

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## *Legal Assistance Note*

### **What Do You Mean My Ex's New Spouse Gets the SGLI? The Judge Said It Was Mine**

Just when legal assistance attorneys (LAAs) thought they had everything under control, another wrinkle in divorce and separation counseling comes along to ruin things. For years, LAAs counseled military clients to update their Service member's Group Life Insurance (SGLI) forms whenever a life-changing event—such as a marriage, divorce, birth of children—occurs. This has been, and continues to be, good advice.

This advice, however, differs considerably from the divorce and separation advice given to non-military clients (that is, the spouses of service members). Legal assistance attorneys routinely advise these clients to seek, and courts just as routinely order, that they or the children of that marriage continue being designated SGLI beneficiaries, because it is often the only life insurance that a service member has. A recent case highlights the fact that LAAs, and the civilian attorneys calling for advice on military issues, should not rely solely upon a SGLI policy to provide for the former spouse or children of that marriage.

In *Lewis v. Estate of Lewis*,<sup>1</sup> the North Carolina Court of Appeals relied upon the Supreme Court case of *Ridgway v. Ridgway*<sup>2</sup> to hold that a service member's beneficiary designation under the Service member's Group Life Insurance Act (SGLIA)<sup>3</sup> prevails over a state child support order requiring the service member to maintain life insurance for his children.

In *Lewis*, the former wife and daughter of a deceased service member brought suit against his estate, seeking a constructive trust against the decedent's SGLI death benefits.<sup>4</sup> The dece-

dent's wife at the time of his death was the SGLI beneficiary and the defendant in this action.<sup>5</sup>

When decedent and his former spouse divorced,<sup>6</sup> the decree contained the following provision:

For so long as there is a child support obligation, [decedent] shall maintain life insurance coverage (or aggregate life insurance policies) on his life which makes [Ebony (his daughter)] the primary irrevocable beneficiaries [sic] in the face amount of \$50,000. If [decedent] dies without the required life insurance, his estate shall be liable to [Ebony] in the amount of insurance that should have been maintained. This provision is subject to further orders of the Court.<sup>7</sup>

Despite the language of the divorce decree, decedent named defendant as his SGLI beneficiary shortly after they married.<sup>8</sup> When he died, his daughter from his previous marriage applied for the \$50,000 SGLI payment ordered in the divorce decree, and was denied.<sup>9</sup> The defendant received the entire \$200,000 SGLI payment.<sup>10</sup>

Plaintiffs sued both the decedent's estate and the defendant, alleging in the latter case that defendant was unjustly enriched and seeking a \$50,000 constructive trust for the daughter's benefit.<sup>11</sup> Plaintiffs also requested specific performance and enforcement of the state divorce decree under the federal Full Faith and Credit for Child Support Orders Act.<sup>12</sup> Both parties filed motions for summary judgment.<sup>13</sup> Plaintiffs prevailed against the decedent's estate,<sup>14</sup> but not against the defendant. To the contrary, defendant's motion against the plaintiffs was successful.<sup>15</sup> Plaintiffs' appealed defendant's summary judg-

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1. No. 99-551, 2000 N.C. App. LEXIS 250 (N.C. Ct. App. Mar. 21, 2000).

2. 454 U.S. 46 (1981).

3. 38 U.S.C.S. § 1917(a) (LEXIS 2000).

4. *Lewis*, 2000 N.C. App. LEXIS at \*3

5. *Id.*

6. Decedent and plaintiff former spouse were married on 15 April 1985 and divorced in Hawaii on 21 February 1991. Decedent then married the defendant on 16 December 1995, and they were still married at the time of decedent's death on 17 November 1996. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

ment, arguing that the defendant held a constructive trust for the plaintiff daughter because the decedent committed fraud and breached a fiduciary duty to her by failing to list her as a beneficiary.<sup>16</sup> Defendant denied the allegations, arguing that decedent could name anyone as his SGLI beneficiary,<sup>17</sup> and further stating that any alleged violation of state law or a state court order did not overcome the provisions of the SGLIA.<sup>18</sup>

Both the trial court and the appellate court agreed with the defendant.<sup>19</sup> Looking first at the SGLIA, the appellate court found that the decedent had the right to choose his beneficiary, stating “[t]he insured shall have the right to designate the beneficiary or beneficiaries of insurance . . . and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.”<sup>20</sup>

Notwithstanding the statute and the *Ridgway* decision, plaintiffs also argued that the decedent’s fraud and breach of a fiduciary duty defeated the SGLIA provisions.<sup>21</sup> This argument also failed, although the appellate court noted that the *Ridgway* court did state, albeit in dicta, that the SGLIA’s beneficiary and anti-attachment provisions might be overcome where the

claimant had a property right in the proceeds.<sup>22</sup> However, there was no such claim made in this case.<sup>23</sup>

Plaintiffs also argued that state law preempted the SGLIA provisions.<sup>24</sup> However, although the court recognized that “[s]tate law is not preempted by federal law unless it is the clear and manifest purpose of Congress,”<sup>25</sup> it also noted that the *Ridgway* court held that Congress has a clear and manifest purpose in having the SGLIA’s controlling provisions prevail over and displace inconsistent state law.<sup>26</sup>

Although this result seems unfair, it highlights an important point for legal assistance attorneys. It is essential that attorneys, service members and family members alike recognize that the SGLI designation belongs to the service member alone, and that the named beneficiary will receive the payment, regardless of the service member’s current marital status, what may have been promised, or what a court orders. Other estate assets and benefits at death can be used to satisfy family obligations; however, the fact that SGLI comprises the largest part of many service members’ assets—yet passes outside the estate—cannot be ignored. Major Boehman.

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11. *Id.* at \*3-\*4. Plaintiffs alleged, among other things, that decedent wrongfully induced plaintiff into signing the divorce decree by representing that he would maintain at least \$50,000 in life insurance for his daughter; that this statement was false, and [plaintiff former spouse] relied on it to her detriment; that after entry of the divorce decree he changed his life insurance so that defendant was the sole beneficiary; and that he did not comply with the court’s order to provide the death benefit to his daughter due to fraud, breach of duty, or other wrongdoing. *Id.* at \*4.

12. *Id.*

13. *Id.*

14. *Id.* However, since the bulk of the decedent’s estate that did not pass directly to the defendant was his SGLI policy, there were insufficient assets to satisfy the judgment.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (quoting 38 U.S.C.A. § 1917(a) (West 1991)).

21. *Id.* at \*6.

22. *Id.* (discussing *In re Marriage of Gonzalez*, 168 Cal. App. 3d 1021 (1985), where a life insurance policy covering the husband was originally a military policy but had been converted to an individual policy under the SGLIA with community funds when the husband retired and the parties were still married; in that case, the appellate court held that the policy was properly designated as community property by the trial court).

23. *Id.*

24. *Id.*

25. *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

26. *Ridgway*, 454 U.S. at 60.

## Labor and Employment Law Note

### Midterm Bargaining: Unions Can Now Initiate!

Last month, your commander signed a new collective bargaining agreement with the installation's exclusive bargaining representative. It was a long and frustrating process, but the parties finally agreed to an agreement with which both sides can live.

Today, the union representative walked into the commander's office and said the union wants to talk about a proposal requiring the agency to pay environmental differential pay to bargaining unit employees allegedly exposed to asbestos.<sup>27</sup> The commander was shocked. He called you, as the installation labor counselor, and said, "What's going on? We just finished bargaining; do we have to do this again now? Why didn't the union ask to talk about environmental differential pay when we were sitting at the table last month?"

How do you respond?

Last year, you might have relied on a split in the federal courts and told your commander that he does not have to reopen negotiations with the union on this issue. However, on 28 February 2000, the Federal Labor Relations Authority (Authority) issued an opinion that now requires your commander to talk to the union about its proposal if the parties did not bargain over it when formulating the new collective bargaining agreement.<sup>28</sup> This note discusses the issue of union-initiated midterm collec-

tive bargaining and explains the current state of the law. It also offers advice to labor counselors on ways to preclude having to bargain over union-initiated midterm bargaining proposals that may interfere with day-to-day agency operations.

### Background

The Federal Service Labor-Management Relations Statute (Statute) requires agencies and exclusive representatives to "meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement."<sup>29</sup> Both agencies and unions agree that this provision means the parties must meet and negotiate an initial collective bargaining agreement when requested by an exclusive representative. It also means the parties must renegotiate the agreement if requested by either side during the open window period of an existing collective bargaining agreement. Issues may arise, however, when discussing whether there is a duty to engage in midterm bargaining.<sup>30</sup>

Either party to a collective bargaining agreement can refuse to engage in midterm bargaining if the issue proposed is contained in or covered by<sup>31</sup> the existing collective bargaining agreement.<sup>32</sup> "In examining whether a matter is contained in or covered by an agreement, [the Authority is] sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter."<sup>33</sup> To prevent the parties from having to bargain over a matter that they previously bargained over when formulating their agreement, it therefore established the following three-part

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27. Wage grade employees must be paid environmental differential pay when they perform duty that involves "unusually severe working conditions or unusually severe hazards." 5 U.S.C.A. § 5343(c)(4) (West 2000); 5 C.F.R. § 532.511 (1999). General schedule employees must be paid a hazardous pay differential when they are exposed to similar hazards. See 5 U.S.C.A. § 5545(d) (authorizing pay differentials "for duty involving unusual physical hardship or hazard"); 5 C.F.R. pt. 550. The amount of the pay differential depends on the type of employee and the type of hazard to which the employee is exposed. For example, a wage grade employee who works in "an area where airborne concentrations of asbestos fibers" may expose him "to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury" is entitled to an eight percent pay differential. 5 C.F.R. pt. 532, subpt. E, app. A.

How much exposure is enough to trigger an entitlement to environmental differential pay is determined at the local level, either in a collective bargaining agreement or through arbitration. See American Fed'n of Gov't Employees, Local 2004 and United States Dep't of Defense, Defense Logistics Agency, 55 F.L.R.A. 6, 15 (1998) (upholding the parties' contractual agreement to apply OSHA's permissible exposure limits). The parties are free to negotiate, consistent with law and regulation, a specific quantitative level of asbestos exposure that would be used in assessing employee entitlement to environmental differential pay. See *infra* note 62. However, if the parties do not agree on a minimally acceptable level in a collective bargaining agreement, then arbitrators have broad discretion to determine the appropriate level. See, e.g., American Fed'n of Gov't Employees, Local 2144 and United States Dep't of Air Force, 51 F.L.R.A. 834 (1996) (holding that where the parties did not negotiate a quantitative level of asbestos exposure, an arbitrator may find that the agency adopted the OSHA standard). An arbitrator's finding that "there is no safe threshold level of exposure" has been found to be an appropriate determination. Allen Park Veterans Admin. and American Fed'n of Gov't Employees, Local 933, 34 F.L.R.A. 1091, 1101 (1990). See also United States Dep't of the Army, Red River Army Depot and American Fed'n of Gov't Employees, Local 3961, 53 F.L.R.A. 46 (1997) (finding that where the parties did not negotiate a quantitative level of exposure, the arbitrator could determine that any level of exposure to asbestos entitles wage grade employees to an environmental differential); Dennis K. Reischl, *Arbitral Dilemma: The Resolution of Federal Sector Asbestos Differential Disputes*, LAB. L.J. 16 (Mar. 1982) (on file with author) (discussing the various issues involved in federal sector grievances involving claims for environmental differential pay based on occupational exposure to asbestos).

28. United States Dep't of the Interior and National Fed'n of Fed. Employees, Local 1309, 56 F.L.R.A. 45 (2000) (concluding that an agency is required to bargain over a proposal that obligates the agency to engage in midterm collective bargaining over matters not contained in or covered by the agreement).

29. 5 U.S.C.A. § 7114(a)(4). 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." *Id.* § 7103(a)(13).

30. There is no statutory definition of midterm bargaining. However, practitioners commonly use the term to refer to bargaining that takes place "while a basic comprehensive labor contract is in effect." National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior, 526 U.S. 86 (1999).

framework for deciding whether a proposal is covered by an agreement:

Initially, [the Authority] will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, [the Authority does] not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute . . . .

If the provision does not expressly encompass the matter, [the Authority] will next determine whether the subject is “inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract.” In this regard, [the Authority] will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision . . . .

To determine whether [the matter sought to be bargained is an aspect of matters already negotiated and therefore covered by the

agreement, the Authority] will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. In this examination, [the Authority] will, where possible or pertinent, examine all record evidence . . . . If the subject matter in dispute is only tangentially related to the provision of the agreement and, on examination, [the Authority] conclude[s] that it was not a subject that should have been contemplated as within the intended scope of the provision, [the Authority] will not find that it is covered by that provision . . . [and] there will be an obligation to bargain.<sup>34</sup>

What happens when a party wants to bargain midterm over an issue that is not contained in or covered by an existing collective bargaining agreement? Initially, the Authority held that there was only a duty to bargain midterm when the agency initiated the proposals, but not when a union initiated the midterm proposals.<sup>35</sup> However, after a federal circuit court disagreed with the Authority and set aside its decision, the Authority changed its position and found that there is a statutory duty to bargain midterm over union-initiated proposals concerning matters that are not covered by the collective bargaining agreement.<sup>36</sup> While the Authority has adhered to this position since 1987, there has been a split in the federal circuits on whether

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31. The “covered by” doctrine generally applies in three circumstances. First, it applies when an agency proposes to take a specific action concerning a condition of employment, but refuses to negotiate with the union over the matter because the agency believes the matter has already been the subject of negotiations and is therefore covered by the parties agreement. Under this circumstance, management must implement the change in strict accordance with the specific terms of the collective bargaining agreement. Second, it applies when an agency refuses to negotiate over union proposals presented during the term of an agreement because the agency believes the subject of the proposals has already been negotiated. Third, it applies when a union refuses to negotiate over agency proposals presented during the term of an agreement because the union believes that the subject of the proposals has already been negotiated. Federal Labor Relations Authority, *General Counsel Issues Guidance on the Impact of Collective Bargaining Agreements on the Duty to Bargain and Other Statutory Rights* (Mar. 5, 1997) (visited May 6, 2000) <<http://www.flra.gov/gc/kmemo>>.

32. Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162, 166 (1987) (finding that the agency had a duty to bargain with the union during the term of a collective bargaining agreement over negotiable proposals that were not contained in the agreement unless the union waived its right to bargain about these matters).

33. United States Dep’t of Health and Human Serv. Soc. Security Admin. and American Fed’n of Gov’t Employees, 47 F.L.R.A. 1004, 1017 (1993) (concluding that the agency did not have a duty to bargain with the local union president over any of the proposals submitted because they were all covered by the existing collective bargaining agreement).

34. *Id.* at 1018-19 (citing *C & S Industries, Inc.*, 158 N.L.R.B. 454, 459 (1966), cited with approval in *Department of the Navy, Marine Corps Logistics Base v. Federal Labor Relations Authority*, 952 F. 2d 48, 60 (D.C. Cir. 1992)). Since announcing this standard, the Authority has found that the vast majority of proposals raised in unfair labor practice proceedings are covered by the existing collective bargaining agreements. See, e.g., *McClellan Air Force Base and American Fed’n of Gov’t Employees, Local 1857*, 47 F.L.R.A. 1161 (1993) (control tower hours); *Fort Benjamin Harrison and American Fed’n of Gov’t Employees, Local 1411*, 48 F.L.R.A. 6 (1993) (paycheck delivery); *Marine Corps, Barstow and American Fed’n of Gov’t Employees, Local 1482*, 48 F.L.R.A. 102 (1993) (health and safety fatigue mats); *Forest Service and National Fed’n of Fed. Employees Forest Serv. Council*, 48 F.L.R.A. 857 (1993) (details). See generally the list of Authority decisions involving the “covered by” doctrine at <<http://www.flra.gov/gc/kattach1.html>>.

35. Internal Revenue Serv. and National Treasury Employees Union, 17 F.L.R.A. 731, 736 (1985). The Authority relied on the legislative history behind the duty to bargain in reaching this conclusion. *Id.* (discussing a Senate report that addressed proposals initiated by management).

36. Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162 (1987) (finding a statutory duty to engage in midterm bargaining initiated by the union when the matters proposed are not addressed in a collective bargaining agreement and the union has not waived its right to bargain about the matters). The Authority did not offer a detailed explanation for its complete change in position on this issue. It merely stated that it agreed with the D.C. Circuit’s opinion and analogous private sector case law on this issue.

there is a duty to bargain over union-initiated proposals during the term of a contract. That split reached a climax in 1999 when the Supreme Court addressed the issue.

### *Split Within the Federal Courts*

In *National Treasury Employees Union*, the United States Court of Appeals for the District of Columbia Circuit became the first federal court to address whether there is a duty to bargain over union-initiated proposals made during the term of a collective bargaining agreement.<sup>37</sup> The Authority had previously heard the case and decided that the agency had no duty to bargain over such proposals.<sup>38</sup> On appeal, the court set aside the Authority's decision because it was not in accordance with law.<sup>39</sup> The court found that the Federal Service Labor-Management Relations Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining."<sup>40</sup> In the absence of any statutory distinction between midterm and basic negotiations, the court stated that Congress intended to protect the special needs of management in the bargaining process by limiting the areas that are subject to bargaining,<sup>41</sup> and not through implied restrictions on who can

initiate midterm proposals in the collective bargaining process.<sup>42</sup>

Five years later, the Fourth Circuit took a different position on the issue of union-initiated midterm bargaining. In *Social Security Administration*, the court held that "union-initiated midterm bargaining is not required by the statute and would undermine the congressional policies underlying the statute."<sup>43</sup> The court acknowledged that the Statute does not explicitly discuss union-initiated midterm bargaining,<sup>44</sup> but relied on the fact that Congress knew of the issue and yet chose language to exclude that possibility in reaching its decision.<sup>45</sup> "Union-initiated midterm bargaining risks serious interference" with the effective and efficient operation of the government.<sup>46</sup> It also "diminish[es] 'the ability of the parties to rely upon . . . basic [collective bargaining] agreements as a stable foundation for their day-to-day relations.'"<sup>47</sup> Refusing to allow such disruptions to occur, the court ultimately set aside the Authority's decision and refused to enforce its order to have the agency bargain over union-initiated proposals.<sup>48</sup>

Last year, in *National Federation of Federal Employees, Local 1309*, the Supreme Court considered the basic question that divided the circuits: "Does the Statute itself impose a duty

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37. *National Treasury Employees Union v. Federal Labor Relations Auth.*, 810 F.2d 295 (D.C. Cir. 1987).

38. *Id.* at 296 (citing *Internal Revenue Serv.*, 17 F.L.R.A. at 736-37).

39. *Id.* at 301. The Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the [Federal Service Labor-Management Relations Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *National Labor Relations Bd. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)). However, courts may set aside the Authority's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (West 2000).

40. *National Treasury Employees Union*, 810 F.2d at 298. The court stated that "[t]o allow management to raise new issues, but to deny that right to the employees' representatives would produce an inequity in bargaining power without express statutory support or strong policy justification." *Id.* at 301.

41. For example, the Statute enumerates specific areas which are not subject to negotiations because management alone has the right to make decisions in those areas. *Id.* (citing 5 U.S.C.A. § 7106(a)). The Statute also established permissive topics that are subject to negotiations only if management consents. *Id.* (citing 5 U.S.C.A. § 7106(b)(1)). "These protections operate throughout the bargaining process, without regard to whether the negotiation is . . . a union proposal or a management proposal, or a midterm or basic agreement." *Id.*

42. *Id.* On remand, the Authority adopted the court's decision in *Internal Revenue Serv. and National Treasury Employees Union*, 29 F.L.R.A. 162 (1987).

43. *Social Security Admin. v. Federal Labor Relations Auth.*, 956 F.2d 1280, 1281 (4th Cir. 1992).

44. The Statute discusses midterm bargaining for when an agency has to negotiate the impact and implementation of a condition of employment midterm. *Id.* at 1284 (citing 5 U.S.C.A. § 7106(b)(2)). The court used this discussion of midterm bargaining by Congress to bolster its position that Congress would have spelled out a specific duty of midterm bargaining if that is what it had intended in the Statute.

45. *Id.* (stating that "Congress was surely aware that union-initiated midterm bargaining was an available option, [yet] it chose language that appears to exclude that possibility").

46. *Id.* at 1288. The court believed that permitting union-initiated bargaining would discourage negotiating issues as part of the basic collective bargaining agreement and encourage seriatim midterm bargaining over individual issues. *Id.*

47. *Id.* (citing the Authority's original opinion on this issue in *Internal Revenue Serv. and National Treasury Employees Union*, 17 F.L.R.A. 731, 736 (1985)).

48. *Id.* at 1290. The Fourth Circuit took a similar position in 1997 when it held that an agency cannot be compelled to bargain over a proposal that would contractually obligate the agency to engage in union-initiated midterm bargaining. *United States Dep't of Energy v. Federal Labor Relations Auth.*, 106 F.3d 1158, 1163 (4th Cir. 1997). See *United States Dep't of the Interior v. Federal Labor Relations Auth.*, 132 F.3d 157 (4th Cir. 1997) (refusing to enforce an Authority decision ordering an agency to negotiate over a union-initiated proposal to include in a collective bargaining agreement a requirement that it bargain over union-initiated midterm proposals).

to bargain during the term of an existing labor contract?”<sup>49</sup> However, the Court failed to resolve the issue. It instead found “the Statute’s language sufficiently ambiguous or open on the point as to require judicial deference to reasonable interpretation or elaboration by the agency charged with its execution.”<sup>50</sup> The Court refused to follow the statutory interpretation by either the D.C. Circuit or the Fourth Circuit because they each reached absolute decisions that were inconsistent with the ambiguity created by the Statute’s general language.<sup>51</sup> “The statutory ambiguity is perfectly consistent, however, with the conclusion that Congress delegated to the Authority the power to determine, within appropriate legal bounds, whether, when, where, and what sort of midterm bargaining is required.”<sup>52</sup> While the Authority had previously determined that the parties must bargain over union-initiated midterm proposals, the Court concluded that it had done so in response to the D.C. Circuit’s holding.<sup>53</sup> The Supreme Court therefore remanded the case so that the Authority could consider the issue of midterm bargaining while it is “aware that the Statute permits, but does not compel, the conclusions it reached.”<sup>54</sup>

### *Resolution of the Split*

Pursuant to the instructions from the Supreme Court, the Fourth Circuit remanded the case of *United States Department of the Interior*<sup>55</sup> to the Authority for final resolution of the midterm bargaining issue. The Authority invited the parties to the dispute and interested persons to “file briefs addressing

whether and under what circumstances agencies are obligated to engage in midterm bargaining.”<sup>56</sup> The Authority received twelve briefs, all of which it summarized in its opinion issued on 28 February 2000.<sup>57</sup> After thoroughly considering all of the arguments made, the Authority held that federal agencies have a statutory duty “to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not ‘contained in or covered by’ the term agreement, unless the union has waived its right to bargain about the subject matter involved.”<sup>58</sup> Because the agency in this case refused to bargain midterm with the union on a negotiable issue, the Authority ultimately found that it committed an unfair labor practice.<sup>59</sup>

### *Preventive Measures*

Labor counselors advising commanders and civilian personnel offices involved in labor-management negotiations can recommend several ways to minimize the potential adverse impact union-initiated midterm bargaining proposals may have on day-to-day agency operations. First, labor counselors should ensure that agency negotiators are familiar with the “covered by” doctrine.<sup>60</sup> Pursuant to that doctrine, negotiators should consider including all appropriate issues in their collective bargaining agreement.<sup>61</sup> If a union later requests negotiations on an issue that is expressly contained in the agreement, the agency may rely on the “covered by” doctrine and refuse to discuss the proposal until it is time to renegotiate the agreement. However,

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49. National Fed’n of Fed. Employees, Local 1309, v. Department of the Interior, 526 U.S. 86, 119 S. Ct. 1003, 1007 (1999) (as this case is not yet paginated, the 119 S. Ct. 1003 cite will be used for the rest of this article).

50. *Id.* The Court noted that:

The D.C. Circuit, the Fourth Circuit, and the Authority all agree that the Statute itself does not expressly address union-initiated midterm bargaining. The Statute’s relevant language simply says that federal agency employer and union representatives “shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement.”

*Id.*

51. *Id.* at 1010.

52. *Id.*

53. *Id.* at 1011.

54. *Id.*

55. United States Dep’t of the Interior v. Federal Labor Relations Auth. II, 174 F. 3d 393 (4th Cir. 1999).

56. 64 Fed. Reg. 33,079 (1999).

57. United States Dep’t of the Interior and National Fed’n of Fed. Employees, 56 F.L.R.A. 45 (2000). The Authority received briefs from its General Counsel, the Respondent, the Charging Party, and nine amici curiae.

58. *Id.* at 50.

59. *Id.* at 54. The Authority ultimately ordered the agency to cease and desist from failing to negotiate, required it to bargain over a proposal authorizing union-initiated midterm bargaining, and directed it to post a copy of the Authority’s order for 60 consecutive days. *Id.* at 55.

60. See *supra* notes 31-36 and accompanying text discussing the “covered by” doctrine.

agency negotiators must be aware that the “covered by” doctrine also limits management from raising “covered by” issues during the life of the agreement. For example, if a collective bargaining agreement provides that management will afford employees 120-days’ notice before a reduction in force, and the Office of Personnel Management modifies its regulations to require only 60-days’ notice, the union can prevent the implementation of the 60-day notice period during the life of the parties’ agreement. As such, agency negotiators must establish a balance between the areas to which they want to bind the union during the life of the agreement and those areas to which management will likewise be bound.<sup>62</sup>

Even if an issue is not expressly contained in a collective bargaining agreement, it will still be covered by the agreement, and therefore not negotiable, if the parties fully discussed it during the contract negotiations and later withdrew it by mutual agreement of the parties.<sup>63</sup> Agency representatives involved in the negotiations should take detailed minutes during the process and file them with the final agreement in case issues arise

midterm. If possible, the agency should develop these minutes jointly with the union representatives. The information contained in these minutes may become critical to the agency’s case if the union initiates midterm bargaining and the Authority has to decide whether a negotiated issue is one that is covered by the agreement.<sup>64</sup> Further, jointly developed negotiation minutes will be extremely useful in overall contract administration and in resolving various negotiated grievances and unfair labor practices where the issues involve contract intent.

Labor counselors may also recommend that agency negotiators strive to include a “zipper clause” in their collective bargaining agreements. A zipper clause is one that is “intended to waive [or limit] the obligation to bargain during the term of the agreement on matters not contained in the agreement.”<sup>65</sup> When considering such clauses, the Authority will look for a “clear and unmistakable waiver of the union’s right to initiate bargaining.”<sup>66</sup> Specifically, the Authority “will examine the wording of the [contract] provision as well as other relevant provisions of the contract, bargaining history, and past practice.”<sup>67</sup> While

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61. Expressly including issues into a collective bargaining agreement may help minimize disruptions to agency operations, but negotiators must ensure that both sides have a mutual understanding over what matters may be reopened and what matters are foreclosed from negotiations during the term of the agreement. The Authority’s General Counsel listed several ways the parties can contractually address these issues in the following excerpt from a 1997 memo to the Authority’s Regional Directors.

[T]he parties may agree that the contract contains the full understanding and obligation of the parties to negotiate over a specific matter during the term of the agreement. The parties could also agree to reserve bargaining over a specific possible management action during the life of the agreement, but perhaps limit that bargaining to a specific time schedule, perhaps even providing for post-implementation impact bargaining so that an action consistent with existing contract terms could be implemented and not delayed. The parties could also limit any bargaining, whether pre- or post-implementation to specific matters, such as the impact of the proposed action on adversely affected unit employees when that impact is not, or could not have been, addressed at the time of contract negotiations; for example, specific impact matters which are particular to the specific management action at issue.

Memorandum from Joe Swerzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, subject: The Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights pt. I.E.2 (5 Mar. 1997) available at <<http://www.flra.gov/gc/kmemo.html>>. See *id.* at pt. V (discussing the duty to bargain pursuant to reopener clauses contained in collective bargaining agreements). If both parties do not have a mutual understanding of how they will deal with each other during the term of the agreement,

the possibilities increase that the agency will take action based on its belief that there is no obligation to give notice and bargain because of the “covered by” doctrine, the union will then file an unfair labor practice charge . . . and the matter will result in litigation and decision-making by a third party.

*Id.*

62. Using the scenario from the beginning of this note, agency representatives should strongly consider negotiating a quantifiable standard of exposure to standardize entitlement to environmental differential pay and including it in their collective bargaining agreement. Inclusion of OSHA standards is the most commonly negotiated standard. Agreement to adhere to OSHA standards, or any negotiated level of exposure, must be clear and unmistakable to ensure an arbitrator’s enforcement. In the last several years, unions have been aggressively seeking this pay because of worker exposure to asbestos. Lieutenant Colonel Melvin Olmscheid, *Environmental Law Division Note: Asbestos Management Program*, ARMY LAW., Apr. 1996, at 51. This has resulted in the Army paying several multimillion-dollar environmental differential pay awards to employees for asbestos exposure. *Id.* Negotiating a specific quantifiable standard may help the unions establish entitlement to environmental differential pay for bargaining unit employees more quickly, while providing the commander a clear, enforceable benchmark for determining environmental differential pay eligibility. A quantifiable standard also helps establish minimum abatement efforts for cleaning asbestos from the workplace, allows for the uniform application of the environmental differential pay standard, and limits the potential for unjustified or unwarranted arbitrator awards of environmental differential pay.

63. While some practitioners believe that union representatives may try to evade the “contained in or covered by” doctrine by withholding matters from negotiations, agency representatives must remember that union representatives do not unilaterally control the breadth and scope of negotiations. United States Dep’t of the Interior and National Fed’n of Fed. Employees, 56 F.L.R.A. 45, 53 (2000). “Rather, during term negotiations, either party has the ability and the right to bargain over any condition of employment, and it is an unfair labor practice for the other to refuse to engage in bargaining over such negotiable matters.” *Id.*

64. See *supra* note 34 and accompanying text explaining that the Authority will examine all record evidence to determine whether a matter sought to be bargained is an aspect of matters already negotiated and therefore covered by the agreement. See also Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162, 167 (1987) (stating that a union may waive its right to discuss an issue midterm if it offered a proposal during negotiations, but later withdrew it in exchange for another provision).

negotiating to include a zipper clause in the agreement is a viable option, practitioners should know that such clauses may not be the ultimate solution to the problem.

Neither the [Authority] nor any court has resolved the question whether such waivers are mandatory subjects of bargaining that an agency may negotiate to impasse. If waiver clauses are only permissive subjects of negotiation, an agency would be denied access to [impasse] arbitration over a union's refusal to accept such a clause in the basic labor contract.<sup>68</sup>

In fact, when the parties raised the issue of zipper clauses in the Authority's latest decision on midterm bargaining, the Authority intentionally refused to consider it<sup>69</sup> and admitted that it may have to decide the issue in a future case.<sup>70</sup>

### Conclusion

The issue of union-initiated midterm collective bargaining is finally resolved. Unions now have the same statutory right as agencies to initiate midterm bargaining over issues not previously subject to collective bargaining. As such, labor counselors must aggressively help their clients mitigate the potential

disruptions that union-initiated midterm bargaining may cause. Insuring that all negotiated issues are either expressly contained in the collective bargaining agreement or documented in a joint bargaining history is a great start. Persuading the union to waive or limit its right to bargain midterm through the use of a zipper clause is another tactic. Regardless of how agencies try to avoid potentially disruptive midterm bargaining, labor counselors must be ready when the commander says "We just finished bargaining; do we have to do this again now?" Hopefully, your final answer will be, "No, Sir, we have it covered."<sup>71</sup> Major Holly Cook.<sup>72</sup>

### Reserve Component Notes

#### Ready Reserve Mobilization Insurance Program (RRMIP) Redux: The Tax Man Cometh

The 1996 Department of Defense Authorization Act included a provision to offer optional mobilization insurance to Ready Reserve and National Guard members who are involuntarily ordered to active duty for thirty-one days or more.<sup>73</sup> The program was dubbed "The Ready Reserve Mobilization Insurance Program" (RRMIP).<sup>74</sup> Enrollment in the program never met expectations, and as a result there were insufficient reserves to support payments of mobilization insurance to

65. *Internal Revenue Serv.*, 29 F.L.R.A. at 166. A union may also contractually waive its right to initiate bargaining over a particular subject matter. *Id.* Before seeking to include a zipper clause in a collective bargaining agreement, agency representatives should keep in mind that, like the "covered by" doctrine, zipper clauses typically preclude both the agency and the union from initiating midterm proposals.

66. *Id.* "Because determinations as to whether a waiver is 'clear and unmistakable' are made on a case-by-case basis, an agency will often be unsure whether the [Authority] will, in fact, find a particular contractual provision to be an adequate waiver." *Social Security Admin. v. Federal Labor Relations Auth.*, 956 F.3d 1280, 1289 (1992).

67. *Internal Revenue Serv.*, 29 F.L.R.A. at 166.

68. *Social Security Admin.*, 956 F.3d at 1288.

69. *United States Dep't of the Interior and National Fed'n of Fed. Employees*, 56 F.L.R.A. 45, 54 (2000). The Authority specifically refused to address "whether 'zipper clauses' are a mandatory subject of negotiation, whether there may be limits on official time for midterm negotiations, and whether the Authority's current application of the 'contained in or covered by doctrine' should be broadened or constricted." *Id.* The Authority determined it was not required to resolve these issues in the current case and refused to consider them until the issues are squarely presented. *Id.*

70. If the Authority ultimately finds that zipper clauses are permissive topics of bargaining, then forcing a union to impasse over a zipper clause may be held to be an unfair labor practice. *See, e.g., United States Food and Drug Admin. Northeast and American Fed'n of Gov't Employees, AFL-CIO, Council No. 242*, 53 F.L.R.A. 1269, 1274 (1998) (stating that "[w]hile parties are free to make proposals over permissive subjects, they may not insist to impasse on such proposals").

71. Using the scenario from the beginning of this note, labor counselors will only be able to give this final answer if the parties thoroughly discussed the issue of environmental differential pay and either expressly included it in their collective bargaining agreement or documented it in the joint bargaining history. *See supra* notes 27 and 62 and accompanying text. It should be noted, however, that even if environmental differential pay is covered by the agreement, unless quantitative standards have been negotiated, entitlement to environmental differential pay would still be grievable and ultimately subject to an arbitrator's "arbitrary" determination.

72. The author would like to thank Mr. David Helmer, Labor Relations Officer, Office of the Assistant Secretary of the Army-Manpower and Reserve Affairs, for his helpful comments in the development of this note.

73. Pub. L. No. 104-106, § 512, 110 Stat. 186, 299-305 (1996) (codified at 10 U.S.C.S. §§ 12,521-12,532 (LEXIS 2000)). *See DEP'T OF DEFENSE, INSTR. 1341.10, READY RESERVE MOBILIZATION INSURANCE PROGRAM (RRMIP) PROCEDURES* (5 Jul. 1996); Major Paul Conrad, *Congress Authorizes Mobilization Insurance for Reserve Component Service Members*, *ARMY LAW.*, Mar. 1997, at 19.

74. 10 U.S.C.A. § 12,522(a).

enrolled Reserve and National Guard troops called up for peacekeeping missions in Bosnia and elsewhere.<sup>75</sup> As a result, appropriated funds were used to provide mobilization insurance payments, thus prompting Congress to terminate the program after only one year.<sup>76</sup> The termination legislation set the cutoff date for the RRMIP coverage as 18 November 1997.<sup>77</sup> Neither Congress nor the Department of Defense have raised the possibility of resurrecting the RRMIP as of this date.

While reservists who received payments under RRMIP thought there were no further surprises associated with this program, a new bombshell is revealed. At an earlier time, the Internal Revenue Service (IRS) informally advised the Department of Defense that RRMIP insurance proceeds would be federally taxable as income because they were not specifically excluded from defined income under the Internal Revenue Code and were not subject to the Combat Zone Tax Exclusion.<sup>78</sup> A recently issued IRS letter ruling on the taxability of RRMIP proceeds clarified this informal position.<sup>79</sup> The IRS ruled that RRMIP payments should have been reported as gross income to the extent they exceeded the amount the reservist paid in premiums to the RRMIP.<sup>80</sup> The IRS determined that RRMIP payments received by a reservist ordered to active duty and serving in a Qualified Hazardous Duty Area are not tax exempt from gross income inclusion.<sup>81</sup> The IRS reasoned that while the payments were received while the reservist was in a Qualified Hazardous Duty Area, they were not compensation for active service in a combat zone.<sup>82</sup> Instead, the RRMIP payments were intended to be proceeds paid to fulfill the RRMIP insurance

contract, which required as a condition to payment that the beneficiary be involuntarily ordered to active duty.<sup>83</sup>

What does this mean for reservists who received RRMIP payments? The IRS has made it clear that it expects reservists to have reported as income any RRMIP payments on their federal income tax returns to the extent the payments exceeded amount that had been paid as RRMIP premiums. Failure to amend federal tax returns to include such RRMIP payments as gross income could subject reservists to penalties and interest on their taxes, if audited. Lieutenant Colonel Conrad.

### **Reserve Officer Separation Boards Redux: Too Many Colonels?**

Congress, in the Fiscal Year 2000 National Defense Authorization Act (NDAA), amended Title 10, U.S. Code Section 14,906, to specify the composition of boards of inquiry (involuntary separation boards) for Reserve Component officers.<sup>84</sup> Under the Reserve Officer Personnel Management Act (ROPMA), Congress required that involuntary separation boards for Reserve Component officers be composed of officers holding the grade of colonel (O-6), thus mirroring the provisions for Active Component officers.<sup>85</sup> Unfortunately, requiring Reserve Component involuntary separation boards to be composed of all colonel board members causes serious problems for commands that have a limited number of Reserve Component colonels available to sit on such boards.<sup>86</sup> Prior to

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75. H.R. REP. NO. 105-340 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2251.

76. Pub. L. No. 105-85, § 512, 111 Stat. 1729 (1997) (codified at 10 U.S.C.A. § 12,533).

77. *Id.*

78. Conrad, *supra* note 73, at 21, n.64. The combat zone tax exclusion, Internal Revenue Code § 112(a), provides that gross income does not include "compensation for active service" as a military member below the grade of commissioned officer for any month the member "served in a combat zone." Internal Revenue Code § 112(c)(2) provides that "combat zone" means any area which the President by executive order designates for purposes of this section as an area in which United States forces are or have engaged in combat. Public Law 104-117, § 1(a)(2), further provided that for purposes of Internal Revenue Code § 112, a "qualified hazardous duty area" shall be treated in the same way as a combat zone. Pub. L. 104-117, § 1(a)(2), 110 Stat. 827 (1996). The Department of Defense Finance and Accounting Service reported RRMIP payments both to the reservist and to the Internal Revenue Service (IRS) on Form 1099-R. Eventually, the IRS matches these employer submitted information returns with the amount of income reported on the taxpayer's 1040. Therefore, in order to stop the accumulation of interest, reservists should amend now rather than wait for the IRS to detect the omission.

79. 2000 Tax Notes Today 49-18 (13 Mar 00) (reprinting Priv. Ltr. Rul. 99-200010007 (Nov. 5, 1999)).

80. *Id.* Cf. Rev. Rul. 59-5, 1959-1 C.B. 12 (stating that unemployment benefits paid by a private fund established and contributed to by fund members constitute reportable gross income to the extent they exceed the amount the member personally contributed to the fund). See also *Williams v. Commissioner*, 35 T.C. 685 (1961); *Johnson v. Wright*, 175 F. Supp. 215 (D. Idaho 1959) (amounts received from private unemployment insurance fund, in excess of the amount contributed to the fund, are taxable income).

81. *Id.*

82. *Id.*

83. *Id.*

84. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 504, 113 Stat. 590-591 (1999). Section 504(b) provides in part, "Subsection (a) of section 14,906 of such title is amended to read as follows: (2) Each member of the board shall hold a grade above major or lieutenant commander, except that at least one member of the board shall hold a grade above lieutenant colonel or commander." *Id.*

ROPMA, the Reserves had no such requirement for their officer separation boards.<sup>87</sup>

Recognizing the difficulties in implementing the ROPMA requirements for board composition, Congress amended the law to require only one colonel on Reserve Component officer

involuntary separation boards.<sup>88</sup> The Department of Defense (DOD) has moved quickly to amend its instruction covering officer separation boards for all the services.<sup>89</sup> Lieutenant Colonel Conrad.

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85. Reserve Officer Personnel Management Act (ROPMA), Pub. L. No. 103-337, § 1611, 108 Stat. 2960 (1994) (codified at 10 U.S.C.S. § 14,906(2)) (LEXIS 2000). Section 14,906(s) states in part, "An officer may not serve on a board under this chapter unless the officer holds a grade above lieutenant colonel or command . . . ." See U.S. DEP'T OF ARMY, REG. 600-8-24. OFFICER TRANSFERS AND DISCHARGES, para. 4-7a (21 Jul. 1995) (providing that all Regular Army officer and Reserve Component officers on active duty for a period of 30 or more consecutive days will be separated by a board of inquiry with voting members "in the rank of Colonel or above."

86. Lieutenant Colonel Paul Conrad, *Changes for United States Army Reserve Component Officer Involuntary Separation Boards*, ARMY LAW., Jan. 1998, at 127. See Lieutenant Colonel Paul Conrad, *Fiscal Year 2000 National Defense Authorization Act Impacts Army Reserve Boards of Inquiry for Officers*, ARMY LAW., Feb. 2000, at 26.

87. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2-25a (22 Feb. 1971). Paragraph 2-25a states: "Boards will be composed of commissioned officers, all of whom must be of equal or higher grade and senior in rank to the officer under consideration for involuntary separation." The regulation has no minimum grade requirement for all board members. This regulation has not been updated to reflect ROPMA or the post-ROPMA changes to Reserve Component officer separation board procedure. The regulation is in the process of being rewritten at this time. *Id.*

88. National Defense Authorization Act for Fiscal Year 2000 § 504b (to be codified at 10 U.S.C.S. § 14,906(a)(2) (LEXIS 2000)).

89. U.S. DEP'T OF DEFENSE, INSTR. 1332.40, SEPARATION PROCEDURES FOR REGULAR AND RESERVE COMMISSIONED OFFICERS (16 Sept. 1997). The Secretary of Defense has modified the Instruction to incorporate the NDAA 2000 amendment to 10 U.S.C.S. § 14,906(2), by memorandum, dated 23 May 2000. The Instruction will be updated within 90 days (unpublished memorandum on file with the author).