UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE
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May 28, 2004

Stephen G. DeNigris, Esq.
Counsel
Fraternal Order of Police DPS Labor Committee
2117 L Street, NW
283
Washington, DC 20037-1524

Re: Pentagon Force Protection Agency
Washington, DC
Case No. WA-CA-04-0251

Dear Mr. DeNigris:

This office has investigated the unfair labor practice charge you filed. I have carefully considered all of the evidence and conclude that the issuance of a complaint is not warranted.

In this charge, the Fraternal Order of Police, DPS Labor Committee ("FOP") alleges that the Pentagon Force Protection Agency ("PFPA") failed to bargain in good faith and unilaterally implemented the Occupational Medical and Fitness Program, in violation of section 7116(1)(1) and (5) of the Statute.

The investigation revealed that the FOP represents a bargaining unit which includes police officers at the PFPA, formerly the Defense Protective service. There is currently a collective bargaining agreement in effect.

In November, 2003 Art Penn, FOP Chairman, attended a meeting to discuss a new Occupational Medical and Fitness Program for police officers at PFPA. While no implementation date was discussed, the parties did engage in some negotiations and reach some agreements, however, Penn made it clear that the union would engage in formal negotiations over the matter. The proposed fitness standards were different then those that had applied to the bargaining unit members when they had been hired.

You, as Union Counsel, prepared proposals for a planned December 3, 2003 meeting and provided them on November 14, 2003 to to Mike Flynn, the Agency's lead on the negotiations. The FOP proposals were essentially modifications or deletions to the program that the Agency had proposed. The first proposal stated that the requirements and obligations under the program would only apply to employees hired after 10/1/03- a "grandfather clause." The second proposal would have required that the agency recognize the employees right to privacy and would have allowed for information to be provided by

the employee's regular/treating physician. The third proposal asked that a paragraph in the program which required police officers to report any condition would could interfere with his or her ability to perform the full range of duties required for the position be deleted. A fourth proposal would require that the agency not unreasonably reject all such documentation supplied by an individual's personal physician. Two proposals dealt with grievances filed in relation to the new program. One final proposal rejected the entire provision of Medical Review and Physical Fitness Board which was part of the new program.

During the investigation, you stated that you believed that the physical fitness standard and "grandfather clause" were substantively negotiable or negotiable as appropriate arrangements.

On November 14, 2003 the Agency provided FOP with a written declaration of non-negotiability on the "grandfather clause" and the FOP's proposal that there be no Medical Review and Physical Fitness Board.

On December 3, 2003 the parties met and reached agreement on some aspects of the program, however, nothing was signed. Flynn then provided you with a counterproposal. You and Flynn continued to disagree over the negotiability of the grandfather clause. You suggested to Flynn that the ULP process would be the quickest way to decide whether or not the Agency was required to negotiate over the matter under the Statute. On December 5 the Agency provided the FOP a second counterproposal.

On December 10, 2003 the parties met and reached an agreement entitled "Memorandum for the Record. Subject: Occupational Medical and Physical Fitness Program". A review of the agreement shows that all of the Union's proposals were incorporated into the agreement in some fashion, except for the proposals for the grandfather clause and rejecting the Medical Review and Physical Fitness Board, which PFPA had declared non-negotiable.

Shortly before December 24, 2003 Penn informed you that the Agency had announced to unit employees that the new program would be implemented on January 1, 2004. You then wrote to Flynn, indicating that the parties had not yet reached an agreement and there were still outstanding issues. You then filed a ULP which was later withdrawn.

On or about January 1, 2004, unit employees were advised by Lt. Stout (Acting Watch Commander) during roll-call that the Occupational Medical and Fitness program was implemented and that they would have to start scheduling physicals.1 Penn then called Julie Brown of personnel and asked her if the new program had in fact been implemented. She stated that implementation was imminent, but never definitively stated whether it had been implemented already. Penn reminded her that negotiations had not been completed. She stated that the Agency would not discuss the grandfathering clause.

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1 Other officers were notified of the change at roll-call on January 15, 2004 and told that it would be implemented at the end of January and effective on April 1, 2003. .

In early February, some employees received forms to sign up for physical exams and the physical battery tests. A meeting was held with some unit employees on February 27, 2004 to discuss the Occupational Medical and Physical Fitness Program. FOP believes the Program was implemented on or about January 1, 2004.

Section 7103(a)(12) of the Statute defines collective bargaining as the "performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" The Statute sets forth what actions taken by an agency or a union constitute unfair labor practices. Section 7114 of the Statute provides, in relevant part:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation–
>
> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
>
> . . .

In determining whether a party has fulfilled its bargaining responsibility, the totality of the circumstances in a case must be considered. Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base, 13 FLRA 492, 505 (1983).

An agency has a duty to give its employees' union notice and an opportunity to bargain before exercising a retained management right if that exercise will change the employees' working conditions and reasonably can be expected to have more than a de minimis impact on the employees. Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 55 FLRA 848, 852 (1999). Under section 7106(a)(2)(A) management has the right to require unit employees to maintain a specific level of fitness to retain certain position. See American Federation of Government Employees, AFL-CIO, Local 987 and U.S. Department of the Air Force, Warner Robins Air Force Logistics Center, Robins Air Force Base, Georgia, 35 FLRA 265, 269 (1990) (management's right to assign employees under section 7106(a)(2)(A) includes the right to determine the particular qualifications and skills needed to perform the work of the position and whether employees meet those qualifications).

For the purposes of this case, it is assumed that management changed a condition of employment for bargaining unit employees by implementing the Occupational Medical and Physical Fitness Program. However, I also find that PFPA and FOP engaged in negotiations over the subject, eventually coming to an agreement on December 10, 2003 on most proposals. Those proposals, which were not included in the agreement, were declared non-negotiable by PFPA.

In determining whether a proposal related to a management right is negotiable as an appropriate arrangement under §7106(b)(3), the Authority uses the analysis set forth in NAGE, Local R14-87, 21 FLRA 24, (1986) (KANG). The Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. See United States Dep't of the Treasury, Office of the Chief Counsel, IRS v. FLRA, 960 F.2d 1068, 1073 (D.C. Cir. 1992); AFGE, Local 1900, 51 FLRA 133, 141 (1995). The claimed arrangement must also be sufficiently "tailored" to compensate employees suffering adverse effects attributable to the exercise of management's rights. See id. at 184. As the Authority has explained, relying on United States Dep't of the Interior, Minerals Mgmt. Serv., New Orleans, Louisiana v. FLRA, 969 F.2d 1158, 1162 (D.C. Cir. 1992), §7106(b)(3), brings within the duty to bargain proposals that provide a balm only to the hurts arising as a consequence of the management actions under § 7106 giving rise to a bargaining obligation. AFGE, Nat'l Border Patrol Council, 51 FLRA 1308, 1319 (1996). See also NAGE, Local R14- 23, 53 FLRA 1440, 1443 (1998). If a proposal is determined to be an arrangement pertaining to the exercise of management's rights, then the Authority determines whether it excessively interferes with the relevant management right. The Authority reaches this determination by weighing the "competing practical needs of employees and managers." NAGE, Local R14-87, 21 FLRA 24, 31-32 (1986).

On balance, I find that the intrusion on the exercise of management's right to determine particular qualifications and skills needed to perform the work of a particular position and whether employees meet those qualifications outweighs any benefits the proposal might afford unit employees.

Because no negotiable proposals remained on the table after the parties entered the December 10, 2004 agreement and when PFPA implemented the program, I find, that the Agency did not violate section 7116(a)(1) and (5) of the Statute.

Accordingly, I am dismissing the charge.

If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. Your appeal should include the Case Number (WA-CA-04-0251) and be addressed to the:

Federal Labor Relations Authority
Office of the General Counsel
1400 K Street, NW, Suite 200
Attention: Appeals
Washington, DC 20424-0001

You can file your appeal by mail or by hand delivery. Whichever method you choose, please note that **the last day for filing an appeal in this case is June 28, 2004.** This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than June 28, 2004. Please send a copy of your appeal to the Regional Director. You should also notify the other parties in the case that you have filed an appeal,

but you do not have to send them a copy of your appeal.

If you need more time to prepare your appeal, you may ask for an extension. Mail or hand deliver your request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than June 23, 2004.

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c) through (e). 5 C.F.R. § 2423.11(c)-(e). The regulations may be found at any Authority Regional Office, public law library, some large general purpose libraries and Federal personnel offices and the Authority's Home Page Internet site – **www.FLRA.gov.** I have also enclosed a document which summarizes commonly asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Very truly yours,

Robert P. Hunter

Robert P. Hunter
Regional Director

cc: Michael J. Flynn , Director
Human Resources
Pentagon Force Protection Agency
Pentagon Room 2E139
Washington, DC 20301

Office of Quality and Appeals
FLRA Office of General Counsel