OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

HAWAII FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO

Respondent

and

Case No. SA-CO-20804

SUPERVISOR OF SHIPBUILDING, CONVERSION AND REPAIR, SAN DIEGO DETACHMENT, PEARL HARBOR, HAWAII

Charging Party

AND

Case No. SA-CO-20807

HAWAII FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO

Respondent

and

NAVY PUBLIC WORKS CENTER, PEARL HARBOR, HAWAII

Charging Party

Benjamin T. Toyama

For the Respondent

Robert F. Griem, Esq.

For the Charging Party

Stefanie Arthur, Esq.

For the General Counsel

Before: SALVATORE J. ARRIGO

Administrative Law Judge

DECISION

Statement of the Case

This matter 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 unfair labor practice charges having been filed by the captioned Charging Parties against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by refusing to proceed to arbitration to resolve certain disputed matters.

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

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

Findings of Fact

The uncontroverted record evidence establishes the following:

At all times material, Respondent, Hawaii Federal Employees Metal Trades Council, AFL-CIO, has been the exclusive representative in a unit appropriate for collective bargaining at the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment's (SUPSHIP) Pearl Harbor facility.

At all times material, Respondent has been the exclusive representative in a unit appropriate for collective bargaining at the Navy Public Works Center's Pearl Harbor facility.

At all times material, Respondent has delegated administration of its SUPSHIP and Public Works Center units to International Federation of Professional and Technical Employees (IFPTE) Local 121 and IFPTE

Local 121 President, Benjamin Toyama, has been the designated contract administrator of the SUPSHIP and Public Works Center units.

THE SUPSHIP AGREEMENT (Case No. SA-CO-20804).

Respondent and SUPSHIP are parties to a collective bargaining agreement covering the employees in the unit, which agreement includes a grievance and arbitration procedure. The collective bargaining agreement expired June 6, 1992.

On June 29, 1992, Contract Administrator Benjamin Toyama sent SUPSHIP's Commander, Captain Ulaszewski, the following letter:

> This is to inform you that certain provisions of the "Agreement" are no longer applicable to our relationship. Those items in the agreement that constitute a permissive subject of bargaining, which were binding during the life of the agreement, (are) terminated since the expiration of the agreement.
>
> The following sections are no longer applicable and the Union will not honor the provisions:
>
> 1. Article IV, section 3, the first sentence.
>
> a. Any and all meetings between the employee and any supervisor or manager will require a Union representative.
>
> 2. Article V, sections 3, 4, and 5.
>
> a. Any and all negotiations will be done in accordance with the CSRA. The Union will not waiver any of it's statutory rights regarding the right to negotiate the ground rules by which we conduct negotiations.
>
> 3. Article XXIII, section 2.
>
> a. The Union reserves the right to file a ULP without first attempting to resolve the matter with the other party.

If you have any questions regarding the unilateral withdrawal of the contract, please do not hesitate to reduce those concerns to writing and submit it to the Union. . . .

The referenced agreement articles provide as follows:[2]

Article IV - Rights of Employees

Section 3. The Union and Employer agree that resolution of matters arising between employees and Employer be accomplished as informally as possible between the individual employee and at the lowest level of supervision practicable. The Employer agrees that employees of the Unit shall have the right to communicate with their steward during working hours at the employee's work site as authorized in Section 4, Article VI.

Article V - Union's Rights

Section 3. It is agreed that the establishment of new or revised activity directives relating to conditions of employment affecting employees in the Unit for which there is an obligation to consult and bargain shall be accomplished as follows:

a. The Employer will furnish a draft of the proposed directive to the Union.

b. The Union will have two (2) calendar days from receipt of the draft to schedule a meeting with the Employer to have the Employer explain the proposed directive.

c. If the Union requests a meeting, the Employer and the Union will hold such meeting no later than three (3) calendar days from receipt of the Union's request.

d. If a meeting is held, the Union will have five (5) calendar days from the date of the meeting to submit written counterproposals. If there is no meeting, the Union will have ten (10) calendar days from receipt of the draft to submit written counterproposals. Should the Union not submit written counterproposals within the prescribed time limits, the Employer may implement the proposed directive without negotiation.

e. Negotiations will commence within seven (7) calendar days of receipt of the Union's written proposals.

f. Normal conduct of negotiations will govern, including third party proceedings.

g. The foregoing does not preclude the Employer from implementing policies and procedures at any time it is deemed necessary to insure effective and efficient operations as mandated by 5 U.S. Code 7101(b). In such event, the parties will continue negotiations, even after the policy has been implemented.

Section 4. At the department level, changes in conditions of employment for which there is an obligation to consult and bargain, and which are not to be implemented by written directives, shall be accomplished as follows:

a. The Employer shall make the proposed change(s) known to the appropriate Steward or Union Official.

b. The Steward/Union Official will have ten (10) calendar days to submit written proposals to the Employer or the Employer's proposed change will be implemented without negotiation.

c. Sections 3e, f, and g will apply.

Section 5. The time limits set forth in Sections 3 and 4 above may be extended by mutual agreement of the parties.

SUPSHIP accepted Toyama's repudiation of Article XXIII, Section 2, a provision which required the parties to attempt to resolve disputes informally before filing an unfair labor practice charge, since it agreed that provision involved a permissive subject of bargaining. However, SUPSHIP did not agree with Toyama that the other identified provisions also involved permissive subjects of bargaining. On July 1, 1992, SUPSHIP filed an employer grievance over Toyama's stated intention to no longer be bound by Article IV, Section 3 and Article V, Sections 3, 4 and 5 of the SUPSHIP/HFEMTC agreement.

After the grievance was filed, Toyama refused to meet with the representatives of SUPSHIP to discuss the grievance and Toyama refused to issue a written decision. By letter dated August 18, 1992, SUPSHIP invoked arbitration of its July 1, 1992 grievance under the terms of the parties' collective bargaining agreement. In that agreement after notification is received that arbitration has been invoked, the parties are to meet within ten calendar days to select an arbitrator. By letter dated August 24, 1992, SUPSHIP reminded Toyama of the requirement to meet to select an arbitrator pursuant to the provisions of the collective bargaining agreement. On that same day Toyama notified SUPSHIP's representative, Peter Pappalardo, that he would not meet to select an arbitrator and that he refused to proceed to arbitration on the employer's grievance.

At no time since August 24, 1992, has Respondent offered to meet to select an arbitrator or indicated it would proceed to arbitration of the July 1, 1992 SUPSHIP grievance. The SUPSHIP grievance is still pending arbitration.

THE NAVY PUBLIC WORKS CENTER AGREEMENT (Case No. SA-CO-20807).

Respondent and the Public Works Center are parties to a collective bargaining agreement covering the employees in the unit, which agreement includes a grievance and arbitration procedure. The agreement expired on April 10, 1989 but the parties have continued to operate under the terms of the expired agreement.

By letter dated June 29, 1992, Contract Administrator Benjamin Toyama sent Public Works Center's Commander, Captain Rispoli, the following letter:

> This is to inform you that certain provisions of the "Agreement" are no longer applicable to our relationship. Those items in the agreement that constitute a permissive subject of bargaining, which were binding during the life of the agreement, (are) terminated since the expiration of the agreement.
>
> The following sections are no longer applicable and the Union will not honor the provisions:
>
> 1. Article II, section 4.
>
> 2. Article XXI, section 6.
>
> a. The Union reserves the right to file a ULP without first attempting to resolve the matter with the other party.
>
> If you have any questions regarding the unilateral withdrawal of the contract, please do not hesitate to reduce those concerns to writing and submit it to the Union.
>
> If you do not respond to this letter by COB July 3, 1992 I will determine you agree with the position of the Union regarding the withdrawal of the contract provisions. If you do not agree with this position you may file an Unfair Labor Practice charge against the Union. . . .

Article II, entitled "Administration of Agreement and Duty to Bargain" provides in Section 4:[3]

> a. It is agreed that the establishment of new or revised activity directives relating to

conditions of employment affecting employees in the unit and for which there is an obligation to consult and bargain shall be accomplished by presenting a draft of the proposed directive to the Union and permitting a sufficient time (not more than ten working days from receipt) for study and submission of proposals. The Union agrees that, should it fail to submit proposals within the prescribed time, the Employer may then proceed to implement the proposal without the obligation to negotiate. If the Union submits proposals, negotiations will commence within five (5) working days from receipt of the Union's proposals, unless the parties agree to a later date. Should negotiations take place, normal conduct of negotiations govern, including third party proceed-ings. The foregoing does not preclude the Employer from implementing policies and procedures at any time it is deemed necessary to insure effective and efficient operations as mandated by 7101(b) of the Act. The Union will be promptly notified of any such actions and the reasons therefore, and the Union may submit such matter as a grievance under Article XIX, Grievance Procedure, Section 8.

b. At the department levels, changes in conditions of employment for which there is an obligation to consult and bargain, whether or not as a result of written policy or procedures, may be made known to the appropriate Steward and/or Union Official. If the Steward or other Union Official submits proposals, the procedures and time limits concerning the obligation to consult and bargain are as set forth in Section 4.a. above. Upon concurrence of the Steward or other Union Official, or if no written proposals are received within five working days, the change may be implemented and there is no further obligation to consult and bargain.

The employer disagreed with Toyama over his repudiation of Article II, Section 4, and by letter dated July 2, 1992, the Public Works Center filed an employer grievance over Toyama's stated intention to no longer be bound by Article II, Section 4 of the Public Works Center agreement. After the July 2, 1992 Public Works Center grievance was filed, Toyama refused to meet with the employer to discuss the grievance and refused to issue a written decision. By letter dated August 19, 1992, the Public Works Center invoked arbitration of the grievance and requested that Respondent meet to select an arbitrator within 10 days as required under the terms of the collective bargaining agreement. On August 25, 1992, Toyama notified Public Works Center representative Peter Pappalardo, that he would not meet to select an arbitrator and that he refused to proceed to arbitration of the employer's grievance. Toyama took the position that "(t)he negotiated grievance procedure was not intended to address Labor Relations problems" but was ". . . to address real issues regarding the interpretation and application of the contract", and that ". . . problems . . . regarding the interpretation and application regarding the law should be (addressed to) the FLRA."

At no time since August 25, 1992, has Respondent offered to meet to select an arbitrator or indicated it would proceed to arbitration of the July 2, 1992 Public Works Center grievance. The Navy Public Works Center grievance remains pending arbitration.

Discussion and Conclusions

The General Counsel alleges that Respondent's refusing to proceed to arbitration on the SUPSHIP and Public Works Center grievances violated section 7116(b)(1) and (8) of the Statute. Respondent denies its conduct violated the Statute and essentially contends that the repudiated contract clauses constituted waivers of union rights and, as such, these clauses were permissive subjects for negotiation. According to Respondent,

when the collective bargaining agreements expired it could then repudiate those sections of the agreements dealing with permissive subjects without violating the Statute. Respondent further urges that it could repudiate those matters without having its action challenged in a grievance-arbitration forum and suggests the only forum for the employers to challenge whether the repudiated matters constituted mandatory or permissive subjects of collective bargaining is a negotiability appeal since, it suggests, under the Statute, an arbitration may not determine an issue of negotiability. Respondent further contends that the employers herein are "attempting to break the Union by forcing the Union to spend their funds in arbitration."[(4)]

It is well settled that the terms and conditions of employment in expired collective bargaining agreements which involve mandatory subjects of bargaining remain in effect until renegotiated or modified in a manner consistent with Statutory requirements. Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C., 14 FLRA 644 (1984) (FAA Northwest) and The Adjutant General, State of Ohio and American Federation of Government Employees, AFL-CIO, Ohio Council of Air National Guard Locals No. 127, Local 3470), 17 FLRA 957 (1985). It is similarly well settled that upon expiration of a collective bargaining agreement, the parties are privileged to repudiate provisions of the agreement which constitute permissive subjects of bargaining, which includes waivers of Statutory rights. FAA Northwest.

Respondent and the Charging Parties disagreed as to whether the portions of their expired agreements repudiated by Respondent constituted mandatory or permissive conditions of employment. Thereupon, the Charging Parties sought to have their disputes resolved through the contractual grievance-arbitration machinery which, as a mandatory condition of employment, survived the expiration of the agreement. Depart-ment of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, California, 4 FLRA 22 (1980). Respondent refused to submit the dispute to the grievance-arbitration procedures and the Charging Parties filed these unfair labor practice charges which, if successful, will have the effect of compelling Respondent to submit the disputes to arbitration for resolution. While, as Respondent cites, the Authority has held in Department of Defense Dependent Schools System, 21 FLRA 1092 (1986), that it is appropriate to resolve the question of repudiation of a collective bargaining agreement in an unfair labor practice proceeding if raised in an unfair labor practice charge, the Authority did not hold in that case that it was inappropriate to resolve such issues though the grievance-arbitration procedures in the parties' collective bargaining agreement. Indeed, the Authority has subsequently specifically indicated that such issues may be resolved in a grievance-arbitration proceeding. American Federation of Government Employees, Local 1457, AFL-CIO, 39 FLRA 519, 527-528 (1990) (AFGE Local 1457). Further, Respondent's reliance on Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 766 (1982), to support its position that the grievance machinery is not available to resolve the parties' dispute is misplaced. In that case the Authority, at 776, held that in situations involving alleged violations of employees' basic rights under section 7116(a)(1) and (2) of the Statute, the Authority would not defer to contractual grievance-arbitration machinery even though the alleged conduct arguably also involves a contract violation. Clearly, this holding was limited to allegations of discrimination against protected employees and interference with their rights protected by the Statute.

Generally, questions of whether the subject matter at issue is arbitrable are for the arbitrator to decide, and a party may not refuse to become a part of the grievance-arbitration process because of a belief that the matter at issue is not subject to the process without violating the Statute. AFGE Local 1457. This holding encompasses claims by a party that a matter is not negotiable. Thus, in Social Security Administration and National Council of SSA Field Operations Locals (NCSSAFOL), American Federation of Government Employees, AFL-CIO (AFGE), 25 FLRA 238, 239-240 (1987), the Authority, when considering a claim of nonnegotiability raised by an agency, held:

> . . . In this and future cases involving allegations of nonnegotiability made in an interest arbitration proceeding, we will carefully examine the record of the case and the arbitrator's award. This examination will be made to determine whether the arbitrator made a negotiability ruling or whether the arbitrator merely applied existing Authority case law to resolve the impasse. . . .

In Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988), the Authority extended an arbitrator's authority in this area(5) to include considering duty to bargain questions raised by Unions, holding, at 623:

> We expect interest arbitrators, when presented with claims that matters are outside the duty to bargain, to consider these questions and to address them in their awards in order to provide the parties and the Authority with the basis on which they have resolved the claim. The parties likewise have an obligation to provide interest arbitrators with relevant precedent on particular duty to bargain issues. Consistent with our case law as set forth above, if exceptions to an interest arbitration award are filed with the Authority, we will examine the record to determine whether the arbitrator applied existing Authority precedent to resolve an impasse. If an examination of the award supports the conclusion that the arbitrator applied existing precedent, we will resolve the exceptions on the merits by determining whether the arbitrator correctly applied the precedent.

and, at 626:

> The principles discussed above concerning the extent of an arbitrator's authority in this area apply equally to claims of nonnegotiability made by unions as well as to claims made by agencies. In our view, nothing in the Statute warrants a finding that an arbitrator's authority to resolve duty to bargain questions raised by a union differs from the arbitrator's authority when the questions are raised by an agency. We conclude that an arbitrator's authority to resolve duty to bargain issues is the same whether the issues are raised by agencies or unions.

In the case herein arbitration was invoked by the Charging Parties, who were parties to a viable collective bargaining agreement, and Respondent, the other party to the collective bargaining agreement, refused to participate in the arbitration proceedings, as required by section 7121 of the Statute, without any justification recognized by the Authority(6). In these circumstances I conclude that by such conduct Respondent violated section 7116(b)(1) and (8) of the Statute as alleged. See Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1982) and AFGE Local 1457. Accordingly, it is hereby recommended that the Authority issue 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 Hawaii Federal Employees Metal Trades Council, AFL-CIO, shall:

1. Cease and desist from:

(a) Refusing to proceed to arbitration on grievances filed by the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment, Pearl Harbor, Hawaii on July 1, 1992 and the Navy Public Works Center, Pearl Harbor, Hawaii on July 2, 1992.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their 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) Upon request, proceed to arbitration regarding the grievances filed by the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment, Pearl Harbor, Hawaii on July 1, 1992 and the Navy Public Works Center, Pearl Harbor, Hawaii on July 2, 1992.

(b) Post at its business offices and its normal meeting places, including all places where Notices to members and employees of the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment, Pearl Harbor, Hawaii and the Navy Public Works Center, Pearl Harbor, Hawaii, are customarily posted, copies of the attached Notices on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the Hawaii Federal Employees Metal Trades Council, 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) Submit signed copies of the Notices to the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment, Pearl Harbor, Hawaii and the Navy Public Works Center, Pearl Harbor, Hawaii, for posting in conspicuous places where unit employees represented by the Hawaii Federal Employees Metal Trades Council are located. Copies of the Notices should be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Los Angeles Subregion, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, 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 26, 1994

SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL MEMBERS AND 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 MEMBERS AND EMPLOYEES THAT:

WE WILL NOT refuse to proceed to arbitration on the grievance filed by the Supervisor of Shipbuilding, Conversion and Repair, San Diego Detachment, Pearl Harbor, Hawaii (SUPSHIP) on July 1, 1992.

WE WILL NOT in any like or related manner, fail or refuse to comply with our obligations under the Federal Service Labor-Management Relations Statute.

WE WILL upon request, proceed to arbitration, in accordance with the terms of our collective bargaining agreement, on the grievance filed by SUPSHIP on July 1, 1992.

_____

(Labor Organization)

Date: _____ 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, Los Angeles Subregional Office, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 744-4000.

NOTICE A

NOTICE TO ALL MEMBERS AND 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 MEMBERS AND EMPLOYEES THAT:

WE WILL NOT refuse to proceed to arbitration on the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on July 2, 1992.

WE WILL NOT in any like or related manner, fail or refuse to comply with our obligations under the Federal Service Labor-Management Relations Statute.

WE WILL upon request, proceed to arbitration, in accordance with the terms of our collective bargaining agreement, on the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on July 2, 1992.

_____

(Labor Organization)

Date: _____ 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, Los Angeles Subregional Office, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 744-4000.

Dated: April 26, 1994

Washington, DC

1. Substantial portions of the excellent brief filed by counsel for the General Counsel have been incorporated into this Decision.

2. Article XXIII, Section 2, is not at issue, infra.

3. Article XXI, Section 6 of the Public Works Center agreement, like Article XXIII, Section 2 of the SUPSHIP agreement, required the parties to attempt to resolve disputes informally before filing an unfair labor practice charge.

4. This contention is not supported by any record evidence.

5. While these cases dealt with an arbitrator's authority when engaged in interest arbitration, I see nothing in these decisions which would limit an arbitrator's authority to only interest arbitration proceedings.

6. Cf. e.g., American Federation of Government Employees, AFL-CIO, Local 1909, Fort Jackson, South Carolina, 41 FLRA 18 (1991).