OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE
AND INSURANCE CENTER, PHILADELPHIA, PENNSYLVANIA
Respondent

and Case No. BP-CA-20767
AMERICAN FEDERATION OF

GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Janice Volkman, Esq.and David Adelman, Esq. on the brief For the Respondent
Verne R. Smith, Esq. For the General Counsel
Before: SALVATORE J. ARRIGO Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Boston Region, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by implementing a compressed work schedule without providing the Charging Party with an opportunity to bargain over the substance or impact and implementation of the change.

A hearing on the Complaint was conducted in Philadelphia, Pennsylvania, at which all parties were afforced full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.(1) Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various employees of the Department of Veterans Affairs. AFGE is represented by the National Veterans Administration Council of Veterans Administration Locals (the Council) when dealing with Respondent at the national level and by Local 940 (sometimes the Union) when dealing with the Respondent for matters which are limited in effect to the Philadelphia Regional

Office and Insurance Center.[2]

Respondent's Insurance Center manages the life insurance program for the Department of Veterans Affairs. In order to facilitate servicing insurance policy holder, the Insurance Center operates a toll free telephone number. Due to a decision in late 1991 or early 1992 to accelerate the receipt of 1992 veteran's insurance dividends, a substantial increase in the number of telephone calls by policy holders were placed.

Sometime in early 1992 the Insurance Center discovered that approximately 90 percent of the telephone callers on the toll free number were receiving a busy signal on the caller's first and second attempts to contact the Center.[3] This failure to complete the telephone call, or "blockage", generated numerous complaints including congressional inquiries. The Center attempted to remedy this unsatisfactory condition by first expanding the hours of operation of the telephone system to 6:30 p.m. from the prior 5:30 p.m. closing time, using existing employees and paying overtime premium, hiring some temporary employees, and rearranging the shifts of some employees. Funds available for overtime payments were dwindling and the Insurance Center concluded that a better approach would be to change the work schedules of those employees assigned to the Veterans Insurance Phone Section to ten hours a day, four days a week, which was permissible under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6120 et seq.[4] However the policy of the Veterans Benefits Administration of the Department of Veterans Affairs was to avoid any compressed workweek schedule. That policy had been successfully defended in 1985 before the Federal Service Impasses Panel in Case No. 84 FSIP 113. In that case, which involved the Council, the Panel ordered the Union to withdraw its proposal for a compressed workweek schedule, having concluded the Agency had shown that establishing a compressed workweek schedule in any division within the "Department of Veterans Benefits" would likely result in reduced productivity, diminished level of services, or increased costs of Agency operations.

Respondent sought permission to utilize a compressed workweek and in response to its request Respondent received written authorization to establish a compressed workweek from the office of the Chief Benefits Director by letter dated March 12, 1992, which read:

1. Your request for a temporary exception to VBA policy, not to exceed one year, to establish compressed work weeks in the Veterans Insurance Phone Section is approved.

2. Although the restriction at VBA Regional Offices from using compressed workweeks was a consensus decision of all test sites and was successfully defended by management before the Federal Service Impasses Panel, your attempt to deal with an unprecedented workload clearly justifies your request.

3. Please take the necessary steps to meet your local labor relations obligations on impact and implementation bargaining prior to effecting the change in working conditions.

On March 16, 1992, Joseph McCann, Respondent's Deputy Assistant Director for Insurance, provided Tyrone Perkins, AFGE Local 940 President, with the following letter:

1. On Monday, March 16, 1992, management of the Policyholders Services Division will discuss with employees of VIPS the possibility of using an alternative work schedule. This work schedule has been approved by the Chief Benefits Director and will allow VIPS to more efficiently staff the Insurance toll free number during our new hours of operation, 8:00 A.M. to 6:30 P.M. EST.

2. I will be available to discuss the alternate work schedule. Please feel free to contact me at ext. 5363.

On that same day Perkins wrote the following reply to McCann:

Thank you for your letter of March 16, 1992, concerning the possibility of using an alternate work schedule in the Veterans Insurance Phone Section (VIPS).

Please be advise by means of this communication that the Union demands bargaining on the significance (sic) change to the work schedule policy that is currently in place in the Veterans Insurance Phone Section.

Should you need to discuss this matter further with me, please do not hesitate to contact me in the Union office.

McCann replied to Perkins on March 16 stating:

1. I have received your letter of March 16, 1992, requesting to bargain over the alternative work schedule in VIPS.

2. I would like to meet with you at 2:00 P.M. March 17, 1992, in my office to discuss the alternative work schedule experiment.

On March 17, Perkins and AFGE Local 940 Chief Steward Joseph Malizia met with McCann. At this meeting, McCann gave Perkins a copy of the Chief Benefits Director's March 12 letter, above, and some other documentation illustrating how the proposed alternative work schedule (AWS) would work. The parties discussed several other matters pertaining to AWS, specifically the 1985 FSIP Decision and why Respondent needed to implement this kind of schedule in the Phone Service. McCann told Perkins that overtime funds would be exhausted by the end of March 1992, and that they had to do something to prevent customer complaints. Perkins told McCann that because of the nationwide VA policy against AWS, he had to contact the VA Council before negotiating further at the local level. McCann took the position that the bargaining obligation on the matter was at the local level and insisted they move forward with negotiations on the impact and implementation of the change.

In the evening of the March 17 meeting, Perkins telephoned Artie Pierce, the Council President. After discussion Pierce told Perkins that he should not negotiate locally with Respondent until Pierce contacted Veterans Affairs Central Office labor relations personnel.

Next ensued a series of electronic mail messages between Perkins and McCann:

Friday, March 20, Perkins to McCann:

I spoke with the National President of the VA Council concerning your proposal to establish compressed work weeks in VIPS. After discussing this matter with Mr. Pierce we feel that there are some national ramifications - relative to the decision by the Federal Service Impasses Panel on this subject. Mr. Pierce will communicate his concerns directly to Mr. Daniel Sobrio, Director of Labor-Management Relations in CO. I will wait until I receive instructions from Mr. Pierce before I offer any proposals on this subject matter.

Monday, March 23, McCann to Perkins:

We plan on implementing the Alternative Work Schedule experiment in VIPS on March 30, 1992. Prior to that date I will be available to discuss our implementation plan with you.

March 23, Perkins to McCann:

Be reminded that our request to negotiate is still on the table. Your unilateral implementation will be addressed in the appropriate forum.

March 23, McCann to Perkins:

As I informed you on March 17, 1992, I have been assigned to negotiate the implementation of the Alternative Work Schedule experiment with Local 940. I am available to meet with you to discuss any proposals you may have concerning our implementation plan.

Also on March 23, McCann sent Perkins a memorandum stating that his electronic mail message of March 20 was received and again stating that Respondent planned to implement AWS on March 30 and that he was available to meet with Perkins concerning implementation of the plan. On that same day Perkins sent McCann the following memorandum:

1. I received your reply to my Wang e-mail message and your letter dated March 23, 1992, concerning your intentions to implement the Alternate Work Schedule in VIPS on March 30, 1992.

2. There are two important concerns that I have regarding your actions in this matter. First is your decision to bypass the Union and engage in direct consultation and negotiations with employees on the implementation of the Compressed Work Weeks in VIPS. Second is your implied position of implementing this change in working condition prior to the conclusion of bargaining. Both of these acts are specifically prohibited by Title 5 of the Federal Service Labor-Management Statute. In the letter that you provided to me from the Chief Benefits Director, Mr. D'Wayne Gray, he stated "Please take the necessary steps to meet your local labor relations obligations on impact and implementation bargaining prior to effecting the change in working conditions."

3. Prior to discussing any implementation plans, the parties should negotiate ground rules to govern how formal negotiations will proceed. I am willing to meet with you to discuss mutually acceptable time and meeting dates for this purpose. Please contact me at your earliest convenience. . .

McCann immediately replied to Perkins, setting up a meeting for 3:00 p.m. that day "to discuss ground rules for formal negotiations."

At the March 23 meeting, attended by Perkins, Chief Steward Malizia, and McCann, Perkins advised McCann that several other local working conditions were then pending negotiations. Perkins testified he wanted McCann to be aware of these other pending issues to put the AWS negotiations "into context." Perkins also told McCann that the parties were negotiating each of the other topics on a "rotational basis", and had agreed to ground rules to govern these other negotiations. McCann responded that the he was not aware of the other, pending negotiations.(5) The parties discussed whether AWS would accomplish the desired result, i.e. eliminate the blockage, and how Respondent planned to supervise the employees on the extended hours. Discussion also went to Respondent's use of overtime to staff the extended hours. In this regard, Perkins asked why management could not continue using the overtime as it had done in the past and McCann replied that budgetary restrictions precluded the continued use of overtime. The meeting concluded with Perkins indicating he would contact Council President Pierce for further directions.(6)

On March 24, 1992 Local 940 President Perkins called Council President Pierce and during the conversation Pierce, among other things, instructed Perkins to notify Respondent of the Council's interest in the matter and postpone any local negotiations on AWS until the Council issued further instructions. Perkins then informed McCann of his discussion with the Council. Perkins made a memorandum of the substance of his conversation with Pierce and sent a copy of the memorandum to McCann. The memorandum stated:

> I spoke with Mr. Pierce today at 1:30p.m. concerning AWS in VIPS. He informed me that he was in contact with VACO regarding this issue. The Labor Relations office in VACO informed Mr. Pierce that they needed to talk with some additional VACO people on this matter. Mr. Pierce advised me to contact local management concerning the National VA Council's interest and to postpone any local activity on this matter until they issue further directions to Local 940.

McCann sent Perkins the following memorandum on March 26, 1992:

> 1. On March 23, 1992, I met with you and Joe Malizia to discuss ground rules for formal negotiations on the VIPS Alternative Work Schedule Experiment. During the meeting you informed me that it was necessary for you to contact the National President of the VA Council for guidance before we started negotiations. On March 24, 1992, you sent me a wang message informing me that you could not negotiate until you received further directions from your

National Office.

2. In our initial meeting of March 16, 1992, I informed you that we were using overtime funds to help staff the VIPS operation to 6:30pm EST and that these funds would soon be exhausted. In receiving approval from the Chief Benefits Director to experiment with an alternative work schedule, we would be able to adequately staff VIPS for the expanded hours of operation. The approval notice also requested that we take the necessary steps to meet our local labor relations obligations on impact and implementation bargaining prior to effecting the change in working conditions.

3. As previously noted, I attempted to negotiate with you on the local level the implementation of the Alternative Work Schedule Experiment. You have informed me that you will not negotiate. Our overtime funds will be exhausted as of Friday March 27, 1992. We have met with the VIPS employees and over 30 Insurance Specialists volunteered to participate in the Alternative Work Schedule Experiment.

4. On March 30, 1992, we will implement the Alternate Work Schedule Experiment in VIPS. If you wish to meet with me to negotiable please contact me.

On that same day Perkins sent Respondent the following electronic message:

Be advised via this communication, should management implement the Alternate Work Schedule as stated in Mr. McCann's letter of March 26, the National VA Council will file a national ULP on the unilateral implementation of the AWS experiment.

The AWS in the Phone Section was implemented on March 30, 1992 precisely as McCann had announced. The record reveals 40 employees volunteered to be put on the AWS, 32 were selected and at the time of the hearing, 26 were still working the AWS. The adverse impact on employees was more than de minimis in that employees had to make adjustments for day care of children, breaks in the normal work day, and annual leave since no more than 10 percent of the employees could be on leave on a given day. Indeed, several employees asked to be taken off AWS due to family considerations.

Local 940 President Perkins testified that as of March 16, 1992 when told of Respondent's AWS intentions, he concluded the matter had to be negotiated at the National Council level but Local 940 maintained authority to negotiate with Respondent over groundrules for negotiations.

Deputy Assistant Director for Insurance McCann testified that he was at all times willing to bargain with the Union on the impact and implementation of the AWS but did not consider the matter to be substantively negotiable. McCann also testified because of information he had regarding prior negotiations with the Union, he expected the Union would attempt to unduly prolong negotiations on AWS.

Additional Findings, Discussion and Conclusions

Counsel for the General Counsel alleges that Respondent implemented the AWS without fulfilling its Statutory obligation to bargain with the Council or Local 940 concerning the substance, impact and implementation of the change. Respondent essentially contends it fulfilled its Statutory bargaining obligation by providing the Local 940 with an opportunity to negotiate on the change but the Union failed to do so and that, in any event, Respondent implemented the change in the manner it did due to the "exigent circumstances" surrounding the need for AWA.(7)

It is well settled that before an agency implements a change in a condition of employment, the collective bargaining representative must be provided with adequate notice of the change and an opportunity to bargain over the change, to the extent consistent with the Statute. See National Weather Service Employees Organization and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, 37 FLRA 392, 395 (1990); U.S. Department of Defense, Department of the Air Force, Air Force Logistics Center, Tinker Air Force Base, Oklahoma, 25 FLRA 914, 939 (1987); and Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA 654, 666 (1984) (Customs Service). Whether the notice of a change given to a union is adequate depends upon the facts of each case. Id at 668-670. Assuming adequate notice of a change and an opportunity to bargain is given, a union, to preserve its Statutory right to bargain on the change, must make a timely request to bargain on the change. Internal Revenue Service (District, Region, National Office Unit), 14 FLRA 698 (1984).

In the case herein, the change in hours under AWS was local in nature and Local 940 was the proper collective bargaining representative to receive notice of the change. Such notice was received by Local 940 on March 16. Local 940 was the authorized representative to negotiate with Respondent over the local change and indeed made a demand to bargain on March 16 which culminated in a bargaining session with management on March 17 at which the Union received a detailed explanation of the change and managements reason for its implementation. Upon notification of the proposed change Local 940 sought assistance from the Council and deferred submitting any negotiating proposals because the Union and the Council concluded the matter had "national ramifications" while Respondent pressed on for local negotiations. Thereafter, Local 940, the authorized collective bargaining representative for the unit employees affected by the change, failed to submit any negotiating proposals although steadfastly maintaining to Respondent that it had an outstanding request to negotiate on the matter. Local 940's President Perkins was aware from March 17 of management's desire to expedite the change in work hours due to the gravity of the problem and overtime funds being exhausted by the end of the month.(8) Perkins received general notice of a imminent change on March 17 and specific notice of the March 30 implementation date by March 23, sufficient time to present proposals and negotiate on the matter. See Customs Service and U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, 16 FLRA 749 (1984). Respondent was dealing with the proper representative of its employees in this matter and Local 940's desire to have Council assistance in its negotiations, or its

willingness to have the Council supplant it in negotiations with Respondent, was not the concern of Respondent. If the Council was replacing Local 940 in dealing with Respondent it had the same obligations as Local 940, i.e. to present Respondent with bargaining proposals in a timely fashion. No such proposals were received by Respondent. Accordingly I conclude under all the circumstances of this case Respondent satisfied its bargaining obligations before implementing the Alternative Work Schedule in the Veterans Insurance Phone Service herein. See U.S. Immigration and Naturalization Service, 24 FLRA 786, 790 (1986).

Counsel for the General Counsel argues that the Union's conduct, and the indication that the VA Council and VA Central Office may have had some discussions concerning the AWS implementation at a time when Respondent and the Union were discussing it, gives rise to a "reasonable conclusion" that the Union was "in effect proposing to freeze the situation" pending negotiations at the "appropriate level" (the national level) and that proposing to maintain the status quo during negotiations on a proposed change is fully negotiable. That argument is rejected in that the "appropriate level" for negotiations herein was the local level and the record is clear that Respondent was pursing negotiations on that level.(9) Indeed, there is no evidence that the National Council sought to negotiate directly with Respondent on the matter. Rather it appears that the Union sought to stall negotiations at the local level in order to give the Council time to decide how to proceed on the matter.

I further reject Counsel for the General Counsel's suggestion that since the testimony revealed Respondent would not have bargained on any substantive proposal by the Union, if requested to do so, such a disposition "precluded good faith bargaining over the subject, and constitutes further evidence of Respondent's failure to conform to its bargaining obligations under the Statute." The Authority has held that a decision to institute or terminate compressed work schedules are fully negotiable. Defense Logistics at 608 citing National Treasury Employees Union and U.S. Department of the Treasury, Office of Chief Council, Internal Revenue Service, 39 FLRA 27, 34 (1991). True, Respondent informed the Union that it was prepared to negotiate on the impact and implementation of AWS and made no mention of substantive matters. But since the Union never made any specific proposals or pressed Respondent into conveying its predisposition not to negotiate on any substantive issue dealing with AWS, in my view Respondent's conduct does not constitute a violation of its obligation to bargain in good faith with the Union on its AWS proposal. While state of mind may be important to ascertain motivation and to otherwise color a party's actions, it alone does not rise to the level of a Statutory violation. Since Respondent was not pressed or challenged to specifically state its position by responding to the submission of proposals or otherwise, I find no violation of the Statute has been established regarding Respondent's unconveyed position on the negotiability of substantive proposals concerning AWS.

Accordingly, in view of the entire foregoing and the record herein I conclude Respondent's conduct did not violate section 7116(a)(1) and (5) of the Statute as alleged and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. BP-CA-20767 be, and hereby is, dismissed.

Issued, Washington, DC, August 30, 1993,

SALVATORE J. ARRIGO

Administrative Law Judge

1. Counsel for the General Counsel's unopposed Motion to Correct Transcript is hereby granted.

2. Article 2 of the parties' collective bargaining agreement contains the following definitions:

Section 1 - Union: The American Federation of Government Employees, as represented by the National Veterans Administration Council of Veterans Administration Locals at the national level or by a single local at the individual field facility level.

Section 2 - Employer: The Veterans Administration Central Office at the national level or local management at the individual field facility level.

3. Around this time the Center was answering close to 4000 telephone calls a day.

4. Phone Section employees' normal work hours were from

8:00 a.m. to 4:30 p.m. or 9:00 a.m. to 5:30 p.m.

5. Perkins testified that the Union and Respondent were engage in ongoing negotiations on performance standards, changes in the merit promotion process and a total quality management survey.

6. Perkins testified that at the meeting McCann indicated he would contact his Central Office concerning the FSIP decision. McCann denied any such statement. I credit McCann's denial in this regard.

7. Respondent also argue that it did not violate

section 7116(a)(1) of the Statute because only volunteers were employed on the AWS schedule. Such an argument is clearly without merit since if a violation of 7116(a)(5) is found to have occurred, a derivative violation of section 7116(a)(1) will also be found.

8. While the matter of time was of important due to the nature if the problem Respondent sought to overcome, I do not find that an "exigency" which would permit Respondent to act before fulfilling its bargaining obligations under the Statute was established on the facts of this case. Cf. Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA 599, 615-618 (1992)(Defense Logistics).

9. Clearly the parties recognized the local level as the appropriate level when notice of the change was given and accepted at the local level.