Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF DEFENSEEGLIN AIR FORCE BASE EGLIN AIR FORCE BASE, FLORIDA Respondent

and Case Nos. AT-CA-00482

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1897 Charging Party AT-CA-00870

Steven E. Sherwood, Esq. For the Respondent Paige Sanderson, Esq.Julie K. Anderson, Esq. For the General Counsel Before: ELI NASH Chief Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint (ULP)

in this case alleges that the Respondent, United States Department of Defense, Eglin Air Force Base, Eglin Air Force Base, Florida violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. sections 7101-7135, (the Statute), by repudiating an agreement to negotiate and by refusing to bargain in good faith with the American Federation of Government Employees, Local 1897 (Union). The Respondent's answer denies that it violated the Statute as alleged in the consolidated complaint.

A hearing was held in Shalimar, Florida on November 16, 2000. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law.

Findings of Fact

A. Background

At all times material, the Respondent has been an agency within the meaning of § 7103(a)(3) of the Statute, and the Union has been the certified exclusive representative of the Respondent's bargaining unit employees. The dispute in this case involves the wearing of short pants by bargaining unit employees who work in the Respondent's 46th Test Wing.

B. ULP Charge AT-CA-90314

During July 1998, a representative of the Respondent advised bargaining unit employees in the 46th Test Wing that they were not permitted to wear short pants while working on the flight line. Union Executive Vice President Steven Davis informed the Respondent's Labor Relations Officer Dolly Holbrook that this amounted to a change in working conditions. Holbrook disagreed, maintaining that rather than a change, this was merely a reiteration of the existing policy concerning the wearing of short pants.

After the Respondent did not answer the Union's demands to bargain on this matter, the Union filed ULP Charge No. AT-CA-90314 on February 26, 1999. General Counsel Exhibit (GC Ex) 2a. The charge alleged, in pertinent part, that the Respondent had changed working conditions by denying the wearing of "shorts during the course of the normal duty day while working on the flightline." *Id.* On August 31, 1999, the Union filed an amended ULP charge, claiming that on August 31, 1998, the "Technical Directorate of the 46th Test Wing terminated the past practice of allowing employees to wear shorts while performing their duties." GC Ex 2.

On October 14, 1999, the Union and the Respondent entered into a Settlement Agreement involving ULP Charge AT-CA-90314. GC Ex 3. The Agreement provided, in pertinent part, that "[t]he Agency and the Union agree to negotiate the issue of the wearing of short pants by the bargaining unit employees assigned to the 46th Test Wing." *Id.*

C. ULP Case AT-CA-00482 - Negotiation of the Settlement of AT-CA-90314

On October 26, 1999, the parties met to negotiate in accord with the Settlement Agreement. Local President Dennis Plante and Vice President Davis represented the Union; Labor Relations Officer Holbrook and Senior Civilian Advisor Frank Scandone represented the Respondent. Transcript (Tr) 31. However, the parties were unable to agree on a short-pants policy during this session or in the ensuing months during which the parties met with a mediator and exchanged correspondence on the matter.

The issue was not resolved because the parties disagreed over the scope of the short-pants policy. The Union favored

a short-pants policy for the entire 46th Test Wing. Respondent's Exhibit (Res Ex) 1; Tr 35. The Respondent's position was that only employees performing flight line duties would be permitted to wear shorts. Res Ex 1, 3; Tr 139-40. During the course of negotiations, the Respondent broadened its position to permit the wearing of short pants by employees who worked in non-air conditioned industrial areas. Res Ex 5, 6; GC Ex 8; Tr 144-46. The Union, however, persisted in its position that the short-pants policy include the entire 46th Test Wing. GC Ex 7, 10.

The failure to resolve this dispute through negotiations led to the Union filing a ULP charge on March 27, 2000, alleging that the Respondent had repudiated the Settlement Agreement. GC Ex 1(a). On July 28, 2000, the General Counsel issued ULP Complaint No. AT-CA-00482 alleging that through this repudiation, the Respondent had violated section 7116(a)(1) and (5) of the Statute. GC Ex 1(c). Respondent denied that it had repudiated the Settlement Agreement or otherwise violated the Statute. GC Ex 1(g).

D. ULP Case AT-CA-00870 - The Respondent's Alleged Implementation of a "No Shorts" Policy

In a July 27, 2000, letter, the Union, having learned that the Respondent had "reissued an unnegotiated Shorts Policy," demanded bargaining on this change. GC Ex 11. In an August 2000 response to the Union, the Respondent asserted that the Union had rejected the Respondent's February 15, 2000, invitation to return to the negotiation table concerning the short-pants policy for the 46th Test Wing. Accordingly, the Respondent advised the Union that it considered the matter closed and that it would continue to enforce its policy of not permitting the wearing of short pants. GC Ex 12. The Union responded, asserting that the Respondent had repudiated the Settlement Agreement and that the matter remained open. The Union also disagreed with the Respondent's claim that there was a policy that employees not be permitted to wear shorts. GC Ex 13.

On September 11, 2000, the Union filed a ULP charge alleging that the Respondent's institution of a "no shorts" policy was a change to the past practice. GC Ex 1(b). On October 4, 2000, the General Counsel issued consolidated ULP Complaint Nos. AT-CA-00482 and AT-CA-00870 asserting that both the previously alleged repudiation and the refusal to bargain by implementing the "no shorts" policy for the 46th Test Wing violated section 7116(a)(1) and (5) of the Statute. GC Ex 1(i). The Respondent maintained that it had not violated the Statute. GC Ex 1(k).

Analysis and Conclusions

A. ULP Case No. AT-CA-00482 - Negotiation of the Settlement of AT-CA-90314

1. Positions of the Parties

The General Counsel asserts that the Respondent improperly limited the scope of the negotiations to only those employees on the flight line. Specifically, the General Counsel argues that notwithstanding the express wording of the Settlement Agreement, the Respondent was unwilling to discuss a short-pants policy for the entire 46th Test Wing. In support of this assertion, the General Counsel points to the testimony of Davis (Tr 34-40, 44-45, 55) and Plante (Tr 90-91, 94-96). The General Counsel also relies on documentary evidence wherein the Respondent's correspondence

reflects an unwillingness to negotiate a short-pants policy for the entire 46th Test Wing. GC Ex 6.

The General Counsel argues that the Respondent erroneously limited the scope of negotiations in reliance upon the fact that the original ULP Charge in AT-CA-90314 only referenced employees on the flight line. In so relying, the General Counsel points out, the Respondent ignored both the amendment which broadened the charge and the fact that in the Settlement Agreement the parties agreed to negotiate a policy for the entire 46th Test Wing. General Counsel Brief (GC Br) 12-13.

The Respondent counters that the Settlement Agreement did not contemplate any particular outcome to the negotiation of a short-pants policy in the 46th Test Wing. As such, the result of negotiations could have been that all, some, or none of the employees in the 46th Test Wing would have been permitted to wear short pants. Tr 14.

The Respondent points out through the testimony of Holbrook that it negotiated and corresponded with the union on several occasions concerning the wearing of short pants. Tr 135-151. While acknowledging that its original position during the negotiations was that only flight line employees be permitted to wear short pants, the Respondent notes that through counteroffers it changed and broadened its position on this matter. Res Ex 5, 6; Tr 15. The Respondent also points to its willingness to consider further broadening its position concerning the employees who would be permitted to wear short pants. GC Ex 8.

2. Whether the Respondent Repudiated the Settlement Agreement

"[T]wo elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (*i.e.*, was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart

of the agreement?)." *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858,

862 (1996). "In considering whether a clear and patent

breach . . . exists, it is appropriate to consider both the statements and actions of the Respondent." *Fed. Aviation Admin.*, 55 FLRA 1271, 1284 (2000).

Rather than finding a clear and patent breach by the Respondent, I find instead that the Respondent complied with the Settlement Agreement. To be sure, both parties entertained different expectations as to which employees in the 46th Test Wing would, as a result of the negotiations, be permitted to wear short pants. The Union preferred a comprehensive agreement that would permit most if not all of the bargaining unit employees in the 46th Test Wing to wear short pants. Tr 35, 79-81. The

Respondent, on the other hand, favored a policy that would limit the wearing of short pants to those performing duties where environmental considerations necessitated cooler clothing. Tr 140; GC Ex. 8. These differing expectations and preferences were reflected in the parties' bargaining sessions, correspondence, and offers.

However, the Settlement Agreement merely required the parties "to negotiate the issue of the wearing of short pants." GC Ex 3. The fact that during the settlement negotiations the Respondent refused to agree to permit the entire 46th Test Wing to wear short pants does not equate to a repudiation of the agreement. On the contrary, I find that the Respondent complied with its collective bargaining obligations *vis-a-vis* the negotiation required by the Settlement Agreement. In this respect, the Respondent met and bargained with the Union concerning the wearing of short pants by bargaining unit employees in the 46th Test Wing. Tr 140-42. The Respondent also participated in an attempt to mediate this matter. Tr 147-49.

The Respondent's flexibility as to the scope of who would be permitted to wear short pants is further evidence that the Respondent satisfied its obligation "to negotiate." This flexibility is demonstrated through the counteroffers Respondent made wherein it broadened its position on this issue during the course of negotiations. Res Ex 5, 6. The Respondent's correspondence also indicates that it was willing to consider broadening its position even further. GC Ex 8. By contrast, the Union was less flexible on this issue, as is evidenced both by its failure to counter the Respondent's offers and by its correspondence with the Respondent. GC Ex 10. Although the Union was not required to move from its original position during the course of negotiations, the Respondent's refusal to agree to the Union's original position does not amount to repudiation.

On consideration of the statements and actions of the Respondent in this case, the General Counsel has failed to establish a clear and patent breach of the Settlement Agreement. I therefore, recommend dismissal of the complaint in AT-CA-00482.

B. ULP Case No. AT-CA-00870 - The Respondent's Alleged Implementation of a "No Shorts" Policy

1. Positions of the Parties

The General Counsel asserts that the Respondent changed conditions of employment by unilaterally implementing a "no shorts" policy without fulfilling its bargaining obligations under the Statute. In support of this assertion, the General Counsel maintains the following: employee attire is a condition of employment; the Respondent changed the past practice involving attire; and the Respondent did so without meeting its bargaining obligations under the Statute. GC Br 15-16. Acknowledging evidence that there was a longstanding "unwritten 'no shorts' policy in effect for the 46th Test Wing," the General Counsel argues that this

policy was often unenforced and not consistently followed. *Id.* at 16. Thus, the General Counsel claims that reissuing the policy (GC Ex 9) violated the Statute.

The Respondent answers by asserting that there was no change in its long-established past practice. Respondent's Brief (Res Br) 19-20. In support, the Respondent relies on the testimony of Technical Advisor Scandone, who testified that since 1972 the Respondent had maintained a practice of not permitting employees of the 46th Test Wing to wear short pants. When violations of this policy were brought to Scandone's attention, they were corrected immediately. Tr 111, 126.

2. Whether the Respondent's Issuance of a "No Shorts" Policy Violated the Statute

Absent any objection by the Respondent and in light of Authority precedent, I find that the wearing of short pants at the 46th Test Wing is a negotiable condition of employment. *IRS, Washington, D.C. and IRS, Denver Dist., Denver, Colorado*, 27 FLRA 664, 668-69 (1987). Notwithstanding the fact that there was no written policy concerning the wearing of short pants, "conditions of employment may be established for bargaining unit employees either by practice or agreement." *U.S. Dep't of Labor, Washington, D.C.*, 38 FLRA 899, 908 (1990). "In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with the agency's knowledge and express or implied consent." *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987).

In this case, the question is whether there was a change in the employees' conditions of employment. "The determination as to whether a change [in conditions of employment] occurred involves an inquiry into the facts

and circumstances regarding the Respondent's conduct and employees' conditions of employment." *U.S. Dep't of Transp., Fed. Aviation Admin., Washington, D.C. and Michigan Airway Facilities Sector, Belleville Michigan*, 44 FLRA 482, 493 n.3 (1992).

On examination of the facts and circumstances in this case, I find that the Respondent had a long-standing past practice of prohibiting the wearing of short pants in the 46th Test Wing and that there was no change to this practice. Although there have been occasions when employees failed to adhere to this policy, I find that management acted promptly to enforce the policy when violations were brought to its attention. As such, a few, sporadic instances of employees not being in compliance does not negate the existence of the Respondent's predominant policy over the years. *Letterkenny Army Depot*, 34 FLRA 606, 612 (1990). In reaching this conclusion, I credit the unrebutted testimony of Technical Advisor Frank Scandone.

Accordingly, I conclude that the General Counsel has failed to establish that the Respondent unilaterally changed the past practice concerning the wearing of short pants in the 46th Test Wing or otherwise violated its bargaining obligations under the Statute. I therefore, recommend dismissal of the complaint in AT-CA-00870.

Finally, I recommend the following:

ORDER

The consolidated complaints in ULP Case Nos. AT-CA-00482 and AT-CA-00870 be, and they hereby are, dismissed.

Issued, Washington, DC, August 2, 2001

ELI NASH

Chief Administrative Law Judge