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

DEPARTMENT OF THE AIR FORCE, SCOTT AIR FORCE BASE, ILLINOIS. Respondent	
and	Case No. 5-CA-00080
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, SEIU, AFL-CIO Charging Party	

Judith A. Ramey, Esquire
For the General Counsel

Mr. Raymond K. Schultz
For the Charging Party

Major W. Jan Faber, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Certain employees of Scott Air Force Base (Scott) received 4% environmental differential pay. Scott eliminated this pay without completing the process of negotiating with the Charging Party (the Union) over the decision to make this change. Scott in effect concedes that ordinarily it would have been obligated to bargain over this, but it contends that a provision in the parties' collective bargaining agreement relieved it of that obligation.

An unfair labor practice complaint alleges that Scott's conduct constituted a failure and refusal to (1) bargain in good faith and (2) cooperate in impasse procedures, thus

placing Scott in violation of sections 7116(a)(1), (5), and (6) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71 (the Statute). A hearing was held in St. Louis, Missouri, on April 4, 1990. The General Counsel and Scott filed post-hearing briefs.

Findings of Fact

The Union is the exclusive bargaining representative of certain "wage grade" employees of Scott, including those in the 375th Consolidated Aircraft Maintenance Squadron Corrosion Control Shop (the Shop). For many years, Shop employees received 4% environmental differential pay (EDP), a form of hazardous duty pay (an addition to their base pay) because of their exposure to dust when sanding lead-based paint and their exposure to polyurethane paint.

EDP for civilian employees of the United States Air Force, including the employees at Scott, is governed by regulations codified in Federal Personnel Manual (FPM) Supplement 532-1 and a special Air Force Supplement to it. The parties' collective bargaining agreement contains only one reference to EDP. It is found in Article XX, Section 2, which says:

> Employees will receive environmental differential pay in accordance with applicable regulations. Where there is a question of the application of the regulation, the Union is afforded an opportunity to present it to the Civilian Personnel Office for expeditious investigation and review. Disputes may be grieved.

The applicable regulations are difficult to capsulize. For the purposes of this case the significant provisions are those which speak to the procedure for determining and reviewing the existence of various hazards listed in Joint Exh. 2 pp. 12-22: "Appendix J". Each local "installation or activity," such as Scott, must "evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories." The "section" of the regulations mandating this evaluation does not "preclude negotiations through the collective bargaining process for . . . application of appendix J categories to local work situation." Id. at p. 4.

Scott is also required to conduct an annual review of "work situations currently approved for environmental pay

differential." These reviews are used "to determine whether the hazard . . . has been eliminated to the degree which would preclude continuance of payment of the differential." Joint Exh. 2 pp. 7, 9; Tr. 74. Scott undertook such a review, starting at the end of 1988, and on September 11, 1989, informed the Union that, effective October 1, EDP would be eliminated in the Shop.

The Union requested negotiations over this matter, "to the extent allowable by law" (Joint Exh. 6). The parties met and discussed it, but Scott would not enter into "negotiations" over the substance of the change. Tr. 21, 83. (Management invited proposals over the impact and implementation of the change, but there is no need to treat "I & I" bargaining here as a separate issue.) Scott consistently maintained that it had no duty to bargain--that Article XX, Section 2 limited the Union, should it wish to contest the elimination of the EDP, to its remedies under the negotiated grievance procedure. Joint Exhs. 14, 17. Meanwhile, the Union requested the assistance of the Federal Service Impasses Panel (FSIP) to resolve what the Union claimed to be a bargaining impasse.

After a brief delay to accommodate the Union's request for information and further discussions, Scott implemented the change on October 15, 1989. Subsequently, FSIP declined to assert jurisdiction, stating that the questions raised by Scott concerning its obligation to bargain "must be resolved in an appropriate forum before a determination can be made as to whether the parties have, in fact, reached a negotiation impasse." The Union then filed the charge initiating this proceeding.

Discussion and Conclusions

This is another case where the issue boils down to whether the applicable legal principle is that of "clear and unmistakable waiver" of the Union's right to bargain or that of "differing and arguable interpretations of a collective bargaining agreement." The General Counsel contends that the former applies, and that nothing in the agreement constitutes such a waiver. Scott Air Force Base takes the position that the latter principle applies, and that Article XX, Section 2, at least arguably gives it the right unilaterally to change the manner in which it applies the EDF regulations, subject to review only as provided in Article XX, Section 2.

Citing a line of cases the latest of which is Internal Revenue Service, 29 FLRA 162 (1987), the General Counsel

argues that the Authority's traditional policy requiring a clear and unmistakable waiver before a union's right to bargain may be extinguished, is "alive and well" (Br. at 12). To this observer, however, the vitality of the traditional policy is very much in doubt in cases where the claim that a duty to bargain exists is met with a colorable claim that a contract provision, rather than the statutory duty, governs. Thus, in United States Marine Corps, 33 FLRA 105, 114 (1988) and Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Chicago, Illinois District Office, 33 FLRA 147, 154 (1988) (IRS Chicago), the Authority held that where a party makes a plausible argument that a contract provision relieved it of any obligation to bargain about a particular subject, the appropriate forum for resolution of the dispute over that party's bargaining obligation is the negotiated grievance machinery rather than the Authority's unfair labor practice procedures. IRS Chicago also makes clear that, in the Authority's view, the existence of differing and arguable interpretations of the contract with respect to the duty to bargain is determinative even in the face of an express finding that there was no clear and unmistakable waiver.1/

I need not repeat here the misgivings I have expressed elsewhere concerning what I understand to be the Authority's policy in cases where these two principles intersect. See Department of Veterans Affairs, Veterans Administration Medical Center, Boise, Idaho, Case No. 9-CA-90575 (Nov. 9, 1990), exceptions pending. I am bound to follow the law as

---

1/ More recently, in Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 345 (1990), the Authority adopted Administrative Law Judge Nash's decision, in which he applied the traditional waiver doctrine. In that case, however, there is no indication that the party adversely affected had disputed the applicability of that doctrine. The Authority's decision, therefore, provides less than a clear signal that it has silently abandoned its 1988 decisions concerning the primacy of the principle of contract interpretation. The same must be said of U.S. Department of the Navy, United States Marine Corps (MPL), Washington, D.C. and Marine Corps Logistics Base, Albany, Georgia, 38 FLRA 632 (1990), where the Authority recited the principle of clear and unmistakable waiver as the applicable doctrine (Id. at 636) but where there is no sign that the issue of whether that was the applicable doctrine was before it.

articulated in the latest published decisions in which the Authority has spoken on this choice of principles, even while welcoming the possibility that I misinterpret them.2/

Applying what I perceive to be the Authority's contract interpretation policy, I find that Scott has presented an arguable position that the contract shunts disputes concerning the application of the EDP regulations away from the negotiations arena and into the forum of the grievance procedure. (By this I do not, of course, mean that I necessarily find that this interpretation most accurately reflects the parties' intentions or is the most reasonable.)

Article XX, Section 2, makes EDP dependent on the applicable regulations. Whenever the Union disagrees with management's application of the regulations, Section 2 prescribes a two-stage path for the Union to follow. First, it may present its views to the Civilian Personnel Office. If the Union is not satisfied with the resulting internal resolution it may pursue the grievance procedure. While Section 2 does not expressly indicate that this path is to be followed in lieu of negotiations, it is plausible that the parties settled on it as the procedure for resolving disputes.3/

Counsel for the General Counsel points to the fact that the applicable regulations themselves refer to local bargaining over their application. But, while counsel argues that the regulations "provide" for bargaining, the best that can be said is that they may not, in themselves, preclude bargaining. As noted above (ante at 2-3), the regulations provide that "nothing in this section shall preclude negotiations" on certain subjects, including, as the only listed subject that might arguably pertain to this case, "application of appendix J categories to local work situations." Joint Exh. 2, p. 4.

2/ Thus I adopt and adapt Francis Bacon's dictum: "Truth emerges more readily from error than from confusion." 8 The Works of Francis Bacon 210, Spedding, Ellis, and Heath, ed. (1869).

3/ Testimony concerning the parties' bargaining history established that the parties' main dispute in reaching the current version of Section 2 was on the issue of whether the Union might proceed directly to arbitration, skipping the earlier steps of the grievance procedure.

It would not be prudent to conclude too easily that such an "application" is the same kind of determination that Scott made in deciding that the hazards in the Shop had been eliminated. Scott's determination was governed by another part of the regulation, found at Joint Exh. 3, p. 9. I have no way of resolving satisfactorily what the regulation, where it says that "nothing in this section shall preclude negotiations," means by the word, "section." Consequently, I cannot say whether or not the matters discussed at p. 9 are intended to be covered by the anti-preclusion language.

But even if the "section" that the anti-preclusion section covers includes the material at p. 9, the anti-preclusion effect is specifically limited to certain kinds of issues. The language and the format of the regulations are such that I cannot say with any confidence that determinations about the elimination of hazards fall within the category of determinations to which the anti-preclusion language applies.

Nor would the failure of the regulations to preclude bargaining give the General Counsel's case the lift it needs, if I am correct in concluding that the contract interpretation doctrine must control here. For it is not to the regulations that Scott looks to find relief from its bargaining obligation. It is to the contract. The contract, it is true, refers to the regulations. But the regulations are, at worst for Scott, neutral as to whether the procedure for determining the propriety of eliminating EDP includes negotiations. That is, at worst they neither mandate nor preclude negotiations. (I venture no opinion as to whether they might under any circumstances have the enforceable effect of precluding negotiations.) Their acknowledgement that the subject might be negotiated is insufficient to negate the plausibility of Scott's claim that the <u>contract</u> limits the Union's external relief to the grievance procedure.

The General Counsel also argues that events in the parties negotiations over a contract to replace the existing one provide evidence of a mutual understanding that Section 2 does not relieve Scott of its bargaining obligation. Thus, at one point Scott sought a revision of Section 2 that would articulate Scott's interpretation of the current Section 2 more clearly. Scott proposed the following final sentence in place of the existing one: "In any instance where management has stated its intent to modify or cancel the payment of EDP to a unit employee and the Union has expressed its objection to such intent, the matter will be

resolved through the parties' negotiated grievance procedure."

Scott's unsuccessful attempt to negotiate that revision would provide the General Counsel with a useful, although probably not necessary, argument, if, as the General Counsel contends, the test here were "clear and unmistakable waiver." But Scott's wish to obtain language that would more nearly evidence a waiver of the right to negotiate is not inconsistent with its contention in this case that the existing Section 2 can be construed as making the grievance procedure exclusive.

With the contract language thus, after all is said, still subject to differing and arguable interpretations as to the negotiability of the subject of eliminating the EDP, I am constrained to recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington, D.C., February 1, 1991

JESSE ETELSON
Administrative Law Judge