

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

THE ADJUTANT GENERAL

WEST VIRGINIA NATIONAL GUARD

Respondent

and

Case No. WA-CA-70569

ASSOCIATION OF CIVILIAN TECHNICIANS

WEST VIRGINIA CHAPTERS

Charging Party/Union

Patricia A. Armstrong, Esquire	For the General Counsel
Major James M. Baker, Esquire	For the Respondent
Before: JESSE ETELSON	Administrative Law Judge

**DECISION**

An unfair labor practice complaint alleges that Respondent violated section 7116(a) (1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by declaring nonnegotiable a proposal submitted by the Charging Party/Union that was "not materially different" from a proposal that the Federal Labor Relations Authority (the Authority) had previously found to be negotiable. In its answer, Respondent admitted every allegation of the complaint except the allegation that, by its conduct, it had violated the Statute. Respondent admitted that the proposal it had declared nonnegotiable was not materially different from one that the Authority had previously found to be negotiable, but asserted, in response to that allegation, that the Authority's decision finding the earlier proposal to be negotiable was "contrary to 18 U.S.C. 1913, which prohibits, in the absence of express authorization from Congress, lobbying of Congress by federal employees."

On November 3, 1997, Counsel for the General Counsel filed a motion for summary judgment on the ground that there was no material issue of

fact and for the reasons set forth in the accompanying memorandum in support of the motion for summary judgment. On the same date, the Regional Director of the Authority's Washington Regional Office referred the motion for summary judgment to the Chief Administrative Law Judge, who issued an order on November 6, 1997, giving all parties until November 21, 1997, to file any pleadings or briefs with regard to this matter. No further pleadings or briefs have been filed. The Chief Administrative Law Judge has delegated to me the disposition of the motion for summary judgment.

As the answer admits all of the material allegations of fact, summary judgment is appropriate here. See *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995). Moreover, as discussed more fully below, the complaint includes an appropriate allegation with respect to the Authority's previous finding that a similar proposal was negotiable, and the answer admits that allegation. See *U.S. Army Aeromedical Center, Fort Rucker, Alabama and Headquarters, Army Health Services Command, Fort Sam Houston, Texas*, 49 FLRA 361, 364 (1994) (*Army Aeromedical*). Accordingly, the General Counsel's motion for summary judgment is granted, and I make the following findings of fact, conclusions of law, and recommendations.

### **Findings of Fact**

Respondent and Charging Party/Union are, respectively, an agency and a labor organization under section 7103(a) (3) and (4) of the Statute. Charging Party/Union is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

On July 8, 1997, Respondent declared nonnegotiable a proposal made by Charging Party/Union that stated:

Official time will be granted for Association representatives to visit elected officials when representing federal employees in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by the Association.

On July 17, 1997, Charging Party/Union filed the unfair labor practice charge that initiated this proceeding with the Regional Director of the Authority's Washington Regional Office. A copy of the charge was served on Respondent.

### **Conclusions**

While stated in different terms elsewhere, the Authority has adopted what it describes as its own precedent to the effect that "an agency commits an unfair labor practice by refusing to bargain over a proposal that is not materially different from one previously found negotiable by the Authority." *U.S. Department of Justice and Immigration and Naturalization Service*, 37 FLRA 1346, 1366 (1990) (emphasis added); *Army Aeromedical*. The Authority has long regarded a declaration of nonnegotiability to constitute, at least presumptively, a refusal to bargain. See *Internal Revenue Service (District, Region, National Office Units)*, 16 FLRA 904, 904-05, 918-22 (1984). Cf. *U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia and Oregon Military Department, Oregon National Guard, Salem, Oregon*, 47 FLRA 1213, 1219 (1993) (agency unlawfully interfered in collective bargaining relationship by informing its subordinate activity that it had no duty to bargain over union's proposal).

Respondent admits that it declared nonnegotiable a proposal that was not materially different from one that the Authority had previously found negotiable.<sup>(1)</sup> Based on the principles set forth above, I find that, under controlling Authority precedent, this amounts to an admission that Respondent has committed an unlawful refusal to bargain. I therefore conclude that Respondent has violated sections 7116(a)(1) and (5) of the Statute and recommend that the Authority issue the following order.

### **ORDER**

(2)

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Federal Service-Labor Management Relations Statute, the West Virginia National Guard, Adjutant General, Charleston, West Virginia, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the Association of Civilian Technicians, West Virginia Chapters, the employees' exclusive bargaining representative, over a proposal authorizing official time for Association representatives that is not materially different from a proposal previously found negotiable by the Authority.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit 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 Statute:

(a) Upon request, bargain in good faith with the Association of Civilian Technicians, West Virginia Chapters, over the proposal authorizing official time for Association representatives to visit elected officials when representing federal employees in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by the Association.

(b) 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 Adjutant General 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 ensure that such Notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the hearing previously scheduled in this case is cancelled.

Issued, Washington, DC, December 2, 1997.

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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 the West Virginia National Guard, Adjutant General, Charleston, West Virginia, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice:

We hereby notify bargaining unit employees that:

WE WILL NOT refuse to negotiate with the Association of Civilian Technicians, West Virginia Chapters, the employees' exclusive bargaining representative, over a proposal authorizing official time for Association representatives that is not materially different from a proposal previously found negotiable by the Authority.

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

WE WILL, upon request, bargain in good faith with the Association of Civilian Technicians, West Virginia Chapters, over the proposal authorizing official time for Association representatives to visit elected officials when representing federal employees in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by the Association.

(Activity)

Dated:\_\_\_\_\_ 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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: 1255 22nd Street, NW, Suite 400, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

1. Respondent has asserted, of course, that the Authority's decision finding such a proposal to be negotiable is contrary to 18 U.S.C. §1913.
2. In some prior cases in which it has found that an agency unlawfully refused to bargain over a proposal substantially identical to one previously found negotiable, the Authority has ordered bargaining over the proposal and has ordered that such bargaining have retroactive effect. The General Counsel has not requested a retroactive bargaining order, and I see no purpose to be served by such an order here. I shall provide instead a prospective bargaining order modeled on the order provided in *U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia*, 52 FLRA 475 (1996), the most recent case in which the Authority had occasion to remedy a violation of this nature.