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

MEMORANDUM DATE:
September 25, 2007

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

Respondent

AND Case
No. CH-CA-07-0425

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 238, AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), 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 is a Motion for Summary Judgment a nd other supporting documents filed by the parties.

Enclosures

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

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

Respondent

AND Case No. CH-CA-07-0425

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 238, AFL-CIO

Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to 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 **OCTOBER 29, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: September 25, 2007
Washington, DC

./ The addition of CBA language permitting ex parte arbitration hearings similarly does not make future disputes unlikely. As I noted earlier, the Authority has held since at least 1981 that ex parte arbitration hearings are appropriate; Federal Aviation Administration, 7 FLRA 164, 167-68 (1981). The parties' new modified CBA language simply restates the law.

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

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

Respondent

Case No. CH-CA-07-0425

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 238, AFL-CIO

Charging Party

Greg A. Weddle
For the General Counsel

David E. Mick
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

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 February 5, 2007, the American Federation of Government Employees, Council 238 (the Union or Charging Party) filed an unfair labor practice charge against the U.S. Environmental Protection Agency (the Agency or Respondent). After investigating the charge, the Regional Director of the Authority's Chicago Region issued a Complaint and Notice of Hearing on June 26, 2007, which alleged that the Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute by refusing to participate in an arbitration proceeding as required by section 7121 of

the Statute. On July 19, 2007, the Respondent filed its Answer to the Complaint, denying that it committed any unfair labor practice and asserting that the case was moot.

At the prehearing conference, it became apparent that the facts of the case were not in dispute, and that the case might be resolved by summary judgment. On August 7, 2007, I issued an order that, *inter alia*, indefinitely postponed the hearing and established a schedule for the parties to file motions for summary judgment as they saw fit. On August 16, 2007, Counsel for the General Counsel filed a Motion for Summary Judgment and Statement of Undisputed Facts, and a brief in support thereof. On August 30, 2007, the Respondent filed a response to the General Counsel's pleadings, agreeing with the facts presented by the General Counsel but arguing that these facts do not support a finding that the Agency violated the Statute.

Discussion of Motion for Summary Judgment

The Authority has held that motions for summary judgment, filed under section 2423.27 of its Regulations (5 C.F.R. § 2423.27), serve the same purpose, and are governed by the same principles as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995); *Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky*, 33 FLRA 3, 4-5 (1988). Appropriately, the parties in this case have submitted exhibits and affidavits in support of their motions, and after reviewing these documents fully, I agree that there is no genuine issue of material fact. While the Respondent did not label its pleading as a Cross-Motion for Summary Judgment, it agrees with the General Counsel's statement of facts and asserts that they warrant dismissal of the Complaint, and therefore I am treating it as a Cross-Motion for Summary Judgment.

Accordingly, it is unnecessary to hold a hearing in this case, and it is appropriate to decide the case on the motions for summary judgment. Based on the entire record, I will summarize the material facts, and based thereon, I make the following conclusions of law and recommendations.

Findings of Fact

The Respondent, the U.S. Environmental Protection Agency, is an agency within the meaning of 5 U.S.C. § 7103(a)(3). The Union, the American Federation of Government Employees, Council 238, is the exclusive representative of a unit of the

Respondent's employees, and it is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4). At all times material to this case, the Respondent and the Union have been parties to a collective bargaining agreement (CBA) that provides, among other things, for a grievance and arbitration procedure and for arbitration as the final step of that procedure.

David E. Mick, whose office is in Cincinnati, is a Labor/ Employee Relations Officer for the Agency. Charles Orzehoskie (whose office is in Chicago) is President and Steven Roy (whose office is in Seattle) is Secretary of Council 238.

The case at bar involves plans being made by the Agency to reorganize (and apparently reduce) its libraries at its Washington, D.C., headquarters and its regional offices. It appears that the Agency has been studying this issue since at least 2005, and to oversee the process it formed a steering committee comprised solely of non-bargaining unit employees. G.C. Ex. 2. On March 16, 2006, Orzehoskie submitted a Demand to Bargain with the Agency over the entire subject of library reorganization, and he appointed Roy as the Union's Chief Negotiator on the issue. Affidavit of Roy at 1-2. Mick, who was the Agency's Chief Negotiator on this issue, advised the Union that no decisions had been made concerning library reorganization, and that while the Agency would share information about its plans with the Union and seek the Union's feedback, the Agency had no obligation to bargain until its plans were completed. G.C. Ex. 2 at 2. The Agency also insisted that any future bargaining should not occur at the national level, but at the regions affected by any changes. *Id.* at 1, 2.

On behalf of the Union, Roy filed a formal grievance on August 16, alleging that the Agency violated Article 45 of the CBA and section 7117(a)(1) of the Statute by failing to negotiate with the Union the changes in library operations. G.C. Ex. 2. On October 17, Roy and the Union invoked arbitration of the grievance and asked Mick to contact Union representative Conrad Franz to select an arbitrator. G.C. Ex. 3, 4. Roy followed up this notification with an email dated October 25, in which he stated (G.C. Ex. 5):

> Council 238 has selected Chicago as our preference venue for holding the arbitration concerning the change in library operations and services. Chicago is centrally located in the country making Chicago convenient for the parties.

> Please contact Conrad Franz to make arrangements for selecting the arbitrator. . . .

Article 44 of the CBA, which was in effect in 2006 and early 2007, provides, in pertinent part (G.C. Ex. 6):

> Section 2. The party desiring to submit the grievance to arbitration shall request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons qualified to act as arbitrators. The parties shall meet within five (5) days after receipt by both parties of the list of arbitrators. If they cannot mutually agree upon one of the listed arbitrators, the parties will each strike three (3) names, and the remaining person will be the duly selected arbitrator. The flipping of a coin or other mutual agreeable means will be used to determine which party will strike the first three (3) names.
>
> * * *
>
> Section 11. The arbitration hearings will be held on the Employer's premises.

On October 26, the FMCS mailed to Roy and Mick a list of seven arbitrators and instructions for utilizing the FMCS in pursuing the arbitration. G.C. Ex. 8. Both Roy and Mick received the list of arbitrators on November 3. Roy Affidavit at 2; G.C. Ex. 1(d) at 1. Roy also emailed a copy of the FMCS list to Mick on November 3, and he advised Mick: "Council 238 is ready to select the arbitrator. Pursuant to Article 44, Section 2, please contact me within 5 days of receipt of this list so we can select an arbitrator." G.C. Ex. 7.

On November 9, Mick responded to Roy by email, expressing his disagreement with Chicago as the venue for the arbitration hearing. G.C. Ex. 9. Noting that the CBA is silent on the selection of venue, and stating his view that Washington, D.C., is the appropriate venue for the hearing, Mick said that "the Union's attempt in the absence of contractual authority to unilaterally decide the venue for the instant arbitration" was "unacceptable." *Id.* Mick also indicated that he would provide Roy "very soon" with a counter-proposal to the Union's March bargaining demands on the library issues, and that he hoped bargaining would "preclude the need for actual arbitration." *Id.*

On November 22, Roy responded to Mick's letter with an email of his own, detailing his many unsuccessful attempts to schedule bargaining on the library issues and to select an arbitrator for the library grievance. G.C. Ex. 10. He blamed Mick for failing to communicate or respond in a timely manner on both the negotiations and the arbitration, and he demanded that Mick comply with Article 44, Section 2 of the CBA and select an arbitrator. He also suggested that Mick phone him to discuss the matter. *Id.* at 2.

The next communication between the Union and Agency on these issues was an email from Orzehoskie to Mick, dated February 5, 2007, attaching a copy of the unfair labor practice charge the Union was planning to file against the Agency. G.C. Ex. 11. Mick responded with an email to Orzehoskie the same day, saying that he hoped to avoid having a ULP charge filed (G.C. Ex. 12), but the Union had already filed the charge with the Authority. Mick recounted to Orzehoskie that he had raised a number of concerns to Roy about the Chicago venue and the Union's attempt to select the venue unilaterally. Mick emphasized that "the Agency is willing to arbitrate the Union's GoP over library service changes", but he proposed that a permanent procedure be established for rotating arbitrations between Washington, D.C. and a venue suitable to the Union. He closed the letter by saying: "If we can come to an agreement on venue rotation, the Agency is certainly willing to proceed with the 'library arbitration' in Chicago." G.C. Ex. 12.

On June 25, 2007, representatives of the Agency and Union did select an arbitrator for the library grievance. G.C. Ex. 1(d) at 2. George Larney, one of the arbitrators listed on the FMCS panel, was selected, and the hearing was scheduled for September 25, 2007. Mick Affidavit at 2; Attachment 2 to Agency Response to General Counsel's Motion for Summary Judgement. Additionally, the parties have negotiated a new "Arbitration" article (Article 39) to their national CBA, effective August 1, 2007. Mick Affidavit at 2. Many provisions in the new Article 39 are the same as in the old Article 44, but the new CBA provides that if one party refuses to participate in the selection of an arbitrator, the other party may select the arbitrator unilaterally. Article 39, Section 2 (Attachment 1 to Agency Response at 1). The new CBA also provides for the rotation of arbitration venues and for the arbitrator to resolve disputes regarding venue. Article 39, Section 9D (Attachment 1 to Agency Response at 3).

Discussion and Conclusions

1. Positions of the Parties

The General Counsel cites numerous Authority decisions holding that an agency or a union which refuses to participate in the procedures for the resolution of grievances violates section 7116(a)(1) and (8) of the Statute. *Department of the Air Force, Langley Air Force Base, Hampton, Virginia*, 39 FLRA 966 (1991)(*Langley A.F.B.*); *Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C.*, 10 FLRA 316 (1982) (*DOL*). Even when the party challenges the arbitrator's jurisdiction or argues legitimately that the grievance is not arbitrable under their collective bargaining agreement, the Authority requires that these arguments be made to the arbitrator himself, not to the Authority. *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 11 FLRA 456 (1983) (*Portsmouth*) (Authority reversed ALJ who had found that agency was not required to arbitrate because the subject of the grievance was "clearly" excluded by the CBA).

The General Counsel asserts that Respondent's refusal (from October 2006 to June 2007) to select an arbitrator is legally indistinguishable from an outright refusal to arbitrate. By rejecting, ignoring and delaying the Union's repeated demands to follow the procedures for striking names set forth in Article 44, Section 2 of the CBA, the Agency prevented the grievance from being resolved and the arbitration hearing from being held. This accomplished, at least for eight months, the same thing as an outright refusal to arbitrate. Moreover, the G.C. says that Mick's objections to Chicago as the venue for the arbitration are indistinguishable from a party's objections to arbitrability, or a party's insistence that an arbitrability hearing be held separately from a hearing on the merits. *Langley A.F.B., supra,* 39 FLRA at 969 (arbitrability); *Department of the Army, 83rd United States Army Reserve Command, Columbus, Ohio*, 11 FLRA 55, 56 (1983) (*Army Reserve*). The G.C. further notes that arbitrators commonly resolve disputes concerning the proper venue for the hearing, and that the Authority has upheld such determinations by arbitrators. *Veterans Administration Medical Center, Coatesville, Pennsylvania*, 56 FLRA 829 (2000) (*VAMC Coatesville*); *U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York,* 38 FLRA 276 (1990) (*Griffiss*). Even assuming the validity of the Agency's objections to the Chicago venue, it should have

raised those objections to the arbitrator rather than delaying the hearing for eight months.

The General Counsel also rejects the Agency's claim that the case is now moot. The G.C., citing *United States Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center, Guaynabo, Puerto Rico*, 59 FLRA 787, 790 (2004) (*Guaynabo*), says that the burden is on the Respondent to demonstrate that neither party has a legally cognizable interest in the outcome of the case. This requires the Agency to show that there is no reasonable expectation that the alleged violation will recur, and that interim events have completely or irrevocably eradicated the effects of the alleged violation. The G.C. argues that the Respondent's delay in selecting an arbitrator continued for over eight months, and thus the hearing has been delayed for a significant period of time. The Respondent's subsequent agreement to proceed with the hearing does not alleviate, much less "eradicate," the effects of the delay, and it certainly does not make the case moot. The G.C. further notes that the Agency continues to insist that its delay was legitimate; this further demonstrates the need for a decision on the merits of the case. It requests that the Respondent be required to cease and desist from its refusal to select an arbitrator and that it post a notice to this effect, signed by the Administrator of the Agency.

The Respondent insists that it has never refused to arbitrate the grievance underlying this case, and that it repeatedly emphasized to the Union that it simply wished to establish a procedure for determining the venue of arbitrations. It was the Union that consistently refused to discuss the resolutions and compromises offered by the Agency. After receiving the list of arbitrators on November 3, Mick responded on November 9 and expressed his objections to the Chicago venue, but the Union did not respond to him until November 22. The Union then waited until February 5 to pursue the matter further, and it then did not wait for Mick's reply before filing an unfair labor practice charge. The Respondent further asserts that by filing the ULP charge so quickly, the Union ignored section 2423.1 of the Authority's Rules and Regulations, which "encourages all persons to meet and, in good faith, attempt to resolve unfair labor practice disputes prior to filing unfair labor practice charges." The premature filing of the charge resulted in the Agency's compromise offer of February 5 being overlooked.

The Respondent shifted its emphasis somewhat in its Response to the General Counsel's Motion for Summary Judgment. Rather than defending its delay in selecting an arbitrator, the Respondent argues that the case is moot, because it did select an arbitrator on June 25 and the arbitration hearing will be held on September 25. Respondent notes that the cease and desist order sought by the General Counsel has been rendered a nullity, because the Agency has already ceased "refusing or failing to proceed to arbitration". Moreover, the standard for mootness set forth in *Guaynabo* has been met. As the arbitration hearing will be held there is no chance of the alleged violation recurring, and the effects of the alleged violation have been eradicated. The Agency also submits that the newly modified arbitration language in the CBA eliminates the possibility of similar disputes arising in the future, as the CBA now establishes a rotation of the arbitration venues and permits a party to proceed to arbitration unilaterally if the other party refuses to participate.

2. Analysis

Since the inception of the Statute, the Authority has made clear that unless the parties to a contract mutually agree to specific exclusions to the coverage of their grievance procedure, the grievance procedure shall be the exclusive method of resolving grievances, and that any grievance not satisfactorily settled (including questions of arbitrability) shall be subject to binding arbitration, which can be invoked by either an agency or a union. *Interpretation and Guidance*, 2 FLRA 274, 278-79 n.7 (1979). For a brief period, the Authority held the view that, since either party to a CBA could proceed to arbitration *ex parte*, the other side's refusal to arbitrate was not an independent unfair labor practice. *See, Federal Aviation Administration, Alaskan Regional Office*, 7 FLRA 164 (1981). But in *DOL,* the Authority partially overruled *FAA*, holding instead that even though a party can arbitrate a grievance in the absence of the other, the refusal to arbitrate still violates sections 7121 and either 7116(a)(1) and (8) or 7116(b)(1) and (8). *DOL*, 10 FLRA at 320.

In *American Federation of Government Employees, Local 1457,* 39 FLRA 519 at 522, 528 (1991), the respondent union argued that it was not refusing to arbitrate but simply refusing to meet to select an arbitrator. The Authority held that there was no material difference between one act and the

other, and that the refusal to select an arbitrator also constituted an unfair labor practice. Similarly, the alleged untimeliness of the grievance was not a lawful basis for refusing to arbitrate, since the untimeliness issue should properly be raised before the arbitrator. The *Army Reserve* case presents facts somewhat similar to the instant case: an agency and union submitted a grievance to the arbitrator, but the agency insisted that separate hearings on arbitrability and the merits be held, refusing to appear for a joint hearing. Although it is clear that the agency in *Army Reserve* was willing to participate in a bifurcated hearing, this did not mitigate the fact that its actions prevented the arbitration from proceeding, and thus it violated section 7116 (a)(1) and (8). The Authority explained that "the Respondent was not thereby relieved of its statutory obligation to proceed to arbitration when the Union rejected the Respondent's offer", and that the agency should have allowed the arbitrator to hear and decide its procedural claims. 11 FLRA at 56 n.1. *See also* the private sector cases of *Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, AFL-CIO,* 321 F.3d 251 (1st Cir. 2003); and *Avon Products, Inc. v. UAW, Local 710*, 386 F.2d 651, 658-59 (8th Cir. 1967); in both of these cases, the courts held that an employer's objection to holding separate hearings for several related grievances could not be used as a basis for refusing to hold the arbitrations.

The simple lesson of all these cases is that all issues related to a grievance, regardless of whether they are procedural or substantive in nature, should be resolved by the arbitrator. Arbitrators are authorized to rule on a wide range of procedural and substantive issues, and section 7121 of the Statute establishes arbitration as the proper forum for resolving those issues. As noted by the General Counsel, the Authority has enforced arbitrators' awards that resolve disputes concerning the appropriate venue of hearings. *VAMC Coatesville; Griffiss*.

This lesson is equally applicable to the facts of this case. The Agency was entitled to oppose the Union's selection of Chicago as the venue for the arbitration hearing, but the Agency's objection to that venue could not lawfully be used to prevent, or to delay, the hearing. This does not mean that Mick's mere objection to the venue in his November 9 letter was unlawful; Mick was entitled to raise the question initially with the Union and to attempt to resolve it consensually. But when Roy replied to Mick on November 22, he refused to discuss an alternative venue or a rotation of

venues, and insisted that Mick follow the contractual procedure for selecting an arbitrator, it was incumbent on the Agency to comply with the CBA, select an arbitrator, and then make its venue argument to the arbitrator. Instead, the Agency let the issue fester until February, when the Union filed its ULP charge, and even beyond that point until June 25, nearly eight months after the Agency was required to select an arbitrator.

The Respondent's objections to the Union's conduct are not persuasive. The Agency first argues that the Union failed to attempt to resolve its dispute consensually with the Agency prior to filing a ULP charge, allegedly in violation of section 2423.1(a) of the Authority's Rules and Regulations. Factually, this is incorrect: the Union had sent several communications to the Agency requesting that Mick select an arbitrator between October 17 and February 5. During that time, Mick sought to negotiate modified contractual language for selecting an arbitration venue, but he rejected the Union's request to select an arbitrator. While Mick might not have agreed with the Union's solution to the question of venue, the Union did at least facially comply with the cited provision of the Rules. Moreover, section 2423.1(a) merely "encourages" such conduct, rather than requiring it. Finally, the Authority has frequently stated that in order for procedural irregularities to provide a basis for dismissing a complaint, a respondent must show that it was prejudiced thereby. *United States Department of Justice, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California*, 58 FLRA 656, 658 (2003). There was no such prejudice suffered by the Agency here. On the same day as the Union filed its ULP charge, Mick offered to conduct the arbitration hearing in Chicago if the Union would agree to a modification of the CBA language regarding venue, and this proposed compromise did not bear any fruit for another five months. There is nothing to suggest that the parties would have selected an arbitrator more quickly if the Union had refrained from filing its ULP charge when it did, and no party should be required to wait an additional five months to resolve its dispute before it is allowed to file a charge.

The Agency also accuses the Union of being unreasonable in refusing to negotiate a modification to the CBA clarifying the procedure for setting the venue of arbitration hearings. Mick proposed such a modification in his November 9 letter to Roy and in his February 5 letter to Orzehoskie, and he now

faults the Union for taking too long to respond to each of these letters. The problem with this argument is that the Union was not required to negotiate a modification to the CBA; the Agency, however, was required to comply with the existing language of the CBA, which required it to select an arbitrator within five days of receiving the FMCS list on November 3. As I noted earlier, it was perfectly acceptable for Mick to suggest that the CBA language needed clarification and to offer a proposal for doing so; but once the Union rejected the idea of modifying the contract on November 22 and insisted that they proceed to select an arbitrator, the Agency was not free to delay the selection and the arbitration as it pursued its goal of negotiating new contract language. Thus, once the Agency received Roy's November 22 email, it was obligated to promptly proceed to selecting the arbitrator and to raise its objections concerning the Chicago venue to the arbitrator. The dispute continued, however, for another seven months before the Agency finally complied with the CBA. This was unreasonable and unlawful on the Agency's part.

Finally, I find that the case is not moot. While the Agency has now complied with the CBA provision previously in dispute, its actions delayed the arbitration for seven to eight months, and the effects of this delay cannot be eradicated. The precise facts of the "library grievance" underlying this case are not in evidence, but it is clear from G.C. Ex. 2 (the grievance filed by the Union on August 16) that the Union sought to begin negotiations in mid-2006 concerning changes the Agency was planning, and it requested that the Agency refrain from implementing any actions under its "Framework" plan for the time being. Instead of having these and other issues related to the grievance resolved in early 2007, the arbitration will not be decided until near the end of the year. While it is unclear what, if any, changes the Agency has implemented regarding its libraries, it is clear that the dispute has been a source of employee unrest for many more months than was necessary. This, in itself, negates the Agency's mootness claim. Moreover, contrary to the Agency's claim, it is not at all certain that the negotiation of new CBA language regarding venue will prevent the alleged violation from recurring. The new CBA provision (Attachment 1 to Agency's Response to Motion for Summary Judgement) establishes a procedure for selecting a venue for arbitration hearings, but the issue of venue is only one of many procedural or substantive disputes that may arise during the pendency of a grievance. A decision in this case will hopefully make it clear to the parties that such procedural

disputes cannot serve as the basis for delaying the arbitration process, whereas a dismissal on mootness grounds would allow the parties to conclude that a seven-month delay in selecting an arbitrator is permissible.

Therefore, I conclude that the Respondent failed to comply with section 7121 of the Statute and thereby committed an unfair labor practice as alleged, in violation of section 7116(a)(1) and (8).

In order to remedy the unfair labor practice, a cease and desist order and the posting of a notice are appropriate. I recognize, as noted by the Respondent, that it has already ceased its refusal to select an arbitrator, but at least as I write this decision, the arbitration itself has not occurred. Thus, I am phrasing the order to require the Agency to cease its refusal "to proceed to arbitration." As for the official of the Respondent who should sign the notice to employees, the Authority has held that the remedial purposes of a notice are best served by requiring the head of the activity responsible for the violation to sign the notice. *Department of Health and Human Services, Regional Personnel Office, Seattle, Washington*, 48 FLRA 410, 411 (1993). While the Administrator of the EPA is the highest official of the Agency, the "activity" responsible for the violation here appears to be the Office of Labor Relations rather than the entire Agency; accordingly, I will order the notices to be signed by the Respondent's Director of Labor Relations and to be posted at all facilities where bargaining unit employees represented by the Union are located.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following:

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, it is hereby ordered that the U.S. Environmental Protection Agency, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing or refusing to proceed to arbitration concerning the grievance filed by the American Federation of Government Employees, Council 238, AFL-CIO (the Union) regarding changes to Headquarters and Regional libraries.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Proceed to arbitration regarding the Union's library grievance.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Respondent's Director of Labor Relations, and 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.

(c) Pursuant to section 2423.41(e) of the Authority=s Rules and Regulations, notify the Regional Director, Chicago 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.

Issued, Washington, DC, September 25, 2007.

_____

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Environmental Protection Agency, Washington, D.C., 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 fail or refuse to proceed to arbitration concerning the grievance filed by the American Federation of Government Employees, Council 238, AFL-CIO (the Union), regarding changes to Headquarters and Regional libraries.

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

WE WILL proceed to arbitration regarding the Union's library grievance.

_____
(U.S. Environmental Protection Agency)

Date: _____ By: _____
(Signature)
(Director of Labor Relations)

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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 W. Monroe Street, Suite 1150, Chicago, Illinois 60603-9729, and whose telephone number is: 312-886-3465

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. CH-CA-07-0425, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Greg A. Weddle, Esq. **7000 2570 0001 8450 3634**
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Chicago, IL 60603-9729

David E. Mick **7000 2570 0001 8450 3641**
Human Resource Specialist
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26 W. Martin Luther King Dr., M/S 275
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Steven Roy, Secretary **7000 2570 0001 8450 3658**
AFGE Council 238
U.S. EPA, Region 10
1200 Sixth Avenue, M/S ETPA-083
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REGULAR MAIL:

President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
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DATED: September 25, 2007
Washington, DC