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

MEMORANDUM DATE:
April 6, 2007

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
SAN FRANCISCO, CALIFORNIA

Respondent

and Case No. SF-CA-06-0399

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2391, AFL-CIO

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his 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 – 2423.41, 2429.12, 2429.21 – 2429.22, 2429.24 – 2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 7, 2007**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____
RICHARD A. PEARSON

Administrative Law Judge

Dated: April 6, 2007
Washington, DC

OALJ 07-14

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

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Charging Party

Vanessa G. Lim
For the General Counsel

Gwen Anderson
For the Respondent

Barbara Brandt
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On April 28, 2006, the American Federation of Government Employees, Local 2391, AFL-CIO (the Charging Party or Union) filed an unfair labor practice charge against the U.S. Department of Labor, Employment Standards Administration, Wage

and Hour Division, San Francisco, California (the Respondent or Agency). After conducting an investigation, the Regional Director of the San Francisco Region of the Authority issued a complaint against the Respondent on August 22, 2006, alleging that it violated section 7116(a)(1) and (5) of the Statute by refusing to implement the terms of an agreement that it had previously negotiated with the Union. The Respondent filed an answer to the complaint, admitting some of the factual allegations but denying that it had negotiated an agreement with the Union or committed an unfair labor practice.

A hearing was held in the matter on November 9, 2006, in San Francisco, California, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record,[1/] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive collective bargaining representative of a nationwide unit of employees of the U.S. Department of Labor (DOL). At all times material to this case, AFGE and DOL have been parties to a collective bargaining agreement (CBA) covering, *inter alia*, the employees involved in this case. The Charging Party, a labor organization within the meaning of section 7103 (a)(4) of the Statute, is an agent of the AFGE for the purpose of representing employees at DOL offices in San Francisco and several western states. Tr. 18.

The Respondent, an agency within the meaning of section 7103(a)(3) of the Statute, is the Regional Office for the Wage and Hour Division's Western Region. It is headed by the Regional Administrator, George Friday, and its San Francisco office includes about seventeen bargaining unit employees and

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[1/] The transcript is hereby corrected as follows: page 42, line 13, should read, "-- we wanted them to be on the right-hand side of the floor plan,"; page 185, line 20, should read, "I did not have a copy of Ms. Brandt's plan . . ."

about seven management officials. Joint Ex. 2. Although a few employees are not assigned to a particular unit, most of the Regional Office staff work in one of three groups: the Wage Survey and Government Contracts (Wage Survey) group, the Migrant and Seasonal Workers Protection Act (MSPA) group, and the Back Wages-Civil Monetary Penalties (BCDS) group. Tr. 34-36, 163-64, 194-95.

The Respondent, along with many other Federal agencies, will soon be moving from its current offices into a new, architecturally-acclaimed Federal Building nearby in downtown San Francisco. The Regional Office will occupy the 13th floor of the building and the District Office will be on the 18th floor.[2/] Tr. 105-106. The dispute in this case concerns the negotiations between management and the Union over where each of the groups in the Regional Office will be located. The Union and the General Counsel allege that the Agency verbally agreed to a specific arrangement for the work groups, while the Agency contends that the parties engaged only in preliminary discussions and reached no agreement.

The Agency's primary labor relations spokesperson is Diane Reese Beyer, Director of Operations for the Regional Office, while the spokesperson for the Union is Barbara Brandt, who (at the time of these events) held the positions of President of Local 2391, Vice-President of AFGE, and Local Steward for the Regional Office. Tr. 18-22. Ms. Beyer and Ms. Brandt have known each other, both professionally and socially, for nearly twenty years. Tr. 97-98. Their offices are directly across from each other, within a few feet, and on days when both are in the office, they speak with each other frequently, both formally and informally. As encouraged by the CBA, Beyer and Brandt generally conducted their labor relations business informally, and they often reached oral agreements that were not put into writing. Tr. 24-26; *see also* Joint Ex. 1, Article 23 of the CBA.

The relocation to the new Federal Building has been in the planning stage for at least a few years, with many delays along the way. The General Services Administration (GSA) coordinates the planning on behalf of the Federal tenants and meets with representatives of the agencies on a monthly basis. Tr. 101. Beyer would attend these meetings on behalf of Respondent, and she would pass along to Regional Office

[2/] The San Francisco District Office, which is also managed by the Regional Administrator, is housed separately, and its move to the new Federal Building is not part of the dispute in this case.

managers and to the Union the information and orders issued by the GSA. Tr. 29, 101-04; *see also* Resp. Ex. 2. In the early stages of the planning, Respondent's managers sought to quantify their needs for space and furniture, and Beyer passed the information to GSA and the architects. Tr. 103-04.

The architecture of the new building presents its tenants with certain fixed requirements that limit their options in arranging their offices. For instance, the building's energy conservation design requires that the outer offices be open to allow light into the building, and this in turn means that any closed offices (i.e. supervisors') must be located in the center of each floor. Tr. 107-08, 194, Joint Ex. 2. The design also allows only enough space for a single row of workstations on the south side of the building and a double row of workstations on the north side. *See* Joint Ex. 2, Resp. Ex. 3. As a result, all bargaining unit employees were to be situated in these rows of workstations, on either the north or south side of the building.[3/]

By June or July of 2005, Respondent's managers had held preliminary discussions and identified the areas where each of their offices would be located, in the central area of the floor. Tr. 31-33, 107, 193-94.[4/] Around this same time, some employees were allowed to visit the new offices under construction. Tr. 105. Near the end of July, Respondent and the other Federal agency tenants were notified by GSA that a contract had been awarded to one company to provide furniture for all of them, and they were given materials that included a draft floor plan (Resp. Ex. 1) and choices of the different types of furniture that were available. In response to this, Ms. Beyer approached her Union counterpart, Ms. Brandt, and told her they needed to select a design for employee workstations and to begin figuring out how to fit the bargaining unit employees in the space available. Tr. 114, 115-17.[5/] Over the next two or three weeks, Brandt and Beyer had two discussions in which the prospective floor plan and seating arrangements at the new building were discussed. At

[3/] On the floor plans that were entered into evidence (Joint Ex. 2, G.C. Ex. 4, and Resp. Exs. 1 and 3), the right side of the documents is the south, and the left side is the north.

[4/] Resp. Ex. 1, one of the earliest versions of the proposed floor plan for the Agency, shows the offices of the various Agency supervisors marked in pen by Beyer.

[5/] According to Brandt, the initial conversation occurred in late August or early September of 2005, when Beyer told her they "need[ed] to have a discussion about where the work groups and the employees are going to sit . . . ." Tr. 31, 33.

the end of these discussions (which were not witnessed by anyone other than Beyer and Brandt), Brandt insists that they had reached a full agreement on where each group of employees would be located, while Beyer insists that they had not reached any agreement at all.

While neither Brandt nor Beyer was particularly certain as to the precise dates of their conversations, the documents in evidence provide some context and a likely timeframe. Respondent Exhibit 1 has a handwritten notation at the top, "8/1/05 copy submitted to BB", and Beyer testified that this was when she gave Brandt the materials from GSA. Tr. 112-14. Thus, any conversations between Brandt and Beyer concerning the locations of work groups likely occurred on or after August 1. Resp. Exhibit 2, a memo dated August 30, 2005, addressed to Beyer and other DOL officials, refers to meetings that had been held during the week of August 23-26 between the prospective tenant agencies and the furniture and interior design contractors. Beyer also referred to the upcoming meetings with the furniture contractor as a motivation for her talking to Brandt initially about the floor plan and workstation choices. Tr. 111, 115-16. This would suggest that Beyer and Brandt had their first discussion of these issues sometime between August 1 and August 23. Moreover, if Beyer is correct that their second discussion occurred after GSA issued a stop-work order to the tenants regarding furniture planning (Tr. 124-25), then that second discussion likely occurred sometime after August 30.

The first discussion was initiated by Beyer, who showed Brandt a copy of the floor plan (Resp. Ex. 1) with the proposed location of the supervisors' offices, and who told Brandt that they now needed to figure out how to fit the remaining employees in the allotted space. Tr. 33, 114. From Beyer's perspective, the main purpose of this initial conversation was to select a furniture design, in preparation for the meeting with the contractors the week of August 23. Tr. 115-16, 118-19, 131. In her mind, it was "way too early" to decide where each employee, or even each work group, would be located. Tr. 119. But Brandt viewed the discussion as directed toward "where the work groups and the employees are going to sit[.]" Tr. 33. According to Brandt, she and Beyer sat down together with the floor plan and Brandt wrote the names of the employees in each work group on the top and in the left margin of the document. Tr. 34, 65-68. (Joint Ex. 2 is the same floor plan as Resp. Ex. 1, except that it also has entries written in blue ink by Brandt. Brandt testified that she wrote down the names of the employees during her first

meeting with Beyer and that she made additional markings when she met later with bargaining unit employees. Tr. 65.) Regardless of how each participant viewed the purpose of the conversation, both women agree that they did discuss, at least in general terms, possible locations for each of the main work groups. Tr. 34, 65-66, 131-36. Beyer indicated that MSPA and Wage Survey, as the largest groups, needed to be on the left (north) side of the office, where the double rows of cubicles were situated. Tr. 131-32. Brandt testified that Beyer wanted BCDS to work at the top left corner of the floor. Tr. 39. There was also discussion of placing the MSPA employees and a receptionist at the bottom of the floor plan, which is closest to the entry area of the office. Tr. 38-40, 118-19, 131-32.

After her initial meeting with Beyer, Brandt felt she needed to discuss the floor plan with her unit employees, and she met with a group of them during lunch a short time later. Tr. 41-42. Employees from the different work groups expressed their preferences as to where they would like to sit in the new offices, and based on this, Brandt marked on the floor plan (Joint Ex. 2) where the Union wanted each group to be located. Tr. 42-43, 65.

Brandt initiated the second discussion with Beyer at some point after she had met with her bargaining unit. According to Brandt, it occurred within a few days of her first meeting with Beyer (Tr. 47); according to Beyer, their second discussion occurred some time after the Agency had received the August 30 "stop work" order concerning furniture purchases (Tr. 125, 130-31). Brandt walked into Beyer's office, showed her the floor plan with the additional annotations on it, and explained to her where the Union wanted each group to be located. Tr. 45, 125. As reflected in the additional markings on Joint Ex. 2, Brandt had placed the Wage Survey group in the single row of cubicles on the south side, MSPA at the bottom of the north side, and BCDS in the middle of the north side. According to Brandt, Beyer agreed with the Union's placement of the Wage Survey and MSPA groups but wanted BCDS to be located in the cubicles at the top of the north side. Tr. 45, 47. Brandt testified that she gave Beyer a copy of the modified floor plan and that Beyer said, "I don't really care where the work groups go, and so this is fine" (Tr. 47-48). Brandt described the conversation in this manner: "She -- it was a very off-hand, off-the-cuff, kind of 'It's not a big deal' kind of feeling I got from her." Tr. 74. She estimated this meeting lasted between 15 and 20 minutes. Tr. 69.

According to Beyer's testimony, however, the meeting was much shorter and inconclusive. At some point prior to the meeting, Beyer noted to Brandt that GSA had issued a stop-work order to tenants. Tr. 124. Subsequently, Brandt "breezed in" to Beyer's office, showed her the marked-up floor plan, and said she "agreed where the work groups would be placed, but that Wage Survey is going to switch with Back Wages [BCDS]." Tr. 125. Beyer did not indicate whether she expressed any specific disagreement with Brandt as to the location of particular work groups, but rather she expressed surprise that Brandt was raising the issue, as they had been told to stop their planning activity. *Id.* She said her reply to Brandt was "just a very brief, dismissive 'Barbara, you know we can't move forward.'" *Id.* The entire discussion lasted "like two minutes." Tr. 126.

According to both Brandt and Beyer, they did not discuss the floor plan again until at least the end of January, 2006. Brandt testified that she decided in January to put into writing the terms she and Beyer had agreed upon in September, and that she went to Beyer on January 26 with a memorandum to that effect. Tr. 51-52; G.C. Ex. 2. Brandt said that she walked into Beyer's office, handed her a copy of the memorandum, and told her it was a summary of their prior agreement on the floor plan. She said Beyer took it, set it aside on her desk, and said "Okay", and they then discussed other things. Tr. 53. Beyer denies that this conversation occurred at all or that she saw the memorandum until March. Beyer testified that after their September discussion of the floor plan, the next time the subject came up was in March, when the Agency was notified that the furniture contract dispute had been resolved and the tenants were permitted to resume planning. Tr. 140, 142. She told Brandt in March that they needed to resume discussions about the floor plan, at which time Brandt said that they'd already reached an agreement, and she gave Beyer a copy of the memorandum dated January 26. Tr. 143-44. Beyer told Brandt that they had not reached any agreement earlier, and that the Agency could not accept a floor plan in which the Wage Survey group is located on the right (north) side of the building. Tr. 157-61. Brandt subsequently protested to the Regional Administrator that she and Beyer had reached an agreement concerning the floor plan, but the parties could not resolve the matter consensually. Tr. 54-55, 204-05. The Union then filed its unfair labor practice charge.

DISCUSSION AND ANALYSIS

Positions of the Parties

The General Counsel's primary argument is that the Union and the Agency reached an agreement in August or September of 2005 on the location of work groups in the new offices, and that the Agency committed an unfair labor practice when it later refused to honor or implement that agreement. Despite the fact that this agreement was an oral one, the G.C. cites *Veterans Administration, Outpatient Clinic, Los Angeles, California*, 22 FLRA 399, 416 n.11 (1986) (*VA Los Angeles*), for the proposition that verbal agreements can be binding and enforceable. Regardless of the formality or informality of the negotiations, the Authority's test is whether the "authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317 (1997) (*FAA Standiford*).

The General Counsel relies heavily on the credibility of Brandt's testimony over Beyer's to support its contention that they had come to a meeting of the minds at the end of their second discussion of the floor plan for the new offices. The G.C. asserts that Brandt's description of her discussions with Beyer on this subject was consistent and plausible, while Beyer's testimony differed in significant respects from her earlier statement to the FLRA. Although the negotiations regarding the floor plan were entirely oral, the G.C. cites the notations on the floor plan (Joint Ex. 2) and Brandt's January 26 memorandum (G.C. Ex. 2) as corroborating Brandt's version of what was agreed to. According to the General Counsel, Beyer initiated the floor plan negotiations in her first meeting with Brandt; at their second meeting, Brandt accepted some of the floor plan arrangements proposed by Beyer and offered some modifications; Beyer agreed to those changes at the second meeting, and thereupon the parties had an agreement. In contrast, the G.C. notes that Beyer initially alleged that she only had one conversation with Brandt about the floor plan of the new offices, and that she wrote the locations of the work groups on the floor plan (G.C. Ex. 3 at p. 2); but at the hearing, Beyer described two conversations and admitted that Brandt made the notations on Joint Ex. 2. The G.C. also pointed to an early version of the floor plan (G.C. Ex. 4), on which Beyer had written "4 WS file cabinet" along the south side of the new building, in the single row of

cubicles, as evidence that Beyer and the Agency had at one time considered locating the Wage Survey group on that side. Thus the General Counsel argues that Beyer agreed in August or September to place the Wage Survey group on the south side, as Brandt has insisted all along, and that Beyer and the Agency later sought to disavow that earlier, binding agreement.

The Respondent asserts, however, that Beyer never agreed to the floor plan proposed by Brandt; in particular, she did not, would not, and could not have agreed to locate the Wage Survey group on the south side of the office. The Agency cited both Beyer's testimony and Regional Administrator Friday's that the managers had spent considerable time trying to devise a workable floor plan, and that it could not be done with the Wage Survey group on the south side, in the single row of workstations. Therefore, it would have been extremely implausible for Beyer to bargain away this important issue, in the course of one or two brief conversations with the Union. Moreover, the Agency argues that there is no persuasive evidence that Beyer did agree to this demand. The Respondent does not consider the marked-up floor plan (Joint Ex. 2) to reflect anything more than the wishes of Brandt and the Union, and it denies the document is indicative of a mutual agreement with the Agency. Additionally, Respondent contends that the two Beyer-Brandt discussions regarding the floor plan were not negotiations at all, but simply casual conversations. Reinforcing this view, it cites Brandt's own description of her second conversation with Beyer as "off-hand" and "off-the-cuff" (Tr. 74). Both participants' descriptions of the circumstances of their conversations are inconsistent with the idea of binding contractual negotiations, according to Respondent. The Agency insists that at the end of the second Beyer-Brandt discussion, there had been no negotiations and there was no meeting of the minds.

Alternatively, the Respondent argues that Beyer did not have the authority to agree to locate the Wage Survey group on the south side of the office. It cites non-FLRA cases to the effect that a Federal agency is not bound by the unauthorized acts of one of its agents. *Jackson v. United States*, 573 F.2d 1189, 1197 (Ct. Cl. 1978). Both Beyer and Friday described the management deliberations which concluded that the Wage Survey group would have to be located on the north side, and Beyer testified that she would have had to obtain Friday's approval to make a concession of this nature. The Respondent argues that the efficiency of the Regional Office would suffer considerably if it were forced to put the Wage Survey employees where the Union wants them and urges me not to

impose an unworkable arrangement on it.

In rebuttal to Beyer's alleged lack of authority, the General Counsel asserts that Beyer had either actual or apparent authority to negotiate with the Union and to agree to a floor plan for the bargaining unit employees. It asserts that Beyer had negotiated with Brandt and the Union in the past, and she said or did nothing during their 2005 discussions to suggest that her negotiating authority was in any way limited. Thus, in accordance with Authority precedent, her concessions were binding on the Agency. *See U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II*, 38 FLRA 193 (1990).

The General Counsel asks that the Respondent be ordered to implement the floor plan agreement made by Beyer. Although it does not specify what the terms of this agreement are, it would appear that the General Counsel is referring to the terms contained in G.C. Ex. 2. The Respondent asks that the complaint be dismissed.

Analysis

While I have, at times in the past, decried the tendency of Federal labor relations practitioners to complicate the process by relying too heavily on formalities and legalistic procedures, this case demonstrates the dangers of abandoning formality altogether. Informal negotiations may serve the parties well when they are able to reach agreement; but when the parties fail to agree, or when they dispute the terms on which they have allegedly agreed, an outsider is left with little or no information on which to determine what really happened. The very "formalities" (such as written bargaining proposals and ground rules) that sometimes appear to be time-consuming and inefficient, provide a fact-finder with clues to understand and evaluate the actions of the parties. The absence of such clues makes it very difficult for a fact-finder to ascertain the truth, and for an aggrieved party to sustain a burden of proof.

In this case, the General Counsel is arguing that Beyer and Brandt reached a binding agreement on the location of employee work groups in August-September of 2005, and it is asking that the Agency be required to honor that agreement. The G.C. is certainly correct in stating that informal bargaining may constitute "negotiations" within the meaning of the Statute, and that agreements reached orally are binding. Indeed, the

DOL-AFGE collective bargaining agreement encourages the parties to resolve office space issues informally at the local level, but "informal" does not necessarily mean "off the cuff" or "shooting from the hip."

Even if I were to construe the evidence in the light most favorable to the General Counsel, I am presented here with "negotiations" that consisted of two casual conversations in which no agenda was prepared, no actual notes were made, nothing was signed or initialed, and no email communications explaining the competing proposals and points of agreement were even exchanged during the "negotiations". Neither of the two disputed meetings was scheduled in advance: instead, one participant simply walked a few feet to the other's office uninvited, began a discussion and left without any appreciable trace of what, if anything, they had agreed on or where they disagreed. On the basis of the evidence in this record, I cannot find that there was a negotiated agreement to place the work groups in specific locations in the new building.

I do not dispute some of the preliminary arguments made by the General Counsel. The Authority has held that oral agreements can be binding and enforceable, and that a party's refusal to execute an agreement it has reached orally during negotiations is a violation of section 7114(b)(5) of the Statute and the duty to negotiate in good faith. *See U.S. Department of the Treasury, Bureau of Engraving and Printing and International Plate Printers, Die Stampers and Engravers Union, Washington Plate Printers Union, Local 2*, 44 FLRA 926, 938-39 (1992), and the case cited therein by the Authority, *Department of the Interior, Washington, D.C. and Bureau of Indian Affairs, Washington, D.C. and Flathead Irrigation Project, St. Ignatius, Montana*, 31 FLRA 267, 299 (1988); *see also VA Los Angeles,* 22 FLRA at 416 n.11 (1986). I also agree with the General Counsel that Beyer was held out to the Union as the Respondent's authorized official to conduct ongoing labor-management negotiations, and she had made binding agreements with the Union on prior occasions. If she had agreed to a particular seating arrangement for the Agency's work groups, that agreement would have been binding on the Agency. In this regard, I reject the Respondent's attempt to disavow Beyer's purported actions. *See U.S. Patent and Trademark Office*, 18 FLRA 713, 727 (1985) (*PTO*).

In *FAA Standiford*, the Authority defined an agreement, within the meaning of section 7114(b)(5), as "one in which authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." 53 FLRA at

317. The crucial question in our case, therefore, is whether Beyer and Brandt came to a "meeting of the minds" on a seating arrangement for the new building. *See Internal Revenue Service, North Florida District, Tampa Field Branch, Tampa, Florida*, 55 FLRA 222 (1999). Citing private sector case law as well as its own, the Authority in *IRS* stated that the existence of a collective bargaining agreement is a question of fact, and that while the parties' subjective intentions may be considered in making that determination, the standard is an objective one. *Id.* at 222; *Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987); *Huge v. Overly*, 445 F.Supp. 946, 949 (W.D.Pa. 1978).

The circumstances surrounding the two disputed discussions between Brandt and Beyer leave two distinct impressions on me: first, while Beyer may have discussed a variety of seating arrangements with Brandt, including locating the Wage Survey group on the south side of the office, Beyer never actually agreed to such an arrangement; and second, at all times during these discussions, Beyer viewed them simply as early, preliminary exchanges of ideas that were part of an ongoing decision-making process that could not yet be finalized.

With regard to this latter point, the initial context of the discussions should be noted. Beyer initiated the first meeting, for the express purpose of obtaining Brandt's preference among the possible furniture and workstation choices. She and other DOL tenants were scheduled to meet soon with the furniture contractor and the office designer, at which time she was supposed to select furniture for the Agency. It was this timetable that Beyer had in mind when she approached Brandt, and the subject of identifying where each work group would be located was raised by Brandt, not Beyer. Since Respondent's managers had already discussed possible locations for the various work groups at that time, I am sure that Beyer relayed management's current thinking on the location of work groups to Brandt; but there is nothing about that initial conversation to objectively indicate that Beyer was either seeking or offering any commitments on this issue. Beyer's only goal at that time was to select a style of furniture for the office.

Prior to this first discussion, it appears that Brandt had been occupied with other matters and had not focused on the information she had received from GSA regarding the move to the new building. Once Beyer captured Brandt's attention, however, it appears that Brandt pursued the issue with her bargaining unit. Having heard Beyer's preliminary ideas on

the layout of the new office, Brandt sought the views of her members on the matter, and she then took the employees' ideas back to Beyer. It was in this context that the second discussion occurred. At this point, Brandt was not concerned about the choice of furniture but the location of each work group, even though that had not been Beyer's motivation. Thus, Beyer and Brandt had different agendas at their meetings, and this largely explains their different memories and descriptions of the meetings.

As I noted in my reference to the case law, the question of a "meeting of the minds" is primarily an objective, rather than a subjective one. If a negotiator's disagreement on a material term is not communicated to her counterpart, then it cannot objectively form a basis for evaluating whether an agreement was reached. *Huge v. Overly, supra*, 445 F.Supp. at 949. If Beyer and Brandt had kept silent as to their competing agendas, then I would have to look elsewhere to determine whether they reached a meeting of the minds. But I believe Beyer did effectively communicate her intentions to Brandt, as well as her unwillingness to commit to a particular seating arrangement. This was communicated implicitly at the first meeting, when Beyer initiated the conversation by asking Brandt's furniture preference: she was not asking Brandt for her opinion on where the work groups would sit, because she was not seeking to reach an agreement on that broader issue. Then, at the second meeting, when Brandt sought to pin Beyer down on where the work groups would be located, Beyer told her that it was too early to make a decision on this, and she reminded Brandt that GSA had issued a stop-work order concerning the relocation. This effectively communicated to the Union that Beyer would make no commitments on the floor plan or seating arrangements until some later time. Even Brandt's testimony about the second meeting confirms the impression of "a very off-hand, off-the-cuff" conversation rather than a negotiation. Tr. 74.

In Brandt's view, the stop-work order was irrelevant to the question of where the work groups would sit, but it was quite important to Beyer. Thus, when asked how the contract dispute among the furniture vendors affected the negotiations, Brandt said, "It didn't." Tr. 50. She explained, "it really didn't matter to us – or, to me, as a Union rep doing this negotiation, who sold us the furniture." Tr. 50-51. But to Beyer, who was involved in all logistical aspects of the Agency's office move, the choice of furniture and workstations would enable the office designer to draw up precise floor plans, which would in turn affect the Agency's decisions on

where each work group might feasibly be located. Tr. 119-20, 122, 125, 128-29, 132-33. Thus, while Brandt may not have seen the need to delay a decision on fixing a seating arrangement for the work groups, Beyer did communicate to Brandt that she could not and would not make a commitment at that time. Thus there was no meeting of the minds on this very fundamental point.

Moreover, I do not believe that Beyer specifically agreed to place the Wage Survey group on the south side of the office. Beside the fact that Beyer had no intent to negotiate the seating arrangements at that time, I credit her testimony that she told Brandt in their second conversation that it was too early to decide which group would sit where. Brandt may be correct that in their second conversation, as in their first, the two women discussed the seating arrangement, but I do not believe she is correct that Beyer told her, "I don't really care where the work groups go . . ." Tr. 47-48. Even according to Brandt's version of the two conversations, Beyer expressed definite opinions as to where the BCDS and MSPA groups would work (Tr. 38-39, 45, 48), as well as some individual employees; it is therefore implausible to me that Beyer would not care where Wage Survey, the largest work group by far in the office, would be located. This is particularly true in light of Regional Administrator Friday's testimony, as well as Beyer's, concerning the importance management placed on achieving an efficient layout in the new building (Tr. 107-08, 125, 193-95, 200-203). While, as I said earlier, Beyer had the authority to make agreements with the Union concerning seating arrangements in the new building, I do not believe that she would have agreed to an arrangement that so conflicted with management's internal views without consulting Friday and the other managers.

The General Counsel seeks to discredit Beyer's testimony in a variety of ways, and in some respects I agree that Beyer's recollection is vague and inconsistent as to what precisely was discussed in her two conversations with Brandt. When she gave a statement to the FLRA during the investigation of this case, she did not have Joint Ex. 2, the preliminary floor plan with the additions and markings made by Brandt, and thus she incorrectly stated that she had marked the locations of the work groups on the document. G.C. Ex. 3; Tr. 184-86. This and other inconsistencies do not, however, impeach the underlying point of Beyer's testimony, that she did not agree to any particular seating arrangement, and that she told Brandt that it was premature to make any final decisions on the location of work groups and employees. Beyer's less

specific memory of the conversations with Brandt is attributable to the fact that she never viewed their discussions as anything but preliminary, particularly after GSA had issued a stop-work order to prospective tenants. It is clear to me, on the basis of the entire record, that Brandt attached considerably more importance to these two conversations than Beyer did, and she was trying to pin the Agency down to a commitment on seating arrangements at a time when Beyer was unwilling to commit. Beyer's inability to recall details is a reflection of the fact that she never considered her discussions about seating arrangements to be negotiations at all. Beyer advised Brandt that it was too early to make such decisions, and thus I conclude that no agreement on seating was made between the Agency and the Union.

In arguing that Beyer did agree to a specific seating arrangement, the General Counsel emphasizes the probative value of Joint Ex. 2, the floor plan on which Brandt listed the employees in each work group and marked where the Union wanted each group to be located. The General Counsel asserts that this document is, in effect, a record of the parties' negotiations, functionally equivalent to bargaining notes, and that it reflects the locations agreed upon for each group. Because Brandt crossed out her first choice for the location of the BCDS group, and wrote BCDS again at the top of the page (allegedly at Beyer's insistence), the G.C. argues that the absence of similar markings crossing out the proposed location of the Wage Survey group corroborates Brandt's testimony that Beyer agreed to that location. Similarly, the G.C. asserts that Beyer's failure to dispute the January 26 memo (G.C. Ex. 2) given to her on that date by Brandt reflects her agreement with the contents of the memo.

I am not convinced, however, that such inferences should be drawn from these documents. Joint Ex. 2 is clearly the product of several series of changes and mark-ups over a period of time: it is not a photograph of the parties' negotiations at a particular point in time, but more a moving picture of discussions over a period of time, and the result is not distinct, but a blur. The marks in black pen, identifying the supervisors' offices, were made on one date by Beyer; the names of employees in the left margin were made on a later date; some things were crossed out and added on a third date. I do not believe that the resulting document can be interpreted to represent anything more than the wishes of the Union. There is nothing intrinsic to the document that identifies what, if any, of the markings on it were approved

by Beyer, other than the locations of the supervisors' offices; and I am not persuaded to impute Beyer's assent to any markings on the document, except for the location of the supervisors' offices.[6/]

As for the January 26 memo (G.C. Ex. 2), I credit it as representing the terms of a seating arrangement that Brandt sincerely believed Beyer had agreed to, but I do not believe that Beyer ever agreed to those terms, either in September or in January. Even if Brandt gave the document to Beyer in January, Brandt's description of the conversation makes it clear that the entire conversation took a matter of seconds, and that Beyer simply set the memo aside. Tr. 52-53. Considering this account in combination with Beyer's testimony that she never received the document at all (Tr. 139-40), the record does not support an inference that Beyer substantively reviewed the document and, by her silence, agreed with it.

When the facts of the instant case are compared to some of the cases in which the Authority has found that oral agreements were reached, the paucity of the evidence here is apparent. In *FAA Standiford*, the union president met on four or five occasions over an eight-month period with several agency officials in planning sessions for the design and layout of a new tower facility. Written proposals were submitted by the union, blueprints were exchanged, and reports of the meetings were sent to employees. 53 FLRA at 314, 330-32. Thus, when the parties disagreed as to what had been negotiated, there was a substantial documentary record on which to evaluate the competing assertions. In *VA Los Angeles*, two union witnesses testified as to demands made by the union relating to the relocation of some employees to a new facility; records of monthly labor-management meetings documented both the union's demands and the agency's agreements and disagreements. 22 FLRA at 404-409. And in *PTO*, management and union negotiating teams conducted dozens of bargaining sessions regarding a proposed office space realignment, written proposals were exchanged, and the parties initialed or wrote "agreed to" on each proposal that was approved. 18 FLRA at 718—20. Even though disagreements arose in all these cases as to what had and had not been agreed upon, there was a substantial documentary record on which to evaluate the competing assertions. While it is commendable that the

[6/] Additionally, I do not consider G.C. Ex. 4 to have any probative value. This was never clearly identified as anything other than a very preliminary floor plan, and it is uncertain when Beyer made the markings on them, or for what purpose.

parties in this case have utilized informal negotiation techniques in prior instances successfully, there simply is not enough evidence here to substantiate the Union's claim that an agreement had been reached orally concerning the seating arrangements in the new building.

Therefore, I conclude that the General Counsel has not demonstrated that the Union and the Agency reached an agreement in 2005 as to the location of work groups. Accordingly, the Respondent has not refused to implement an agreement and has not violated the Statute as alleged. I therefore recommend that the Authority issue the following order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, April 6, 2007.

_____
RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. SF-CA-06-0399, were sent to the following parties:

_____

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Dated: April 6, 2007
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