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

DEPARTMENT OF VETERANS AFFAIRS. VETERANS ADMINISTRATION MEDICAL CENTER, DECATUR, GEORGIA Respondent	
and	Case No. 4-CA-10764
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2778 Charging Party	

Karol S. Armwood, Esq.
For the Respondent

Richard S. Jones, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on September 23, 1991 by the Regional Director for the Atlanta Regional Office of the Federal Labor Relations Authority, a hearing was held before the undersigned on November 20, 1991 at Atlanta, Georgia.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on an amended charge filed by the American Federation of Government Employees, Local 2778 (herein called the Union) on September 19, 1991 against Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia (herein called the Respondent).

The Complaint alleged, in substance, that on June 17, 1991 (a) Respondent implemented new parking procedures which change required employees to pay to park in its new parking deck - all at a time prior to completion of negotiations with the Union over the substance, or impact and implementation of the change, in violation of section 7116(a)(1) and (5) of the Statute; (b) Respondent implemented the said change, and failed to maintain the status quo, at a time when the dispute between the parties was pending before the Federal Service Impasses Panel, in violation of section 7116(a)(1) and (6) of the Statute.

Respondent's Answer, dated October 18, 1991, denied the aforesaid allegations of the Complaint as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times herein the American Federation of Government Employees (AFGE) has been and still is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining, including the unit employees of Respondent.

2. At all times material herein the Union has been, and still is, the agent of AFGE and the representative of the unit employees of Respondent.

3. In a memo dated October 9, 1990 C. Wayne Hawkins, Acting Associate Chief, Medical Director for Operations of the Department of Veterans Affairs wrote Respondent's Director concerning parking fees. Hawkins mentioned that Public Law 99-576, Section 223, amending Section 5009 of Title 38 U.S.C., requires the VA to establish parking fees for all garage and parking facilities at those medical facilities which met specified criteria. Further, that Respondent must develop a policy to implement parking fees upon activation/availability for use of the parking structure under construction. The Medical Center Director was also notified that the local union must be given an

opportunity to bargain on the impact and fee collection procedures prior to implementation.

4. Circular 00-90-31, dated November 1, 1990, was issued entitled "PARKING FEES AT VA MEDICAL FACILITIES." It set forth the policies and procedures for assessing and collecting parking fees, which must be established for a garage costing above $500,000. It covered such items as "COLLECTION OF PARKING FEES", "EXEMPTIONS", ASSIGNING SPACES AND CONTROL", and "APPEAL OF RATES."

5. Under date of May 6, 1991 Respondent's Personnel Officer, Regis Massimino, wrote the Union concerning the paid parking system which it planned to put into effect. The Union was notified therein that if it wished to negotiate, it should submit counterproposals by May 20, 1991. The "Interim Paid Parking Plan," which was submitted by Respondent, set forth the procedures to be followed and the fees to be charged for parking.

6. In response to the notification the Union submitted six proposals: (a) free parking to continue; (b) the Union take part in a survey to determine appropriate rates; (c) survey employees re the mode and hardship of travel; (d) no reserved parking except for handicapped persons; (e) bargain the substance of Interim Parking, and (f) official parking space for Union officials.1/

7. The parties met on May 30, 1991 to discuss the new parking policy. Massimino testified the parties negotiated on all issues except the fee for parking - that everything else was bargained for, more or less, in some fashion. Both Union representatives, who attended the discussions, agree that no bargaining took place on the parking fee proposal. They do not agree that full negotiations occurred on the other proposals. Shelby LeGarde, president of the Union who attended the discussions, testified there were no official negotiations. Massimino informed the Union officials that management intended to implement the new parking plan on June 17, 1991. Further, that negotiations were over since the issue of fees was nonnegotiable.

8. On May 31, 1991 Guy M. Jordan, AFGE representative, wrote the Federal Service Impasses Panel (FSIP) and filed a

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1/ Respondent concedes that proposals (d), (e) and (f) are negotiable and to consider (c) after a Union survey. The other proposals it designated as nonnegotiable.

request for assistance on behalf of the Union. FSIP was notified therein that during informal discussions between the parties on May 30 it appeared that an agreement may not be reached by June 17, the date when Respondent intended to implement the parking fee plan. Jordan also stated the request was filed to halt the Respondent from unilaterally implementing the parking guidelines.

9. On May 31 the Union sent seven new proposals in respect to the Interim Parking Plan. These dealt with (a) the applicability of the Plan to only unit employees, (b) the rate to be charged employees, (c) the designated areas for parking and entitlement thereto, (d) handicapped spaces, (e) duration of the proposals (f) provision for resolving disputes of the "agreement" through appropriate procedures. (Joint Exhibit 2).

10. Record facts show the parties were in agreement only as to proposal (a) of the May 31 proposals sent to Respondent by the Union.

11. There were two more meetings between the parties. Record facts show one was held on June 5, and the other prior thereto.2/

12. The Parking Plan was put into effect on June 17. The Union wrote Massimino on June 18 and requested that Respondent cease and desist its implementation to prevent an unfair labor practice.

13. Management representative Massimino testified that it was not possible to postpone the implementation of the new parking plan beyond June 17; that Respondent was given a million dollars to keep going while the garage was being constructed, and the funding ended June 30. Thus, it was necessary to collect fees for parking in order to sustain the new construction. Employees had been bussed back and forth, but management could not continue to do so.

2/ Neither General Counsel nor Respondent introduced evidence concerning the details of their negotiations. The record is barren of any facts in that regard save for generalized conclusions that the parties did or did not negotiate. While Respondent's brief indicates that certain of the Union's proposals were deemed "negotiable" and others labeled "nonnegotiable", no detailed evidence was adduced with respect to the negotiations on the bargaining sessions.

14. Record facts show that the Respondent's parking facility cost a million dollars; that the garage which was built to accommodate parking - for which fees were to be charged for parking - was completed on June 1, 1991.

Conclusions

It is contended by the General Counsel that the decision to require employees to pay for parking in its newly constructed garage is negotiable. Hence, the unilateral change from free parking and the refusal to bargain over that decision is deemed a violation of section 7116(a)(1) and (5) of the Statute.

Under 38 U.S.C. § 8109 it is provided that employees of the Veterans Administration, and other individuals or visitors using the medical facilities, shall be charged parking fees for use thereof.3/ It is further provided under subsection (3) that "the Secretary shall collect (or provide for the collection of) parking fees charged under this subsection."

Two other provisions are included under 38 U.S.C. § 8109 which have applicability herein:

(1) Under subsection (d)(1) it is stated that -

> "For each medical facility where funds from the revolving fund described in subsection (h) of this section are expended for -
>
> > "(A) a garage constructed or acquired by the Department at a cost exceeding $500,000. . .
>
> "the Secretary shall prescribe a schedule of parking fees to be charged at all parking facilities used in connection with such medical facility."

(2) Under subsection (d)(2) it is stated that -

> "The parking fee schedule prescribed for a medical facility referred to in paragraph (1)

3/ Certain exceptions, not applicable herein, are specified under subsection (c)(2) of Section 8109.

of this subsection shall be designed to establish fees which the Secretary determines are reasonable under the circumstances."

That statute makes it clear that when the Secretary constructs or alters a parking garage costing over $500,000 he shall prescribe and collect fees for parking therein. This is a mandatory requirement applicable to Respondent's employees. Moreover, under the Federal Service Labor-Management Relations Statute, section 7117(a)(1), the duty to bargain does not extend to any matter or condition inconsistent with law. The garage constructed by Respondent, which was far in excess of $500,000, fit the statutory terms which mandated that fees be charged for parking thereat. The Respondent maintains, and I agree, that it was required by law to charge employees for parking at the new garage. Accordingly, the decision to institute paid parking was not subject to negotiation. Thus, I conclude that Respondent did not violate the Statute by refusing to bargaining in that respect; that proposals requiring free parking do not have to be negotiated by Respondent.

It is not denied by Respondent that it also refused to bargain re the rates to be charged employees for parking at the garage. Management insists it has no discretion to bargain over the rates; that this is also mandated by law, and the VA Regulation requires that rates are to be one-half of the appraised fair rental value.

General Counsel argues that the amount of fees to be charged for parking is negotiable. Reference is made to 38 U.S.C. § 8109(d)(2) which recites that the fee schedule should be designed to establish fees which the Secretary determines are reasonable under the circumstances. Thus, it is argued, the Union should be entitled to bargain as to what are reasonable fees to be charged employees.

Note is taken of the agency regulation pertaining to VA Medical Facilities, as published in the Federal Register, Vol. 53, No. 130 (July 7, 1988) - Rules and Regulations. This regulation provides for Parking Fees at VA Medical Facilities. Provision is made for fees in 38 C.F.R. § 1.303(b)(1). This section provides that:

> . . . All parking fees shall be set at a rate which shall be equivalent to one-half of the appropriate fair rental value (i.e., monthly, weekly, daily, hourly) for the use of equivalent commercial space in the vicinity of the medical facility . . . Fair

> rental value shall include an allowance for the costs of management of the parking facilities. The Secretary will determine the fair market rental value through use of generally accepted appraisal techniques. . . .

The Federal Service Labor-Management Relations Statute, under section 7117(a)(2), deals with the duty to bargain when an agency rule or regulation governs a particular subject matter. It provides, in substance, that the duty to bargain shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters, that are the subject of any agency rule or regulation only if the Authority has determined no compelling need exists for the rule or regulation.

In the instant case the agency regulation sets forth a formula for fixing the parking fees of garages costing, as here, in excess of $500,000. As recited herein, they are based on one-half of the fair rental value of equivalent commercial space in the same vicinity as a medical facility. Under section 7117(a)(2) the agency is required to negotiate as to this matter - which is the subject of the Agency's regulation only if the Authority has determined the existence of a compelling need for it. No such determination has been made with respect thereto. Thus, I conclude that the said VA regulation is controlling; that it has prescribed the method of fixing or calculating the fees for parking at the garage; and that Respondent Medical Center had no option or duty to bargain in regard thereto. Accordingly, I conclude its refusal to negotiate as to the rates or amounts to be charged for parking was not violative of the Statute.4/ See Boston District Recruiting Command, Boston, Massachusetts; Commander, Fort Devens, Fort Devens, Massachusetts, et al., 15 FLRA 720, 725.

4/ The mechanism for determining the amount of fees to be collected was set forth in the regulation. The regulation did not leave the amount of fees open to "implementation" negotiations. Headquarters, Defense Logistics Agency, Washington, D.C., et al., 22 FLRA 875, 885. See and compare Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, KY, 44 FLRA 162, involving the grant of statutory discretion to the Secretary to establish prices in the cafeteria. The Authority held such discretion alone did not prohibit Respondent from negotiating that discretion. Such is not true in the case at hand.

Respondent agrees that it was obliged to negotiate with the Union concerning the impact and implementation of the Parking Plan for its new facilities. However, it insists that it fulfilled this duty during its discussions with the Union in May and June 1991.

The record herein sheds very little light on the negotiations which took place between the parties. No details were adduced by either General Counsel or Respondent as to the discussion re the Plan or the proposals made by the Union. While Respondent declared that certain areas or proposals were negotiable, it does not appear that bargaining occurred with respect thereto. Respondent's sole witness testified that everything other than the fees to be charged was more or less bargained before in some fashion. The fact that Respondent deemed certain proposals by the Union to be negotiable does not warrant the conclusion that these matters were negotiated. Contrariwise, both Jordan and LeGarde testified negotiations or agreement did not occur. Moreover, there were matters or conditions in connection with the Plan which were bargainable as to impact and implementation. These included such subjects as parking areas, reserved parking, method of collection of fees, and special considerations for employees who are handicapped or otherwise affected by the Plan.

On the basis of the foregoing, I conclude that Respondent, while not obliged to bargain as to the decision to initiate paid parking for employees, was under a duty to bargain as to the remainder of the Interim Parking Plan concerning its impact and implementation; that Respondent did not bargain thereon with the Union and therefore violated section 7116(a)(1) and (5) of the Statute.

General Counsel also maintains that Respondent failed to maintain the status quo while the dispute was pending before FSIP and thus violated section 7116(a)(1) and (6) of the Statute.

Once parties reach an impasse in their negotiations and a party has invoked the services of the Panel, the status quo must be maintained to the maximum extent possible. This is required so that the Panel may take appropriate action. Department of the Air Force, Scott Air Force Base, Illinois, 42 FLRA 266. Failure to maintain the status quo in these circumstances violates section 7116(a)(1) and (6) of the Statute.

In the instant case, however, different circumstances prevailed in regard to the dispute between the parties.

Firstly, the Union wrote FSIP at the outset of its discussions with Respondent. In fact, Union official Jordan testified the Panel was notified because the Union felt there might be a problem re certain of its proposals. At the time it invoked the Panel's services or assistance there was no impasse, nor had the parties exhausted negotiations. Moreover, as heretofore concluded, they never did complete bargaining on the impact and implementation of the Parking Plan. There is no evidence that the parties negotiated to the point of impasse since there are no details regarding the discussions.

Accordingly, I am persuaded that when the new Parking Plan was implemented on June 17 the parties were not at impasse in negotiations; that therefore Respondent's implementation because the Union invoked the services of the Panel did not violate section 7116(a)(1) and (6) of the Statute.

In sum, I conclude that (a) Respondent did not violate the Statute by failing and refusing to negotiate the decision to institute paid parking, as well as the fees to be charged, at its facilities in Decatur, Georgia; (b) Respondent did not violate section 7116(a)(1) and (6) by virtue of its implementing the Parking Plan at a time when the Union had invoked the services of the Federal Service Impasses Panel; (c) Respondent did violate section 7116(a)(1) and (5) by implementing the Parking Plan on June 17, 1991 without completing negotiations on the impact and implementation of said Plan.

Remedy

General Counsel seeks a remedy of status quo ante, directing the Respondent to rescind its "Interim Parking Plan" and a make whole remedy refunding all monies paid by unit employees since June 17, 1991.

The Authority has held that where an agency fails to bargain re impact and implementation, such a remedy may be ordered under certain circumstances. Federal Correctional Institution, 8 FLRA 604, 605-06 (1982). The cited case to its five factors to be taken into consideration:

> (a) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (b) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action

or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (c) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the statute; (d) the nature and extent of the impact experienced by adversely affected employees; and (e) whether, and to what degree a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

In determining whether this type remedy should be granted, the Authority has evinced an intention to balance the nature and circumstances of a particular violation against the degree of disruption if the remedy were granted. At the outset I cannot conclude that Respondent's failure to discharge its bargaining obligation reflected willfulness on its part. The record is lacking in specific details re the meetings and discussions as to the Parking Plan. While Respondent adhered to its position that the implementation was required by regulations, it is not clear that such implementation was a willful disregard of its obligation. Moreover, a return to the former practice of not charging a fee would fly in the face of the mandate set by the law and regulation which required Respondent to institute and calculate fee parking. A status quo ante remedy would disturb the requirements set by law as to the establishment of such fees when the constitution of parking facilities, as here, exceeds $500,000. Under these circumstances I conclude a status quo ante remedy is not appropriate and would be unwarranted.

Based on the foregoing findings and conclusions, I recommend 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 the Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation of Government Employees, Local 2778, the exclusive representative of a unit of its employees, concerning the impact and implementation of its Paid Parking Plan which it instituted on June 17, 1991 at its Decatur, Georgia parking facilities.

(b) 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) Bargain with the American Federation of Government Employees, Local 2778, the exclusive representative of a unit of its employees, concerning the impact and implementation of its Paid Parking Plan which it instituted on June 17, 1991 at its Decatur, Georgia parking facilities.

(b) Post at its facilities at Decatur, Georgia, 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, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30367, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 16, 1992

WILLIAM NAIMARK
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 refuse to bargain with the American Federation of Government Employees, Local 2778, the exclusive representative of a unit of our employees, concerning the impact and implementation of our Paid Parking Plan which was instituted on June 17, 1991 at the Decatur, Georgia parking facilities.

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 bargain with the American Federation of Government Employees, Local 2778, the exclusive representative of a unit of our employees, concerning the impact and implementation of our Paid Parking Plan which was instituted on June 17, 1991 at the Decatur, Georgia parking facilities.

_____

(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 Regional Office, whose address is: 1371 Peachtree St., NE, Suite 122, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.