

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
SUITE 416 - 1111 20TH STREET, NW.  
WASHINGTON, D.C. 20036

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DEPARTMENT OF THE AIR FORCE .  
LOWRY AIR FORCE BASE, COLORADO .  
Respondent .  
and .  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO, LOCAL 1974 .  
Charging Party .  
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Case No. 7-CA-652

Lieutenant Colonel Franklin Wright, Esq.  
For the Respondent

Gavin Lodge, Esq.  
For the General Counsel

Dariel S. Case  
For the Charging Party

Before: WILLIAM NAIMARK  
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 26, 1981, by the Acting Regional Director for the Federal Labor Relations Authority, Kansas City, Missouri Region, a hearing was held before the undersigned on March 5, 1981, at Denver, Colorado.

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7101 et. seq. (herein called the Act). On July 14, 1980 a charge was filed by American Federation of Government Employees, AFL-CIO, Local 1974 (herein called the Union or charging party)

against Department of the Air Force, Lowry Air Force Base, Colorado, (herein called to Respondent). Based upon said charge it was alleged in the complaint that Respondent violated Sections 7116 (a) (1) and (5) of the Act in that (a) since on or about January 27, 1980 it refused to negotiate with the Union in good faith concerning changes in hours of work at the Commissary store, (b) on or about July 1, 1980, it unilaterally implemented changes in the Commissary store hours which affected working conditions of the store employees.

Respondent filed an answer, dated February 10, 1981, which denied the commission of any unfair labor practices.

Both parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

#### Findings of Fact

1. At all times material herein the Union was, and still is, the exclusive bargaining representative of all non professional civilian employees of Lowry Air Force Base. Both the Union and Respondent are parties to a written collective bargaining agreement, which by its terms is effective for a three year period commencing in August 31, 1979.

2. Part of Respondent's operations at the Lowry Air Force Base includes the maintenance of the Commissary store thereat. Cashiers at the Commissary have, since at least 1976, been assigned to particular shifts in the store on the basis of their service computation date (SCD)--the particular date when each person joined the federal service.

3. (a) In past years Respondent has sought to change the hours of duty of employees at the Commissary. Thus, in 1976 management, in response to a survey conducted among its customers, proposed to open the store one hour earlier. The scheduling of the shifts for the cashiers and others in conjunction with the earlier opening of the Commissary, was negotiated with the Union. It was also agreed that cashiers could bid for positions on the three shifts on the basis of their service computation date.

3. (b) Management sought to change the store hours in the commissary during the summer of 1979 for Wednesday of each week. It planned to extend the business hours of that day for one hour. In connection therewith there was a proposal to place all full time cashiers on the third shift. The existent shifts for cashiers started at 7:45

a.m., 8:45 a.m., and 9:45 a.m., respectively. Management desired to place the said cashiers on a shift which started on Wednesday at 10:45 a.m. It met with Union representatives who proposed moving the cashier third shift to 10:45 a.m. and returning the other two shifts as they existed. Bidding for the shifts by cashiers continued on a service computation date (SCD) basis.<sup>1/</sup>

4. A discussion took place on May 30, 1980, between Colonel Giles, Commander of the Base, and Donald Wells, deputy director of the Rocky Mountain Complex which comprises inter alia, the Lowry Air Force Base Commissary. Giles mentioned that the weekday store hours, which closed at 6 p.m., did not afford the instructors sufficient time to shop for groceries. Wells suggested the store hours<sup>2/</sup> be rescheduled and that the new hours be as follows: 9:00 a.m.-7:00 p.m. (Tuesday, Thursday, and Friday); 9:00 a.m.-8:00 p.m. (Wednesday); and 8:00 a.m.-4:00 p.m. (Saturday). It was agreed that the implementation date would be July 1, 1980.<sup>3/</sup>

5. Wells prepared a letter on May 30 in respect to the changes. It was deposited in the U.S. Mail on that date addressed to Daniel Case, President of the Union herein, at his P.O. Box at Lowry AFB. The letter advised the Union representative of the change in store hours, as aforesaid, and that those employees classified as cashiers, day stocking, night stocking, tellers and produce would start one hour later than previously to accommodate new store hours. Further, the employer proposed changing the tours of duty in the cashier sections as follows: instead of three tours (7:45, 8:45, 9:45 with 10:45 on Wednesday), there would be two tours as follows: Shift one: 8:45 a.m. to 5:45 p.m. (Tuesday, Thursday, and Friday; 9:00 a.m. to 6:00 p.m. (Wednesday); 7:45 a.m.-4:45 p.m. (Saturday) Shift two: 10:45 a.m. to 7:45 p.m. (Tuesday, Thursday and Friday); 11:45 a.m. to 8:45 p.m. (Wednesday); and 7:45 a.m. to 4:45 p.m. (Saturday). It was also stated by Wells that Union proposals on the impact of such changes should be directed to him by June 11; and that management intended to implement the changes on July 1.

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<sup>1/</sup> Based on the testimonies of Union Steward Susan Pool, and management officials Tydingo and Wells the record reflects, and I find, that the SCD applied only to shift assignments for cashiers. Further, Tydingo testified that within a week to ten days the Commissary returned to the use of seniority based on service computation date for cashiers. Such standard for seniority continues in effect.

<sup>2/</sup> Prior to July 1, 1980 the Commissary store hours were 8:00 a.m.-6:00 p.m. (Tuesday, Thursday and Friday); 8:00 a.m.-7:00 p.m. (Wednesday); and 8:00 a.m.-4:00 p.m. (Saturday).

<sup>3/</sup> Unless otherwise indicated all dates hereinafter mentioned occur in 1980.

6. The aforementioned letter was found by Case in his mail box on June 5. Although he made several telephone calls to both Wells and Commissary Manager Walkup, the Union official was unable to reach either of those individuals. On June 6, after learning of the contemplated changes in the store hours and working hours. Case notified Union Steward Pool thereof. Pool discussed on expected change with several cashiers. Several of the employees were concerned since the new hours, as planned, would make it difficult to handle child care or attend to evening classes at school.

7. On June 6 Pool telephoned Wells regarding the placement of the cashier's scales. She also told the deputy director that if any change was contemplated in the tours of duty, the Union desired to negotiate it, "and for them to let us know." According to Pool's testimony,<sup>4/</sup> Wells replied that they should wait and see what happens--nothing was final as yet.

8. Further testimony by Pool reflects that she spoke to Daniel Tydingo assistant manager of the Commissary store on June 6 or 7 in the office regarding the anticipated changes in the cashiers' hours. The steward stated that if the hours changes were going into effect, the Union wanted to negotiate the matter; that she desired to be informed when they would occur. Pool testified that she also spoke to Tydingo on June 10 or 11 in the break room; that she repeated the fact that the Union wanted "to negotiate on the cashier hours." A further conversation ensued on June 13 in the presence of Sergeant Hager regarding the changes, at which time Pool said, "Is this going into effect--if it is, we need to negotiate the hours. Let me know when we can do that." Tydingo's reply to Pool was to the effect that they should wait and find out for sure what would happen.

9. Undenied testimony by Pool also reveals that on about June 6 she spoke to Robert Walkup, Commissary manager, regarding the new store hours. Pool requested that she be informal when management proposed to make them effective so the matter could be negotiated. Walkup replied that they should wait and see if the changes would go into effect.

10. Case informed the Union steward that the changes in store hours would occur by reason of the request from Colonel Giles, Commander of the Lowry AFB. Pool made an appointment to see the Colonel and they met on June 11. A discussion ensued regarding the Commissary store hours and the impact the change would have on the cashiers. The Union representative asked Giles if he knew that the present hours resulted from a past customer survey, and the

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<sup>4/</sup> The facts regarding Pool's discussions with Wells and Manager Dan Tydingo, as set forth herein, represent the credited versions of the conversations involving the contemplated changes. Pool's testimony in this regard was precise and straightforward; the recollection of both management officials was not as direct or precise.

Commander replied he was not aware of it. Pool asked if Giles would be interested in "us running a survey on customer preference." Giles indicated he would be interested and had not made up his mind definitely on the subject.

11. On the same day, June 11, Pool spoke to Tydingco and advised him that Giles approved a survey by the Union of store hour preference by customers. The management official stated it was too involved, and he preferred taking a count of the tapes off the computer cash registers. Whereupon Pool examined the tapes for two weeks and discovered that most sales occurred between 10:30 a.m.-3:30 p.m.

12. Recent facts show that on June 15 Case drafted a letter to management stating it was impossible to meet the employer's request that proposals be submitted by June 11. The Union official suggested a negotiation date of June 14, and proposed the work schedule remain the same. Case testified the letter was delivered to management on June 16 by an employee. Tydingco testified the letter was never received.<sup>5/</sup>

13. Under date of June 13 Walkup wrote Case a letter stating that since Respondent did not receive any Union proposals in the change in store hours and tours of duty, it intended to implement the changes on July 1. Case testified he received this letter on June 17 or 18.

14. Between June 18-26 Case telephoned Tydingco and informed him that the Union desired to negotiate the changes in store hours and tours of duty. The management official agreed to meet with case on June 26. The parties convened for a short time on that date, but other matters at hand prevented a full scale consideration of the changes.

15. On June 25 or 26 Tydingco and Sergeant Hager spoke to Larry Brock, Labor Relations Specialist, regarding the intended meeting with the Union representative as to the change in store hours and tours of duty. Brock advised them that they could meet with Case and listen to suggestions; that they had no obligation to negotiate with the bargaining representative since the employer had given ample notification to the Union and the latter had not submitted timely proposals. The labor specialist asked if they wanted to implement the changes by using seniority on date. Both Tydingco and Hager replied in the negative.

16. Case met with Tydingco and Hager on June 27. In discussing the proposed changes, the Union official told them there was no attempt

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<sup>5/</sup> Under contract law a letter which is addressed and mailed properly is presumed to been delivered in the normal course of business. In view of my ultimate conclusion, and the basis therefor, I find it unnecessary to resolve whether this presumption has been rebutted by management's testimony that it never received the letter of June 15.

to tell the commissary what hours they could be open; however, the Union felt it had the right to negotiate the impact on working conditions and the shifts as they applied to employees. Case stated he saw no need to change store hours, nor to change shifts, in any event, to cover different hours; that SCD should govern choice of shifts available to employees in all divisions of the commissary. Hager commented that the union had no right to negotiate choice of shifts; that he would select those individuals he wished a for a particular shift and would not agree to SCD for assignment purposes. Case adverted to the the fact that if management declared subjects to be non-negotiable, the parties could resort to the Federal Mediation and Conciliation Service or the Federal Impasses Panel, but a "status quo" was required beforhand. The management officials refused and remarked that the changes would take place are planned. They were implemented on July 1.

17. Deputy Director Wells testified, and I find, that a return to the original hours and shifts at the Commissary as existed prior to July 1, would require notification to the vendors; that such rescheduling was not particularly difficult; that, in all, it was not a big problem for the commissary to return to status quo.

#### Conclusions

Several past decisions in the public sector have dealt with attempts by management to alter the tours of duty of employees or change the basic work week. Under Executive Order 11491, as amended, it was established that a change in hours was a bargainable matter and not excepted, as a management right, unless it was integrally related to, and determinative of, the staffing pattern of the agency, i.e. numbers, types and grades of positions of employees. See Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36. Moreover, it was held in South East Exchange Service Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, S.C. A/SLMC No. 656, that a change in work hours (7:45 a.m.-4:30 p.m. to 7:15 a.m. - 4:00 p.m.) was not so integrally related to staffing and thus was a negotiable matter.<sup>6/</sup> It is also noted that the decisional law, which involves changes in tours of duty, reflects that it is incumbent upon the agency to demonstrate that such action affects the staffing pattern.<sup>7/</sup>

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<sup>6/</sup> To the same effect see Dept. of the Treasury, IRS, Chicago District Office, Chicago, Illinois, A/SLMR No. 962 involving a similar change in hours.

<sup>7/</sup> It would not lie with respondent herein to defend its conduct on the ground of non-negotiability. This is so because it chose to make the work hours a negotiable matter regardless of whether it is determinative of the numbers and types of employees. See Rosewood Warehouse case, supra.

Thus a mere proposal to change the work week is not determinative of the numbers, types and grades of employees assigned to propose tours of duty Internal Revenue Service and Brookhaven Service Center, 5 FLRA No. 64.

Applying the foregoing precepts to the case at bar, I am satisfied that the decision by Respondent herein to change the store hours<sup>8/</sup> and the shift hours of the Commissary employees was a negotiable matter under the Act. In the case at bar management was bent upon both opening and closing the store one hour later, as well as rescheduling the working hours (starting and quitting times) to meet the new store hours. In this respect, the present situation does not differ from past cases where, as recited hereinafter, management changed working hours so that different starting and quitting times were imposed upon employees. See also the decisions of Judge Burton S. Sternburg in Department of the Treasury U.S. Customs Service, Region VIII, 9-CA-224, 230 December 15, 1980.

Respondent herein does not disagree that it is obliged to bargain regarding proposed changes in working hours. While conceding that such changes are bargainable, the employer contends it satisfied such obligation; that notice was given to the Union on May 30 of its intentions to implement the new hours on July 1, that the bargaining agent was given until June 11 to submit proposals; that none was submitted and no meetings or discussions were held until June 27--just prior to implementation. Therefore, insists Respondent, the Union never made a timely demands to bargain, and its failure to do so relieves the employer of any duty to bargain regarding the proposed changes.

In support of its position in this respect the Respondent cites various cases in the public sector wherein the particular employer was relieved of any obligation to bargain over changes proposed by management. However, upon reading such cases. I am persuaded the facts therein are distinguishable from those in the present controversy. In most of the cases relied upon by Respondent herein, the Union either made no demand to bargain concerning the changes, or the request was made subsequent to implementation. In U.S. Department of Air Force, Norton Air Force Base, A/SLMR M. 261 notification of proposed elimination of a shift was given 17 days prior to its implementation. No request was made by the Union to negotiate the chage before the shift was eliminated, and no evidence existed theat the bargaining agent desired to discuss the impact upon employees. In U.S. Department of Transportation, FHA, et. al. A/SLMR No. 612, the Union had eleven weeks to demand impact bargaining, but

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<sup>8/</sup> To the extent that a change in the store hours of the Commissary are a resultant implementation of different hours of work of the store employees, I conclude that the store hours are likewise a bargainable issue.

made no request to do so. Those instances where a demand was made by the bargaining agent, and still no violation was found to exist, involved situations where the Union came forward at the eleventh hour before implementation. See Headquarters 63d Air Base Jump, et. al. A/SLMR No. 761.

In my opinion the cases cited by Respondent are inopposite to the instant situation. Record facts reveal the Union herein manifested its desire to bargain regarding the change in hours. Union Steward Pool made it clear to Wells and Tydingco in early June that the Union wanted to negotiate any changes in the tours of duty and the hours. Moreover, it is uncontradicted that Pool told the Commissary manager on about June 6 that the new store hours should be negotiated. Finally, Case informed Tydingco at least ten days before July 1 that the Union desired to negotiate the changes in store hours as well as the working hours of employees. These conversations, coupled with the meeting between the parties on June 27, evidenced a clear desire on the part of the bargaining agent, which it imparted to management, that those changes be the subject of bargaining.

Respondent adverts to the fact that it afforded the Union about 10 days to submit proposals regarding the contemplated changes; that since none was forthcoming, it was entitled to implement them, as planned, on July 1. Apart from the fact that Case did not receive the memo from Wells until June 5, I am reluctant to conclude that management may impose rigid datelines as a condition precedent to fulfilling its statutory duty to bargain. The Union agents herein indicated to Respondent that the changes in hours should be negotiated, and in pursuance thereof they arranged a meeting with management to discuss the matter. At that point the employer had been expressly notified that the Union wanted to negotiate regarding the new store hours and the change in shift hours. Notwithstanding the fact that management knew sufficiently beforehand of the Union's request to bargain regarding the changes, it frowned upon negotiating with respect thereto. Such a position is scarcely compatible with good faith bargaining. Thus, both Tydingco and Hager were told by labor relations specialist Brock that, while they could listen to Case regarding the contemplated changes, they were not obliged to bargain over those matters since no timely proposals were submitted. In view of the fact that the record also reflects no great hardship would have resulted if Respondent had reversed its decision prior to July 1, its adamant refusal to negotiate the changes contrains me to conclude that the employer failed to show good faith in respect to its bargaining obligation. Effectuating the new hours and shift changes in face of a demand for bargaining thereon constitutes, in my opinion, a demonstrable lack of good faith. In this posture, and despite notification to the Union regarding contemplated changes, Respondent did not afford the bargaining agent a reasonable opportunity to meet and confer as the disputed matters. Implementation of the changes, in the face of the Union demand to negotiate, flouts the Act

and is violative of Sections 7116 (a) (1) and (5),<sup>9/</sup> U.S. Customs Service, Region VI, Houston, Texas, A/SLMR No. 1161.

Respondent avers in its brief to the undersigned that the change in conditions of employment must be viewed as de minimus. To the extent that such contention is referable to the changes in work hours I would disagree. The Authority has hold that changing employees' hours of duty, i.e. a shift change, has a significant effect upon working conditions of bargaining unit employees. It rejected the argument that the change is de minimus. The same rearming and holding is applicable to the case at bar, and I conclude the changes by Respondent herein were not de minimus or insignificant in effect. See Internal Revenue Service, Austin Service Center, 2 FLRA No. 97.

Having found and concluded that Respondent violated Sections 7116 (a) (1) and (5) of the Act, it is recommended that the Authority issue the following order:

Order

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Lowry Air Force Base, Colorado, shall:

- (1) Cease and desist from
  - (a) Instituting changes in the work hours of its employees, designed to implement a different or new schedule of the hours of operation at its commissary store, without first notifying and, upon request, bargaining in good faith with the American Federation of Government Employees, AFL-CIO, Local 1974, the exclusive representative of these employees, to the extent consonant with law and regulations, on the decision to effectuate such changes.
  - (b) Refusing to meet and negotiate in good faith with the American Federation of Government Employees, AFL-CIO, Local 1974, or any other exclusive representative, with respect to changes in the hours of its Commissary store employees designed to implement a different or new schedule of the hours of operation at its Commissary store.

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<sup>9/</sup> In its brief General Counsel seeks, inter alia, a reinstatement of the use of employee seniority-based upon service computation date for employee choice of shifts. This remedy does not appear appropriate under the circumstances since record facts reflect that SCD was not the general practice for sections other than cashiers. Further, the use of seniority by service computation date was restored for cashiers on July 1.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by Federal Service Labor-Management Relations Statute.

(2) Take the following actions:

(a) Rescind and revoke the changes in the work hours of its Commissary store employees designed to implement a different or new schedule of the hours of operation at its Commissary store.

(b) Upon request, meet and negotiate with the American Federation of Government Employees, AFL-CIO, Local 1974 with respect to any proposed changes in the work hours of its Commissary store employees designed to implement a different or new schedule of the hours of operation at its Commissary store.

(c) Post at its Commissary store at Lowry Air Force Base, Colorado, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms they shall be signed by the Deputy Director and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. The Deputy Director shall take reasonable steps to insure that notices are not altered, defaced, or covered by any material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region 7, Suite 680 City Center Square, 1100 Main Street, Kansas City, Missouri 64105 in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated: July 24, 1981  
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER OF THE  
FEDERAL LABOR RELATIONS AUTHORITY  
AND IN ORDER TO EFFECTUATE THE POLICIES OF  
CHAPTER 71 OF TITLE 5 OF THE  
UNITED STATES CODE  
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS  
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in the work hours of our Commissary store employees, designed to implement a different or new schedule of the hours of operation at our Commissary store, without first notifying and, upon request, meet and negotiate in good faith with the American Federation of Government Employees, AFL-CIO, Local 1974, the exclusive representative of our employees, to the extent consonant with law and regulation, on the decision to effectuate such changes.

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

WE WILL rescind and revoke the change in the work hours of our Commissary employees, effectuated on July 1, 1980, designed to implement a different or new schedule of the hours of operation at our Commissary store.

WE WILL notify the American Federation of Government Employees, AFL-CIO, of any intended changes in the work hours schedule of our Commissary employees designed to implement a different or new schedule of the hours of operation at our Commissary store, and, upon request meet and negotiate in good faith, to the extent consonant with law and regulation on the decision to effectuate such changes.

\_\_\_\_\_  
Agency or Activity

Dated: \_\_\_\_\_ By \_\_\_\_\_  
Signature

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region 7, Suite 680 City Center Square, 1100 Main Street, Kansas City, Missouri 64105, telephone number: (816) 374-2199.