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

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, AFL-CIO, LOCAL 1592 Charging Party	Case No. 7-CA-80212

Clare A. Jones, Esquire
For the Respondents

Mr. William E. Wade
Mr. Juan Pinedo
Daniel Minahan, Esquire
Minahan and Shapiro, P.C.
On Brief
For the Charging Party

Matthew L. Jarvinen, Esquire
For the General Counsel

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 Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondents[2/] violated §§ 16(a)(5), and (1) of the Statute by placing on-call employees in a nonpay status prior to bargaining over the impact and implementation of such action. As they are employed specifically subject to periodic release to a nonpay status, Respondent changed no condition of employment when it placed on-call employees in a nonpay status and, for reasons more fully set forth hereinafter, Respondent did not violate § 16(a)(5) or (1) of the Statute.

This case was initiated by a charge filed on January 7, 1988 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on May 26, 1988, and set the hearing for July 13, 1988 (G.C. Exh. 1(b)). By Order dated June 22, 1988 (G.C. Exh. 1(e)), the hearing was rescheduled, on motion of the Charging Party, for good cause shown, for September 13, 1988; and by Order dated September 7, 1988, the hearing was further rescheduled for September 15, 1988 (G.C. Exh. 1(f)), pursuant to which a hearing was duly held on September 15, 1988, in Ogden, Utah, before the undersigned. All parties 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 the Charging Party exercised and the other parties waived. At the

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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)(5) will be referred to, simply, as "§ 16(a)(5)."

2/ Notwithstanding that there is a nationwide bargaining unit of employees of the Air Force Logistics Command, there was no evidence or testimony that Respondent Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, played any part whatever in the events which gave rise to this proceeding; nor is there any contention that the actions involved herein were not the actions of the activity. cf. Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, 17 FLRA 394 (1985). Accordingly, those portions of the Complaint alleging unfair labor practices by the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, are hereby dismissed and all references hereinafter to alleged unfair labor practices will be solely to Respondent Ogden Air Logistics Center, Hill Air Force Base, Utah.

conclusion of the hearing, October 17, 1988, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, for good cause shown, to November 10, 1988. Each party timely mailed a brief, received on November 14, 1988, which have been carefully considered. Upon the basis of the entire record[3/], I make the following findings and conclusions:

Findings

1. At all times material, the American Federation of Government Employees, AFL-CIO (hereinafter referred to as "AFGE") has been the certified exclusive representative of a nationwide bargaining unit of employees of the Air Force Logistics Command (hereinafter referred to as "AFLC"), as more fully described in the Master Labor Agreement (G.C. Exh. 2, Articles 1 and 2), including employees of Respondent's Hill Air Force Base.

2. American Federation of Government Employees, AFL-CIO, Council 214 (hereinafter referred to as "Council 214") is an affiliate of AFGE and Council 214 and AFLC are parties to the Master Labor Agreement (G.C. Exh. 2, Article 1).

3. American Federation of Government Employees, AFL-CIO, Local 1592 (hereinafter referred to as the "Union") is an affiliate and agent of AFGE and of Council 214 for the representation of Respondent's employees. The Union and Respondent are parties to a Local Supplement Agreement (G.C. Exh. 3).

4. In 1987, Respondent employed about 250 to 300 on-call employees, most of whom were employed in the Maintenance Directorate, and all of whom were in the bargaining unit. (Tr. 17, 29, 30). On-call employment is governed by Government-wide Regulation, FPM Chapter 340 (Res. Exh. 2); and is augmented by Respondent's Regulation, 00-ALC-HAFB Regulation 40-340 (Res. Exh. 3) and by the parties' Local Supplement Agreement (G.C. Exh. 3, Art. 16(S), p. 30).

5. On December 9, 1987, Mr. William S. Shoell, President of the Union (Tr. 28) and Mr. Harlan Francis, Master Chief

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3/ General Counsel's Motion to Correct Transcript, to which no opposition was filed, is hereby granted and the transcript is hereby corrected as set forth in the Appendix.

Steward of the Union and chief steward of maintenance (Tr. 16), were called to a meeting with several management officials and informed that on-call employees in maintenance would probably be placed in a non-pay status[4/] in January, 1988, because of the lack of work and funding but management was unable to provide details (Tr. 16, 17, 29).

6. Although recognizing that he might be premature, Mr. Shoell nevertheless, by letter dated December 18, 1987, served a notice to bargain and submitted nine proposals, the first, in part, being that, "1. There be no furlough . . . ." (G.C. Exh. 4). By letter dated December 21, 1987, Mr. Shoell submitted two further proposals (G.C. Exh. 5).

7. On, or about, December 28, 1987, Respondent notified Mr. Francis that on-call employees would be furloughed on January 7 and 8, 1988 (Tr. 18, 32, 42).

8. Also on, or about, December 28, each on-call employee identified for placement in a non-pay status, determined by the Base Retention Roster as provided by the Local Supplement Agreement (G.C. Exh. 3, Art. 16(5); Tr. 52), was given a letter (Res. Exh. 1; Tr. 6-7, 52-53) which told each the exact date of release to non-pay status and the reasons for it. (Tr. 53). Affected employees were given a briefing regarding their rights and benefits while in a nonpay status. (Tr. 52-53).

9. On, or about, January 8, 1988, 131 on-call employees were placed in a nonpay status (G.C. Exh. 6) and remained in a nonpay status for about six months (Tr. 37, 59).

4/ Employees hired into on-call positions are not furloughed but are placed in a non-pay status. (FPM, Res. Exh. 2, Section 3-1). Nevertheless, Messrs. Shoell and Francis referred to it as "furloughed" and Ms. Anna L. Sessions, Personnel Staffing Specialist (Tr. 49), stated that for practical purposes placing an on-call employee in non-pay status was essentially the same as furlough. Accordingly, for the purpose of this case, the terms are used interchangeably, although it is recognized that on call employees are not furloughed and that, where their technical status is in issue, there may be differences between on-call employees on non-pay status and other employees on furlough.

10. Respondent did not meet to negotiate prior to the on-call employees having been placed in a nonpay status.5/

Conclusions

On-call employees work on an as needed basis during periods of heavy workload; their employment is governed by Government-wide Regulations (FPM Chapter 340, Res. Exh. 2), American Federation of Government Employees, AFL-CIO, Local 1858, 26 FLRA 102, 106-107 (1987), American Federation of Government Employees, AFL-CIO, National Council of SSA Field Operations Locals, 25 FLRA 622, 626-627 (1987); is argumented at Hill Air Force Base by local regulation (OO-ALC-HAFB Regulation 40-340, Res. Exh. 3) and by the parties' Local Supplement Agreement (G.C. Exh. 3, Art. 16(5)); on-call employees had previously been placed in non-pay status by Respondent; and Respondent made no change whatever in established conditions of employment when it gave notice (on, or about, December 28, 1987) and placed on-call employees in a nonpay status (on, or about, January 8, 1988).

A condition of employment of all on-call employees is employment on an as needed basis and placement in a nonpay status at the end of peak workload periods. The Federal Personal Manual provides, in part, as follows:

> "3-5 TERMS AND CONDITIONS OF EMPLOYMENT
>
> a. Since an on-call employee is subject to periodic release and recall to and from nonduty/nonpay status as a condition of employment, it is imperative that candidates understand and agree to these conditions prior to actually entering on duty.
>
> b. A special employment agreement must be executed between the agency and the on-call employee at the time of appointment . . . ." (Res. 2).

5/ This case does not involve any allegation that Respondent failed or refused to bargain but only that, "The placement of on-call employees in a non-pay status . . . was implemented . . . prior to bargaining over the impact and implementation of such action . . . ." (G.C. Exh. 1(b), Par. 9(b)). I assume, as the Complaint clearly implies, that bargaining did occur, although, as noted that is not at issue in this proceeding.

When Respondent began the on-call employment some years prior to 1988, it initiated, as required, an '"ON-CALL' WORKING AGREEMENT" (Res. Exh. 4), which is sent with employment inquiries; at their interview the Agreement is reviewed; and the employee signs it (Tr. 56)..

Respondent was obligated to bargain during the term of the collective bargaining agreement on negotiable union-initiated proposals. Internal Revenue Service, 29 FLRA 162 (1987). Although "on-call" employment was addressed in the Local Supplement Agreement, it is not asserted by Respondent that the Union waived its right to negotiate further on the matter. Presumably, as the Complaint implies, the parties did meet to negotiate on the Union's proposals. No opinion is expressed as whether any of the Union's proposals were, or were not, negotiable; but, even though Respondent placed the on-call employees in a nonpay status before it met to negotiate, Respondent changed no condition of employment by implementing its notice on, or about, January 8, 1988. Stated otherwise, Respondent's obligation to bargain on the Union's mid-term proposals did not affect Respondent's right to continue existing conditions of employment, including placing on-call employees in a nonpay status which, as noted, was specifically a condition of their employment. General Counsel misconstrues the applicability of Department of the Air Force, Scott Air Force Base, Illinois, 19 FLRA 136 (1985). Unlike the employees in Scott Air Force Base, supra, it is a condition of employment of on-call employees that they are subject to periodic release to nonpay status.

Having found that Respondent did not violate § 16(a)(5), or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CA-80212 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 20, 1989
Washington, D.C.