UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE OGDEN AIR LOGISTICS CENTER, HILL AIR FORCE BASE, UTAH and AIR FORCE LOGISTICS COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondents and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592 Charging Party	Case No. 7-CA-70722

Clare A. Jones, Esq.
For the Respondents

Timothy Sullivan, Esq.
For the General Counsel

Mr. Juan C. Pinedo
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,1/ and the

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116 (a)(1) will be referred to, simply, as "§ 16(a)(1)".

Final Rules and Regulations issued thereafter, 5 C.F.R. § 2423.1, et seq., concerns the refusal of Respondents to bargain with the Charging Party with respect to the selection of employees for the mobility team at Hill Air Force Base.

This case was initiated by a charge (G.C. Exh. 1(a)) filed on August 11, 1987, which alleged violations of §§ 16(a)(1) and (5) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1(b)) issued on February 19, 1988, alleged violations of §§ 16(a)(1) and (5) of the Statute and set the hearing for March 17, 1988, pursuant to which a hearing was duly held on March 17, 1988, in Ogden, Utah, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument, which each party waived. At the close of the hearing, May 6, 1988, was fixed as the date for mailing post hearing briefs. Respondents and General Counsel each timely mailed a post-hearing brief, received on May 9, 1988, which have been carefully considered.2/ Upon the basis of the whole record,3/ including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. At all times material, the American Federation of Government Employees, AFL-CIO (hereinafter "AFGE") has been certified as the exclusive representative of a nationwide bargaining unit of employees employed by the Air Force Logistics Command (hereinafter AFLC), including, among others, all non-supervisory, non-professional employees of AFLC and excluding, among others, all management officials, supervisors, professional employees, employees engaged in federal personnel work other than in a purely clerical capacity, employees paid from non-appropriated funds and temporary appointments not to exceed one year. This unit

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2/ By Order dated May 18, 1988, the undersigned denied General Counsel's motion to strike Respondents' post-hearing brief.

3/ Counsel for the General Counsel filed with his brief a Motion to Correct Transcript, to which no opposition was filed. The motion is granted and the transcript is hereby corrected as more fully set forth in the Appendix hereto.

includes employees of the Ogden Air Logistics Center (hereinafter "Ogden"). At all times material, the American Federation of Government Employees, AFL-CIO, Counsel 214 (hereinafter "Council 214") has been an affiliate and agent of AFGE, and at all times material, the American Federation of Government Employees, AFL-CIO, Local 1592 (hereinafter "Local 1592") has been an affiliate and agent of Council 214 and of AFGE (G.C. Exh. 1(b)).

2. At all times material, Mr. William S. Shoell has been Executive Vice-President of Council 214, and President of Local 1592 (Tr. 41). Mr. Shoell testified that he has been delegated authority by the President and Executive Board of Council 214, as President of Local 1592, to initiate bargaining with respect to any issue relating to Ogden (Tr. 53, 56); however, the record contains no evidence or testimony that Council 214 and AFLC ever agreed to submit the bargaining request involved herein, see Paragraph 8, infra, to local negotiations as provided in the Agreement of the Parties and more fully set forth in Paragraph 3, infra.

3. At all times material herein, AFLC and Council 214 have been parties to a collective bargaining Agreement (G.C. Exh. 7) covering the employees in the unit more fully described in Paragraph 1, above. Article 33 of the Agreement is entitled "Negotiations During The Term of the Agreement" and in Section 33.02 c. provides that,

> "c. The parties may mutually agree to delegate responsibility for negotiations to subordinate activities and local Union officials."4/ (G.C. Exh. 7, Art. 33, Sec. 33.02 c., p. 128)

From February 15, 1980, to August 5, 1987, Local 1592 and Ogden were parties to a Memorandum of Understanding (G.C. Exh. 5) which was replaced by a Local Supplemental Agreement

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4/ Section 33.02 deals with "Negotiations At Command Level"; but Section 33.03, which deals with "Negotiations at Activity Level," incorporates the provisions of Section 33.02 c. by the language in subsection 33.03 a.(2) which provides:

> "(2) Upon notification that activities and local Unions have been delegated negotiation responsibilities in accordance with Section 33.02 c. . . ."

effective August 6, 1987 (G.C. Exh. 6). Article 4(s), Section 2 of the Local Supplemental Agreement provides, in relevant part, that,

> ". . . Notification of changes in local conditions of employment will be in accordance with Article 33 of the Master Labor Agreement [G.C. Exh. 7]." (G.C. Exh. 6, Art. 4(s) 2, p. 4)

4. For at least the last eighteen years there has been a Directorate of Distribution Mobility Team ("DMT") at Ogden and at each of the other four AFLC Centers (Tr. 34, 50-51). The function of each DMT is to move manpower and equipment of tenant organizations overseas or bring them back from overseas (Tr. 16, 17). DMTs participate in mobility exercises which are conducted about every six weeks and may last from a day to a week (Tr. 17).

The only qualification for service on the Ogden DMT is employment at Hill AFB. Upon selection, an applicant must then complete a formal classroom training program in the Mobility Command Center which lasts a week (Tr. 19). Members of the DMT may work in classifications essentially the same as their regular classifications (Tr. 19) but many do not. Indeed, one of the two chief inducements to service on the DMT is the opportunity to break the monotony of the daily routine by doing something wholly different, and the other is the opportunity to earn overtime pay. When serving on the DMT, employees work twelve hour shifts and are paid at their regular rate of pay (Tr. 38).

5. Ordinarily, the DMT is staffed by volunteers; service is for eighteen months; and a member is required to obtain a replacement in order to be released (Tr. 21); however, if there were insufficient volunteers, supervisors select employees to fill the remaining slots. Neither the Agreement (G.C. Exh. 7) nor the local supplemental agreements (G.C. Exhs. 5 and 6) make reference to DMTs.

6. In June, 1987, two unit employees came to the Union to express their displeasure over being designated to serve on the DMT (Tr. 22). On July 2, 1987, the Union submitted an information request concerning the selection procedures used by management to staff the DMT (G.C. Exh. 2, Tr. 23).

7. Respondent responded by conducting a briefing on July 21, 1987, for the Union on the DMT and the selection procedures used (Tr. 24), which, in the final analysis, was

that if there were not enough volunteers, each division was required to provide a quota to fill the vacancies and this requirement filtered down to the branch level where the supervisor was permitted to select at his discretion (Tr. 24).

8. On July 23, 1987, Mr. Shoell, as President of Local 1592, by letter made a demand to bargain mid-term, ". . . on the selection and appointment of individuals to the mobility team." (G.C. Exh. 3). Mr. Shoell further stated that, "Local 1592 feels that there needs to be a procedure set up in regards to selecting employees when there are not enough volunteers available to be assigned to mobility and other such exercises." (G.C. Exh. 3). Mr. Shoell also named the members of his bargaining team.

9. On July 28, 1987, Respondent replied and stated, in part, that,

> "2. The augmentee selection process has remained unchanged since its inception many years ago. Therefore, there is no 'change in conditions of employment' regarding this issue. . . .
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> "3. Based on the above, bargaining on this subject is inappropriate." (G.C. Exh. 4).

In subsequent discussions, Respondent repeated that selection of employees to fill vacancies was a management retained right and if the Union had problems with it, the Union could take care of it on a case by case basis through the grievance procedure (Tr. 27-28).

10. On or about, November 6, 1987, AFLC, i.e., at the national level, submitted proposals on Union initiated mid-term bargaining; on, or about, November 13, 1987, Council 214 submitted counterproposals; and on, or about, November 25, 1987, Council 214 requested the assistance of the Federal Mediation and Conciliation Service (Tr. 70-71).5/

5/ I am aware that AFLC's proposals on union initiated mid-term bargaining were in response to certain bargaining requests by Council 214 on other matters.

Conclusions

A. Union Initiated Mid-Term Bargaining

Prior to 1987, agencies or activities were not obligated to bargain over union-initiated mid-term bargaining proposals, except where management sought to change some established condition of employment, or where the agreement of the parties provided for reopening. Internal Revenue Service, 17 FLRA 731 (1985); Internal Revenue Service (District Office Unit), Department of the Treasury, 18 FLRA 361 (1985). The union, National Treasury Employees Union, sought review of these two decisions and the United States Court of Appeals for the District of Columbia Circuit, in a consolidated decision, set aside the Authority decisions, National Treasury Employees Union v. Federal Labor Relations Authority, 810 F. 2d 295 (D.C. Cir. 1987). The decision of the Court of Appeals, issued February 3, 1987, and amended February 10, 1987, preceded Local 1592's July 23, 1987, demand to bargain; however, the Authority's decision, Internal Revenue Service and National Treasury Employees Union, 29 FLRA No. 12, 29 FLRA 162 (1987) (hereinafter referred to as "IRS"), issued on September 28, 1987, after Local 1592's demand to bargain and after Respondent's declination,

The Authority in its IRS decision, supra, stated in part:

> ". . . we conclude that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters which are not addressed in the agreement and were not clearly and unmistakably waived by the union during negotiation of the agreement. Previous Authority decisions not consistent with this conclusion will no longer be followed." (29 FLRA at 167).

In this case, neither the DMT nor its selection was covered by any of the collective bargaining agreements, and there is no evidence or testimony that shows, or purports to show, that the Union had waived its right to negotiate this particular matter although, for reasons set forth hereinafter, the Union may by the provisions of its Agreement (G.C. Exh. 7) have waived its right to bargain mid-term on

any Union initiated proposal to change conditions of employment other than Union proposed changes negotiated in supplemental agreements as authorized by Article 34 of the Agreement (G.C. Exh. 7, Article 34); and except, of course, that negotiation of a collective bargaining agreement did, prior to 1987, pursuant to Authority law, preclude mandatory negotiations on union-initiated proposals in the absence of management's change of conditions of employment or a reopening provision in the agreement. Moreover, while the Union6/ at the time Respondent refused to negotiate7/ had not formulated a specific selection procedure, the Authority has held that a proposal that parties develop a system for rotation of work among qualified employees is negotiable. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981); Veterans Administration Staff Nurses Council, Local 5032, WFNHP, AFT, AFL-CIO, 29 FLRA No. 62, 29 FLRA 849, 865 (1987). Consequently, there is no basis in the record to indicate that the Union's proposal for a procedure to select employees would have infringed management's rights.

B. COULD LOCAL 1592 INITIATE MID-TERM BARGAINING?

Where, as here, local bargaining units have been consolidated into a national unit, the agency may refuse to bargain with the local unit unless the parties have agreed to permit supplemental negotiations at the local level. Department of Health and Human Services, Social Security Administration, 6 FLRA 202 (1981); Overseas Education

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6/ The Union, in its July 23, 1987, demand to bargain, stated only that,

> "2. Local 1592 feels that there needs to be a procedure set up in regards to selecting employees when there are not enough volunteers . . . ." (G.C. Exh. 3).

7/ Respondent stated, in part, that it refused to negotiate because,

> ". . . there is no 'change in conditions of employment' regarding this issue . . .
>
> "3. Based on the above bargaining on this subject is inappropriate." (G.C. Exh. 4).

Association, 7 FLRA 84 (1981); Social Security Administration, Mid-Atlantic Program Service Center, Kansas City, Missouri, 10 FLRA 15 (1982); Social Security Administration, 11 FLRA 390 (1983); Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas, 23 FLRA 807 (1986).

Here, the Agreement of the parties (hereinafter also referred to as "MLA"), G.C. Exh. 7, Article 33, addresses mid-term bargaining both at Command level i.e., the level of recognition, (Section 33.01 and 33.02) and at Activity level (Section 33.03); however, each Section contemplates management initiated changes.8/ In addition, Article 34 provides for local supplements to the Master Agreement9/ (G.C. Exh. 7, Article 34). The current Local Supplement between Respondent and Local 1592 (G.C. Exh. 6) (hereinafter referred to as "Supplement"), as noted above, makes no reference to the DMT nor its selection.

8/ Thus, Section 33.02 provides, in relevant part, that,

> "a. The Labor Relations Office will notify the designated Union official . . . of the intended changes in conditions of employment . . . ." and
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> "b. If the Union wishes to negotiate . . . concerning proposed changes, the Union will submit written proposals . . . ." (G.C. Exh. 7, Section 33.02 a and b); and

Section 33.03 provides, in relevant part, that,

> "a. Activity-wide changes in local conditions of employment . . . will be brought to the attention of local Union officials . . . ." and
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> "b. changes in local conditions of employment at echelons below the activity commander will be brought to the attention of the Union representative designated to be contacted . . . ." (G.C. Exh. 7, Section 33.03 a and b).

9/ However, only one supplemental agreement may be negotiated at each subordinate AFLC activity (G.C. Exh. 7, Article 34, Section 34.02).

Quite probably the reason that the MLA makes no reference to Union initiated proposals for changes in conditions of employment is that, at the time the MLA was negotiated (Signed September 24, 1986), agencies were not obligated to bargain, mid-term, on union initiated changes in conditions of employment. Nevertheless, it is obvious that AFLC did, in the MLA, provide for Union initiated proposals in the Supplement but not otherwise. Of course, when the Supplement was negotiated (Signed July 23, 1987), it is immaterial whether the parties were, or were not, aware of the decision of the Court of Appeals (810 F. 2d 295) for the reasons that: (a) although the Authority's decision in IRS, supra, had not issued, the MLA specifically reserved the right for the Union to negotiate, albeit mid-term, a local supplement; and (b) even more important, Article 34, Section 34.02, provided that only, ". . . One supplemental agreement may be negotiated at each subordinate activity . . . ." (G.C. Exh. 7, Article 34, Section 34.02); notwithstanding that Section 34.02 specifically provides that, ". . . this Article shall not affect the right of the Employer to propose and change personnel policies, procedures, and matters affecting conditions of employment during the term of this Agreement when such are not governed by this Agreement or local supplements. . . ." (G.C. Exh. 7, Article 34, Section 34.02).

Consequently, Ogden was not obligated to bargain on the mid-term proposals initiated by Local 1592 concerning DMT because: 1) Article 34, Section 34.02 (G.C. Exh. 7, Article 34, Section 34.02) specifically limits Union initiated mid-term negotiations to a single supplemental agreement. The Union negotiated the Supplemental and, by agreement, the right of Local 1592 to initiate further mid-term bargaining proposals had been waived; 2) Article 33, Section 33.02 c. (G.C. Exh. 7, Article 33, Section 33.02 c.) permits local negotiations only by mutual agreement of Council 214 and AFLC.10/ General Counsel introduced testimony that would support delegation of negotiation authority to Mr. Shoell, President of Local 1592, by Council 214, although the record does not show that Ogden or AFLC was ever advised of the delegation. Nevertheless, nothing in the record shows any delegation by AFLC to Ogden to bargain mid-term on Union initiated proposals. To the contrary, the record shows that

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10/ "c. The parties may mutually agree to delegate responsibility for negotiation to subordinate activities and local Union officials." (G.C. Exh. 7, Article 33, Section 33.02 c.)

AFLC had raised, and was actively pursuing, the question of the right of the Union under the Agreement to bargain mid-term. Accordingly, since there was no mutual agreement of the Parties for local bargaining, Ogden was under no obligation to bargain with the Union.11/

Stated otherwise, the Union, Local 1592, was precluded by the terms of the MLA from initiating mid-term bargaining.

C. COULD COUNCIL 214 INITIATE MID-TERM BARGAINING?

Obligations to bargain are governed by the state of the law at the time a case is decided, Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA No. 73, 33 FLRA 532, 544 (1988); U.S. Department of the Treasury, 27 FLRA 919 (1987), so, for the reasons set forth above, Council 214 could, indeed, have initiated mid-term bargaining on DMT; but it did not. General Counsel does not assert that Council 214 initiated, or sought to initiate, mid-term bargaining on DMT, but, rather, asserts that Respondent did not, on July 28, 1987, when it declined to bargain on the Union's (Local 1592's July 23, 1987, letter) demand, raise the question of Local 1592's lack of authority to initiate mid-term bargaining. It is true that Respondent

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11/ It might be argued that, because union initiated proposals for changes of conditions of employment are not referred to in either Section 33.02 or 33.03, Section 33.02 c. is not applicable to union proposals. I do not agree. The effect of the Authority's IRS decision is to "amend" Sections 33.02 and 33.03 to incorporate, by operation of law, the right of the union to generate a bargaining obligation i.e., the "when", but has no effect whatsoever on that portion of the parties' Agreement, Section 33.02 c., which governs the manner, i.e., the "how", negotiations are to be conducted. Section 33.02 c. clearly reflects the intention of the parties to retain absolute control of all mid-term bargaining at the level of exclusive recognition. To this end, Section 33.03 a.(2) (negotiation at Activity level) incorporates 33.02 c. The parties, i.e., Council 214 and AFLC, while retaining control of all mid-term bargaining, may by mutual agreement delegate responsibility to subordinate activities and local union officials. Consequently, while the Authority's IRS decision has given a general right to unions to initiate, mid-term, proposals to change conditions of employment, here, Section 33.02 c. by its unrestricted terms governs all mid-term negotiations.

refused to bargain, i.e., found ". . . bargaining on this subject is inappropriate" principally because the ". . . selection process has remained unchanged since its inception many years ago. Therefore, there is no 'change in conditions of employment' regarding this issue . . . ." (G.C. Exh. 4), which all parties fully understood meant that, absent management change of conditions of employment, management had no obligation to bargain mid-term on the Union's request concerning selection for the DMT. It is further true that Respondent did not cite, or assert reliance on, specific portions of the MLA as a bar to Local's 1592's bargaining demand. Under some circumstances a failure to assert a defense will bar the later assertion of the defense, but there is no basis to bar the assertion of the contract defense in this case. First, at the time it refused to bargain, Respondent's position was fully in accord with Authority case law and its asserted defense was a full and complete bar to any obligation to bargain mid-term on union initiated proposals, absent management change of established conditions of employment or a contractual right to reopen during the term of the contract. Second, the Union was not prejudiced by Respondent's failure to assert a contract defense. At the time Respondent refused to bargain - and, indeed, at the time the Union filed its unfair labor practice charge on August 11, 1987 (G.C. Exh. 1(a) - it was immaterial whether the Union, i.e. Local 1592, or Council 214, had initiated the request to bargain. Respondent's response neither prevented nor dissuaded the Union from seeking to initiate mid-term bargaining through Council 214. The Union, however, elected to file its charge on August 11, 1987; but AFLC, in November, 1987, raised the issue of union initiated mid-term bargaining in negotiations with Council 214. Third, the Authority's decision in IRS on September 28, 1987, rendered Respondent's July 28, 1987, defense vulnerable. The Union, notwithstanding its charge, could have renewed its demand to bargain; but it did not. Respondent might have told the Union its defense still barred any obligation to bargain because it, the Union, had waived the right to bargain mid-term or could have told the Union it had other defenses; but it did not. Each had the right to do as it did. Indeed, if the refusal to bargain on July 28, 1987, was in violation of the Statute, it would have constituted an unfair labor practice even if Respondent had later bargained, either in response to the original demand to a new demand. Fourth, the Union did not rely to its detriment on Respondent's failure to assert its contract defense on July 28, 1987.

Although Council 214 could, pursuant to the Authority's IRS decision and in accordance with the MLA, have generated a bargaining obligation mid-term on DMT, it did not. The sole allegation of the Complaint is that Respondent Ogden refused to bargain with Local 1592, the Union, in violation of §§ 16(a)(5) and (1) of the Statute. While there is no dispute that Respondent refused to bargain with Local 1592, for reasons set forth above, its refusal to do so did not violate either § 16(a)(5) or § 16(a)(1). Internal Revenue Service, Ogden Service Center, Ogden, Utah, 16 FLRA 777 (1984). Therefore, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CA-70722 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 11, 1989
Washington, D.C.