UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE NAVY NAVY PUBLIC WORKS CENTER NORFOLK, VIRGINIA Respondent and TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL Charging Party	Case No. WA-CA-01-0310

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 1, 2002**, and addressed to:

Office of Case Control Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 31, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 31, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE NAVY
NAVY PUBLIC WORKS CENTER
NORFOLK, VIRGINIA
Respondent

and Case No. WA-CA-01-0310

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

02-43

WASHINGTON, D.C.

DEPARTMENT OF THE NAVY NAVY PUBLIC WORKS CENTER NORFOLK, VIRGINIA Respondent and TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL Charging Party	Case No. WA-CA-01-0310

Mr. Regional D. Moss, Esquire
For the Respondent

Mr. Clarence E. Smith, Jr.
For the Charging Party

Lisa Belasco, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the

United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent repudiated a provision of the parties' Agreement by refusing to grant a grievance when Respondent failed to issue its decision timely. Because the Agreement provided that, "the EMPLOYER's failure to answer within the time limits means that the grievance is sustained unless doing so precludes the EMPLOYER from exercising its statutory management rights." (Emphasis supplied), I conclude, for reasons fully set forth hereinafter, that Respondent did not repudiate this provision of the Agreement.

This case was initiated by a charge filed on February 27, 2001 (G.C. Exh. 1(a)) and a first amended charge filed on August 27, 2001 (G.C. Exh. 1(b)). The Complaint and Notice of Hearing issued on August 31, 2001 (G.C. Exh. 1(c)) and set the hearing for January 8, 2002, in Norfolk, Virginia, at a place to be determined; by Notice issued on December 26, 2001, the place of hearing was fixed (Jt. Exh. 1(g)); and pursuant therein, a hearing was duly held on January 8, 2002, in Norfolk, Virginia, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence hearing on the issue involved, and were afforded the opportunity to present oral argument, which all parties waived. At the conclusion of the hearing, February 8, 2002, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on, or before, February 22, 2002, which have been carefully considered. Upon the basis

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

of the entire record[2], I make the following findings and conclusions.

FINDINGS

1. The Tidewater Virginia Federal Employees Metal Trades Council (hereinafter, "Union") is the exclusive representative of some 1300 wage grade employees of the Department of the Navy's Public Works Center, Norfolk, Virginia (hereinafter, "Respondent").

2. At all times material, the parties were operating under an April 2, 1996, collective bargaining agreement (hereinafter, "Agreement") whose initial term was three years (Jt. Exh. 2; Tr. 25-26); however, the parties entered into a Memorandum of Understanding (MOU) which provided that the 1996 Agreement would remain in effect until a new contract, which was then in negotiation, was signed (Tr. 25-26, 74). A new agreement was signed on, or about, January 23, 2001 (id.)

3. Respondent contracted with Tidewater Community College to teach courses at Respondent's training facility during working hours (Tr. 32-33). Two of the courses were: "Drafting 195, Topics in Construction Blueprint Reading" and "Electrical 131, National Code 2." (Tr. 31).

4. Sheet metal mechanics: Messrs. Stephen Barrett, Jeff Latta and Richard Copeland, who work in the Maintenance Department, requested permission to attend one or the other

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2/ General Counsel's Motion to Correct Transcript, with which Respondent agrees, is Granted; and the transcript is hereby corrected as follows:

p. 23, l. 6, "sold" to "hold"
p. 28, l. 14, "mute" to "moot"
p. 42, l. 11, "as" to "his"
p. 49, l. 23, "agreements" to "a grievance"
p. 75, l. 15, "mute" to "moot"
p. 86, l. 24; p. 87, l. 1; p. 87, l. 6, "repudiated" to "repeated".

of the courses identified in paragraph 3, above[3], during working hours and when their requests were denied each filed a grievance on August 29, 2000.

Captain Rieger testified, without contradiction, that Respondent's policy was, and is, to provide employees training during normal working hours that was necessary and required in order to do their jobs. He further stated, ". . . if it was a type of training whereby the procedures had changed and they needed to go to that training in order to keep up with their skills, then we would provide that training during normal working hours. Other training that was related to what they were doing -- related to their field but not required -- we would allow the employees to go to that training, would pay for that training, but would do that after normal working hours." (Tr. 101-02).

5. The requests of Messrs. Barrett, Latta and Copeland were denied because the training was not required for their jobs and each filed a grievance on August 29, 2000 (Jt. Exhs. 3, 4 and 5) which were consolidated on October 17, 2000. The grievances were not resolved at Step two and were appealed to Step 3 on October 17, 2000 (Tr. 34-36).

Captain, then Commander, Michael N. Rieger, held a Step 3 grievance meeting on November 13, 2000 (Tr. 36). Pursuant to the Agreement, a written decision within five work days after the Step 3 meeting ordinally is required; however, the parties fixed December 1, 2000, as the reply date. But, Respondent was granted four ten day extensions of time (Tr. 38-39). The parties met again on January 10, 2001. Respondent requested a further extension of time which was denied (Tr. 41) and, whether the written decision was due on January 18, 2001, as the Union, stated (Jt. Exh. 8, p. 2) or on January 16 or 17 (if Saturday is not a "workday") as a literal reading of the Agreement would suggest, there is no dispute that Respondent's decision was late. Respondent's written decision was dated January 19, 2001 (Jt. Exh. 7) and the Union stated, it was not received until January 22, 2001 (id.)

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3/ Messrs. Barrett and Latta sought "Drafting 195, etc." (Jt. Exh. 3-4) and Mr. Copeland sought "Electrical 131, etc" (Jt. Exh. 5) (Consolidated, Jt. Exh. 6, October 17, 2000).

6. Article 31, Section 9(b) of the Agreement provides, in pertinent part, as follows:

> "Failure to answer within the time limits prescribed in each step of the grievance procedure shall permit the aggrieved to refer the case to the succeeding step of the procedure, except at Step 3 where the EMPLOYER's failure to answer within the time limits means that the grievance is sustained unless doing so precludes the EMPLOYER from exercising its statutory management rights. . . ." (Jt. Exh. 2).

7. Following Respondent's denial of the grievances (Jt. Exh. 7), the Union on January 26, 2001, notified Respondent that pursuant to Article 31, Section 9(b),

> ". . . failure to answer a third 3 step Grievance within the time limit means that the Grievance is sustained. . . ." (Jt. Exh. 8, p. 2).

8. Respondent replied by memorandum dated January 29, 2001, stating in pertinent part as follows:

> ". . . On 26 January 2001, I received your memorandum stating that the time limit for a decision had been violated and therefore the ". . . grievance is sustained." As you know, reference (a) provides relief for a grievant if the allowed time limits are violated. Reference (a) also states that failure to answer within the time limit of a step three grievance will result in sustaining the grievance ". . . unless doing so precludes the EMPLOYER from exercising its statutory management rights." <u>In this case, to grant the grievance would violate the right of management to assign work</u>. Your request that the grievants ". . . be made Whole (sic)" is denied. . . ." (Jt. Exh. 9, p. 2)(Emphasis supplied).

9. The Union filed the charge herein on February 27, 2001 (G.C. Exh. 1(a)).

CONCLUSIONS

In this case, the "but for" limitation on a late decision at Step 3 is clear and without qualification. It states that failure to answer within the time limit of a step three grievance will result in sustaining the grievance,

> ". . . unless doing so precludes the EMPLOYER from exercising its statutory management rights. . . . (Jt. Exh. 2, Article 31, Section 9(b)).

There is no dispute that assigning employees to "on-the-clock" training interferes with Respondent's § 6(a)(2)(B) right to assign work. Respondent reasonably interprets the limitation as attaching only when it would preclude management from acting, here, its right to assign work. Where, for example, it has acted by assigning overtime, an untimely Step 3 decision on the payment of an overtime premium would result in the granting of the grievance because paying, or not paying, the overtime premium would not interfere with its right to assign the overtime (Resp. Exh. 1; Tr. 144-45). By way of contrast, again, a disciplinary case would fall squarely within the limitation because it concerns Respondent's action of imposing discipline (Tr. 133-34).

The Complaint asserted that, "Since January 26, 2001, the Respondent has repudiated . . . . [Article 31, Section 9 (b) of the collective bargaining agreement] (G.C. Exh. 1(c), Paras. 24, 19). In Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996) (hereinafter, "375th Mission Support Squadron"), the Authority stated the following with respect to whether a refusal to honor a contract provision constitutes a repudiation of that agreement,

> "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. [Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1218-19 (1991)].

". . . See Cornelius v. Nutt, 472 U.S. 648, 664 (1985) (if the violation of an agreement provision constitutes a clear and patent breach of the terms of the agreement, then the union may file an unfair labor practice charge with the Authority), citing Iowa National Guard and National Guard Bureau, 8 FLRA 500, 510-11 (1982); Panama Canal Commission, Balboa, Republic of Panama, 43 FLRA 1483, 1507-09 (1992), reconsideration denied, 45 FLRA 1075 (1992) (the respondent's actions in unilaterally terminating employees' negotiated right to appeal adverse actions through the administrative appeals procedures went to the heart of the parties' agreements and constituted a repudiation of the agreement provisions). See also Department of Defense Dependents Schools, 50 FLRA 424, 426-27 (1995).

"Consistent with the foregoing, two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?) The examination of either element may involve an inquiry into the meaning of the agreement provision allegedly breached. However, for the reasons that follow, it is not always necessary to determine the precise meaning of the provision in order to analyze an allegation of repudiation. (footnote omitted)

"Specifically, with regard to the first element, it is necessary to show that a respondent's action constituted 'a clear and patent breach of the terms of the agreement [.]' Cornelius v. Nutt, 472 U.S. at 664 (citation omitted). In those situations where the meaning of a particular agreement term is unclear,

> acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement. (footnote omitted) Cf., e.g., Crest Litho, Inc., 308 NLRB 108, 110 (1992)(NLRB will not find a violation "if the record shows that 'an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.'") (citing Vickers, Inc., 153 NLRB 561, 570 (1965)). . . ." 375th Mission Support Squadron, 51 FLRA at 861-63.

To like effect, United States Department of the Air Force, Seymour Johnson Air Force Base, 57 FLRA No. 172 (May 15, 2002)(Slip opinion at 8-9).

Here, of course, the meaning of the qualification in Article 31, Section 9(b), ". . . unless doing so precludes the EMPLOYER from exercising its statutory management rights," is clear, unambiguous, and wholly without limitation. As noted there is no question that to grant the grievance because the decision was issued, by the Union's calculation, one day late, would require providing of training "on-the-clock" for the employees involved (Mr. Barrett is no longer employed by Respondent (Tr. 44)) which plainly would preclude Respondent's exercise of its management right to assign work. Respondent, in refusing to grant the grievance for its late answer, applied the clear provisions of the Agreement and the assertion that Respondent repudiated Article 31, Section 9(b) is wholly without basis.

If, contrary to my conclusion above, it were deemed that it was ambiguous whether granting the grievance and requiring that the training be given "on-the-clock" precluded Respondent's exercise of its right to assign work, nevertheless, Respondent's interpretation was reasonable and consistent with the language of the Agreement; and, as the Authority has noted when, ". . . acting in accordance with a reasonable interpretation of that term, even it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement" 51 FLRA at 862.

As the Union's Position Paper shows with respect to the 1986 FSIP proceeding, when the provisions of Article 31, Section 9(b) first were incorporated in the 1986 Agreement and "rolled over" to the 1996 Agreement (Tr. 147),

> ". . . Recognizing the Employer's statutory rights the Union has added to the existing Contract language the caveat that, should the Employer fail to meet the time limits in grievance processing the grievance would be sustained 'unless it would bar the Employer from exercising statutory management rights.' If such were the case the grievance would progress to the next higher level with the time limit/management rights question as another issue in the grievance. . . ." (Resp. Exh. 4, p. 2).

Not only did the Union in its proposal, which was incorporated, state that the grievance would progress to the next higher level [arbitration] with the time limit/ management rights question as another issue in the grievance, but, clearly, the Union recognized that: a) the Employer would decide whether granting the grievance would bar it from exercising statutory management rights; and b) there could be disagreements over the time limit/management rights question. Respondent, by doing what the Agreement provided it could do, most assuredly was not repudiating the Agreement.

Because Respondent did not repudiate Article 31, Section 9(b), it did not violate §§ 16(a)(5) or (1) of the Statute and, accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-01-0310 be, and the same is hereby, dismissed.

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WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 31, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-01-0310, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NUMBERS**:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 31, 2002
WASHINGTON, DC