ATTACHMENT 1F1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
ATLANTA REGION

UNITED STATES ARMY AVIATION AND MISSILE COMMAND REDSTONE ARSENAL, ALABAMA **Respondent** **and** **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858** **Charging Party**	**Case No. AT-CA-99999**

COUNSEL FOR THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Counsel for the General Counsel, pursuant to § 2423.27 of the Rules and Regulations of the Authority, as amended, files this Motion for Summary Judgment with the Chief Administrative Law Judge (ALJ), and requests that the ALJ make findings of fact and conclusions of law, finding and concluding that the United States Army Aviation and Missile Command, Redstone Arsenal, Alabama (Respondent), has engaged in conduct violative of 5 U.S.C. § 7101-7135 (the Statute) as alleged in the Complaint and Notice of Hearing issued in the captioned matter. Counsel for the General Counsel further requests that the ALJ make such findings and conclusions without taking oral testimony. In support of its Motion, Counsel for the General Counsel shows that:

1. The American Federation of Government Employees, Local 1858 (the Union) filed the underlying charge on December 10, 1998. The Union filed an amended charge on July 29, 1999. Copies the charge and amended charge were served on Respondent. A copy of the original charge is attached as G.C. Ex. 1(a). A copy of the statement of service for the original charge is attached as G.C. Ex. 1(b). A copy of the amended charge is attached as G.C. Ex. 1(c). A copy of the statement of service for the amended charge is attached as G.C. Ex. 1(d).

2. On July 30, 1999, the General Counsel for the Federal Labor Relations Authority, by the Regional Director, under section 7104(f)(2) of the Statute, as amended, and section 2424.10(a)(4) of the Rules and Regulations of the Authority, as amended, issued a Complaint and Notice of Hearing (Complaint) which is attached hereto as G.C. Ex. 1(e). The Atlanta Regional Director caused copies of the Complaint to be

served by certified mail upon Respondent and the Union. On August 10, 1999, the Regional Director issued an Amended Complaint and Notice of Hearing (G.C. Ex. 1(f)), which was similarly served upon the parties.

3. The Amended Complaint alleges that Respondent violated § 7116(a)(1) and (5) of the Statute by: (1) repudiating an agreement of March 20, 1997, to negotiate term collective bargaining agreements for professional and non-professional employees (G.C. Ex. 1(d), ¶¶ 18, 21); and (2) refusing to negotiate new term agreements to the extent required by the Statute (G.C. Ex. 1(d), ¶¶ 19, 21). The Amended Complaint also alleges that such conduct violates the statutory duty to negotiate term agreements contained in § 7114(a)(4) and 7114(b)(1), (2) and (3), thereby violating § 7116(a)(8) of the Statute (G.C. Ex. 1(d), ¶¶ 20, 22).

4. On September 7, 1999, Respondent submitted a letter in response to the Amended Complaint. In the letter, Respondent did not specifically address each paragraph of the Amended Complaint, nor deny any of its factual allegations. Accordingly, pursuant to § 2423.20(b) of the Authority's Rules and Regulations, as amended, the Respondent, has admitted all the facts which form the basis for the alleged violation. Respondent did provide an explanation for its conduct, whereby it essentially disagrees with the General Counsel's interpretation of the Authority's Regulations. Thus, the dispute is a pure legal issue appropriate for disposition without necessity for a hearing. For the reasons more fully set forth in the attached Brief in Support of this Motion, Counsel for the General Counsel maintains that its Motion for Summary Judgment should be granted, inasmuch as violations of section 7116(a)(1), (5) and (8) have been established.

Respectfully submitted,

Counsel for the General Counsel

September 14, 1999
Atlanta, Georgia

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
ATLANTA REGION

UNITED STATES ARMY AVIATION AND MISSILE COMMAND REDSTONE ARSENAL, ALABAMA **Respondent** **and** **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858** **Charging Party**	**Case No. AT-CA-99999**

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. Statement of the Case

The American Federation of Government Employees, Local 1858 (the Union), filed a charge against the United States Army Aviation and Missile Command, Redstone Arsenal, Alabama (Respondent), on December 10, 1998, and an amended charge on July 29, 1999. Thereafter, on July 30, 1999, the Regional Director for the Atlanta Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing, and, subsequently, on August 10, 1999, an Amended Complaint and Notice of Hearing, alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, by failing to engage in negotiations for new term collective bargaining agreements with the Union for its professional and non-professional bargaining units. The Respondent filed a letter in response on September 7, 1999, whereby it did not contest the factual allegations, but offered argument as to why its conduct did not violate the Statute.

Section 2423.20(b) of the Authority's Rules and Regulations provides in part that, "Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission." Accordingly, the factual allegations in the complaint must be deemed to be admitted in their entirety. The only issue for determination, therefore, is the legal issue as to whether Respondent, in light of the Authority's amended representation regulations, was obligated to engage in negotiations for new term collective bargaining agreements.

II. Issues

A. Whether Respondent repudiated an agreement to engage in negotiations.

B. Whether the Authority's Regulations require Respondent to engage in negotiations for new term agreements notwithstanding the pendency of representation petitions.

C. Whether Respondent's conduct violates the statutory duty to negotiate new term agreements in good faith under § 7114(a)(4) and 7114(b)(1),(2) and (3) of the Statute.

D. Whether the General Counsel is entitled to judgement in its favor as a matter of law.

III. Statement of the Facts

As noted above, the facts are not in dispute. As alleged in the Amended Complaint, the Union, on February 25, 1997, requested "to commence renegotiations on the MICOM Non-Professional and Professional Agreements." On March 20, 1997, the Respondent agreed, in writing, to "pursue this matter as expediously [sic] as feasible," and to contact the Union "to set up meetings to begin the negotiation process by developing prenegotiation agreements." At this time, there was no representation issue pending. However, Respondent, aware of an impending reorganization planned for October 1997, opined that the negotiations could not be completed prior to that time. By letter of March 26, 1997, the Union agreed that completion of the negotiations prior to October 1997 was unlikely, but asserted that "this should not hinder the process." The Union named its negotiating team members and requested that Respondent do the same by April 8, 1997. Copies of the aforementioned letters of February 25, 1997, March 20, 1997, and March 26, 1997 (G.C. Ex. 2-4), are attached as supporting documentation.

The Respondent did not reply. In October 1997, the aforementioned reorganization took place, and the two affected labor organizations, including the Union, filed representation petitions in Case Nos. AT-RP-80005 and At-RP-80007, filed October 22, 1997, and November 10, 1997, respectively. Copies of those petitions are attached (G.C. Ex. 5 and 6) as supporting documentation. The parties maintained, and continue to maintain, the previously existing recognitions during the pendency of those petitions. See Department of the Army, U.S. Army Aviation Missile Command (AMCOM), Redstone Arsenal, Alabama, 55 FLRA No. 108, 55 FLRA 640 (1999).

By letter of September 18, 1998, the Union renewed its request to "renegotiate the MICOM Non-Professional Agreements which is now known as the U.S. Army Aviation and Missile Command instead of the U.S. Army Missile Command." By letter of October 23, 1998, Respondent refused to negotiate, citing as justification the Authority's Regulations:

> As you know, a representation proceeding concerning the status of union recognition in the U.S. Army Aviation and Missile Command is ongoing before the Federal Labor Relations Authority as a result of petitions filed by your Union and the National Federation of Federal Employees. In accordance with Section 2422.34, 5 Code of Federal Regulations, Chapter XIV (copy enclosed), the parties are obligated to adhere to existing collective bargaining agreements while such a representation proceeding is pending. Since alteration of the

> agreements in question at this time would contradict this provision, I must respectfully decline your request to renegotiate.
>
> When the aforementioned representation proceeding is completed, renegotiation of the agreements may then be permissible and appropriate.

Copies of the September 18, 1998, and October 23, 1998, letters are attached as supporting documentation (G.C. Ex 7 and 8).

The regulation referenced by the Respondent provides, in § 2422.34(a), that "[d]uring the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, **and fulfill all other representational and bargaining responsibilities**. . . ." (Emphasis added).

IV. Argument

A. Respondent repudiated its agreement of March 20, 1997, to renegotiate the term agreements.

In Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991) (Warner Robins), the Authority considered whether an agency's failure or refusal to honor an agreement constituted a repudiation:

> We find that the nature and scope of the failure or refusal to honor an agreement must be considered, in the circumstances of each case, in order to determine whether the Statute has been violated. Because the breach of an agreement may only be a single instance, it does not necessarily follow that the breach does not violate the Statute. . . . Rather, it is the nature and scope of the breach that are relevant. Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute.

Id. at 1218-19. In Warner Robins, the Authority found a repudiation when the agency failed to place a union negotiator on the day shift during negotiations so that he could be on official time even though there was only a single instance of refusal. In other words, there are certain types of agreements that by their very essence require "one-time" action to ensure compliance.

The instant case is one such agreement. Either the Respondent follows through with the agreement to negotiate or it does not. Here, Respondent refused to follow through with the agreement. Accordingly, its clear breach of its commitment, even though a one-time event, goes to the heart of the agreement, thereby constituting a repudiation in violation of section 7116(a)(1) and (5) of the Statute. Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996).

B. Pursuant to the Authority's new representation Regulations, Respondent is required to negotiate new collective bargaining agreements even during the pendency of the representation petitions.

Once a union has been certified as the exclusive representative of employees in a bargaining unit, that certification does not cease during the processing of a representation petition that raises a question concerning representation until the Authority resolves the question(s) raised by the petition. Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina, 48 FLRA 686 (1993). Long-standing case law requires, as Respondent points out, that an agency is required to accord recognition to its employees' union and to adhere to collective bargaining agreements, during the pendency of a representation petition involving the unit the union has been certified to represent. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey, 3 FLRA 658 (1980); Department of Energy, 2 FLRA 838 (1980).1/ Indeed, in the instant case, as noted above, the parties have continued to adhere to the recognitions as they existed prior to the filings of the representation petitions.

The Authority codified in section 2422.34(a) of its Regulations the obligation to maintain existing recognitions during the pendency of a representation proceeding. That subsection, which is at issue here, provides that:

> During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, **and fulfill all other representational and bargaining responsibilities.**

(Emphasis added). Thus, the new regulation assures that employees will continue to enjoy the benefit of their selection of an exclusive representative for their appropriate bargaining unit until the Authority, exercising its sole authority, decides that the union no longer represents the unit. The new substantive rule created by section 2422.34(a) of the Regulations also demonstrates the Authority's intent to assure that the union certified to represent a bargaining unit retains all of its rights and duties with respect to that unit during the pendency of representation proceedings. Prior to promulgation of section 2422.34(a), an agency was obligated to maintain existing conditions of employment during the pendency of representation proceedings, to the maximum extent possible, unless changes were required consistent with the necessary functioning of the agency. Defense Distribution Region West, Lathrop, California, 47 FLRA 1131, 1134 n.1 (1993). Changes other than those necessary for the functioning of the agency could not be made even at the union's request. See Immigration and Naturalization Service, 16 FLRA 80, 87 (1984).

What Respondent misses here is that section 2422.34(a) lifted the restriction on making changes during the pendency of representation proceedings; it "permit[s] changes after representational and collective bargaining responsibilities under the Statute are satisfied . . . and require[s], among other things, **bargaining over and execution of a term agreement during the pendency of certain petitions."** Authority's Proposed Representation

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1/ The latter two decisions were based on Executive Order 11491, not the Statute. However, as shown by the next paragraph in the text above, the Authority effectively adopted them in 1985 during proceedings leading to the promulgation of section 2422.34 of its Regulations.

Regulations, 60 Fed. Reg. 39880 (1995). Thus, the Authority has clarified that one of the "other representational and bargaining responsibilities" the parties must continue during the pendency of a petition, pursuant to section 2422.34(a) of the Regulations, is the obligation to negotiate and execute term agreements. § 7114(a)(1) and 7114(b)(1),(2) and (3) of the Statute. Accordingly, Respondent cannot simply rely on the previous clause in the Regulation– "adhere to the terms and conditions of collective bargaining agreements–" to the exclusion of the requirement to fulfill all **other** responsibilities.2/

The Authority's new Regulation is consistent with private sector case law as well. The National Labor Relations Board has continually held that "the mere filing of a representation petition by an outside, challenging union will no longer require, or permit an employer to withdraw from bargaining or executing a contract with an incumbent union." Jasco Industries Inc., 328 NLRB No. 27 (1999), 1999 WL 274414 (N.L.R.B.), citing RCA del Caribe, Inc., 262 NLRB 963 (1982); Celebrity, Inc. 284 NLRB 688, 690 (1987). In RCA del Caribe, the Board announced its policy reasons for departing from the previous long-standing requirement (known as the Midwest Piping doctrine) that employers maintain strict neutrality by not bargaining after a rival union has challenged the incumbent's status:

> We have concluded that requiring an employer to withdraw from bargaining after a petition has been filed is not the best means of assuring employer neutrality, thereby facilitating employee free choice. Unlike initial organizing situations, an employer in an existing collective bargaining relationship cannot observe strict neutrality . . . if an employer continues to bargain, employees may perceive a preference for the incumbent union, whether or not the employer holds that preference. On the other hand, if an employer withdraws from bargaining . . . this withdrawal may more emphatically signal repudiation of the incumbent and preference for the rival. . . . .
>
> For the foregoing reasons, we have determined that the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union . . .
>
> . . . Consequently, in the ensuing election, employees will no longer be presented with a distorted choice between an incumbent artificially deprived of the attributes of its office and a rival union placed on an equal footing with the incumbent.

262 NLRB at 965-66.

Respondent argues that the above rule should apply only where negotiations have already commenced, i.e., that it need not **begin** to negotiate a new term agreement after the filing of the petition. While it is true that in the circumstances of the Rio del Caribe case, negotiations had in fact already commenced, there are several reasons why Respondent's argument does not excuse its conduct in this case. First, the Authority's regulations

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2/ It is noteworthy that Respondent has engaged in negotiations concerning changes in conditions of employment, such as AWS, under the new regulations, contrary to the previous requirement to maintain the status quo. A copy of an MOU between the parties dated May 19, 1999, is attached (G.C. Ex. 9) as supporting documentation. Apparently, it is only the requirement to negotiate term agreements that Respondent does not recognize under the new Regulations.

place no such limitation on an agency's duty to negotiate a term agreement. Second, in the circumstances of this case, the Union's initial request to negotiate new term agreements, and Respondent's agreement to enter into such negotiations, occurred in February and March 1997, well prior to the filing of the petitions here and well prior to the reorganization that prompted the filing of the petitions. As the parties both recognized at that time, the fact that a reorganization was on the horizon did not change the obligation to bargain. Respondent, after agreeing initially to expeditiously pursue renegotiation, should not be allowed to do as it did here -- to fail and refuse to respond to the Union's request that it name a bargaining team, thereby delaying the actual exchange of substantive proposals until a petition is then filed and then claim that such petition prevents it from "commencing" negotiations. Thus, the General Counsel submits that even assuming that Respondent is correct in asserting that the Authority's Regulations are to be interpreted narrowly to only require bargaining if negotiations have already commenced, the parties, in the circumstances of this case, did in fact commence the bargaining process with its exchange of letters in early 1997-- well before the filing of the petitions in October and November of that year.

C. Respondent's conduct set forth above also violates section 7114(a)(1) and 7114(b)(1), (2) and (3) of the Statute, thereby constituting a violation of section 7116(a)(8) of the Statute.

Section 7114(a)(1) of the Statute provides, in part, that "a labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, **and negotiate collective bargaining agreements** covering, all employees in the unit." (Emphasis added). As demonstrated above, the Authority's Regulations have clarified that the Union's entitlement to negotiate collective bargaining agreements continues even during the pendency of the representation petitions. Accordingly, Respondent's refusal to engage in term agreement negotiations has unlawfully deprived the Union of this entitlement in violation of § 7114(a)(1) of the Statute.

Section 7114(b)(1), (2) and (3) details obligations of the parties with respect to their conduct during such negotiations, including the duty to (1) approach the negotiations with a sincere resolve to reach a collective bargaining agreement; (2) to be represented at the negotiation by duly authorized representatives prepared to discuss and negotiate on any condition of employment; and (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays. In the instant case, Respondent violated § 7114(b)(1) by refusing to negotiate; Respondent violated section 7114(b)(2) by failing to even designate (in response to the Union's specific request), much less send, to the table duly authorized representatives; and Respondent violated § 7114(b)(3) by refusing to further respond to the Union after March 1997, thereby creating unnecessary delay and failing to meet at reasonable times.

Therefore, by violating the above-cited provisions, Respondent has committed unfair labor practices within the meaning of § 7116(a)(8) of the Statute, by failing and refusing "to comply with any provision of this chapter."

D. The General Counsel is entitled to judgment in its favor as a matter of law.

The Authority has adopted Rule 56 of the Federal Rules of Civil Procedure, which covers requirements for summary judgments. U.S. Equal Employment Opportunity Commission, 51 FLRA 248, 252-53 (1995), rev'd on other grounds sub nom, Department of the Navy, U.S. Naval Ordnance Station, Louisville, KY. v. FLRA, No. 88-1861 (D.C. Cir. Aug.9, 1990) (unpublished). Rule 56 provides that summary judgment is appropriate when all material facts have been admitted or cannot be not contested and the admitted facts entitle the moving party to judgment as a matter of law. Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tenn., 50 FLRA 220, 227 (1995).

In the instant case, as shown in this argument, the amended complaint's pleadings make out unfair labor practices under § 7116(a)(1), (5) and (8). The Respondent, by its failure to deny the factual allegations, has admitted each material fact. Accordingly, the General Counsel is entitled to judgment in his favor as a matter of law. Counsel for the General Counsel urges the Judge to so find a violation and grant the recommended Order and Notice to All Employees. As a remedy, the General Counsel requests a cease and desist order and a notice posting signed by the facility commander. A copy of the proposed recommended Order (attached as Appendix "A") and language for the Notice (attached as Appendix "B.")

Respectfully submitted,

Counsel for the General Counsel

September 14, 1999
Atlanta, Georgia

APPENDIX "A"
PROPOSED ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the United States Army Aviation and Missile Command, Redstone Arsenal, Alabama, shall:

1. Cease and desist from:

   i. Refusing to renegotiate collective bargaining agreements for the nonprofessional and professional employees currently covered by the MICOM agreements;

   ii. Repudiating agreements with the Union to renegotiate such agreements;

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

Take the following affirmative action:

(1) Renegotiate with the Union, upon request, the collective bargaining agreements with a sincere resolve to reach agreement;

(2) Post at its facilities located at Redstone Arsenal, Alabama, 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 the Commander, United States Army Aviation Missile Command, and they 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(3) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

APPENDIX "B"
PROPOSED NOTICE TO ALL EMPLOYEES

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Army Aviation Missile Command, Redstone Arsenal, Alabama, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT refuse to negotiate new collective bargaining agreements with the American Federation of Government Employees, Local 1858, (the Union), the exclusive representative of professional and non-professional units of our employees, currently covered by collective bargaining agreements with MICOM, notwithstanding the pendency of representation petitions questioning the status of the Union as exclusive representative.

WE WILL NOT repudiate agreements with the Union to negotiate such agreements with the Union.

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

WE WILL, upon request, enter in good faith negotiations as required by the Statute wit a sincere resolve to reach collective bargaining agreements with the Union, represented by duly authorized representatives, and meeting at reasonable times and convenient places as frequently as may be necessary, avoiding unnecessary delays.

Date: _____ By: _____
(Signature) (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.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303, and whose telephone number is: (404) 331-5212.