; and the statement, “Match civilian appointments (permanent, term, or temporary) to the projected length of the workload . . .”, treats with a cornerstone of a union’s interest and obligation to those it represents. It is true, of course, that Air Force Instruction 36-502 did not inform the Union that, for example, term employees would be used if new hires were required after an activity had been selected for a contracting out study, and, if the Union did not know, it was because the Union did not ask. Consequently, because the right to use temporary or term employees when the probable duration of the job is short is a reserved right of management, U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA 858, 866 (1997), 54 FLRA 360, 361, 388 (1998), Respondent was not required to negotiate its substantive decision to use temporary, or term employees, but was required to give the Union notice and opportunity to negotiate the impact and implementation (i.e., pursuant to § 6(b)(2) and (3), “procedures” or “appropriate arrangements” for employees adversely offered). This Respondent did on April 14, 1998, and, as noted, the Union made no response. As to it’s general decision to use temporary or term employees for projected short duration, Respondent gave the Union notice and opportunity to bargain I & I.

Nevertheless, Article XXXVIII, Section 4 of the parties negotiated Agreement provides as follows:

> “Section 4. The Union will be advised of contracting out decisions which will have an impact on the unit employees. The impact and implementation of these contracting out decisions will be negotiated at request of the Union.” (Res. Exh. 8, Art. XXXVIII, Sec. 4, p. 29).

Respondent on March 21, 2001, requested approval to proceed with Competitive Sourcing (direct conversion) of the Heat Plant (Res. Exh. 12, Attachment) but gave no notice of this contracting out decision by Respondent. Indeed, Respondent did not give the Union notice until October 24, 2001, after Air Force Headquarters had approved the request and after Respondent, on July 24, 2001, and August 3, 2001, had hired two term employees. Respondent changed the conditions of employment of Heat Plant employees by its decision to seek approval of the contracting out of the Heat Plant and by its implementation of Air Force Instruction 36-502 to fill vacancies in the Heat Plant with term employees. The waived opportunity to bargain on I & I in 1998 as to the general requirement of matching civilian appointments (permanent,

term, or temporary) to the projected length of workload did not affect the duty to bargain I & I when Respondent changed the conditions of employment of the Heat Plant employees in 2001. § 6(b)(2) of the Statute specifically governs, "(2) procedures which management officials of the agency will observe in exercising any authority under this section; . . ."; and § 6(b)(3) of the Statute governs, "(3) appro-priate arrangements for employees adversely affected by the exercise of any authority under the section . . .". The right to hire term employees is a reserved right of management under § 6(a)(1) of the Statute and the exercise of this right to hire term employees in the Heat Plant in 2001, coupled with Respondent's decision to seek approval of contracting out the Heat Plant, directly invoked the provisions of §§ 6(b)(2) and (3). U.S. Equal Employment Opportunity Commission, 40 FLRA 1147, 1150, 1154 (1991).

Respondent failed and refused to give the Union notice of its request for approval of the contracting out of the Heat Plant and its intention to hire term employees for Heat Plant vacancies and if the effect of the change were more than de minimis, Respondent violated §§ 16(a)(5) and (1) of the Statute. Respondent's obligatory duty to match civilian appointments (permanent, term, or temporary) to the projected length of the work - here, completion of the study and, if cost effective, contracting out the Heat Plant - had been established by Air Force Instruction 36-502 and in 1998 the Union received notice but did not seek to negotiate I & I on the general use of term employees. Consequently, the Union waived the right to negotiate I & I as to applicants for term jobs; however, as Respondent did not give notice until October 24, 2001 (Res. Exh. 1), three months after Mr. Strickland had been hired as a term employee (Res. Exh. 9) and over 2½ months after Mr. Stanton had been hired as a term employee (Res. Exh. 10), and by analogy to: U.S. Department of Commerce, Patent and Trademark Office, supra, 53 FLRA at 867, by the time Respondent gave notice - they never met - two new term employees had been actual employees for about three months. There is no credible evidence that there was any impact whatever on term employees. Mr. Strickland asserted he would not have accepted the job if he had known it was under study for contracting out (Tr. 32), an assertion which I wholly discount as contrary to the record, contrived and not worthy of belief. Mr. Strickland, as he acknowledged (Tr. 32, 33-34), was hired for a term position, ". . . exceeding one year and lasting not more than 2 years on a calendar basis. Upon expiration of this term appointment you will be separated from employment at Seymour Johnson" (Res. Exh. 9, Attachment, signed and acknowledged

by Mr. Strickland on July 24, 2001). The memorandum of July 24, 2001, further stated in part: "3. As a term employee, you will be covered by reduction-in-force (RIF) procedures and will be placed in tenure group 3 [indefinite] in the event a RIF occurs during your employment." (id.)

As to incumbent permanent employees, it would appear from the record that there was but one, the other employee being a supervisor, Mr. Scott Conway, who was called as a witness by General Counsel. Mr. Reaves and Ms. Howell suggested that if term employees were hired at a higher A Grade than incumbent employees there would be an impact. If true, I would agree; but General Counsel presented no evidence whatever that any permanent employee in the Heat Plant was less than a WG-11, the highest rate at which term employees were hired. Not only did General Counsel not ask Mr. Conway his present Grade, I draw the adverse inference from his failure to inquire that Mr. Conway would have testified that he was a WG-11. Because the changes in permanent employee's condition of employment were de minimis, Respondent did not violate § 16(a)(5) and (1) by its failure to give the Union notice and to bargain over I & I. General Services Administration, Region 9, San Francisco, California, 52 FLRA 1107, 1113 (1997). Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-02-0285 be, and the same is hereby, dismissed.

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 31, 2003
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-02-0285, were sent to the following parties:

_____

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

Philip T. Roberts, Esquire **7000 1670 0000 1175 2898**
Regional Attorney
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Peter A. Sutton, Esquire **7000 1670 0000 1175 2904**
Regional Attorney
Federal Labor Relations Authority
55 W. Monroe, Suite 1150
Chicago, IL 60603-9729

Major Ferdinando P. Cavese, USAF **7000 1670 0000 1175 2911**
Major Troy R. Holroyd, USAF
Air Force Central Labor Law Office
AFLSA-JACL-CLLO
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209-2043

Mr. George L. Reaves, Jr. **7000 1670 0000 1175 2928**
National Representative
NAGE
36 Wine Street
Hampton, VA 23669

Ms. Mae Howell, President **7000 1670 0000 1175 2935**
NAGE, Local R5-188
P.O. Box 11082
Goldsboro, NC 27532

DATED: October 31, 2003
Washington, DC