ATTACHMENT 1F2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

DEPARTMENT OF DEFENSE WASHINGTON, D.C. -and- DEFENSE FINANCE & ACCOUNTING SERVICE ARLINGTON, VIRGINIA -and- PUGET SOUND NAVAL SHIPYARD BREMERTON, WASHINGTON Respondents -AND- INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 12, AFL-CIO Charging Party	Case Nos.	SF-CA-80652 SF-CA-80659 SF-CA-80660

DEPARTMENT OF DEFENSE WASHINGTON, D.C. -and- DEFENSE FINANCE & ACCOUNTING SERVICE ARLINGTON, VIRGINIA -and- NORFOLK NAVAL SHIPYARD NORFOLK, VIRGINIA DEPARTMENT OF THE NAVY, TECHNICAL SUPPORT CENTER ATLANTIC NORFOLK, VIRGINIA Respondents -AND- INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 1, AFL-CIO PORTSMOUTH, VIRGINIA Charging Party	Case Nos.	WA-CA-80577 WA-CA-80578 WA-CA-80579 WA-CA-80596 WA-CA-80597 WA-CA-80599

DEPARTMENT OF DEFENSE WASHINGTON, D.C.		
-and-	Case Nos.	BN-CA-80528 BN-CA-80529 BN-CA-80530
DEFENSE FINANCE & ACCOUNTING SERVICE ARLINGTON, VIRGINIA Respondents		BN-CA-80531 BN-CA-80532 BN-CA-80533
-AND-		
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 4, AFL-CIO PORTSMOUTH, NH Charging Party		

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT PUGET SOUND NAVAL SHIPYARD'S MOTION FOR SUMMARY JUDGMENT

1. STATEMENT OF THE CASE

By Order dated March 2, 1999, the above-referenced cases were consolidated for hearing. Among the charges included in the consolidated complaint originally issued by the San Francisco Regional Director is Case No. SF-CA-80652, filed by Charging Party IFPTE Local 12 against Puget Sound Naval Shipyard (see Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated January 29, 1999, ¶ 7). Respondent Puget has filed a Motion for Summary Judgment as to this charge, contending that there are no material issues of fact and that, as a matter of law, Respondent is entitled to judgment in its favor. This Opposition to Respondent Puget's Motion for Summary Judgment is submitted pursuant to § 2423.27(b) of the Authority's Revised Regulations.

The consolidated cases involve implementation of new procedures for the accumulation and use of compensatory time, based upon a June 3, 1997 policy issued by the Department of Defense (DOD) and a June 13, 1997 policy issued by Defense Finance and Accounting Service (DFAS). As to Respondent Puget, the instant complaint alleges that on February 9, 1998, Respondent Puget notified Charging Party, the exclusive representative of certain of its employees, of the new DOD/DFAS compensatory time policy; that on February 24, 1998, Charging Party requested a clarifying discussion concerning the compensatory time policy and "thereafter requested to negotiate concerning the new policy" and that the new policy was implemented on June 7, 1998 with a retroactive effective date of June 8, 1997. The complaint alleges that "Since in or about March 1998, Respondent Puget has failed to negotiate with Charging Party over the new compensatory time policy. . . to the extent required by the Statute." (Consolidated Complaint ¶¶ 16, 17, 18, 19, 21).

In its Motion for Summary Judgment, Respondent Puget asserts that its duty to negotiate arose only after it received a request to negotiate from the union and that IFPTE Local 12 "never requested to negotiate as required by the parties' collective bargaining agreement." (Respondent's Motion for Summary Judgment, pp 2-3). In support of its Motion, Respondent Puget offers Article 5 of the collective bargaining agreement between Puget Sound Naval Shipyard and IFPTE Local 12, dated October 1985 and proffers an affidavit from Personnel Management Specialist Herbert Lang in which he asserts that "At no time. . .did I receive a request, either oral or written, from the IFPTE representatives to bargain on the compensatory time changes, nor did I ever receive any bargaining proposals from them."

General Counsel submits that the Motion for Summary Judgment should be denied because there is a genuine issue of a material fact. *U.S. Equal Employment Opportunity Commission*, 51 FLRA 248, 252-53 (1995) (*EEOC*) (Authority found that ALJ incorrectly granted motion for summary judgment where respondent presented hearing testimony disputing a number of factual assertions). Based on the affidavit of John Oats (attached), and for

the reasons discussed more fully below, there are genuine issues of material fact which preclude granting Respondent's motion.

2. THERE ARE GENUINE ISSUES OF MATERIAL FACT WHICH PRECLUDE GRANTING RESPONDENT'S MOTION

As indicated above, Respondent contention that there are no genuine issues of material fact is predicated upon its claim that it had no duty to bargain until the union requested to bargain in accordance with the procedures in Article 5 of the collective bargaining agreement and upon the affidavit of Mr. Lang in which he states that the union never requested to bargain and did not submit any bargaining proposals.

Respondent's claims are contradicted by the affidavit of John Oats, the union's chief negotiator on this matter. Oats claims that the parties no longer strictly follow the procedures set forth in Article 5 of the expired contract and that bargaining may be initiated informally as the parties discuss their interests and attempt to resolve problems in the spirit of partnership (a matter not addressed by Lang in his affidavit). Oats states that in this case, during their clarifying discussions, the union did make known its desire to negotiate over the changes in compensatory time (comp time) procedures (although the union understood this to be post-implementation bargaining since they believed that the changes had been implemented effective June 1997) and that, albeit in an informal manner, the Union offered proposals at the March 1998 meeting and during their June 1998 meeting, proposals designed to alleviate the impact which the employees experienced as a result of the change in comp time procedures. In short, Oats' affidavit supports the conclusion that the parties had entered into negotiations over the new compensatory time procedures.

The Statute is clear in the obligations it imposes on the respective parties. If management intends to make a change in employees' working conditions, it has an obligation to provide the union with adequate advance notice of the proposed change; once this is done, the union must request to bargain, if it wishes to exercise its statutory right to do so. Failure to request bargaining in response to adequate notice of a proposed change in conditions of employment may be construed as a waiver of the union's right to bargain. See, *e.g., Bureau of Engraving and Printing, Washington, D.C.*, 44 FLRA 575, 582 (1992).

The question here, however, goes not to the respective legal obligations of the parties but to Respondent's insistence that these obligations can only be met in a particular, mechanical formulation. Nothing in the Statute imposes a particular form that the union's request to bargain must take. And while it is true that Authority will enforce parties contractual procedures for negotiations, *Air Force Logistics Command, Wright Patterson Air Force Base*, 51 FLRA 1532 (1996), it is also true that the parties may modify their contract by agreement or practice, *e.g., USDA Forest Service, Pacific Northwest Region*, 48 FLRA 857, 860 (1993).

Oats' affidavit supports the finding that the parties have modified the procedures in Article 5 in their expired contract, and that bargaining, in the form of interest based dispute resolution, can and does take place during the clarifying discussion. Moreover, Oats' affidavit demonstrates that the parties were engaged in collective bargaining at the March and June clarifying discussions, during which the Union offered proposals to modify the proposed change in comp time procedures and/or to ameliorate the effects of the change on the bargaining unit.

> The fact that the sessions were conducted in a partnership atmosphere, as opposed to "traditional" collective bargaining, does not preclude a conclusion that the sessions constituted collective bargaining within the meaning of the Statute. The definition of collective bargaining set forth in section 7103(a)(12) does not prescribe any particular method in which collective bargaining must occur. It is well-recognized that collective bargaining may occur in a variety of ways, including the use of collaborative or partnership methods. See, e.g., E.O. 12871; Walton et al., *Strategic Negotiations* (1994) at 31-33; Bluestone and Bluestone, *Negotiating the Future* (1992) at 155-64.[footnote omitted].

FAA Standiford Air Traffic Control Tower, 53 FLRA 312, 319 (1997).

General Counsel submits that if the parties were actually engaged in negotiations, then it is immaterial whether the union made a formal request in accordance with contract. Once the parties are engaged in bargaining, management is not free to implement the proposed changes until negotiations are completed. *See generally, U.S. Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69, 72-73 (1999).

3. RESPONDENT PUGET'S MOTION SHOULD BE DENIED

Section 2423.27 of the Authority's Revised Regulations (effective January 1, 1998), codifies the summary judgment procedures adopted by the Authority in earlier cases, in which the Authority adopted the requirements of Rule 56 of the Federal Rules of Civil Procedure. *E.g., Dept. of the Navy, U.S. Naval Ordinance Station, Louisville, Kentucky*, 33 FLRA 3, 4-6 (1988). Thus, under § 2423.27(a), moving party's motion "shall be supported by documents, affidavits, applicable precedent, or other appropriate materials" and, consistent with Rule 56(c), the motion is to be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). The party opposing the motion "may not rest upon mere allegations or denials but must show, by documents, affidavits, applicable precedent, or other appropriate materials, that there is a genuine issue to be determined at hearing." § 2423.27(b). *See also EEOC*, 51 FLRA 248 (1995).

In this case, Respondent offered testimony to support its position that no request for bargaining was made in accordance with the procedures set out in Article 5 of the parties' collective bargaining agreement and that Respondent Puget was therefore entitled to judgment as a matter of law. In response, however, General Counsel has presented evidence which shows that the parties have modified the procedure to initiate bargaining in their expired contract through practice1/ and that regardless of the form the union's "request" for negotiations took, the parties did actually commence negotiations on the subject change.

1/ Indeed, Respondent concedes that General Counsel (mistakenly referred to as the Regional Director) will prevail if he can show that "Charging Party was not bound by the procedures. . .in Article 5 of its collective bargaining agreement." (Respondent's Motion for Summary Judgment at p. 7).

As discussed above, whether the union requested negotiations, whether the parties continued to be bound by the procedures in the expired contract and/or whether the parties had commenced negotiations are issues of material fact to this case, in which it is alleged that Respondent Puget failed to meet its statutory bargaining obligations relative to the new compensatory time procedures which were implemented retroactively in June 1998.

Accordingly, as there are material issues of fact in dispute in this case, Respondent's Motion for Summary Judgment must be denied and this case should proceed to hearing as part of the consolidated cases, on June 10, 1999 as scheduled.

Dated: March 29, 1999

Respectfully submitted,

Counsel for the General Counsel
Federal Labor Relations Authority
San Francisco Region

CASE NO. SF-CA-80652

STATE OF WASHINGTON)

COUNTY OF KITSAP)

I, JOHN OATS, declare as follows:

I am currently employed by Puget Sound Naval Shipyard as an Engineering Technician. International Federation of Professional and Technical Engineers, Local 12, AFL-CIO (IFPTE) represents a unit of technical and professional GS employees at the Shipyard. I currently occupy the position of Chief Representative for IFPTE, a position I have held since October 1996. As Chief Representative, I am the business manager and chief steward for the Local.

I have first hand knowledge of the facts relating to the unfair labor practice charges which IFPTE Local 12 filed against the Shipyard, Department of Defense (DOD) and Defense Accounting and Finance Service (DFAS) relative to the changes in compensatory time policy which were implemented.

As I recall, in about January 1998, the union began hearing rumors of changes to the compensatory time procedures in effect at the Shipyard. At that time, the Shipyard's comp time procedures allowed employees to accumulate up to 160 hours of comp time. The comp time could be carried over from year to year and did not expire. Comp time is a important benefit to employees in the IFPTE bargaining unit, many of whom work significant amounts of overtime.

After inquiries to management, by letter dated February 9, 1998, attached hereto as Exhibit A, Herbert Lang, Personnel Management Specialist, notified IFPTE of Public Law 104-201, which allows wage grade employees to receive compensatory time instead of overtime payment, and that DOD had issued a new compensatory time policy. Our bargaining unit does not include WG employees so PL 104-21 was informational only. However, the new compensatory time policy was of great interest. Mr. Lang attached to her letter a June 13, 1997 Memorandum from DFAS, which described DFAS plans to implement "the new Department of Defense (DOD) policy, dated June 3, 1997, which establishes parameters on the accumulation and use of compensatory time. . ." A copy of the June 13, 1997 DFAS Memorandum is attached hereto as Exhibit B. In broad outline, the new comp time policy provided for the establishment of a grandfathered account of comp time earned prior to June 8, 1997, and for comp time to be "perishable" after 26 pay periods, i.e. to be converted to overtime pay.

By letter dated February 24, 1998, a copy of which is attached hereto as Exhibit C, IFPTE requested a Clarifying Discussion on the new compensatory time policy. I was identified as the Locals' primary representative on this subject. Later, Josh Marks was identified as the alternate.

In accordance with our practice, management scheduled the clarifying discussion. The meeting was held on March 20, 1998. Josh Marks and I attended for the union. Herbert Lang and Charlie West, a representative from

the Shipyard Comptroller's office, represented the Shipyard. At that point in time, the Union understood that DOD/DFAS and/or the Shipyard had already implemented certain aspects of the new comp time procedures. We misunderstood the full extent of the change and in March 1998, we did not think as many individuals were impacted as we later learned were adversely affected by the change. Based on our reading of the June 13, 1997 DFAS memo, and information provided to us by management during the March 20, 1998 meeting, we understood that the grandfathered comp time accounts had already been established, i.e. that all comp time earned prior to June 1997 had already been separated and protected. We were concerned that employees who had used comp time but had not earned replacement amounts of comp time since June 1997 had been harmed because they had unknowingly drawn from their grandfathered accounts. But we thought that employees who had earned and used equivalent amounts of comp time since June 1997 had not been harmed since we thought that the comp time earned after June 1997 would be charged first.

We asked a number of questions during the March 20, 1998 meeting in order to ascertain the scope of the change, such as who would be affected, when and how it had been implemented, whether this was DOD wide or specific to the Navy (this latter was especially important because of possible impact on the FLSA agreement between NAVSEA and IFPTE which allows for indefinite accumulation of comp time for certain uses). Because we thought the grandfathered accounts had already been established, I specifically asked management if employees could be compensated for any grandfathered comp time they had (unknowingly) used. We also wanted to know whether the grandfathered accounts would show up on the employees' leave and earnings statements.

Lang and West were unable to answer all of our questions. They agreed to obtain answers and it was understood that we would have further meetings to continue our discussion. The union requested a second clarifying discussion by letter dated April 9, 1998, a copy of which is attached as Exhibit D. Our next meeting was on June 9, 1998. I do not recall why there was this delay except that there may have been difficulties in finding a mutually agreeable date.

At the June 9, 1998 meeting, Charlie West explained to us and to Herbert Lang all of the details of the new comp time policy. At this meeting we learned that the perishable comp time went back to June 8, 1997; we also learned, for the first time, that the grandfathered accounts had not been established, i.e. that comp time earned prior to June 1997 had not been sheltered. Thus, not only were employees who used but did not earn equivalent amounts of comp time impacted by the change, but all employees who used comp time after June 1997 had been adversely affected, since absent the shelter of the grandfathered account, the oldest comp was used first.

At the June 9, 1998 meeting, we offered specific proposals which we hoped would ameliorate the effects of the new comp time policy: We proposed that employees be allowed to substitute annual leave for comp time used after June 1997 and that employees be allowed to swap comp time earned after June 1997 for comp time earned

before June 1997 and used after June 1997. Management said they did not know whether they could agree to these proposals. As I recall, West had a meeting with DFAS planned for the following week, and she was agreed to discuss our proposals with DFAS. At our next meeting, on June 26, 1998, we were told that DFAS would not agree to the procedures we proposed.

At the meeting on June 26 and our final meeting in July 1998, attended by the same parties, we again tried to determine what, if anything, the Shipyard could do to respond to our concerns about the adverse effects of the new comp time policy, particularly its retroactive application. It became clear to us that the Shipyard was limited in what it could do because the policy and implementing procedures were issued by DOD and DFAS. We then filed these charges.

I have read Respondent Puget's Motion for Summary Judgment and am aware that Respondent Puget asserts that, in this case, the union did not request to bargain in accordance with the procedures outlined in Article 5 of the collective bargaining agreement. However, the collective bargaining agreement is 12 years old and expired long ago. While the parties continued to follow the contract until a new contract is negotiated, we no longer strictly follow the procedures outlined in Article 5. In my April 6, 1998 letter, when I reserved the union's right to "elect to negotiate and initiate bargaining on the implementation [in accordance with] Article 5 of the Agreement," I did so to be sure to cover all our bases. In the last several years, a new procedures for discussion and resolution of issues have developed as we have attempted to work in a "spirit of partnership." Clarifying discussions have become the arena for airing our interests and attempting to come to agreement regarding labor management matters, including management proposed changes in working conditions, in an informal, partnership mode. In my experience, the participants frequently engage in the give and take of collective bargaining during clarifying discussions. In this case, although the union did not formally request bargaining in accordance with the procedures set out in Article 5, we did present proposals at the March 20 and June 9 meetings, and attempted to engage in negotiations with Shipyard management. Our bargaining was thwarted by the Shipyard's inability to negotiate over any of the significant aspects of the comp time policy, since the policy was dictated by DOD and implemented by DFAS.

I have read the affidavit of Herbert Lang which accompanies Respondent's Motion, in which Mr. Lang states that at no time did he "receive a request, either oral or written" to bargain, nor did he "receive any bargaining proposals from them." As described above, while not formally requesting to bargain in accordance with the procedure described in the old Article 5, the union representatives did make known our desire to negotiate over the changes in comp time procedures, informal bargaining did take place during our meetings, and the union did offer specific proposals relative to the changes in comp time procedures.

I have read the above, consisting of 10 pages including this page, and, under penalty of perjury, say that it is true to the best of my knowledge or belief.

_____ _____