OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE,
AIR FORCE MATERIEL COMMAND,

WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

Case No. CH-CA-30438

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

Lt. Col. Timothy D. Wilson

For the Respondent

Judith A. Ramey, Esq.

For the General Counsel

Joseph Nickerson

For the Charging Party

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 (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the

Authority), by the Regional Director for the Chicago Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by refusing to negotiate with the Union over the Respondent's time off incentive awards program.

A hearing on the Complaint was conducted in Dayton, Ohio, 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.

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 of Respondent's employees and Council 214 has been the agent of AFGE for the purpose of representing those employees. The collective bargaining unit is comprised of approximately 73,000 employees located within the Air Force Materiel Command (AFMC) Headquarters at Wright-Patterson Air Force Base and at various other Air Force bases throughout the country.

By correspondence of November 13, 1992 Respondent notified the Union that it received authority to grant employees time off from duty, without loss of pay or charge to leave, as an incentive award. The program was new and it does not appear that the matter had been previously discussed by the parties nor is the subject addressed in their collective bargaining agreement. The document sent to the Union included Air Force operating guidance regarding the program. Respondent's cover letter stated, in part:

> Should you wish to negotiate over any bargainable impact and implementation relative to this matter, your written proposals must be submitted to this office not later than 15 workdays after your receipt of this letter in accordance with Section 32.02 of the Master Labor Agreement. We wish to implement this program on 10 January 1993.

Article 33 of the parties' collective bargaining agreement, considered to be in effect at all time relevant to these proceedings, is entitled "Negotiations During the Terms of the Agreement." Section 33.02, entitled "Negotiations at Command Level," provides, in relevant part:

SECTION 33.02: NEGOTIATIONS AT COMMAND LEVEL

When a bargaining obligation is generated by a proposed directive at Command level or a directive issued above Command level, the following procedures will apply:

a. The Labor Relations Office will notify the designated Union official in Section 33.01 above of the intended changes in conditions of employment. A reasonable time period/date following the notifica-tion will be identified as the implementation date. The Council President or designee may request and be granted a meeting to discuss the change.

b. If the Union wishes to negotiate, in accordance with entitlements under CSRA, concerning proposed changes, the Union will submit written proposals to the Labor Relations Office not later than 15 workdays after receipt of Employer's notification. Negotiations will normally begin within five workdays after receipt by the Labor Relations Office of the timely Union proposals. If necessary, the identified implementation date may be postponed by the Employer to complete negotiations in good faith.

c. The parties may mutually agree to delegate responsibility for negotiations to subordinate activities and local Union officials.

d. Agreements reached under this Section will be promptly implemented by the Employer in the appropriate form such as regulation, letter, or operating instruction. Disputes over the application of the implementing directive will be subject to resolution under Articles 6 and 7 of this Master Labor Agreement.

On November 18, 1992 the Union sent Respondent the following letter:

This responds to your letter dated 13 November 1992, received in this office on 13 November 1992, providing AFGE Council 214 written notification pursuant to Section 33.02 of the Master Labor Agreement (MLA) in connection with proposed changes in conditions of employment as

referenced above.

AFGE Council 214 requests to negotiate over the intended changes in conditions of employment prior to any implementation in accordance with the Civil Service Reform Act of 1978 (CSRA) and MLA. In order that AFGE Council 214 may intelligently develop proposals and subsequently engage as such in negotiations, the following is requested:

(X) The data as identified in the attached list pursuant to Section 7114(b)(4) of the Labor Statute (CSRA).

(X) A meeting to discuss the change pursuant to Section 32.02a of the MLA (AFGE is prepared to meet at your earliest convenience).

(X) An extension of the time limits to fifteen (15) workdays after receipt of the items(s) requested immediately above due to a current heavy workload (A non- response by 4 days before the deadline will be interpreted as agreed).

Your immediate response will be appreciated.

The record reveals that shortly after the Union's response, Respondent provided the Union with an extension of the contractual time limits, a briefing by Respondent regarding the time off incentive awards program and the data the Union requested.

By letter dated December 11, 1992 the Union notified Respondent that it had no proposals regarding the time off incentive awards "at this time." The Union further stated "we do reserve the right to initiate bargaining in the future if we deem it necessary."(1) Respondent implemented the time off incentive awards programs on January 10, 1993 without further communication with the Union. On January 20, 1993 the Union sent a letter to Respondent captioned "Subject: Union Initiated Demand to Bargain/Time Off Incentive Awards," noting "Implementation Date: Upon Reaching Final Agreement" and referencing, "Authority: AFGE/AFLC Agreement, 25 October 1988 and Labor Statute." The letter stated:

Attached hereto are AFGE Council 214's proposals with respect to Time Off Incentive Awards, Public Law 101-509.

Should you wish to negotiate, your written proposals must be submitted to this office not later than fifteen (15) work days after receipt of this notification in accordance with Section 33.02 of the Master Labor Agreement (MLA) and AFGE/AFLC Agreement on Procedures for Union Initiated Mid-Term Bargaining dated 25 October 1988.

Should you waive your right to negotiate by not submitting timely counter proposals, the Union proposals will become the agreement and we will require that management implement.

I have set aside 10 February 1993 at 10:00AM here at the Council office to begin Negotiations.(2)

The Union submitted the following proposals:

1. The employer will fairly, equitably and objectively consider all eligible employees for the subject award.

2. Employer agrees to a one time test basis only in 1993 to provide AFGE Council 214 Equal Employment Opportunity (EEO) data for bargaining unit members nominated and selected for this award. This data will be reviewed to mutually determine relevance to the eligible bargaining unit population. The one time collection of this data will have no effect on the nomination or selection process.

3. Each local president, Council 214 president or their designees may submit bargaining unit members for nomination in accordance with subject regulation.

4. The employer shall provide to the Council 214 president or designee the following information about employees receiving the award:

(a) Name

(b) Job Title, Series, and Grade Level

(c) AFMC Facility and Organizational Symbol

(d) Telephone Number

5. The following additional information for each bargaining unit member receiving an award is also to be provided so that EEO can be monitored by AFGE in conjunction with Article 19 of the Master Labor Agreement:

(a) Race

(b) Color

(c) National Origin

(d) Sex

(e) Age

(f) Handicap

6. Employees will be notified when recommended for the time off incentive award. If not selected, employee will be advised in writing the rationale for non-selection/approval.

7. Notices by organization will be posted quarterly on official Bulletin Boards listing all recipients of the award for the quarter.

8. Time period for award to be taken by employee shall be jointly agreed to by supervision and the employee.

9. Turn around time for submission of recommendation of employee for the award and approval shall not exceed 30 calendar days.

10. In qualifying for assignment of Category 3 awards for merit promotion, (Time off awards, accumulative, by quarter) are to be used to meet the Category 3 requirements and qualify for Category 3 awards.

11. No rights of the employee, the union or management are waived by this agreement.

Respondent, in its reply to the Union of February 3, 1993, stated, inter alia:

By letter dated 13 November 1993 [sic], you were notified of our intent to implement the time off incentive awards program. You were reminded that should you wish to negotiate over this initiative, your written proposals must be submitted to this office not later than 15 workdays after your receipt of the notification letter in accordance with Section 33.02 of the Master Labor Agreement. You submitted no proposals.

Since you waived your right to bargain by not submitting proposals within the time limits outlined in Section 33.02 of the MLA, we must reject your 20 January 1993 demand to bargain. In addition, based on the decision by the 4th Circuit Court of Appeals referenced in our 20 March 1992 letter, the Union does not have the right to initiate bargaining in accordance with the Civil Service Reform Act of 1978, outside contract negotiations.

No bargaining even occurred between the parties regarding the time off incentive awards program.

Discussion and Conclusions

The General Counsel essentially contends that Respondent was obligated to negotiate with the Union concerning the Union's proposals regarding the time off incentive awards program since the matter was neither addressed in the previously negotiated agreement nor waived by the Union during negotiations. Respondent essentially contends that the parties' agreement regarding bargaining procedures to be followed when a bargaining obligation arises obligates the parties to follow that procedure if bargaining is desired and the Union's failure to follow the negotiated procedure extinguishes any further bargaining right or obligation on the matter.

In my view Respondent fulfilled its responsibilities under the collective bargaining agreement and the Statute before implementing the time off incentive awards program which, beyond question, was a matter concerning a condition of employment. Thus, Respondent gave the Union notice of the pending change substantially in advance of the implementation date, granted the Union a meeting on the matter during which a briefing occurred, supplied requested data and, at the Union's request, granted an extension of time to submit negotiating proposals. The Union clearly and unmistakably declined bargaining on the proposal within the time-frame set forth under the terms of the negotiated agreement which established mutually agreed upon procedures for bargaining on a change such as the one herein. This conduct, in my view, constituted a clear and unmistakable waiver of the Union's Statutory right to bargain on the matter. Cf. U.S. Immigration and Naturalization Service, 24 FLRA 786, 790 (1986).

Further, I give no effect to the Union's statement in its December 11, 1992 letter that it had no proposals "at this time," and its statement that it would "reserve the right to initiate bargaining" in the future if it was deemed necessary. There is no contention or indication in the record that the Union could have reasonably considered Respondent's lack of response to this attempt to reserve a right to negotiate to constitute an acceptance of the Union's position. The parties' agreement provided for proposals to be submitted during a specific time frame. The Union may not unilaterally amend the procedural requirements set forth in their bilateral agreement simply by stating it could proceed in the future without regard to the constraints imposed by their negotiated agreement.

The General Counsel also argues that the Union's January 20, 1993 request to bargain constituted a demand for mid-term bargaining on the time off incentive awards program, citing Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan (Selfridge), 46 FLRA 582 (1992) and Department of the Air Force, 3800 ABW/AU, Maxwell Air Force Base, Alabama (Maxwell), 39 FLRA 1461 (1991) where agency refusals to bargain were found to have violated the Statute. While both of those cases concerned a union demand for mid-term bargaining and a claim of "waiver," both cases are distinguishable from the situation herein. In Selfridge the agency refused to enter mid-term negotiations with the union, which represented the employees, over safety concerns of bargaining unit employees relating to a prior staffing reduction in the agency's boiler plant operations. In Selfridge there was no claim that the union's bargaining request involved a substantive or procedural matter contained in or covered by the existing collective bargaining agreement and moreover, the timing of the demand to bargain vis a vis the change was substantially different from the case herein. Thus the Authority held in Selfridge, at 586-87:

> Here, the facts do not establish that the Union relinquished its interest in negotiating over safety concerns as part of a bargain reached with the Agency prior to implementation. In this case, the parties reached no agreement and the entire matter was left unresolved. . . . Moreover, even assuming that the Union, by its actions, waived its right to object to the Agency's institution of a system that entailed the use of rovers and personal duress alarms to maintain safety after staff reductions, it does not follow that the Union waived its right to bargain over safety concerns relating to breakdowns and failures in that system that became evident only after several months of experience with the reduced staffing patterns.

Maxwell involved a mid-term request to bargain on agency smoking policy. In Maxwell, neither the terms of the agreement nor bargaining history contained any reference concerning smoking policy and the agreement specifically provided for a mid-term reopener. The Authority found ". . . the mid-term reopener provision allow[ed] negotiations on all subjects in the same manner as basic contract negotiations over a new agreement, and would therefore encompass even matter that had been waived by a party under the current agreement." Maxwell, at 1462. In view of this conclusion, the Authority found it unnecessary to pass on the Administrative Law Judge's finding that the proposal "would have been manditorily negotiable at any time unless there was a waiver." (Emphasis in original.) Maxwell, at 1462-63.

In the case herein the parties' collective bargaining agreement does not address the time off incentive awards program. However, the agreement does set forth procedures for negotiating mid-term changes in conditions of employment. Respondent followed those procedures before implementing the change herein. On November 13, 1992 Respondent notified the Union of the January 10, 1993 implementation date. On December 11 the Union declined to negotiate on the matter and the change was implemented as scheduled. Ten days thereafter the Union demanded to bargain on the program. None of the proposals encompassed any matter which could not have been considered in the period the collective bargaining agreement set forth for the submission of proposals.

One of the most important benefits of having a collective bargaining agreement is to provide the parties to the agreement with some semblance of "stability and repose" with respect to matters reduced to writing in the agreement which extends to the procedures the parties agree to regarding changes during the term of an agreement and the opportunity to negotiate regarding such changes. Cf. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1016-19 (1993). It is well settled that when an agency notifies a union which is the collective bargaining representative that a change in a condition of employment is envisioned, the union must make a timely request to bargain if it wishes to preserve its right to negotiate on the matter. See Internal Revenue Service (District, Region, National Office Unit), 14 FLRA 698, 700 (1984) and Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA 654 (1984) at 668-71. See also Army and Air Force Exchange Service (AAFES), Lowry AFB Exchange, Lowry AFB, Colorado, 13 FLRA 310 (1983). To allow the Union herein to, in effect, extend its right to negotiate which was procedurally circumscribed by the terms of its collective bargaining agreement, and impose a continuing obligation upon Respondent to negotiate on time off incentive awards within ten days after the change was effectuated under the guise of enforcing the Union's right to engage in mid-term bargaining would substantially undermine the stability that contractual agreements seek to establish when addressing substantive or procedural rights and obligations.

Accordingly, I conclude that by its refusal to negotiate with the Union, in the circumstances herein, Respondent 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. CH-CA-30438 be, and hereby is, dismissed.

Issued, Washington, DC, December 20, 1994

SALVATORE J. ARRIGO

Administrative Law Judge

1. The Union was in the process of soliciting proposals from its members but did not wish to delay implementation of the program since it was beneficial to its members.

2. No "AFGE/AFLC Agreement on Procedures for Union Initiated Mid-term Bargaining dated 25 October 1988" was identified at the hearing or offered as an exhibit for the record.