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

DEPARTMENT OF THE NAVY PORTSMOUTH NAVAL SHIPYARD PORTSMOUTH, NEW HAMPSHIRE Respondent	
and	Case No. 1-CA-90448
FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO Charging Party	

Joseph Mason, Esquire
Counsel for the Respondent

Carol Waller Pope, Esquire
Richard D. Zaiger, Esquire
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The issue in this unfair labor practice case is whether Respondent violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) on or about September 8, 1989 by refusing to execute a written document embodying the agreed terms of a Memorandum of Understanding which provided for a training and promotion package for printers/helpers and to take the steps necessary to implement that agreement.

For the reasons set forth below, I find that a preponderance of the evidence does not establish that Respondent committed the unfair labor practices as alleged.

A hearing was held in Portsmouth, New Hampshire. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce

relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Federal Employees Metal Trades Council (Council or Union) is the exclusive representative of an appropriate unit of employees of the Respondent (the Shipyard). Local 1915 of the International Brotherhood of Painters and Allied Trades of the United States and Canada, an affiliated local of the Union, represents unit employees working as painters, sandblasters, and equipment cleaners at the Shipyard. (Tr. 11; General Counsel's Ex. 2, p. 161-162).

Sometime in January, 1989, John O'Brien, business manager for Local 1915, met with Captain Bowman, Shipyard commander, and Gary Alamed from the Production Office. During that meeting the parties discussed the problem the Shipyard was having recruiting WG-7 sandblasters. In an effort to alleviate this problem, Captain Bowman and Mr. Alamed informed O'Brien of their intention to develop a new training and promotion program that would provide training to WG-5 painter/helpers to become painter/ sandblasters. After completion of the training, the employees would be promoted to the WG-7 level. (Tr. 12-13).

On January 30, 1989 the Union submitted a formal request to Code 160, Respondent's Industrial Relations Office, pursuant to Article 6, Section 5 of the parties' collective bargaining agreement, to negotiate "the training program that is being established in the Shop 71 area for Painter/ Blaster." (Respondent's Exhibit A-1).

Thereafter, the parties met to begin negotiations. O'Brien served as chief spokesman on behalf of the Union as designated by Union president Arnie Paul. Charles H. Cummings, Jr., employee relations specialist, Employee Relations Division, was assigned by Code 160 to conduct the negotiations on behalf of management. Cummings attended the initial bargaining session, but thereafter Philip Houston, assistant superintendent, represented Respondent at the next several negotiation sessions. (Tr. 14-15; 36-40; 75).

At an early negotiation session the Union was given management's proposed training package. Upon review of the training program the Union raised various issues regarding the length of training and supervisory review procedures during the training process. (Tr. 15, 17, 43). Larry J. Kilbourn, Local vice president and chief steward, was designated by O'Brien to negotiate with Houston on the specifics of the training program. (Tr. 16, 18).

Separate negotiation sessions were held thereafter on the particulars of the training program between Kilbourn and Houston. (Tr. 16, 18). Kilbourn submitted several proposals to Houston regarding safety matters and the training evaluation process. The Union's proposals regarding the training program were adopted and incorporated into the final training document. There is no dispute that the final training document accurately reflects the terms orally agreed to during negotiations. (General Counsel's Ex. 3, Enc. 1; Tr. 29-30).

Additional negotiation sessions were conducted for the purpose of drafting a Memorandum of Understanding (MOU) to address impact and implementation issues of the new training/promotion program. During these negotiation sessions, O'Brien and Houston discussed the consequences employees could anticipate upon successful or unsuccessful completion of the training program, as well as the consequences of an interruption in training through no fault of the employee. O'Brien acknowledged management's right to separate an employee during the training if he did not perform satisfactorily. (Tr. 16, 17). At no time during the negotiation sessions with Houston was O'Brien told that the items under discussion were nonnegotiable. (Tr. 76).

At their third negotiation session O'Brien and Houston reached an oral agreement on the terms of the MOU. The oral agreement provided that all painter/helpers hired after February 1, 1989 would be entered into the previously agreed upon training program. The oral agreement also provided that upon satisfactory completion of the training program an employee would be promoted, and if an employee did not receive the training through no fault of his own, but otherwise had sufficient hours in grade, the employee would be promoted and thereafter receive expedited training. At this meeting, which was also attended by Kilbourn and Arnold Paul, Union president, the parties shook hands on the oral agreement and Houston said he would "take it back to the shipyard, get it . . . put in typewritten form and everything, and that, we'd sign off then." (Tr. 17-18, 30-31, 76).

Robert E. Campbell, Director of Respondent's Labor and Employee Relations Division, and Frank M. Harris, labor relations specialist, testified without contradiction that the practice at the Shipyard is that no agreement is binding until it is reviewed and signed off by the parties. Harris testified that due to the varying interests of the Council, composed of some 17 locals, the review of agreements must be by the Council president or one of the two other officers that he designates, to make sure that they are not in conflict with the Council's interest. President Arnold Paul has submitted to Respondent the names of three officers who are authorized to sign for the Council (Respondent's Ex. 3).[1/] Similarly, any agreement must be reviewed by the Code 160 (Labor and Employee Relations Division), which represents the commander, to make sure it is not in conflict with the master agreement and is in accordance with law. Due to this review by both parties, the practice is that there is no binding agreement until it is signed by the designated officials. The General Counsel did not present any evidence to refute this testimony as to the existing practice, and I so find.

Following the oral agreement by Houston and O'Brien, Houston advised Charles Cummings of the Labor and Employee Relations Division of its contents. (Tr. 59). A meeting was held between Cummings, Harris, and Campbell. It was decided that the agreement was contrary to Article 25.6 of the parties agreement, and Respondent could not agree to it on that basis. (Tr. 47-49).

In July 1989, O'Brien was called to a meeting to sign a MOU. (Tr. 19, 43). He was presented with a MOU and attached training program, which had been drafted by Respondent, for review and signature. (General Counsel's Ex. 3; Tr. 20, 40-41). The MOU indicated that James W. Wakefield would sign for the employer and Arnold Paul for the Council. The Union had no objection to the training program which was attached to the MOU, but the MOU only provided that employees, after satisfactory completion of the program, "will be eligible for noncompetitive promotion" instead of providing that they would be promoted. After

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1/ Despite the fact that President Paul has only designated himself, the First Vice President, and the Recording Secretary as authorized to sign for the Council, the record reflects that Mr. O'Brien has also signed agreements for Mr. Paul. (General Counsel's Ex. 6).

review of the document O'Brien informed the management officials in attendance that the MOU did not embody the terms agreed to by the parties during negotiations because it did not include language for promotions after satisfactory completion of training and had no provisions for those unable to complete the training. None of the management officials in attendance at the meeting, including Houston, disputed O'Brien's position that the MOU presented for signature did not accurately reflect the terms of the earlier agreement, but they insisted that there could be no guaranteed promotions. (Tr. 21, 43, 45). Noting O'Brien's objections to the MOU as prepared, the management official indicated that they would try to work something out and get back to him. (Tr. 22).

Sometime thereafter, O'Brien was asked to attend a second meeting to sign the MOU. At this meeting the Union was presented with a revised MOU and training program for signature. In response to O'Brien's objections to the first MOU, Respondent had added language providing for promotions for employees successfully completing the training as the parties' earlier agreement had provided. O'Brien informed management that with only one additional amendment, the language in the second MOU would accurately reflect the rest of the terms of their earlier agreement. At that time, the MOU provision at issue provided as follows:

> 3. If an employee is delayed in completing his/her formal training program due to the employer's workload needs, then as long as the employee possesses the necessary qualification and experience requirements of the WG-4102-7 level, the employer <u>can</u> non-competitively promote to WG-4102-7. Training will be completed by the employee after non-competitive promotion. (Emphasis supplied) (General Counsel's Ex. 4)

O'Brien explained that if the word "can" was replaced with "will" or "shall", he would agree to sign to as an accurate reflection of the terms of the agreement. During this meeting Houston did not deny that he had agreed to the word "will" during their negotiations. Nevertheless, Respondent's position during this meeting was that they would agree to promote the employees in accordance with the oral agreement, but they would not guarantee it in writing. (Tr. 23-24, 61).

Subsequent to the presentation of the two proposed MOUs by management, Frank M. Harris, labor relations specialist, met with Mr. O'Brien in September 1989 and told him that it was managements' intent to promote, but it could not be guaranteed in writing as management felt it was contrary to law. Harris said the parties would have to agree to some other language. O'Brien, in response, presented an unfair labor practice charge relative to the matter which he had previously prepared. (Tr. 49, 62).

Although a written document has not been executed, the terms of the agreement, including the training program, have been implemented to the date of the hearing. In this regard, employees who have satisfactorily completed the training program have been promoted, and others who have not received the training through no fault of their own have also been promoted. (Tr. 25).

Article 25.6 of the parties' collective bargaining agreement provides:

> Employees who are selected for formal training programs from a competitive list of eligibles will not be held back from promotion or from being placed on a list of eligibles for the higher rating because the Employer did not provide the required training and the employee was available for the training.

Mr. O'Brien acknowledged that Article 25 "seems to cover" the same subject matter the parties were attempting to address in paragraph 3 of management's proposal (Tr. 26-27).

Positions of the Parties

The General Counsel contends that Respondent violated section 7116(a)(1), (5), and (8) by refusing to execute a written agreement embodying the terms of the oral agreement as required by section 7114(b)(5) of the Statute. The General Counsel maintains that the parties, by their fully authorized representatives, reached agreement, and that the provision was negotiable as an appropriate arrangement for employees adversely affected by the exercise of a reserved management right.

Respondent defends on the basis (1) that Mr. Houston lacked authority to bind the Agency or to repudiate Article 25.6 of the parties' collective bargaining agreement; (2)

that the Agency had no duty to bargain over a matter already covered by Article 25.6 of the collective bargaining agreement; (3) that the Union proposal would excessively interfere with the Agency exercise of section 7106 rights; (4) that Mr. O'Brien did not bargain in good faith by presenting an unfair labor practice charge at the last session; and (5) any violation is de minimus.

Discussion, Conclusions, and Recommendations

Section 7114(b)(5) provides that the duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) shall include the obligation--

> (5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

It has not been established by a preponderance of the evidence[2/] that a final agreement was reached at the bargaining table by John O'Brien, representing the Council, and Philip Houston, representing the Shipyard. The uncontradicted evidence reflects the existence of a practice at the Shipyard whereby no agreement is final or binding until it is reviewed and signed off by the parties. In Respondents' case, this meant review by the Labor and Employee Relations Division and signature by James V. Wakefield. In view of this practice, O'Brien knew, or should have known, that the oral agreement reached with Houston at the third negotiation session was a tentative agreement. Since a final agreement was not reached, it was not an unfair labor practice for the Respondent to fail or refuse to execute a written document embodying its terms and to take steps to implement such agreement. Internal Revenue Service and Internal Revenue Service, Brooklyn District, 23 FLRA 63 (1986).

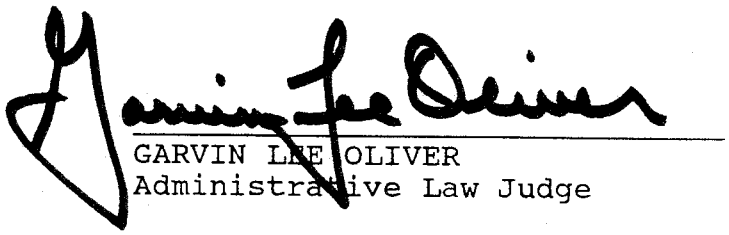
In view of this determination, it is unnecessary to reach the other issues posed by the parties.

2/ Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

Order

The complaint is DISMISSED.



GARVIN LEE OLIVER
Administrative Law Judge

Dated: August 1, 1990
Washington, D.C.