UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20005

MEMORANDUM DATE: December 21, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. SECURITIES AND EXCHANGE COMMISSION

Respondent

AND Case Nos. WA-CA-03-0127

WA-CA-03-0130

NATIONAL TREASURY EMPLOYEES UNION

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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20005

U.S. SECURITIES AND EXCHANGE COMMISSION Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case Nos. WA-CA-03-0127 WA-CA-03-0130

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 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 **JANUARY 23, 2006**, and addressed to:

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

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RICHARD A. PEARSON
Administrative Law Judge

Dated: December 21, 2005
Washington, DC

OALJ 06-04

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C.

U.S. SECURITIES AND EXCHANGE COMMISSION Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case Nos. WA-CA-03-0127 WA-CA-03-0130

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For the Respondent

Michael Piacsek, Esquire
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 (2005).

The proceedings in this case were initiated when the National Treasury Employees Union (the Union or Charging Party) filed two unfair labor practice charges against the U.S. Securities and Exchange Commission (the Agency or SEC). After investigating these charges, the Acting Director of the Washington Regional Office of the Authority issued a consolidated unfair labor practice complaint on June 30, 2003, alleging that the Agency violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by instituting a new pay system for employees and by terminating the previous system for within-

grade increases (WGIs) and quality-step increases (QSIs) without bargaining with the Union to the extent required by the Statute. The Agency filed its answer on July 25, 2003, denying that it committed any unfair labor practice.

A hearing was held on October 29, 2003, in Washington, D.C., at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the SEC subsequently filed post-hearing briefs, which I have fully considered. On April 21, 2004, I granted the General Counsel's Motion to Reopen the Hearing to offer additional evidence on a limited issue, and a hearing was scheduled for November 3, 2004. Subsequently the parties determined that additional testimony would not be needed, and the hearing was canceled. I did, however, permit the parties to file supplemental briefs, which I have also considered.

Based on the entire record, 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 SEC is an independent Federal regulatory agency, whose mission is to administer and enforce the Federal securities laws in order to protect investors and maintain fair, honest and efficient markets. It oversees a securities industry consisting of companies required to file public financial reports, brokers and brokerage firms, investment companies and a variety of self-regulatory organizations such as securities exchanges, and it investigates potential securities law violations. In recent years, technological and legal changes have swept the securities industry, as a larger portion of the American public has invested in the markets and in mutual funds and as Congress has eliminated many of the traditional distinctions between the securities, insurance and banking industries. These changes have placed increasing demands on the Agency's financial and human resources.

The Agency employs slightly more than 3200 employees at its Washington, D.C. headquarters and in 11 regional and district offices around the country. Approximately 39 percent of the employees are attorneys, 18 percent accountants and financial analysts, and 6 percent securities examiners, with the remaining 37 percent working in various professional, technical, clerical and administrative positions. In July 2000, the Union was certified as the exclusive representative of the Agency's headquarters,

regional and district employees, and approximately two-thirds of the Agency's employees are in the bargaining unit. During April and May of 2002, when the events material to this case were transpiring, the Agency and Union were negotiating, but had not reached, a comprehensive collective bargaining agreement (CBA);[1] they had, however, negotiated an interim agreement, which established certain union-management working procedures and a preliminary grievance procedure. Agency Ex. 4.

In response to requests from Congress, the General Accounting Office (now called the Government Accountability Office) prepared reports in September 2001 (Securities and Exchange Commission: Human Capital Challenges Require Management Attention) (Agency Ex. 3) and March 2002 (SEC Operations: Increased Workload Creates Challenges) (Agency Ex. 2), which analyzed the "staffing crisis" at the Agency[2] and its impact on the Agency's ability to perform its core functions, and which recommended a variety of solutions. The Agency has long suffered from high employee turnover; in recent years, the turnover rates among the SEC's attorneys, accountants and examiners were twice the government-wide average for comparable positions. Agency Ex. 1 at 4-5. This resulted in more than 1000 employees (500 of whom were attorneys) leaving the Agency between 1998 and 2000, and 280 positions remained unfilled in 2001. It also left the Agency with shortages of experienced attorneys in key supervisory and nonsupervisory positions, hindering the Agency's ability to litigate cases and to conduct basic examinations and investigations. Agency Ex. 2, Highlights, at 11-19.

While the GAO reports agreed with Agency assessments that the high turnover was largely attributable to the SEC's low compensation levels, in comparison to comparable private sector jobs and to other Federal financial regulatory agencies, GAO also recommended that the Agency change its "organizational culture" toward human capital issues and that the SEC "establish a constructive relationship with the new union [*i.e.*, the NTEU]." Agency Ex. 3 at 3. For further recommendations by GAO, see Agency Ex. 2 at 34-35.

The Agency has recognized since at least the 1980's that it had a problem recruiting and retaining employees in certain job classifications, and it has tried to alleviate

[1] A comprehensive CBA was agreed upon by the parties in late summer of 2002 (Tr. 42-44), but it is not material to the issues of this case.

[2] Agency Ex. 3 at 1.

the problem by taking advantage of as many "compensation and benefit flexibilities" as possible under existing law. Agency Ex. 1, Pay Parity Implementation Plan and Report, at 4. Prior to May 2002, Agency employees were paid under the General Schedule (5 U.S.C. chapter 53, subchapter III), which applies generally to employees throughout the Federal government. SEC attorneys, accountants and securities examiners are particularly attractive to private sector companies, which pay far higher salaries than the government. In order to hire the best employees and keep them at the Agency, the SEC has sought and received permission to pay certain of its most sought-after employees "special pay rates." In 1991, it was authorized and began paying salaries to attorneys and accountants that were between 6 and 15 percent higher than the General Schedule rates; in 2001, the special rates were raised further, and they were authorized for examiners as well as attorneys and accountants. Tr. 103-4, 152-53, Agency Ex. 3 at 17. From at least the early 1990's to 2002, it also utilized special legal provisions to pay large numbers of employees recruitment bonuses, retention allowances, superior qualification appointments, quality step increases and performance awards. Tr. 150-55, Agency Ex. 3 at 16-19. While most of these compensation options were also available to other Federal agencies, the SEC utilized these provisions at far higher rates than government-wide. *Id.* Agency officials indicated that these measures improved recruitment and reduced turnover for brief periods of time, but they stated that the measures did not offer a long-term resolution of the problems. Agency Ex. 1 at 4-8.

Meanwhile, the Agency's staffing problems were exacerbated by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which authorized several Federal financial regulatory agencies to determine their own compensation and benefit levels for their employees, without regard to the limitations of the General Schedule.[3] This legislation

[3] Pub. L. No. 101-73, 103 Stat. 183. These agencies include the Federal Deposit Insurance Corporation (FDIC), National Credit Union Association, Office of the Comptroller of the Currency, and Office of Thrift Supervision (OTS). While the language of each agency's authorization concerning salaries differed in certain respects, some agencies were given "unfettered discretion" in this area, and therefore they were not required to negotiate these new salary levels with their employees' exclusive representatives. *See, e.g., American Federation of Government Employees, Local 3295 v. FLRA*, 46 F.3d 73, 78 n.6 (D.C. Cir. 1995), affirming 47 FLRA 884 (1993).

allowed those agencies to pay higher salaries to their employees, so that they could better compete with the private sector, but it left the SEC at a comparative disadvantage to those agencies. The Agency believed that it could resolve its staffing problems on a permanent basis only by obtaining similar legislative authorization to set its own salaries and benefits, unbound by the General Schedule; it lobbied actively for such legislation, and the GAO Operations Report supported this argument. Agency Ex. 1 at 4, 9; Agency Ex. 2 at 26-27, 35.

On January 16, 2002, the Investor and Capital Markets Fee Relief Act (the Act) was enacted.[4] This legislation, among other things, gave the Agency the authority it had sought to "set and adjust[]" its employees' pay rates "without regard to the provisions of chapter 51 or subchapter III of chapter 53[]" of title 5 of the United States Code.[5] Unlike the comparable provision of FIRREA applicable to the OTS (discussed in footnote 3, *supra)*, section 8(c) of the Act does not authorize the SEC to set pay rates "without regard to the provisions of other laws applicable to officers or employees of the United States." Rather, it only authorizes the SEC to disregard the classification (chapter 51) and General Schedule (chapter 53, subchapter III) provisions of title 5.

In compliance with the Act, the Agency submitted a Pay Parity Implementation Plan and Report (Agency Ex. 1) to Congress on March 6, 2002, in which it set forth the new salary and pay rate structure that it had developed, and it explained the need for the higher salaries. The Agency estimated that it would cost $76 million to implement pay parity in fiscal year 2003 and sought a "reprogramming" of $25 million in order to implement the plan during fiscal 2002. It explained that "The Commission believes it is essential to begin a new pay parity system this fiscal year so that our employees see the tangible benefit of staying at the Agency." Agency Ex. 1 at 15. It also advised Congress that it was required to negotiate with the Union before it implemented the plan. *Id*. at 14-15.

Approximately 15 months before the Act was passed, the Agency contracted with an outside consulting firm, the Hay Group, to study the different pay systems within the Federal government and to develop a system that would best address the SEC's particular problems. The Agency wanted to have its new pay system ready once the necessary legislation was

[4] Pub. L. No. 107-123, 115 Stat. 2390 (2002).

[5] Section 8(c) of the Act, codified at 5 U.S.C. § 4802(c).

passed. Tr. 155. Thus, when the Act went into effect on January 16, 2002, the Agency was able to submit its Implementation Report (including the specifics of its proposed new salary structure) to Congress on March 6. At roughly the same time, the Agency was able to persuade Congressional appropriators to approve the reprogramming of approximately $25 million of excess fees collected by the SEC toward FY 2002 implementation of pay parity.[6]

Meanwhile, the President of NTEU sent a letter to the SEC Chairman on January 17, requesting that salary negotiations begin immediately. G.C. Ex. 2. The Agency did not respond to the Union's letter, however, until after it had submitted its March 6 report to Congress and after the Union had made several additional attempts to start the bargaining process. Tr. 24-26. Negotiators held initial discussions on April 10, 2002, and formal bargaining began on April 22, when Agency officials briefed the Union representatives on the "pay parity" salary structure developed by the Agency and the Hay Group. G.C. Ex. 3. On April 18, the SEC Chairman announced to all employees that he intended to implement the new pay raises on May 19 – he stated that he hoped to finish bargaining and obtain the Union's approval for a new pay plan by that date, but that he would implement the raises for nonbargaining unit members on that date even if the Union negotiations were not concluded. G.C. Ex. 8.

Under the pay system proposed by the Agency in April 2002, employees would be placed in one of 17 pay grades (compared to 15 in the General Schedule), but two of these grades were reserved only for supervisors. Each grade had between 21 and 31 steps (compared to ten in the General Schedule), the higher grades having more steps. Employees could earn as many as three step increases in a year, but these increases would be given solely through a merit-pay system based on supervisors' recommendations reviewed by a second-level review board. The proposed system would eliminate "automatic" step increases for satisfactory performance (WGIs), as well as step increases based on an employee's performance appraisal (QSIs). Both the old and new systems provide for "locality pay" for employees working in high-cost cities, but the Agency's system has different

6 The Implementation Plan submitted to Congress on March 6, 2002 indicated that the Agency's reprogramming request was then pending in Congressional committees. Agency Ex. 1 at 15, 16 n.12. An Agency official testified at the hearing that the reprogramming request was approved by Congress "in I think March of 2002." Tr. 155-56. *See also* Tr. 243-46 and Agency Ex. 2 at 29-30.

rates than the General Schedule: higher in some cities, lower in others. *See*, G.C. Ex. 8 and attachment thereto; Agency Ex. 7.

Under the Agency's proposed pay system, all employees received some increase in their annual salary: the average increase for employees not in "securities industry (SI) positions" was about 14 percent, and for "securities industry" employees it was about 16 percent. Tr. 254. For some employees, however, the actual increase was as little as 3 percent or as much as 32 percent. Agency Ex. 8, sixth line on p. 11, and 22nd line on p. 57. No employee's job title, series, or duties were changed in the new system. G.C. Ex. 9, question 9. According to the basic methodology for converting employees from one system to the other, they were placed at the grade and step level that corresponded most closely to their previous GS grade after 6 percent was added to their old base pay. (Except that GS-14 supervisors were slotted into the corresponding step on the new pay level 15; nonsupervisory GS-15's were slotted into the new level 16; and GS-15 supervisors were slotted into the new level 17.) G.C. Ex. 9 at 5-6. According to the Agency's Pay Parity Implementation Plan, the proposed salaries in the new structure placed SEC salaries "toward the lower end of those that we analzyed [*i.e.* in comparison with the other FIRREA regulatory agencies]." Agency Ex. 1 at 13. The SEC plan also concentrated the highest salary increases most heavily in the jobs where it had suffered the highest turnover and for GS-14 and -15 supervisors, and it allowed the Agency to maximize management's ability to motivate employees through "a rigorous merit pay system[.]" *Id.* at 12-14.

During the negotiations which began on April 22, the Union submitted a set of pay proposals to the Agency that was roughly modeled on the FDIC pay structure: both the Union's proposal and the FDIC's retain the 15-grade scale of the General Schedule, and the Union proposed salary levels for SEC employees equivalent to the FDIC's. Tr. 33-34, 79-80. The FDIC's salaries are higher than the comparable grades in the SEC's system. Tr. 34, 140. But whereas the FDIC system has only minimum and maximum salaries at each grade and does not have steps within the grades, the Union's proposal to the SEC called for a continuation of the old 10-step structure within each grade. Tr. 33-34, 79-80.

The hearing record contains only brief accounts of the salary negotiations between the Agency and the Union, but several bargaining sessions were held between April 22 and May 17, 2002. Initially the parties met on their own, and then they participated in mediation on or about May 10.

When mediation was unsuccessful in resolving the issues, the parties met again on May 16 and 17, but still could not reach agreement. Tr. 29, 33, 36-37. On May 15, the Union filed a request for assistance with the Federal Service Impasses Panel (the Panel), and ultimately the Panel took jurisdiction of the dispute and issued a Decision and Order on November 8, 2002. Case No. 02 FSIP 122, published in Panel Release No. 453 (November 22, 2002). Nonetheless, when negotiations broke down on May 17, the Agency notified employees later that same day that it would implement its pay plan for both bargaining unit and nonbargaining unit employees effective May 19.[7] G.C. Exhibit 10. The Agency stated in this notice that the "bargaining process" with the Union would continue and that it would recognize any additional pay or other benefits that might be obtained by the Union during this process. *Id.* When the Panel issued its decision concerning the salary dispute, it adopted the Agency's plan, with minor modifications regarding the timing and manner of subsequent negotiations.

Pursuant to the compensation plan put into effect by the Agency, it ceased giving employees WGIs as of May 19, 2002, even to employees who had been waiting two or three years for such increases and would otherwise have received them in June of that year. Tr. 85, 264. Similarly, employees have not received QSIs since May 2002. Tr. 86-87. The Agency's plan calls for all step increases to be based on its merit pay system. Tr. 264. At the time of the hearing in this case in October 2003, the Agency was still in the "process" of implementing the merit pay procedure, and no employees had yet received any merit pay increases. Tr. 264-66.

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[7] While the pay plan took effect on May 19, it took several more months before the Agency's payroll office could actually convert its systems and enter the new data for employees. Employees first saw the increases in their paychecks in August, but the increases were retroactive to May 19. Tr. 245-46. In its earlier communications with employees, the Agency had been somewhat ambiguous, or even contradictory, as to whether the pay raises would be applied retroactively. *See* G.C. Exhibit 8. It should also be noted that the pay plan implemented by the Agency differed somewhat from the plan it had proposed to the Union during negotiations. For instance, while the Agency had proposed that employees in SI positions would not receive extra pay for such work until they had worked in such positions for two years (as in the old system) (*see* G.C. Ex. 9 at question 8), the plan implemented by the Agency placed all employees doing SI work at the higher pay levels regardless of whether they had two years experience or not. Tr. 95-98.

Discussion and Conclusions

A. Issues and Positions of the Parties

The General Counsel asserts that the Agency violated section 7116(a)(1) and (5) of the Statute by implementing its compensation plan (which included the new salary schedule as well as the elimination of the old system of within-grade and quality step increases) for bargaining unit employees on May 19, 2002, before the bargaining process had been completed. It argues that upon the passage of the Act, employee pay was a substantively negotiable condition of employment, and that the Agency significantly changed employees' conditions of employment by imposing an entirely new salary schedule and at the same time eliminating the traditional methods by which employees moved from one step to another within a pay grade. Because this implementation occurred unilaterally, while the Agency was still negotiating these very issues with the Union, and as the Union was seeking the assistance of the Panel in resolving their bargaining dispute, it was premature and interfered with the normal bargaining process.

As a threshold matter, the Agency denies that the new salary structure was negotiable at all, because the conversion to the new pay system related to the classification of positions, within the meaning of section 7103(a)(14)(B) of the Statute. Citing Authority decisions such as *National Association of Government Employees, Local R5-168 and U.S. Department of the Army, Fort Polk, Louisiana*, 53 FLRA 1622, 1624 (1998), it argues that the Agency's plan, by placing employees at specific grades and steps in the new pay system, involved "the identification of the appropriate title, series, grade and pay system of a position" and thus was not negotiable. The General Counsel denies that the issues being negotiated by the parties involved the classification of positions, noting that an employee's grade and step in the new pay system essentially matched his or her grade and step in the old system, and arguing that the conversion from one system to the other did not require analyzing in any way the duties or responsibilities of any position. The G.C. further contends that because the Act removed SEC employees from the classification provisions of the U.S. Code, the classification language of section 7103(a)(14)(B) of the Statute is also inapplicable.

The Agency also argues that it was not required to negotiate concerning either within-grade or quality step increases: WGIs, because such increases are "specifically

provided for by statute" (5 U.S.C. § 5335(a)); and QSIs, because they are covered by the interim agreement between the Union and the SEC, and because they were being separately negotiated by the parties in a comprehensive CBA.

Both the Agency and the General Counsel contend that the other side had (and failed to carry) the burden of showing that a specific negotiable (or non-negotiable) Union proposal was pending on May 19, 2002. The Agency cites *Social Security Administration, Malden District Office, Malden, Massachusetts*, 54 FLRA 531, 538 (1998) (*SSA Malden*), in support of its argument, while the G.C. cites *U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 351, 356 (2000) (*INS-2*), to the contrary.

The Agency further argues that even if it was obligated to bargain over its new compensation system, it fulfilled that obligation and was justified in implementing its proposals on May 19. After engaging in negotiations with the Union in April and May of 2002 concerning the proposed system, the Agency argues that immediate implementation of the system for both bargaining unit and nonbargaining unit members on May 19 was necessary for the Agency to effectively and efficiently carry out its mission.

Citing *Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee*, 44 FLRA 599 (1992), and other cases, the Agency submits that its ability to carry out its mission was in serious jeopardy in 2002 due to severe staff attrition and expansion of its workload. It offers as evidence the two studies performed by the GAO (Agency Exs. 2 and 3), the first of which detailed the causes and severity of the loss of staff, and the second of which analyzed the impact of attrition on the SEC's operations. The "human capital" study identified the Agency's inability to compete with the private sector and with other Federal financial agencies such as FDIC in pay as a major reason for losing attorneys and accountants. The report noted that the SEC had exhausted all avenues available under the General Schedule for maximizing employee compensation, such as special pay rates, recruitment bonuses and retention allowances, without solving its long-term problem. The "operations" study confirmed that the shortage of employees in key positions hindered the Agency's ability to optimally perform many of its functions. Congressional passage of the Act in 2002 gave the Agency, in its view, a historic opportunity to reverse these trends, and the SEC felt it was essential that it respond quickly to provide its employees with the salary relief that they had long awaited. Finally, the Agency argues that after it obtained

Congressional and OMB approval for reprogramming $25 million in funding for the new pay system in FY 2002, it needed to act as quickly as possible to implement the pay system, or else the funds might be lost.

The General Counsel notes that "necessary functioning" or "overriding exigency" is an affirmative defense that the Agency must prove, and it argues that the SEC has not adequately justified the unilateral implementation of its pay system. The G.C. acknowledges that the Agency had long experienced recruitment and retention problems that adversely affected its ability to perform its statutory functions, but the G.C. says it is totally speculative whether the SEC's proposed solution (its new pay system) will solve, or even alleviate, its problems. The General Counsel argues that it is equally, if not more, likely that the SEC's new pay system will be no more successful than its earlier attempts, especially since the new SEC pay rates are still considerably lower than some FIRREA agencies and can never hope to compete with private sector pay for attorneys and accountants. Just as the SEC could only hope that its new pay system would reduce attrition, *a fortiori* its prediction that the new system will translate into a better-functioning agency is even more speculative and long-term in nature. The G.C. submits that the standard of proof for demonstrating "necessity" requires more than speculation. *See, e.g., Department of Health and Human Services, Social Security Administration, Field Operations, Region II*, 35 FLRA 940, 951 (1990).

The General Counsel counters the Agency's argument that delaying implementation would have adversely affected employee morale, by noting that this "problem" was a creation of the Agency's own actions in raising employee expectations that pay relief would arrive on May 19. The May 19 implementation date was artificially established by the SEC Chairman before bargaining started (G.C. Ex. 8), and employee expectations could have been satisfied if the Agency had simply reassured employees that a pay system negotiated with the Union after May 19 would be made retroactive.

Finally, the General Counsel disputes the Agency's contention that the reprogramming of $25 million for FY 2002 created an urgency in implementing the pay system in May. It cites testimony from an Agency official that the reprogrammed funds would have been available in FY 2003 even if they were not spent in FY 2002 (Tr. 244-46). Any fear of losing this money was, in the G.C.'s view, speculative again, and insufficient to justify short-circuiting the statutory bargaining process.

Some months after the hearing in this case, an additional issue was raised by the Authority's decision in *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina,* 59 FLRA 646 (2004) (*SSA Charleston*). In *SSA Charleston*, the Authority held that the same "*de minimis*" test that it had applied in cases where an agency unilaterally changed a condition of employment that involves the exercise of a management right, should also be applied to changes that are substantively negotiable. At the hearing in this case, it was undisputed that employee salaries are substantively negotiable[8]; therefore, under then-applicable case law, the impact of the change in conditions of employment on unit employees was irrelevant. After the Authority issued its *SSA Charleston* decision, however, the SEC argued that a change in conditions of employment must be negotiated only when it has a more-than-*de minimis* adverse impact on employees. It further argued that because all unit employees received a salary increase from the new pay system, nobody was adversely affected; thus the *de minimis* test has not been met.

The General Counsel, however, argues that both beneficial and adverse effects must be taken into account when measuring the impact of a change in conditions of employment. The G.C. notes that the phrase "adverse effects" derives from the "management rights" section of the Statute, and specifically from section 7106(b)(3). That is, while agencies are not required to negotiate with unions over the decision to exercise the management rights listed in § 7106(a), they are required to negotiate regarding the implementation (*i.e.*, procedures which management officials observe in exercising a management right) and impact (*i.e.*, appropriate arrangements for employees "adversely affected" by the exercise of a management right) of such decisions. Thus the G.C. argues that it is only appropriate to look at the "adverse" impact of a change when an agency exercises a management right under 7106; in cases such as ours, however, where the pay system itself is substantively negotiable, any type of impact, positive or negative, is relevant to the "*de minimis*" test. Accordingly, the G.C. says it is obvious that salary increases averaging 14 to 16 percent for more than 2000 unit employees had more than a *de minimis* impact.

The parties also disagree on a remedy for any unfair labor practice. The General Counsel seeks *status quo ante* relief, to the extent that this is possible. It concedes, however, that the old pay system cannot be reinstated, since

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[8] That is, so long as they are not specifically provided for by statute and don't involve classification matters.

the Panel's November 2002 decision adopted the system that the SEC had already implemented. Instead, the G.C. requests that for the period of May 19 to November 8, 2002, employees be granted all WGIs and QSIs that they would have earned under the old system if the Agency had waited until the Panel ruled before implementing its new system. For the WGIs, this would be relatively simple to determine, based on employees' anniversary dates from their last WGI and their performance appraisals; for the QSIs, this would require the Agency to apply its 2001 operating policies and procedures and to consider all employees for QSIs based on those procedures. It also requests that the SEC Chairman be required to sign a notice of violation and that the Agency be required to post that notice to employees. The Agency argues that it would be improper under 5 U.S.C. § 5596(b)(1)(A) and the Back Pay Act to award WGIs or QSIs to employees retroactively, because no unjustified personnel action occurred and because it is entirely speculative that any employee would have actually received a step increase under the old pay system. *Donovan v. United States*, 580 F.2d 1203, 1208 (3rd Cir. 1978). It further argues that the employees benefited more from the early implementation of the new pay scale than they would have from a step increase under the old system.

B. Analysis

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas,* 55 FLRA 848, 852 (1999). Unless one party has waived its right to bargain, the parties must fulfill their mutual obligation to bargain before implementing changes in conditions of employment. *Id.* When parties are engaged in bargaining over a proposed change, an agency is generally obligated to maintain the status quo pending the completion of the entire bargaining process, including the opportunity to pursue impasse procedures.[9] *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 902-03 (1999) (*INS-1*); *United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector,*

[9] In still another INS case, *United States Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69 (1999), the Authority modified its case law and held that unilateral implementation of a change when the parties are at impasse violates 7116(a)(5), but not (a)(6), absent some additional conduct interfering with the Panel's processes.

San Diego, California, 43 FLRA 642, 652-53 (1991). An agency may, however, assert as an affirmative defense that unilateral implementation of the change was "consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *INS-1* at 904.

In the case at bar, the SEC did provide the Union with notice of its proposed new compensation system. The Union requested bargaining concerning the system, and the Agency entered into substantive negotiations with the Union, pursuant to which differing pay proposals were offered and discussed by the parties. Testimony at the hearing established that the Agency proposed a pay schedule with 15 grades and between 21 and 31 steps per grade for bargaining unit employees (two other grades were reserved for supervisors), a new locality pay scale, and a new system for within-grade step increases that was entirely based on performance. The Union also proposed a pay schedule with 15 grades, but its schedule retained the traditional ten steps within each grade and the traditional methods of within-grade increases that combined an employee's longevity and performance. The Union's proposed salaries were considerably higher than those in the Agency's schedule, roughly matching those paid to FDIC employees. There is no evidence that at any time prior to May 19, 2002, the Agency advised the Union that any issues or proposals were non-negotiable. Two hours after the Union notified the Agency on May 17 that it was seeking the Panel's assistance to resolve the compensation dispute, the Agency notified employees that it would immediately implement its pay system for all employees.

1. The General Counsel Was Not Required to Prove that the Union Submitted Negotiable Proposals; Rather, It Was Up to the Agency to Prove the Non-Negotiability of the Union's Proposals in Order to Support a Defense that It Had No Duty to Bargain

In *INS-1*, 55 FLRA at 901, and *INS-2*, 56 FLRA at 356, the Authority held that "finding that a union has submitted negotiable proposals is not a necessary element" of the General Counsel's case alleging improper unilateral implementation of a change in conditions of employment. Instead, the non-negotiability of the union's proposals is one possible affirmative defense that the agency may assert in order to show that it had no obligation to bargain. In *SSA Malden*, cited by the Agency, SSA had taken the position during bargaining that some of the union proposals were not negotiable; under those circumstances, it was appropriate to

require the General Counsel to prove the existence of a negotiable proposal. The other cases cited by the Authority in *INS-1*, at 900-01, further illustrate the necessity for an agency to initially assert non-negotiability during bargaining before the burden shifts to the General Counsel to demonstrate the existence of negotiable proposals at the hearing.

Here, the SEC never raised a non-negotiability claim during bargaining, at a time when the Union could have responded by revising its proposals or filing a negotiability appeal. *See INS-2*, 56 FLRA at 357. The Agency did not even raise this as an affirmative defense in its answer to the complaint. G.C. Ex. 1(f). The first time the Agency clearly stated that the Union had made no negotiable proposals was in its post-hearing brief, and this is neither timely nor fair.

Even if I were to agree with the SEC as to the burden of proof, I would still find that the General Counsel met its burden. Although none of the Union's proposals were offered into evidence, Mr. Keller described the Union's proposals for pay rates, within-grade increases and locality pay (Tr. 33-35, 79-81). Because SEC pay was no longer "specifically provided for by Federal statute" after January of 2002, the entire range of issues related to salaries, benefits and pay increases was substantively negotiable on its face. Absent affirmative evidence rebutting the negotiability of the proposals described by Mr. Keller, I am satisfied that the Union offered proposals that imposed a bargaining obligation on the Agency.[10]

2. The System Implemented by the Agency Changed Unit Employees' Conditions of Employment

Traditionally, most Federal employees' base pay and locality pay have been uniform government-wide and fixed by the General Schedule, 5 U.S.C. § 5332. Similarly, 5 U.S.C. §§ 5335 and 5336 and their implementing regulations fix the manner in which employees can receive within-grade step increases. Therefore, these issues are not "conditions of employment," as defined by section 7103(a)(14)(C) of the Statute, because they are "specifically provided for by Federal statute." In those few situations where Congress has exempted an agency from these statutory requirements, employee pay is a "condition of employment" and is

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[10] I will address the classification issue separately.

substantively negotiable. *See Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645-50 (1990).[11]

Upon passage of the Act in January 2002, "[r]ates of basic pay" could be "set and adjusted" by the SEC "without regard to the provisions of chapter 51 or subchapter III of chapter 53" of 5 U.S. Code. 5 U.S.C. § 4802(c). By virtue of this provision, the SEC was no longer bound by the classification rules applicable to most Federal agencies or by the General Schedule pay rates, and it could give within-grade and quality step increases to employees without regard to the restrictions of 5 U.S.C. §§ 5335 and 5336. The Agency does not argue that its new pay schedule is specifically provided for by statute, but somewhat paradoxically it does argue that within-grade increases remain covered by 5 U.S.C. § 5335(a). There is no basis for such a claim, however. Within-grade and quality step increases are "adjustments" to employee pay, and the Act clearly removed the SEC from the provisions of the U.S. Code governing such increases. On the other hand, the Act did not exempt the SEC from chapter 71 of Title 5 of the U.S. Code, (*i.e.* the Statute and its collective bargaining provisions), and the SEC has not even argued that it has unfettered discretion to ignore those statutory requirements. Therefore, no aspect of the Agency's compensation system was "specifically provided for" by statute.

However, the Agency has raised other arguments to show that it had no obligation to bargain with the Union. One such argument is that the pay systems proposed by the Agency and the Union in May 2002 "relate to the classification of any position;" accordingly, the Agency submits that paragraph (B) of section 7103(a)(14) excludes the SEC's pay schedule from the definition of "conditions of employment."

Most of the decisions analyzing the meaning of "classification" in section 7103(a)(14)(B) are negotiability cases involving employees whose pay is fixed by the General Schedule; thus they do not directly involve pay proposals. Moreover, such employees are subject to the detailed classification provisions of 5 U.S.C. chapter 51 and 5 C.F.R. part 511, while SEC employees, pursuant to the Act, are no longer covered by those provisions. 5 U.S.C. § 4802(c). As a result, some of the language used in Authority decisions is either misleadingly broad or

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[11] However, when Congress gives agency management unfettered discretion in setting pay rates, the agency is not required to negotiate on that issue. *See* note 5, *supra*.

inapplicable to cases such as ours. For instance, in *National Association of Government Employees, Local R12-33 and U.S. Department of the Navy, Naval Air Warfare Center, Weapons Division, Point Mogu, California*, 45 FLRA 802 (1992), cited by the Agency, the union offered a proposal to "reclassify . . . thirty (30) Firefighter GS-081-05 positions to the GS-081-06 level[.]" The issue in dispute there was not the pay for employees at a given grade, but whether those employees should be classified at the GS-5 or GS-6 level. It was, therefore, clear that the union's proposal "related to the classification" of a specific job, and was non-negotiable under 7103(a)(14)(B). In so holding, the Authority explained, "Proposals concerning the pay level of positions concern classification of positions, within the meaning of section 7103(a)(14)(B)." 45 FLRA at 803. The SEC inaccurately seeks to apply this language to mean that any proposal setting a specific pay rate for a position relates to classification.

The language used by the Authority in *American Federation of Government Employees, Local 2031 and U.S. Department of Veterans Affairs Medical Center, Cincinnati, Ohio*, 56 FLRA 32 (2000), clarifies some of the potential confusion. The Authority stated that a proposal involves a classification matter when it "assigns a specific grade level to a specific position." 56 FLRA at 34. Citing *March Air Force Base, Riverside, California and American Federation of Government Employees, AFL-CIO, Local 1953*, 13 FLRA 255, 258 (1983), it further explained [56 FLRA at 35]:

> [I]t appears that Congress intended to remove from the scope of bargaining threshold determinations as to what duties and responsibilities will constitute a given position and the placement of that position in a class for purposes of personnel and pay administration.

Thus it is not the setting of pay itself that is offensive to 7103(a)(14)(B), but the relationship of the duties of a position to its placement on a pay schedule. With this distinction in mind, it is clear that the Union's pay dispute with the SEC focused on the appropriate pay for each position and had nothing to do with the duties of those positions.

Although the SEC describes its pay schedule as having 17 grades, compared to the General Schedule's 15 grades, only 15 of the SEC grades apply to bargaining unit employees. Thus the General Schedule, the SEC's system, and the Union's proposed system all involve the same number of

pay grades. In explaining its proposed system to employees shortly before implementation, the Agency emphasized the similarity of the old and new grade schedules. G.C. Ex. 9, Question 3. In both the Agency's and the Union's proposals, all employees would be converted from their grade and step in the General Schedule to a comparable position in the new system. More to the point, neither the Agency's proposed system nor the Union's sought to change in any way the "job title, series, or duties" of any positions or employees. G.C. Ex. 9, Question 9. The Agency's system set new pay rates for each grade that are higher than the General Schedule's, and the Union's proposal would have set pay rates even higher; but there is no evidence that the Union sought to change in any way the grade level for any position from the grade assigned by the Agency. Thus the pay negotiations in this case did not relate in any way to the classification of any position.

Two Authority decisions are most directly applicable to the situation here. In *International Organization of Masters, Mates and Pilots, Marine Division, Panama Canal Pilots Branch and Panama Canal Commission*, 51 FLRA 333 (1995), employee pay rates were not covered by the General Schedule, and the union offered proposals concerning a system for setting pay. The Authority rejected the agency's claim that "any proposal which would establish or adjust the basic pay of Agency employees" "intrinsically concern[s] the classification of positions." 51 FLRA at 340. It noted that the duties and responsibilities of positions, and the placement of those positions in a classification, had already been determined by the agency; therefore, the union proposals concerning the amount of compensation for positions whose classification had already been set did not involve classification. *Id.*

Finally, and most relevantly, the Authority cited the *Panama Canal* case in an arbitration decision involving the SEC and the Union and the 2002 pay rates implemented under the Act. *United States Securities and Exchange Commission, Washington, D.C. and National Treasury Employees Union, Chapter 293*, 61 FLRA 251 (2005) (*SEC-1*). The specific issue in dispute there concerned the conversion to the SEC's new pay system of certain employees who had been paid at "special rates" prior to the Act. While that issue is distinct from the issues posed in the instant case, the Authority's treatment of the Agency's claim in *SEC-1* that this was a "classification" matter is directly applicable here. Just as the SEC's formula for converting employees from one pay system to another did not involve "an assessment of the duties of any employees and whether those duties should be classified at a different grade[,]" the

Union's pay proposals here did not involve any determinations that fit within the meaning of "classification." 61 FLRA at 254.[12]

In summary, the evidence demonstrates that all portions of the SEC's new compensation system (the pay rates, locality pay, and the procedures and grounds for earning step increases) constituted conditions of employment within the meaning of section 7103(a)(14) of the Statute. It is also clear that the system implemented by the Agency in May 2002 was different from the old compensation system, and that it changed conditions of employment for bargaining unit employees.

3. The Change in Conditions of Employment Had More Than a De Minimis Effect on Unit Employees

Since at least its decision in *Department of Health and Human Services, Social Security Administration, Chicago Region*, 15 FLRA 922, 924 (1984), the Authority has held that "no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than *de minimis*." Subsequently, the Authority has occasionally adjusted the factual criteria that are relevant to determining the impact of a change, but the standard itself has remained the same. *See Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986). Recently, in *SSA Charleston*, the Authority extended the *de minimis* standard to changes that do not involve the exercise of a management right, but it reiterated the underlying standard as whether the change "has more than a *de minimis* effect on conditions of employment." 59 FLRA at 650, 654. Contrary to the SEC's arguments, however, none of the above-cited decisions (indeed nothing in FLRA case law) indicates that a change is negotiable only when it has more than a *de minimis* "adverse" impact or effect.

The SEC's confusion apparently arises from the language of section 7106 of the Statute. Section 7106(a) lists those

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[12] The Authority has also held on several occasions, most recently in *SEC-1*, that classification matters defined by section 7103(a)(14)(B) are not limited to employees covered by chapter 51 of Title 5 of the United States Code. 61 FLRA at 253; *American Federation of Government Employees, Local 3295 and U.S. Department of the Treasury, Office of Thrift Supervision*, 47 FLRA 884, 902 (1993). The General Counsel therefore is incorrect in seeking to rebut the Agency's "classification" defense on that basis.

management rights concerning which an agency is not required to bargain, but even in those areas management must negotiate concerning "procedures which management officials of the agency will observe in exercising any authority under this section[]" (so-called "implementation" bargaining) and "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials[]" (emphasis added) (so-called "impact" bargaining). In other words, the "adverse impact" of a management decision is relevant only when an agency has exercised one of its section 7106(a) rights, and only in negotiating "appropriate arrangements" for employees affected by the change.

In our case, the SEC changed the salaries and the pay system of all bargaining unit employees. This was not the exercise of a management right, and the bargaining which ensued was not confined to appropriate arrangements, but to the substance of the pay system itself. The Agency was required to bargain if the new system would foreseeably have more than a *de minimis* effect on bargaining unit employees, regardless of whether the effect was beneficial or adverse.

The "pay parity" system implemented by the SEC in May 2002 established an entirely new salary scale for all 3200 of its employees, with pay rates between 14 and 16 percent higher, on average, than the General Schedule. Within this new system in which everyone received a pay increase, some employees benefited far more greatly than others. By design, the new system was skewed to provide the largest increases to "securities industry" employees in particular, as well as to attorneys, accountants and examiners (most of whom worked in SI jobs), because these were the positions in which the Agency had suffered the highest attrition. The new system also modified the General Schedule's locality pay rates, giving higher adjustments to employees working in New York, Los Angeles and Boston and lower adjustments to employees in Atlanta and Dallas. As a result, a Fort Worth employee in a non-SI job received roughly a 3 percent raise, while a New York employee in an SI job received roughly a 32 percent increase. (*Compare*, in Agency Ex. 8, 6th line on p. 11 and 22nd line on p. 57.) And the new system altered dramatically the way that employees receive within-grade increases. Under the old system, employees received regular step increases as long as they performed at an acceptable level. While the record offers little detail as to the precise mechanisms of the SEC's new "merit pay" system, employees are eligible to receive up to a three-step increase each year, or none at all, depending on an

evaluation of their work performance by their supervisors and by a review committee (Tr. 264-65; Agency Ex. 1 at 14).

Merely describing the SEC's pay system illustrates the absurdity of its claim that the impact of the change was *de minimis*. It affected all of the more than 2000 unit employees in the most significant ways imaginable: their salaries, the ways they earn salary increases, and the importance of seniority and supervisory appraisals on pay. Indeed, even if I were only to consider the "adverse" impact of the new system on employees, it is undeniable that securities industry employees benefited far more from the new system than other employees; that employees in Atlanta and Dallas-Fort Worth were adversely affected by the change in locality adjustments in relation to New York and Boston employees; and that employees receiving "acceptable" performance appraisals will be adversely affected in relation to employees rated "outstanding." These changes will affect all employees in their wallets and in their relationships with their supervisors, and the effects will be cumulative with each passing year. The disparate effects of the Agency's system on different employees raise concerns that the Union might legitimately seek to alleviate.

4. The Subject of Quality Step Increases Was Not Covered By the Parties' Interim Agreement

The Union was first certified to represent Agency employees in July 2000, and in October of that year the Union and Agency signed a two-page interim agreement, which covered only a few of the issues concerning the parties. Agency Ex. 4. This agreement continued the SEC's pre-existing grievance procedure, and it contained Attachment 1, which listed matters that could not be grieved under the grievance procedure. Among these non-grievable issues was the "[d]isapproval of a quality step increase or any other kind of discretionary award . . . ." The Agency now argues that this provision "covered" the issue of quality step increases and rendered the issue non-negotiable in May 2002. There is no merit to this argument.

The "covered by" doctrine is intended to provide the parties to a collective bargaining agreement with "stability and repose with respect to matters reduced to writing" in their agreement. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1017 (1993), quoting from *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). It prevents a party from renegotiating an issue that had already been negotiated by the parties. In the case at bar, however, the Union did

not initiate any change in the parties' rules or procedures governing quality step increases: the Agency did. The Union requested bargaining only after the Agency proposed its new compensation system, which included the elimination of all within-grade increases as previously governed by 5 U.S.C. §§ 5335 and 5336 and the institution of a new "merit pay" system to govern pay increases. As already discussed, it was this Agency-initiated change in conditions of employment that triggered a duty to bargain on the part of the Agency. Thus the "covered by" doctrine is wholly inapplicable here.

This disposes of the SEC's various grounds for insisting that it had no obligation to bargain with the Union concerning the new compensation system. I conclude that by implementing the new system, the Agency was significantly changing the conditions of employment of bargaining unit employees, and that it therefore had a duty to bargain fully and substantively with the Union concerning salaries, locality pay, merit pay, step increases and other aspects of the new system. I now must determine whether the Agency fulfilled this duty.

5. The Agency Has Not Demonstrated That Immediate Implementation of the Pay System Was Justified

Despite its protestations at the hearing that it had no obligation to bargain at all, the SEC did engage in bargaining with the Union concerning its proposed pay system for a period of time in April and May of 2002. However, when the Union indicated that it was invoking the Panel's impasse procedures on May 17, the Agency sent a letter to employees two hours later, notifying them that it was implementing its system for bargaining unit and non-unit employees, effective May 19. Thus the Agency did not maintain the status quo for the duration of the bargaining process, and this violated section 7116(a)(5) of the Statute, unless the evidence demonstrates that "a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *INS-1*, *supra* at 904.

As noted by the Authority in *INS-1*, the "necessary functioning" rule is one of long standing, dating back to Executive Order 11491, according to *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466, 468 n.5 (1985) (*BATF*). The legal standard has been expressed in a variety of ways. In *BATF*, the Authority quoted the rule as requiring parties "to adhere to established personnel policies and practices . . . to the maximum extent possible, *i.e.*, to the extent consistent with the necessary functioning of the agency[.]" *Id.* Indeed,

this seems to be the most common formulation of the rule. But in *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 29 FLRA 734, 740 (1987), a negotiability case, the Authority stated that the *BATF* standard was essentially the same as "compelling need." In *22 Combat Support Group (SAC), March Air Force Base, California*, 25 FLRA 289, 301 (1987), the ALJ (affirmed without comment by the Authority) explained that while a new rule proposed by the agency "was obviously important," it was not "so critical as to create an overriding exigency or other compelling reason" to justify unilateral implementation. The Authority stated in *U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri*, 23 FLRA 435, 437 (1986), that costs are a legitimate factor in evaluating the necessity for implementation, but it rejected speculative evidence on this point. And again in *INS-1*, 55 FLRA at 904, the Authority stated:

> Although . . . the Respondent's assertions show a need for the new policy, the arguments do not demonstrate how delaying implementation of the policy until the parties had an opportunity to bargain over the policy's impact and implementation would have prevented the Respondent from effectively and efficiently carrying out its mission.

Although agencies often urge (as the SEC does) that the Authority should defer to the considered judgment of agency management concerning their underlying missions and operational needs, research shows that the Authority has consistently applied "a rather demanding standard for establishing the kind of necessity that is asserted here[.]" *INS-1* at 915. The only case I could find in which the Authority upheld an agency's invocation of "necessary functioning" was still another INS case, *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas*, 23 FLRA 90 (1986) (*INS Laredo*). There, the Authority permitted management at a Border Patrol station to unilaterally change the shift schedules and assignment procedures for its agents. The ALJ, with the Authority's express approval, emphasized the importance of the agency's mission of protecting the nation's borders and the relationship of the shift changes to that mission. *Id.* at 93, 102-03. The judge found that these "were not just desirable changes, they were changes deemed necessary . . . to effectively stop the maximum number of illegal aliens." *Id.* at 103. It is apparent that the Authority in that case did indeed take a

"deferential" approach to the agency's perceived necessity, but such an approach is atypical in the case law, even in other cases involving Border Patrol and law enforcement agents.[13] *See, e.g., INS-1* (agency policy concerning use of non-deadly force by agents and criminal investigators); *INS-2* (agency policy concerning body searches by agents in the field).

From these various decisions, it is apparent that the individual facts and circumstances justifying an agency's unilateral change must be carefully examined. But the most significant guiding principle evident throughout these decisions is that agency management must demonstrate not merely that the change is necessary to its effective functioning, but also that delaying implementation until after the impasse is resolved would undermine the effective functioning of the agency. *INS-1* at 904.

With these principles in mind, I return to the facts of the case at bar. The SEC has marshaled a considerable arsenal of facts in support of the need for significant salary increases for its employees, particularly for its attorneys, accountants and examiners in SI positions. Indeed, much of this factual work was done by the GAO in its 2001 and 2002 reports to Congress on the problems facing the SEC (Agency Exs. 2, 3): those reports made a convincing case for Congress to pass the Act, enabling the Agency in turn to give its employees salary relief. The SEC argues now that if Congress was convinced that SEC employees needed immediate pay raises, why shouldn't I be equally convinced?

This is not the proper question, however. Indeed, in the face of the factual data contained in the GAO reports, I fully agree with the Agency that it was losing key employees at an alarming and dangerous rate, and that it needed to act to reduce that attrition by paying those employees more (among many other steps recommended by GAO). The Union also agreed with the Agency on this, but the Union urged the SEC to implement even higher pay raises (among

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It should also be noted that the *INS Laredo* case involved implementation of a change while a question concerning representation (QCR) was pending, rather than at a bargaining impasse. The "necessity" test is the same in both situations, but the ALJ emphasized that because the QCR was pending for nearly six years, the proposed change could not be held in abeyance for such a long time. 23 FLRA at 96, 103. He also noted that because the shift change was an exercise of management rights, the union could not have negotiated the substantive terms of the schedules in any case. 23 FLRA at 103.

other things). The question for me is whether the "necessary functioning" of the Agency depended on implementing the new system in May 2002, rather than waiting until the Panel ruled in November, since any unilateral action risked being overturned by the Panel.[14]

In some respects, the SEC's situation conjures the image of a bleeding hospital patient, except that it was bleeding employees, endangering its health. In the SEC's view, it needed to act to stop the bleeding, just as a doctor would for a patient. But while medical treatment is largely a scientific process, based on principles that have been empirically tested and confirmed, human resources and personnel relations have little in the way of scientific answers. Attrition can be measured, but whether a particular action by management (even something as dramatic as a 16 percent pay raise) will have a particular effect on an organization of 3200 employees is largely speculative. The speculative nature of the SEC's calculations is reinforced by the Agency's own history. The GAO and the SEC itself traced the Agency's attrition problems at least as far back as the 1980's, and the SEC had already given significant pay increases to its employees on several occasions, with only mixed and temporary results. The Agency had at least twice received permission to pay special rates to key employees (most recently in 2001), and the record reflects that these steps resulted only in short-term reductions in attrition. Similarly, the Agency had been utilizing every form of monetary inducement possible under the General Schedule, such as recruitment and retention bonuses targeted specially toward those positions most affected by attrition. The Agency argues to me that its new pay system is going to immediately slow the bleeding and at least alleviate it over the long term, but the historical record suggests otherwise, or at least that the SEC is being overly optimistic.

The SEC's case to Congress also may have proved too much for purposes of this case. The statistics portrayed SEC employees as far behind private sector securities attorneys and accountants in pay and benefits, and from 24 to 39 percent behind Federal employees at FIRREA agencies. G.C. Ex. 9, Question 6. But this did not take into account the special rate increases many SEC employees received in

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[14] If the SEC had delayed implementation while the case was pending at the Panel, and if the SEC and Union had requested expedited consideration, it is not clear whether the Panel's decision could have been issued earlier than November 8. But for purposes of this decision, I assume the date of decision would not have changed.

2001 (prior to the Act), which considerably reduced the gap with the FIRREA agencies. *Id.* The actual pay increases promised to SEC employees under the Agency's new system are considerably less than these employees may have been led to expect, and indeed SEC employees are still paid considerably less than FDIC employees, among others. It appears that the SEC compared its employees to FDIC's in order to make the most dramatic case for statutory pay relief, but then after receiving approval to raise salaries, it took (to quote the Agency's own words) "a rather conservative approach that will place the agency's proposed salary structure toward the lower end of those that we analyzed." Agency Ex. 1 at 13. Moreover, SEC's witnesses accept the premise that they cannot hope to compete financially with private sector law and accounting firms. Thus, even if the Agency's calculation was correct that a substantial pay raise would alleviate attrition, its system offered only a half-dose of the prescribed medicine.

The Agency also seems to be arguing that the new pay system would at least temporarily stop employees from leaving and encourage new ones to come, and that the attrition problems were so severe that they required this immediate relief. Agency witnesses testified that attrition did decrease significantly in the 18 months between implementation and the hearing. Tr. 139-40, 205-06. While this may be true, it does not justify the Agency's action. First, delayed implementation of the pay raises would likely have had the same result, albeit a few months later, and it is unlikely that the long-term impact of the delay would be significant. The historical evidence in the record demonstrates that the beneficial effects of pay raises are temporary. Second, while the Agency declared that it was implementing the new pay system as of May 19, employees did not receive the increases until August. Payroll employees needed to perform calculations to convert everyone's pay and enter the data into the computerized system during the interim. If the Agency had delayed implementing its system while the impasse proceedings were pending, the payroll staff could still have been performing these calculations and entries and significantly reduced the time needed to implement the new system after the Panel's decision. And until August of 2002, neither the employees nor the Agency actually benefited at all from the premature implementation. This dilutes considerably the SEC's argument that waiting until November would have endangered the functioning of the Agency.

Third, although employees received pay increases under the SEC's plan, their within-grade increases were eliminated on May 19 and had not been restored a year and a half later,

at the time of the hearing. One significant component of the SEC's new system was its "merit pay" process that would reward the best employees the most. But during the very months when the SEC claimed it "needed" to implement its plan to cure its attrition problems, it was denying employees one major part of their incentive. Not only did this dilute the supposedly-beneficial impact of the new system, but it permanently locked some employees at a lower level on the new pay scale than if implementation had been delayed until November. Employees who would normally have received within-grade increases under the old system between May and November 2002 will never recover that loss: they were converted to the new pay system at a lower step than if implementation had been delayed until November, and they will feel the impact of that loss each subsequent year, regardless of how they are promoted in the future. Finally, the Agency argues that its employees "needed" to see that the Act was actually resulting in pay relief to keep them from leaving. But the Agency could have achieved much the same effect in May if it had simply told bargaining unit employees that they would be receiving the same, if not larger, pay increases as soon as the labor negotiations were completed, and that their increase would be made retroactive to May. Even with the SEC's early implementation, the employees were forced to wait for retroactive raises, and waiting for the Panel's decision would not have altered that result significantly. Thus again, the Agency seems to be overstating the beneficial impact of its own unilateral plan and underestimating the employees' ability to understand that they would be receiving pay raises very soon at the conclusion of the impasse resolution process.

I am also unpersuaded that the Agency's reprogramming of $25 million to pay for the new system constituted an emergency justifying immediate implementation. This money was available through the fiscal year ending September 30, so that it was hardly evident in May that the bargaining impasse could not be resolved before the end of September. This is especially true when it is noted that the SEC did not actually implement the new plan until August, despite having "declared" implementation back in May; as a result, funds for the pay raise were applied retroactively from August to May. This could just as easily have been done at a later date, when the bargaining impasse was actually resolved. Moreover, in testifying for the Agency, Mr. McConnell indicated that while this money would need to be reauthorized by Congress for FY 2003 if it wasn't spent by the end of FY 2002, it would "still be there . . . [and] it would be an easy matter, I believed, to have it then kicked forward into the next fiscal year as well . . ." Tr. 244-45, 246. Additionally, I do not accept the argument

that FY 2002 funds could not have been allocated to cover a retroactive pay raise to employees dating back to May, even if the impasse were not resolved until November. This money was still being used to pay FY 2002 salaries, and the Agency's argument -- that it could pay employees retroactively in August but couldn't do so after September 30 -- is unsupported and does not ring true. While I am mindful of the case law recognizing the legitimacy of financial considerations in evaluating exigent circumstances, I do not credit the Agency's argument that it would have lost its pay parity funding for FY 2002 if it had delayed implementation of its plan.15

Despite the Agency's professed concern for avoiding the additional costs of implementing its new system in May for non-bargaining unit employees and later for unit employees, it was actually incurring a significant financial risk by going ahead with its plan in May. If the Panel's decision had gone in the Union's favor, or if the Panel had made even minor changes in the pay rates proposed by the SEC, the Agency would have been forced to adjust its payroll system again and recalculate the pay and related data for all unit employees.

Finally, after considering all the testimony and documents, I come away with the impression that the SEC manipulated the timing of events in this case to suit its own convenience. First, the Agency delayed meeting with the Union to discuss a new pay system until late April, and then it prematurely terminated the process on May 19. The SEC had long been lobbying in Congress for the passage of the Act, and it had spent 15 months prior to passage working with a contractor to develop its pay parity system, but the Union was not brought into that process. As soon as the Act was signed into law in January 2002, the Union wrote to the SEC Chairman and asked to begin negotiations immediately. The Agency intentionally chose to keep the Union in the dark until after it had submitted an implementation plan to Congress and obtained approval for reprogramming funds for the system. Tr. 234-37. While the SEC was certainly within its discretion to do these things, and while it may have had

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Mr. McConnell also testified that the $24.8 million was "more than adequate to cover the remainder of that fiscal year if we'd started even earlier than May." Tr. 244. Thus only a small part of the reprogrammed funds was actually being used for employee pay raises. The Agency was also intending to use the funds to pay for FY 2003 operations, in case the 2003 budget did not pass by September 30. Tr. 161, 245. Pay parity was simply a fig leaf to cover other contingencies the SEC might face.

good reasons for delaying negotiations, those decisions also ensured that a pay agreement with the Union would be similarly pushed back in time. The Agency's pay system had been essentially completed by the time the Act was passed, and even without funding approval from Congress, it might have been wise to begin discussions with the Union promptly -- especially if SEC management felt that speedy implementation was essential to the "necessary functioning of the Agency." The actions of the SEC in dealing with the Union undercut the credibility, as well as the persuasiveness, of its legal claims. It is apparent to me that time was not of the essence to Agency management until at least April 2002.

On April 18, 2002, before the Agency had even begun bargaining with Union,[16] the SEC Chairman sent a letter to all employees, advising them it was his hope to implement the new pay system on May 19, "in a manner consistent with the Pay Parity Implementation Plan and Report we submitted to Congress." G.C. Ex. 8. Thus, before the Union had even heard management's briefing to explain the proposed pay system, employees were already being told that management hoped to implement the management-proposed plan in one month. This appears to be the moment at which time suddenly became important to the Agency. After putting off discussions with the Union for at least three months, the SEC expected the entire bargaining process to be completed in one month. But the May 19 implementation date was a totally artificial creation of management. There was no inherent reason why implementation needed to occur on that date. Mr. McConnell testified that May 19 was the earliest date by which they thought they could put the system into effect (Tr. 157), but he never really explained how this calculation was reached. In reality, it appears the Agency simply wanted to spend as much of the reprogrammed funds as possible during the fiscal year (Tr. 157), but it also turned out that the payroll conversions could not be completed until August, and the pay raises were made retroactive to May 19. Thus May 19 had no real significance, as the payroll staff could have made retroactive payments at any time in the fiscal year dating back as far in the year as they chose. Nonetheless, the May 19 implementation date took on a life of its own; it was useful in focusing the minds of the negotiators, and the Agency stuck to its timetable to the very end. Thus the SEC narrowed the window for bargaining at both ends: by

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16 While the parties had an initial ground rules discussion on April 10, the Union was first briefed on the substance of the Agency's pay proposals on April 22.

delaying the start of negotiations until late April and by imposing an artificial termination/implementation date.

It is also important to note that the unilateral change in this case was not an exercise of the SEC's management rights. The Agency was required to bargain with the Union over the substance of the new pay system, not "merely" regarding impact and implementation. Thus, unlike the situation in *INS Laredo*, the SEC's unilateral implementation of its system destroyed any realistic possibility that the Union's salary proposals could be accepted. *See* 23 FLRA at 103.

In light of these circumstances, I do not accept the SEC's argument that implementation on May 19 was essential to the necessary functioning of the Agency. Indeed, the Agency did not truly "implement" the plan until August, although its "declaration" of implementation in May served to terminate the bargaining process with the Union. This fact alone cuts in half the time in which employees were receiving the benefits of the new pay system and contradicts the alleged urgency of the Agency's action. If, on May 19, the SEC had announced to bargaining unit employees that the bargaining impasse between management and the Union was being submitted to the Panel; that the Panel would be deciding whether to give them a 16 percent average pay increase or an even higher one; and that they would receive payment of their new pay retroactive to May 19, I am convinced that the Agency would have suffered little or no more attrition than they incurred anyway, and that the integrity of the bargaining process would have been protected. While this conclusion cannot be empirically tested, the burden is on the Agency to demonstrate that its ability to carry out its mission would have been impeded if it had waited until the Panel ruled, and the Agency simply has not met this burden.

Accordingly, I conclude that the Agency committed an unfair labor practice by implementing its pay system on May 19, 2002, in violation of section 7116(a)(1) and (5) of the Statute.

6. Remedy

As I have already stated, the pay and pay-related issues in dispute in this case were substantively negotiable. When an agency changes a condition of employment without fulfilling its duty to bargain substantively, the Authority orders a *status quo ante* remedy in the absence of special circumstances. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79,

84 (1997). It is generally the agency's responsibility to establish the existence of such special circumstances. *Id.* at 85.

In this case, the Panel's November 8, 2002 decision adopted the SEC's pay scales and most other aspects of the disputed system. Thus it is not practicable to require the Agency to return to its old pay system for the May-November period, and the General Counsel has not requested such relief. However, the G.C. does ask that employees be reimbursed for any within-grade step increases (both longevity-based and performance-based increases) they would have received if the Agency had complied with its bargaining obligations under the Statute. The Agency argues that any employee's entitlement to such relief is entirely speculative and that it violates the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A).

The Back Pay Act, 5 U.S.C. § 5596, provides, in pertinent part:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-
>
> > (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
> >
> > > (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred[.]

The Authority has consistently held that under the Back Pay Act, an award of back pay is authorized only when: (1) the employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action directly resulted in the withdrawal or reduction of the employee's pay, allowances or differentials; and (3) but for such action, the employee otherwise would not have suffered the withdrawal or reduction. *U.S. Department of Health and*

Human Services and National Treasury Employees Union, 54 FLRA 1210, 1218-19 (1998) (*HHS*). The term "personnel action" includes the omission or failure to take an action or confer a benefit. 5 U.S.C. § 5596(b)(5). *See also Federal Aviation Administration, Washington, D.C.*, 27 FLRA 230, 233 (1987).

The Agency first argues that its employees did not suffer from an unjustified or unwarranted personnel action, but its commission of an unfair labor practice, as discussed above, clearly constitutes an unwarranted personnel action under subsection (b)(1) of the Back Pay Act. The Agency next asserts that employees did not suffer any "withdrawal or reduction" of pay, and that employee step increases were speculative in nature; these arguments require closer analysis.

When the Agency implemented the pay system in August 2002, the base pay of every employee was increased, retroactive to May 19, 2002. As of May 19, the Agency discontinued the system of WGIs and QSIs from the General Schedule, but it did not immediately replace it with its new "merit pay" system. Indeed, by the time of the hearing in October 2003, the Agency still had not yet begun paying any such increases to employees. If the Agency had complied with the Statute and waited until the Panel's decision to implement its system, employees would have been paid at the lower General Schedule rates for approximately six months, but many of them would have received WGIs. For some (although apparently not many) employees, their General Schedule salary with a step increase would have net them more money between May and November 2002 than they received by converting to the new pay system. *See* Example 1 on G.C. Ex. 7. But for all employees whose within-grade service would have entitled them to step increases prior to November 8, 2002, receiving that step increase would have placed them at a higher step on the salary scale when their salaries were converted to the new pay scale, and this benefit would have carried over into subsequent years. Therefore, even though some employees' total pay for May to November 2002 might have been less under the "old" system than under the "new" one, they would have benefited significantly in each year subsequent to 2002, because they would have been one step higher on the "new" pay scale. *See* Examples 1-12, G.C. Ex. 7.

With respect to WGIs, no speculation is required to determine which employees would have received them prior to November 8, 2002. Eligibility for such increases is set forth at 5 U.S.C. § 5335 and 5 C.F.R. part 531, subpart D: in order to qualify for the increase, an employee must

simply have completed the waiting period and performed at an "acceptable level of competence". 5 C.F.R. § 531.404 (2005).[17] By checking each employee's personnel records, it will be immediately apparent whether they would have completed the waiting period for a WGI between May 19 and November 8. SEC employees continued to receive performance appraisals after May 2002, so it will also be immediately apparent whether these employees met the "competence" qualification.

With respect to QSIs, the statutory language gives a much greater degree of discretion to each agency, and an employee correspondingly has much less certainty of receiving an increase. 5 U.S.C. § 5336(a) provides, in pertinent part: "Within the limit of available appropriations . . . , the head of each agency may grant additional step-increases in recognition of high quality performance . . . ." While 5 C.F.R. § 531.504 defines "high quality performance" as "outstanding" or its equivalent, the regulation does not set any parameters on when an agency head "may" grant increases, nor does it fix any budgetary parameters. In practice at the SEC, it also appears that managers had considerable discretion in determining who to give QSIs to, and how to allocate them. Tr. 85-88. The Agency is therefore correct in asserting that there is no way of determining which, if any, of its employees would have been awarded QSIs between May 19 and November 8, if the Agency had delayed implementing its new system until the latter date.

Accordingly, the second and third requirements of the Back Pay Act are not met here for QSIs; that is, it cannot be found that the premature implementation of the new pay system "directly resulted in" the loss of QSIs to any particular employees, even if we can identify which employees received "outstanding" performance appraisals for the relevant period. Even if the Agency had waited to implement its plan, it could have decided that QSIs were not "within the limit of available appropriations," or it could have simply chosen not to allocate QSIs for that year. Thus the Back Pay Act does not permit the award of QSIs in this case.

But just as the law gives considerable discretion to agency heads in awarding QSIs, it affords agency heads no comparable flexibility in awarding WGIs. SEC employees were

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17 Although the SEC was no longer bound by these legal requirements upon the passage of the Act, that system remained a condition of employment for SEC employees until it was lawfully changed.

appraised in 2002, and therefore it can be determined precisely which employees would have earned WGIs between May 19 and November 8. "But for" the Agency's premature cessation of WGIs on May 19, a certain number of SEC employees would have received WGIs in that period.

The only remaining question under the Back Pay Act is whether the loss of their WGI caused these employees a "withdrawal or reduction of pay, allowances, or differentials." The Agency argues that because the employees all received pay raises when they were converted to the new pay system as of May 19, they didn't suffer a loss of pay at all. But the General Counsel's evidence, summarized by me earlier, demonstrates that some employees would have received more pay, both in 2002 and in subsequent years, if they had not been converted to the new pay system until after they had earned a WGI in the May-November interim. It seems mathematically incontrovertible to me that any employee who was statutorily eligible for a WGI between May 19 and November 8 would have benefited financially from a delayed implementation of the new system, because he or she would then have entered the new pay scale at a higher step, and this would result in higher pay every subsequent year until he or she reaches the highest step in that grade. The Agency's failure to give WGIs between May 19 and November 8 was a direct result of its unlawful premature implementation of its pay system, and it directly resulted in certain employees being paid less money than they would have otherwise received.

Citing *Donovan v. United States*, 580 F.2d 1203, 1208 (3d Cir. 1978), the Agency argues that its employees suffered only the "denial of potential" WGIs, but no "real Reduction or Withdrawal of benefits[.]" The *Donovan* case was not decided under the Statute and did not occur within the context of an unfair labor practice or arbitration award, so its applicablility to the instant situation is tenuous at best. If applied literally to unfair labor practice cases and arbitrations under the Statute, employees would have to be actually reduced in pay or grade to be entitled to back pay. Numerous decisions of the Authority hold to the contrary, however.

In *Air Force Flight Test Center, Edwards Air Force Base, California*, 55 FLRA 116 (1999), the Authority upheld the award of retroactive promotions to four employees who would have been promoted to WG-12, but for the agency's unilateral elimination of automatic promotions. As in the instant case, the *Edwards* employees were not actually reduced in grade, step or pay rate, but by depriving them of the ability to be promoted as in the past, the agency caused

them to lose the pay they would have received if the agency had complied with the Statute. Other applicable cases in which the Authority ordered employees retroactively promoted include *U.S. Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forests, Gainesville, Georgia*, 45 FLRA 1310 (1992); *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 43 FLRA 1414 (1992); and *Letterkenny Army Depot*, 35 FLRA 113 (1990).

In the case at bar, the Agency's elimination of WGIs in May 2002 directly resulted in many employees not receiving step increases who definitely would otherwise have received them; this in turn resulted in these employees being paid at a lower step on the new pay scale than they would have, if the new pay scale had been implemented on November 8. While the record is insufficient to prove exactly which employees would have received WGIs, the Agency's personnel records will show this precisely. It is appropriate, therefore, that the Agency be ordered to search its personnel records to determine which employees were eligible for WGIs between May 19 and November 8 and to retroactively award those employees step increases as of their appropriate dates. The Agency must then calculate what pay and allowances these employees would have received in the years since 2002, while deducting the pay and allowances the employees actually received, and to pay the employees the difference. Finally, the Chairman of the SEC should sign the traditional notice to employees of the Agency's violation, and the notice should be posted at all locations (headquarters, regional and district) where employees represented by the Union work.

Based on the above findings and conclusions, I conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute, and I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Securities and Exchange Commission (SEC) shall:

1. Cease and desist from:

(a) Changing the conditions of employment, including changes to the rates of compensation and the methods and procedures for adjusting compensation, of bargaining unit employees without first completing bargaining with the National Treasury Employees Union (the Union), the exclusive representative of its employees, to the extent required by law with respect to any proposed changes.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Grant longevity-based within-grade step increases retroactively to bargaining unit employees who were entitled to such increases between May 19 and November 8, 2002. The following procedure should be used to identify employees entitled to such increases:

- Review employee personnel files to ascertain which employees met the time-in-grade and other longevity requirements for a step increase between May 19 and November 8, 2002;

- For those employees who met the longevity requirements during that period, review their performance appraisals for the corresponding period to ascertain which employees performed at an acceptable level of competence;

- Grant one-step increases, under the SEC's pay schedule in existence prior to May 19, 2002, to all employees who meet the two criteria above, retroactive to the date each employee met the longevity requirements;

- Taking into account the step increases given to those employees identified above, determine the appropriate placement of those employees in the new pay schedule implemented by the SEC in 2002 and adjust such employees' pay and benefits as of the date each employee qualified for such step increase.

(b) Make whole the employees identified above by paying them back pay, with interest, for all pay they lost because of the SEC's failure to give them step increases prior to conversion to the new pay schedule, between the date they qualified for step increases until the date of compliance.

(c) Post at its headquarters, regional and district office facilities 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 Chairman of the SEC 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.

(d) Pursuant to Section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1400 K Street, N.W., 2nd Floor, Washington, D.C. 20424-0001, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, December 21, 2005.

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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. Securities and Exchange Commission (SEC), violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the conditions of employment, including changes to the rates of compensation and the methods and procedures for adjusting compensation, of bargaining unit employees without first completing bargaining with the National Treasury Employees Union (the Union), to the extent required by law with respect to any proposed changes.

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

WE WILL grant longevity-based within-grade step increases retroactively to bargaining unit employees who were entitled to such increases between May 19 and November 8, 2002, and recalculate their proper placement on the new pay schedule implemented by the SEC in 2002, taking such step increases into account.

WE WILL make whole all bargaining unit employees entitled to such step increases, by paying them back pay, with interest, for all pay they lost because of the SEC's failure to give them step increases prior to conversion to the new pay schedule, between the date they qualified for step increases until the date of compliance.

_____
U.S. Securities and Exchange Commission

Date: _____ By: _____
Chairman

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 any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Washington Regional Office, whose address is: