Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE

PATENT AND TRADEMARK OFFICE

Respondent

and

PATENT OFFICE PROFESSIONAL ASSOCIATION

Case No. WA-CA-70150

Charging Party

and

GENERAL SERVICES ADMINISTRATION

Intervenor

Christopher M. Feldenzer, Esquire For the General Counsel
Pamela R. Schwartz, Esquire For the Charging Party
Sharon J. Pomeranz, Esquire For the Intervenor
Marilyn Blandford, EsquireRobert L. Woods, Esquire For the Respondent
Before: JESSE ETELSON Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

The Regional Director of the Federal Labor Relations Authority (the Authority) for the Washington Regional Office issued an unfair labor practice complaint alleging that Respondent (PTO) violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations

Statute (the Statute). More specifically, the complaint alleges that PTO violated sections 7116(a)(1) and (5) when Intervenor (GSA), allegedly as PTO's agent, issued a Solicitation for Offers (SFO) containing PTO's requirements for a consolidated headquarters facility without providing the Charging Party (POPA or the Union) with an opportunity to negotiate to the extent required by the Statute.

PTO's answer denies that it issued the SFO or had authority to do so, asserting that GSA issued the SFO pursuant to authority granted exclusively to GSA. The answer also denies that the specifications in the SFO were dictated by PTO and denies that it committed the alleged unfair labor practice. PTO also asserts as a defense, among others, that it had a good faith belief that it had no duty to provide the Union with an opportunity to negotiate because, at the time the SFO was issued, PTO had not made a final decision to relocate to a new facility.

PTO and GSA filed motions for summary judgment dismissing the complaint. At a prehearing conference, Judge Eli Nash, Jr., established April 3, 1998, as the date for submitting responses to PTO's motion for summary judgment. On April 1, 1998, Chief Judge Chaitovitz extended the time for responses to the motion to April 16. The Chief Judge assigned the case to me for a ruling on the motion. The General Counsel and POPA submitted responses. For the following reasons, I shall recommend that the Authority grant PTO's motion for summary judgment.

Standard for Disposition by Summary Judgment

Motions for summary judgment filed with Administrative Law Judges serve the same purpose and have the same requirements as motions for summary judgment filed with United States District Courts pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995).[(1)] The standard for granting such motions under Rule 56 is the absence of a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Although some of the statements set forth as facts in PTO's motion for summary judgment are disputed, the following, which I find sufficient on which to rule on the motion, are undisputed.

Undisputed Material Facts

PTO currently occupies space in 16 locations in Crystal City, Virginia, under 31 leases placed by GSA, the leasing agent for Federal executive agencies, with the Charles E. Smith Companies and Westfield Realty. The majority of PTO's leases had 1996 expirations.

Pursuant to the Public Buildings Act of 1959 (as amended), GSA is required to submit project prospectuses to Congress, through the Office of Management and Budget (OMB), for major leases exceeding $1,810,000 average annual rental. Replacement space for PTO, whether acquired by construction or lease, would require such Congressional approval.

In 1989, PTO began working with GSA on alternative approaches to meet PTO's long-range space requirements. In 1990, GSA contracted with Leo A. Daly, an architectural- engineering firm, to develop a "prospectus development study." Such a study was issued in March 199l. It concluded that direct Federal construction was the best approach to finding replacement space for PTO.

GSA contracted with Leo A. Daly for a space requirements report. That report, a six-volume study produced in 1991-92, identified PTO's long-term space needs. An early version of the report was submitted to OMB in 1991 and was ultimately rejected. GSA submitted further draft prospectuses in 1992, 1994, and January 1995. All were rejected for various reasons.

In April 1995, GSA submitted an "operating lease prospectus" to OMB. OMB approved the prospectus in August 1995 and authorized GSA to transmit it to the House and Senate Public Works Committees to obtain authorization to acquire a competitively procured 20-year operating lease for 1,989,116 occupiable square feet on a consolidated site within an area in Northern Virginia lying between the Potomac River and Dulles Airport. The prospectus set forth the procurement method that GSA planned to use:

> To achieve the prime objective of selecting the most advantageous offer, a Source Selection process will be used. The process will involve an impartial and

comprehensive evaluation of all proposals in order to identify the one which achieves optimum satisfaction of PTO's overall space objectives. A high priority will be given to such evaluation factors as price, site, quality and functionality of buildings, including maintenance, availability of public transportation, including Metrorail, parking, and minimization of relocation costs.

The Senate and House Committees approved the prospectus in October and November 1995, respectively, with directions to amend the Source Selection process as follows:

"*Provided*, That any evaluation used for such acquisition considers proximity to public transportation, including Metro Rail, to be a factor as important as any other noncost factor."

On June 26, 1996, GSA issued SFO No. 96.004 for a PTO consolidated headquarters facility. The SFO is an inch-thick document, including nine amendments issued through 1997. It is in the nature of a prospectus seeking proposals to provide PTO the space it needs to house, on a long-term basis, its consolidated headquarters facility. The SFO contains specifications for such matters as occupiable square footage, "Class A condition," certain defined amenities, a 20-year lease term with purchase options, parking availability, and shuttle-bus service on any site farther than 2,500 "walkable linear feet" from a Metrorail station. The SFO describes an approach to the development of the site in stages and states that a lease award is anticipated in the summer of 1998, followed in four years by completion of the first of two blocks of space to be made available. It also describes the procurement procedures, including the preliminary and final submissions of offers and the subsequent negotiation, evaluation, and selection process. Only at the time of the lease award would the Government (GSA and PTO) present a comprehensive Program of Requirements (POR) for interior architecture, "which defines qualitative and quantitative data, personnel, space, equipment, and functional requirements" (R Ex. 7 at Section D pp. 2-3).

On the same day the SFO was issued, PTO Commissioner Bruce A. Lehman issued a memorandum to all employees summarizing the status of the procurement process and the steps remaining.

In September 1997, PTO awarded a contract to Deva and Associates to undertake an analysis of the consolidation move versus retention of the present PTO sites. The results of this analysis were due in April 1998. In March 1998, the Department of Commerce, PTO's parent agency, awarded a contract to Jefferson Solutions to conduct a review of the PTO space project for the purpose of validating the soundness of the project in defining, among other things, the need for new space. The contract was awarded in response to a December 1997 draft report from the Department's Office of Inspector General that, while concluding that PTO would benefit from a new facility, recommended further assessment of the "space planning and build-out risks." A final written report by Jefferson Solutions was due by April 14, 1998.

Discussion and Conclusions

A. Contentions of the Parties

The evidentiary facts concerning the status of PTO's decision to relocate are undisputed. From these facts, POPA argues that, at the time GSA issued the SFO, PTO had made a final decision to relocate, while the General Counsel, in agreement with PTO in this respect, concedes that PTO had not made a final decision. The General Counsel also disagrees with PTO and POPA about the scope and meaning of the Authority's decision in *U.S. Department of Health and Human Services, Social Security Administration, Region I, Boston, Massachusetts*, 47 FLRA 322 (1993)(*SSA Region I*), which PTO and POPA read as holding that there is no duty to bargain until a "final decision" to relocate has been made. The General Counsel argues, however, that in the circumstances of this case PTO was obligated to negotiate with POPA over the anticipated relocation before GSA issued the SFO.

B. PTO Had Not Made a Final Decision to Relocate

I infer from the undisputed facts that no final decision to relocate had been made when GSA issued the SFO. A final decision must be distinguished from a tentative decision or an expressed intention to relocate such as is evidenced by Commissioner Lehman's June 26, 1996, memorandum to all PTO employees (CP Ex. 3). For notwithstanding an agency's unequivocal desire or intention to relocate, a decision cannot

be considered final until all matters essential to making a final commitment to the move have been dealt with. *See* my analysis as the Administrative Law Judge in *SSA Region I,* 47 FLRA at 330-31.

Here, the steps taken in contemplation of a move had been initiated but were far from complete. As Commissioner Lehman's June 1996 memorandum stated, the second phase of the "source selection approach" begun in 1996 were expected to get underway in 1997. Even then, offerors of facilities would submit only preliminary designs and models, which would then be evaluated before negotiations with five finalists among the offerers began. I believe that Counsel for PTO accurately characterizes the SFO as a market survey from which to identify potential sites.

While I shall discuss below the relationship between a "final decision" to relocate and a final site selection, it is sufficient at this point to note that, taking into consideration the total process required before a final commitment to move could be made, the situation in mid-1996 cannot be fairly characterized as one in which a final decision had been reached. Further evidence of the tentativeness of the decision (and for this purpose I believe it is permissible to use the benefit of hindsight) may be found in the reviews of the procurement process that have continued for almost two years since the SFO was issued.

If the process were viewed as a walk through a forest, which it does seem to resemble in some respects, the most that can be said for PTO's progress in mid-1996 is that it had proceeded beyond some of the trees. The clearing at the far end was not yet in sight, even assuming that the map showed that it ought to be just ahead. In short, PTO was not yet in a position to make a final decision to relocate. It only hoped to be in that position as soon as possible. That, however, is not the same thing.

C. There Was No Duty to Bargain

The General Counsel, while conceding that no final decision to relocate had been made (a concession that does not, of course, bind POPA), argues that this is not dispositive of PTO's bargaining obligation because, among other things, PTO should be found to have had an obligation to bargain over the *substance* of at least certain aspects of the decision to relocate. As the General Counsel puts it, Authority precedent does not preclude such a finding because, "[h]istorically, the Authority has confined its analysis of the bargaining obligation under the Statute for office relocations to matters of 'impact and implementation'" (Br. at 5).[(2)]

As I see it, however, the reason that, "historically," the Authority has focused on impact and implementation (I&I) bargaining is that it has long been understood that only such bargaining, and not "substance" bargaining, is mandated. *Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois*, 16 FLRA 141, 161 (1984) (*IRS Midwest*).[(3)] *See also U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 41 FLRA 339, 350 (1991)(relocating an office gives rise to an obligation to bargain about I&I); *Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York*, 19 FLRA 328 (1985)(agency violated its duty to bargain when it exercised its management right to relocate its office without negotiating over the I&I of that exercise, where the relocation caused changes in conditions of employment of unit employees that were more than *de minimis*.)

The General Counsel acknowledges that, in SSA *Region I*, the Authority upheld the Administrative Law Judge's dismissal of a complaint alleging that the agency had violated the Statute by refusing to bargain over the I&I of a contemplated relocation. However, the General Counsel argues that the Authority's affirmance of the Judge's dismissal was premised on the limitation of the complaint to the refusal to bargain over I&I, thereby distinguishing *SSA Region I* from the instant case, where the complaint alleges that PTO failed to provide the Union with an opportunity to negotiate "to the extent required by the Statute."

Although the language of the complaint in this case distinguishes it from the complaint in *SSA Region I*, that distinction can be meaningful for our purposes only to the extent that there are grounds for attributing to the Authority an intention to expand the underlying bargaining obligation beyond matters of I&I. The General Counsel suggests that the Authority signaled its openness on this issue in footnote 4 of its *SSA Region I* decision:

> The complaint alleges only that the Union requested, and the Respondent refused, to bargain over the impact and implementation of the relocation of the Hyannis office. We have found that no final decision to relocate the Hyannis office had been made at the time of the Union's request and, thus, no duty to bargain existed. Therefore, we do not need to decide issues regarding the scope of the obligation to

bargain on matters related to such a final decision, including the issue of where the office will relocate. (47 FLRA at 324).

PTO contends that this footnote means only that the Authority concluded that a duty to bargain must be established before the scope of that bargaining can be determined (Br. at 19-20).

I find it unnecessary to decide whether the Authority intended to indicate there that it might be willing to consider expanding the scope of bargaining in a case where the complaint is not limited to an allegation of refusal to bargain over I&I. The Authority has not yet gone so far as to actually reconsider its precedent in this regard, and while it is privileged to do so, I am not. At most, I have found it proper in certain circumstances to exhort the Authority to reconsider doctrines that appear to me to have unintended consequences, or, in rare instances, where other factors seem to dictate rethinking of an issue.(4)

Notwithstanding footnote 4, the Authority clearly adopted the Judge's conclusion that the obligation to bargain (whatever its scope) arises only when a final decision to relocate has been made. The Authority's footnote 4 reaffirms that conclusion but suggests the possibility that in certain circumstances the issue of where the office will relocate might be negotiable. That suggestion, standing alone, might appear at first blush to be inconsistent with the principle that a bargaining obligation arises only after a final decision to relocate. But the apparent inconsistency is fact-dependent and does not affect the validity of the principle. A final decision to move could be made, at least theoretically (although this does not appear to be the case here), before the new site has been selected. In such a case, it would at least be possible to bargain over the new location *after* a final decision to move has been made, and the Authority could, consistent with its holding in *SSA Region I*, conclude that the issue of where the office will relocate is negotiable. Such a conclusion would be illusory, of course, where the decision to move is inextricably bound with the site selection.(5)

Having found, based on the undisputed material facts, that PTO had not made a final decision to relocate at the time it is alleged to have refused to bargain, and having concluded that, under existing Authority precedent, such a final decision is a prerequisite to any bargaining obligation concerning the relocation, I conclude that there is no genuine issue as to any material fact and that PTO is entitled to judgment as a matter of law. Accordingly, I recommend that the Authority issue the following order.(6)

ORDER

Respondent U.S. Patent and Trademark Office's motion for summary judgment is granted and the complaint is dismissed.(7)

Issued, Washington, DC, April 29, 1998.

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JESSE ETELSON

Administrative Law Judge

1. Section 2423.19 of the Authority's regulations, pursuant to which motions for summary judgment were filed until recently, no longer exists. However, under the Authority's July 31, 1997, amendments to its regulations concerning unfair labor practice proceedings, motions for summary judgment are submitted to Administrative Law Judges pursuant to section 2423.27. The standards for ruling on such motions have not been changed.

2. POPA also argues that a decision to relocate is not a management right.

3. Although the complaint in *IRS Midwest* alleged only a refusal to negotiate on the I&I of the decision to relocate, the union had not so limited its request to negotiate. Rather, it requested the right to negotiate the substance of the decision as well. *IRS Midwest*, 16 FLRA at 154.

4. - " " " " "" ' " " ' '

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