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

SOCIAL SECURITY ADMINISTRATION. OFFICE OF HEARINGS AND APPEALS. ARLINGTON, VIRGINIA Respondent	
and	Case No. WA-CA-20378
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 215, AFL-CIO Charging Party/ Union	

Laurence M. Evans, Esquire
For the General Counsel

Marybeth Pepper
For the Respondent

James E. Marshall
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on February 20, 1992, by the American Federation of Government Employees, Council 215, AFL-CIO, (hereinafter called the Union) a Complaint and

Notice of Hearing was issued by the Regional Director for the Washington Regional Office, Federal Labor Relations Authority, Washington, D.C., on May 27, 1992. The Complaint alleges that the Social Security Administration, (hereinafter called the Respondent or SSA), violated Sections 7116(a)(1), (5) and (6) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute) by virtue of its actions in unilaterally implementing a change in a condition of employment while the matter was pending resolution pursuant to an order from the Federal Service Impasses Panel (FSIP).

A hearing was held in the captioned matter on July 23, 1992, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent filed post-hearing briefs on September 18, 1992, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (hereinafter called the AFGE), is the exclusive representative of a nationwide consolidated unit of Respondent's employees appropriate for collective bargaining. The Union is an agent of AFGE for purposes of representing unit employees working at Respondent's Office of Hearings and Appeals.

In the summer of 1991, the Respondent served notice on the Union that new factors and weights were being implemented for four positions within the Office of Hearings and Appeals. The four positions were: (1) Legal Clerk/Technician, (2) Inventory Management Specialist, (3) Civil Actions Clerk/Technician, and (4) Computer Analyst/Specialist.

Subsequently the Union and the Respondent held separate bargaining sessions on all four sets of factors and weights. The parties were assisted in their negotiations by the Federal Mediation and Conciliation Service (FMCS). Following a declaration by the FMCS that the parties were at

impasse, the Union filed four separate requests for assistance with the Federal Service Impasses Panel (FSIP).

On November 4, 1991, pursuant to the parties agreement, the FSIP referred the parties' dispute to a mediator-arbitrator (med-arb). In the letter from FSIP wherein the parties were directed to med-arb, Ms. Linda Lafferty, Executive Director of FSIP, made it clear that the mediator-arbitrator could "decline to consider any proposal about which either party contends it has no obligation to bargain."

On December 5, 1991, the parties requested FMCS to provide an Arbitration Panel. On December 18, 1991, FMCS submitted to the parties a list of 11 arbitrators to select from. The Union after reviewing the list determined that none of the arbitrators, for various reasons, were acceptable. Thereafter on January 10, 1992, the Union notified Respondent of its position and on the same date wrote to Ms. Lafferty and requested her assistance in obtaining a new list of arbitrators. In the letter to Ms. Lafferty the Union noted, among other things, that while the letter from FMCS forwarding the original list of arbitrators was dated December 18, 1991, the Union did not receive the list until January 6, 1992.

On January 30, 1992, while the parties were awaiting a new list of arbitrators, Respondent sent a letter to the Union wherein for the first time it took the position that the Union's bargaining proposals were nonnegotiable since they conflicted with the national agreement between the Social Security Administration and the AFGE. Respondent also took the position that the Union's proposal dealing with the blanket disclosure of crediting plans was "inconsistent with FPM Supplement 335-1." The letter went on to state that "since there are no negotiable issues separating the parties, we are implementing the use of the factors and weights without delay."

On February 10, 1992, Respondent posted the vacant positions using the factors and weights that had been the subject of bargaining.

According to Mr. Guy B. Arthur, then Chief, Labor Management and Employee Relations Branch, Office of Hearings and Appeals, and Mr. Richard Hamilton, a Supervisor in the same office, prior to posting the vacant positions they spoke separately with Mr. Joseph Schimansky and

Mr. Harry Jones, FSIP staff members, who informed them in respective conversations that the FSIP no longer had jurisdiction over the issues concerning factors and weights.

When asked to describe his conversation with Mr. Schimansky of the FSIP, Mr. Hamilton testified that the conversation occurred just prior to the issuance of the January 30th letter wherein Respondent declared the Union proposals to be non-negotiable. At that time he asked Mr. Schimansky if it was necessary to send a copy of the letter to the Panel. Mr. Schimansky after stating "that as far as the Panel was concerned the case was closed", proceeded to point out Section 2471 of the CFR wherein FSIP was given various "techniques" to resolve impasses, including the referral of the parties to arbitration. He then told Mr. Hamilton that since FSIP "had invoked that section -- and it was referred to in the FSIP letter -- that was the conclusive act of the FSIP." Mr. Schimansky further stated that while FSIP had other methods to solve impasses, "that referral to arbitration under Section 2471" concluded the Panel's action.

Both Mr. Hamilton and Mr. Arthur acknowledged that they never received any written correspondence from FSIP declining jurisdiction.

Discussion and Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1), (5) and (6) when it unilaterally posted the vacancy announcement for the four positions in dispute. According to the General Counsel, Respondent's action amounts to a failure to cooperate in impasse procedures of which med-arb is a part. The General Counsel would discredit the testimony of Mr. Hamilton and Mr. Arthur to the extent that they claim that they had been informed by FSIP staff members that FSIP no longer had jurisdiction over the impasse. Finally, the General Counsel takes the position that the record is insufficient to support a finding that the posting of the four vacancies without completing impasse procedures was necessary in order to protect the functioning of the Office of Hearings and Appeals.

Respondent, who has abandoned its "exigency"*/ defense in its post-hearing brief, takes the position that it was free to implement its proposals since the Impasses Panel no longer had jurisdiction. Alternatively, Respondent takes the position that inasmuch as it has declared the Union's proposals to be non-negotiable and there was no showing by the General Counsel to the contrary the Complaint must be dismissed. In support of this latter position Respondent relies upon the Authority's decision U.S. Department of Defense, Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia, 37 FLRA 895 (DLA), wherein the Authority dismissed a complaint based upon the failure to follow an arbitrator's award on the ground that the provision which was the subject of the arbitrator's award was outside "the duty to bargain because it is inconsistent with a Government Wide rule or regulation, FPM Supplement 335-1. . . ."

Contrary to the contention of Respondent, I can not find on the basis of the instant record that the FSIP staff representatives did, in fact, inform Respondent's representatives that the FSIP no longer retained jurisdiction over the dispute. Rather, I find that the FSIP staff representatives merely told the Respondent's representatives that since FSIP had utilized one of the techniques available to it, namely med-arb, that the Panel had completed its actions on the matter. Moreover, and in any event, I find that whether or not the statements were made, that med-arb, among other things, is a part of the impasses procedure. Support for this conclusion is found in the FSIP Rules and Regulations.

Section 2471.11 of the Federal Service Impasses Panel's Rules and Regulations, 5 CFR, Subchapter D, Part 2470, entitled "Final Action by the Panel" provides that when the parties do not arrive at a settlement of their dispute the Panel may take whatever action is necessary to resolve the impasse, including but not limited to, ordering binding arbitration conducted according to whatever procedure the Panel deems suitable and rendering a binding decision.

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*/ To the extent that this is not the case, I find that the record is insufficient to support a finding that posting of the four vacancies prior to proceeding to med-arb, was necessary in order to protect the functioning of the Office of Hearings and Appeals.

Section 2471l.11(d) states that "Notice of any final action of the Panel shall be promptly served upon the parties and the action shall be binding on such parties during the term of the agreement, unless they agree otherwise." The November 4, 1991 letter from Ms. Linda Lafferty ordering med-arb was the final action of the Panel. In view of the aforementioned Regulations, it is obvious that Respondent was bound and obligated to complete the med-arb ordered by the Panel.

To the extent that Respondent relies upon DLA, supra as justification for its action, I find such reliance to be misplaced. DLA merely stands for the proposition that when a failure to comply with an arbitrator's decision, which is a product of a Panel referral to a Panel member, is based upon a contention that the arbitrator's decision is contrary to the Statute or other applicable law or regulation, the Authority, prior to finding an unfair labor practice based on such non-compliance, must first determine whether the provisions contained in the arbitrator's decision are in fact negotiable. If the provisions are found to be non-negotiable then the Complaint must be dismissed. See, U.S. Dept. of the Treasury, IRS, Austin and Houston Districts, 23 FLRA 774, 777-778.

In the instant case we have the Respondent defending its actions in implementing the impassed vacancies on alternate grounds, i.e., statements from Panel staff members that the Panel no longer retained jurisdiction and/or the alleged non-negotiability of the Union's four proposals. Having found above that med-arb is a tool of the Impasses Panel and a part of its procedures, the sole issue remaining for consideration is whether a belated claim of non-negotiability excuses an agency from pending med-arb and allows it to implement the impassed items.

The mere claim or allegation that a union proposal is non-negotiable does not automatically remove an impassed matter from the jurisdiction of the Impasses Panel. To the extent that the Authority might have entertained similar proposal in the past, the Panel is free to retain jurisdiction and apply Authority precedent. Commander, Carswell Air Force Base, Texas, and AFGE, Local 1364, 31 FLRA 620, 624. Additionally, allegations that the Union's proposals are in conflict with the parties national agreement, are also properly before the Panel in deciding whether to retain jurisdiction. See, Dept of the

Treasury, IRS, Nat'l Computer Ctr., Martinsburg, W. Va. & Chapter 82, Nat'l Treasury Employees Union, Case No. 87 FSIP 168, (June 29, 1988) (Addendum B)

While the Authority is recognized as the sole arbiter of non-negotiability claims based upon alleged conflicts with the provisions of the Statute or other applicable laws or regulations, it does not enjoy such distinction with respect to non-negotiability claims based upon contract interpretations. In fact it is well established that disputes based upon contract interpretation are best resolved through the parties grievance procedures, which of course have arbitration as the final step.

In the instant case Respondent has refused to proceed to med-arb and unilaterally implemented its proposals on the ground that three of the Union's proposals conflict with the provisions of the National Agreement between the parties. Since it is obvious that resolution of Respondent's contention with respect to the Union's proposals involves a contract interpretation, I find that the matter would best be resolved by submission to an arbitrator and that Respondent's failure to follow the Panel's med-arb order amounted to a failure to cooperate in impasse procedures.

It appears that Respondent has misinterpreted the law and concluded that all allegations of non-negotiability are to be decided in the first instance by the Authority. As noted above such is not the case.

In conclusion, I find that the Respondent was under an obligation to complete the med-arb ordered by the Impasses Panel and that its failure to do so, along with its unilateral implementation of the vacancies in dispute, constituted a violation of Sections 7116(a)(1), (5) and (6) of the Statute.

Based upon the foregoing findings and conclusions, it is hereby recommended that the Authority issue the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.9 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the Social

Security Administration, Office of Hearings and Appeals, Arlington, Virginia, shall:

1. Cease and desist from:

(a) Unilaterally assigning new factors and weights to four clerical positions without completing bargaining over such changes with the American Federation of Government Employees, Council 215, AFL-CIO, the exclusive representative of its employees.

(b) Failing and refusing to cooperate in impasse procedures by failing and refusing to participate in med-arb pursuant to an order from the Federal Service Impasses Panel.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights assured them 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) Participate in the mediation-arbitration ordered by the Federal Service Impasses Panel for purposes of determining the correct factors and weights to be assigned to several clerical vacancies and to resolve other issues at impasse.

(b) If it is determined by the arbitrator that different factors and weights than those used in the February 10, 1992 vacancy announcement are more appropriate for the vacancies, then repost the vacancies and evaluate the candidates who apply for the vacancies using the factors and weights found to be appropriate by the arbitrator.

(c) If it is determined that a candidate or candidates may have been excluded from consideration as a result of the factors and weights utilized in the original posting on February 10, 1992, select such candidate or candidates and make them whole, with interest, for any losses they might have incurred as result of the unlawful action.

(d) Post at it facilities wherever bargaining unit employees are located, 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 Chief Judge, 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 ensure 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, Washington, D.C. Regional Office, 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, December 24, 1992

Burton S. Sternburg by JFT

BURTON S. STERNBURG
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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally assign new factors and weights to four vacant clerical positions without completing bargaining over such changes with the American Federation of Government Employees, Council 215, AFL-CIO, the exclusive represent-active of our employees.

WE WILL NOT fail and refuse to cooperate in impasse procedures by failing and refusing to participate in mediation-arbitration pursuant to an order from the Federal Service Impasses Panel.

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

WE WILL participate in the mediation-arbitration ordered by the Federal Service Impasses Panel for purposes of determining the correct factors and weights to be assigned to several clerical vacancies and to resolve other matters at impasse.

WE WILL if it is determined by the arbitrator that different factors and weights other than those used in the February 10, 1992 vacancy announcement for clericals are more appropriate for such vacancies, repost the vacancy anouncements using factors and weights found to be appropriate by the arbitrator.

WE WILL if it is determined that a successful candidate or candidates may have been excluded from consideration for the vacancies as a result of the factors and weights utilized in

the original posting on February 10, 1992, not only select such candidate or candidates but make them whole, with interest, for any losses they might have incurred as a result of the unlawful action.

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