

In the matter of

**NATIONAL TREASURY EMPLOYEES UNION**  
Grievant

and

**U.S. DEPARTMENT OF AGRICULTURE**  
**FOOD AND NUTRITION SERVICE**  
Respondent

**Case No. 071130-51734-3**

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For the Grievant Union

**Sarah Summerville, Esq.**  
For the Respondent Agency

### **STATEMENT OF THE CASE**

Pursuant to a demand for arbitration under the terms of the collective bargaining agreement between the Food And Nutrition Service, U.S. Department of Agriculture (FNS or Agency) and the National Treasury Employees Union (NTEU or Union),<sup>1</sup> the undersigned arbitrator conducted a hearing in the above-captioned matter at the FSN offices in Arlington, Virginia on January 30, 2007. The case concerns the negotiability of three Union proposals submitted to FNS at the outset of impact and implementation bargaining related to the Agency's offer of voluntary early retirement to eligible employees. Based on testimonial and documentary evidence, my observation of the witnesses' demeanor and the parties' timely post-hearing briefs, I make findings of fact and reach conclusions of law as set forth below.

### **FINDINGS OF FACT**

Anticipating budget shortages in fiscal year 2007,<sup>2</sup> FNS Deputy Administrator for Management, Gloria Gutierrez, testified that the Agency determined that it needed to reduce the staff by 76 FTE's.<sup>3</sup> In an effort to avoid a reduction-in-force (RIF), the Agency sought authorization from the Office of Personnel Management (OPM) to implement a program that would permit eligible employees to take early retirement. The program, "Early Out Retirement Authority Approval Without Buyout" (VERA), permits agencies that are downsizing or undergoing substantial reorganization, to lower the age and/or service requirements temporarily in order to increase the number of employees eligible for retirement. In applying to OPM, an Agency is required to establish opening and closing dates for the acceptance of retirement applications. However, after OPM approves such a request, ".....the agency may subsequently establish a new or revised closing date if management's downsizing and/or reshaping needs change."<sup>4</sup>

<sup>1</sup> The National Agreement is effective from January 17, 2006 to January 17, 2009

<sup>2</sup> The government's fiscal year runs from October 1 to September 30.

<sup>3</sup> Full-time equivalents does not refer to 76 individual employees, but to a number of staff hours of work per week.

<sup>4</sup> 5 CFR Sec. 842.213 (i)

On July 6, 2006,<sup>5</sup> after FNS submitted its VERA application on May 10, OPM authorized FNS to offer voluntary early retirements to eligible employees between September 1, 2006 and March 31, 2007. Four days later, on July 10, FNS informally advised the Union by e-mail that OPM had approved its VERA request. Official notice followed on July 17.

In response to the Union's request for a VERA briefing, Ms. Gutierrez met with the NTEU on July 20. At this time, she outlined FNS' budgetary problems, stating that they could be avoided only if the VERA was implemented early in fiscal year (FY) 2007. The Union promptly requested bargaining and submitted a proposal to the Agency that listed ten items .

The parties engaged in bargaining on August 9 and 10, reaching agreement on seven of the ten items; namely, items one through six and eight. However, the Agency declined to bargain about proposals seven, nine and ten, indicating that it had no duty to negotiate about them. Instead, on August 11, without notifying the Union, FNS unilaterally implemented VERA, offering an opportunity to all eligible employees to retire between October 1 and November 3. However, interested employees were required to register their intent to retire by September 8.. When Union President Pat Maggi found the VERA announcement on the Agency's intranet, she promptly brought the matter to the attention of NTEU Negotiator, Dana Scalere. On the same day, the Union cautioned FNS that it had no right to implement VERA before the three outstanding proposals were negotiated.

On August 14, the Agency asked the Union to sign a Memorandum of Understanding (MOU) approving the seven items on which the parties had agreed. In accordance with past practice, the Union refused to sign, insisting that negotiations were required for all ten items.

On August 16, NTEU contested the Agency's unilateral implementation of VERA by requesting the Federal Service Impasse Panel (FSIP) to resolve the impasse on an expedited basis. On the same date the Union filed a grievance with the Agency's Administrator which he denied on September 13. A month later, the Union initiated the instant arbitration proceeding.

Subsequently, by letter dated November 1, the FSIP declined to assert jurisdiction over the contested proposals deciding that

questions concerning the obligation to bargain (about part-time work, leave without pay, awards and bargaining about added work requirements) must be resolved in an appropriate forum before a determination can be made as to whether the parties have, in fact, reached a negotiation impasse.<sup>6</sup>

With respect to the Union's proposal for a job sharing program, the FSIP found that

....the parties have not negotiated over any of the details of such a program and have not exhausted voluntary efforts to reach agreement. Accordingly, negotiations should resume over this matter....(Id).

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<sup>5</sup> Unless otherwise specified, all events took place in 2006.

<sup>6</sup> Joint exhibit 8. Hereinafter joint exhibits will be marked as JX, Union exhibits as UX- and Agency exhibits as EX -, followed by the relevant exhibit number.

In short, FSIP concluded that the proposal for a job sharing program was negotiable and ordered the parties back to the bargaining table. However, the Panel ruled that the Agency's duty to bargain about the other remaining matters would depend on the outcome of a hearing in a different forum. (*Id.*)

## ISSUES

The case presents the following issues for resolution:

Did the FNS violate the collective bargaining agreement and/or 5 U.S.C. 7116 (a)(1) and (5) of the Federal Service Labor Relations Statute (hereinafter Statute), thereby committing an unfair labor practice by

1. declining to bargain about three Union proposals concerning part-time work, leave without pay, job sharing, employee performance awards and added work assignments, and
2. unilaterally implementing VERA prior to the completion of bargaining?
3. If FNS is found to have violated the Statute and breached the parties' collective bargaining agreement, what is the appropriate remedy?

## CONCLUDING FINDINGS

### Union Proposal 7

The first of three proposals that FNS declined to negotiate provides:

The parties agree that employees may request to work part-time, take Leave Without Pay, or to participate in a job-sharing program. The request for job-sharing will be made in writing by September 8, 2006. The employer will consider such requests and make a determination based on the employer's need for the employee's services, suitability of the position for conversion, availability of resources and/or impact on the efficiency of the Agency. After consideration of these factors, unless to do so would have an adverse effect upon the efficiency of the Agency, such requests will be granted. The employer will provide the employee with a written decision by September 22, 2006. Thereafter, a grievance may be initiated in accordance with...the National Agreement.

### **The Parties' Positions**

The Union relies heavily on *NTEU and Department of Treasury and U.S. Customs Service*, 31 FLRA 181 (1998) to support its contention that Proposal 7 is negotiable. In that case, the Federal Labor Relations Authority (FLRA or Authority) held that a proposal permitting an employee to return to part time work or participate in a job sharing program following maternity leave was negotiable where the employer was entitled to consider a number of factors in deciding whether the action was warranted and the efficiency of the Service would not be impaired. NTEU submits that since Proposal 7 is modeled closely on the proposal in the *Customs Service* case, *supra*, the Agency's erred in refusing to bargain about it.<sup>7</sup>

<sup>7</sup> The proposal in the *Customs Service* case states in pertinent part:

An employee returning from maternity leave may request to work part time or to participate in a job sharing program on a temporary or permanent basis....The employer will consider such requests and make a determination based on the employer's need for the services, suitability of the position for conversion to part time, availability of resources and or impact on the efficiency of the Service. After consideration of these factors, unless to do so would have an adverse effect upon the efficiency of the Agency ....such requests will be granted....

The Union also maintains that there is no reference to job sharing in the current National Agreement. Therefore NTEU avers that this aspect of proposal 7 is not covered by or in conflict with any provision in the parties' contract. The Union further asserts that mere references to part-time work and LWOP in the National Agreement do not modify or conflict with those references. Therefore, the "covered by" doctrine is inapplicable to those aspects of the proposal 7.

FNS contends that OPM's VERA authorization specifically concerned the Agency's right to determine the number, types and grades of its employees; therefore, its refusal to bargain about the job-sharing proposal was an appropriate exercise of its management rights under Section 7106 (a)(1) and (b)(1) of the Statute.<sup>8</sup>

In support of its management rights argument, FNS relies on *AFGE Local 12 and Department of Labor*, 18 FLRA 418 (1985), where the Authority held that a proposed job-sharing program conflicted with management's right to determine the number of employees assigned to a work project, organizational subdivision or tour of duty and, therefore, was outside the employer's duty to bargain. FNS disputes the Union's reliance on *NTEU and U.S. Customs Service, supra*, arguing that it can be reconciled with the Department of Labor case only if it is limited to its particular facts.

FNS next contends that when a proposal intrudes into management rights, it is obliged to bargain only about appropriate arrangements for employees who are adversely affected by its action pursuant to Sec. 7106 (b)(3). Claiming that the eligible employees benefited from, rather than being adversely affected by the VERA retirements, the Agency reasons that it was not duty bound to bargain. Consequently, although FNS stated that it was not opposed to bargaining about a job-sharing program in general, it chose not to do so at a time when such negotiations would have delayed the VERA retirement offers.

The Agency also maintains that job-sharing, part-time work and LWOP are covered by provisions of the National Agreement; therefore, proposal 7 was outside its duty to negotiate. Further, FNS maintains that the impact of VERA retirements on employees who remained with the Agency was highly speculative and unforeseeable. Consequently, the changes brought about by the early retirements could have no more than a *de minimis* impact on the balance of the bargaining unit members.

### **Analysis and Conclusions**

In *U.S. Customs Service*, 31 FLRA 181, *supra*, the Authority, considered language virtually identical to that used in Proposal 7, and rejected the very argument that the Agency makes here; concluding instead, that the proposal would not directly interfere with management's right to determine the numbers and types of employees or positions assigned to a work project. To the contrary, FLRA found that:

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<sup>8</sup> Sec. 7(a)(1) of the Federal Service Labor-Management Relations Act (The Act) declares that "nothing in this chapter shall affect the authority of any management official of any agency... to determine the mission, budget, organization, number of employees, and internal security practices of the agency;" Section b(1) adds that "Nothing in this section shall preclude any agency and any labor organization from negotiating...at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work."

[n]othing in the proposal suggests that management would be obligated to convert certain positions to part-time if it determined that to do so would make its staffing patterns unacceptable. Therefore, the proposal would not infringe on the Agency's discretion to determine whether to use part-time employees; rather it sets forth a procedure to be used by the agency in evaluating an employee's request for part-time work." *Id.*

In contrast to the language set forth in *Customs Service* as well as in proposal 7, the proposals at issue in the *Department of Labor* case are framed in mandatory terms that would, for example, compel the Department to freeze vacancies or hire only temporary personnel to fill vacancies, leaving virtually no discretion to the Service. For this reason, the *Department of Labor* decision is an inapposite precedent. I find, therefore, that proposal 7 does not interfere with management's right to determine the numbers, types and grades of employees under section 70196 of the Statute, and is within the duty to bargain.<sup>9</sup>

The Agency further asserts that it is not obliged to bargain since the changed conditions brought about by the VERA offer benefited, rather than adversely affected the employees. However, as discussed further below, the VERA offer was not an unmixed blessing. (See discussion, *infra* at p. 10.)

In order to determine whether the Agency had a duty to bargain about the job-sharing part-time work and LWOP provisions in proposal 7, which it contends already are contained in the parties' Agreement, it is necessary to examine these terms under the "covered by" doctrine announced in *Social Security Administration (SSA) and American Federation of Government Employees (AFGE)*, 47 FLRA No 96 at 1018-1019 (1993), as confirmed and clarified in *U.S. Customs Service and NTEU Chapter 37*, 56 FLRA 809 (2000). In SSA, the Federal Labor Relations Authority (FLRA) stated that it would resolve claims as to whether a contract provision covered a matter in dispute by means of a two-pronged test: first it would determine whether the matter was "expressly contained" in the collective bargaining agreement. SSA, 47 FLRA at 1018. The Authority explained that "exact congruence of language" was not required if "a reasonable reader would conclude that the provision settles the matter in dispute." *Id.*<sup>10</sup>

Second, if the contract provision did not expressly cover the matter, the FLRA stated that it next would consider whether the disputed proposal was "inseparably bound up with... a provision expressly covered by the contract." *Id.* Recognizing that such distinctions may be difficult to make, FLRA explained that when appropriate, it would examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id.* In analyzing whether the subject matter about which bargaining is sought constitutes an element of matters already negotiated so as to foreclose further bargaining, the parties bargaining history and/or intent may be taken into account. See, SSA, 47 FLRA at 1019.

The Agency claims that the job-sharing program is effectively covered by National Agreement (NA) Article 14, which is solely concerned with the reassignment of work. It is clear that under this Article, reassignments are wholly within the control of the Agency which has the authority to solicit volunteers for different posts or, in the absence of volunteers, may select an employee for involuntary reassignment. Moreover, it apparently affects one employee at a time, whereas a job-sharing program depends on a

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<sup>9</sup> It is noteworthy that after considering the parties' arguments, the FSIP determined that the job-sharing proposal was negotiable and that the parties should resume bargaining. Apparently the FSIP decision was not dispositive.

cooperative arrangement between two employees. Accordingly, there is no congruence between the job sharing aspect of proposal 7 and Article 14, nor can it be said to be inseparably bound up with that Article.

FNS further urges that the part-time employment and LWOP aspects of proposal 7 are covered by Articles 43 and 26, section respectively. Article 43 provides in relevant part:

Sec. 43.02 ....The Employer will consider employee requests to work part-time and respond to requests in a timely manner. Requests will be in writing, contain the reasons for the change and the duration of the part-time employment period. Requests will be approved unless it is determined that the requested change would have an adverse affect on working unit's ability to function efficiently and effectively. Any denial will be in writing.

Sec. 43.03: (1) The Employer recognizes that part-time career employment may be appropriate, but in way limited to the following classes of employees:

(a) older employees seeking gradual transition into retirement....(JX 1)

The above-quoted language clearly is applicable to the very employees whom the Agency identified as eligible for retirement. In fact, Section 43.03 specifically takes into account the appropriateness of part-time employment for those who may be anticipating retirement. It follows that the reference in provision 7 to part-time employment was intentionally anticipated by the negotiators of Article 43 and, therefore, is inseparably bound up with its terms.

Section .03 of Article 26 deals with LWOP, but its applicability to VERA eligible employees is dubious. Section 1 of the article contains a list of circumstances in which LWOP may be granted, including activities such as attending school if the course of study increases job skills, college teaching, while disability compensation awards are pending or being paid, or accepting work that will benefit the Agency. Unlike itemized criteria found in other provisions of the Agreement that expressly state that they are non-exclusive, as in Article 43, the framers of Article 26, confined section 03 to specific criteria, none of which on their face specifically cover VERA eligible employees. Consequently, it cannot be said that the LWOP language in proposal 7 is inseparably bound up with Article 26.

Based on all of the foregoing considerations, I find that apart from part-time employment options, the job-sharing and LWOP terms in Union proposal 7 are negotiable.

### **Union Proposal 9**

The proposal reads:

In accordance with the parties' National Agreement, Article 17, section 2 (2)(e), the parties agree that employees associated with extra workload pursuant to VERA will qualify for awards under the specified criteria.

### **The Parties' Positions:**

The Union contends that proposal 9 does not invade the Agency's right to grant awards to employees who met established criteria; rather, it addresses the impact of additional work that necessarily would be shouldered by remaining employees as a result of the VERA retirements. Thus, NTEU contends that proposal 9 simply requires that the Agency apply the criteria found in the contract language to a specific category of

## The Parties' Positions

NTEU asserts that under well-settled law, the Agency is required to bargain over the impact and implementation of a change in working conditions. See, *International Plate Printers, Die Stampers and Engravers Union of N.A. Local 2 and Dep't of Treasury*, 25 FLRA 113 (1987); *AFGE Local 3231 and Social Security Administration*, 22 FLRA 868 (1986). In light of this principle, the Union submits that proposal 10 requires the employer to bargain when employees are assigned additional responsibilities previously performed by retired employees.

FNS correctly points out that it is only required to bargain about changed working conditions when the impact on employees is appreciable. Since proposal 10 mandates bargaining over any work changes related to VERA retirements, the Agency asserts that it would impose a duty to negotiate about trivial, *ergo*, *de minimis* assignments.

## Analysis and Conclusions

It is beyond dispute that the Agency changed the conditions of employment of bargaining unit employees when it offered eligible employees the opportunity to take early retirement under the VERA program. It did so without notifying the Union and before bargaining over three of the Union's proposals. The issue here is whether these proposals were *de minimis* so that the Agency was relieved of an obligation to bargain about them.

An analysis of this question begins with the well-settled proposition that it is an unfair labor practice to deny the exclusive representative an opportunity to bargain over the impact and implementation of a change in unit employees' terms of employment, provided that the change has more than a *de minimis* effect. See, e.g., *General Services Administration, Region 9, San Francisco, California (GSA)*, 52 FLRA 1107, 1111 (1997). *SSA*, 24 FLRA at 407-08. See, *Association of Administrative Law Judges (AALJ) v. FLRA*, 397 F. 3<sup>rd</sup> 957, 962 (D.C. Cir. 2005) where the Court stated that

[a] *de minimis* change is not a proper subject of bargaining ...because it has no appreciable effect upon working conditions. In assessing whether the effect of a decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *GSA*, 52 FLRA at 1111.

Accordingly, any change that has a foreseeable effect on the working conditions of bargaining unit employees is negotiable. *AALJ* at 962.

In the instant case, the Union did not produce direct evidence that additional work assignments for remaining employees were a foreseeable consequence of the VERA retirements. Nevertheless, it would be rash to assume that remaining bargaining unit members would not be asked to assume new duties that were no longer performed by the VERA retirees. It is appropriate to take into account that in granting the Agency's application, OPM approved a plan that called for the removal of 76 FTEs by March 31, 2007, a closing date that could be extended on request on a showing of changed circumstances. In fact, according to Ms. Gutierrez, 21 employees retired under the VERA plan as of January 30, 2007, the date of the instant proceeding. Surely, FNS could or perhaps did extend the time period so that more eligible employees could retire by March 31, the VERA closing date. In that way, the Agency could come closer to solving its budgetary problems. Moreover, the record does not indicate that the Agency eliminated or outsourced the work previously performed by the

employees. As such, NTEU asserts that the proposal does not conflict with or modify the National Agreement; rather it ensures that a new category of employees are not overlooked when FNS is considering who is deserving of an award. The Union also insists that the proposal bears only a tangential relationship to Article 17 and, therefore, is not inseparably bound up with it under the second prong of the "covered by" standard.

FNS counters that it has no duty to bargain where, as here, the proposal is covered by Section 17.01 of the contract that reads:

The Employer will administer its Awards Program fairly and equitably.... Awards will be made judiciously and solely on the basis of merit. While the criteria for different awards may vary, the decision to grant an award must be based on careful evaluation of the merits of the job performance, special act or service, or the suggestion or invention. (JX 1 at 28)<sup>11</sup>

The Agency also asserts that proposal 9 is non-negotiable because the Union failed to demonstrate that VERA retirements would have an impact on employees. Moreover, FNS maintains that it would be absurd to award employees regardless of the amount of work or level of performance.

### **Analysis and Conclusions**

The exact terms of the Union's proposal with regard to performance awards for employees affected by VERA retirements do not appear in Article 17 of the parties' contract. However, as the Authority made clear in the SSA decision, exact congruence is not required if a reasonable reader would conclude that the provision settles the matter in dispute. Section 17.01, does not specifically identify remaining employees who assume increased workloads as a result of VERA retirements, as prospective award recipients. Neither does it designate any other type of eligible recipient of an award. Instead, the language is phrased in comprehensive terms that surely embrace all FNS employees, including those whose responsibilities are expanded following the departure of VERA retirees. Thus, it is fair to reason that the parties intended Article 17 to apply to all employees including those who take on new job responsibilities. As recognized by FLRA in the SSA decision, *supra*, "exact congruence of language" is not required where, as here, "a reasonable reader would conclude that the provision settles the matter in dispute."

Since Union proposal 9 is expressly covered by the National Agreement, the Agency was not obliged to bargain about it. Having reached this conclusion, it is unnecessary to consider whether the proposal is "inseparably bound up" with a provision in Article 17 and, therefore, covered by the Agreement. See, SSA, *Id.*

### **Union Proposal 10**

The third and last proposal in contention states: The Agency agrees to provide notice and bargain with the union before imposing any additional work requirements on said employees in association with VERA.

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<sup>11</sup> It is interesting to note that Article 18, sec. 18.01 provides for "time off" awards, that is, an excused absence without loss of pay in recognition of a superior accomplishment or other personal effort that contributes to the quality, effort or economy of Government operations." Sec. 18.02 identifies examples of achievement that certainly will be applicable to an employee who "successfully complet(ed) additional work...while maintaining the employee's own workload...." (JX 1, Sec. 18.02 (e))

retirees or abandoned the hiring freeze that was in place. Therefore, there are grounds to believe that the remaining employees had to assume duties previously performed by the VERA retirees. It follows that expanding the work load of remaining employees was reasonably foreseeable and more than a negligible change in working conditions giving rise to a duty to bargain.<sup>12</sup> Accordingly, proposal 10 was negotiable.

### **FNS Violated the Statute and the Parties' Collective Bargaining Agreement**

The Federal Labor Relations Statute provides at 5 U.S.C. 7103(4) that an agency must bargain in good faith over conditions of employment, which include "personnel policies, practices and matters... affecting working conditions." By refusing to bargain in good faith with a labor organization, an agency commits an unfair labor practice in violation of 5 USC Sec. 7116 (a)(1) and (5).

In order to determine if either an employer or union is bargaining in good faith, the FLRA will examine all the relevant facts of a case. "Totality of conduct" is the standard through which the quality of negotiations is tested. See, *U.S. Geological Survey and AFGE*, 53 FLRA 1006 (1997). On assessing the totality of the Agency's conduct in this matter, the conclusion is inescapable that it failed to bargain in good faith with the Union over the implementation and impact of the VERA program.

Here, according to EX 6 (b), the Agency targeted August 8 to 10 for bargaining. In fact, it bargained for only two days on August 9 and 10, during which time it offered no counter proposals. Then it declined to bargain further about the three remaining items, aspects of which, as discussed above, are negotiable. The Union's proposal for job sharing could have had particular importance for bargaining unit employees. If presented with the prospect of job-sharing, some of those who chose to retire might have chosen that alternative. Taking early retirement has a major impact on an employee's future, as was well recognized in *U.S. Department of the Air Force, Air Force Material Command and AFGE*, 54 FLRA 914 (1998). The eligible employees at FNS had a right to have their Union representative bargain in their behalf so that they were in a position to make an informed choice among various options.

Making matters worse, one day later, that is, on August 11, FNS unilaterally began to implement VERA by posting a notice of the retirement offer to all eligible employees on the intranet, without notice to the Union. Under long established precedent, the Authority finds it unlawful for a party to implement changes in terms and conditions of employment prior to the completion of bargaining, except in specific circumstances. See, e.g., *U.S. Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 43 FLRA 642, 652-53 (1991), *U.S. Immigration and Naturalization Service and National Border Patrol Council, AFGE*, 55 FLRA 69 (1999); enforced 12 F.3d 882 (9th Cir. 1993); see also, *Duffy Tool and Stamping, LLCV*. NLRB 233 F.3d 995 (7th Cir. 2000) holding that an agency may not implement its final offer or make changes in the terms and conditions of employment before reaching a genuine impasse on an entire proposal or agreement. No hard and fast rule can be set with regard to an appropriate number of meetings between parties. However, the Authority concurs with the NLRB that a union is "entitled to as much notice as is needed for meaningful bargaining at a meaningful time before a change in working conditions becomes a *fait accompli*." *Gannett Co., Inc. and American Federation of Television and Radio Artists, Local No. 224*, 333 NLRB 355 (2001); see, *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832-33 (5th Cir. 1965) ("There remains on

<sup>12</sup> FNS seems to employ the word "any" in proposal 10 to refer to trivial or *de minimis* proposals. Determinations of when matters are truly *de minimis*, "will turn on the assessment of particular circumstances and the Union will bear the burden of making the required showing." *Dep't of Health and Human Services, SSA*, 397 F.2d 954, 957, U.S. Court of Appeals for the D.C. Circuit (2005). Further, when the parties resume bargaining, they will be free to define *de minimis* to avoid controversy in the future.

the employer the positive legal duty to meet and confer with the Union at reasonable times and intervals.") Two days hardly seems sufficient to negotiate a ten point proposal that affects significant employee interests.

Here, the Agency was intent on following its own schedule that called for completing negotiations within a preconceived and constricted timeframe, followed by the rapid implementation of VERA. The NTEU promptly reminded the Agency of its duty to maintain the *status quo*, but within a week, petitioned the FSIP requesting expedited intervention to resolve what it labeled a bargaining impasse pursuant to 5 USC 7119. *Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466 (1985), *INS*, Washington, D.C., 55 FLRA 69 (1999). Although FSIP cautioned the parties by letter dated August 16, that pending the outcome of its investigation, it might order the employer to maintain the *status quo*, the Agency continued to move forward with the VERA process.

To explain the Agency's rush to implement VERA, Ms. Gutierrez testified that the sooner employees retired, the greater the economic savings would be for FNS. However, she acknowledged that the duty to bargain with the NTEU took priority over implementing VERA. Nevertheless, the Agency hastily expedited the VERA process. As noted heretofore, the VERA authorization was not due to expire until March 31, 2007, and if that was not time enough, OPM's letter of approval specifically advised the Agency that it could extend that deadline. While the Agency anticipated a budget shortfall, it presented no evidence that it was facing a financial emergency or any other exigent circumstances. The Agency's haste was at the expense of the Union and its bargaining unit members who did not obtain the advantages that good faith bargaining might have achieved.

In addition, the Agency's conduct, as described above, also violates Article 54 of the parties' collective bargaining agreement that provides in pertinent part:

- 54.02. (2) Where the Employer wishes to change a personnel policy, practice or condition of employment not controlled by the terms of this Agreement...
- (a) [It] shall provide the Union with reasonable advance notice, but normally not less than...5 workdays of the intended changes.
- (b)(1) Where the Union wishes to negotiate over the requested change, the Employer will delay the implementation of such change until that time when the Parties have reached agreement on the proposed change....

To summarize, I find that FNS breached Article 54 of the parties' National Agreement, grounds in itself to sustain an unfair labor practice finding,<sup>13</sup> failed to bargain in good faith by declining to complete negotiations about the implementation and impact of the VERA program, unilaterally implemented VERA before reaching agreement or a *bona fide* impasse without notifying the Union, and failed to preserve the *status quo ante*, in violation of 5 U.S.C. 7116 (a)(1) and (5) of the Statute. However, the Agency is not obliged to bargain about Union proposal 7 regarding part-time employment and proposal 9 addressing awards for employees assigned additional duties as a consequence of the VERA retirements and those parts of the ten-point proposal will be dismissed

<sup>13</sup> 5 U.S.C. 7116 (a)(7) provides that it shall be an unfair labor practice "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...."

## THE REMEDY

As found above, the Agency engaged in unfair labor practices in violation of 5 U.S.C. 7116 (a)(1) and (5) by failing to negotiate in good faith about the implementation and impact of the VERA program on affected employees, unilaterally implementing the program without completing bargaining, notifying the Union or preserving the *status quo ante*. Accordingly, although the Agency is not required to negotiate about the decision to offer the VERA program, I conclude that it is obliged to bargain in good faith with the Union about the implementation and impact of the VERA program, the job sharing and LWOP provisions of proposal 7 and the terms of proposal 10 until an agreement or impasse has been reached.

In light of the Agency's unfair labor practices, the Union urges a return to the *status quo ante*. In determining whether such a remedy is appropriate in a case where the violation involved a failure to bargain about the implementation and impact of a management change in the terms and conditions of employment, the Authority ruled in *Federal Corrections Institute (FCI)*, 8 FLRA 604 (1982) that the following factors, among others, should be considered:

- (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon;
- (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change;
- (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the statute;
- 4) the nature and extent of the impact experienced by adversely affected employees;
- and (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

Taking the FCI factors into account, it is clear that FNS failed to notify the Union in sufficient time to allow for meaningful bargain or to provide eligible employees sufficient time to consider all possible options, including those the bargaining might have obtained. Notwithstanding the lack of adequate notice, the Union acted promptly in requesting a briefing and then submitted proposals regarding the implementation and impact of the change. FNS allowed only two days for bargaining, having decided that the balance of the Union's proposals were non-negotiable. The fact that FNS believed it had lawful grounds for its position, and engaged in some bargaining does not alter the Authority's position that the Agency acted willfully at its peril. See, *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, TX and AFGE*, Local 3828, 55 FLRA 848 (1999).

The *status quo* remedy is denied only where there are "special circumstances", a term which is narrowly construed. Typically, the FLRA will not impose a *status quo ante* remedy unless the agency proves with record evidence that such an order "would disrupt or impair the efficiency or effectiveness of its operations." *Id.*; see, *AFGE and Department of Defense, Colorado*, 61 FLRA 688 (2006). In the instant case, FNS established that it obtained VERA approval so that it could address an anticipated budgetary shortfall as a benign measure for employees who otherwise might face involuntary separations. However, the Agency produced no evidence that a *status quo ante* remedy would disrupt the efficiency or effectiveness of its operations. Even assuming that some dislocation would occur, the Authority has indicated that any disruption must be substantial to justify withholding a *status quo* remedy. See, e.g. *Bureau of Engraving and Printing, Washington, DC and IAM, Lodge 2135* 44 FLRA 575 (1992)(*status quo* order would disrupt parking lot construction already underway or compel cancellation or drastic revision of construction plan.)

Based on the foregoing considerations, I conclude that a modified restoration of the *status quo ante* is appropriate. Unlike the denial of a *status quo order* in *FCI* where duty assignments were rearranged for a few corrections officers, here, at least 21 bargaining unit members accepted VERA without benefiting from the advantages they might have obtained if meaningful bargaining had taken place. In other words, their decision to accept VERA was not based on a fully-informed choice. Therefore, their reinstatement is warranted so that they may make a different choice based on options that may result from the parties' renewed negotiations. Yet, those who opted for VERA, have been retired for over half a year, during which time they received pension benefits and made life style arrangements that they may prefer to preserve. Accordingly, recognizing that the Agency was well-intentioned in offering eligible employees the opportunity to retire in lieu of RIFs, even though its implementation was misguided, I conclude that the Agency should offer reinstatement to the VERA retirees, and pay them an amount equal to the difference between the salaries they earned at the time they retired, less the sums they received from their pensions, to commence from the date of their retirement to the date that FNS tenders a written offer of reinstatement to their former or substantially similar positions. *Cf., Gannett, Inc. and American Federation of Television and Radio Artists, 333 NLRB 355 (2001)*(sale of radio station and termination of bargaining unit employees)

In addition, I also shall order that FNS post the notice attached to this decision in conspicuous places in each of its facilities where eligible employees received offers of early retirement under VERA.

Counsel for the Union representing the bargaining unit employees affected by the Agency's unfair labor practices, requests an award of attorney fees under the Back Pay Act, 5 U.S.C. 5596. The standards for awarding such fees are set forth in *Naval Air Development Center, 21 FLRA 131*. There the Authority outlined the following requirements that must be met for an award of attorney fees to be supportable under the Act:

1. Fees must be incurred for the services of an attorney.
2. Fees may be sought only by the prevailing party.
3. The award of fees must be warranted "in the interest of justice."
4. The amount claimed for attorney fees must be reasonable.
5. The award of fees must be set out in a fully articulated, reasoned decision.

Having prevailed in a significant part of the case, the Union's attorney is entitled to submit a detailed application for attorney fees. I will consider the reasonableness of such fees and whether fees are warranted in the interests of justice in accordance with the Back Pay Act and its explication in *Naval Air Development Center, supra.* Of course, the Agency is entitled to file a responsive pleading. Thereafter, I will issue a "fully articulated and reasoned decision" as required by the Act and Authority precedent. *Id.*<sup>14</sup>


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<sup>14</sup> The Union proposed that I retain jurisdiction for purposes of clarifying or interpreting the award, citing as authority for such a request, *VA, Allen Park, VAMC and AFGE Local 833, 40 FLRA 160, (1991)*. However, the award in that case involved complex compliance issues that, after remand, required continued oversight to ensure that the award was implemented properly. Because the issues in the present case are entirely different, it would be inappropriate to maintain jurisdiction.

**AWARD**

Pursuant to the foregoing discussion, I find that the bargaining unit members who accepted early retirement under VERA are entitled to reinstatement upon their acceptance of written offers from the Agency, and payment to all VERA retirees of a sum representing the difference between the salary they received at the time of retirement to the date on which FNS sends them written offers of reinstatement. The Agency will reinstate those who accept the offer within one month of the date of their acceptance. Further, I find that the Agency, having failed to bargain with the NTEU over negotiable proposals, is responsible for posting the attached Notice in each of its facilities where early retirement to eligible employees under VERA authorization was offered. Lastly, I will retain jurisdiction to issue a supplementary decision regarding the award of attorney fees pursuant to 5 U.S.C. 5596.

Respectfully submitted,



Hon. Arline Pacht (ret.)  
Arbitrator

Dated: April 23, 2003

**NOTICE TO EMPLOYEES**

**AS ORDERED BY ARBITRATOR ARLINE PACTH**

**TO EFFECTUATE THE PURPOSES AND POLICIES OF THE  
FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE**

**WE NOTIFY FOOD AND NUTRITION SERVICE EMPLOYEES THAT**

**WE WILL NOT fail to provide the National Treasury Employees Union (NTEU), the exclusive bargaining agent of certain FNS employees, with prior notice of changes in the terms and conditions of employment of non-professional members of the bargaining unit represented by the NETU.**

**WE WILL NOT refuse to bargain with the NTEU concerning procedures related to the Voluntary Early Retirement Authority (VERA).**

**WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Statute.**

**WE WILL return to the *status quo ante* in accordance with the terms of the Arbitrator's order and award.**

**WE WILL, upon request of the NTEU, bargain over negotiable proposals concerning the implementation and impact procedures to be followed in connection with the VERA, and apply any agreements reached pursuant to such negotiations retroactively to the date of our refusal to bargain.**

**WE WILL, based upon any agreements that are reached pursuant to negotiations, make whole any bargaining unit member for any losses that he or she may have sustained as a result of our failure to provide the NTEU a meaningful opportunity to bargain over procedures to be followed in implementing VERA for affected employees.**

**Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature and Title)**

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