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

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| DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, VETERANS CANTEEN SERVICE, LEXINGTON, KENTUCKY<br><br>Respondent | |
| and | Case No. 4-CA-00670 |
| NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-184<br><br>Charging Party | |

Sherrod G. Patterson, Esquire
For the General Counsel

Ginny M. Hamm, Esquire
For the Respondent

Michael Lane Doss, National Representative
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

"In this case, the single issue is whether or not the pricing of food items in the cafeteria at Leestown Division of VAMC Lexington is a 'condition of employment'." I quote the Respondent's brief for this statement because it simplifies things by eliminating other issues (especially those concerning which organizational unit within the named Respondent was responsible for any existent bargaining obligation) that surfaced at the hearing. Collateral issues the Respondent, despite the quoted statement, raises in its brief, fall away for reasons to be noted.

The unfair labor practice complaint alleges that the Respondent raised the price of several food items offered to employees without first giving the Charging Party (the Union) notice and without providing the Union with the opportunity to negotiate over the substance or the impact and implementation of the change. This unilateral action is admitted, but the further allegation that it violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) is denied.

A hearing was held in Lexington, Kentucky, on February 28, 1991. Counsel for the General Counsel and for the Respondent filed post-hearing briefs. The facts are essentially undisputed.

## Findings of Fact

The pleadings treat the Respondent as a single entity (and see "joint stipulation three" at Tr. 13).1/ It has a collective-bargaining relationship with the Union, the agent for the exclusive representative of employees at the Respondent's Lexington, Kentucky, Leestown Road hospital (paragraphs 8 and 9 of Complaint, admitted in "Response": GC Exh. 1(c) and (d)). Approximately 300 bargaining unit employees work at the Leestown Road facility. This hospital has a cafeteria. Approximately eight bargaining unit employees work in the cafeteria or in retail food sales.

The cafeteria's hours of operation include the normal lunch break for the approximately 150 bargaining unit employees who work on the day shift. A number of employees patronize the cafeteria every working day. To facilitate employees' and visitors' use of the cafeteria, patients are discouraged from using it between 10:30 a.m. and 1:30 p.m.,

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1/ Evidence was presented concerning a landlord-tenant relationship between the Veterans Canteen Service (VCS) and each Veterans Administration Medical Center (VAMC) at which VCS operates. Both VCS and the VAMC's are organizational subdivisions of the Department of Veterans Affairs. See Veterans Administration Medical Center, Leavenworth, Kansas, 40 FLRA 592, 593 (1991). While remaining focused on the "single issue" described above and honoring the pleadings' treatment of the Respondent as a single entity, it will be necessary to take account of some aspects of VCS' operation that pertain to the Respondent's defense.

Monday through Friday (Tr. 18).2/ Use of off-facility food establishments requires a round trip time of 15 minutes by car, including purchase of carry-out food but excluding time to eat (Tr. 19). Most bargaining unit employees have 30 minutes for lunch (Tr. 16). A significant part of the cafeteria's sales is to employees, especially at lunchtime (Tr. 146-47).

VCS operates under a statutory mandate codified at 38 U.S.C. Chapter 75. It does not operate with appropriated funds and must, therefore, be self-supporting (Tr. 110). To accomplish this, VCS's internal guidelines provide that its cafeterias sell food at an average gross markup of at least 65%. That is, the "chief" of the canteen facility at each hospital is responsible for establishing a cafeteria price list which, in the overall mix of food items, provides a margin of at least 65% over the cost of all, but not necessarily each, of the items sold. This markup covers estimated labor, supplies, equipment, and other overhead costs. Margins for individual items may be set at more or less than the average, based on such considerations as competitive pricing in the local area and the desire to keep certain items, such as fresh fruit, available at attractive prices. Periodic price analyses require reevaluations of each item's price and adjustments to ensure that the overall margin is maintained.

Food service employees in the cafeteria get their lunches free. Other bargaining unit employees employed by VSC at the Leestown facility get lunches at half price. Hospital employees in the bargaining unit pay full price.

John Winski, then chief of the VCS operating at two VAMC facilities in Lexington, determined in early 1990 that the Leestown cafeteria was not maintaining the targeted markup percentage. On May 3, 1990, he raised the prices on 12 items by amounts ranging from 5¢ (seven items) to 35¢ (chef salad). Hamburgers and cheeseburgers were raised 25¢. As admitted, Winski raised these prices without consulting the Union.

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2/ Counsel for the General Counsel characterizes the evidence on this point as establishing that, at the relevant time, the cafeteria was closed to patients during those hours. That policy, apparently in effect at a later time, is not attributable to the earlier time by virtue of a stipulation that the cafeteria hours were the same.

## Discussion and Conclusions

Employee food services and related prices are working conditions. American Federation of Government Employees, AFL-CIO, Local 1622 and Department of the Army, Fort George G. Meade, 27 FLRA 11, 14 (1987) (Fort Meade case). Similarly, the Authority has stated that "[m]atters pertaining to the provision of food services to employees at their place of work concern the conditions of employment of these employees." National Association of Government Employees, Local R1-134 and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 38 FLRA 589, 594 (1990). Accord: Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979) ("[T]he availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain. * * * * The terms and conditions under which food is available on the job are plainly germane to the 'working environment'. . . .")

The Respondent argues, however, that the primary mission of VCS is to provide goods and services to hospitalized veterans (38 U.S.C. § 4201), and that the cafeteria service offered to employees is only incidental to the benefit to such patients. But the Authority rejected essentially the same argument in the Fort Meade case:

> We find that by granting employees access to the . . . dining facility, the Agency has changed the character of that facility from a military mess to a dining facility that meets employee needs as well. In other words, the Agency's action has created an employee cafeteria. Since food services and prices to be charged in an employee cafeteria are conditions of employment, we conclude that the price of food charged employees in the . . . dining facility is a working condition.

Id. at 14.

The Respondent contends that this case is unlike those in which food prices were held to be negotiable because the statute which created VCS gives the Secretary of Veterans Affairs the sole authority to "fix the prices of merchandise

and services in canteens so as to carry out the purposes of this chapter[.]" 38 U.S.C. § 4202(7). In the Respondent's view, this grant of authority negates any participation by the Union in establishing prices for bargaining unit employees. Again, however, such an argument has already suffered rejection. Thus, in National Federation of Federal Employees, Local 1153 and U.S. Army, Seventh Signal Command and Fort Ritchie, Fort Ritchie, Maryland, 26 FLRA 505, 509-10 (1987), the agency argued that a proposal concerning prices for employees at a military dining facility was nonnegotiable because the enabling statute required the Secretary of Defense to establish rates for meals, "at a level sufficient to provide reimbursement of operating expenses and food costs." The Authority noted that the specific prices were left to the discretion of the Secretary, who could price items variously to different groups, in different circumstances, as long as the rates, overall, cover food costs and operating expenses. The Authority concluded, therefore, that the prices for employees were not specifically provided for by Federal statute, nor was negotiation as to prices inconsistent with a Federal statute. The same conclusion applies here.

It should be understood here that, as in Fort Ritchie, the bargaining obligation goes only to prices for bargaining unit employees. As far as the Union is legitimately concerned, the Respondent may set prices for anyone else as it sees fit. See Fort Ritchie, supra, at 508. Cf. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 29 FLRA 380, 385 (1987) (fact that a subsidy for bargaining unit employees may result in an increase in prices for individuals outside the unit does not render an otherwise negotiable proposal nonnegotiable).

The Respondent does not specifically contend that negotiating over cafeteria prices would impinge on its authority to determine its budget, as reserved to it in section 7106(a)(1) of the Statute. Nevertheless, it does argue that VCS establishes its prices so that it "may operate financially as a whole." Assuming that VSC is required to be self-supporting, which is not obvious from the statutory provisions cited by the Respondent (5 U.S.C. §§ 4204 and 4205) but appears to be so from Winski's uncontradicted testimony, there is no basis for concluding that the requirement to negotiate would itself conflict with its ability to meet that requirement. Any proposal the Union makes, once negotiations begin, would then be subject to scrutiny to determine whether it was inconsistent with

section 7106(a)(1). See Office of Personnel Management, supra, at 384-85; Fort Stewart Schools v. FLRA, 110 S. Ct. 2043, 2049-50 (1990). Nor, assuming that I am to credit Winski's testimony that VCS is a "non-appropriated fund agency" (Tr. 110, but see 38 U.S.C. § 4204), does VSC escape from having to undergo the Authority's general budget test for exemption under section 7106(a)(1). See American Federation of Government Employees and U.S. Department of Defense, Army and Air Force Exchange Service, Dallas, Texas, 38 FLRA 282 (1990); American Federation of Government Employees, Local 1857 and U.S. Department of the Air Force, Air Logistics Center, Sacramento, California, 36 FLRA 894 (1990).

As noted above, the Respondent, despite its statement that the single issue presented here is whether the food pricing was a condition of employment, asserts other issues. First, it contends that even if the pricing was a condition of employment, no duty to bargain arose because the price changes had an insubstantial or de minimis impact on employees. This is irrelevant, however, where, as here, the issue is whether the decision to make the changes, not merely the impact and implementation of the changes, is negotiable. U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 19 FLRA 290, 292-93 (1985).

The Respondent's second additional, and final, argument, is that VCS has a "compelling need" to establish prices independently of collective bargaining. Use of these magic words at first blush raises warning signals that the case is not litigable in an unfair labor practice proceeding but must be heard as a negotiability appeal. See FLRA v. Aberdeen Proving Ground, 485 U.S. 409, 108 S. Ct. 1261 (1988). On closer examination, however, the Respondent has not raised the kind of "compelling need" argument that requires a negotiability appeal. For "compelling need" as contemplated in section 7117 of the Statute (providing for negotiability appeals) refers to the need for an existing agency rule or regulation. The Respondent does not claim that its need to establish prices independently of collective bargaining arises from an agency rule or regulation, but that such a need is implicit in the statutory authorization for VCS operations. Having found, above, that negotiations over food prices would not be inconsistent with a Federal statute, I must reject the Respondent's "compelling need" argument.

I conclude, ultimately, that the Respondent had a duty to afford the Union notice and an opportunity to bargain about changes in the cafeteria prices before implementing them, and that by failing to do so it violated sections 7116(a)(1) and (5) of the Statute. I recommend that the Authority issue the following remedial order.3/

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 the Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in working conditions by raising the prices charged to bargaining unit employees for food served by the Leestown Road cafeteria without providing notice to the National Association of government Employees, Local R5-184, the exclusive representative of certain of its employees, and affording it the opportunity to bargain concerning the change.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise

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3/ There has been no showing to justify withholding the normal status quo ante remedy, requested here by the General Counsel, for cases of unlawful refusal to bargain over decisions to change conditions of employment. U.S. Immigration and Naturalization Service, 16 FLRA 1007, 1008 (1984). The parties' treatment of the named Respondent as a single entity, however, makes me hesitate to act on the General Counsel's request that the notice be signed by the local canteen chief and by the Medical Center's director. Instead, I shall treat the canteen chief as though he were (although he apparently is not) a subordinate official in the managerial hierarchy at the Medical Center and shall, in accordance with Authority practice, provide in the recommended order that the highest local official, in this case the director, sign it. See U.S. Department of the Navy, Navy Ships Parts and Control Center, 37 FLRA 722, 724 (1990). The recommended order as a whole is adapted from the order the Authority fashioned in Department of the Air Force, Scott Air Force Base, Illinois, 31 FLRA 1013 (1988), to remedy a violation similar to the one found here.

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) Notify the National Association of Government Employees, Local R5-184, the exclusive representative of certain of its employees, in advance of any intended changes in the working conditions of bargaining unit employees concerning the raising of food prices for bargaining unit employees at its employee cafeterias and, upon request, negotiate with the exclusive representative concerning such proposed changes.

(b) Rescind the price increases initiated on May 3, 1990, and collected thereafter from bargaining unit employees at the Leestown Road cafeteria.

(c) Post at its Leestown Road cafeteria 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 Director of the Medical Center 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, 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, June 13, 1991

JESSE ETELSON
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 unilaterally institute changes in working conditions by raising the prices charged to bargaining unit employees for food served by the Leestown Road cafeteria without providing notice to the National Association of Government Employees, Local R5-184, the exclusive representative of certain of our employees, and affording it the opportunity to bargain over 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 notify the National Association of Government Employees, Local R5-184, the exclusive representative of certain of our employees, in advance of any intended changes in the working conditions of bargaining unit employees concerning the raising of food prices charged to bargaining unit employees at our employee cafeterias and, upon request, negotiate with the exclusive representative concerning such proposed changes.

WE WILL rescind the price increases initiated on May 3, 1990 and collected thereafter for meals to bargaining unit employees at the Leestown Road cafeteria.

_____
(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, Atlanta Region, whose address is: 1371 Peachtree Street, NE, Atlanta, Georgia, and whose telephone number is: (404) 347-2324.