

Office of Administrative Law Judges

U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER

COATESVILLE, PENNSYLVANIA
Respondent

Case No.
BN-CA-90660

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-35,
SEIU, AFL-CIO

Charging Party

Stephen M. Pahides, Esq. For the Respondent

Alfred Gordon, Esq. Julie McCarthy, Esq. For the General Counsel of
the FLRA

Edward Smith, Esq. For the Charging Party

Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

BENCH DECISION AND ORDER

A hearing was held in this case on December 15, 1999, in Philadelphia, Pennsylvania. Pursuant to section 2423.31(d) of the Federal Labor Relations Authority (Authority's) Rules and Regulations, all parties jointly moved for a bench decision. I granted the motion at the close of the hearing and issued a Bench Decision and Order. This Decision and Order is set forth⁽¹⁾ in the transcript of the hearing in this case, page 188, line 7 through page 200, line 10. Pursuant to section 2423.31(d) of the Authority's Rules and Regulations, a copy of these pages is excerpted and attached hereto and made a part hereof, as Attachment A. Further, a copy of the proposed Notice is attached hereto and made a part hereof, as Attachment B.

Issued, Washington, DC, January 11, 2000.

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

ATTACHMENT A

7 BENCH DECISION

8 THE COURT: Okay. You' ll forgive me. On the
9 record. This is a proceeding under the Federal Service
10 Labor Management Relation Statute, based on the charge
11 filed by the National Association of Government
12 Employees, SEIU, AFL-CIO, NAGE Local R3-35, which I
13 will refer to as Local R3-35, versus the United States
14 Department of Veterans Affairs, Veteran, Veteran
15 Administration, Veteran Affairs Medical Center,
16 Coatesville, Pennsylvania, called the VA Medical
17 Center. The regional director for the Boston region
of

18 the FLRA issued a complaint and notice of hearing,

19 alleging that the, am I going too fast?

20 COURT REPORTER: No, Your Honor.

21 THE COURT: No? That the VA Medical Center

22 violated Section 7116(a)(1), (5) and (8) of the
statute

23 by failing to comply with an arbitrator's order, by

24 refusing to recognize Local R3-35's designation of
its

25 president Bailey as its representative, and by
refusing

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1 him access and to hold arbitration hearings at a

2 location, and to hold arbitration hearings at a

3 location off the premises. Respondent filed an answer

4 denying the allegations. The parties requested that I
5 issue a bench decision. A hearing was held, and the
6 bench decision is issued, is being issued. Okay.

7

8 The National, NAGE and Local R3-35 are labor
9 organizations under 5 U.S.C. Section 7103(a)(4) and
the

10 U.S. Department of Veterans Affairs, Veterans Affairs
11 Medical Center in Coatesville. The respondent is an
12 agency under 5 U.S.C. Section 7103(a)(3). NAGE is the
13 certified exclusive representative of a nationwide
14 consolidated unit of employees appropriate for
15 collective bargaining at VA. NAGE Local R3-35 is an
16 agent of NAGE for representing a unit of about nine
17 hundred non-professional employees at the
respondent's
18 medical center in Coatesville, Pennsylvania. They
have

19 entered into a master agreement, Article 48, Section
20 3

21 of that agreement provides that arbitrations will be
22 held during regular shift hours and at the facility.

23 During the time covered by the, the occurrences
24 here, Gary A. Devansky was chief executive officer of
25 the VA Medical Center, and George R. Pearson was the
chief human resources management, chief of human

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1 resources management, and they were both supervisors
2 and/or managers under 5. U.S.C. Section 7103 (8), (10)
3 and (11), and were acting on behalf of the VA Medical
4 Center. Mark Bailey is president of Local R3-35 and
5 was recently reelected to another three year term. Mr.

6 Bailey worked for respondent until January, until
7 January, 1997, when he was removed for sexual
8 harassment. As part of his removal, VA Medical Center
9 restricted Mr. Bailey from accessing Respondent's
10 premises for all purposes, including union
11 representation, except to get medical care which he
was
12 entitled to as a veteran. The Merit Systems
Protection
13 Board administrative judge on July 30th issued a
14 decision sustaining the VA Medical Centers removal of
15 Mr. Bailey.
16 Between January of 97, and July 30 of 99, the
17 respondent or the VA Medical Center and Local R-35,
or
18 R, yeah, dash 35, had two arbitrations at the
19 Coatesville Community Center, and four impact and
20 implementation sessions at the Coatesville Community

21 Center.

22 During August of 99, another arbitration was held

23 at the Coatesville Community Center. Mr Bailey was

24 present at all arbitrations and impact and

25 implementation sessions.

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1 The Coatesville Community Center is one to two

2 miles from the VA Medical Center campus, a four or
five

3 minute auto ride. The campus of the VA Medical Center

4 is a number of buildings. Building 16, where

5 arbitrations are held, is the building where

6 arbitrations are held. Employees involved in patient

7 care are from a fifteen to a five-minute, an eighteen
8 to a five-minute walk to Building 16.

9 By letter dated April 7th, 1999, Arbitrator John
10 M. Skonier scheduled an arbitration hearing in FMCS
11 Case Number 98-11919, to take place on September
12 15th,
13 1999 at ten a.m. in the human resources conference
14 room
15 at the Department of VAMC, first floor, building,
16 first
17 floor, Building 16, 1400 Black Horse Hill Road,
18 Coatesville, Pennsylvania.

19 On September 9th, the charging party's attorney,
20 Edward Smith, sent a facsimile letter to attorney
21 Stephen Pahides, representing the VA Medical Center,
22 which stated as follows Mr. Mark D. Bailey, Senior,
23 president, NAGE, Local R-35, will serve as my
24 technical

21 representative. As you are aware, the Agency has
22 prohibited Mr. Bailey's presence on facility grounds
23 for the purpose of union representation. Accordingly,
24 in accordance with past practice and to ensure that
the
25 local union is represented at the hearing, I must

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1 insist that the arbitration hearing take place at the
2 Coatesville Community Center.
3 On September 14th, 1999, Arbitrator John M.
4 Skonier, how does he pronounce his name?
5 MR. GORDON: Skonier.
6 THE COURT: Skonier, conducted a conference
7 call in the subject federal mediation arbitration,
8 during which NAGE was represented by attorney Smith.

9 The respondent was represented by attorney Stephen
10 Pahides, and its executive officer, Gary Devansky.
The
11 respondent did not raise the safety of employee
12 concerns at, during this conference call. Only the
13 efficiency of the Agency and the terms of Article 48,
14 Section 3 of the contract. During the conference
call,
15 Arbitrator Skonier ruled that the hearing in the case
16 is to be conducted at the Coatesville Community
Center.
17 He confirmed this by a letter of the same day, saying
18 the VA Medical Center had waived the contract
19 provision.
20 Okay. I think those, as I see it, are the
21 relevant facts. Let me say that although there was
22 some dispute as to whether or not the arbitrator did,
23 in fact, rule upon during the conference call. I find
24 that he did, because I think that Mr. Smith's memory

of

25 what occurred was a little better than the, than the

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1 others. Plus, his letter was written in the past
2 tense. I have held, not I hereby held or am holding.
3 So it seems, and, and its written the same day as the
4 conference call.
5 Okay. Discussion. Actually, its Conclusions of
6 Law and recommended Order. Section 7121(a), one
7 second, (a) and (b) of the, of the statute provides
8 that the parties shall have a grievance and
arbitration
9 proceeding in their collective bargaining agreement.
10 The Authority has held that the, a failure to proceed

11 with the arbitration violates the statute, Section
12 7116(a)(1) and (8). For that, see Department of
Labor,
13 10 FLRA 316 (1982). This failure to proceed includes
14 disagreement with procedural rulings. Again, see the
15 Department of the Army, the 83rd U.S. Reserve Command,
16 11 FLRA 55 (1983). And it involves disputes as to the
17 location of any such arbitration. See, U.S.
Department
18 of the Air Force, Griffis Air Force Base, Roane, New
19 York, 39 FLRA 1117 (1991).

20 Basically, here we had an arbitrator's award that
21 was clear, perhaps erroneous. I don't know that. But
22 the scheme of the statute is when you pick an
23 arbitrator, you have to live with that arbitrator,
and
24 then if you don't like what he did, you can appeal
his

25 decision. The Agency did not appeal his decision.

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1 They might not have been able to. I agree, cause it
2 was, it was not a final decision. It was merely a, an
3 interim one. But the, the normal procedure is you
4 continue, and then in the end, you can raise it all.
5 But you have to continue. Okay.
6 I find the, the Authority has held recently that
7 in U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA
8 704,
9 but more particularly, their case number DE-CA-60349,
10 which starts at page 712, they, they discuss that
11 agency's ability to designate a representative. And
all

12 talk about a, the, a union's right to designate its
13 representative. The union can designate them, and
14 unless there are special circumstances, management
has
15 to deal with that employee.

16 I find in this case, because of the nature of, of
17 Mr. Bailey's conduct, there was special
circumstances.

18 However, remember that I've already found that
failure
19 to hold the hearing off the base, off the VA facility
20 is a, is a violation of (1) and (8). If I haven't
made
21 that clear, I'm making it clear. The question is is
22 there also a (1) and (5) here. If this hearing were
to
23 be held on the VA Medical Center, I think the VA
24 Medical Center was, was perfectly within its authority
25 to deny Mr. Bailey access to the premises, and I

think

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1 these, the special security concerns and the whole
2 little discussion here by the Authority, abbreviated
3 and, and somewhat glib, I think applies.
4 However, its dealing with access. From, they
5 talk about entering, they, they, denying the person,
6 the president, precluding the president from entering
7 the penitentiary. And the, the respondent has
8 demonstrated special circumstances warranting its
9 refusal to grant the president access to the
10 institution for representational purposes. And I think
11 that if there was nothing more, respondent in this
 case
12 would have been privileged, was privileged in denying

13 Mr. Bailey access. However, we have here an
arbitrator
14 saying no, hold the hearing off the premises. I don't
15 see where these special circumstances privilege the,
16 the Agency from dealing with Mr. Bailey off the
17 premises. And by its refusing to go off the premises,
18 and not allowing him on the premises, which it was
19 privileged to do, it was in effect denying the union
20 the ability to name Mr. Bailey as its representative
in
21 this case. Therefore, I say by refusing Mr. Bailey
22 access to the facilities, while at the same time,
23 refusing to participate in the hearing off the site,
24 the Agency was violating Section 71, 7116(a)(1) and
25 (5). But that s only in light of the arbitrator's

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1 order. If this were to be held on the premises, I
2 submit special circumstances perhaps would, would have
3 privilege in my view, although its dictum in this
4 case, would have privileged the Agency from denying
Mr.

5 Bailey access.

6 So I do find just so that I make this nice and
7 neat that the phone hook-up offer was not a sufficient
8 offer of representation. That's, I find
9 unsatisfactory. I do find in, in, in keeping with the
10 somewhat novel language of this decision, still
11 referring to the Leavenworth case, that, that the
12 respondent did not preclude the, the, Mr. Bailey from
13 entering the penitentiary in order to prevent the
union
14 from carrying out its representative activities. I
say

15 you are privileged to do it. As they would say,
16 security trumps union representation. They like that
17 trump stuff. They must play bridge is all I can think
18 of.

19 However, having said that, and, and noting that
20 you had offered to meet with other union
21 representatives, the power of a union to designate
its
22 own representatives is of utmost importance. It is
the
23 nature of the union. It is a, a representative
24 organization and, therefore, who it designates to
25 represent it is of the highest order. So, by refusing

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1 to meet on the base, which you were privileged to do,

2 but by at the same time refusing to comply with an
3 arbitrator's order, I find that you, you violated your
4 duty to bargain in good faith, because you, in effect
5 denied the union the right to designate Mr. Bailey.

6 In the same way, or along the same line, I find
7 that there was also an independent violation of
8 7116(a) (1) because this kind of a denial of the union
9 its right to designate Mr. Bailey as its
10 representative, is independent interference with
11 employee's rights to organize and be represented.

12 With respect to the unions request for expenses,
13 I'm sorry Mr. Smith is not here, but they required
14 to file disclosure, too. He was very upset when the
15 respondent wanted to put in something that perhaps
was
16 not in the disclosure. They didn't file any
17 disclosure. They didn't indicate they were asking for

18 expenses. The parties had no opportunity to prepare
19 for such a request, nor did I.

20 Further, I find that the Equal Access to Justice
21 clearly doesn't apply, because that's to allow
22 respondents who feel they have been improperly
pursued
23 by the general counsel to seek some small recompense.

24 But the Back Pay Act doesn't apply either. This
wasn't
25 a prohibited personnel practice. There was no back
pay

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1 involved. So I find that that doesn't apply. As far
2 as the remedy, as, just as a, a good or novel,
3 everybody's saying we need novel remedies to make our
4 act more effective. A: I'm not sure you can order an

5 agency to pay funds as such. I think there may be some
6 problems with that as a remedy, as a punishment. But
7 also, I just don't think it's appropriate here. As I
8 say, this is not, this is a closed case. I think that,
9 that the Agency was privileged in denying Mr. Bailey
10 access to its premises. And I just don't think
11 expenses are appropriate in this case.

12 For an Order, I ORDER the following: Pursuant to
13 Section 2423.29 of the Federal Labor Relations
14 Authorities Rules and Regulations and Sections 7118
of
15 the Federal Service Labor Management Relation
statute,
16 the United, the Veterans Administration Medical
Center
17 in Coatesville, Pennsylvania shall cease and desist
18 from refusing to participate in the hearing in the
19 arbitration proceeding in FMCS, case number 98-11919

at

20 the Coatesville Community Center, or any other
location

21 as ordered by Arbitrator John M. Skonier. We'll,

22 thats A.

23 B: refusing to abide by the arbitrator's

24 decisions, including those that designate an off-site

25 location for arbitration hearings.

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1 C: refusing to recognizing NAGE Local R3-35

2 president Mark D. Bailey, Senior as the union's

3 designated representative by refusing to abide by an

4 arbitrator's decision concerning location of hearings.

5 And in any like or related manner, interfering with,

6 restraining or coercing bargaining unit employees in

7 the exercise of their rights assured by the statute.

8 You'll take the, take the affirmative, the

9 following affirmative action in order to effectuate

the

10 purposes and policies of the statute: participate in

11 the arbitration proceeding in FMCS, case number 98-

12 11919 at the Coatesville Community Center, or any

other

13 location as ordered by Arbitrator John M. Skonier and

14 abide by arbitrator's decisions, including those that

15 designate an off-site location for arbitration

16 hearings.

17 Post at the, post a notice to all employ, post at

18 the VA Medical Center, Coatesville, Pennsylvania,

19 copies of the attached notice to all employees on

forms

20 furnished by the Federal Labor Relations Authority.

21 Upon receipt of the forms, the notice shall be signed

22 by the chief executive officer of the VA Medical
23 Center, Coatesville, and shall be posted and
maintained
24 for sixty consecutive days in conspicuous places,
25 including all places where notices to employees are

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1 customarily posted. Reasonable steps shall be taken to
2 ensure that the notice and order are not altered,
3 defaced or covered by any other material. What was
4 that? That was B.
5 C, D, I'm sorry. Pursuant to Section 242330 of
6 the Authority's rules and regulations, notify the
7 regional director, Federal Labor Relations Authority,
8 Boston region, in writing, within thirty days from the

9 date of this order as to what steps have been taken to
10 comply.

11 That's my decision. Now, let me tell you the
12 procedures. When I get the transcript, I ll read it
13 over, certify it and issue a, a notice which will go
14 along, which will basically track the order. At that
15 point, when I certify it, the parties can take
16 exceptions if they desire. Are there any questions?

17 MR. GORDON: No, Your Honor.

18 THE COURT: Then the hearing is closed.

19 (Whereupon, the hearing was concluded at 3:27
20 p.m.)

21

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ATTACHMENT B

Bn90660

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Authority has found that the U.S. Department of Veterans Affairs Medical Center, Coatesville, Pennsylvania, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to participate in the hearing in the arbitration proceeding in FMCS Case Number 98-11919 at the Coatesville Community Center, or at any other location as ordered by Arbitrator John M. Skonier.

WE WILL NOT refuse to abide by arbitrators' decisions, including those that designate an off-site location for arbitration hearings.

WE Will NOT refuse to recognize NAGE, Local R3-35 President, Mark Bailey Sr., as the Union's representative, by refusing to abide by an arbitrator's decision concerning the location of hearings.

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

WE WILL participate in the arbitration proceeding in FMCS Case Number 98-11919 at the Coatesville Community Center, or at any other location as ordered by Arbitrator John M. Skonier, and will abide by arbitrators' decisions, including those that designate an off-site location for arbitration hearings.

Bn90660

(Agency)

Dated: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617)424-5730.

1.' -