OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

SACRAMENTO AIR LOGISTICS CENTER

MCCLELLAN AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. SF-CA-50936

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO

Charging Party

Yolanda Shepherd Eckford, Esquire For the General Counsel
Major Wendy L. Wiedenfeld, Esquire For the Respondent
Tony Roberts, Business Agent For the Charging Party
Before: JESSE ETELSON Administrative Law Judge

DECISION

The complaint in this case alleges that Respondent committed unfair labor practices in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to negotiate with the Charging Party (the Union) over child care fees at Respondent's Child Development Center and by implementing new child care fees without bargaining, as requested, with the Union. The complaint was amended to add an allegation that, by its refusal to negotiate, Respondent also repudiated a Memorandum of Agreement (MOA) between the Air Force Material Command (AFMC) and the American Federation of Government Employees, AFL-CIO (AFGE), in further violation of sections 7116(a)(1) and (5) of the Statute. In its answer to the amended complaint, Respondent denied that it had an obligation to negotiate at the time it implemented the change in child care fees, since the Union had been given an opportunity to bargain over such changes but had not responded. Respondent also denied that it repudiated the MOA.

A hearing was held in Sacramento, California. Counsel for the General Counsel and for the Respondent filed post-hearing briefs and

provided computer diskettes containing their briefs.

Findings of Fact

(1)

Background

AFGE is the certified exclusive representative of a nationwide unit of employees of AFMC appropriate for collective bargaining. This nationwide unit includes employees at Respondent, a facility that is a constituent "activity" of AFMC. The Union is AFGE's agent for representing employees of Respondent.

AFMC is a successor party to a Master Labor Agreement between Air Force Logistics Command (AFLC), AFMC's predecessor, and AFGE. Although this contract's original term had expired, it was still in effect in the summer of 1995.

The Master Labor Agreement contains an article entitled "Child Care Services" which provides, among other things, that a child care committee, to be established at each AFLC facility, "will consist of equal representatives from union and management." The Master Labor Agreement's Article 33 contains provisions for delegating responsibility for negotiations to "subordinate activities and local Union officials" and, in Section 33.03, procedures for initiating negotiations at the activity level.

Pursuant to Article 33, AFMC and AFGE Council 214 (AFGE's "Command level" agent) had entered into successive MOAs delegating to several activities, including Respondent, and the local AFGE unions representing employees at those activities, "any responsibility for negotiations associated with child care fee ranges" for certain specified periods. In August 1992 these parties signed an MOA delegating such responsibilities to these activities and local unions for fee ranges "for FY93 - FY95."

Here is the procedure by which the fees were established. The Services Division of Air Force Headquarters prescribed ranges of user fees within which fees could be set. Individual fees are based on family income. The prescribed ranges permitted the local "installations [to] determin[e] the fee within each income range" at a level sufficient to make the program self-sustaining but no higher. (Agency Exh. 7 at 2).

Upon receipt of the prescribed range of fees and, usually, after a current Command-level MOA delegating nego-tiation responsibility to the local parties, the activity management representative notified the local union and invited negotiations of fees within the announced ranges for each income "category."

Foreground

On June 16, 1995, the Services Division issued a "MEMORANDUM FOR ALMAJCOM SV" announcing the range of user fees for the School Year beginning August 1. Instructions in the memorandum advised its recipients that:

> The new fees must be implemented by 1 October 1995. Fee ranges for SY 1995 may be implemented anytime between August 1 and 30 September 1995. Each installation must select a fee for each category within the ranges outlined. The high end of each fee range has been increased by 5 percent . . . .

This memorandum was provided to Robert L. Nolan, Labor Relations Officer for the 77th Air Base Wing, in which capacity he deals with the Union on behalf of Respondent. Nolan sent a copy of the packet of materials included with the memorandum to the Union, to the attention of Neil Bruffett, the Union's Nonappropriated Fund (NAF) Chief Steward. The NAF employees were in a separate bargaining unit represented by the Union who were not covered by the Master Labor Agreement. However, based on past practice, Nolan believed that the NAF chief steward was the Union's designated contact person for child care matters. Nolan's covering letter to the Union, dated June 29, 1995, said:

> 1. Attached is a copy of the new fees for the Child Development Center [for 1995-1996]. Please note the fees listed under "Range of weekly fees authorized per child" are the fees that will be applied at McClellan AFB.
>
> 2. If you have any questions, please feel free to contact me at 643-3518.

Bruffett received this notification and informed Union Business Agent Tony Roberts. Roberts concluded that the subject of child care fees was being discussed at the national level and "was not a matter for local negotiation (Tr. 20). The Union, therefore, did not respond to the notification.

Sometime in July, Nolan notified management that no response had been received and that they could go ahead with the internal operations necessary to implement the new fees. Nolan relied on his understanding that the Union had ten days from the date of notification in which to submit a demand to bargain (Tr. 63).

On August 4, the Command-level parties, AFMC and AFGE Council 214, executed an MOA delegating responsibility "for negotiations associated with child care fee ranges for School Year 95-96" to Respondent, the Union, and the local parties at other activities. In accordance with previous practice, the August 4 MOA stated that:

> The above delegation is made pursuant to Article 33, Section 33.02c of the Master Labor Agreement (MLA). Written notice with an offer to bargain will be provided to the above locals pursuant to Article 33, Section 33.03(a)(2) of the MLA.

AFGE Council 214 notified the Union of the delegation. On August 17, the Union wrote to Nolan requesting negotiations over the fee changes. Nolan responded on August 18, stating that he was returning the Union's letter without action as management had implemented the changes on 10 July 95 after it had notified the union of the changes on 29 June and the Union had "not submit[ed] a demand to bargain, any proposals, or question[ed] the increases."

The Union requested negotiations again, in a letter containing the following response to Nolan's letter:

> Your letter of 18 Aug 95 refers to your notification to the Union on 29 Jun 95. At the most, this noti-fication of child care fees can only be considered anticipatory in nature as the Memorandum of Agree-ment between AFMC and AFGE Council 214 on this issue was only signed off on 4 Aug 95.

Nolan responded on September 13. He reaffirmed management's reliance on the Union's failure to respond and stated further that: "Management has not made any changes in the child care fees from whom your office was informed of on 29 Jun 95[.] [T]herefore, management is under no obligation to bargain at this time."

The Union filed the unfair labor practice charge on September 25. Although Nolan had stated in his August 18 letter to the Union that management implemented the changes on July 10, he testified that what he meant was that he had notified management on that date that the Union had failed to respond within ten days and that the changes could be

implemented. The changes actually went into effect on October 1.

Discussion and Conclusions

A. The Statutory Bargaining Obligation

Respondent does not contest the negotiability of the subject of the Union's bargaining requests--the new child care fees. *See National Association of Government Employees and U.S. Department of Veterans Affairs, Washington, D.C.*, 43 FLRA 414, 415-21 (1991), *vacated as moot,* No. 92-1111 (D.C. Cir. May 26, 1993). Respondent contends, rather, that the Union's failure to respond within ten days to its June 29, 1995, notification of the new fees and invitation to contact Labor Relations Officer Nolan relieved Respondent of its obligation to bargain over those changes.

There are several strands to this defense, and it is necessary to sort out those having potential significance in light of, first, the kinds of defenses the Authority has recognized, and then in light of any other considerations that might appropriately be brought to bear.

Respondent argues, for one thing, that the negotiated August 1992 Command-level delegation of "any responsibility for negotiations associated with child care fee ranges for FY93-FY95" remained in effect until September 30, 1995 and therefore gave the parties at the local level authority to negotiate at the time Nolan notified the Union of the new fees and invited contact. Respondent notes also that the delega-tion was still in effect in September 1995, when the Union filed its unfair labor practice charge. Therefore, the logic of the argument continues, the Union was unjustified in ignoring Nolan's June 29 notification and, pursuant to the parties' established practice, Respondent was permitted to begin implementation of the new fees.

Although this line of argument appears to be in the nature of a "waiver" defense, Respondent does not label it as such. Nor does Respondent characterize this defense in terms of the Authority's doctrinal analysis of whether a bargaining subject was "covered by" a provision in a collective bargain-ing agreement. However, Respondent's reliance on the August 27, 1992 MOA at least arguably requires that this case be analyzed under that framework, as established in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA*). Thus, as the Authority stated in

SSA, "The framework we establish today is intended to apply only to cases in which an agency asserts that it has no obligation to bargain based on the terms of a negotiated agreement." *Id.* at 1016 n.7. It may be, however, that Respondent's reliance on the 1992 MOA brings this case instead within the Authority's more general framework for resolving contractual defenses to alleged interference with statutory rights, as announced in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (*IRS*).

Respondent has thus, more or less, left it to the Authority to place its 1992 MOA defense within the appropriate framework for analysis. Lacking any suggestions from the parties, I am also unable to find any affirmative guidance from Authority decisions as to where this defense fits among the established analytical approaches.[(2)]

However, I find Respondent's reliance on the 1992 MOA to be fatally flawed from any of these perspectives.

Under either the *SSA* or the *IRS* approach, it is necessary to determine the meaning of the contractual provision on which reliance has been placed.[(3)] Although fiscal year 1995, included in the 1992 MOA delegating responsibility, did not end until September 30, 1995, Nolan's June 29 notification to the Union, with its attached packet explaining the fee rates, referred to the "School Year 1995-1996." That school year was to begin on August 1, 1995. The accompanying "MEMORANDUM FOR ALMAJCON SV" stated that the new fees could be implemented anytime between August 1 and September 30 but must be implemented by October 1.

As I interpret the information in the packet, the fees to be established are for the entire school year. There is no suggestion that the previous range of fees might be changed solely for the period of August 1 to September 30. Thus, if the steps necessary to implement the new fees, required to be implemented by October 1, could be completed earlier, the Air Force authorized such implementation. If implementation could not be accomplished earlier, I interpret the memorandum as contemplating that the previous schedule of fees would remain in effect until October 1. Therefore, although the local parties still had authority under the FY93-95 delegation to negotiate over child care fees, Nolan's June 29 notification, incorporating the information packet, did not refer to any fees that were subject to negotiations under that delegation.

I find this interpretation of the negotiations posture in the summer of 1995 to be supported by the conduct of the parties at the Command level. Thus, on August 4, they jointly delegated to the parties at the activity level "any responsibility for negotiations associated with child care fee ranges for School Year 95-96." By agreeing to such delegation, management at the Command level implicitly acknowledged that the FY93-95 delegation did not authorize local negotiations over fee ranges for School Year 95-96. In other words,

management at the Command level did not interpret its own FY93-95 delegation as having the effect that Respondent, its delegate, would now give it.

To the extent that Respondent's argument that the Union's inaction permitted Respondent to implement the new fees rests on the Union's conduct apart from the effect of any delegation of authority, I believe it must be treated as an allegation of waiver.[(4)] The Authority announced in *SSA* and *IRS a* departure from the "clear and unmistakable waiver" analysis it had previously applied. However, I have concluded that the Authority intended that departure to be limited to situations where either the *SSA* or the *IRS* approach was to be substituted. In *SSA*, the Authority specifically reaffirmed the principle that an agency is required to bargain during the term of a collective bargaining agreements on negotiable "proposals concerning matters that are not contained in the collective bargaining agreement, unless the union has waived its right to bargain about the subject matter involved." *Id.* at 1013. Moreover, the Authority approved the application of the "clear and unmistakable" standard for a waiver of bargaining rights, at least when the asserted waiver was based on bargaining history. *Id.* at 1015 n.6.

Thus, I have no reason to believe that the traditional "clear and unmistakable" standard for waivers of *statutory* rights has been changed except in those situations now falling under either *SSA* or *IRS*. Applying that standard here, I cannot find that the Union waived its bargaining rights by failing to respond to a notification that: (1) did not specifically invite negotiations; (2) did not indicate either that the "new fees" were being *proposed* or *when* Respondent intended to implement them; and (3) was issued at a time when it was not clear that the local parties had authority to negotiate. Without deciding that anything less than a combination of these factors would be sufficient to defeat a claim of waiver, in combination they render the Union's inaction less than a clear and unmistakable indication that it intended to waive its right to bargain.[(5)]

Respondent also argues, however, that the child care fees in question represent a "local," not a "national" issue, and that authority to negotiate the fees therefore did not depend on any delegation. This argument proceeds from the assertion that the fees are based on local economic factors such as the costs of maintaining the child care center and the income mix of the users. This localized basis, the argument goes, makes the fees "inherently a local matter."

While these pragmatic observations may contain some useful real-world insights, the conclusion that Respondent would have the Authority draw from them does not conform to my understanding of the Authority's treatment of the "level" at which bargaining is required by the Statute. That "level" of bargaining must be the focus here because this case

involves the *obligation* to bargain. Granted that nothing in the Statute *prohibited* the parties from negotiating at the local level at any time, their respective actions here must be evaluated in this forum in terms of the minimum standard of conduct that the Statute actually *requires*.

The Authority recognizes no inherent "level" of issues to be negotiated. It has treated the question of whether an *issue* is "local" or "national" as a matter to be resolved by mutual agreement. *See United States Marine Corps, Washington, D.C.*, 42 FLRA 3, 10-11 (1991). The Authority addresses the basic statutory bargaining obligation not according to the nature of the issues to be negotiated but, rather, according to the organizational structure of the parties. See *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, Case No. BN-CA-50168, March 1, 1996, OALJ 96-23 (*FDA*). Thus, it places the obligation to bargain (absent agreement to the contrary) "only at the level of exclusive recognition." *Department of Health and Human Services, Social Security Administration*, 6 FLRA 202, 204 (1981). *See also SSA* at 1013-14. While the meaning and application of the term, "level of exclusive recognition," may not always be as clear as it is assumed to be, *see FDA*, in this case it appears to be undisputed that the level of exclusive recognition is the "national," or "Command" level, represented on the management side by AFMC and on the exclusive representative side by AFGE (national union) or its Council 214.

Respondent would dismiss the practice of the parties at the Command level in delegating, either annually or for a period of years, the responsibility for negotiating these fees, as a superfluous exercise. However, in view of the locus of the bargaining obligation, this practice reflects the understanding of the parties at the Command level as to where their own Master Labor Agreement places the obligation to bargain over local child care fees. Their understanding appears to have been that the obligation remained at the Command level, as the level of exclusive recognition, subject to the periodic delegations of responsibility. This manifestation of the mutual understanding of the parties at the level of exclusive recognition reinforces my view that the mandatory bargaining dictated by the Statute was not "inherently" at the local level but remained at the level of exclusive recognition absent a delegation.

Respondent also asserts that both parties at the local level "have treated the child care fees as a local condition of employment and proceeded in accordance with Section 33.03 [of the Master Labor Agreement], Negotiations at Activity Level, despite the MOAs." I do not so interpret the parties practices concerning these fees. It is difficult to view their fee negotiations as actions independent of or "despite" the MOAs, which, in delegating negotiating responsibility to the local parties, rely explicitly on Article 33 and specify that notice, and an offer to bargain, be provided to the local unions pursuant to Section 33.03.

Within Respondent's panoply of defensive assertions one also may be able to detect a suggestion that the Union's inaction after receiving the June 29 notification, if not technically constituting a waiver, was conduct that in any event led Respondent to the reasonable belief that the Union was not interested in bargaining. There is some circumstan-tial support for such an observation. During the previous few years, the Union had failed to exercise its opportunity to negotiate over fee rates. Further, it certainly would have been desirable for the Union to have shared with Respondent its concerns about initiating negotiations in the absence of a delegation of authority. Indeed, one might reasonably speculate that such communication would have prevented the following events that led to this proceeding. But the Statute does not purport to hold parties to a standard of "reasonable-ness" in every respect. As noted, the Statute only requires certain minimum standards of negotiating behavior. One party's failure to rise above that standard does not excuse the other's failure to achieve it.

In these circumstances, the Union's failure to respond to the June 29 notification, which, for the reasons discussed above, cannot reasonably be construed as more than an invitation for *voluntary* negotiations, did not relieve Respondent of its obligation to bargain on request once the authority for negotiations was delegated. My ultimate conclusion, there-fore, is that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing that request and proceeding with implementation.

B. The Alleged Repudiation

I do not find an additional unfair labor practice of repudiation of the August 1995 MOA delegating responsibility for negotiation. Repudiation usually connotes a refusal to honor one's *own* commitment or obligation rather than one that has been imposed by another party. Thus, the Authority examines, in "repudiation" cases, whether the provision allegedly breached was one that went "to the heart of the *parties'* agreement." *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 862 (1996) (emphasis added). Unless the Authority's use of the word, "parties'," to modify "agreement" is to be regarded as filigree, it bespeaks an intention to so limit the meaning of "repudiation" as an unfair labor practice.

It is at best an open question whether such a violation can be established based on one party's breach of another party's agreement. Arguably, Respondent and AFMC should be considered the same party for this purpose, but such an approach seems incompatible with the Authority's concern over levels of recognition. Finding this alleged additional violation would not substantially affect the affirmative remedy here. Therefore I do not consider it necessary to attempt a definitive exploration of the outer limits of the repudiation doctrine.

The Remedy

A *status quo ante* remedy is normally deemed appropriate where management changes a negotiable condition of employment without fulfilling its obligation to bargain on that change and the change is one that is "substantively" negotiable. In such cases, the Authority will grant such a remedy absent special circumstances. *Veterans Administration, West Los Angeles Medical Center, Los Angeles, California*, 23 FLRA 278, 281 (1986). Since no special circumstances have been shown here, I shall recommend a *status quo ante* remedy. In connection with that remedy, to ensure that employees do not incur a monetary loss as a result of Respondent's unfair labor practice, I shall recommend that bargaining unit employees be made whole for any child care fees paid in excess of the fees in effect during the school year 1994-1995. *See U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 996-97 (1992). Therefore I recommend that the Authority issue the following orde

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, Sacramento Air Logistics Center, McClellan Air Force Base, California, shall:

1. Cease and desist from:

(a) Changing child care fees applicable to bargaining unit employees without first affording notice and an opportu-nity to bargain concerning any proposed changes to the American Federation of Government Employees, Local 1857, AFL-CIO (Local 1857), the agent of the employees' exclusive collective bargaining representative.

(b) Refusing to bargain with Local 1857 concerning any changes in child care fees at the Child Development Center (Child Care Center).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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) Rescind the child care fees implemented on October 1, 1995, as they apply to employees included in the bargaining unit represented by Local 1857.

(b) Negotiate with Local 1857 regarding increases in child care fees for the 1995-1996 school year.

(c) Refund to bargaining unit employees any child care fees paid in excess of the fees in effect during the 1994-1995 school year.

(d) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, Sacramento Air Logistics Center, 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.

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

Issued, Washington, DC, July 23, 1996

JESSE ETELSON

Administrative Law Judge

NOTICE TO

ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that SacramentoAir Logistics Center, McClellan Air Force Base, California violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT unilaterally change the conditions of employment of our employees represented by the American Federation of Government Employees, Local 1857, AFL-CIO (the Union) by increasing fees at the Child Development Center (Child Care Center) without affording the Union an opportunity to negotiate concerning the change.

WE WILL NOT refuse to bargain with the Union concerning an increase in fees at the Child Care Center for the 1995-1996 School Year.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the child care fees implemented on October 1, 1995, as they apply to employees represented by the Union.

WE WILL negotiate with the Union regarding increases in child care fees for the 1995-1996 school year.

WE WILL refund to bargaining unit employees any child care fees paid in excess of the fees in effect during the 1994-1995 school year.

_____

(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, San Francisco Region, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.

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1. Although Respondent requested and was granted sequestra-tion of witnesses, there were no resolutions of credibility that I found to be dispositive. The facts I have found to be material are essentially undisputed.

2. In *Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206 (1993) (not to be confused with *SSA*, 47 FLRA 1004), the Authority described the range of cases to which the *SSA* framework would apply in a manner that apparently would exclude the instant case. Thus, after describing the *IRS* approach as one in which the Authority "will determine the meaning of the parties' agree-ment in order to resolve the alleged unfair labor practice[,]" the Authority noted that (*Id.* at 1210 n.2):

In contrast, when an agency defends its refusal to bargain over a specific mid-term proposal based on a contention that the subject matter of the proposal is contained in or covered by the parties' collec-tive bargaining agreement, we will examine whether the agreement has generally foreclosed further bargaining on that matter (citing *SSA*).

3. But see the Authority's "contrast" quoted in n.2, above.

4. I reject Respondent's puzzling suggestion that the consequences of the Union's failure to respond within ten days to the June 29 notification should be evaluated in light of the Master Labor Agreement's having operated to authorize the local parties as of August 1 (45 days after the MEMORANDUM FOR ALMAJCOM SV was issued) to negotiate child care fees.

5. While the basis for Respondent's assertion, through the testimony of Nolan, that the Union had ten days in which to submit a demand to bargain, is not clear, I note that Section 33.03a(1) of the Master Labor Agreement provides that "the Union will submit written proposals to the activity labor relations office within

ten calendar days of the date of notification if circumstances permit that much time." To the extent that the asserted ten day limit is based on that provision, the failure of the June 29 notification to provide any indication of an implementation date is sufficient in itself to make that limit inapplicable. Thus, the introduc-tory paragraph of Section 33.03a, which sets up the conditions under which Section 33.03a(1) becomes operative, provides in pertinent part that: "The Union will be given a specified reasonable implementation date as determined by mission requirements and the urgency for implementation."