ATTACHMENT 3D

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

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Respondent

and **Case No. CH-CA-00333**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2411

Charging Party

MOTION TO STRIKE

Pursuant to section 2423.21 of Authority's Rules and Regulations (Regulations), Counsel for the General Counsel submits this motion to the Administrative Law Judge. In this motion, Counsel for the General Counsel requests that the portion of Respondent's February 25, 2000 Posthearing Brief entitled "RESPONDENT'S ONLY OBLIGATIONS CONCERNING THE NEW PERFORMANCE STANDARDS WERE COVERED BY THE GOVERNING COLLECTIVE BARGAINING AGREEMENT" (Respondent's Brief, pages 2-3) be struck because Respondent failed to properly raise this affirmative defense at any time prior to the filing of its Posthearing Brief.

The Authority has held that affirmative defenses are waived if not timely asserted by a respondent. U.S. Army Armament Research Development and Engineering Center, Picatinny Arsenal, New Jersey, 52 FLRA 527, 532-34 (1996) (Picatinny Arsenal) (section 7118(a)(4) defense was waived when the respondent raised it for the first time in their posthearing brief).

"Covered by" is an affirmative defense, Social Security Administration, 55 FLRA 374, 377 (1999) (SSA) and, consequently, consistent with Picatinny Arsenal, when a respondent decides to raise the covered by defense, the respondent must raise the defense timely or respondent will be found to have waived it.

Moreover, pursuant to section 2423.23(c) of the Regulations, a respondent is required to set forth in its Prehearing Disclosure its theory or theories of the case "including **any and all defenses** to the allegations in the complaint." (emphasis added).

The clear intent of the Authority's requirement that a respondent must disclose its affirmative defenses timely whether prior to the closing of a hearing, Picatinny Arsenal, or at the time of the prehearing disclosure mandated by section 2423.23 of the Regulations, is to assure that each party to the litigation has a fair opportunity not only to present its case but to properly prepare for and present evidence to rebut the other party's case, including any affirmative defenses. Preventing trial by ambush was the reason the Authority revised its Regulations in October 1997 to require prehearing disclosure: [P]rehearing disclosure . . . [is] an important device that will . . . clarify the matters to be adjudicated. . . . [E]arly prehearing disclosure will enable the parties to knowledgeably and more efficiently prepare their cases without having to guess what evidence or theories others in the litigation will offer.

62 Fed. Reg. 40,911 (1997).*/

A review of the record here establishes that Respondent failed to place the General Counsel and Charging Party on notice prior to the submission of its Posthearing Brief of its intent to raise the covered by defense. Respondent's entire "defense" during the pre-complaint-investigation stage of the unfair labor practice charge, during the post-complaint-pre-hearing stage and during the hearing itself was that the new performance standards were not a change because they had no adverse impact.

In its position paper that Respondent submitted to the FLRA Regional Director during the investigation of the charge and which Respondent submitted into evidence at trial, Respondent stated as follows:

> Of course, Management recognizes that changes in performance standards may result in adverse impact on employees which would create an obligation to negotiate appropriate arrangements for those employees. But no adverse impact resulted from the change in the performance standards. As stated above, the employees continue to perform the same work in the same way.

(Resp. Exh. 2, page 2)

During the post-complaint period, Respondent again failed to raise the covered by defense. Respondent did not raise it in its Answer. (GC Exh. 1(f)). Nor did Respondent raise the covered by affirmative defense in its Prehearing Disclosure which was submitted pursuant to section 2423.23. (Attachment 1-Respondent's 1-5-00 Prehearing Disclosure, Attachment 2-Respondent's 1-11-00 Amended Prehearing Disclosure). Respondent's expressed "defenses" in its Prehearing Disclosure were:

1. The new element did not change the duties or job requirements of the employees of the Income Verification Center.
2. The employees continued to do the same work, in the same manner, under the new performance standards as they did under the old performance standards.
3. The employees experienced no adverse impact from the change in the performance standards.

(Respondent's 1-5-00 Prehearing Disclosure, "Theories," page 2.) Respondent's 1-5-00 and 1-11-00 Prehearing Disclosure witness lists and document lists also contain no mention of the covered by defense.

Furthermore, during the hearing itself, as a review of the transcript reveals, Respondent never raised the covered by defense. Rather, Respondent's Counsel, Attorney Ophelia Frank, firmly repeated its consistently held "no change and de minimis defense" in its opening statement:

> At the conclusion of the hearing Respondent will have show[n] that the new elements issued to the employees at the Income Verification Center did not change the duties or job requirement, that the employees continue to do the same work in the same way under the new performance standards as they did under the old performance standards. Furthermore, Respondent will show that the employees experienced no adverse impact from the change in the performance standards.
>
> And for these reasons, Your Honor, Respondent will request to have the charges filed against it dismissed.

(Tr. 15, lines 4-16).

Since covered by was not an issue at the hearing, the General Counsel justifiably relied upon Respondent's stated defense of "no change and de minimis" and did not prepare and present any evidence to rebut the covered by defense including bargaining history, past practice and the relationship between Article 5 and Article 37. Accordingly, it would be manifestly unfair and extremely prejudicial to the General Counsel and the Charging

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*/ Given that the Authority's Prehearing Disclosure requirements were implemented in 1997, after the Authority issued its decision in Picatinny Arsenal, 52 FLRA 527(1996), one could reasonably contend that a respondent will be deemed to have waived an affirmative defense if such, without good cause, is not raised in its Prehearing Disclosure, rather than prior to the close of a hearing. However, given that Respondent did not raise the defense until several weeks after the close of the hearing, it is not necessary to determine precisely when Respondent was required to raise the covered by defense.

Party to consider Respondent's belated covered by claim at this late stage of the proceeding.

Accordingly, Counsel for the General Counsel moves that His Honor strike all references to the covered by defense from Respondent's Posthearing brief and not consider this defense in deciding the merits of General Counsel's complaint.

Respectfully submitted,

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