

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DAVIS-MONTHAN AIR FORCE BASE, TUCSON, ARIZONA

Respondent

and

Case No.
SA-CA-20492

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2924,
AFL-CIO

Charging Party

Major Phillip G. Tidmore, Esquire	Captain Jeffrey A. Rockwell, Esquire	For the Respondent
Stefanie Arthur, Esquire	For the General Counsel W. Patrick O'Connor	For the Charging Party
Before: BURTON S. STERNBURG	Administrative Law Judge	

DECISION

Statement of the 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 May 22, 1992, by American Federation of Government Employees, Local 2924, AFL-CIO, (hereinafter called the Union), against the Davis-Monthan Air Force Base, Tucson, Arizona, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on October 29, 1992, by the Acting Regional Director for the San Francisco, California Region, Federal Labor Relations Authority. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by implementing, without first giving the Union notice and an opportunity to bargain, a change in working conditions whereby the Union is now required to obtain Respondent's approval before posting Union materials in designated spaces on Respondent's base bulletin boards. It is also alleged that Respondent committed an independent Section 7116(a)(1) violation of the Statute when it removed Union-sponsored materials from official base bulletin boards which had been posted without prior approval of the Respondent.

A hearing was held in the captioned matter on December 9, 1992 in Tucson, Arizona. 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. Counsel for the Respondent and Counsel for the General Counsel filed post hearing briefs on January 29, and February 1, 1993, respectively, which have been fully 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 Union is the exclusive representative of three units of employees at Respondent's Davis-Monthan Air Force Base located in Tucson, Arizona. The employees represented by the Union work in the Aerospace Maintenance and Regeneration Center (AMARC) and the Air Combat Command.

At the time of the incident underlying the instant complaint, Mr. Frank Romero was Chief of Respondent's Labor and Employee Relations Section and Mr. Ronald Clawson was the Civilian Personnel Officer. Mr. Edward Margosian was, and had been, the President of Local 2924 since March of 1985.

The Union and the Respondent are parties to a collective bargaining agreement which became effective June 6, 1988 and covered the employees represented by the Union. Article 16 of the agreement,⁽¹⁾ entitled Facilities and Publicity, reads in pertinent part as follows:

Section 1. The Employer agrees to provide a designated reserved space for the use of the Union measuring a minimum of 18" wide by 14" high on the lower right hand corner of official bulletin boards in the units of recognition. . . . Where official bulletin boards are not located in the immediate work area or within the designated break area, then existing informational boards as available, may be used for the purpose of posting Union literature within the limitations of the above stated area. The Union will be responsible for keeping their designated space current and orderly.

Section 2. Posting and removal of Union literature shall only be done by a Union representative. Materials to be posted are subject to approval of the Employer in accordance with AFM 40-13.

AFM 40-13 reads in pertinent part as follows:

1-4 Labor Organization Entitlement:

* * *

f. Labor organization notices or bulletins may be posted or distributed in designated areas at Air Force activities. Literature posted or distributed within an activity must not violate any law, applicable provisions of a negotiated agreement, the security of an activity, or regulation of higher authority, or contain libelous material. Labor organizations are responsible for the contents and distribution of their literature. Violations of standards concerning content and distribution of literature are grounds for revocation of this privilege. When literature posted or distributed appears to be in violation of the standards the following action is taken:

(1) The commander obtains a decision from the Staff Judge Advocate.

(2) If the Staff Judge Advocate determines that the material does not meet the standards, the commander notifies the labor organization in writing that its privilege of distribution or posting of literature at the activity may be suspended or withdrawn for such period as he determines warranted by the circumstances.

(3) If after receipt of such warning the labor organization again posts or distributes material which violates the standards, the commander may suspend, withdraw or revoke its privilege.

In April 1992, Union President Margosian posted copies of the Union's April newsletter on several bulletin boards, including the bulletin board in the Civilian Personnel Office.⁽²⁾ The newsletter discussed, among other things, the negotiations involving Compressed Work Schedules and the progress made thereon, AFGE benefits, and a scheduled Union sponsored training session on the Performance Appraisal System.

On April 20, 1992 Mr. Clawson noticed the copy of the Union's newsletter which had been posted earlier by Mr. Margosian and removed it. He then went to see Mr. Romero and inquired whether the Union had been given prior approval for the posting. Inasmuch as he had not given prior approval for the posting, Mr. Romero, on April 22, 1992, sent a memorandum to Mr. Margosian which read as follows:

1. On 20 April 1992 an AFGE Local 2924 newsletter was found posted on the Civilian Personnel Office Official Bulletin Board. IAW Article 16, Facilities and Publicity, Section 2 of the Memorandum of Agreement between Davis-Monthan Air Force Base, Tucson, Arizona, and American Federation of Government Employees, AFL-CIO Local 2924, Davis-Monthan Air Force Base, "Materials to be posted are subject to approval of the Employer in accordance with AFM 40-13".

2. We have no record of having approved the attached union newsletter; therefore, the posting of this newsletter on official bulletin boards without our approval constitutes a contractual violation.

3. Request that the union remove all referenced newsletters posted basewide on official bulletin boards until submitted by the union to our office for review and approval; otherwise, we will be forced to file a grievance against the union. Any further postings are subject to our approval.

Since April 1992, Respondent has taken the position that the Union could not post any material on the base bulletin boards with prior approval. In support of this latter position, Respondent offered testimony through a number of witnesses that Union newsletters were customarily submitted to the labor relations office for approval prior to posting. However, all the instances of pre-posting approval, admittedly, occurred prior to 1985. They further testified that they were unaware of any Union postings since 1985. Mr. Clawson acknowledged that he did not customarily check the contents of any bulletin board other than the one located in the Civilian Personnel Office. Respondent's three other witnesses, who testified that they had not observed any Union postings since 1985, did not claim to have monitored all fifty of Respondent's bulletin boards since 1985.

According to the credited testimony of Mr. Margosian, prior to his becoming Union President in March of 1985, the parties had an argument over whether the Union had to submit its materials for approval prior to posting. The matter was finally resolved when the Union convinced Respondent that AFM 40-13 did not require prior approval. After his election in March of 1985 the Union posted newsletters and other information on a regular basis. According to Mr. Margosian the materials were posted approximately every two or three months, but not always on every bulletin board. Mr. Margosian further testified that he personally posted materials on the bulletin boards over the years and that management officials observed him doing so.

Mr. Tony Levy credibly testified that between 1988 and 1990 while he was serving as Chief Steward for the Union he regularly posted, without prior management approval copies of the Union's newsletter on base side bulletin boards. Since 1990, Mr. Levy estimates that he posted literature on the bulletin boards approximately three or four times a year. While in response to a question from Respondent's Counsel he acknowledged seeking prior approval, in answer to another question from Respondent's Counsel he denied that such approval was necessary prior to posting on the bulletin board.

Discussion and Conclusions

The General Counsel, relying particularly on the testimony of Mr. Margosian and Mr. Levy, takes the position that Respondent by requiring prior approval of Union postings on the bulletin boards changed an established past practice in violation of Sections 7116(a)(1) and (5) of the Statute. The General Counsel further contends that Respondent's removal of the Union's newsletter, on April 20, 1992, from the bulletin board located in the Civilian Personnel Office constituted a separate and independent violation of Section 7116(a) of the Statute.

The Respondent, on the other hand, takes the position that Respondent, predicated upon its interpretation of the past and current collective bargaining agreements, had always required that the Union obtain prior approval before posting anything on the Respondent's bulletin boards. Further, based upon the testimony of Mr. Clawson, Mr. Romero and Ms. Judge, Respondent contends that there had not been any postings by the

Union without such prior approval. Finally, Respondent contends that inasmuch as it appears that the instant dispute involves a matter of contract interpretation it should be referred to an arbitrator for decision.

According to the testimony of all Respondent's witnesses, Respondent's approval was always required prior to the posting of any union literature on Respondent's bulletin boards. In this connection, Union President Margosian acknowledges that prior to his election as President in 1985 there were some occasions when the Union was required to seek prior approval before posting. Similar testimony was elicited from Mr. Warren Kossman, who is currently employed as a Labor Relations Officer. Thus, Mr. Kossman testified that he served as Union Steward, Union Chief Steward and Union President during the period 1976-1982 and one of his duties during such period required him to take the Union's newsletters to the Civilian Personnel Office for prior approval before posting them on Respondent's bulletin boards.

According to the credited testimony of Mr. Margosian, subsequent to his election as Union President in 1985 the Union stopped the practice of seeking Respondent's approval prior to posting its newsletters on Respondent's bulletin boards. Such postings occurred approximately every two or three months. Admittedly the postings were not on all the approximately 50 official bulletin boards located throughout the base. Finally, Mr. Margosian testified that a number of management representatives observed him posting Union material on the bulletin boards.⁽³⁾

In contrast to Mr. Margosian's testimony, we have Union Chief Steward Levy's testimony that he sought prior approval before posting even though he was of the opinion that such approval was not necessary.

Analyzing the record as a whole, I can not find that the General Counsel has carried the burden of establishing that since 1985 there existed a practice of posting Union literature on Respondent's bulletin boards without prior approval of management.

In order to establish a condition of employment by way of a past practice, it must be shown that the practice was consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent. Norfolk Naval Shipyard, 25 FLRA 278, 286; U.S. Department of the Treasury, Internal Revenue Service, Louisville District, 42 FLRA 137, 142. Here we have evidence that there was occasional posting on some of the Respondent's approximately 50 bulletin boards without prior consent. Where and under what circumstances the notices were posted does not appear. We also have evidence that other postings occurred only after seeking prior approval. Finally, we have no probative evidence establishing agency knowledge and express or implied consent for the Union posting which occurred without prior approval.

Upon the basis of the above considerations I find that there is insufficient evidence to establish a past practice of posting the Union's newsletters or other literature on Respondent's official bulletin boards without prior approval. In such circumstances, Respondent did not change a condition of employment when, on April 20, 1992, it removed the Union's newsletter from the bulletin board located in the Civilian Personnel Office and thereafter informed the Union that posting of Union literature on official bulletin boards was subject to prior approval of management.⁽⁴⁾

Having found that the Respondent did not unilaterally change a condition of employment without first notifying the Union and according it the opportunity to bargain thereon, it is hereby recommended that the

Authority adopt the following Order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint in Case No. SA-CA-20492 should be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, August 2, 1993

BURTON S. STERNBURG

Administrative Law Judge

Dated: August 2, 1993

Washington, DC

1. Identical language appeared in the previous agreement which became effective on September 15, 1980. According to the uncontroverted testimony of Mr. Margosian, during negotiations for the current contract the language dealing with the Union's use of Respondent's bulletin board was rolled over without any discussion.

2. According to the uncontroverted testimony of Mr. Margosian, the Union has use of a portion of about 50 official bulletin boards located throughout the Air Force Base.

3. Mr. Margosian did not name the management representatives who allegedly observed him posting the Union literature.

4. While I do not agree that Article 16 of the collective bargaining agreement, which incorporates by reference

AFM 40-13, requires prior management approval before the Union is allowed to post material on the official bulletin boards, the fact remains that the Union appears to have acceded to, and followed, Respondent's contrary interpretation. See, U.S. Patent and Trademark Office, 31 FLRA 960, 977, where the Authority recognized that a condition of employment could be established by a past practice despite the fact that such condition of employment contravened the terms of a memorandum of understanding.