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

U.S. DEPARTMENT OF LABOR Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO Charging Party	Case No. 3-CA-00464

Christopher Feldenzer, Esq. and
Peter A. Sutton, Esq.
For the General Counsel

David L. Pena, Esq.
For the Respondent

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 April 16, 1990 the American Federation of Government Employees, Local 12, AFL-CIO, (herein called the Union), filed an unfair labor practice charge against the U.S. Department of Labor, (herein called Respondent). Pursuant to the aforementioned charge, the Regional Director of the Washington Region of the Authority, issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1), (5) and (8) of the Statute by unilaterally changing conditions of employment for bargaining unit employees concerning the "Parking Garage Operations."

A hearing was held before the undersigned in Washington, DC. 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:

Findings of Fact

1. The Union is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining. The bargaining unit consists of all of Respondent's employees in the Washington metropolitan area who are not excluded by the Statute. There are approximately 4,000 employees in the bargaining unit.

2. At all times material herein, William J. McLaughlin was Respondent's Director of the Office of Administrative Programs. Isaac W. Cole occupied the position of Director, Division of Employee Relations Collective Bargaining, at all times material herein.

3. Respondent is the principal occupant of the Frances Perkins Building at 200 Constitution Avenue, NW, Washington, DC (herein called the Perkins Building). The Perkins Building has three underground parking garages (north, south and east) which encompass three parking levels and contains approximately 1,000 parking spaces. Respondent received a delegation of authority from the General Services Administration (GSA) to operate these parking facilities. Respondent contracted with Facilities Management Corporation, a private concern, to provide the necessary attendant and guard services for these facilities.

4. About 805 of the total of 1,029 parking spaces located at the Perkins Building are for Respondent's employees. Of these, around 630 parking spaces are for general employee use which includes car pools and van pools. It is estimated that about half of the people in car pools (1,000-1,500 employees) are bargaining unit employees. Respondent presented a specially prepared document purporting to show that a random 10 percent sampling of the 3,110 car pool members provided that approximately 34.4 percent were bargaining unit employees. Given these figures, it appears

that at somewhere around 1,000 bargaining unit employees were affected by the changes.

5. On April 9, 1990, Respondent through McLaughlin, issued a memorandum to all affected employees, the subject of which was "Parking Garage Operations." The purpose of this memorandum was to announce a change in parking fees effective May 1, 1990, as well as to indicate that the hours of operation of the parking facilities would be changed. Specifically, the purchase price of the monthly parking permits was increased from $10.30 to $16.65. In addition, the hours of operation for the three garages were extended both at the beginning and end of the day. McLaughlin testified that when the April 9 memorandum was sent out, the decision to increase the parking fees had already been made. Finally, Respondent also instituted a change in the purchase procedures for parking permits in that it allowed certain employees to purchase their permits on a quarterly basis rather than on a monthly basis as had been done in the past. All of these changes were effective on May 1, 1990.

6. The day after the above-mentioned memorandum issued, April 10, 1990 Director of Division of Employee Relations and Collective Bargaining Cole, notified Union President Michael Urquhart in writing of the changes in parking garage operations at the Perkins Building. Attached to Cole's letter was the memorandum to employees announcing the changes which had issued on the previous day. Urquhart testified that the Union was informed as early as November 1989, that Respondent wanted to raise fees for parking permits. According to Urquhart, during the November 1989 mid-term bargaining session, while the parties were discussing another aspect of parking, the Union was informed that Respondent "wanted to raise the fees for parking permits." The Union was told that the raise in fees was "going to happen in the near future." When the Union objected it was notified that "they considered that subject non-negotiable and they were not going to negotiate the fees with us." While the issue of the parking fees did surface during this mid-term session Respondent's Director for Employee and Labor Management Relations, Jerry Lelchook recalls that the Union was concerned about not only the permit fees, but other aspects of the garage, as well. Lelchook, while denying making any specific statement regarding the negotiability of the fees, does admit that Respondent did not see the fees as negotiable and that "conceptually we didn't see what there was to negotiate about parking fees." Thus, the Union took a position that it had already asked to "negotiate over it and they refused

to negotiate." In any event, the Union did not seek bargaining when it received the April 10, 1990 memorandum, but instead filed the instant unfair labor practice charge. Finally, Respondent never indicated any willingness to negotiate the parking arrangement changes prior to the May 1, 1990 effective date. Having been informed by Lelchook that parking fees were not negotiable as a general proposition, the Union could well have viewed a request to negotiate at an established mid-term bargaining session or at any other time as a futile action.

Conclusions

A. THE PARKING ARRANGEMENTS IN THIS CASE ARE A CONDITION OF EMPLOYMENT PLACING AN OBLIGATION ON RESPONDENT TO BARGAIN OVER THE SUBSTANCE OF THE CHANGE AS WELL AS ITS IMPACT AND IMPLEMENTATION.

In American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 33 FLRA 335, 338 (1988) the Authority found that in determining whether a bargaining proposal concerns a condition of employment it will look to see whether the proposal vitally affects the working conditions of employees in the bargaining unit. It also stated that where the proposal at issue vitally affects the working conditions of unit employees and is consistent with applicable laws and regulations, that proposal is within the duty to bargain.

The fundamental issue here is whether parking is a "condition of employment" within the meaning of section 7103(a)(14) of the Statute. Respondent's arguments in this case are all connected to its feeling that the parking involved here is not a condition of employment, but instead is an employee commuting expense which it is prohibited by law from paying. Parking arrangements and parking costs are absolutely of vital concern to federal employees as they travel to and from work on a daily basis. No doubt decisions are made as to whether or not to accept, or to continue in certain employment, based on parking accommodations. Recognizing the importance of parking as a working condition, the Authority has consistently held that parking arrangements are conditions of employment of bargaining unit employees. U.S. Department of the Air Force, Williams Air Force Base, Chandler, Arizona, 38 FLRA 549 (1990); U.S. Customs Service, Washington, D.C., 29 FLRA 307 (1987); Philadelphia Naval Base, Philadelphia Naval Station and Philadelphia Naval Shipyard, 37 FLRA 79 (1990). Respondent's argument notwith-

standing, the instant matter involves parking arrangements and not just parking fees. Some of the arrangements had been in place, in one form or another, since the Perkins Building first opened in the 1970's. Although the change in parking fees received primary focus, other changes concerning parking garage operations were implemented by the April 9 announcement, including a change in the procedure for purchasing parking permits and changes in the hours of operation of the parking garage. These parking arrangements carry a bargaining obligation which it is found Respondent failed to meet.

Any argument that the increase in cost for parking fee permits or the other changes in garage operations announced by Respondent has a de minimis impact on bargaining unit working conditions is irrelevant since the matter is substantively negotiable. See Williams Air Force Base, supra; United States Department of Health and Human Services, Region II, New York, New York, 26 FLRA 814, 826 (1987); U.S. Army Reserve Components Personnel and Administrator Center, St. Louis, Missouri, 19 FLRA 290, 293 (1985). Having found that the parking arrangements are a condition of employment carrying with it a duty to bargain, then it must be determined what Respondent's bargaining obligation is in this case. Early on, the Authority held that where an agency exercises discretion regarding a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 759-760 (1980). The instant record reveals that Respondent increased the purchase price of parking permits in order to cover the operating costs of increased hours of operation as well as providing funding for the guard service in the parking garages. The record, however, is short of any evidence that Respondent was precluded from negotiating with the Union over the substance and impact and implementation of its decision to implement the subject changes in parking arrangements. It is therefore, found that Respondent had an obligation to negotiate over the condition of employment herein, i.e., parking, which was within its discretion.

B. RESPONDENT VIOLATED SECTION 7116(a)(1) AND (5) OF THE STATUTE BY UNILATERALLY IMPLEMENTING CHANGES IN PARKING ARRANGEMENTS AT THE FRANCES PERKINS BUILDING PARKING FACILITIES ON MAY 1, 1990.

Department of the Air Force, Scott Air Force Base, 5 FLRA 9, 11 (1981), teaches that an obligation to negotiate

in good faith would be rendered meaningless if a party were able to unilaterally change established conditions of employment during the term of an existing collective bargaining agreement without first affording the exclusive representative notice of proposed changes and an opportunity to negotiate.

Respondent maintains that it informed the Union of the changes in parking arrangements 21 days prior to its implementation and that the Union did not request to negotiate over the matter. The foregoing argument is rejected since there does not appear to be a waiver of any right by the Union. Furthermore, seeking to bargain after the announcement of the parking changes had already been made would have been pointless. It is not contested that on April 9, 1990, Respondent, before notifying the Union, informed employees who parked in the Perkins Building that effective May 1, 1990 the purchase price of monthly parking permits would be $16.80, that the permits could be purchased quarterly and that the hours of operation of the parking garages would be extended. Respondent sees the notice given the Union on April 10, a day after it made the announcement of parking changes to its employees, as giving the Union 21 days to negotiate. This position ignores the fact that the change had already been announced, leaving one to ponder what was left for the Union to bargain about. It is difficult to agree with Respondent that it gave the Union a 21-day opportunity to bargain and change its mind concerning the parking permit costs or any other aspect of the announced change. Giving notice of intended changes to employees before informing their bargaining representative of the change, in my view tends to vitiate rather than enhance the statutory scheme. Such notice to the Union after employees have already been presented with the change seems pointless. An after-the-fact notice does not meet statutory requirements to notify and give an opportunity to negotiate before implementing a change. Thus, it is found that the April 9 announcement of parking payment changes presented the Union with a fait accompli. Notice, to be timely and effective, should be given to the exclusive representative sufficiently in advance of implementation in order to permit the bargaining process to the completed prior to actual implementation. 22 Combat Support Group (SAC), March Air Force Base, California, 25 FLRA 289 (1987). Informing unit employees of a change which has already been decided upon and later telling the Union of the change hardly constitutes proper notice as required by the Statute.

Additionally, Respondent contends that notice was given six months prior to the change. This notice, it turns out, was allegedly given at the November 1989 mid-term bargaining session by Lelchook, who also told the Union, at the same time, that parking was nonnegotiable. This argument must be rejected since it is clear that the Union had no actual notice of the change in parking operations until April 10, 1990 or after the changes had already been announced to bargaining unit employees. To require an exclusive representative to request negotiations after it had been informed by a responsible agency official that the matter was nonnegotiable would again appear futile or pointless. U.S. Department of Interior, Bureau of Reclamation, 20 FLRA 587 (1985) See also, U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, 38 FLRA 887 (1990). Indeed the record shows that Lelchook informed the Union that "they were going to raise the fee." Clearly an increase in parking fees was "going to happen." However, the conversation concerning what was going to happen sometime in the future was neither sufficient nor adequate to meet the statutory obligation to give notice. See, Internal Revenue Service, 10 FLRA 326 (1982); Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA 575 (1982). Absent the sufficiency, clarity and adequacy presently imposed by law, it cannot be found in this case that the Union received, either through the mention of fee increases during the 1989 mid-term bargaining session or the April 10, 1990 memorandum, adequate advance notice to allow it to engage in meaningful bargaining over the change in parking operations. It is undisputed here that Respondent's April 9 memorandum implementing the changes in parking operations preceded any specific or sufficient notification of those changes to the Union, thereby effectively preventing negotiations prior to its announcement.

The waiver argument as presented by Respondent also is misplaced. Respondent asserts that a waiver existed because the Union never made parking fees an agenda item on any mid-term bargaining session before or after the Union was notified of a proposed change in the fees. The evidence Respondent wants to use as proof of a waiver does not establish a clear and unmistakable waiver either expressly or by bargaining history. See U.S. Department of Labor, Washington, D.C., 38 FLRA 1374 (1991); 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). Thus, it is not clear from Respondent's presentation that the Union was ever informed prior to the change in

fees, if and when or how much the fees were to be increased. Furthermore, the question of frequency of collection of the parking fees was never, it appears, negotiated. Accordingly, it is found that the unilateral implementation of the changes at the Perkins Building parking garages without giving sufficient notice to the Union violated section 7116(a)(1) and (5) of the Statute.1/

C. WHETHER RESPONDENT IS PROHIBITED BY LAW FROM REIMBURSING ITS EMPLOYEES' COST WITH REGARD TO PARKING SINCE IT SEES THE SUBJECT OF PARKING FEES AS OUTSIDE ITS DUTY TO BARGAIN.

Respondent asserts that it had no duty to bargain in the matter because agencies are prohibited by law from paying the commuting expenses, including parking costs, of its employees. Family Support Administration, Department of Health and Human Services, 30 FLRA 677 (1987). The Family Support case is inapposite. What we have in this case is the exclusive representative seeking lower priced parking for bargaining unit employees, instead of the parking fee unilaterally implemented by Respondent. Simply put, we do not have, as Respondent suggests, an attempt to have bargaining unit employees reimbursed for commuting costs. In United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Houston District, 25 FLRA 843 (1987) the Authority recognized such a distinction in finding it appropriate for an exclusive representative to seek free or low cost parking. Since what is involved in this case is an attempt to lower costs for already existing parking, which has been over the years a working condition for bargaining unit employees, Respondent's argument that the parking fees in this case are commuting costs and outside its duty to bargain is rejected.

Based on the foregoing it is found that Respondent violated section 7116(a)(1) and (5) of the statute by failing and refusing to bargain with the Union concerning increases in the costs of monthly parking permits, changes

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1/ The General Counsel speculated that Respondent might raise arguments concerning parking price changes in the past without bargaining, as a waiver or that a management right to determine its budget was involved. Since Respondent raised neither of these arguments, it is unnecessary to address them.

in the hours of operation of the parking facilities and changes in the procedures for purchasing parking permits.2/

D. A STATUS QUO ANTE REMEDY, INCLUDING MAKE WHOLE RELIEF, IS APPROPRIATE.

The General Counsel contends that this is merely a case where an agency made a unilateral change in a negotiable condition of employment, and that a return to the status quo is, absent special circumstances, required. Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA 278, 281 (1986); Williams Air Force Base, supra; Philadelphia Naval Shipyard, supra. The undersigned agrees. The change in the case was negotiable as to substance and impact and implementation. Further, Respondent presented no evidence of any special circumstances warranting the withholding of status quo ante relief. Respondent argued instead that the increased parking fees are not back pay, but are fees paid to a contractor over whom the Authority has no jurisdiction and, therefore the Authority does not have restitutionary power to order their repayment. In my opinion, Respondent should have negotiated, at least to the extent it was able, prior to announcing and implementing any changes regarding parking arrangements here. See for example, U.S. Environmental Protection Agency, Washington, D.C., 38 FLRA 1328 (1991). In this regard, Respondent does not deny its bargaining obligation with the Union and, where as here, it has an obligation to bargain over changes in conditions of employment the Authority may fashion the remedy which it feels will effectuate the purposes and policies of the Statute. The Authority has made it certain that a "make whole" remedy is appropriate in a refusal to bargain situation where the agency's action relates to an elimination or reduction in pay, allowances or differentials. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 37 FLRA 278, 290 (1990); Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas, 32 FLRA 521, 527 (1988). Since employees were required to pay $6.35 more in monthly parking fees, this increased cost of the parking represents a pay reduction here. Consequently, to remedy the violation in this case Respondent should be ordered in addition to posting an appropriate notice throughout the bargaining

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2/ The General Counsel's uncontested Motion to Correct Transcript is granted and attached hereto as Appendix "B".

unit, signed by the Secretary of Labor, to rescind the changes and to make whole the unit employees who where affected by the parking rate increase (i.e., the difference between the old rate and the new rate). Moreover, as noted earlier, Respondent did not assert or seek to establish any special circumstances to show that a status quo ante remedy would not be warranted in this case. See Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 35 FLRA 153, 155-56 (1990). Accordingly, it is recommended that the Authority adopt the following:

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 U.S. Department of Labor, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of unit employees by implementing a parking policy, without first giving notice and affording an opportunity to negotiate over the substance and impact and implementation of the change to the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of its employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the parking policy announced on April 9, 1990.

(b) Notify the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of its employees, of any intended changes in conditions of employment, including changes in parking policies, and afford it the opportunity to negotiate over the changes.

(c) Make whole any employees for pay of parking fees in excess of $10.30.

(d) Post at its facilities throughout the Department of Labor 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 Secretary of Labor 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1111 - 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 24, 1991.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

APPENDIX "A"

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 change working conditions of unit employees by implementing a parking policy, without first giving notice and affording an opportunity to negotiate over the substance and impact and implementation of the change to the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of our employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the parking policy announced on April 9, 1990.

WE WILL notify the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of our employees, of any intended changes in conditions of employment, including changes in parking policies, and afford it the opportunity to negotiate over the changes.

WE WILL make whole any employees for pay of parking fees in excess of $10.30.

_____
(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, Washington Region, whose address is: 1111 - 18th Street, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.

APPENDIX "B"

Pursuant to section 2423.19(r) of the Regulations, the official transcript in this proceeding is corrected as follows:

PAGE	LINE	FROM	TO
64	9	Gary Lelchook	Jerry Lelchook
64	16	Gary Lelchook	Jerry Lelchook
76	8	would be duty	would be no duty