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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. 8-CA-80454

Wilson G. Schuerholz and
Pamela Smith
For the Respondent

Deborah S. Wagner, Esq.
For the General Counsel

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION

This is a proceeding under the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., hereinafter called the Statute, and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

American Federation of Government Employees, AFL-CIO, hereinafter called the Union, filed an unfair labor practice charge dated July 15, 1988 against Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, (hereinafter called Respondent). Pursuant to the foregoing charge, the Acting Regional Director of Region VIII, issued a Complaint and Notice of Hearing alleging that

Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally changing working conditions of the employees at its Chula Vista, California Office by relocating the office without first completing bargaining with the Union over the impact and implementation of the change, including the allocation of space and facilities to conduct union activities.

Respondent filed a timely Answer denying it had violated the Statute.

A hearing was held before the undersigned in San Diego, California. Respondent, the Union, and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor and my evaluation of the evidence, I make the following:

Findings of Fact

1. Sometime in February 1988, Respondent's Chula Vista District Office management notified the Union's local representative, in writing, that it planned to move from its offices on L Street to new office space on Third Avenue. Union Representative Barbara Lawson, informally met and negotiated with the office management on several occasions, and the parties were able to resolve a number of issues prior to the move. Thereafter in late June 1988 the parties began a more formal bargaining process on the three issues left unresolved by the informal process mentioned above. These issues involved employee parking, seating for the Title II employees, and office space for the Union. More specifically, on June 21, 1988, Lawson submitted a formal, written request to bargain on these remaining issues. With respect to Union space, Lawson made the following comments:

> On the third issue, the Union's proposal is:
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> The desk on the north side of the private interviewing room is designated for Union activities. Management will provide partitions to be placed on either side of the desk. The IBM typewriter by the current FR desk will be located on the Union desk for use by the Union.

> When we spoke this morning, I explained that separate space was needed for purposes of confidentiality, and that privacy for conduct of Union activities would be in our mutual self-interest. You stated that the Union could use the private interviewing room. I told you that it was often unavailable. You stated that there was no need for confidentiality since all management actions are proper. . . .

2. Chester responded to the Union's proposals on June 24, 1988. His letter concerning Union office space states as follows:

> Concerning separate Union space surrounded by partitions. I will not bargain this issue. That issue was negotiated in the National Contract. We will provide what the contract calls for. That is, use of the private interview room for confidential conversations,1/ and use of the telephone and any typewriter not being used.

Subsequently, Lawson and Chester met on several more occasions, and were able to resolve the issues concerning parking and employee seating arrangements. The only issue left unresolved was the question of designated Union space. Chester continued to refuse bargaining concerning the Union's proposals on office space, asserting that he had no duty to bargain because the issue was covered by the National Agreement.2/ When the move did occur in late July 1988, the

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1/ Respondent's Assistant Manager, Richard Chester claimed that the issue of confidentiality did not come up at any time during these negotiations. He asserted that the question of confidentiality for Union business did not come up until a few weeks before the hearing in this case, which would be about six months after the move to the new office. In spite of his assertions in the hearing, Lawson's letter to him clearly raises confidentiality as a concern, and furthermore the letter reflects a conversation held with Chester regarding the issue of confidentiality.

2/ The National Agreement between Respondent and the Union does include some language regarding the use of official facilities in Article 11, Section 1:

(footnote continued)

proposal concerning Union office space was the only remaining issue which had not been negotiated or resolved.

3. The record shows that supplemental negotiations did take place at the component level for the Field Office component (which would include the Chula Vista District Office), as envisioned by Section 1, Part B. However, no agreement was ever reached. Therefore, Article 11, Section 1-A appears to be the only language agreed to at the National level concerning Union office space. However, Article 11, Section 1-A requires that the Respondent continue to provide the Union with any office space or furnishings which it was providing on June 10, 1980, whether the space was provided under a component-wide agreement or any other arrangement. The only agreement in effect on June 10, 1980, which applies to the Chula Vista District Office is a 1977 Regional level agreement. Article 10, Office Facilities, thereof addressed the question of space for union activities in Section E., which states:

> **Section E.** The Region will provide available space to the Council for the conduct of labor management relations. Available space will be provided to assure private, confidential discussions between

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(footnote 2 continued)

> **Article 11**
> **Use of Official Facilities**
> **Section 1 - Office Space and Furnishings**
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> A. The Administration will continue to provide the Union such office space and furnishings as were being provided under component-wide agreements or other arrangements on June 10, 1980. The Administration will make reasonable efforts to provide space, as available, for confidential discussions between a bargaining unit member and a designated union representative, when held in accordance with the terms of this agreement.
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> B. As provided for in Article 5 (Supplemental Agreements), this article may be supplemented at the component level.

unit members and Union Representatives. In the absence of such space, unit members and Union Representatives may leave the worksite to hold private and confidential discussions in accordance with the proper use of Form SSA-75 by the Union Representative.

Article 5, Section 2, of the Master Agreement states that "All provisions of labor agreements currently in effect that are not superceded by, in conflict with or compromised during bargaining of this Master Agreement will automatically be incorporated into the appropriate Supplemental Agreement." It appears to be agreed by both parties that Article 10, Section E. was not "superceded by, in conflict with or compromised during bargaining," but rather was carried over, and remains in effect.

4. On June 10, 1980, Lawson was the "Column 2" Union representative for the Chula Vista Office. In this position, she represented employees on grievances, but did not negotiate with management on any issues. The "Column 1" representative, Jenny Olson, conducted any necessary negotiations.3/ In June 1980, Lawson only spent a few hours a week on Union business.

5. At that time, in June 1980, the Chula Vista Office was located at 336 Oxford Street, and Lawson's office was located on the second floor, apart from the other employees. In addition to her desk, Lawson had a long table, a typewriter, a telephone, and a large working area.

6. Sometime in 1981, Lawson acquired several new Union positions, including both Local President and Network Vice President, and the amount of time she spent on Union business increased to about 25 per cent of her total work time. In April 1982 she became the Union's Chief Steward for the entire San Francisco Region, and her Union activity increased to 100 per cent of her time.

7. Several years later, in July 1983, the Chula Vista District Office moved from 336 Oxford Street to 670 L Street, where it remained for the next five years. Prior to that move, the local union representative, Lydia Vela, negotiated with the manager at the time, Gene Moreno, regarding union

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3/ The designations of "Column 1" and "Column 2" representatives were eliminated and these terms have not been used since the National Agreement became effective in 1982.

location of Lawson's desk, which was placed against a wall, and for partitions around her desk for confidentiality.

8. Sometime in 1984, Lawson resigned her varied Union positions. As a result of these resignations, she agreed to give up the partitions that had been placed around her desk, because those partitions were clearly negotiated for and agreed to in order to accommodate a specific need for confidentiality in conducting certain Union activities.

9. For the next several years, the only Union position Lawson held was that of Local Office Representative. In this position, when privacy or confidentiality was necessary, Lawson would simply use the private interviewing room. As local office representative, Lawson would spend no more than a couple of hours a week on Union representation activities, and these activities normally involved only the Chula Vista District Office.

10. In March 1988, Lawson was designated as a Local President's Designee, and later in July 1988 she was elected Second Vice-President of Local 2879. This position involves primarily internal Union business. A Local President's Designee, or LPD, is a person who assists the local office representatives with their grievances and provides advice on bargaining. As LPD, Lawson also became responsible for all unfair labor practice charges filed by the Local. As LPD, Lawson also assisted the Union representatives in the 22 different offices within Local 2879's jurisdiction, which covers San Diego County, Imperial County, San Bernardino, Riverside, California, as well as Las Vegas, Nevada and Yuma, Arizona. The LPD position did not exist prior to the implementation of the Master Agreement in 1982. The responsibilities handled by Lawson in her capacity as LPD in 1988, previously in 1980, would have been handled by either the network vice president or the Council's Chief Steward. Both of the individuals holding those positions had private office space for their Union activities. At the time of the hearing, Lawson spent about 50 percent of her work time on official Union business. Because the area covered by the Local is so wide ranging, at least half of that time is spent on the telephone.

Discussion and Conclusions

The only issue in this case is whether Respondent had a duty to bargain concerning space for Union activities in the context of its relocation of one of its District offices.

Respondent submits that its reasons for refusing to bargain on what it considers to be separate Union space in connection with the relocation of the Chula Vista District Office are proper since such arrangements are already set out in the National Agreement. Respondent also asserts that this matter is one of interpretation and application of the parties collective bargaining agreement and therefore is improperly before this forum. Finally, Respondent introduced several arbitrators awards concerning similar issues as found herein which it asserts should control the issue in this case and is final and binding on the parties regardless of the Union's action regarding ratification. Respondent's main point here is that the matter is one of contract interpretation and that the Charging Party selected this forum simply because of its failures through the arbitration machinery.

The General Counsel asserts that moving an office to a new location creates a bargaining obligation on an agency regarding the impact and implementation of the decision to relocate. Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, 19 FLRA 328 (1985); United States Department of the Treasury, Internal Revenue Service, Dallas District, 19 FLRA 979 (1985). This obligation, the General Counsel contends, includes the procedures to be observed in implementing the relocation as well as appropriate arrangements for employees affected by the move. American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477, et al., 7 FLRA 578 (1982) (involving the negotiability of various proposals related to a relocation). In the case at bar, the parties had agreed on all aspects of the relocation except the proposal relating to the Union's use of office space.

Generally, the Authority has found proposals regarding a union's use of agency facilities to be negotiable, National Federation of Federal Employees and General Services Administration, 24 FLRA 430 (1986). In this regard the Authority has stated that "it is well established that the use of office space by a union functioning as the exclusive representative of bargaining unit employees is a matter affecting conditions of employment." American Federation of Government Employees, AFL-CIO, Local 1631 and Veterans Administration Medical Center, Chillichothe, Ohio, 25 FLRA 366, 369 (1987). Thus, a union's proposal that a specific desk be designated as exclusively for union representational activities is a negotiable proposal, unless that union has waived its right to bargain on this issue. In addressing Respondent's contention that there are arbitrators awards supporting its view in this area, it seems that the only

test to be applied here is whether the Union had a statutory right to bargain the impact and implementation of the office relocation including space for union activity and whether it was shown that the Union clearly and unambiguously waived its right to bargain. Department of the Air Force, Ogden Air Logistics Center, Hill AFB, Utah, 32 FLRA 277 (1988). Such a waiver can be shown through the express language of the agreement, or through the bargaining history. In this case, neither the language of Article 11, Section 1-A nor Respondent's evidence of bargaining history reflect a clear and unmistakable waiver.

United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker AFB, Oklahoma, 21 FLRA 679 (1986) relied on by the General Counsel appears to me to be indistinguishable from this matter. In that case, the parties in their local supplemental agreement had an article concerning overtime, including provisions regarding the assignment of overtime and methods for dealing with certain problems arising out of overtime. The activity unilaterally placed the paint hanger employees (who had already been working substantial amounts of overtime) on a regular overtime schedule, so that all employees would be required to work ten hours on workdays and eight hours on their first day off each week. The administrative law judge found that the contract did not specifically indicate that all matters concerning overtime were governed by the contract terms. Rather, the contract seemed to address ordinary overtime assignments, not the extraordinary situations created when all employees were placed on a regular schedule of substantial overtime. Since no evidence showed that the parties had discussed this possibility or contemplated the contract's applicability to an extraordinary change of this nature, the Authority upheld the administrative law judge's finding that there was no clear waiver of the Union's statutory right to negotiate on the impact and implementation of the extraordinary change.

The very same situation we see in Tinker, supra, exists in this matter. Here, Article 11, Section 1-A addresses the Union's right to continue using office space and furnishings which were provided to it at the time the negotiations took place in 1980. There is nothing in that article to suggest that it was meant to cover the permanent relocation of an office to new facilities. As in Tinker, supra, the union here is entitled to negotiate with respect to what procedures management will follow in exercising its right to relocate its offices, and the appropriate arrangements for the adversely affected employees, including the question of

space for its activities. This right is granted to unions under the Statute, and there is nothing in the parties' collective bargaining agreement which can be construed as a clear waiver of that statutory right. See also Department of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio and Newark Air Force Station, Newark, Ohio, 21 FLRA 609 (1986), where the Authority found that the contract did not contain language which specifically relieved the agency of its duty to notify the union and bargain concerning procedures and appropriate arrangements for adversely affected employees when it revised performance standards.

Contrary to the assertions of Respondent, there are important differences between issues which should be resolved by the parties' own contractual mechanism, and statutory rights which must be resolved by the Authority in the context of whether a clear and unmistakable waiver of that statutory right exists. In Department of the Air Force, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, OALJ 87-47 (1987), adopted without precedential significance May 20, 1987, Administrative Law Judge Chaitovitz dismissed the respondent's contract interpretation argument as a misunderstanding of the case, stating in pertinent part:

> The subject case involves a contention that Respondent has denied AFGE Local 916 a right it has under the Statute. The case involves whether AFGE Local 916 has a right under Section 7114(b)(4)(B) of the Statute to copies of the requested rosters. The case does not involve whether the union has a right granted it under contract to the documents. The case does not allege a violation of the Statute based upon a violation of the contract. Only where the violation of the contract is the basis of the statutory violation, is it appropriate to defer to an arbitrator to interpret whether the contract had, in fact, been violated. In the subject case the statutory right exists in its own right and the contract must be looked to only to see if the statutory right had been clearly and unmistakably waived.
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> (OALJ 87-47, at pp. 8-9)

A similar approach to this issue was adopted by the Authority in ACTION, 31 FLRA 634 (1988), where it specifically noted that interpretations of a certain ground rule by Respondent and the General Counsel were both plausible, yet refused to consider the case a matter of contract interpretation. Rather, the Authority stated, "we are unable to conclude that ground Rule III constitutes a clear and unmistakable waiver of the Union's right to bargain over its subsequent proposal for the payment of travel and per diem expenses." This same sort of analysis was applied in Bureau of Indian Affairs, Phoenix Area Office, Phoenix, Arizona, 32 FLRA 903 (1988), a case in which the Authority specifically did not adopt the administrative law judge's alternative finding that the resolution of the dispute (over names and home addresses) involved differing and arguable interpretations of the memorandum of agreement.

As expressed by Judge Chaitovitz in Tinker, supra, it is crucial to determine whether the issue in the case at hand involves rights flowing from the Statute, or rights flowing out of the contract itself. Since this case involves the Union's statutory right to bargain, it clearly flows out of the Statute. Therefore, it is found that unless the Union has clearly waived that statutory right, the terms of the contract are irrelevant. Since the Union has not clearly waived its statutory rights, those rights remain in effect, and were violated when Respondent refused to bargain regarding the proposal on Union office space.

Accordingly, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute in relocating its Chula Vista District Office without first completing bargaining over the impact of the change, including the allocation of space and facilities to conduct union activities.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Department of Health and Human Services, Social Security Administration, Baltimore, Maryland shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment by relocating its Chula Vista District Office, without first bargaining with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its

employees over the impact and implementation of the changes including the allocation of space/facilities to conduct union activities.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees over the impact and implementation of the changes including the allocation of space/facilities to conduct union activities.

(b) Post at its Chula Vista, California District Office copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Office Manager or a designee and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, 350 South Figueroa Street, 3rd Floor, Room 370, Los Angeles, CA, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 16, 1990.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge