

DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, GALLUP, NEW MEXICO Respondent	
and INDIAN EDUCATORS FEDERATION, NEW MEXICO FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, LOCAL 4524 Charging Party	Case No. DA-CA-40306

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 **NOVEMBER 20, 1995**, and addressed to:

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

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: October 19, 1995
Washington, DC

MEMORANDUM

DATE: October 19, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
GALLUP, NEW MEXICO

Respondent

and

Case No. DA-

CA-40306

INDIAN EDUCATORS FEDERATION,
NEW MEXICO FEDERATION OF
TEACHERS, AMERICAN FEDERATION OF
TEACHERS, AFL-CIO, LOCAL 4524

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 INTERIOR, BUREAU OF INDIAN AFFAIRS, GALLUP, NEW MEXICO Respondent	
and INDIAN EDUCATORS FEDERATION, NEW MEXICO FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, LOCAL 4524 Charging Party	Case No. DA-CA-40306

Joseph L. Jarrett
For the Respondent

John M. Bates, Esq.
For the General Counsel

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 Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by dealing directly with employees concerning changing conditions of their employment and by implementing

a change in a condition of employment without providing the Union with notice and an opportunity to bargain over the impact and implementation of the change.

A hearing on the Complaint was conducted in Gallup, New Mexico 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.¹

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 Union has been the exclusive collective bargaining representative of various employees of Respondent, including nine teachers at the Crystal Boarding School which Respondent operates. Because of a decrease in student enrollment at the school, which resulted in a reduction in its operating budget, Respondent concluded in August 1993 that a reduction in operating costs would have to be effectuated for the coming school year. Accordingly, at a staff meeting conducted on September 2, 1993 by school principal Lena Wilson, the school staff, which included Union steward Linda Davis, was informed that because of the situation a Reduction In Force (RIF) would be necessary unless enrollment increased. Sometime later that month when Wilson and Davis were discussing another matter, Wilson mentioned that enrollment at the school was not improving and the school was in trouble. Davis' only response was to express "dismay."

The October 12 Staff Meeting

Wilson held another staff meeting on October 12, 1993 at which the budget problem was discussed again. Wilson informed the staff that since enrollment had not increased, Respondent was considering implementing some cost saving measure in addition to the RIF. Wilson asked the staff to

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In its brief Respondent made various references to a provision in a collective bargaining agreement which Respondent claimed was in existence between the parties. The General Counsel filed a motion to strike those portions of Respondent's brief that made such references in that the record contains no testimony or documentary evidence concerning the existence of a collective bargaining agreement. While I find the General Counsel's motion to strike to be somewhat overly broad, the motion to strike is hereby granted to the extent that Respondent's brief refers to and relies upon purported factual contractual matters not contained in the record of this case.

consider and discuss their preference for a shortened work-year, a seven-hour day, or closing the school at noon on each Friday of the school year, all with a commensurate reduction in pay. Union steward Linda Davis asked whether the Union had been notified of the situation and Wilson stated the Union had been informed. Wilson received an open confirmation of this from her secretary who was at the meeting.

The record reveals the Union was never notified of the change by Respondent. Principal Wilson testified that during the October 12 meeting she stated that the Union would be notified of the changes that were envisioned, but testified the Union was not notified because she was "overwhelmed" by the various matters she had to confront concerning the shortfall. The record further reveals that although a steward, Davis did not get involved in negotiations with school principal Wilson.

The October 18 Staff Meeting

The school's budget problems were discussed again at another staff meeting conducted on October 18, 1993. At this meeting Wilson presented the staff with three alternative plans to resolve the budget difficulties. The first plan would shorten the school year with a corresponding decrease in salaries. The second provided that the staff would only work and be paid for a seven-hour day rather than an eight-hour day. The third plan reduced the work time and pay of all employees from 80 hours a pay period to 64 hours. Wilson asked the staff to vote for one of the three plans and the employees chose the seven-hour day. With regard to this meeting Wilson testified:

I presented these and put them on the board for them to see the three options . . . We gave them the figures and we gave them a chance for their input. There was discussion there. We had to make a decision there and I asked for a vote on each one. They voted to go with the seven hours.

Wilson then notified the staff that all who were willing to work the seven-hour day with one hour being designated as leave without pay should give her a written statement to that effect sometime prior to November 1. Wilson acknowledged that the decision to change to the seven hour day was made by the teachers and the other staff members.

Notification To The Union

On October 29, 1993 Union steward Davis notified Wilson by memorandum that she was willing to work the seven-hour day. Other teachers submitted similar statements to Wilson around this time. On that same day Davis called the Union's Agency Representative, Cameran Chesser, and told her about the seven-hour day and asked her if she had received a letter from Wilson concerning the situation. Chesser revealed she had no knowledge of the matter and suggested to Davis that she call Dennis Ziemer, the Union's Field Representative, whose duties included negotiations, representing employees in grievances and arbitrations, and processing unfair labor practice charges. Davis then immediately called Ziemer and informed him of the staff meeting Wilson held and the options given to the employees to curtail costs and of having been told by Wilson that the Union had been notified of the situation. Davis also informed Ziemer that she had signed a document authorizing the reduction of her hours. Ziemer had not previously been advised of the matter and told Davis that the school could not change employees' hours without first negotiating with the Union.

Shortly thereafter Ziemer telephoned Respondent's Personnel Chief, Joseph Jarrett, and asked why the school employees' hours were being reduced when no negotiations with the Union had occurred. Jarrett responded that the Union had been notified and Ziemer denied that he had ever been given notification of the change. Jarrett replied that when the change was announced the Union's steward was in the audience and that was notice to the Union. Ziemer told Jarrett that negotiations with the Union would have to take place before any further change occurred, but Jarrett maintained that the Union had received notification through its steward's presence at the meeting when the change was announced and since no objection was made at that time, the Union had lost its opportunity to negotiate on the matter.

Subsequently, the seven-hour day for school staff, including teachers, was implemented on November 1, 1993 without any further contact occurring between the parties. The reduction in teachers' hours of work from eight hours a day to seven hours a day resulted in teachers losing one hour of pay each workday from November 1, 1993 to April 18, 1994. The change also resulted in most teachers performing some of their class preparation work on their own time.

Additional Findings, Discussion And Conclusions

Positions Of The Parties

The General Counsel contends Respondent violated section 7116(a)(1) and (5) of the Statute by principal Wilson meeting with bargaining unit employees on October 18, 1993 and soliciting the opinions of those employees on the three plans by which Respondent could meet its budget shortfall and having the employees choose one of those plans. The General Counsel also alleges Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the seven-hour workday without providing the Union with notice and an opportunity to bargain over the impact and implementation of the action.

Respondent takes the position that principal Wilson had no intent to bypass the Union but, overwhelmed by the necessity of dealing with the financial shortfall, she somehow forgot to do so and, in any event, the Union, through steward Davis, received notice on October 18, 1993 that the change would be implemented on November 1 but did not make a timely request to negotiate. Respondent also argues that even if a violation is found to have occurred, back pay would not be an appropriate remedy.

The Bypass

As to the meeting of October 18, the record reveals principal Wilson was not merely seeking opinions from employees on how to best resolve the budget shortfall. Rather, Wilson called for a vote by the employees on three specific options suggested by management and adopted the precise change the employees selected. Union steward Davis did not negotiate working conditions with Davis as part of her Union duties. Indeed no attempt was made to enter negotiations with Davis on the change. In these circumstances I conclude Wilson's conduct of October 18 constituted dealing and negotiating with unit employees concerning conditions of employment thereby bypassing the collective bargaining representative in violation of section 7116(a)(1) and (5) of the Statute. Cf. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service Indianapolis, Indiana District Office, 31 FLRA 832 (1988) and see United States Department of Transportation, Federal Aviation Administration, 19 FLRA 893 (1985).

The Unilateral Change And Refusal To Bargain

Clearly the reduction in the workday of bargaining unit employees from eight hours to seven hours, with a corresponding decrease in pay, was a change in a condition of employment. Cf. Veterans Administration, Washington, D.C. and VA Medical Center, Brockton, Massachusetts, 37 FLRA 747,

753 (1990) and Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844, 854 (1990). I find and conclude the impact of such change was more than de minimis, having reduced each employees' workday and pay by one hour. See Department of Health and Human Services, Social Security Administration, 26 FLRA 344 (1987).

I further find and conclude that Respondent implemented the reduction in the workday to seven hours from eight hours on November 1, 1993 without providing the Union with adequate notice and an opportunity to bargain on the impact and implementation of the change as required by section 7106 (b) (2) and (3) of the Statute. The fact that Union steward Davis was a participant and therefore aware of the events of October 18, 1993 concerning Respondent's intention to change employees' conditions of employment does not establish notice to the Union in the circumstances herein. Thus, there is no indication that steward Davis was a Union representative for the purpose of receiving notifications of changes in conditions of employment on behalf of the Union. Indeed the record supports the conclusion that principal Wilson was aware of this and intended to notify the Union at a higher level and relayed this to Davis. At the October 12 meeting Wilson openly conveyed to the employees that the Union, as an entity separate and apart from steward Davis, was or would be notified of changes in conditions of employment necessitated by the budget shortfall. Davis was thus misled by such conduct and she did not mention the situation to any Union representative until Friday, October 29, two days before the unilateral implementation of the change. In these circumstances I conclude notice to steward Davis did not constitute notice to the Union.

Shortly after being notified by Davis of the contemplated change, Union representative Ziemer telephoned Respondent's representative Jarrett who refused to negotiate with the Union on the matter. Jarrett's position essentially was that the Union had been given timely notice of the contemplated change through employee Davis but had slept on its rights and not made a timely demand to bargain, thereby forfeiting the right to negotiate the impact and implementation of the change. However I have found that the Union did not receive timely notice of the contemplated change. Accordingly I conclude that by its refusal to bargain with the Union Respondent failed to comply with the bargaining obligations imposed by the Statute and thereby violated section 7116(a) (1) and (5) of the Statute. See Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 41 FLRA 690,698 (1991) and Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988),

affirmed National Association of Government Employees, Local R7-23 v. FLRA, 893 F.2d 380 (D.C. Cir. 1990).

The Remedy

The General Counsel seeks as part of the remedy that an appropriate Notice be posted, signed by the Area Personnel Officer, and that Respondent make whole any teacher who suffered loss of pay or benefits as a result of Respondent's unilateral implementation of the seven-hour workday. Respondent argues that no unilateral reduction of pay occurred since employees "voluntarily" requested a reduction in the workday. Respondent further suggests that no "unjustified or unwarranted personnel action" occurred authorizing back pay within the meaning of the Back Pay Act.

To begin, I reject Respondent's claim that no unilateral change occurred because employees "voluntarily" requested the reduction in hours. Respondent's act herein was unilateral in that the change was implemented by the Agency without it having fulfilled its bargaining obligation with the employees' collective bargaining representative. Whether or not employees "voluntarily" requested the change is irrelevant to the issue of whether Respondent met its Statutory bargaining obligation to the Union. See U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, North-east Region, Boston, Massachusetts, 38 FLRA 770, 792 (1990).

I also conclude that back pay to employees adversely affected by Respondent's unilateral decision to effectuate a reduction in the hours and pay of teachers is permissible under the Back Pay Act. The Back Pay Act, 5 U.S.C. 5596, and the implementing regulations, 5 C.F.R. Section 550.801, et seq., clearly permit and warrant the payment of back pay

in circumstances such as those present herein.² See Pueblo Depot Activity, Pueblo, Colorado, 50 FLRA 310 (1995) and U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and U.S. Department of Health and Human Services, Social Security Administration, Hartford District Office, Hartford, Connecticut, 37 FLRA 278, 288-290 (1990). Accordingly I shall recommend the issuance of a make whole bargaining order. I shall further order the Notice be signed by Respondent's Area Personnel Officer, the individual who announced to the Union that Respondent would not bargain on the matter, as requested by counsel for the General Counsel.

In view of the foregoing and the entire record herein I conclude Respondent has violated section 7116(a)(1) and (5) of the Statute and I therefore recommend the Authority issue the following:

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, it is hereby ordered that the Department of the Interior, Bureau of Indian Affairs, Gallup, New Mexico, shall:

1. Cease and desist from:

(a) Bypassing the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, and dealing directly

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5 U.S.C. 5596(b) provides, in relevant part:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the with-drawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred

with such employees by soliciting the employees' vote concerning personnel policies, practices and matters concerning their working conditions.

(b) Unilaterally changing working conditions of bargaining unit employees at the Crystal Boarding School by reducing teachers' work hours and pay from eight hours a day to seven hours a day without first notifying the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, and affording it the opportunity to negotiate over the impact and implementation of the change.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Make whole all bargaining unit employees who suffered a reduction of pay and/or other benefits as a result of the implementation of the reduction in work hours and pay.

(b) Notify the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, of any intended change in work hours or pay and, upon request, negotiate on the impact and implementation of the change.

(c) Post at its Crystal Boarding School facility 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 Area Personnel Officer, 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas 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 herewith.

Issued, Washington, DC, October 19, 1995

SALVATORE J. ARRIGO
Administrative Law Judge

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 bypass the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, and deal directly with such employees by soliciting the employees' vote concerning personnel policies, practices and matters concerning their working conditions.

WE WILL NOT unilaterally change working conditions of bargaining unit employees at the Crystal Boarding School by reducing teachers' work hours and pay from eight hours a day to seven hours a day without first notifying the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, and affording it the opportunity to negotiate over the impact and implementation of the change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL make whole all bargaining unit employees who suffered a reduction of pay and/or other benefits as a result of the implementation of the reduction in work hours and pay.

WE WILL notify the Indian Educators Federation, New Mexico Federation of Teachers, American Federation of Teachers, AFL-CIO, Local 4524, the employees' exclusive collective bargaining representative, of any intended change in work hours or pay and, upon request, negotiate on the impact and implementation of the change.

(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, Dallas Regional Office, 525 Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4496.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. DA-CA-40306, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Joseph L. Jarrett
U.S. Department of the Interior
Bureau of Indian Affairs
Navajo Area
P.O. Box 1060
Gallup, NM 87301

John M. Bates, Esq.
Federal Labor Relations Authority
Dallas Regional Office
525 Griffin St., Suite 926, LB-107
Dallas, TX 75202-1906

REGULAR MAIL:

Lena Wilson, Principal
Crystal Boarding School
Navajo, NM 87328

Mr. Don Jones
Labor Relations Specialist
P.O. Box 1060
Gallup, NM 87305

Mr. Dennis V. Ziemer
Field Representative
Indian Educators Federation
New Mexico Federation of Teachers
American Federation of Teachers,
AFL-CIO, Local 4524
8009 Mountain Road Place, NE
Albuquerque, NM 87110

Dated: October 19, 1995
Washington, DC