UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

375TH COMBAT SUPPORT GROUP, SCOTT AIR FORCE BASE, ILLINOIS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, AFL-CIO, SEIU Charging Party	Case No. 75-CA-10724

Major David F. Brash, JACL
For the Respondent

Timothy J. Sullivan, Esquire
For the General Counsel

Mr. Carl L. Denton
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.,

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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, e.g., Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)".

concerns, principally, where management has moved manpower authorizations from one department to another, whether Respondent is obligated to negotiate the selection of employees for reassignment as well as the impact and implementation of the reassignments prior to implementation of the reassignments. Respondent asserts that there was no obligation to negotiate concerning the reassignments because reassignments are governed by Agreement; that there only was an obligation to negotiate concerning the impact and implementation of the schedule changes of the employees reassigned, which obligation it met.

This case was initiated by a charge filed on September 9, 1991, in the Chicago Regional Office, 5-CA-10724 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1), (2), (4), (5) and (8) of the Statute. By Order dated September 10, 1991, pursuant to § 2429.2 of the Regulations (G.C. Exh. 1(b)), the case was transferred to the Denver, Colorado, Region. On April 23, 1992, a 1st Amended charge was filed in the Denver Region, where it had been redesignated as Case No. 75-CA-10724 (G.C. Exh. 1(c)), which alleged violations of §§ 16(a)(1), (5) and (6) of the Statute. The Complaint and Notice of Hearing issued on May 29, 1992, alleged violations of §§ 16(a)(1), (5) and (6) of the Statute, and set the hearing for August 25, 1992, pursuant to which a hearing was duly held on August 25, 1992, in St. Louis, Missouri, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, 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, September 25, 1992, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a brief received on, or before, September 29, 1992, which have been

carefully considered. Upon the basis of the entire record,[2/] I make the following findings and conclusions:

Findings

1. National Association of Government Employees, Local R7-23, AFL-CIO, SEIU (hereinafter, "Union") is the exclusive representative of a unit of employees appropriate for collective bargaining at Scott Air Force Base, Illinois, including employees of the 375th Combat Support Group (hereinafter, "Respondent") and its Base Commissary. The Union and Respondent are parties to a negotiated Agreement (G.C. Exh. 2).

2. Prior to 1991, the Commissary was supplied principally by a Direct Delivery System whereby some 150 manufacturers, or retailers, visited the Commissary, solicited sales and delivered merchandise ordered to the Commissary's warehouse where warehouse employees received and stored it (Tr. 79). Pull crews would inventory and verify grocery needs in the Commissary store, go the warehouse and "pull" the items and load them on pallets which would be moved by forklift to the staging area in the warehouse where the stocking

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2/ Respondent's motion to correct record, to which there was no objection, is hereby granted and the transcript is hereby corrected as follows:

Page	Line	From	To
6	24	"This was the"	"This way the"
20	19	"Anita Gray"	"Anita Bell"
28	2-3	"assign and"	"assign"
42	1	"verify an"	"verify and"
80	24	"when were"	"when we're"
85	4	"know, m"	"know, how"
85	23	"Exhibit 8"	"Exhibit A"
93	19	"private"	"prior"
94	8	"private"	"prior"
109	24	"accepted"	"excepted"
110	2	"accepted	"excepted"
129	17	"an"	"and"
137	20	"give"	"given"

On my own motion I have removed from the Exhibit File a document marked G.C. Exhibit 16, which is a memorandum dated August 1, 1991, from Ms. Sandra Edinger to Mr. Jack A. Smith, Deputy Director, which reads, in part, "Request permission to move full time position number 0014389 MSBBC to MSBBD", for the reason that no such exhibit was offered or received. I have checked the transcript and my record of exhibits and no "G.C. Exhibit 16" appears.

contractor would move the pallets to the Commissary store and shelve the merchandise (Tr. 42, 79). Each pull crew would pull 2,500 to 3,500 cases per shift (Tr. 80-81).

3. In early 1991, the delivery system for merchandise had begun to change to a Frequent Delivery System (Tr. 50) whereby manufacturers send their products to distributors who store the merchandise in their warehouses. In the case of the Scott AFB Commissary, there are five distributors in the area; the Commissary store, by order-writers using a hand-held computer, orders merchandise from the distributors who deliver it to the Commissary store where it is placed on carts for the stocking contractor (Tr. 80). Frequent Delivery when adopted by all manufacturers will wholly eliminate the Commissary's warehousing function and, of course, all pull crews (Tr. 80).

4. Effective October 1, 1991, all commissary systems (i.e., Air Force, Army, Navy, etc.) were merged into a single, new agency called the Defense Commissary Agency (hereinafter "DCA") (Tr. 81-82). By letter dated March 22, 1991, the Director of Northern Region Air Force Commissary Service advised Commissary Officers, inter alia, of the increased use of Frequent Delivery and the significant decrease of warehouse operations (Res. Exh. A).

5. By August, 1991, Frequent Delivery, under strong pressure from DCA (Tr. 85), had advanced to the point that the workload for pull crews had decreased so markedly that two pull crew positions had become surplus.[3/] On Friday, August 2, 1991, Ms. Anita L. Bell, a pull crew employee, heard a rumor that she was to be reassigned (Tr. 46), but her supervisor, Ms. Martha Bailey, knew nothing about it (Tr. 46). On Tuesday evening, August 6, 1991, when she went to work at 1800, she and Mr. Billy D. Gray, a fellow pull crew employee, were informed by Mr. James Barnes, Produce Manager, and by Ms. Bailey that they were being reassigned to the Produce Department (Tr. 47).

6. By letter dated, and received, August 7, 1991 (G.C. Exh. 3), Respondent informed Mr. Carl Denton, President of the Union, that it had moved two authorizations from the Warehouse

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3/ The record does not show how many suppliers had converted to FDS by August, 1991; however, the record shows that by the date of the hearing (August 25, 1992) all but three manufacturers (Proctor and Gamble; Lever Brothers; and Hunt-Wesson) had gone to FDS; that Hunt-Wesson was converting to FDS October 1, 1992; that Lever Brothers would convert to FDS January 1, 1993; and that Proctor and Gamble was expected to convert at any time (Tr. 97).

to the Produce Department and that Ms. Bell and Mr. Gray would be reassigned to these positions. Their old and new work schedules were attached.

Also on August 7, Ms. Bell talked to Ms. Edinger, Commissary Officer, who told her, ". . . there is no negotiating available . . ." (Tr. 47).

7. When Mr. Robert Nelson, Labor Relations Officer who had prepared the notification letter (G.C. Exh. 3) for Mr. Gerald F. Norton's signature (Chief, Labor and Employee Management Relations), delivered it to Mr. Denton, Mr. Denton asked to meet at 1400 on August 9, 1991 (Tr. 21, 116).

8. Messrs. Nelson and Valentine (Commissary store supervisor) for Respondent and Ms. Bell and Messrs. Denton and Gray for the Union met at 1400 on August 9, 1991. Mr. Nelson stated that notice of the reassignment (G.C. Exh. 3) was given because it was a schedule change, i.e, "The employees would be working a different schedule than they did when they were pulling." (Tr. 117-118); that he explained that the employees were assigned to the produce section because the authorizations had been moved from the pull crew to produce (Tr. 117). Mr. Denton did not want Bell and Gray reassigned (Tr. 117); they, Bell and Gray, did not want to go to produce (Tr. 23, 47-48); and Ms. Bell, in particular, felt she had seniority rights and that there were other people who could be reassigned (Tr. 23, 25).[4/]

Mr. Denton requested another meeting and he, Mr. Nelson and Mr. Valentine met again on August 12 at which time Mr. Denton presented the Union's proposals (Tr. 27-28; 117, 118) as follows:

"a. Reassign the pull crew in accordance with seniority.

4/ As noted in paragraph 6, above, Ms. Bell had talked to Ms. Edinger on August 7, 1991, at which time she asked why, in view of her seniority, someone else couldn't go, e.g., Kenny Abbott, and was told that, "Yes, he [Abbott] could go, but with my status, and I could take his status as an intermittent and lose my permanent status as a career person, so I dropped the subject . . ." (Tr. 48-49). Ms. Edinger also mentioned that Jerry Haar had prior experience in Produce but was not selected because of his seniority (Tr. 49). Ms. Edinger also told Mr. Bell she had the right to grieve to the Commanding Officer (Tr. 49).

"b. Ask for volunteers first. If there are no volunteers, then reassign the person(s) with the least seniority in accordance with Service Computation Date first.

"c. Allow Ms. Anita Bell 120 days under her old schedule in order to take care of personal matters.

"d. Leave Mr. Gray where he is until he has had an opportunity to contact his doctor and obtain a release to work in produce due to his diabetes and the possible impact of the environment on that condition." (G.C. Exh. 4; Tr. 28-29).

In presenting his proposals, Mr. Denton discussed Ms. Bell's problems (Tr. 29) and stated that, as to Mr. Gray, ". . . we felt that it would be derelict to reassign him . . . until he could get a medical evaluation." (Tr. 29). Mr Nelson stated that Mr. Denton also had brought up Mr. Gray's diabetes on August 9 and that he, Nelson, had asked for a medical statement on August 9 and again on August 12 but had never received anything (Tr. 121, 122).[5/] Mr. Nelson stated that he was, ". . . not there to negotiate over the reassignment" but ". . . was there to negotiate over the schedule change . . . ." (Tr. 118) and, to this end, he asked Mr. Denton if he, Nelson, could break the Union's proposal up and address them individually, but Mr. Denton, ". . . responded that I had to take all four proposals as one, that I could not break the individual proposals out." (Tr. 119, see, also Tr. 121). Mr. Denton confirmed Mr. Nelson's testimony, having testified as follows:

"Q Of the four proposals, in your meeting with Mr. Nelson, do you recall Mr. Nelson asking you if you could somehow separate the proposals and discuss one or two, but table the others?

"A I believe he said something like that.

"Q You would not acquiesce to that request, would you?

5/ Nothing in the Position Descriptions (G.C. Exhs. 10 (Pull Crew) and 11 (Produce)), in Mr. Gray's testimony, or in the record otherwise, suggests how work in Produce could potentially be more detrimental to diabetes than work on a pull crew, except that Mr. Gray testified that his irregular work schedule in Produce makes it difficult to stay on a set eating schedule (Tr. 74).

"A No, I wouldn't.

"Q It was an all-or-nothing proposition. Correct?

"A Basically." (Tr. 37).

Nor was there any doubt that Respondent asserted the right to assign. Thus, Mr. Denton stated, in part, that,

> ". . . it was management's right to assign work. . . ." (Tr. 28)
>
> ". . . it [Union's proposals] interfered with their right to assign work or to assign at all . . . this 'right' to assign people, the exact people they wanted to assign . . . ." (Tr. 31, 32).

9. The meeting of August 12 ended with Mr. Nelson telling Mr. Denton that Respondent was going to implement the reassignment of Ms. Bell and Mr. Gray as proposed the following day, August 13. Mr. Denton asked to continue negotiations through the auspices of FMCS and the Impasses Panel but Mr. Nelson refused (Tr. 32).

10. On August 12, Mr. Denton delivered to the office of Mr. Daniel G. Marlett, Civilian Personnel Officer, a letter, dated August 12, protesting Mr. Nelson's announced implementation of the reassignments of Ms. Bell and Mr. Gray on August 13, and requesting that the status quo be maintained; that negotiations continue; and that the Union was referring the matter to the Impasses Panel (G.C. Exh. 7).

11. Mr. Denton submitted a request for Panel Assistance on August 14, 1991 (G.C. Exh. 8), acknowledging that he had submitted similar requests on numerous occasions; that he was familiar with the process and had submitted requests for Panel assistance on the same day negotiations had broken down on several prior occasions (Tr. 38, 39). The Federal Service Impasses Panel advised Mr. Denton and Mr. Nelson, by letter dated August 20, 1991, of a request for Panel consideration of an impasse, " . . . concerning the substance and impact and implementation of moving the positions of Ms. Anita Bell and Mr. Billy Gray. . . ." (G.C. Exh. 9).

12. Ms. Bell, a permanent, full-time employee, was reassigned to Produce on August 13, 1991; however, she continued to work the same hours she had worked on the pull crew (i.e., Tuesday - Friday, 0600 - 0200; Saturday

1500 - 2300 (Tr. 43)) through the last week of November, 1991 (Tr. 59, 60).[6/] Not until December 1, 1991, did she begin her new hours of 0900 - 1730 Tuesday through Saturday (Tr. 60).

Mr. Gray, a part-time employee on a Veterans Adjustment Act appointment (Tr. 109), was also reassigned to Produce on August 13, 1991. On the pull crew, Mr. Gray worked 1500 to 2330 for a total of about 37 to 39 hours per week (Tr. 64)[7/]; however, his earning statements for July 27 and August 10, 1991, showed 71 hours for each pay period or 35.5 hours per week (G.C. Exh. 15; Tr. 70). In Produce, Mr. Gray initially was scheduled Tuesday through Friday 1400 to 1900 and Saturday 1400 to 1800 (G.C. Exh. 3) for a total of about 24 hours per week (Tr. 71) (his earning statement for September 7, 1991, the only full pay period shown after his reassignment to Produce [the pay period ending August 24 included work on the pull crew] shows 53 hours, or 26.5 hours per week (G.C. Exh. 15)); however, his schedule varies (Tr. 72) which Mr. Gray asserts makes it difficult to stay on a set eating schedule (Tr. 74). Mr. Gray testified that he received a 7½ per cent night differential on the pull crew which he does not receive in Produce (Tr. 71, 72).[8/] The Manager of the Commissary, Mr. David Leffert, stated that there are opportunities in Produce for Mr. Gray to work additional

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6/ Notwithstanding that the Produce Department Schedule for August, 1991 (G.C. Exh. 12) shows Ms. Bell on a 1300 - 2130 shift Tuesday - Friday and 0900 - 1830 or Saturday, she testified that her hours did not change (Tr. 59) and she did not, in fact, work the hours shown on the schedule.

7/ G.C. Exh. 3 shows that Mr. Gray worked Monday, Friday and Saturday; but this would not comport with the 35½ to 39 hours per week that he worked. Although the record, except for G.C. Exh. 3 which, as indicated, does not fully reflect Mr. Gray's schedule, is silent as to the days Mr. Gray worked on the pull crew, it is probable that he worked four or five days rather than three as shown on G.C. Exh. 3 (nor can the "Old Schedule" be read to mean Monday through Friday and Saturday as this would result in substantially greater hours than Mr. Gray worked).

8/ Mr. Gray stated that his hourly wage rate was $11.40 (Tr. 71) which, with a night differential of 7½ percent, would have been $12.26, as shown on the earning statements for July 27 and August 10, 1991, prior to his reassignment (G.C. Exh. 15); however, the same rate, $12.26, is shown on the earning statements for August 24 and September 7, 1991, when, except for August 12, Mr. Gray worked in Produce and, presumably, was not entitled to a night differential.

hours, i.e., beyond his scheduled hours, but that he had not sought additional hours (Tr. 91).

13. By the time of the hearing, pull crews had been wholly dissipated. Thus, Mellinder,[9/] Haar, Bird and Meyer, considered the best order-writers (Tr. 88), had been re-assigned to order-writing (Tr. 89); Terry Gallager and Laura Winkelman had been reassigned to the Meat Department (Tr. 89); two have been reassigned to Receiving (Tr. 89); one to Salvage (Tr. 89); and, of course, Ms. Bell and Mr. Gray were reassigned to Produce. The remaining pulling duties, and as of August 25, 1992, three manufacturers: Proctor and Gamble; Lever Brothers; and Hunt-Wesson, had not converted to FDS, are performed by Mr. Haar who "pulls" for 2 to 4 hours and spends the rest of his time ordering (Tr. 84). As previously noted, by January 1, 1993, two of the three were scheduled to have converted to FDS (Hunt-Wesson, October 1, 1992; Lever Brothers, January 1, 1993) and the remaining manufacture, Proctor and Gamble, although no definite date for conversion to FDS had been set, was expected to have converted not later than January 1, 1993 (Tr. 97). Upon conversion of all manufacturers to FDS, Respondent's warehousing operations will cease.

14. Article XIV of the parties' agreement, entitled, "REDUCTION IN FORCE", provides, in part, as follows:

> "Section 1: The Employer agrees to do everything possible to avoid or minimize a reduction-in-force by restricting recruitment and promotions, by meeting ceiling limitations through normal attrition, and by reassignment of surplus employees to vacant positions authorized for staffing. The Employer agrees to notify the Union as far in advance as possible of implementation of officially approved reductions-in-force affecting the unit . . . ." (G.C. Exh. 2, Art. XIV, Section 1) (Emphasis supplied).

Mr. Denton testified, in part, that,

> ". . . we weren't objecting to management's right to reassign people in general, but we felt that if they were going to have to reassign some people from the pull crew that they ought to give regard to seniority, and that was our first proposal; and the next proposal was that . . . they ask for volunteers

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9/ Mr. Denton admitted that he was aware of the reassignment of Greg Mellinder and Tim Bird from the pull crew (Tr. 36).

first . . . then the person with the least seniority in accordance with service comp would be one that was selected." (Tr. 28).

Ms. Williams testified, as to Ms. Bell, from a staffing or assignment point of view,

> "A Basically what happened was that the authorization for that position was moved from the pull crew to the produce department, and she was reassigned into the produce department with that authorization." (Tr. 108)

And, as to Mr. Gray, she stated,

> "A . . . it was similar to the -- Ms. Bell's situation. The authorization was moved from the pull crew into the produce department. Management initiated a reassignment request to move Mr. Gray with his authorization so that there would not have to be a reduction in force." (Tr. 109)

Later, Ms. Williams explained the transfer of an authorization for a position as follows:

> "THE WITNESS: Within the Air Force, we have a system where -- it is like billets. It is like an authorization that says you have money to fill a job. And they are assigned to various units or departments . . . Sometimes, because of workload changes . . . the work is no longer here in office A, but there is now new work in office B, so you take an authorization that is assigned to office A; you move it to office B . . . you have too many in office A so you switch the positions." (Tr. 111).

With regard to the procedure, Ms. Williams stated,

> "THE WITNESS: . . . management . . . [tells] them that they want to switch and move an authorization to another section. It is then reflected to us on what we call the Standard Form 52. It would be like cancelling a position in office A and establishing a new position in office B." (Tr. 111-112).

Of course, the Standard Form 52 is a "Request for Personnel Action" and Respondent requested the reassignment of Ms. Bell (G.C. Exh. 5) and of Mr. Gray (G.C. Exh. 6). In turn, they were advised of their reassignment on a Standard Form 50, "Notification of Personnel Action" (G.C. Exh. 11 [Bell]; 14 [Gray]).

15. All employees working on the pull crews were warehouse employees, classified as "Store Worker", all were covered by the same Position Description (G.C. Exh. 10; Tr. 93-94); each was equally qualified on paper to perform the duties of the pull crew job (Tr. 94), although each exhibited strengths and weaknesses, e.g., Mellinder, Haar, Bird and Meyer rarely had "over-writes" and were consistently the best order-writers (Tr. 88). Any one of them could have worked in Produce (Tr. 95).

Conclusions

1. Seniority as negotiable procedure

There is no dispute that the advent of the Frequent Delivery System had, by August, 1991, rendered two pull crew positions surplus. Nor is there any dispute that, pursuant to § 6(a) of the Statute, Respondent was free to move the two excess manpower authorizations from the Warehouse to the Produce Department. Obviously, the elimination of excess employee positions was a "reduction-in-force", 5 C.F.R. § 351.201(2), and the parties concede that Article XIV, Section 1 of their Agreement applies. Article XIV, Section 1 not only permits, but mandates, that Respondent, to avoid or minimize a reduction-in-force, reassign surplus employees to vacant positions authorized for staffing. This is wholly consistent with the Federal Personnel Manual, Supplement 351-1, Subchapter S4-2a (Res. Exh. B), and Air Force Regulations, 351-41, 4-20 (Res. Exh. D); 351-55, 5-6c (Res. Exh. E).

However, there is total disagreement as to who determines what employees are surplus where, as here, only two of about eleven wholly identical positions are eliminated. Nothing in Article XIV, Section 1, which, in pertinent part, provides that,

> "The Employer agrees to do everything possible to avoid or minimize a reduction-in-force . . . by reassignment of surplus employees to vacant positions authorized for staffing. . . ." (G.C. Exh. 2, Art. XIV, Section 1) (Emphasis supplied),

addresses identification, or selection, of "surplus employees". If Respondent had had only two pull crew positions and had eliminated both positions, there would have been no question of which employees had become surplus due to the elimination of their positions; Respondent could have reassigned the two employees; and the Union would have had no right to negotiate concerning the reassignments, although it

might well have had an obligation to bargain about the impact and implementation of the reassignments.

But here there were about eleven warehouse employees who made up the pull crew. Each was covered by the same Position Description; each was equally qualified to perform the duties of the pull crew; and each could have worked in Produce. When Respondent moved the authorizations for the two excess positions from the pull crew to produce it made a selection of Ms. Bell and Mr. Gray; but the Union objected to the selection and demanded to bargain about the procedure for selection of the pull crew employees to be reassigned. Respondent refused to bargain about the selection of employees to be reassigned - Union proposals a and b [also designated "A" and "B"], General Counsel Exhibit 4 - asserting that, ". . . A and B, that dealt with taking a right to reassign, which . . . was completed." (Tr. 127), i.e. ". . . we had completed that bargaining in Article 14, Section 1." (Tr. 125). In its Brief, Respondent asserts, in part, that,

> "3. THE SENIORITY AND VOLUNTEER PROPOSALS RESPONDENT REFUSED TO BARGAIN ARE NON-NEGOTIABLE . . .
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> " . . . Respondent is not charged with a violation of the Statute by virtue of its refusal to bargain the substantive reassignment decision. Presumably, this is so because the assignment of work is clearly a non-negotiable matter. It is the position of the Respondent . . . that although the Union's proposals are packaged in 'impact and implementation' wrapping, they are no more than a thinly disguised attempt to bargain the substantive decision and are thus non-negotiable . . . the proposals, as written, do not leave with management the ability to determine which employees have the necessary personal skills for the available jobs.
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> "Mr. Lefferts (sic) . . . testified, as diplomatically and pleasantly as possible, that other employees fared better than Mr. Gray and Ms. Bell in use of the hand held computers and adaptability to the mechanized ordering system. . . ." (Respondent's Brief, pp. 21-22).

Respondent is in error as to each of its assertions.

First, the seniority and volunteer proposals were negotiable. National Federation of Federal Employees, Local 2096 and U.S. Department of the Navy, Naval Facilities Engineering Command, Western Division, 36 FLRA 834, 849-852 (1990) (hereinafter, "Naval Facilities Engineering Command");

U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, et al., 37 FLRA 278, 286-287 (1990); Overseas Education Association, Inc., 29 FLRA 734, 792-793 (1987), aff'd mem, as to other matters, sub nom. Overseas Education Association, Inc. v. FLRA, No. 87-1576 (D.C. Cir. Aug. 31, 1988). The substantive decisions, which were not negotiable, were the decisions to eliminate two pull crew positions, to move the manpower authorization from the Warehouse (pull crew) to Produce, and to fill the Produce positions. Respondent, in Article XIV, Section 1 of its Agreement, had committed itself to reassign surplus employees to vacant positions. With respect to a very similar proposal in Naval Facilities Engineering Command, supra, that, "When reduction in personnel . . . is necessary, volunteers will first be solicited . . . for . . . transfers . . . In the event that no volunteers are obtained for the transfer, the employee with the least amount of government service will be selected for the transfer." (36 FLRA at 849), the Authority, stated in part, that,

> ". . . the provision becomes effective only after the Agency determines to fill vacancies by transferring qualified unit employees. . . . Consequently, the provision does not directly interfere with the Agency's right to assign employees under section 7106(a)(2)(A) of the Statute . . . the provision applies only after management has identified bargaining unit employees performing identical work as the source from which positions . . . will be filled. At that point, the Agency has itself determined the appropriate source from which to fill the vacancy. As such, the requirement that the Agency use seniority to select qualified employees does not infringe on the Agency's right to make selections from any appropriate source. . ." (36 FLRA at 851-852).

Respondent had transferred two manpower authorizations from the pull crew to Produce; and Respondent had determined to fill the Produce vacancies with surplus pull crew employees, all of whom performed identical work and each of whom was qualified to work in Produce. Accordingly, use of seniority to select qualified employees for reassignment to Produce would not infringe upon Respondent's rights under § 6(a)(2)(A) or (C) of the Statute and Union's Proposals a. and b. were negotiable.

Second, the Complaint does encompass a violation of Respondent's refusal to bargain the reassignment decision. Respondent misconceived the Union's procedural proposal as a substantive decision. As noted above, the Authority held, in

Naval Facilities Engineering Command, supra, that use of seniority to determine which of two or more equally qualified employees will be reassigned is a procedure within the meaning of § 6(b)(2) of the Statute. The Complaint alleges a violation of §§ 16(a)(5) and (1) as the result of Respondent's failure and refusal to bargain over the impact and implementation of the reassignments (i.e., procedures [§ 6(b)(2) of the Statute] and appropriate arrangements [§ 6(b)(3) of the Statute]).

Third, Respondent wholly ignores the facts and the violation charged and, without proper consideration of applicable law, addresses a non-issue. The record shows only that by August, 1991, the conversion to FDS had made two pull crew positions surplus; that Respondent moved two manpower authorizations from the Warehouse (pull crew) to Produce; and that Respondent determined to fill the two vacancies at Produce by reassigning two pull crew employees. That is all. The violation charged is the August, 1991, reassignments. I am well aware that between August, 1991, and August 25, 1992, when the hearing was held, pull crew work further deteriorated until by August 25, 1992, only a single employee, for 2 to 4 hours per day, was required to perform the remaining pull crew work; and that, at some point, other reassignments of pull crew employees occurred; but this was all in the future and was not in issue in this case. In August, 1991, Respondent had about eleven pull crew employees; it determined that two of the eleven were no longer required; it determined to move the authorizations for two positions from the pull crew to Produce; and it determined to fill the ensuing vacancies in Produce by reassigning two pull crew employees. Whether Mr. Gray or Ms. Bell was competent in the use of hand held computers or adaptable to mechanized ordering was, and is, immaterial. Respondent had not in August, 1991, established a position of Order Writer and was not then selecting employees to fill any such position. Of course, the Authority recognizes that, "The right to assign employees [under § 6(a)(2)(A)] . . . encompasses management's discretion to establish the qualifications necessary to perform the duties generally assigned to the position and to determine whether an employee meets those qualifications. . . . Similarly, management's right to assign work pursuant to section 7106(a)(2)(B) encompasses discretion to establish the particular qualifications and skills needed . . . and to exercise judgment in determining whether a particular employee meets those qualifications." Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California, 9 FLRA 703, 706 (1982); "The Authority has consistently held that management's rights under section 7106(a)(2)(A) and (B) include the exercise of judgment in

establishing the particular skills and qualifications needed to perform the work to be done and in determining which employees possess the requisite skills to do the work to be assigned." Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 795 (1987).

In like manner, Respondent's suspicion, belief or knowledge that at some time in the future all pull crew jobs would disappear did not absolve it of the duty to bargain about the selection, from among about eleven equally qualified employees performing identical jobs, of the two pull crew employees to be reassigned to Produce. That was the sole determination Respondent had made in August, 1991: namely that two pull crew positions were no longer needed; that it would move the manpower authorizations for those two positions to Produce; and that it would fill the ensuring Produce positions with pull crew employees.

Not only did Respondent, for reasons set forth above, violate §§ 16(a)(5) and (1) of the Statute when it refused to bargain about procedures for the selection of like employees for reassignment, inasmuch as the Authority had issued a prior ruling on the negotiability of a proposal substantially identical to the Union's proposals a. and b. in Naval Facilities Engineering Command, supra, it also violated §§ 16(a)(5) and (1) of the Statute when it refused to bargain over a proposal that is the same or substantially identical to a proposal the Authority has previously determined to be negotiable. National Guard Bureau, 47 FLRA No. 109 (1993).

Finally, as noted above, nothing in Article XIV, Section 1, addresses the identification, or selection, of surplus employees where only some, of a number of identical positions are eliminated. At the hearing, Ms. Williams first asserted that the authorizations for Ms. Bell's position and for Mr. Gray's position were moved to Produce and "she was reassigned . . . with that authorization" (Tr. 108) and "management initiated a reassignment request to move Mr. Gray with his authorization. . . ." (Tr. 109). However, Ms. Williams later explained that, actually, there were only authorizations for positions, e.g., Store Worker-Pull Crew. Indeed, the notification to the Union specifically stated that,

> "Commissary management has moved two authorizations from the warehouse area to the produce department. Ms. Anita Bell and Mr. Bell Gray will be management reassigned to these positions. . . ." (G.C. Exh. 3).

The record does not show that either Ms. Bell's position or Mr. Gray's position was abolished. Rather, the record shows that two of eleven pull crew positions were abolished. Not only does Article XIV, Section 1 not address the identification, or selection, of surplus employees where only some of a number of identical positions are eliminated, but the Federal Personnel Manual clearly contemplates retention by seniority. For example,

> ". . . If a competing employee must be released, an employee in an abolished position has a right to one of the other positions in the level as long as he or she is not the lowest-standing employee. If the employee in the abolished position has the lowest standing, he or she is the one released from the competitive level. . . ." (Res. Exh. B, S4-2b)

In like manner, Air Force Regulations provide that,

> "Vacancies will be offered to employees in the same subgroups in retention order." (Res. Exh. 1E, 351-54, 5-6b(2)(d)).

I fully agree with General Counsel that the language of Article XIV, Section 1 does not demonstrate a waiver by express agreement. (General Counsel's Brief, pp. 14-19; U.S. Department of the Treasury, Customs Service, Washington, D.C., et al., 38 FLRA 770, 784 (1990); U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 31 FLRA 1231, 1236-1238 (1988). Department of the Air Force, Nellis Air Force Base, Nevada, 41 FLRA 1011, 1015-1016 (1991). Nor, for reasons set forth above, was the selection, or identification, of surplus employees, where only some of a number of identical positions are abolished, covered by the agreement. U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, supra, 31 FLRA at 1234.

2. Negotiability of Arrangements

Negotiability of procedures, pursuant to § 6(b)(2) of the Statute, specifically herein the use of seniority to determine which of several employees performing identical duties will be reassigned, has been discussed above. The counterpart, or the other "I" in I & I bargaining, are appropriate arrangements for employees adversely affected, pursuant to § 6(b)(3) of the Statute. Negotiations pursuant to § 6(b)(2) and (3) are required when management changes conditions of employment and a change in an employee's tour of duty is a change in a condition of employment, Veterans Administration Medical Center, Prescott, Arizona, 46 FLRA No. 41, 46 FLRA 471, 474 (1992). It is true, as Respondent asserts, that not all

changes affecting a particular employee constitutes a change in conditions of employment, e.g. Naval Amphibious Base, Little Creek, Norfolk, Virginia, 9 FLRA 774 (1982)(non-disciplinary adverse action in accordance with agreement); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA 743, 757 (1985)(intra-district transfer pursuant to established practice); U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. and Michigan Airway Facilities Sector, Belleville, Michigan, 44 FLRA 482, 495, 496 (1992)(detail of employees pursuant to agreement). Although Article XIV, Section 1, of the parties' agreement provides for reassignment of surplus employees, respondent changed the conditions of employment of pull crew employees by abolishing two positions; the work and the hours of duty of both Ms. Bell and Mr. Gray were changed, and the work week of Mr. Gray was significantly reduced. Morever, the changes in the conditions of employment of each was substantial; clearly had more than a de minimis effect on their working conditions; and was reasonably foreseeable at the time Respondent made the change. Bureau of Engraving and Printing, Washington, D.C., 44 FLRA 575, 584-585 (1992). Accordingly, Respondent had an obligation to bargain pursuant to § 6(b)(3) - Union's proposals c. and d. (G.C. Exh. 4).

Respondent recognized an obligation to bargain about the impact of the change, which it described as the schedule change (Union proposals c. and d.); however, Respondent refused to bargain over the Union's proposals a. and b., contending, erroneously as I have found, that they were non-negotiable and the Union refused to bargain separately on its proposals c. and d. Accordingly, the parties never bargained on Union proposals c. and d.; nevertheless, Respondent did not change Ms. Bell's schedule until December 1, 1991, which afforded virtually the whole of the relief sought in Union proposal c., "Allow Ms. Anita Bell 120 days under her old schedule. . . ." (G.C. Exh. 4, proposal c.) (110 days provided) and as to Mr. Gray the Union never submitted any medical evaluation.

Respondent violated §§ 16(a)(5) and (1) by its refusal to bargain on the Union's proposals, each of which was negotiable pursuant to § 6(b)(2) and (3) of the Statute.

3. Implementation without adequate opportunity to invoke the services of FSIP

Were there an impasse, I should agree with General Counsel that Respondent did not afford the Union sufficient

opportunity to invoke the services of the Panel[10/]; but there was no impasse. The parties never bargained. Respondent refused to bargain about Union's proposals a. and b., asserting that they were non-negotiable; and the Union refused to bargain separately about its proposals c. and d. Respondent violated §§ 16(a)(5) and (1) by its refusal to bargain on Union's proposals a. and b. (obviously, proposals on "arrangements" would be governed by proposals a. and b.) and by implementing the reassignments before completing bargaining, but having refused to bargain there was no impasse. U.S. Department of the Air Force, Space Systems Division, Los Angeles Air Force Base, California, 38 FLRA 1485, 1501-1504 (1991); Davis-Monthan Air Force Base, Tucson, Arizona, 42 FLRA 1267, 1278-1280 (1991); American Federation of Government Employees, AFL-CIO, Council of Marine Corps Locals, 44 FLRA 543, 548 (1992). Accordingly, those portions of the Complaint alleging a violation of § 16(a)(6) of the Statute are hereby dismissed.

4. Remedy

The pull crew function is gone, indeed, warehousing has shifted from Respondent to its suppliers. Recognizing this, General Counsel has not suggested a status quo ante remedy. Rather, General Counsel requests that,

> ". . . Respondent [be directed] to, upon request, bargain with the Union over the procedures and appropriate arrangements for implementing the reassignments of employees from the Commissary 'Pull Crew' to the Produce Department, and that Respondent apply any agreement reached pursuant to such negotiations retroactive to August 12, 1991." (General Counsel's Brief p. 28).

Because it seems innocuous at first blush, it is tempting since it leaves the remedy to the parties. On reflection, however, the proposed remedy would be wholly inappropriate, would be unrealistic and would not address the only injury shown.

As the event is long past, seeking volunteers would not be possible and assuming that, by application of seniority,

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10/ Respondent informed the Union on August 12 that it was going to implement the reassignments the following day, August 13. The Union gave formal notice of its intent to seek panel assistance on August 12. Respondent implemented the reassignments on August 13; and Union filed request with Panel on August 14.

neither Ms. Bell nor Mr. Gray would have been reassigned to Produce on August 13, 1991, what then? As the record makes plain, all other pull crew positions subsequently became surplus and all pull crew employees were, between August 13, 1991, and August 25, 1992, reassigned. Accordingly, if neither Ms. Bell nor Mr. Gray had been reassigned to Produce on August 13, 1991, they would, nevertheless, subsequently have been reassigned somewhere else. The only relief the Union sought for Ms. Bell had been that she be allowed 120 days under her old schedule to attend to personal matters. Otherwise, she incurred no loss in earnings and neither application of seniority, nor the failure to apply seniority, in the choice of pull crew employees to be reassigned to Produce would have had any effect on Ms. Bell's opportunity for advancement. Whether Respondent properly filled other positions is not before me.

As to Mr. Gray, the record is clear that he suffered a substantial decrease in his work week, from about 37 hours to about 24 hours per week and loss of shift differential, as well as loss of earned leave, as the result of his reassignment on August 13, 1991, to Produce. If, by application of seniority, Mr. Gray would not have been reassigned to Produce on August 13, 1991, then Respondent's refusal to bargain over a negotiable proposal, in violation of §§ 16(a)(5) and (1), of the Statute, caused his loss in pay, allowances or differentials and pursuant to the Back Pay Act he is entitled to be made whole; however, Mr. Gray would, as noted above, have become surplus on the pull crew, if not by August 13, 1991, then sometime in the ensuing year, at which time he would have been reassigned. If he then would have been reassigned to a position that did not pay a night differential, payment of the night differential shall terminate; the hours per week, not to exceed Mr. Gray's average hours per week for the year proceeding August 12, 1991 - represented as about 37 hours per week - for the position to which Mr. Gray would, by the application of seniority, have been assigned shall then govern Mr. Gray's expected work week; and Mr. Gray's compensation for loss of pay shall continue until Respondent restores Mr. Gray's work week to the number of hours, not to exceed the average hours per week for the year preceding August 12, 1991, for the position to which Mr. Gray would, by the application of seniority, have been assigned.[11/] In addition, Mr. Gray asserts that after his

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11/ By way of example: (a) If Mr. Gray by application of seniority would have been reassigned to Produce on August 13, 1991, then Mr. Gray suffered no loss in pay, allowances, or differentials as the result of unfair labor practice; (b) If

(continued...)

reassignment to Produce he has had to work irregular hours (e.g. Tr. 72) which makes it difficult to maintain a fixed eating schedule. Accordingly, Respondent will also be ordered to bargain about appropriate arrangements concerning Mr. Gray's medical condition.

Having found that Respondent violated § 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the 375th Combat Support Group, Scott Air Force Base, Illinois, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, (hereinafter, "Union") the exclusive representative of its employees, with respect to the procedures and appropriate arrangements concerning the reassignment of surplus employees to avoid or minimize a reduction-in-force, including, specifically, the use of seniority to select for reassignment from among employees working under a common job description and with equal qualifications for vacant positions.

11/ (...continued)
Mr. Gray would not have been reassigned until May 1, 1992, and then to Salvage which pays no shift differential and has a 40 hour work week, then Mr. Gray would be entitled to no shift differential after May 1, 1992, but would be entitled to the difference between his average weekly earning in Produce and his earning for the average number of hours he worked in the year preceding August 12, 1991, and continuing until Respondent restores Mr. Gray to a work week of that number of hours per week; (c) If Mr. Gray would not have been reassigned until May 1, 1992, and then to the Meat Department which pays a shift differential but has a 20 hour work week, then Mr. Gray would be entitled to pay for the difference between the pay earned in Produce and the pay for his average work week plus shift differential from August 13, 1991, to April 30, 1992, and after May 1, 1992, to the shift differential for 20 hours per week until such time as Respondent restores Mr. Gray to a position which pays shift differential.

(b) From implementing reassignments to avoid or minimize a reduction-in-force without completing good faith negotiations with the Union concerning procedures and appropriate arrangements for reassignment of surplus employees.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Determine jointly with the Union the date, by application of seniority, that Mr. Billy D. Gray would have been reassigned from the pull crew. If such date would have been later than August 13, 1991, in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, make whole Mr. Billy D. Gray for all loss in pay, allowances or differentials he suffered as the result of his unlawful reassignment on August 13, 1991.

(b) Upon request negotiate in good faith with the Union concerning appropriate arrangements for Mr. Billy D. Gray with respect to his medical condition.

(c) Post at its facilities 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 Commanding Officer, 375th Combat Support Group, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30 notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

FURTHER ORDERED, that all other allegations of the Complaint, including the alleged violation of § 16(a)(6), 5 U.S.C., § 7116(a)(6), be, and the same are hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 18, 1993
Washington, DC

NOTICE TO All EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, (hereinafter, "Union") the exclusive representative of our employees, with respect to the procedures and appropriate arrangements concerning the reassignment of surplus employees to avoid or minimize a reduction-in-force, including, specifically, the use of seniority to select for reassignment from among employees working under a common job description and with equal qualifications for vacant positions.

WE WILL NOT implement reassignments to avoid or minimize a reduction-in-force without completing good faith negotiations with the Union concerning procedures and appropriate arrangements for reassignment of surplus employees.

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

WE WILL determine jointly with the Union the date, by application of seniority, that Mr. Billy D. Gray would have been reassigned from the pull crew. If such date would have been later than August 13, 1991, we will in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, make whole Mr. Billy D. Gray for all loss in pay, allowances or differentials he suffered as the result of his unlawful reassignment on August 13, 1991.

WE WILL upon request negotiate in good faith with the Union concerning appropriate arrangements for Mr. Billy D. Gray with respect to his medical condition.

_____
(Activity)

Date: _____ By: _____

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

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