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

DAVIS-MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2924, AFL-CIO Charging Party	Case No. 8-CA-00485

Major Phillip Tidmore, Esq.
For the Respondent

Lisa Clare Lerner, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

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

On July 30, 1990 the American Federation of Government Employees, Local 2924, AFL-CIO, (herein called the Union), filed an unfair labor practice charge against the Davis-Monthan Air Force Base, (herein called Respondent). Pursuant to the aforementioned charge, the Regional Director of the Los Angeles, California Region of the Authority, issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1), and (5) of the Statute by unilaterally implementing a change in the procedure for distribution of employee leave and earning

statements prior to completion of negotiations with the Union over the substance or impact and implementation of the change.

A hearing was held before the undersigned in Tucson, Arizona. All parties were represented and afforded the full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs which were timely filed by the parties 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:

Finding of Facts

1. At all times material herein, the Union has been the exclusive representative of three separate units of employees which are appropriate for collective bargaining at Respondent's facilities. Edward A. Margosian, at all times material herein, was president of the Union.

2. At all times material herein, Raleigh Christian was Respondent's Chief, Labor & Employee Relations.

3. Respondent's employees for about 17 years prior to June 1990 received their leave and earning statements (hereafter called LES's) at home through the US Postal system.

4. Sometime in February 1990, Respondent contacted Margosian proposing a change in the procedure of having the LES's delivered to employees at home. According to Christian, Respondent desired that effective the pay period of March 11, 1990, those statements would be delivered to employees at the worksite through the Base Information Transfer System (BITS).

5. Upon receipt of Respondent's notification of the proposed change Margosian contacted Christian requesting bargaining on the matter.

6. On February 12, 1990, Christian again wrote Margosian regarding the LES's and deferred the implementation of the change by proposing that the change in distribution take place during the pay period of March 25, 1990. Margosian responded by letter on February 22, 1990 stating that the Union did not agree with Respondent's proposal regarding a

change in the distribution procedure and requested impact and implementation bargaining over the matter.

7. On March 5, 1991, Christian sent a letter and Respondent's proposed memorandum of understanding concerning the distribution of LES's to Margosian for signature. On March 26, 1990, Margosian responded to the memorandum of understanding, in essence, rejecting it and suggesting that the services of the Federal Mediation and Conciliation be sought.

8. The parties met with a mediator on April 19, 1990. At the close of the meeting, the mediator directed the parties to meet again at some future time to discuss the LES's again. Both parties had proposals on the table. Respondent proposed that the LES's be passed out at work on a trial basis. The Union proposed that the LES's be passed out at the work place to employees on a voluntary basis. The mediator did not declare an impasse at this meeting, but instead "asked the parties to try and get back together and discuss that issue again and to give him a call."

9. By letter dated May 21, 1990, the Union was informed of Respondent's plan to implement the distribution of LES's at the work place through BITS beginning pay period 13 or June 13, 1990. A subsequent letter dated June 6, 1990 corrected the date on which the change would occur to the pay period beginning June 3, 1990. Although the parties had discussed several aspects of the change no impasse on the subject was declared. Respondent apparently was convinced that it could save money through using the BITS and that it was a reliable system. The Union was concerned about privacy and the desire of some employees to continue to have the statements delivered at home.

10. After Margosian received the June 6, 1990 second letter on the matter, he became quite concerned because Respondent was telling him "that they had made up their mind" that they were going to implement passing out the LES's. Margosian insists that the Union's proposal at all times was that Respondent implement no change. Since implementation was clearly going to occur based on Respondent's June 6, 1990 letter, Margosian submitted a request for assistance to the Federal Service Impasses Panel (herein called FSIP) on June 19, 1990. On August 22, 1990 the FSIP declined to assert jurisdiction, without prejudice.

11. Beginning with the pay period of June 3, 1990 and continuing to date, LES's have been distributed to employees at the worksite.

Conclusions

A. The Leave and Earning Statements are a condition of employment over which a duty to bargain existed.

The General Counsel argues that the delivery of LES's is a condition of employment. Basically, the General Counsel relies on Federal Employment Metal Trades Council, AFL-CIO, and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 25 FLRA 465 (1987). In Mare Island, the Authority found that the delivery of paychecks is a condition of employment, and that proposals concerning changes thereto are negotiable. In U.S. Department of the Treasury, 27 FLRA 919 (1987), not only paychecks, but other payroll products were found to be a condition of employment. More recently in, National Federation of Federal Employees, Local 738 and Department of the Army, Army Engineer Center and Fort Leonard Wood, Fort Leonard Wood, Missouri, 37 FLRA 131 (1990), the Authority determined that delivery of "payroll products," including W-2 tax statements and LES's were matters "inextricably bound" to pay and the manner in which they are delivered is a matter affecting conditions of employment within the meaning of the Statute. In comparing the yearly W-2 form to the biweekly LES's the Authority stated that each is a "payroll product" representing a record of compensation and compensation related issues flowing from the employment relationship between the employee and the employer. LES's, like W-2 tax forms provide the employee with a record of pay disbursement, leave accumulation, and leave usage. Indeed, employees availing themselves of direct electronic fund transfers are not aware of the particulars of their deposits, save for the data reported on the LES's. I see no reason cited by Respondent to reject the General Counsel's reasoning and find therefore, that the LES's here constituted a condition of employment. It is also found that Respondent's desire to change its method of delivery of LES's required bargaining with the exclusive representative.

B. There was no Union waiver to bargain the substance of distribution of bargaining unit members' LES's.

Respondent argues, however, that the Union waived its right to bargain substance of the LES's. The nub of this defense is that the Union did not submit any "proposals of

substance." Furthermore, according to Respondent, the record as a whole would show only that in the conversations between the parties, "the Union was only bargaining impact and implementation." In my view, such an argument lacks merit.

The Authority does not take waiver issues lightly. It recently reiterated its long standing position that a "clear and unmistakable" relinquishment of a claim or privilege must be based on expressed agreement, bargaining history or inaction. Department of Veterans Affairs, Veterans Administration Medical Center, Boise, Idaho, 40 FLRA 992 (1991); see also U.S. Department of Treasury, Customs Service; 38 FLRA 1300 (1991). Here, if anything the Union was insisting to the very end that there be no change in the distribution of LES's.

U.S. Department of Health and Human Services, Public Health Service, Indian Health Service, Indian Hospital, Rapid City, South Dakota, 37 FLRA 972 (1990) issued shortly before the hearing in this matter is a case where the Authority dealt with precisely the same issue raised by Respondent. The problem is one strictly over the semantics of bargaining. In that smoking policy case, the Authority stated, "it is not meaningful in this situation to distinguish between 'substance' and 'impact and implementation bargaining'." Adding, "We are unwilling to interpret the Statute in a manner which would require a union . . . to label its proposals in a particular way to preserve its right to bargain." The rationale of the above case clearly answers Respondent's assertion that the Union here waived its right to bargain over the substance of proposed changes when it only requests to bargain impact and implementation. Distribution of LES's has already been found negotiable. See NFFE, Local 738, supra. As a negotiable subject the Union should be required only to make required proposals and not required to label each proposal as substantive or impact and implementation, before it can be considered. Based on the foregoing, Respondent's argument that the Union waived its right to bargain over the substance of the change herein, is rejected.

C. The Union did not waive its right to bargain impact and implementation of the distribution of the LES's.

With tongue in cheek, Respondent argues first that the Union did not offer bargaining proposals and then that the Union failed to offer "specific concrete proposals". Notwithstanding the position Respondent takes here, it is

clear that the Union submitted specific proposals and that it was not merely seeking information or engaging in any tactics other than to have Respondent continue to deliver the LES's to employees at their homes. Again, as Respondent argued with regard to the Union's having waived its right to bargain over the substance of the change, this is a play on semantics and the record as a whole established that the Union did not waive any right in this matter. It is found therefore, that the Union did not waive its right to bargain over the impact and implementation of the distribution of LES's.

D. **Did Respondent have an obligation to bargain the cost under the change?**

Respondent also argues that under section 7106(a)(1) of the Statute it has a nonnegotiable right to determine its budget. That argument has already been addressed by the Authority in NFFE Local 738, supra, where it restated the tests of American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 606-608 (1980), aff'd as to other matters sub nom. Department of Defense, Army Exchange Service v. FLRA, 659 F. 2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982) saying that proposals which directly interfere with management's right to determine its budget must either: "(1) demonstrate that the proposal prescribes the particular programs or operations the agency would include in its budget or prescribes the amount to be allocated in the budget for them; or (2) demonstrate substantially that the proposal entails an increase in costs that is significant and unavoidable and is not offset by compensating benefits. See Fort Stewart Schools v. FLRA, 110 S. Ct. 2043, 2049 (1990).

It is clear from the record that no Union proposal in this case prescribed programs or operations to be included in Respondent's budget or the amount to be allocated for them. The proposals herein clearly leave Respondent the judgment as to how the proposal will be accommodated in the budget. Consequently, the proposal does not interfere with management's right to determine its budget under the first budget test.

Under the second Wright-Patterson test, it is incumbent on the agency to produce evidence demonstrating that compliance with the proposal would result in a significant and unavoidable increase in costs, not offset by compensating benefits. Here Respondent implemented the

change to worksite distribution, with a single minded notion that it would save money. It offered no evidence to show that affording employees the option of having their LES's distributed by mail would result in a significant and unavoidable increase in costs over the costs of worksite distribution. When making the claim that a matter is one of budget, the Authority has squarely placed the burden on the claiming party to create a record on which it can make a decision. Failure to do so is at the party's peril. See, American Federation of Government Employees, Local 1857 and Department of the Air Force, McClellan Air Force Base, California, 36 FLRA 894 (1990). Here, Respondent provided no estimate of the cost in man-hours for the distribution of LES's at the worksite, but relied only on the cost of mailing LES's and how much it would save in postage. It is only through providing evidence such as this that it can be determined whether or not the increase in costs would not be offset by the compensating benefits. Thus, Respondent's showing falls short of satisfying the second Wright-Patterson test. Accordingly, Respondent's argument that it has a nonnegotiable right to determine its budget under section 7106(a)(1) of the Statute, is rejected.

E. The parties were not at impasse and Respondent violated section 7116(a)(1) and (5) when it implemented the change effective June 3, 1990.

Respondent contends that the parties were at an impasse after a series of discussions over the proposed change. Testimony at the hearing reveals that the Union provided two valid proposals and that no proposal was ever declared nonnegotiable by either side. The record further shows Christian asserted that he met with the Union for several meetings and discussions on the change in distribution of the LES's. However, it was never established that an impasse was declared on the issue of the LES's or that the word "impasse" was ever mentioned or contained in any of the written documents directed to the Union.

In U.S. Department of the Air Force, Space Systems Division, Los Angeles Air Force Base, California, 38 FLRA 1485 (1991), the Authority adopted the approach of the administrative law judge in making its determination where the parties disagreed whether an impasse was reached during negotiations. That approach was to examine the conduct of the parties from the inception of their negotiations. After tracking the parties' negotiations and correspondence, the Authority in that case found the facts demonstrated that although the parties had not agreed on all terms of the

proposal on the table, no impasse existed. Particular importance was attached to the fact that evidence did not show disagreement as to the terms of the proposal on the table, or an unwillingness to modify them. See also Department of Defense, Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, 17 FLRA 896 (1985).

The facts in this case are similar to those cited above and there does not appear to be an impasse here. First, there is no evidence here that the Union refused to bargain over Respondent's proposed change. Second, the record does not indicate that, at any time, further negotiations would not have been productive. Third, the Union replied to Respondent's proposals and counter-proposals by submitting negotiable proposals of its own. Fourth, the Union never delayed its response so as to imply waiver by inaction nor did it fail to submit negotiable proposals. Thus, it seems that the Union behaved in a way reflecting responsiveness to the bargaining process. Furthermore, it is undisputed that the parties met routinely, throughout this time period to bargain over proposed changes regarding drug-testing of employees. Although it is not disputed that the parties failed to reach agreement over the change prior to implementation, the evidence does not reveal that either party refused to negotiate further, or that subsequent bargaining would have been fruitless. Clearly no impasse existed in June 1990 when Respondent effected the change in LES's.

In U.S. Department of the Air Force, Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289 (1990), the Authority agreed with the administrative law judge that an agency violates the Statute by implementing changes to established conditions of employment if it implements the changes, absent (1) agreement by the parties, (2) timely invocation of the services of the Federal Services Impasses Panel after impasse following good faith bargaining, or (3) the waiver of Union bargaining rights. See also, Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, 18 FLRA 466 (1985); Office of Program Operations, Filed Operations, Social Security Administration, San Francisco Region, 9 FLRA 73 (1982); and Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). In the Luke case no impasse was found since the respondent would not deviate from its intention to implement the change; the union's proposal not to implement was negotiable; impasse was not declared; the union clearly was not refusing to continue negotiations; there was no waiver by the union; and, no overriding exigency requiring immediate implementation existed. The Authority also found that there was no

impasse within the meaning of 5 C.F.R. section 2470.2(e)(1) (1988) which contemplates efforts to reach agreement through negotiations and use of mediation before declaring impasse and that the union did not have a reasonable opportunity to invoke the processes of FSIP.

Without establishing that the parties were in agreement or at impasse, Respondent contends that the Union "missed the boat's departure. . . . " on the issue of timely invoking the procedures of the FSIP. The facts do not support this assertion. Again, the matter was definitely negotiable. There was no impasse and the credible evidence shows that Margosian was caught off guard by Respondent's announcement that the change would take place in June. Furthermore, the Union had not waived any of its rights to bargain and the parties had sought the services of a mediator who had plainly encourged them to continue negotiations. Finally, it appears that Margosian's application to FSIP on June 19, 1990, after he received a second letter from Respondent indicating implementation, was an attempt to continue rather than to shut off negotiations. Such facts establish that all efforts to reach agreement by available means had not been exhausted when Respondent originally announced that the change would take place. In such circumstances, when the Union filed to invoke FSIP procedures is irrelevant. Thus, the record discloses and it is found, that the Union had no opportunity to use the services of the FSIP in a timely fashion and its failure to file for those services prior to June 19, 1990 does not constitute an "untimely" filing.

Based on the foregoing, it is found and concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing a change in distribution of LES's without completing good faith bargaining with the Union over the substance and impact and implementation of the change. Therefore, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 USC section 7118(a)(7)(A) and section 2423.29(b)(1) of the Federal Labor Relations Authority's Rules and Regulations, it is hereby ordered that Respondent, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally changing the working conditions of bargaining unit employees by changing the method by which Leave and Earnings Statements are distributed to employees, without first completing bargaining with the American Federation of Government Employees, Local 2924, AFL-CIO, the exclusive representative of its employees, over the substance of the change or the impact and implementation of the change.

(b) Refusing to continue bargaining with the American Federation of Government Employee, Local 2924, AFL-CIO over the manner in which Leave and Earnings Statements will be distributed for all bargaining unit employees of Davis-Monthan Air Force Base.

(c) 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) Rescind the May 21, 1990 and June 6, 1990 directives ordering distribution of Leave and Earnings Statements to bargaining unit employees at the worksite and restore the previously existing distribution procedure.

(b) Upon request, bargain with the American Federation of Government Employee, Local 2924, AFL-CIO over the issue of distribution of Leave and Earnings Statements for all bargaining unit employees at Davis-Monthan Air Force Base.

(c) Notify the American Federation of Government Employee, Local 2924, AFL-CIO of any intended changes in the manner in which Leave and Earnings Statements are to be distributed to employees and, upon request, bargain to completion over the substance and/or impact and implementation of such change.

(d) Post at its Tucson, Arizona facilities, 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 Commanding Officer 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Los Angeles Sub-Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 13, 1991

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement unilateral changes in the working conditions of bargaining unit employees by changing the method by which Leave and Earning Statements are distributed to employees without completing bargaining with the American Federation of Government Employees, Local 2924, AFL-CIO, the exclusive representative of our employees, over the substance of the change or the impact and implementation of the change.

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 the May 21, 1990 and June 6, 1990 directives ordering distribution of Leave and Earnings Statements to bargaining unit employees at the worksite and restore the previously existing distribution procedure.

WE WILL notify the American Federation of Government Employees, Local 2924, AFL-CIO in advance of any contemplated change concerning the distribution of employees' Leave and Earning Statements and, upon request, bargain to completion over the substance and/or impact and implementation of such change.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

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 employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Los Angeles Sub-Regional Office, whose address is: 350 South Figueroa Street, 3rd Floor, Room 370, Los Angeles, Ca 90071 and whose telephone number is: (213) 894-3805.