

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND 88TH AIR BASE WING WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1138, AFL-CIO Charging Party	Case Nos. CH-CA-40709 CH-CA-50246

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 11, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: August 11, 1995
Washington, DC

MEMORANDUM

DATE: August 11, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
88TH AIR BASE WING
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

CA-40709
CA-50246

and

Case Nos. CH-
CH-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1138, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND 88TH AIR BASE WING WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1138, AFL-CIO Charging Party	Case Nos. CH-CA-40709 CH-CA-50246

John F. Gallagher, Esquire
For the General Counsel

James D. Brubaker, Esquire
For the Respondent

Roy James Gricar
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

In pursuit of a Department of Defense (DOD) program to create a smoke-free workplace, the Air Force Materiel Command (AFMC) entered into a series of interim agreements with authorized constituent bodies of American Federation of Government Employees, AFL-CIO (AFGE), the certified exclusive representative of a Command-wide unit of AFMC employees. At a certain stage of the program's proposed implementation at Wright-Patterson Air Force Base, the Charging Party (Local 1138) submitted to the Respondent

proposals regarding the program as it applied to the local work force.¹ The Respondent declared that these proposals were "violative of the spirit and intent" of a prior Command-wide agreement and that, by submitting them as its response to the proposed implementation, Local 1138 waived its right to bargain on the subject. The Respondent implemented the proposed smoking policies and this unfair labor practice proceeding resulted.

The consolidated complaints, as amended, allege that the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing the smoking policies unilaterally, first throughout the base (except for the heating plants) and later in the heating plants. An additional allegation characterizes the unilateral implementation as a repudiation of an earlier agreement to maintain the policies set forth in a previous interim agreement, and therefore as a further violation of sections 7116(a)(1) and (5). The Respondent denies that it had any obligation to bargain over the proposals Local 1138 submitted or to bargain separately concerning the implementation in the heating plant, and denies that it committed any unfair labor practices.

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

Findings of Fact

A. Chain of Events

In 1978, the Air Force issued a memorandum entitled "Smoking in Air Force Facilities." In 1986 it issued an "Interim Message Change" to the 1978 memorandum. AFMC's predecessor, Air Force Logistics Command, and AFGE Council 214, the constituent AFGE body that negotiates on the "Command level," entered into a "Memorandum of Agreement" (MOA) in April 1987. This MOA had as its stated purpose the implementation of the 1986 "Interim Message Change" in a manner that protects the health and welfare of employees by providing and maintaining a workplace that is free of unnecessary hazardous substances, ensures an equitable balance between the rights of smokers and non-

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The Respondent, 88th Air Base Wing, is an "activity" that provides administrative support for AFMC with respect to its employees located at Wright-Patterson Air Force Base. This administrative support includes personnel functions and, within those functions, labor relations, or, as currently named, "work force effectiveness."

smokers, and give priority to an employee's right to breathe smoke-free air (GC Exh. 3). Among other substantive provisions, the 1987 MOA provides for the designation of smoking areas after negotiations between "the Employer" and "the Local President or designee." While never making explicit that the designated smoking areas could include indoors areas, the MOA states that "[v]entilation and lighting in these areas will conform to recognized safety standards." The 1987 MOA also provides for voluntary smoke cessation classes.

The Charging Party (Local 1138) is AFGE's agent for representing bargaining unit employees at Wright-Patterson Air Force Base. In implementing the 1987 MOA, Local 1138 and local management at Wright-Patterson entered into a number of agreements. Under one such agreement, in October 1991, a designated smoking area was moved to a specific (indoor) room.

A Department of Defense "Instruction," apparently received at "HQ AFLC/SG" on March 9, 1994, sets the date of April 8, 1994, for all "DoD Components" to commence implementation of certain policies, including the banning of smoking in all workplaces (Resp. Exh. 1).² However, it instructs each "DoD Component" to meet its obligations under the Statute "[p]rior to implementation of a smoke-free workplace in accordance with this Instruction."

Negotiations between AFGE Council 214 and AFMC culminated in an April 1, 1994, MOA on "AFMC Tobacco Reduction Policy." The April 1994 MOA states that was made "pursuant to the USAF Tobacco Reduction Implementation Plan and the AFMC Tobacco Reduction Policy." The meaning and intent of this brief MOA is central to this case, and it is set forth in full as the Appendix to this decision. Portions of the most immediate relevance are set forth below:

2. The parties agree to remain status quo with the current Memorandum of Agreement signed by AFGE Council 214 and AFMC on 29 April 1987 and with all existing activity level agreements accommodating the smoker and smoking facilities relative to smoking/non-smoking until such time as the matter

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AFLC (Air Force Logistics Command) merged into AFMC in 1992. See also *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base*, 47 FLRA 602, 603 (1993). However, the designation, "HQ AFLC/SG," stamped on the above Instruction with a 1994 date indicates that "AFLC" was still in use for some purposes.

has been subject to the negotiation process consistent with the Labor Statute.

3. Any bargainable matters left to the discretion of the local commanders such as providing shelter from the elements will be negotiated at the local level.

* * *

6. When there are any conflicts or disputes arising over the Tobacco Reduction Policy, it will be resolved in favor of the non-smoker. However, designated indoor smoking areas shall not be eliminated until such time as outdoor smoking areas have been subject to the negotiation process pursuant to the Labor Statute.

On April 11, the Respondent, by Acting Labor Relations Officer Paul Hepp, wrote to Roy Gricar, Vice President of Local 1138, noting and attaching the April 1 MOA. Hepp's letter, after referring to the MOA, states that "[a]ll remaining issues have been delegated to the field." The letter concludes with the following two paragraphs:

Therefore, it is our intent to implement the AFMC Tobacco Reduction Policy no earlier than 25 April 1994 (Atch 2). We also propose that outdoor smoking will be permitted in those areas where employees currently smoke outdoors. Any further problems that may arise with outdoor smoking will be dealt with on a case-by-case basis.

If you have questions regarding this matter, please advise Ms. Ellen Round at 257-2487. If you wish to bargain aspects of this matter, please submit any bargaining proposals by close of business 22 April 1994.

A notation on the copy of Hepp's April 11 letter that was submitted into evidence indicates that in a "telecom" on April 26, Hepp extended the requested submission date for proposals until April 28. I infer from a reference in a later document (GC Exh. 8) that on April 26 Hepp also renewed the statement of intent to implement the AFMC Tobacco Reduction Policy.

The "AFMC Tobacco Reduction Policy," referred to in the April 1 MOA and constituting "Atch 2" to Hepp's April 11 letter, is principally a set of policy statements, among which is a prohibition of smoking in "[a]ll indoor work site

facilities." The document concludes by stating that: "Final implementation affecting employees in bargaining units will not be accomplished until the bargaining obligation has been satisfied."

On April 28, Local 1138 submitted a comprehensive proposal for an agreement that would constitute the parties' mutual and binding MOA containing the following references to implementation of the AFM's Tobacco Reduction Policy (undated), given to the Union by . . . letter, dated April 11, 1994 and the Department of Defense 'Smoking Policy,' as distributed to the National Civilian Employees March 1994 by the Office of the Secretary of Defense. Among the subjects covered by the Union's proposal cessation phase is a period until January 1, 2000 during which employees tobacco use for workplace and attendance maintenance of indoor smoking areas to be designated pursuant to the anti-smoking survey. The proposal also called for negotiations to establish additional indoor smoking areas, if any, for all indoor smoking was eliminated, for employees recently added to the bargaining unit pursuant to an Authority employee classification.

The parties may discuss the Union's proposal. Management representative Elia told Union Vice President Griparis that the proposal encouraged phase-in period and continuation of indoor smoking employees inconsistent with the April 1 Command Level MOA. The parties disagreed as to whether this was so, and agreed to check with their respective negotiators.

The MOA to determine whether the parties' subjects over-burdened the information received from Council 214. Local 1138 submitted its proposed agreement with a change regarding the events that would permit changes from the AFM's Management Rights within established under the 1987 MOA and all existing local agreements entered into pursuant to that MOA. The proposal also added a provision for providing outdoor smoking areas from the shelter after January 1, 2000 prepared to consider the "three examples of [delegation] agreements" attached to the Respondent's revised proposal dated June 10, 1994.

The subjects in addition to the establishment of smoking areas for newly-represented employees, the phased-in elimination of indoor smoking, and the interim maintenance of the indoor areas for employees employed by the bargaining unit. These subjects were included: dependents.

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Thus, (the agreement is against the necessary convenience of employees who denied it, smoke it is necessary to establish that only one proposal was negotiable at the time Respondent refused) to determine whether the outdoor smoking areas that at least one of the proposals was within the scope of bargaining."

(3) providing "outdoor shelters" after January 1, 2000, pursuant to future negotiations;

(4) minimum specifications for all designated smoking areas, with adequate lighting and appropriate signs and maintenance.

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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally establish a new smoking policy without first affording American Federation of Government Employees, Local 1138, AFL-CIO, the agent of the exclusive representative of a unit of our employees, the opportunity to bargain, to the extent consistent with law and regulation, on the decision to effectuate such a policy and on the impact and implementation of the policy.

WE WILL NOT fail and refuse to honor the April 1, 1994, Memorandum of Agreement between AFGE Council 214 and Air Force Materiel Command by failing and refusing to maintain the *status quo* with respect to smoking policies until such policies have been subject to the negotiation process consistent with the Federal Service Labor-Management Relations Statute.

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

WE WILL rescind the new smoking policy implemented on or about June 24, 1994, at Wright-Patterson Air Force Base and in November 1994 in the heating plants at Wright-Patterson Air Force Base.

WE WILL notify American Federation of Government Employees, Local 1138, of any new smoking policy and, prior to implementation, afford it the opportunity to bargain, to the extent consistent with law and regulation, on the decision to effectuate such a policy and on the impact and implementation of the policy.

(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Chicago Regional Office, whose address is: 55 West Monroe Street, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

APPENDIX

MEMORANDUM OF AGREEMENT

AFMC TOBACCO REDUCTION POLICY

1. This agreement is made pursuant to the USAF Tobacco Reduction Implementation Plan and the AFMC Tobacco Reduction Policy and is between the American Federation of Government Employees represented by AFGE Council 214 and the Air Force Materiel Command (AFMC), Wright-Patterson AFB, Ohio.

2. The parties agree to remain status quo with the current Memorandum of Agreement signed by AFGE Council 214 and AFMC on 29 April 1987 and with all existing activity level agreements accommodating the smoker and smoking facilities relative to smoking/non-smoking until such time as the matter has been subject to the negotiation process consistent with the Labor Statute.

3. Any bargainable matters left to the discretion of the local commanders such as providing shelter from the elements will be negotiated at the local level.

4. When the demand for smoking cessation classes exceeds resources, civilian employees will have priority over military dependents and retirees. If an employee has no medical coverage that provides a means for obtaining relief for nicotine patches and/or gums, the employee may request assistance from the local medical treatment facilities. Those facilities are encouraged to make subject items available to employees attending on-base smoking cessation classes. Where smoking cessation classes are held during duty hours, employees approved for attendance shall be granted excused absence to attend consistent with mission requirements.

5. Smokers and non-smokers alike shall be afforded the same break opportunities consistent with good work practices and the accomplishment of the mission. It is not the intent of this agreement to limit smokers to only authorized break times now in existence without first affording the Union with the opportunity to bargain these changes in conditions of employment.

6. When there are any conflicts or disputes arising over the Tobacco Reduction Policy, it will be resolved in favor of the non-smoker. However, designated indoor smoking areas shall not be eliminated until such time as outdoor smoking areas have been subject to the negotiation process pursuant to the Labor Statute.

7. Upon reaching a joint agreement between AFMC and AFGE, management shall publicize this agreement and the terms agreed to in the local papers at all AFMC facilities within 30 days of the date of this agreement. Only where no newspapers may exist, appropriate publication shall be made in any employee newsletter, Civilian newsletter or in the daily bulletin. Publication of any editorial other than the terms of the agreement will be mutually agreed to between the Union and management.

8. Delegation and written notice shall be made pursuant to and in accordance with Article 33 of the Master Labor Agreement after execution of this agreement.

9. No rights of the Union, employees, or the employer are waived by this agreement.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. CH-CA-40709 and CH-CA-50246 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

John F. Gallagher, Esquire
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Employees, Local 1138
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REGULAR MAIL:

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Employees, AFL-CIO
80 F Street, NW
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Dated: August 11, 1995
Washington, DC