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

HEADQUARTERS, U.S. AIR FORCE WASHINGTON, D.C., AND 375TH COMBAT SUPPORT GROUP, SCOTT AIR FORCE BASE, ILLINOIS Respondents	
and	Case No. 75-CA-10048
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, AFL-CIO, SEIU Charging Party	

Timothy Jay Sullivan, Esquire
For the General Counsel

Major Steven E. Sherwood, Esquire
For the Respondents

Mr. Carl L. Denton
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

In this case it is alleged that a violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) occurred when notices of a proposed furlough were issued to employees without prior notification to the Charging Party (the Union) and without first giving the Union the opportunity to negotiate over the impact and implementation of the notices. As I conclude that issuance of the notices did not effect a change in any condition of employment, I shall recommend that the complaint be dismissed.

A hearing was held on May 16, 1991.1/ Counsel for the General Counsel and for the Respondents filed post-hearing briefs.2/

Findings of Fact

The Union is the exclusive bargaining representative of certain employees assigned to Scott Air Force Base, an "activity" subordinate to Respondent "Headquarters, U.S. Air Force, Washington, D.C."3/ On August 20, 1990, the Office of Management and Budget (OMB) issued a "sequester report" as required under the Gramm-Rudman-Hollings Act. As a result, the Secretary of the Air Force, on September 14, directed subordinate Air Force units to issue notices of "proposed furlough" to approximately 230,000 to 240,000 appropriated fund civilian employees. To enable the

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1/ I grant Counsel for the General Counsel's unopposed motion to correct the transcript. In addition to the corrections requested in the motion, I note that the transcriber took too great a liberty, even considering that the hearing was held in St. Louis, when he or she spelled the President's name "Busch" (Tr. 108).

2/ At the hearing, and memorialized in a separate order issued on May 22, 1991, I granted the motion by Respondent Headquarters, U.S. Air Force, to dismiss the complaint's allegations against it as being barred by section 7118(a)(4) of the Statute. Counsel for the General Counsel urges me in effect to reconsider that ruling. Further consideration causes me rather to reconfirm it. See U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania, 40 FLRA 449, 455 (1991) (A charge is sufficient if it informs the alleged violator of the general nature of the violation charged against him.) Regarding General Counsel's argument that the 6-month time bar should be tolled under section 7118(a)(4)(B), there is no contention that Respondent Headquarters, the party in favor of which the time bar applies, owed any duty to the Union to inform it of its (Headquarters') actions, nor is there any basis for a finding that anyone concealed the participation of Headquarters in these events.

3/ The second named Respondent in the unfair labor practice complaint is "375th Combat Support Group, Scott Air Force Base, Illinois." However, as the parties refer to it as "Scott Air Force Base," I shall do likewise.

imposition of furloughs as soon as possible after October 15 (the sequester report's target date for implementation of the Gramm-Rudman-Hollings sequestration of agency funds), while at the same time giving employees the 30-day notice required by 5 U.S.C. § 7513, it was understood that the notices should be issued no later than September 18.

Scott Air Force Base Labor Relations Officer Robert Nelson informed the Union's then acting president, Executive Vice President John Cissell, on September 14, about the imminent action. Nelson delivered a sample copy of the notice to Cissell on September 17. The notices, although dated September 17, were being prepared with the addresses of the approximately 3500 Scott employees who were to receive them throughout that evening and night. They were distributed on the 18th. By then, Union President Carl Denton had returned from leave status, and Nelson contacted him with reference to the notices. Neither Cissell nor Denton made any proposals regarding the furloughs, although they both testified that they told Nelson that the Union did not concur with the issuance of the notices.

A copy of the notice issued to the employees is appended to this decision for convenient reference. In brief, it informs each employee as follows:

1. The Air Force proposes to furlough you, for up to 22 days for full-time employees, sometime between 17 Oct 90 and 31 Sep 91.

2. The furlough is proposed because of the Gramm-Rudman-Hollings sequestration order.

3. If other employees are not being furloughed or are being furloughed for a different number of days, it is because of (specified) special circumstances.

4. If a need for furloughs beyond 22 days develops, you will be given another notice. We will try to keep you informed as more information regarding the necessity of furlough becomes available.

5. You may respond to this letter within 7 days. [The reason for this opportunity for response is that furloughs of 30 days or less are technically "adverse actions" under Chapter 75 of Title 5 U.S.C.]

6. There are designated officials to hear oral replies.

7. No decision to furlough has been made or will be made until full consideration is given to your reply.

8. These proposals are being issued as a contingency against possible significant sequestration. In the event that sequestration does not take place, or is of brief duration, furlough may not be required. Appropriate guidance on this issue will be forthcoming as events unfold. [This is the complete original paragraph 8.]

9. This proposal in no way reflects adversely on your performance.

[Space is provided for the employee's acknowledgement of receipt of the notice.]

Discussion and Conclusions

Generally, an agency must afford the exclusive representative of affected employees notice of proposed changes in conditions of employment, and an opportunity to bargain over those aspects of the changes that are negotiable, before it makes those changes. U.S. Department of Transportation and Federal Aviation Administration, 40 FLRA 690, 702 (1991) (FAA). At issue here is whether Scott Air Force Base was obligated to negotiate with the Union before it issued the notices of proposed furlough. It is not contended that Scott failed or refused to give the Union an opportunity to bargain after the notices were issued. Therefore, it must be determined whether issuance of the notices constituted a change in any "conditions of employment" as defined in section 7103(a)(14) of the Statute:

> (14) 'conditions of employment' means personnel policies, practices, and matters . . . affecting working conditions. . . .

As is clear from the face of the notice, no decision had been made to furlough any employee who received the notice. The only respect in which the status of those who received the notice changed was that as of that date they were subject to being furloughed within 30 days if a decision were later made to implement the proposed furlough. It is the position of the General Counsel that such a contingency, with its attendant intrinsic effects, is sufficient to constitute a change in a condition of employment.

There is no question but that the change of an employee's status from working and being paid to not working

and not being paid is a change in conditions of employment, whatever the mechanism for the change. Ogden Air Logistics Center, Hill Air Force Base, Utah, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 41 FLRA 690, 698 (1991). Normally, however, the mere proposal of a change does not trigger a bargaining obligation until there is at least some move toward "implementing" it. See Department of Defense, Department of the Air Force, Armament Division, AFSC, Elgin Air Force Base, 13 FLRA 612, 622 (1984). In the reported cases, there has hardly ever been a dispute about whether a contemplated change in a condition of employment was or was not actually "implemented." It was that very problem with which the Authority had to wrestle not too long ago in a case arising at the same facility as this one. Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844 (1990).

In Scott, the Air Force Base had, in the face of a union request to bargain over the impact and implementation of a proposed contracting out of bargaining unit work and any resulting reduction-in-force (RIF), proceeded unilaterally to issue RIF notices to a number of employees. Scott argued that no obligation to bargain existed until after the RIF notices were issued. It asserted that issuance of the notices did not constitute implementation of the RIF but was only a step toward eventual implementation, which would occur on the effective date of the RIF. That date, Scott asserted, was subject to being extended through post-notice negotiations that Scott was "ready and willing" to enter into. Id. at 851- 52.

The Authority disagreed with Scott and with dissenting Authority Member Armandariz, who relied on the "effective" date of a RIF to determine when a change in conditions of employment occurs. Id. at 857. The Authority noted that before a RIF notice was issued to any employee the agency had already determined the numbers and types of positions to be eliminated and had identified the employees who would be affected. The notice informed the recipient that (1) a final determination had been made by the agency as to the employee's RIF status; and (2) that the employee will be subject to the action specified unless circumstances change before the effectuation date. By virtue of having received a specific RIF notice, an employee "may be treated differently during the notice period prior to the effective date of the RIF from other employees who have not been identified as subject to a RIF action. For example, . . . when an agency determines during the notice period that there is a lack of work or funds, employees who have

received specific RIF notices may be placed on annual leave, in a leave without pay status, or in a nonpay status." In addition, such employees must decide within the notice period whether to accept the reassignments or other actions to which they are subject pursuant to the notices. Id. at 853-54.

Here is the Authority's own summary of its holding on this issue (Id. at 854):

> Because the issuance of specific RIF notices identifies particular employees who will be affected by the RIF, subjects those employees to changes in pay status due to lack of work or funds, and requires employees to make decisions which affect significantly their employment in an agency, we conclude that an agency's issuance of specific RIF notices to employees constitutes a change in the employees' conditions of employment.

The employees who received the notice of proposed furlough in the instant case had not by then been subject to a determination that their positions would be affected by a furlough in the event a furlough occurred.4/ Their receipt of the notice did not subject them to any change in pay status during the notice period. While notice that they might suffer diminished earnings sometime within the next fiscal year naturally caused them concern and made it advisable to plan for such an eventuality, I do not believe that this required them "to make decisions which affect significantly their employment" in the sense in which the Authority used this phrase in Scott Air Force Base. There, the reference was to the necessity of immediately making possibly irreversible elections as to their continued status as employees.

The General Counsel's argument in favor of a finding that a change occurred focuses on the desirability of the Union's input into the contents of the notice, for the purpose of insuring that the notice include pertinent information that might help the employees take all the steps necessary to protect themselves to the greatest extent

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4/ In Scott Air Force Base, the Authority noted that Scott failed to afford the union an opportunity to bargain about the procedures which determined which employees would be subject to the RIF. Id. at 858.

possible. This focus leans heavily, for its strictly legal as opposed to its public policy basis, on a passage in the Authority's Scott Air Force Base opinion: "Indeed, proposals concerning the content of the RIF notice itself are negotiable. . . . [I]t would be anomalous, at best, for the Authority to find that although an agency is obligated to bargain over the content of the RIF notice, the agency is not obligated to bargain until after the RIF notice has been issued." Id. at 855. Aside from the question of whether the proposition about RIF notices applies to notices of proposed furloughs as well, I do not derive from that passage an independent basis for finding that issuance of a notice of a proposed change implements the change.

The cases on which the Authority relies in stating that the contents of the notice are negotiable make it clear that the proposition means that a union may, in anticipation of the possibility of a future RIF-producing development, compel an agency to negotiate in advance over contract language to cover the contents of a RIF notice necessitated by such future event. National Treasury Employees Union and Department of the Treasury, Financial Management Service, 29 FLRA 422 (Provision 5) (1987); National Treasury Employees Union and Nuclear Regulatory Commission, 31 FLRA 566, 590-92 (1988). Negotiability determinations, however, do not deal with issues of whether the conditions of employment with which bargaining proposals are concerned have been changed. So, in neither of the above cases was the question of whether the issuance of a notice changed a condition of employment raised or discussed. The purpose of the negotiations those unions obtained, of course, was to seek an agreement about the content of the notices. Until such an agreement was reached, however, the agencies were free to draft notices unilaterally in the absence of specific proof that their issuance changed conditions of employment. That is where the instant case stands.

Turning to the General Counsel's policy arguments, the Union's failure to obtain an agreement to include certain desired information in the notice (whether this failure is due to a finding that there was no pre-notice bargaining obligation or to its inability to obtain agreement on its proposals after full negotiations) does not prevent it from providing to employees the information it believes they need. See Department of the Air Force, 3rd Combat Support Group, Clark Air Base, Republic of the Philippines, 29 FLRA 1044, 1048 (1987). Nor would post-notice bargaining over steps that could be taken to ameliorate the effects of the notice, including information to be provided by Scott,

necessarily be too late to be effective. Negotiations could well include the subject of delay or selective deferral of implementation of furloughs, or special relief for those employees who must be furloughed earliest and therefore might be subject to unusual hardship.

One aspect of the furlough notice procedure merits separate attention. As noted, because a furlough is technically an "adverse action," a response to the notice is permitted. This option, and the requirement that it be exercised within seven days, arguably places the recipient of the notice in a changed status. But the option effects no greater change in the employee's status than the very fact that s/he has become subject to a possible furlough in 30 days. The opportunity for a response is, at worst, meaningless, and at best a means to undo what the notice did. If issuance of the notice did not constitute a change, affording the right to challenge it does not make it one.5/

One can hardly disagree with the General Counsel's assertion that receipt of the notice of proposed furlough had an impact on employees. This impact, however, did not make issuance of the notice a bargainable event unless what changed was something that conforms to what is to be understood by the statutory term, "conditions of employment." For the reasons discussed above, I have

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5/ The General Counsel argues that the Union should have had the opportunity to negotiate over the amount of official time available to employees to prepare such a response. To hold here, as I do, that Scott was privileged to issue the notices before bargaining, does not address the issue of whether the subject matter of official time for such preparation is negotiable. That, as Scott argues generally in its defense, is something that must, apparently be determined through a negotiability appeal.

concluded that the impact, real though it is, does not represent or signify such a change. I therefore recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, September 17, 1991.

JESSE ETELSON
Administrative Law Judge

DEPARTMENT OF THE AIR FORCE
375TH MISSION SUPPORT SQUADRON (MAC)
SCOTT AIR FORCE BASE, ILLINOIS 62225-5000

REPLY TO ATTN OF: MSC

17 SEP 1990

SUBJECT: Notice of Proposed Furlough

TO:

1. This letter is notification that the Air Force proposes to furlough you no earlier than 30 days from receipt of this notice for full-time employees. Furlough will not be more than 22 days or 176 hours. Part-time employees' furlough time will be pro-rated based on work schedules. The furlough will fall between the following dates: 17 Oct 90 - 31 Sep 91.

2. The furlough is being proposed under the authority of 5 CFR, Part 752, Subpart D because the Air Force is under a sequestration order pursuant to the balanced budget and emergency deficit control act of 1985, PL 99-177, commonly known as the Gramm-Rudman-Hollings Act, as amended. Accordingly, maintaining the present rate of spending will result in an expenditure of funds in excess of the Air Force's authorized budget. Although many actions are being taken within the Air Force to curtail spending, this furlough is proposed to promote the efficiency of the service by avoiding a deficit of funds in fiscal year 1991.

3. If employees in your competitive level are not being furloughed or are being furloughed for a different number of days, it is because they (1) are currently in a non-pay status, (2) are under an intergovernmental personnel act mobility assignment, (3) are on an assignment not otherwise causing an expenditure of funds to the Air Force, or (4) are in a position whose duties have been determined to be of crucial importance to the Air Force's mission and responsibilities, and cannot be curtailed.

4. At this time, we do not reasonably anticipate the need for furlough beyond 22 work days. However, should additional furlough days be necessary, employees will be given another notice. We recognize the difficult personal financial implications of any furlough no matter how limited its length. We will make every effort to keep you informed as additional information regarding the necessity for furlough becomes available.

5. You will be allowed 7 calendar days from receipt of this letter to respond orally and/or in writing, to review the supporting material used to make this determination, and to furnish any affidavits or other supporting documentary evidence in your answer. You have the right to be represented in this matter

by an attorney or other person you may choose. If you are in a duty status, you and/or your representative, if an Air Force employee, will be allowed up to 4 hours of official time to review the supporting material, seek assistance, prepare your reply, secure affidavits, and statements, consider appropriate course of action, and make a response. Contact your supervisor to arrange for official time.

6. The deciding official has designated representatives to hear oral replies. To arrange for an oral reply, or to review the supporting materials, please contact your Employee Relations Specialist at extension 64188. Written response should be addressed to the deciding official, Mr Daniel G. Marlett, Civilian Personnel Officer, 375 MSSQ/MSC, Scott AFB, IL 62225-5965 or delivered to the Central Civilian Personnel Office, Building 52.

7. A final written decision, including an explanation of the specific reasons for the action taken will be given to you as soon as possible after the 7 days allowed for your reply. No decision to furlough has been made or will be made until full consideration is given to your reply.

8. These proposals are being issued as a contingency against possible significant sequestration. In the event that sequestration does not take place, or is of brief duration, furlough may not be required. Appropriate guidance on this issue will be forthcoming as events unfold.

9. The Air Force deeply regrets the necessity for making this proposal. This proposal in no way reflects adversely on your performance.

GERALD F. NORTON
Chief, Labor and Employee
Management Relations Section
Civilian Personnel Office

1st Ind,

I acknowledge receipt of this notice.

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Signature Date