OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

OGDEN AIR FORCE LOGISTICS CENTER

HILL AIR FORCE BASE, UTAH

Respondent

and Case No. DE-CA-30268

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1592

Charging Party

Clare A. Jones Counsel for the Respondent
Steven B. Thoren Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by removing a soft drink dispenser from Fire Department Building 9 without providing the Charging Party (Union) with adequate notice and the opportunity to bargain over the substance or the impact and implementation of the change.(1)

Respondent's answer denied any violation of the Statute.

A hearing was held in Ogden, Utah. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, Council 214, AFL-CIO, is the exclusive representative of a nationwide bargaining unit of the U.S. Air Force Materiel Command (formerly known as the Air Force Logistics Command), including certain employees who work for the Respondent at Hill Air Force Base. The Union, AFGE Local 1592, is an agent of Council 214 and represents bargaining unit employees located at the Respondent's facilities.

There is no evidence that the Union ever negotiated with Respondent over the cost of drinks or meals in Fire Department Building 9 or the manner in which such food or drinks were dispensed.

In approximately January 1991, Respondent entered into a contract with Logistical Support, Incorporated to supply food service for the firemen in Fire Station No. 1, Fire Department Building 9. With respect to beverages, the contract provided that the contractor would provide "a choice of . . . [t]wo beverages[.]" The contract did not specify the method of dispensing the beverages.

The local manager of Logistical Support, Incorporated for the contract is Mr. Norm Gilstrap. Respondent's contract administrator, Ms. Patty Lynn Erickson, deals with Mr. Gilstrap on almost a daily basis concerning problems which arise in the administration of the contract. She can recommend to the contractor ways to resolve problems, and the contractor has been cooperative in the past. According to Ms. Erickson, as long as Logistical Support, Incorporated supplies two beverages in any form, Respondent has no occasion to complain to the contractor.

Fire Station No. 1, which has sixty-two bargaining unit employees covering all shifts, has had a kitchen since at least 1985 serving two daily meals at reduced prices to the firemen. The serving line, set up cafeteria style, included a self-serve soft drink dispenser that mixed carbonated water with syrup. The dispenser served the Coke brand of soft drinks, including Coke, Sprite, orange, and root beer, as well as water. Fire Station personnel paid five cents for an eight ounce soft drink from this dispenser.

In September 1992, one of the bladders containing drink syrup leaked its contents on the kitchen floor through a small puncture in the neck of the bladder dispenser. Mr. Gilstrap of Logistical Support, Incorporated claimed this damage had been caused by vandalism and removed the syrup bags so that the dispenser could not be used.

The dispenser was put back in use about one month later after Union President William Schoell contacted officials of Respondent and requested that the dispenser be made operable until the Union had a chance to negotiate. Although the dispenser was returned to use, no agreement was reached and Mr. Gilstrap threatened to take the machine out if it was damaged again.

Shortly after the dispenser was again operating, in late October 1992 another syrup bladder leaked its contents on the floor through a similar puncture. Mr. Gilstrap of Logistical Support, Incorporated again claimed this damage had been caused by vandalism on the part of the firemen.[(2)] He removed the bladders and had the Coke distributor remove the dispenser.

Respondent admitted in its Answer that it removed the soft drink dispenser on November 1, 1992. Acting Union President Scott Blanch was notified by Gail Carlson, executive officer of the Air Base Group, that the dispenser was being taken out effective that day; that the Air Base Group Commander was "sick and tired of the kids over there." She said the Union could take its "best shot" and do what it had to do, but Respondent was not going to negotiate.

After the Coke dispenser was removed, Respondent and the Union agreed in November 1992 to install a roll-down wire barrier so that the contractor could secure the kitchen equipment when not in use. The agreement was made with the view toward the contractor returning the Coke dispenser. The barrier was installed in March 1992, but it has not been used regularly by the contractor, and the contractor is not otherwise locking the doors to the area. The Coke dispenser has not been returned.

Following the removal of the Coke dispenser, the contractor, Logistical Support, Incorporated, installed an ice and water machine in place of the Coke dispenser and has provided cans of Shasta brand beverages. The contractor has charged as much as thirty cents per can for Shasta drinks, as low as twenty cents, and at the time of the hearing was charging twenty-five cents. Although the contractor never ran out of soft drinks when the Coke dispenser was operating, the supply of some flavors of Shasta cans has proved insufficient during some of the meals.

Discussion and Conclusions

The Authority has consistently held that the provision of food and drink by an agency, and the prices charged for such food and drink, are conditions of employment, and within the mandatory scope of bargaining. Marine Corps Logistics Base, Barstow, California, 46 FLRA 782, 783 (1992) (Marine Corps I), reconsideration denied, 47 FLRA 454 (1993) (Marine Corps II); National Association of Government Employees, Local R1-144 and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 43 FLRA 1331, 1345-46 (1992). It is well settled that when an agency implements a change in conditions of employment outside of the reserved rights under section 7106, the agency has an obligation to provide the Union with notice and an opportunity to negotiate over the substance and the impact and implementation of the change.

Counsel for the General Counsel contends that the Respondent, through the contractor, Logistical Support, Incorporated, violated section 7116(a)(1) and (5) by unilaterally removing the Coke dispenser from the kitchen in Fire Station No. 1 without providing the Union with adequate prior notice and an opportunity to negotiate before making the change. The General Counsel seeks to have Respondent return the Coke dispenser and take action to address the change in the price of soft drinks as a result of the change.

Respondent contends that there was no obligation to bargain with the Union as (1) Respondent has never bargained with the Union over the cost of meals or the means whereby they are dispensed, (2) Respondent had no discretion to bargain over the manner in which the soft drinks were dispensed as long as they were dispensed consistent with the terms of the service contract, (3) the substitute manner in which the drinks were dispensed was consistent with the contract and was instituted to provide increased security for the property and equipment of a government contractor, a management-retained right.

Respondent seems to contend that the Union waived its right to bargain because there is no evidence that in the past the Union ever negotiated with Respondent over the cost of drinks or meals or the manner in which such food or drinks were dispensed. This is insufficient to establish a waiver by bargaining history which must establish that a matter was "fully discussed and consciously explored during negotiations and the union must have consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan, 46 FLRA 582, 585 (1992). There is also no evidence of a past practice which requires a showing that the practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. Norfolk Naval Shipyard, 25 FLRA 277, 286-87 (1987). As Judge Nash stated in Marine Corps I, 46 FLRA at 799:

> The mere fact that Respondent in the past changed food or vending prices without objection from the Union does not, standing alone, establish a longstanding past practice. Although the Union may have known of past price adjustments, those changes may have met with Union approval, giving it no reason to object or to request negotiations. Furthermore, it may not have recognized the price increases as changing a condition of employment. In any event, Respondent has not established on the instant record that the Union acquiesced in a practice of allowing unilateral changes in the vending machine prices.

As in Marine Corps I, there is no evidence that the Union ever acquiesced in allowing unilateral changes in the price, selection, or type of soft drink dispenser.

Respondent's position that it had no discretion to bargain concerning the manner in which the soft drinks were dispensed is rejected. It is noted that the Respondent admitted in its Answer that it removed the Coke dispenser as alleged in the Complaint. (Complaint, paragraph 13; Answer, paragraph 1). By contracting out the food and beverage service, the Respondent merely used an agent to provide a condition of employment for unit employees. In Library of Congress, 15 FLRA 589, 590 (1984), the Authority rejected a contention that the agency had no duty to bargain over a change in conditions of employment made by a vending company. The Authority stated:

> In agreement with the Judge, the Authority finds that the change to the token system of operation from the use of microwave ovens by unit employees free of charge constituted a change in an established condition of employment. The Respondent does not dispute that the introduction of the token system constituted a change in conditions of employment for unit employees but argues that it had no duty to bargain over changes in conditions of employment which are within the control of an

independent party, in this case, the vending company. However, the Authority has previously held, in situations where agencies have assertedly lacked control over the decision to effectuate various proposed changes in their employees' condition of employment and have therefore contended that they had no bargaining obligation with regard to those changes, that the Statute requires these agencies to bargain to the extent of their discretion over such proposed changes even if that discretion is limited to making requests or recommendations to the entity which does have decision-making authority. See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C., 7 FLRA 578 (1982), enforced sub nom. Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280 (D.C. Cir. 1983); American Federation of Government Employees, AFL-CIO, Local 51 and Department of the Treasury, Bureau of the Mint, U.S. Assay Office, San Francisco, California, 9 FLRA 809 (1982); Internal Revenue Service, Chicago, Illinois, 9 FLRA 648 (1982); American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 FLRA 409 (1982). In the instant case, there is no indication in the record that the Respondent's ability to negotiate regarding the subject matter of access by employees to microwave ovens was precluded or limited by law or regulation. Therefore, upon learning of the vending company's decision to install the token system of operating the microwave ovens, the Respondent was obligated to notify the Charging Party of the impending change and, upon request, bargain over the change in an established condition of employment--i.e., continued access by unit employees to microwave ovens free of charge. The Respondent's failure to fulfill its bargaining obligation in this regard over the change in microwave oven access, as well as the implementation of such change and the impact thereof on unit employees constituted a violation of section 7116(a)(1) and (5) of the Statute. (footnote omitted)

The record reflects that Respondent can, and has, made recommendations to the contractor concerning ways to resolve problems in the administration of the contract, and the contractor has been cooperative in the past.

Respondent's position that the substitute manner in which the drinks were dispensed was instituted by the contractor as a security matter to protect its equipment, even if accepted as true, also does not excuse Respondent's failure to notify the Union of the change and, upon request, bargain over those aspects of the change that are negotiable. The right of management under section 7106(a)(1) of the Statute "to determine the

. . . internal security practices of the agency" is expressly "[s]ubject to subsection (b)" which, as relevant here, does not preclude an agency and labor organization from negotiating "(2) procedures which management officials of the agency will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee, 50 FLRA 220 (1995). Moreover, the record reflects that there were alternatives to removing the Coke dispenser, including the installation of a metal screen barrier, that would have protected the product from the vandalism alleged by the contractor. Although this device was installed after the unilateral action was taken, it has not been generally used to protect other kitchen equipment, thus casting doubt on the validity of this justification.

It is concluded that Respondent, through the action of its contractor, violated section 7116(a)(1) and (5), as alleged, by unilaterally removing the Coke dispenser from the kitchen in Fire Station No. 1 without providing the Union with adequate prior notice and an opportunity to bargain over its decision.

Where, as here, management has changed a condition of employment without fulfilling its obligation to bargain on its decision to effect that change, the Authority will grant a status quo ante remedy in the absence of special circum-stances. Marine Corps I, 46 FLRA at 784; Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky, 44 FLRA 179, 191 (1992); Library of Congress, 15 FLRA at 591. The Respondent has not alleged that any special circumstances exist which would establish that a status quo ante remedy is unwarranted in this case. In these circumstances and consistent with longstanding Authority precedent, a status quo ante remedy will effectuate the purposes and policies of the Statute. In addition, the remedy sought by Counsel for the General Counsel to address the change in the price of soft drinks as a result of the change in dispenser is also appropriate. Marine Corps II, 47 FLRA at 457.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

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 Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Implementing unilateral changes in the working conditions of unit employees by removing the soft drink dispenser and increasing the price of soft drinks in the kitchen located in Fire Station No. 1 at Hill Air Force Base, without first notifying and negotiating with the American Federation of Government Employees, Local 1592, AFL-CIO, the agent of the exclusive representative of certain of its employees, and affording it an opportunity to complete negotiations over the decision to implement the removal of the soft drink dispenser and increase the price of soft drinks and the impact and implementation of the changes.

(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) Return the soft drink dispenser and rescind the price increase for soft drinks in the kitchen located in Fire Station No. 1 effected on or about November 2, 1992.

(b) Effect a further decrease in the price of soft drinks of 5¢ from the Coke dispenser in the kitchen located in Fire Station No. 1 for the number of days equal to the number of days that unilateral increase in price was in effect times four, the amount of the increase (20¢) divided by 5¢.

(c) Notify and, upon request, negotiate with the American Federation of Government Employees, Local 1592, AFL-CIO, the agent of the exclusive representative of certain of its employees, in advance of any contemplated change or price increase in soft drinks in the kitchen located in Fire Station No. 1, and, upon request, negotiate with it over the decision to implement any change or price increase and the impact and implementation of the proposed changes.

(d) Post at the Ogden Air Logistics Center, Hill Air Force Base, Utah, copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Commander, Ogden Air Logistics Center, and they shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notices are not altered, defaced, or covered.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Federal Labor Relations Authority, Denver Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, March 30, 1995

GARVIN LEE OLIVER

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 unilaterally implement changes in the working conditions of unit employees by removing the soft drink dispenser and increasing the price of soft drinks in the kitchen located in Fire Station No. 1, without first notifying and negotiating with the American Federation of Government Employees, Local 1592, AFL-CIO, the agent of the exclusive representative of our employees, and affording it an opportunity to complete negotiations over the decision to implement the price increase and the impact and implementation of the change.

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 return the soft drink dispenser and rescind the price increase for soft drinks in the kitchen located in Fire Station No. 1 effected on or about November 2, 1992.

WE WILL further decrease the price of the soft drinks from the Coke dispenser located in the kitchen in Fire Station No. 1 for the number of days equal to the number of days that unilateral increase in price was in effect times four, the amount of the illegal increase (20¢) divided by 5¢.

WE WILL notify the American Federation of Government Employees, Local 1592, AFL-CIO, the agent of the exclusive representative of our employees, in advance of any contemplated change or price increase in soft drinks in the kitchen located in Fire Station No. 1, and, upon request, negotiate with it over the decision to implement any change or price increase and the impact and implementation of the proposed changes.

_____

(Activity)

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, Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DE-CA-30268, were sent to the following parties in the manner indicated:

1. Prior to the hearing, Respondent and the Union resolved allegations relating to another dispute. At the request of Counsel for the General Counsel, these were severed from the complaint. (Tr. 8).

2. 2/ The source of the damage to the syrup bladders was never determined. Fire Chief Dennis W. Murphy testified that he never felt certain that the damage was intentional and recognized that it could have been caused through shipment or when the bags were placed in the dispenser.